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**DESAI'S**  
**ALL INDIA CONSOLIDATED**  
**CIVIL DIGEST.**

**1911-1934,**

**Volume I,**

**Abadi to C. P. C. 1908 Order 8.**

BY

**B. R. DESAI, *Vakil High Court, BARODA.***

( Author of Desai's Index of Cases 1811—1933 (13th. Edtn), Desai's Comparative Tables  
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1934



# ABBREVIATIONS EXPLAINED.

A. I R 1921 All. Bom., etc.	... All India Reporter. Allahabad, Bombay, etc., section of the respective years.
All. or A. Bom. or B. etc.	... Allahabad; Bombay etc. ( I. L. R. )
Agra-	... Agra High Court Reports.
A. I. J.	... Allahabad Law Journal.
A. W. N.	... Allahabad Weekly Notes.
B. H. C. R.	... Bombay High Court Reports.
B. L. R.	... Bengal Law Reports.
Bom. L. R.	... Bombay Law Reporter.
Bourke	... Bourke's Reports.
Bur. L. R.	... Burma Law Reports.
Bom. P. J.	... Bombay Printed Judgments.
C. L. J.	... Calcutta Law Journal.
C. L. R.	... Calcutta Law Reports.
C. W. N.	... Calcutta Weekly Notes.
C. P. L. R.	... Central Provinces Law Reports.
Cor.	... Coryton's Reports
Hay.	... Hay's Reports.
Hyde	... Hyde's Reports
Ind. Cas.	... Indian Cases.
Ind. Jur. ( N. S. )	... Indian Jurist ( New Series )
Ind. Jur. ( O. S. )	... Indian Jurist ( Old Series ).
Knapp.	... Knapp's Reports.
L. B. R.	... Lower Burma Rulings.
L. L. J.	... Lahore Law Journal.
M. H. C. R.	... Madras High Court Reports.
M. J.	... Madras Jurist.
M. L. J.	... Madras Law Journal
M. L. T.	... Madras Law Times.
M. W. N.	... Madras Weekly Notes.
M. L. W. or L. W.	... Madras Law Weekly.
Marsh.	... Marshall's Reports.
M. L. A.	... Moore's Indian Appeals.
Ind. App. or I. A.	... Law Reports Indian Appeals.
Moo. P. C. C.	... Moore's Privy Council Cases.
N. L. R.	... Nagpur Law Reports.
N. W. P. H. C.	... North-West Provinces High Court Reports.
N. L. J.	... Nagpur Law Journal.
L. R. A.	... Law Report Allahabad
U. P. L. R.	... United Provinces Law Reports.
O. C.	... Oudh Cases.
O. L. J.	... Oudh Law Journal.
O. W. N.	... Oudh Weekly Notes.
L. C.	... Lucknow Cases.
P. R.	... Punjab Record
P. L. R.	... Punjab Law Reporter
P. W. R.	... Punjab Weekly Reporter
Pat. L. J.	... Patna Law Journal.
Pat. L. T.	... Patna Law Times.
Pat. L. R.	... Patna Law Reporter.
P. H. C. C.	... Patna High Court Cases.
Pat. L. W.	... Patna Law Weekly-
R & J's.	... Rafique and Jackson's Oudh Privy Council Decisions.
R. S. C.	... Rules of the Supreme Court of England.
Bur. L. J.	... Burma Law Journal.
Bur. L. T.	... Burma Law Times.
Sar.	... Saraswati's Privy Council Judgments
S. L. R.	... Sind Law Reporter.
Suth.	... Sutherland's Privy Council Judgments.
Suth. W. R. or W. R.	... Sutherland's Weekly Reporter.
U. B. R.	... Upper Burma Rulings.
Shome	... Shome's Law Reports.
Weir.	... Weir's Rulings

# DESAI'S

# ALL INDIA CONSOLIDATED

# CIVIL DIGEST.

## 1911-1934.

## Volume I.

### ABADI.

See also Cases under :—

- (1) Co-owners.
- (2) Custom (Punjab).
- (3) Landlord & Tenant.

—Abadi rights vested in all proprietors of village—Loss of right to share of Kuri Kamini goes not deprive of right to control disposal of abadi land, it being a common right of all. 19 P W R 1918==43 I C 456.

—The deft. should prove his adverse possession when a proprietor of waste land sues him for it, as the possession goes with the title. 204 P. L R 1914==25 I C 82.

—Civil Courts have jurisdiction to grant possession of Abadi lands partitioned by Revenue Court. 20 I C 45.

—Occupancy right in houses Transferability. Transfer of Property Act, S. 108 (f) see 37 All 144==25 I C 445.

—Adverse possession See Limitation Act, 1908, Art. 144 A I R 1931. All 325==I R 1931 A 26==130 I C 296.

—License to build on abadi of Malgu zari villages being generally given to persons residing in the village, a malguzar who did not object to a shop-keeper in the village building on the abadi, for about 10 years, though he knew of it, was estopped from saying that he had not given license to build. A I R 1931 Nag 158==Ind Rul (1931) Nag 180==27 N L R 183==134 I C 852.

—A suit for ejectment of a non-proprietor from the site occupied by the latter is governed by Art. 144 and not by art. 120 of the Limitation Act. Ind Rul (1931) Lah 887==134 I C 119.

See also cases under :—Limitation Act Art. 144.

—Proprietors not objecting to good many sales or mortgages of house sites by non-proprietors establishes right to sell in the latter, and the latter need not prove circumstances of the sales in every case, Non-proprietors of village Sinawan in Muzaffargarh are entitled to sell the house sites. Ind Rul (1931) Lah 753==133 I C 273.

—A customary right to sell house sites

### ABADI (Contd.)

must be strictly proved: I R 1931 A 753==133 I C 897.

—Unless there is evidence to the contrary, houses in the abadi of Shamilat go with the land, and if the land is proved to be ancestral the houses may be presumed to be ancestral property. Ind Rul (1931) Lah 994==32 P L R 603==134 I C 785.

—Where some of the proprietors sue to eject trespassers, and also challenge the title of the village proprietary body in the disputed site, a decree for possession ought not to be given to plaintiffs, as such decree will enable them to have possession to the exclusion of the village proprietary body. 1932 P C L 696 (Civ)==33 P L R 124==A L R 1932 L 603 (Civ.)

—The circumstances of a particular case may no doubt give rise to an inference that a tenant is entitled to occupy part of the village site so long as he is a cultivator in the village, or so long as he cultivates a particular holding. But it is not permissible to presume generally that the right to occupy the site of a house in the village abadi ceases when he ceases to cultivate land in the village or is ejected from a particular holding. A landlord, seeking to eject his tenant from the site of his house after his ejectment must therefore, establish that the defendant's right to the site is dependent on his right to retain the holding. 54 A 379==1912 A L J 142==13 L R 105 (Rev.)==16 R D 222

==A I R 1932 A 252==A L R 1932 A 312.

—Raiyat's outer "sahan" of his house—raiya not entitled, as a matter of right, and without the consent of the Zemindar to build on the "sahan." A L R 1933 A 155==1933 A L J 56==1 A W R 194==A I R 1933 A 288.

—Partition—Plff. representing majority residing in another village some defts. representing small share. 2 P L R 1912==228 P W R 1911==12 I C 605.

—There was a thatched shed dedicated to permanent religious purpose, the tenant before whose house it was, was not entitled

संख्या १०००/१९८८  
दिनांक १०/०५/८८  
प्रति,  
श्री. [Name]  
[Address]  
[City]  
[State]  
[Pin Code]

प्रति,  
श्री. [Name]  
[Address]  
[City]  
[State]  
[Pin Code]

विषय: [Subject]

महोदय,

संदर्भित [Reference] के अन्तर्गत आपका पत्र प्राप्त हुआ।

आपके पत्र में उल्लेखित [Mentioned] के संबंध में निम्नलिखित सूचना दी जाती है:

[Information]

आपका पत्र [Your letter] के अन्तर्गत प्राप्त हुआ।

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आपके पत्र में उल्लेखित [Mentioned] के संबंध में निम्नलिखित सूचना दी जाती है:

[Information]

**ABADI (Contd.)**

to build a pucca building on shed—sites. 27  
A 356==24 A W N 276==2 A L J 27.

**ABANDONMENT.**

See also :—

- (1) Beng. Tenancy Act, SS. 18, 87.
- (2) Easement.
- (3) Easements Act. SS. 28, 38.
- (4) Evidence Act S. 92.
- (5) Limitation Act art. 144.
- (6) Specific Relief Act S. 22

—Abandonment is a mixed question of law and fact and cannot be raised at a late stage. 35 C W N 648.

—After a Hindu testator's death, in mutation proceedings among the heirs the will was not mentioned nor revoked, but the suit was compromised, the settlement being not strictly according to the personal law. It was a family arrangement and in spite of the will, the property was family property and as such was inherited from the testator. 110 P W R 1914== 215 P L R 1914==3 P R 1915==25 I C 480.

—Whether a transfer of an under-raiyati holding amounts to relinquishment or not depends upon the effect of what is done in each case. 19 C W N 43==42 A 751==20C L J 548==27 I C 271.

—Right acquired by is heritable though non-transferable interest in land clearest intention to abandon—No active assertion of right. 15 O C 67==13 I C 613.

—or not is a question of fact in a second appeal. 41 P R 1919== 51 I C 396== 82 P L R 1919.

**ABANDONMENT OF APPEAL.**

See C P Code O 23 R I.

**ABANDONMENT OF ATTACHMENT.**

See C P Code, O 21.

**ABANDONMENT OF CLAIM.**

See also :—

- (1) Beng. Tenancy Act Sch III art. 6.
- (2) Presidency Small Cause Courts Act 1895 S 39 (1).
- (3) C P Code S 11 expl. IV S. 47, O. 2, R 2.
- (4) Limitation Act S. 14.

—when amounts to abandonment of ones rights. See 18 I C 799==113 P L R 1913==112 P W R 1913==63 P R 1913.

—Where lands are left in possession of strangers, the owner living and tilling lands elsewhere for over 20 years; Held to be sufficient evidence of abandonment. 33 P W R 1913==72 P L R 1913==19 I C 3.

A portion of claim can be abandoned to bring it within a certain Courtfee. A I R 1931 Mad 716==Ind Rul (1931) Mad 864== (1931) M W N 677==34 L W 252==134 I C 816.

**ABANDONMENT OF PLEA.**

See C P Code, O. 41, R. 2.

—Question whether there was legal

**ABANDONMENT OF PLEA (Contd.)**

necessity for an alienation is not a question of law, and if abandoned in the lower Court it cannot be raised in appeal. A I R 1931 Nag 147==Ind Rul (1931) Nag 118==14 N L J 84== 133 I C 390.

—A mixed question of law and fact abandoned in the Court of first instance cannot be revived in second appeal. A I R 1931 Sind 170.

**ABANDONMENT OF TENURE.**

See Landlord and Tenant.

**ABANDONMENT OF WIFE.**

See cases under :—

- (1) Husband and Wife.
- (2) Restitution of conjugal Rights.
- (3) Hindu Law (maintenance).
- (4) Marriage.

**ABANDONMENT OF WORDLY AFFAIRS.**

See also Hindu Law-Succession.

**ABATEMENT.**

—See also Civil Procedure Code, 1908, O. XXII.

—Where heirs are impleaded and decree passed after abatement the executing Court cannot refuse to execute it on the ground of want of jurisdiction. Ind Rul (1931) All 623 ==133 I C 303.

—Order XXI rr. 3 and 4 are not applicable to execution proceedings. When a judgment-debtor dies pending execution, application may be made to continue proceedings against legal representatives in the pending *darkhast*. Separate application is unnecessary. A I R 1931 Bom 425 (2)==33 Bom L R 858==Ind Rul (1931) Bom 538==134 I C 730.

**ABATEMENT OF APPEALS**

See C P Code O. 22

**ABATEMENT OF CAUSE OF ACTION**

See C P CODE O. 22 R I

**ABATEMENT OF EXECUTION PROCEEDINGS**

See C P CODE SS. 47 and 92, order 22.

**ABATEMENT OF PAUPER APPLICATION**

See C P CODE O. 22, r. 3(1) and O. 32, r. 2

**ABATEMENT OF RENT**

See (1) Landlord and Tenant—Rent

(2) T<sub>1</sub>P Act S. 108

(3) Bengal Rent Act 10 of 1859 5.18, S. 23

**ABATEMENT OF SUIT**

See C P Code S. 92 and O. 22

**ABATEMENT OF WRONG**

See Torts

**ABATEMENT PARTIAL**

See C P Code O. 22 r. 3 (1)

**ABDUCTION**

See Contract Act, 1872. S. 23,

**ABKARI**

See (1) Bombay Abkari Act

**ABKARI (Contd.)**

(2) Madras Abkari Act

—Where a license prohibits transfer, sub-lease is illegal. 34 I C 927

**ABSENCE**

See (1) C P Code 0. 17 r. 3

**ABSENCE, ADVERSE POSSESSION**

See Lmt. Act. art 144

**ABSENCE, COSHARERS**

See Co-owners

**ABSENCE FROM BRITISH INDIA**

See Lmt Act S. 13

**ABSENCE OF REASONABLE AND PROBABLE CAUSE:**

See—Tort (malicious Prosecution)

**ABSENTEES**

See Limitation Act. art. 144

**ABSOLUTE ESTATE**

See (1) Hindu Law

(a) Stridhan

(b) Widow

(c) Will

**ABSOLUTE GRANT**

See (1) Mahomedan Law

(2) Will—Construction

**ABSOLUTE OCCUPANCY HOLDING**

See (1) Landlord and tenant nature of tenancy

(2) Occupancy Holding

(3) C P Tenancy Act (1893) S. 41

**ABSOLUTE OCCUPANCY TENANT**

See (1) C P Tenancy Act

(2) Occupancy Holding

**ABSOLUTE PRIVILEGE**

See (1) C P Code 0. 11 r. 14

(2) Evd. Act SS. 123, 125, 129

(3) Tort—Defamation

**ABUSE**

See Tort—Defamation

**ABUSE OF PROCESS OF COURT**

See C P Code S. 151 and 0. 21 rr. 89-91

**ABUSE, SUIT FOR DAMAGES**

See Tort—Defamation

**ABUSIVE LANGUAGE**

See Tort—Defamation

**ACCELERATION OF ESTATE**

See cases under:-

(1) Hindu Law (widow)

**ABWAB**

See B T Act, ss. 74 and 75.

See Landlord and Tenant.

See Mad. Estate Land Act, SS. 3 (11), 143 and 144.

See Words and Phrases.

See Cess.

**ACCEPTANCE**

See (1) Contract

(2) Contract Act, SS. 3, 7, 107

**ACCEPTANCE OF VAKALAT**

See Legal Practitioner

**ACCEPTING INSTRUMENT NOT DULY STAMPED**

See Stamp Act, (II of 1899), S. 62.

**ACCEPTOR**

See Bill of Exchange

**ACCESSION**

See also Alluvion and Diluvion

**ACCIDENT.**

See Railways Act, Ch. VIII.

**ACCOMMODATION.**

See cases under :-

(1) Bills of Exchange—Hundi

(2) Negotiable Instruments Act

(3) Negotiable Instruments

(4) Pres. Towns Insolvency Act ss. 46, 56.

**ACCOMMODATION—ACCEPTOR.**

See (1) Contract Act S 128.

(2) Negotiable Instruments.

**ACCORD & SATISFACTION.**

See also.

Contract Act S 62.

**ACCORD & SATISFACTION—NOVATIO.**

Where a new agreement was substituted by an award of arbitrators—the rights under the original one were at an end and a suit based on the latter is liable to be dismissed but as the Deft. had not taken any objection at any time, Plaintiff was allowed to amend his plaint. 17 N L R 56=26 I C 228=41 I A 142=18 C W N 617.

**ACCOUNT BOOKS.**

See also cases under :-

Evidence Act—S 34.

**ACCOUNTS 1-56.**

(1) Mode of taking 1

(2) Accounts stated 1 a—30.

(1) What amounts to accounts stated 1 a—4

(2) Effect of new cause of action 5—7

(3) When can be reopened. 8—25

(4) Miscellaneous 25—33

(3) Suits for accounts. 31—55

(4) Miscellaneous cases. 57—55

(5) Commissioner for taking accounts. see C P C (1908) order 25.

(6&amp;7) Limitation.

See Limitation Act ss. 19 &amp; 20, and arts 64, 85, 88 to 99.

(8) Mortgagor and Mortgagee.

See (1) Mortgage Accounts.

(2) C P Code, 0. 34 rr 2 to 8.

(3) T P Act ss 72 and 75.

(9) Mutual open and current accounts See Limitation Act Art. 85; 88 &amp; 89.

(10) Principal and Agent.

## ACCOUNTS (Contd.)

See (1) Contract Act S 213.

(2) Limitation Act arts. 89 and 90.

(3) Principal and agent accounts.

- (11) Suits of small cause nature.  
See provincial Small cause courts  
Act, sch. II arts. 30 and 31.

- (12) Trustee.

See also :—

(1) C P Cole S 92.

(2) Trusts Act ss. 55 to 69.

See also cases under :—

- (1) Banker and Customer.
- (2) Burden of Proof—Accounts.
- (3) Civil P. code S. 75, S 92 and orders 20 and 26.
- (4) Civil P Code O 34 rr. 2—8
- (5) Contract Act, ss. 213, 253 to 258.
- (6) Co-owners.
- (7) Court Fees Act S. 7
- (8) Debtor and Creditor.
- (9) Evidence Act SS. 34, 114 etc.
- (10) Hindu Law.—Partition.
- (11) Jurisdiction.
- (12) Partnership
- (13) T.P. Act ss. 72 and 76

## (1) MODE OF TAKING ACCOUNTS—1

1—Where a balance is struck by an educated debtor the presumption is that he has understood it, but if the debtor is illiterate, it is otherwise. Interest is to be added each time a balance is struck and if there is a repayment between two balances, interest should be allowed to the debtor from date of repayment.  
103 P W R 1916==37 I C 300

## (2) ACCOUNTS STATED 1a—30

- (1) What amounts to accts-stated 1a—4
- (2) Effect of New C. A. 5—7
- (3) When can be reopened 8—25
- (4) Miscellaneous 26—30

## (1) What amounts to accts. stated 1a—4

1 a—Stated and settled account—Banker and customer—Pass-book—Return by customer of without comment—Stated and settled account if constitutes—Banker and Customer—Customer—Pass-Book of 59 C 662 (665)=138 I C 653=A I R 1932 C 521 = I R 1932 C 479 (2) = A L R 1932 C 1229.

2—A sorkot, showing merely a balance due and not containing any promise to pay within S. 25 of Contract Act, is not accounts stated.  
19 C L J 263=25 I C 89.

3—Settled—Payment for each transaction was held to constitute settled accounts to that extent in case of Commission Agency A I R 1925 Rang. 210=3 R I=89 I C 598.

4—Adjustment of means payment and repayment on paper without actual cash payment. A I R 1931 Mad. 251; 60 M L J 355

## ACCOUNTS (Contd.)

(2) EFFECT OF NEW CAUSE OF ACTION.  
(5—7).

5—An account stated, creates a new cause of action. 8 Bom. L R 454=28 B 447.

6—Account stated gives a new substantive cause of action, but for this result to follow there must be mutual demands and a balance struck. The rate of interest once charged in such balance, is presumed to continue till payment Art. 85 of Limit Act does not apply for recovery of over payments but art 64 or 57 applies, 148 P W R 1916=7 P L R 1917 =35 I C 577

7—If debt. accepts settlement as correct—Plaintiff has a cause of action and the burden to prove the correctness is not on him. A I R 1928 R 304=6 R 538=117 I C 572.

## (3) WHEN CAN BE REOPENED 8—25

8—Whether a court can go behind the balance struck by the parties, is a question which has to be decided on the circumstances of each particular case. 7 P L R 1912=12 I C 617.

9—Whether the accounts are of a devisible nature or not and whether a settled acct. can be disturbed are questions for the court and not the commissioner to decide. Once the accts are settled, they can be reopened only on the ground of fraud or mistake. 1 LL J 220. See to the same effect=67 I C 10=34 C L J 405=A I R 1921 C 722.

10—In exercising discretion to reopen settled accounts great caution should be used. However if fraud is proved it must be reopened. 38 Cal 754=15 C W N 475=13 C L J 365=7 I C 270.

11—In order to allow reopening of settled account between trustees and *Cetique trust* some substantial objection and error in acct. must be made out. 25 I C 218.

12—Debtor entitled to reopening of—if settlement obtained under improper circumstances—creditor can appropriate payment to interest first in case of debtor failing to specify. (28 A 25, foll. 5 M I A 372 Ref.)=29 I C 718.

13—Reopening allowed where it is considerably erroneous and also in case of fiduciary relation though less considerable errors are shown. 31 M L J 851=1917 M W N 121=5 L W 279=37 I C 984.

14—When a defendant is allowed to reopen a settled account he is entitled to plead in defence that the consideration based on that account is not received. (1918) M W N 146; 7 L W 26=43 I C 871.

15—Settled—Reopening of—Some fraudulent entries—Proof of—Re-opening of whole accounts will be ordered especially in case of principal and agent or trustees & *Cetique trust*. 41 All 635=17 A L J 805=52 I C 373.

**ACCOUNTS (Contd.)****(2) Accounts Stated. (Contd.)****(3) When can be reopened (Contd.)**

See also 113 I C 635=1928 M 879.

—16 Settled—Re-opening of—Error, a ground when there is least one definite and important error. 56 I C 129.

17—Settled—Fraud—Serious error may be reopened. *Williamson v. Barbour*. L R 9 Ch. D 529=5 M I A 372, foll. 42 All 230=18 A L J 100=59 I C 20.

18—Once settled cannot be allowed to be reopened if no fraud &c. is proved. 6 Rang 538=117 I C 572 similarly held in L R 3 A 308, so also in 59 I C 20=42 A 230.

19—Settled—Reopening particular items, false and fraudulent, must be shown to the Court before it can order the accounts to be reopened on the ground of fraud. A L R 1923 Bom 16 (1)=70 I C 839.

—Held that mistake can be proved for reopening settled accts. 71 I C 45 (2)=A I R 1922 Nag 265.

20—where there is mutual mistake or fraud Accounts settled can be reopened. A R 1925 Rang 99=75 I C 171

—Where fiduciary relation exists accts reopened on less serious grounds. 89 I C 598 =A I R 1925 Rang 210=3 R I

21—Accounts settled not allowed to be reopened for a mere single error however important but—Leave to surcharge and falsify must be given. A I R 1925 Rang 210=3 R I =89 I C 598

—Settled—Overcharge paid consciously cannot be objected to subsequently after accounts. A I R 1925 Rang. 210=3 R I=98 I C 598

22—A single fraudulent error is sufficient to order reopening. The burden to prove the fraud is on the party setting up. A I R 1925 Rang 210=3 Rang 1=89 I C 598

23—Suit to falsify settled accounts—Specific averments needed—Procedure in suits for—Pleader and Client. 12 C W N 28=6 C L J 580.

24—Settled—Re-opening of—Specific allegations of fraud or mistake essential. 1 Lah L J 220

25—Settled—Re-opening of—fraud—No specific allegation—Evidence, not admissible

Document not allowed to be reopened although a certain debt was found fraudulently entered. 35 I C 603

**(4) MISCELLANEOUS 26-29**

26—Accounts were settled with further advances and compound interest was charged several times held. Agreement to pay compound interest was proved. A I R 1929 P C 176=(1929) A L J 787=33 C W N 921=31 Bom. L R 905=50 C L J 183=30 L W 615=(1929) M W N 770=11 P L T 21=57 M L J 319=117 I C 496.

**ACCOUNTS (Contd.)****(2) Accounts Stated. (Contd.)****(4) Miscellaneous (Contd.)**

27—Accounts stated a forgery—Suit may be not commuted to one on account stated in previous year. 19 C W N 170=23 I C 587.

28—Stated—Power to accumulate given, to a shewait when valid—Will. Construction, Trust. 23 C L J 241.

29—Proceedure as to taking of acc's. after a preliminary decree laid down. It is a duty of a partner to render true accounts and full information affecting the partnership to any other partner. A I R 1921 C 722=34 C L J. 403=67 I C. 10..

**Accounts—Mortgagor and Mortgagee**

See (1) Mortgage—Accounts

(2) C P Code O 34 rr 2 to 8

(3) T P Act ss. 72 and 76

**Accounts—Principal and Agent**

See (1) Contract Act S. 213

(2) Lmt Act arts 89 and 90

(3) Principal & Agent—Accounts.

**Accounts—suit for small cause**

See Prov. Small Cause Courts Act, sch. II arts. 30 and 31

**Accounts—Trustee**

See (1) C. P. Code S. 92

(2) Trusts Act ss. 55 to 69

**Accounts—Limitation**

See Lmt. Act arts. 85, 88, and 89

**(3) Suit for accounts. 31-66**

30—A person liable to accounts must pay interest on sums collected but not accounted for. 50 I C. 747..

31—Principle of measure of liability should be ascertained before directing accounts—Court can vary mode of taking A I R 1924 Pat=176 I C 911..

32—Defendant firm owned by one of the plaintiffs suit for account does not lie. A I R 1924 Bom 263=25 Bom L R 1307=87 I C 289..

33—Liability—suit for account can be decreed only when the relationship between the parties makes it necessary in order to entitle claimant to assert his legal rights satisfactorily A I R 1925 Lah 100=78 I C 959..

34—Decree for is final and appeal to P C lies. A final decree as to amount if passed in deft's absence is exparte. 14 C L J 604.

35—A defendant can get a decree—A I R 1924 All 854 (2)=46 All 858; 22 A L J 783; 5 L R A Civ. 563=83 I C 880..

36—Thavani Limitation Act arts. 57 and not 60 or 115 applies to suits on Thavani accts. as the parties stand in, the position of lender and borrower. In such accts, if the lender does not demand payment at the fixed period, the presumption is that it is extended for next two months. 36 I C 497..

37—Accounts of an administrator need not be investigated by Court there being no procedure or practice for doing so. 18 C W N 320=24 I C 447..



**ACCOUNTS (Contd.)****(3) Suits for Accounts (Contd.)**

38—Any money paid by a Receiver as bribe must be deemed to be wholly unauthorized and disallowed. 20 C L J 113-28 I C 25

39—Surety is not bound by the admissions of debtor—Even judgment is not binding—Entitled to fresh accounts. 17 C W N 106==19 I C 901

40—Suit for, against deceased guardian's representatives—Maintainability—Guardians and Wards Acts, 1890, S. 41 (3), 78 P L R 1911=9 I C 591=74 P W R 1911

41—If plaintiff refuses to produce accounts—dismissal of suit. 5 Lah. L J 19=79 I C 275

42 A—Liability to account should be determined before ordering accounts. If liability is not disputed, account should be ordered. 3 Pat L T 638==A I R 1922 Pat. 598=71 I C 911

43—In a suit for account if the plaintiff does not prove that account books are lost and withholds such books, Held that secondary evidence was inadmissible and no decree for accounts could be passed. 1 L L J 242 = 56 I C 940. See to the same effect 59 I C 181=24 C W N 922. See also 13 C W N 696=4 I C 542. and 19 W R 14.

44—Case where onus is on defendant to produce accounts on his failure plaintiff to prove his case. A I R 1927 Lah 782=28 P L R 98==9 Lah L J 94==199 I C 820.

45—Non production of—Adverse inference therefrom to party withholding. 40 Mad 402 (P C)=44 I A 98=15 A L J 281=19 Bom L R 456=25 C L J 589=21 C W N 761=32 M L J 369=11 M L T 288=5 M L W 759=1917 M W N 487=1 P L W 457=49 I C 981.

46—Owing to plaintiff's fault it may be impossible to for debt. to produce accounts. Burden is on debt. 24 C W N 922=59 I C 181.

47—In a continuous dealing non-payment of one item does not create a separate cause of action but the whole together forms but one cause of action and cannot be divided. 15 S L R 207==A I R 1922 Sind 15=67 I C 44.

48—Suit—Cause of action only one and indivisible when dealings between parties give rise to a continuous account—Limitation. 42 Cal. 1043 19 C W N 724=31 I C 626.

49—Where plaintiff treated certain orders as creating separate cause of action held not a continuous account. A I R 1925 Cal. 937 (939)=29 C W N 496=87 I C 508.

50—Where Defendant submitted accounts to the plaintiff several times and plaintiff did not allege fraud. Plaintiff did not produce accounts which should be in his possession.

Held that the suit should be dismissed. A I R 1921 Lah. 14 (2)=5 Lah. L J 19=79 I C 275.

51—If a voucher is challenged the affidavit or oral evidence of person receiving the money must be tendered and in its absence his

**ACCOUNTS (Contd.)****(3) Suits for Accounts (Contd.)**

signature must be proved. A I R 1924 Cal. 1063=40 C L J 28=82 I C 419.

52—Suit on—Dealings for many years—Defendant acknowledging liability, but failing to pay—Suit for recovery of the same is maintainable. A I R 1926 Lah. 160=89 I C 366.

53—It is duty of the Court to go into accounts and pass a decree for definite amount A I R 1929 Lah. 753=30 P L R 503=122 I C 457.

54—Suit for—Costs of suit pending reference for accounts awarded to plaintiffs up to the decree for account; where Defendant resisted the claim for account. 20 C W N 368=35 I C 83.

55—Where a defendant is largely responsible for the litigation, and hampers by obstructive methods, he should be made liable for the whole costs of the suit. 30 C L J 417=54 I C 635.

56—A suit does not necessarily become a suit for accounts because the plaintiff asks for an account. The plaintiff must show that the defendant is an accounting party and that the plaintiff claims on the footing that an account has to be taken to ascertain the sum due to him: 35 L W 358 = 137 I C 871 = A I R 1932 M 565 = I R 1932 M 455 = A L R 1932 M 495.

**(4) Miscellaneous. (57-56.)**

57—In a suit by employee against the employer the plaintiff alleged that under a threat of criminal prosecution for certain alleged defalcations he paid Rs. 1,700 odd in five separate amounts to cover the alleged defalcations. The Plaintiff alleged that it was specifically agreed at the time of each payment that the accounts would be settled and that such money as was not found owing to defendant would be paid back to the plaintiff. Held, that the suit was substantially a suit for accounts. Plaintiff is not claiming to recover the sum of Rs. 1,700 odd paid by him, but only so much as may be found due after an account has been taken. 35 L W 358 = 137 I C 871 = A I R 1932 M 565 = I R 1932 M 455 = A L R 1932 M 495.

58—A residuary legatee is entitled against the executor to such an account as is necessary for the purpose of ascertaining the residue. 41 Cal 271=25 I C 370

59—Court does not cease to have jurisdiction if the decree for amount exceeds the pecuniary limit of its jurisdiction. 56 B 23 (26, 33.4)=34 B L R 44=I R 1932 B 314=137 I C 702=A I R 1932 B 111=A L R 1932 B 324.

60—A suit by person, claiming to be a partner, for taking of accounts and recovery of his share of profits is a suit for accounts and not a suit to establish plaintiff's right as



**ACCOUNTS (Contd.)****(4) Miscellaneous. (Contd.)**

a partner or suit to recover a definite amount  
35 L W 846-139 I C 105== A I R 1932 M 656  
==1932 M W N 979==I R 1932 M 626== A L R.  
(1932) M 764.

61—A suit for accounts differs from a suit for compensation for breach of contract in that the former, if the accounts should ultimately show something due to the defendant, a decree can at once be given to him, which is not the case in the latter. A I R 1931 Mad 185 (2)== (1930) M W N 1199==33 L W I==Ind Rul (1931) Mad 501==54 M (5)== 131 I C 165

62—In a suit for accounts equitable set off may be allowed and a decree passed in favour of defendant. A I R 1931 Cal 353 (2)==35 C W N 17==132 I C 195

63—Preliminary decree does not conclude proceedings and subsequent proceedings are not fresh proceedings. A I R 1931 Lah 268

64—Plaintiff's valuation binds the defendant in appeal. A I R 1931 Oudh 47==7 O W N 1205==Ind Rul (1931) Oudh 145==130 I C 337

65—Fresh notice for final decree is not necessary in a suit for rendition of accounts.  
A I R 1931 L 268.

66—A suit for rendering of accounts lies only where relationship of principal and agent exists, and where no suit for specific sum due to one of the parties could have been brought. A I R 1930 Lah 1062==Ind Rul (1931) Lah 246==32 P L R 137==130 I C 54

**ACCRETION.**

See Alluvion and Diluvion;  
See Bengal Alluvion and Diluvion Regulation (XI of 1825).  
See Hindu Law.  
See Landlord and Tenant.  
See Land Tenures.  
See T. P. Act, ss. 63, 72 and 108.

**ACCRUAL OF CAUSE OF ACTION.**

See C. P. Code, O. XX r. 2.  
See Limitation.

**ACCUMULATION.**

See (1) T. P. Act, S. 18.  
(2) Hindu Law—Alienation—Joint family—Widow.

**ACCUSED PERSON.**

See Tort—(a) Defamation.  
(b) Malicious Prosecution.

**ACKNOWLEDGMENT.**

See (1) Accounts.  
(2) Contract Act s. 25.  
(3) Lmt Act ss. 19, 20 and 21.  
(4) Mahomedan Law—Acknowledgment—Legitimacy—Marriage.  
(5) Stamp Act, art. 1.

—Statement of facts sometimes amount to an acknowledgment of liability, e. g. recital

**ACKNOWLEDGMENT (Contd.)**

of a prior mortgage in a later mortgage. A I R 1931 Oudh 295=8 O W N 541=Ind Rul (1931) Oudh 302=132 I C 542..

—Acknowledgment implies promise to pay and should be stamped as agreement can be admitted on payment of penalty if not duly stamped. Ind Rul (1931) Lah 684=32 P L R 767=132 I C 844..

—No obligation to pay debts—letter acknowledging debt signed by inadvertence—not an unconditional acknowledgment from which a promise to pay can be inferred. A L R 1933 A 160=1933 A L J 170=A I R 1933 A 175

—In a lease, the lessor described himself as mortgagee, though he was not, it does not, estop him from asserting his true position against the mortgagors for the matters not included in the lease. 27 C 1004 P C=27 I A 103=4 C W N 565=7 Sar 718.

—Promissory note payable to bearer—Suit on—Not maintainable—Suit on original cause of action—Pronote evidence of acknowledgment of liability, Paper Currency Act S. 26. 6 L W 630=42 I C 706 (1).

—There can be a case where an entry amounts to acknowledgment of liability and yet does not import a promise to pay. 125 P L R 191t

**ACQUIESCENCE. 1-27.**

- (1) What is 1-16
- (2) Effect: 17-21.
- (3) Building on land of others, effect of standing by. 22-27.

See also

- (1) Easements
- (2) Estoppel
- (3) Ejectment
- (4) Evidence Act S. 115
- (5) Laches
- (6) Landlord and Tenant.
- (7) Limitation act art. 144.

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**(1) What is (1-16).**

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1—By conduct joint estate registered in names of plaintiffs' and defendants' ancestors—management by 2nd defendant co-sharer for 19 years—right to call for accounts by other co-shares—acquiescence in management etc., of. A L R 1933 M 401.

2—Insolvency Court passing an order vesting debtor's properties in receiver subsequent to the order of annulment-debtor or creditors taking no steps to have it set aside—amounts to acquiescence in the order passed. A L R 1933 P 180==12 P 163==13 P L T 775== A I R 1933 P 84.

## ACQUIESCENCE (Contd.)

## [1] What is (Contd.)

3—In case of servant's or tenants'—Continuing obligation—Absence of repudiation implies renewal or acceptance of service or rent. 18 O C 168=31 I C 728.

4—During the progress of the act acquiesced in, is quiescence from which assent may be inferred. Acquiescence after the act is complete does not take away the right vested in the person affected except in cases of leases which has affected the position of the opponent. 23 C L J 82=33 I C 273.

5—Mere—Delay in suing—Does not prove acquiescence or waiver.

97 P W R 1916=57 P L R 1917=34 I C 168.

6 Leach where a period.....while acquiescence availed—41 I C 722 =11 Bar L T 150.

7—Acquiescence may be imputed to Defendant when he knows his own rights and allows plaintiff to do some act under a mistaken belief. A I R 1930 Oudh 235=7 O W N 271=14 R D 119=122 I C 774

8—The ground for the defence of acquiescence or laches according to the English Courts of Equity is that a plaintiff is bound to prosecute his claim without undue delay. But in India even in cases of laches the defendants must show that they had suffered a change of position. A I R 1930 Mad. 364; 30 L W 898=122 I C 37

9—By agent binds principal.—112 I C 609 (All.)

10—A mere delay in filing a suit does not per se constitute acquiescence. A I R 1927 Nag. 400=105 I C 286

11—Trespasser building on site of another though owner protesting suit for possession after two years. Held there was no acquiescence. A I R 1927 Nag. 348=104 I C 565.

12—Words or conduct may amount to acquiescence. A I, R 1927 Bom. 225=29 Bom. L R 375=102 I C 255.

13—Acquiescence must amount to fraud to be successfully pleaded. A I R 1927 Oudh 63; 3 O W N (Sup) 282=99 I C 255

14—Acquiescence applies where one is acting with knowledge of a person's rights and other bonafide—In absence of either, doctrine does not apply. There must be fraud to deprive a person of his rights. A I R 1927 Oudh 89=99 I C 199.

15—Merely because a Person neglects his rights in certain cases—He cannot be compelled to forego his remaining property. A I R 1924 All 477=L R 5 A Rev. 115=79 I C 134

16—Mere delay in suing does not amount to acquiescence. 3 U P L R (Lah) 24=60 I C

## ACQUIESCENCE (Contd.)

## (2) Effect of Acquiescence 17—21.

17—Acquiescence Can operate as a bar to a claim if the Person acquiescing aware of the matter in which he acquiesced. 3 Pat. L T 653=(1922) Pat. 619=65 I C 882

18—Finding as to, can be questioned in second Appeal. 69 P R 1917=41 I C 927

19—By occupancy tenant does not affect his heir's rights. A I R 1930 Oudh 300=7 O W N 438=14 R D 190=123 I C 53

20—Doctrine of, applicability to opening of settled accounts. 41 Cal 771=26 I C 284.

21—A principal did not object to his agents giving loans contrary to his instructions but interfered in the collection. This constituted his acquiescence in the loans. 28 M L J 199=289 I C 135.

## (3) BUILDING on land of others—effect of standing by 22—27.

22—Where it was found that plaintiff—Landlord kept quiet while the house was being built by the Defendants under a bonafide belief of their right to do so on a portion of the land belonging to the landlord. Held that the principle of acquiescence applied and therefore the plaintiff's suit for ejectment must fail. 1917 M W N 104 = 36 I C 1001. see to the same effect:— 65 I C 705

—Plaintiff's mere seeing defendant building does not apply by Defendant must be encouraged to build. A I R 1930 Lah. 392=31 P L R 33=121 I C 295

23—There is no acquiescence where defendants does not act under a mistaken belief re. their legal rights. A I R 1929 All. 877=127 I C 749

24—Acquiescence applies where—Plaintiff connives at defendant's building in plaintiff's land and Defendants having bonafide belief in their title to that property. A I R 1929 Oudh 292

25—Stranger knowing that he is building on another's land—Owner entitled to recover—Mere delay in suit is not acquiescence. A I R 1926 Lah. 354=94 I C 158

26—Mortgagee in possession building on mortgagor's land—Mortgagor can sue for demolition. A I R 1925 All 576=L R 6 A Civ. 252=87 I C 15

27—Plaintiff conniving at defendant's building in plaintiff's land—He cannot pray for demolition A I R 1925 Oudh 258=28 O C 114=11 O L J 677=84 I C 511

**ACT DONE IN OFFICIAL CAPACITY.**

See Tort

**ACTION.**

—For damages.

See Damages.

—Form of.

See C. P. Code.

—Framed in Tort.

See C. P. Code.

See Tort.

—In Contract.

See Contract.

See also Tort.

**ACTIONABLE CLAIM.**

See Assignment.

See Negotiable Instruments Act.

See Promissory Note.

See T. P. Act, ss. 3, 6 (e), 130 to 137, 138.

**ACTIONABLE WRONG.**

See Compensation.

See Damages.

See Torts.

**(A) Imperial Acts****ACT OF BANKRUPTCY**

See Insolventcy.

**ACT OF GOD**

See (1) Carrier

(2) Carriers Act

(3) Railways Act etc

(4) Tort

**ACTS CONSTRUCTION OF**

See Statutes, Construction of.

**ACTS**

(A) Acts Imperial

(B) Acts Provincial

**(A) ACTS IMPERIAL**

Act VIII of 1835 See Sales in satisfaction of decrees for Rent Act.

—IX of 1837 See Parsis succession to Immoveable Property Act.

—XI of 1838 See Amins Effecting partitions remuneration of

—XXIII of 1838 See Madras Regulation IV of 1821 repeal of part of Act.

—XXV of 1838 See Wills Act.

—II of 1839 See Fines by Magistrates Act.

—XIV of Emigration Act.

—XXIX of 1839 See Dower Act.

—XXXII of 1839 See Interest Act.

—XIV of 1840 See Act Extending 9 Geo. 4, c. 14.

—XXIII of 1840 See Execution of Mufas s. l Process in Presidency Towns Act.

—X of 1841 See Registration of Ships Act.

—XI of 1841 See Military Courts of Requests Act.

**ACTs [Contd.]****[A] Imperial [Contd.]**

—XIX of 1841 See Protection of Succession Property Act.

—XX of 1841 See Successions collection of Debts on Act.

—XXI 1841 See Local Nuisances Act.

—XXIX of 1841 See Appeals and Suit dismissal of suits Act (Bengal and Madras).

—III of 1843 See special Appeals Special Act.

—V of 1843 See Slavery Act.

—XIX of 1843 See Registration of Certain Deeds Act.

—V of 1844 See Private Lotteries Act.

—XX of 1844 See Factors Act.

—I of 1845 See Arrears sales of land for Revenue Act.

—XVI of 1845 See Appeals re-admission of Bengal and Madras Act.

—XXIX of 1845 See joint Zilla and Sessions judges Act.

—I of 1846 See Legal Practitioners Act.

—I of 1847 See Boundaries Act.

—XX of 1847 See Copyright Act.

—XV of 1848 See Trading by Supreme Courts' Officers Act.

—XXI of 1848 See Wagers Act.

—VI of 1849 See Pensions Act.

—IX of 1850 See Presidency Small Cause Courts, Act.

—XVIII of 1850 See Judicial Officer's Protection Act.

—XXI of 1850 See Caste Disabilities Removal Act.

—XXVI of 1850 See Towns Improvements Act.

—X of 1851 See Administration Certificates Act.

—V of 1852 See Marriage by Registrars Act.

—XVI of 1853 See Appeals Special Act.

—XIX of 1853 See Witnesses Recusant Act.

—VI of 1854 See Equity Procedure Supreme Courts, Act.

—IX of 1854 See Civil Appeals Act.

—XVIII of 1854 See Railways Act.

—II of 1855 See Evidence Act.

—VI of 1855 See Execution, Supreme Courts Act.

—VIII of 1855 See Administrator-general Act.

—XI of 1855 See Mesne Profits and Improvements Act.

—XII of 1855 See Legal Representatives' Suits Act.

—XIII of 1855 (fatal Accidents) Act.

—XVIII of 1855 See Pardons and Reprieves Act.

—XXII of 1855 See Ports and Port-dues Act.

—XXVIII of 1855 See Usury Laws Repeal Act.

## ACTS [Contd.]

## [A] Imperial [Contd.]

- XV of 1856 Hindu Widows Re-marriage Act.
- VI of 1857 See Acquisition of Land for Public Purposes Act.
- XI of 1857 See State Offences Act.
- XIX of 1857 See Joint-Stock Companies Act.
- XXV of 1857 See Forfeiture Act.
- III of 1858 See State Prisoners Act.
- X of 1858 See Confiscation, etc., for Rebellion Act.
- XI of 1858 See Corporal Punishment Act.
- XXI of 1858 See Native Passenger Ships Act.
- XXXIV of 1858 See Lunacy Supreme Courts Act.
- XXXV of 1858 See Lunacy District Courts Act.
- XXXVI of 1858 See Lunatic Asylums Act.
- XL of 1858 See Minors Act.
- I of 1859 See Merchant Shipping Act.
- III of 1859 See Cantonment Joint Magistrates Act.
- VIII of 1859 See Civ. Pro. Codes.
- IX of 1859 See Forfeiture Act.
- XIII of 1859 See Workman's Breach of Contract Act.
- XIV of 1859 See Lmt. Act.
- XV of 1859 See Patents Act.
- VIII of 1860 See Electric Telegraphs Act.
- X of 1860 See Custom-duties Act.
- XXI of 1860 See Societies Registration Act.
- XXVII of 1860 See Succession Certificate Act.
- XXVIII of 1860 See Boundaries Act.
- XXXII of 1860 See Income-tax Act.
- XXXVI of 1860 See Stamps Act.
- XLII of 1860 See Prov. Small Cause Courts Acts.
- XLIII of 1860 See Civ. Pro. Codes Amendment Amending Act. VIII of 1859.
- XLV of 1860 See Penal Code.
- XLVIII of 1860, (See Police Presidency-Towns Amending Act).
- V of 1861, (See Police Act.)
- IX of 1861, (See Minors Act).
- X of 1861, (See Civil Procedure enactments repealing Act.)
- XI of 1861, (See Amending Act XIV of 1859).
- XXI of 1861, (See Income-Tax Act).
- XXVII of 1861, (See Civil Procedure Code).
- XXVIII of 1861, (See Criminal Procedure Code).
- VI of 1862, (See Act Annexing Chdula to Act IV of 1862.

## ACTS [Contd.]

## [A] Imperial Acts [Contd.]

- X of 1862, (See Stamp Acts)
- XX of 1862, (See Presidency High Courts Act).
- II of 1863, (See Appeals to Queen in Council Act).
- XIV of 1863, (See Agra Amending Act X of 1859 in the Province of).
- XIX of 1863, (See Revenue Paying Estates Partition Act).
- XX of 1863, (See Religious Endowments Act).
- XXIII of 1863, (See Waste-Lands Claims Act).
- III of 1864, (See Foreigners Act).
- XI of 1864, (See Native Law Officers Act).
- XIII of 1864, (See Native Labourers Emigration Act).
- XVI of 1864, (See Registration of Assurances Act).
- XVII of 1864, (See Official Trustees Act).
- XXVI of 1864, (See Presidency Towns Small Cause Courts Act).
- III of 1865, (See Carriers Act).
- VII of 1865, (See Government Forests Act).
- VIII of 1865, (See Imprisonment of certain persons validating Act).
- X of 1865, (See Succession Act).
- XI of 1865, (See Mofussil Small Cause Courts Act).
- XV of 1865 (See Parsi Marriage and Divorce Act).
- XX of 1865 (See Pleaders, Mukhtars and Revenue Agents Act).
- XXI of 1865, (See Parsi Intestate Succession Act).
- V of 1866, (See Assignment Policies of Insurance (Marine and Fire) Act).
- X of 1866, (See Companies Act).
- XII of 1866, (See Water-courses private Act).
- XIV of 1866, (See Post Office Act).
- XX of 1866, (See Registration Act).
- XXI of 1866, (See Native Converts Marriage Dissolution Act).
- XXV of 1866, (See Unclaimed Deposits Act).
- XXVII of 1866, (See Trustees Act).
- XXVIII of 1866, (See Trustees' and Mortgagees' Powers Act).
- Act X of 1867, (See Mufussil Small Cause Courts Referees by Act).
- XII of 1867, (See Jails Presidency Act).
- XXIV of 1867, (See Administrator General Act).
- XXV of 1867, (See Press and Registration of Books Act).
- XXVI of 1867, See Stamp-Duties Act.
- XXVII of 1867, (See Deputy Commissioners Act).

## ACTS [Contd.]

## [A] Imperial Acts [Contd.]

- I of 1868, (See General Clauses Act).
- IV 1869, (See Divorce Act).
- V of 1869, (See Articles of War).
- VIII of 1869, (See Criminal Procedure Amendment Code).
- X of 1869, (See Police Superannuation Funds Act).
- XV of 1869, (See Prisoners' Testimony Act).
- XVIII of 1869, See Stamps Act.
- XXII of 1869, See Garo-Hills Act.
- VII of 1870, See Court Fees Act.
- X of 1870, See Land Acquisition Act.
- XXI of 1870, See Hindu Wills Act.
- XXIII of 1870, See Coinage Act.
- I of 1871, See Cattle Trespass Act.
- VIII of 1871, See Registration Act.
- IX of 1871, See Limitation Act.
- XXIII of 1871, See Pensions Act.
- XXV of 1871, Railway Act Amendment Act.
- I of 1872, See Evidence Act.
- III of 1872, See Special Marriage Act.
- IX of 1872, See Contract Act.
- X of 1872, See Criminal Procedure Code.
- XV of 1872, See Christian Marriage Act.
- VIII of 1873, See Canal and Drain Northern Indian Act.
- X of 1873, See Oaths Act.
- XVII of 1873, See Nawab Nizam's Debts Act.
- II of 1874 See, Administrator-Generals Act.
- III of 1874, See Married Women's Property Act.
- VI of 1874, See Privy Council Appeals Act.
- XIV of 1874, See Scheduled Districts Act.
- I of 1875, See Distress Act.
- IV of 1876, See Merchant Shipping Act.
- IX of 1875, See Majority Act
- X of 1875 See Advocate-General's Powers Act.
- XVIII of 1875 See Indian Law Reports Acts.
- VIII 1876 See Native Passenger Ships Act.
- XI of 1876 See Presidency Banks Act.
- XII of 1876 See Repealing Act.
- I of 1877 See Specific Relief Act.
- III of 1877 See Registration Acts.
- IV of 1877 See Presidency Magistrates Court-fees Act.
- X of 1877 See Civil Pro. Codes.
- XV 1877 See Lmt. Acts.
- XVIII of 1877 See Salt Act.
- I of 1877 Opium Act.
- VI of 1878 See Treasure Trove Act.
- VII of 1878 See Forest Act.

## ACTS [Contd.]

## [A] Imperial Acts [Contd.]

- VIII of 1878 See Sea Customs Act.
- XI of 1878 See Arms Act.
- XVII of 1878 See Northern India Ferries Act.
- I of 1879 See Stamp Acts.
- IV of 1879 See Railways Act.
- XII of 1879 See Registration and Limitation Act, Amendment Act.
- XIV of 1879 See Hackney-Carriage Act.
- XVIII of 1879 See Legal Practitioners Act.
- III of 1880 See Cantonments Act.
- VII of 1880 See Merchant Shipping Act.
- V of 1881
- XV of 1881 See Factories Act.
- XXII of 1881 See Excise Act.
- XXVI of 1881 See Negotiable Instruments Act.
- II of 1882 See Trusts Act.
- IV of 1882 See Transfer of Property Act.
- V of 1882 See Easements Act.
- VI of 1882 See Companies Act.
- X of 1882 See Civ. Pro. Code 1882.
- XII of 1882 See Salt Act.
- XIV of 1882 See Civ. Pro. Codes.
- See Presidency Small Cause Suits Acts.
- XX of 1882 See Paper Currency Act.
- V of 1883 See Merchant Shipping Act.
- XIX of 1883 See Land Improvement Loans Act.
- XII of 1884 See Agriculturists' Loans Act.
- III of 1885 See Transfer of Property Act (1882) Amendment Act;
- II of 1886 See Income-Tax Act.
- X of 1886 See Criminal Law Amendment Act.
- I of 1887 See General Clauses Act.
- VII of 1887 See Suits Valuation Act.
- IX of 1887 See Prov. Small Cause Courts Act.
- XII of 1887 See Bengal N. W. F. P. Agra and Assam Civil Courts Act.
- V of 1888 See Inventions and Designs Act.
- VI of 1888 See Debtors Act.
- VII of 1888 See Civil Procedure Code Amendment Act
- X of 1888 See Presidency Small Cause Courts Law Amendment Act.
- IV of 1889 See Merchandise Marks Act.
- VI of 1889.
- VII of 1889.
- X of 1889 See Ports Acts.
- XIII of 1889, See Cantonments Act.
- I of 1890, See Revenue Recovery Act.
- VIII of 1890,
- IX of 1890, (See Railways Act)
- XI of 1890, (See, Cruelty to Animals Prevention Act)

ACTS [*Contd.*][A] Imperial Acts. [*Contd.*]

- VIII of 1891, [See, Easements Act (extending Act V of 1882)]
- XII of 1891, (See Act 12 of 1891 Amending Act)
- XVIII of 1891, (See Bankers' Books Evidence Act)
- VI of 1892, (See Limitation Act & Civil Procedure Code Amendment Act)
- IV of 1893, (See Partition Act)
- I of 1894, (See Land Acquisition Act)
- V of 1894, (See Civil Procedure Code Amendment Act)
- VIII of 1894, (See Tariff Act)
- I of 1895, (See Presi. Small Cause Courts Act)
- XII of 1895, [See Companies (Memorandum of Association) Act]
- XV of 1895, (See Crown Grants Act)
- XI of 1896, See Legal Practitioners Act
- XII of 1896, (See Excise Act)
- III of 1897, (See Epidemic Diseases Act)
- IX of 1897, (See Provident Funds Act)
- X of 1897, (See General Clauses Act)
- VI of 1898, (See Post Office Act)
- X of 1898 See Presy. Towns Insolvency Act,
- II of 1899, See Stamp Acts.
- VI of 1899, See (Contract Act Amendment Act).
- IX of 1899, See Arbitration Act.
- XI of 1899, See (Court-Fees Amendment Act.)
- XXII of 1899, See (Coinage and Paper Currency Act).
- II of 1900, See Transfer of Property Act.
- II of 1902, See (Cantonments House Accommodation Act.)
- V of 1902, See (Administrators General and Official Trustees Act).
- VII of 1903, See Works of Defence Act.
- XV of 1903, See Extradition Act.
- I of 1904, See Poisons Act.
- X of 1904, See Co-operative Credit Societies Act.
- III of 1905, See Paper Currency Act.
- III of 1907, See Provincial Insolvency Act.
- V of 1907, See Local Authorities Loan Amendment Act.
- V of 1908 See Civil Procedure Code.
- VI of 1908, See Explosive Substances Act.
- IX of 1908, See Limitation Act.
- XIV of 1908, See Criminal Law Amendment Act.
- XV of 1908, See Ports Act.
- XVI of 1908, See Registration Act.
- III of 1909, See Presidency Towns Insolvency Act.

ACTS [*Contd.*]Imperial Acts [*Contd.*]

- IV of 1909, See Whipping Act.
- I of 1910, See Press Act.
- IX of 1910, See Electricity Act.
- II of 1911, See Patent and Designs Act.
- III of 1911, See Criminal Tribes Act.
- X of 1911, See Prevention of Seditious Meetings Act.
- XII of 1911, See Factories Act.
- II of 1912, See Co-operative Societies Act.
- IV of 1912, See Lunacy Act.
- III of 1913, See Administrator General's Act.
- VI of 1913, See Mussalman Waqf Validating Act.
- VII of 1913, See Companies Act.
- III of 1914, See Copyright Act.
- VIII of 1914, See Motor Vehicles Act.
- IV of 1915, See Defence of India Act.
- VII of 1916, See Medical Degrees Act.
- VII of 1918, See Income Tax Act.
- IX of 1918, See Indian Soldiers (Litigation Act).
- X of 1918, See Usurious Loans Act.
- X of 1919, See Excess Profits Duty Act.
- V of 1920, See Provincial Insolvency Act,
- XIV of 1920, See Charitable and Religious Trusts Act.
- XIX of 1920, See Super-Tax Act.
- VIII of 1921, See Hindu Transfers and Bequests Act.
- XVIII of 1921, See Maintenance Orders Enforcements Act.
- XI of 1922, See Income-Tax Act.
- XXII of 1922, See Police Incitement to Disaffection Act.
- VIII of 1923, See Workmen's Compensation Act.
- X of 1923, See Paper Currency Act.
- XIX of 1923, See Official Secrets Act.
- XXIII of 1923, See Legal Practitioners (Women's) Act.
- XLII of 1923, See Mussalman Wakf Act.
- XIII of 1924, See Specified Instruments (Stamp) Act.
- XIX of 1925, See Provident Funds Act.
- XXIII of 1925, See Legislative Members Exemption Act.
- XXXIX of 1925, See Succession Act.
- XI of 1926, See Promissory Notes (Stamp) Act.
- XII of 1926, See Contempt of Courts Act.
- XVI of 1926, See Trade Unions Act.
- XXI of 1926, See Legal Practitioners (Fees) Act.
- XXX of 1926, See Negotiable Instruments Interest Act.
- XXXVIII of 1926, See Par Councils Act.



## ACTS (Contd.)

## [A] Imperial Act (Contd.)

- XII of 1928, See Hindu Inheritance (Removal of Disabilities) Act.
- XX of 1928, See Life Insurance Companies Act.
- II of 1929, See Hindu Law of Inheritance (Amendment) Act.
- XIX of 1929, See Child Marriage Restraint Act.
- XX of 1929, See Transfer of Property (Amendment) Act.

## (B) PROVINCIAL ACTS.

## Bengal Acts.

- V of 1836, See (Bengal Enforcement of Decrees Act).
- X of 1836, See (Bengal Indigo Contracts Act).
- XXV of 1837, See (Bengal Judiciary System Act).
- IV of 1840, See (Bengal Affrays Act).
- I of 1841, See (Bengal Pattidari Estates Act).
- XII of 1841, See (Bengal Land-revenue Sales Act).
- VII of 1847, See (Bengal Distresses Calcutta Act).
- IX of 1847, See (Bengal Alluvion and Diluvion Act).
- I of 1848, See (Bengal Forgery Act).
- XIII of 1848, See (Bengal Limitation Act).
- XIV of 1848, See (Calcutta Supreme Court Commission to take Affidavits Bengal Act).
- XVIII of 1852, See (Bengal Lower Provinces Pleaders Act).
- XV of 1853, See (Bengal Regular Appeals Act).
- XXXVII of 1855, See (Bengal Sonthal Parganas Act).
- III of 1856, See (Bengal Abkari Calcutta; Madras Town Act).
- II of 1857, See (Calcutta University Act).
- XXXI of 1858, See Bengal Alluvial Land Settlement Act).
- X of 1859, (See Bengal Rent Act)
- XI of 1859, (See Bengal Land Revenue Sales Act)
- IV of 1862, (See Bank of Bengal Act)
- VI 1862, (See Bengal Rent Act)
- VII of 1862, (See Bengal Land Revenue Resumption Act)
- VIII of 1862, (See Bengal Zamindari Dak Act)
- III of 1863, (See Bengal Transport of Native Labourers Act)
- V of 1863, (See Bengal Process-servers Act)

## ACTS [Contd.]

## Bengal Acts [Contd.]

- VI of 1863, (See Calcutta Municipality Bengal Act)
- III of 1864, (See Bengal District Municipal Improvement Act)
- VI of 1865, (See Bengal Transport of Native Labourers Act)
- VIII of 1865, (See Bengal Rent Recovery (Under-Tenures Act).
- XII of 1865, (See Bengal Prisoners in Calcutta Act)
- I of 1866, (See Bengal Ferris (Amending) Act (Beng. Reg. XVI of 1819)
- II of 1866, (See Calcutta Suburban Police Bengal Act)
- IV of 1868, (See Assessment of New lands Bengal Act. amending Act IX of 1847)
- VII of 1868, (See Bengal Land Revenue Sales Act)
- XVI of 1868, (See Amins Principal Sadr etc. Bengal).
- II of 1869, (See Chota Nagpur Tenures Bengal Act)
- VIII of 1869, (See Bengal Landlord and Tenant Procedure Act)
- XVI of 1869, (See Bhutan Duars Bengal Act)
- III of 1870, (See Bengal Transfer of Certain Suits to Civil Courts Act)
- IV of 1870, (See Bengal Court of Wards Act)
- V of 1870, (See Calcutta Port Improvement Bengal Act)
- VI of 1870, (See Bengal Village-Chaukidari Act)
- VI of 1871, (See Bengal Civil Courts Act)
- IX of 1871, (See Howrah Bridge Bengal Act)
- X of 1871 (See Bengal District Roadcess Act)
- VI of 1873, (See Bengal Embankments Act)
- V of 1875, (See Bengal Survey Act)
- I of 1876, (See Bengal Muhammadan Marriages and Divorces Registration Act).
- III of 1876, (See Bengal Irrigation Act)
- IV of 1876, (See Calcutta Municipal Consolidation Bengal Act)
- V of 1876, (See Bengal Municipal Act)
- VI of 1876, (See Chota Nagpur Incumbered Estates Act)
- VII of 1876, (See Bengal Land Registration Act)
- VIII of 1876, (See Bengal Estates Partition Act)
- II of 1877, (See Bengal Provincial Public Works Act)

## ACTS [Contd.]

## Bengal Acts [Contd.]

- XII of 1877, (See Chota Nagpur Incumbered Estates Act, amending Act VI of 1876)
- VII of 1878, (See Bengal Excise and Licensing Act)
- VIII of 1878, (See Hazaribagh Lohardugga Rural Police Bengal Act)
- I of 1879, (See Chota Nagpur Landlord and Tenant Procedure Act)
- III of 1879, (See Bengal Steam-Boiler and Prime-movers Act)
- VIII of 1879, (See Bengal Rent Settlement Act)
- IX of 1879, (See Bengal Court of Wards Act)
- VI of 1880, (See Bengal Drainage Act)
- VII of 1880, (See Bengal Public Demands Recovery Act)
- IX of 1880, (See Bengal Cess Act)
- II of 1882, (See Bengal Embankment Act)
- III of 1884, (See Bengal Municipal Act)
- V of 1884, [See Calcutta Municipality (amending Ben. Act IV of 1876 Act)]
- VIII of 1885, (See Bengal Tenancy Act)
- IX of 1886, (See Bengal Deo Estate Act)
- II of 1888, See (Calcutta Municipal Consolidation Act)
- II of 1889, See (Bengal Private Fisheries Protection Act).
- XV of 1891, See (Murshidabad Bengal Act).
- IV of 1894, See (Bengal Municipal Amendment Act).
- I of 1895, See Bengal Public Demands Recovery Act.
- VII of 1895, See (Bhutan Duars Reappealing Bengal Act).
- VIII of 1895, See (Bengal Sanitary Drainage Act).
- I of 1897, See (Bengal Public Demands Recovery Amendment Act).
- V of 1897, See (Bengal Estates Partition Act).
- III of 1898, See (Bengal Tenancy Amendment Act).
- I of 1899, See Bengal General Clauses Act.
- III of 1899, See (Calcutta Municipal Bengal Act).
- I of 1903, See [Bengal Tenancy (Validation and Amendment Act).]
- II of 1903, See (Bengal Excise and Licensing Amendment Act.)
- V of 1903, See (Chota Nagpur Tenancy Amendment Bengal Act).
- VII of 1905, See (Bengal and Assam Laws Act).
- I of 1907, See (Bengal Tenancy Amendment Act).

## ACTS [Contd.]

## Bengal Acts [Contd.]

- VI of 1908, See (Chota Nagpur Tenancy Bengal Act.)
- III of 1913 Bengal public demands recovery Act.
- VI of 1914 Beng Medical Act.
- I of 1917 See Beng ghee Adulteration Act.
- V of 1919 Beng Village self Govt Act.
- VI of 1919 See Beng Food Adulteration Act.
- IV of 1922 See Beng Court Fees Amendment Act.
- I of 1923 Beng Medical Act.

## BIHAR AND ORISSA ACTS

- I of 1913 Bih and Ori Board of Revenue Act.
- II of 1914 Bih. and Ori Public Demands Recovery Act.
- II of 1919 Bih and Ori Food Adulteration Act.
- II of 1922 Bih and Ori Court Fees Amend Act.
- III of 1922 Bih. and Ori. Village Administration Act.
- VII of 1922 Bih and Ori Municipal Act.

## BOMBAY ACTS.

- XVI of 1838 See Bombay Suits Act.
- XIX of 1838, See Bombay Coasting Vessels Act.
- XX of 1839, See Bombay (Levy of Haqq, Etc., Act).
- XV of 1840, See (Bombay Agents of Foreign Sovereigns, etc., Act).
- XI of 1843, See Bombay Hereditary Officers Act.
- XVI of 1844, See Bombay Salt duties Act.
- XIX of 1844, See (Bombay Abolition of Town Duties etc., Act).
- II of 1845, See Bombay Adultery Act
- XVIII of 1848, See Bombay Nawab of Surat Act.
- XI of 1852, See (Bombay Titles to Rent-free Estates Act).
- XV of 1855, See Bombay Joint Police Officers Act.
- XXII of 1857, See (Bombay University Act).
- V of 1862, See (Bombay Bhagdari and Narwadari Tenures Act).
- VI of 1862, See (Bombay Ahmedabads Taluqdars Act).
- II of 1863, See (Bombay Exemptions from Land Revenue in Territories Subject to Act XI of 1852).
- VI of 1863, See (Bombay Public Conveyances (Bombay Town Suburbs and Harbour Act).



**ACTS (Contd.)****Bombay Acts (Contd.)**

- VII of 1863, (See Bombay Summary Settlement Act)
- II of 1864, (See Aden Civil and Criminal Justice, Act)
- IV of 1864, (See Bombay Native Law-officers Act)
- V of 1864, (See Bombay Mamlatdars' Courts Act)
- XX of 1864, (See Bombay Minors Act)
- I of 1865, (See Bombay Survey and Settlement Act)
- II of 1865, (See Bombay Municipal Act)
- III of 1865, (See Bombay Wagers Act)
- XXVIII of 1865, (See Bombay Insolvent Traders, Act)
- VII of 1866, (See Bombay Hindu Heirs Relief Act)
- XII of 1866, (See Bombay Sindh Courts Act)
- III of 1867, (See Bombay Contonment Act)
- VII of 1867, (See Bombay District Police Act)
- VIII of 1867, (See Bombay Village Police Act)
- IV of 1868, (See Bombay Act For City Surveys and Amendment of Bombay Surveys and Settlement Act)
- III of 1869, (See Bombay Local Funds Act)
- XIV of 1869, (See Bombay Civil Courts Act)
- XV of 1871, (See Bombay Broach Thakur's Relief Act)
- III of 1872, (See Bombay Municipal Act)
- V of 1872, (See Bombay Jurisdiction over Sindh Act)
- I of 1873, (See Bombay Port Trust Act)
- VI of 1873, (See Bombay District Municipal Act)
- VII of 1873, (See Bombay Salt Act)
- I of 1874, (See Bombay Tramways Act)
- III of 1874, (See Bombay hereditary Offices Act)
- III of 1875, (See Bombay Tolls on Roads and Bridges Act)
- III of 1876, (See Bombay Mamlatdar's Courts Act)
- X of 1876, (See Bombay Revenue Jurisdiction Act)
- XIV of 1877, (See Bombay Broach and Kaira Incumbered Estates Act)
- V of 1878, (See Bombay Abkari Act)
- V of 1879, (See Bombay Land Revenue Code)
- VI of 1879, (See Bombay Port Trust Act)
- VII of 1879, (See Bombay Irrigation Act)
- XVII of 1879, (See Bombay Dekkhan Agriculturists' Relief Act)

**ACTS (Contd.)****Bombay Acts (Contd.)**

- I of 1880, (See Bombay Khoti Settlement Act)
- XV of 1880, (See Bombay Revenue Jurisdiction Act)
- XX of 1881, (See Bombay Sindh Incumbered Estates Act)
- XXIII of 1881, (See Bombay Dekkhan Agriculturists' Relief Act)
- XXII of 1882 see Bombay Dekkhan agriculturists relief Act.
- I of 1884, (See Bombay Local Boards. Act)
- II of 1884, (See Bombay District Municipal, Amendment Act)
- V of 1886, (See Bombay Vatan Act) VI of 1886, (See Bombay Karachi Port Trust Act)
- XXIII of 1886, (See Bombay Dekkhan Agriculturist's Relief Act)
- VI of 1887, (See Bombay Madras Act)
- VII of 1887, (See Bombay Toda Giras Allowances Act)
- III of 1888, (See Bombay City Municipal Act)
- VI of 1888, (See Bombay Gujarat Taluqdars Act)
- II of 1890, (See Bombay Salt Act)
- IV of 1890, (See Bombay District Police Act)
- II of 1894, (See Bombay Peint Laws. Act)
- XX of 1896, (See Bombay Sindh Incumbered Estates Act)
- IV of 1898, (See Bombay City Improvement Act)
- III of 1901, (See Bombay District Municipal Act)
- IV of 1903, (See Bombay Land Record-of-Rights Act)
- I of 1904 See Bombay General Clauses. Act.
- I of 1905 See Bombay Court of Wards. Act.
- II of 1906, (See Bombay Mamlatdars' Courts Act)
- II of 1912 See Bombay Societies Registration Amendment Act.
- I of 1918 See Bombay Primary Education (District Municipalities Act.)
- II of 1918 See Bombay Rent War Restrictions Act.
- VII of 1918 —Do—
- VII of 1920 See Bombay Public Conveyances Act.
- XVII of 1920 See Bombay Pleaders Act
- XIV of 1922 See Bombay Cotton Contracts Act.
- VI of 1923 See Bombay Primary Education Act.

**ACTS (Contd.)****Bombay Acts (Concl'd.)**

- VI of 1923 See Bombay Local Boards Act.
- X of 1923 See Bombay Hereditary Offices Amendment Act.
- XI of 1923 See Bombay Prevention of Prostitution Act.
- XVIII of 1925 See Bombay City Municipalities Act.

**BURMA ACTS.**

- XXI of 1863, (See Burma Recorders' Courts, Act)
- VII of 1875, (See Burma Fisheries Act)
- XVII of 1875, (See Burma Courts Act)
- II of 1876, (See Burma Land and Revenue Act)
- V of 1880, (See Burma Boundaries Act)
- XVII of 1884, (See Burma Municipal Act)
- III of 1889, [See Burma (Lower) Village Act]
- XI of 1889, [See Burma Lower Courts Act]
- III of 1898, [See Burma Municipal Act]
- IV of 1898, [See Burma Lower Town and Village Lands Act]
- XIII of 1898, (See Burma Laws Act)
- VI of 1900, [See Burma (Lower) Courts Act]
- IV of 1902 (See Burma Forest Act)
- VII of 1907, [See Burma (Lower) Courts, (1900) Amendment Act]
- III of 1907 See Burma Towns Act.
- VI of 1907 See Burma Village Act.
- I of 1909 See Burma Vaccination Law Amend Act.
- I of 1910 See Burma Process fees Act
- II of 1917 See Burma Salt Act.
- V of 1917 See Burma Excise Act.
- I of 1918 See Burma Oil fields Act.
- VIII of 1920 See Burma Registration of Business names Act.
- IV of 1922 See Burma Rural self Govt Act.
- V of 1922 See Burma Anti Boycott Act.
- XI of 1922 See Burma Courts Act.
- VI of 1927 See Burma Cooperative society Act.
- VI of 1927 See Ghee Adulteration Act

**CENTRAL PROVINCES ACTS.**

- XIV of 1835, (See Central Provinces Courts Act)
- XX of 1875, (See Central Provinces Laws Act)
- X of 1878, (See Central Provinces Additional Rates Act)
- XVIII of 1881, (See Central Provinces Land-Revenue Act)
- IX of 1883, (See Central Provinces Tenancy Act)

**ACTS (Contd.)****Central Provinces Acts (Contd.)**

- XVI of 1885, (See Central Provinces Civil Courts Act)
- XVII of 1885, (See Central Provinces Government Wards Act)
- XVI of 1889, (See Central Provinces Land-Revenue Act)
- XVII of 1889, (See Central Provinces Tenancy Act)
- XVIII of 1889, (See Central Provinces Municipal Act)
- XI of 1898, (See Central Provinces Tenancy Act)
- XII of 1898, (See Central Provinces Land-Revenue Act)
- XXIV of 1899, (See Central Provinces Court of Wards Act)
- XVI of 1903, (See Central Provinces Municipal Act)
- II of 1904, [See Central Provinces Courts Act]
- I of 1914 see C. P. General Clauses Act.
- II of 1916 see C. P. Land Alienation Act.
- I of 1917 see C. P. Courts Act.
- I of 1920 see C. P. Tenancy Act.
- II of 1922 see C. P. Municipalities Act.
- I of 1923 see C. P. Court Fees Amendment Act.

**MADRAS ACTS.**

- XXIV of 1839, (See Agency Rules Act)
- VII of 1843 (See Madras Courts Act).
- XII of 1851 See Madras City Land Revenue Act)
- VII of 1857, (See Madras Uncovenanted Officers' Act)
- I of 1858, (See Madras Compulsory Labour Act)
- XXX of 1858, (See Nawab of Carnatic Madras Act)
- XXIV of 1859, (See Madras District Police Act)
- IV of 1863, (See Madras Small Cause Jurisdiction Act)
- II of 1864 (See Madras Revenue Recovery Act)
- III of 1864, (See Madras Abkari Act)
- IV of 1864, (See Madras Cess in Lieu of Village Fees Act)
- VII of 1865, (See Madras Irrigation Cess Act)
- VIII of 1865, (See Madras Rent Recovery Act)
- X of 1865, (See Madras Town Improvement Act)
- IV of 1866, (See Madras Enfranchised Inams Act)
- VI of 1867, (See Madras City Land Revenue (Amendment) Act)
- IX of 1867, (See Madras Municipal Act)
- III of 1871 (See Madras Town Improvement Act)

## ACTS (Contd.)

## Madras Acts (Contd.)

- III of 1873, (See Madras Civil Courts Act)
- I of 1876, (See Madras Land Revenue Assessment Act)
- V of 1878, (See Madras City Municipal Act)
- V of 1882, (See Madras Forest Act)
- XXI of 1882, (See Madras Forest (Validation) Act)
- I of 1884, [See Madras City Municipal Act]
- III of 1884, [See Madras Revenue Recovery [Amendment] Act]
- IV of 1884, (See Madras District Municipalities Act)
- V of 1884, (See Madras Local Boards Act)
- I of 1885, (See Madras Abkai Act)
- II of 1886, (See Madras Harbour Trust Act)
- I of 1887, (See Madras Malabar Compensation for Tenants' Improvements Act)
- I of 1889, (See Madras Village Courts Act)
- IV of 1889, (See Madras Salt Act)
- II of 1890, (See Madras Canals and Public Ferries Act)
- I of 1891, (See Madras General Clause Act)
- VII of 1891, (See Madras City Civil Courts Act)
- II of 1894, (See Madras Proprietary Estates' Village Service Act)
- III of 1895, (See Madras Hereditary Village Offices Act)
- IV of 1897, (See Madras Survey and Boundaries Act)
- IV of 1899, [See Madras Court of Wards (Amendment) Act]
- I of 1900, (See Madras Malabar Compensation for Tenants' Improvements Act)
- I of 1902, (See Madras Court of Wards Act)
- III of 1904, (See Madras City Municipal Act)
- I of 1908, (See Madras Estates Land Act)
- I of 1914, (See Madras Hindu Transfers and Bequests Act)
- IV of 1919, (See Madras City Municipal Act)
- V of 1920, (See Madras District Municipalities Act)
- VIII of 1920, (See Madras Elementary Education Act)
- XIV of 1920, (See Madras Local Boards Act)
- VIII of 1921, (See Madras Hindu Transfers and Bequests Act)
- II of 1922, (See Madras District Municipalities and Local Boards Amend Act)
- III of 1922, (See Madras City Tenants Protection Act)
- VIII of 1923, (See Madras Survey and Boundaries Act)

## ACTS (Contd.)

## 6— PUNJAB ACTS.

- XIX of 1865, (See Punjab Civil Courts Act)
- IV of 1866, (See Punjab Chief Court Act)
- VII of 1868, (See Punjab Appeals Act)
- XXVIII of 1868, (See Punjab Tenancy Act)
- XXXIII of 1871, (See Punjab Land Revenue Act)
- IV of 1872, (See Punjab Laws Act)
- IV of 1873, (See Punjab Municipality Act)
- IX of 1873, (See Punjab Appeals Act)
- XVII of 1877, (See Punjab Courts Act)
- XII of 1878, (See Punjab Laws Amendment Act)
- XIII of 1884, (See Punjab Municipal Act)
- XVIII of 1884, (See Punjab Courts Act)
- XVI of 1887, (See Punjab Tenancy Act)
- XVII of 1887, (See Punjab Land Revenue Act)
- XIII of 1888, (See Punjab Courts Act)
- XX of 1891, (See Punjab Municipal Act)
- III of 1893, (See Punjab Government Tenants, Act)
- I of 1898, (See Punjab General Clauses Act)
- XXV of 1899, (See Punjab Courts Act)
- I of 1900, [See Punjab Limitation (Ancestral Land Alienation)]
- IV of 1900, (See Punjab Descent of Jagirs Act)
- XIII of 1900, (See Punjab Alienation of Land Act)
- II of 1903, (See Punjab Court of Wards Act)
- I of 1904, (See Punjab Loans Limitation Act)
- II of 1905, (See Punjab Pre-emption Act)
- I of 1907, (See Punjab Land Alienation Amending Act)
- III of 1911, (See Punjab Municipal Act)
- V of 1912, (See Punjab Colonisation of Govt. lands Act)
- I of 1913, (See Punjab Pre-emption Act)
- I of 1920, (See Punjab Limitation (Custom) Act)
- I of 1914, (See Punjab Easements Act)
- V of 1918, (See Punjab Restriction of Habitual Offenders Act)
- VI of 1918, (See Punjab Courts Act)
- II of 1910, (See Punjab Custom (Power to Contest) Act)
- VII of 1922, (See Punjab Court Fees Amendment Act)
- III of 1923, (See Punjab Loans Limitation Repealing Act)
- VIII of 1925, (See Punjab Sikh Gardwaras Act)

## ACTS (Contd.)

## 7—UNITED PROVINCES ACTS.

- XIV of 1863, (See Agra, Amending-Act X of 1859 in the Province of Act)
- XXIV of, 1864, (See Agra Non-Regulation District, Agra Act)
- XVI of 1865, (See Oudh Revenue Courts Act)
- XIII of 1866, (See Oudh Limitation of Certain Suits, Act)
- XXVI of 1866, (See Oudh Sub-Settlement Act)
- XIII of 1868, (See King of Oudh Act)
- XIX of 1868, (See Oudh Rent Act)
- I of 1869, (See Oudh Estates Act)
- XXIV of 1870, (See Oudh Taluqdars Act) Relief
- XXXI of 1871, (See Oudh Civil Courts Act)
- XV of 1873, (See United Provinces Municipalities Act)
- XVIII of 1873, (See Agra Rent Act)
- XIX of 1873, (See Agra Land Revenue Act)
- XVII of 1876, (See Oudh Land Revenue Act)
- XVIII of 1876, (See Oudh Laws Act)
- III of 1878, (See Agra Local Rates Act)
- IV of 1878, (See Oudh Local Rates Act)
- VIII of 1879, (See Agra Land-revenue Act)
- XIII of 1879, (See Oudh Civil Courts Act)
- XII of 1881, (See Agra Rent Act)
- XIII of 1882, (See Kanungos and Patwaris Act)
- XVI of 1882, (See Jhansi Incumbered Estates U. P. Act)
- XV of 1883, (See United Provinces Municipalities Act)
- XIV of 1886, (See Agra Rent Act)
- XVII of 1886, (See Jhansi and Morar U. P. Act)
- XXII of 1886, (See Oudh Rent Act)
- IX of 1889, (See United Provinces Kanungos and Patwaris Act)
- XX of 1890, (See United Provinces Act)
- XIV of 1891, (See Oudh Courts Act)
- III of 1892, (See United Provinces Village Courts Act)
- V of 1894, (See Oudh Local Rates Act)
- I of 1895, [See U. P. Municipalities Act (Amending Acts XV of 1873 and XV of 1883)]
- III of 1899, See United Provinces Court of Wards Act.
- I of 1900, See United Provinces Municipalities Act.
- II of 1901, See Agra Tenancy Act.
- III of 1901, See United Provinces Land Revenue Act.

## ACTS (Contd.)

## U. P. ACTS, (Concl'd)

- IV of 1901, See Cudh Rent, 1886, Amendment Act.
- I of 1903, See Bundelkhand in Cumberped estates Acts
- II of 1903, [See Bundelkhand Alienation of Land] Acts]
- I of 1904, See United Provinces General Clauses Act
- VIII of 1923 see Agra Pre-emption Amend Act.
- IV of 1925 see Oudh Courts Act.
- II of 1926 see Agra Tenancy Act.
- IX of 1929 see Agra Pre-emption Amend Act.

Aden, Civil and Criminal Justice Act II of 1864 (as amended by Act 16 of 1891)

Resident should not refer the whole case but only the points on which he requires opinion. A I R 1931 Bom 533

=33 Bom L R 1056

—S. 3— Resident at Aden is not a "District judge" as defined in s.3 of Divorce Act.

37 Bom. 57=14 Bom. L. R. 872=17 L. C. 215

—Ss. 8, 15—S. 8—Revision lies from an order by Resident claiming reference under s. 115 of C. P. C. A. I. R. 1929 Bom. 190=31 Bom. 190=31 Bom. L. R. 225=115 I. C. 407

—s.8—A reference from an appeal lies under s. 8 from an order passed under C. P. Code, O XXI r. 50 (3) 54 B 26=31 Bom. L. R. 1302=A. I. R. 1930 Bom. 57=122 I. C. 851

—s.15— Words "shall be guided by the spirit and principles of law" do not signify the application of specific provisions of any Act—Provincial Insolvency Act. A L. R. 1933 B 237=35 B L R 271.

## ADEN COURTS ACT (II of 1864)

See Aden civil and criminal justice Act 2 of 1864

## ADEN SETTLEMENT REGULATION VII of 1900

—R. 13, authorises the Resident to make rules with the previous sanction of the Local Govt, to provide for certain specified matters. But any rule, made in pursuance of the above authority, which purports to take away the jurisdiction of Civil Court to examine property of values fixed is ultra vires 40 Bom, 446=18 Bom L. R. 296=34 I C 141..

## ADEQUACY OF CONSIDERATION.

See Contract.

See Contract Act. s. 25

## ADHLAPI TENURE

See Land Tenure.

## ADIMAYAVANA TENURE

See Land Tenure

## AD INTERIM INJUNCTION.

See C. P. Code 0.39.

**AD INTERIM PROTECTION**

- See (1) C. P. Code.  
(2) Practice

**AD INTERIM RECEIVER**

—His status is not that of a representative of the debtor, and so he has no power to apply under s. 47, C. P. C.  
35 C. W. N. 971

**ADJACENT LANDS.**

See Neighbour

**ADJURNMENT**

- See (1) C. P. Code O. 17 rr. 1 to 3  
(2) Practice.

**ADJUDICATION**

- See (1) Prov. Ins. Act  
(2) Presi. Towns Ins. Acts.

**ADJUSTMENT OF DECREE**

See C. P. Code, O. 21 r. 2 and O. 34.

**ADJUSTMENT OF SUITS**

- See (1) C. P. Code O. 23, r. 3  
(2) Compromise-decree-Adjustment.  
(3) Hindu Law Family Arrangement.

**ADMINISTRATION (1-58)**

- (A) Administration—Bond (1-3)  
(1) Limitation (1)  
(2) Surety, duties, liabilities discharge of (2-3)  
(B) Administration—suit (4-42)  
(1) Costs. (4-7)  
(2) Creditors, Suit by (8-12)  
(3) Heirs, rights and liabilities of (13-15)  
(4) Nature and Scope of the suit (16-24)  
(5) Parties to the suit (25-26)  
(6) Procedure, & Jurisdiction question as to (27-30)  
(7) Who can bring the suit (31-33)  
(8) When maintainable (34-37)  
(9) Miscellaneous (38-42)  
(C) Administration Letters of (43-58)  
(1) Decision as to title, inheritance, (43)  
(2) Limitation (44)  
(3) Revocation (45-47)  
(4) To whom can be granted (48-51)  
(5) When granted & when not (126-138)  
(6) Miscellaneous (52-58)

See also cases under :—

- (1) C. P. Code ss. 54, 92 and O. 21, s. 11  
(2) Hindu Law—will  
(3) Hindu Will Act  
(4) Probate and Adm. At  
(5) Succession  
(6) Administ

**(A) ADMINISTRATION—BOND**

- (1) Limitation, (1)

**ADMINISTRATION (Contd)****(A) ADMINISTRATION—BOND (Contd.)**

- (2) Surety, duties, liabilities and discharge of, (2-3)

**(1) LIMITATION**

1—Breaches of adm. bond come under art. 63 of Lmt. Act. Where a bond contains successive covenants each breach constitutes separate cause of action, but the date of the last breach is the starting point of limitation when the bond is enforceable till the last of the conditions is fulfilled 17 M L T 61-27 I C 849

- (2) Surety, duties, liabilities and discharge of (2-3).

2—On the beneficiary's constituted attorney's filing a verified certificate together with the account or abstract thereof stating that they had examined and found it correct and on the administrator filing the receipts for the debts paid to the satisfaction of the Registrar, the surety—bond creating a charge on the immovable properties of the sureties will be discharged, conditional upon the sureties executing a fresh security bond making themselves personally liable for the administration of the estate. 24 I. C. 447-18 C. W. N. 320

3—As soon as the duties imposed on the executor by the probate and Adm. Act were performed, the liability of the executor and the sureties under the bond cease and any subsequent acts should be attributed to him not as executor but as beneficiary in possession [3 C W N 635 foll.] 17 M. L. T. 61-27 I. C. 849.

**(C) ADMINISTRATION—SUIT (4-42)**

- (1) Costs (4-7)  
(2) Creditors, suit by (8-12)  
(3) Heir's rights and liabilities of (13-15)  
(4) Nature and Scope of the suit (16-24)  
(5) Parties to the suit (25-26)  
(6) Procedure and jurisdiction, questions as to (27-30)  
(7) Who can bring the Suit (31-33)  
(8) When maintainable (34-37)  
(9) Miscellaneous (38-42)

**(1) Costs [4-7]**

4—In a suit for administration, order as to costs should be made as to relieve persons with unencumbered share. 56 C. 447-1929 Cal. 477-119 I. C. 21

5—Suit for administration—Creditor of the deceased's heir intervening—Unsuccessful claimant is not liable for costs. A I R 1921 Cal 222-59 I C 581-24 C W N 888-48 C 352.

6—Where one creditor sues on behalf of himself and the others for administration of the debtor's estate, the debt may have

## ADMINISTRATION (Contd)

## (C) ADMINISTRATION SUIT (Contd)

## (1) Costs ((Contd.))

the action dismissed on payment of the plff's debt and Costs. 44 C 890=21 C W N 810=24 C L J 448=38 I C 835.

7—Right of inspection of documents is subject to solicitor's lien for costs, but the solicitor cannot withhold inspection where the documents are essential to determine questions arising in normal administration proceedings. 35 B 352.

## (2) Creditors, suit by [8-12].

8—In a sense a creditor's suit for administration is a suit for an account, but the analogy between it and an ordinary suit for an account is not complete. 55 M 26=A I R 1931 M 683=I R 1932 M 1=1931 M W N 916.

9—In one sense a creditor's suit for administration is a suit for the benefit of all the creditors of the estate, but the other creditors cannot be held to be represented by the plaintiff-creditor in such a suit in the sense that they are in effect parties to the suit from the outset, because if, before the preliminary decree for administration is made, the person who represents the estate of the deceased pays off the plaintiff-creditor's claim, the suit will be dismissed, although none of the other creditors has been satisfied at all: (2) a plaintiff in such a suit can have his suit dismissed, compromised, withdrawn or otherwise settled out of Court by any arrangement with those representing the estate without in any way caring for the interests of the other creditors: (3) it is open to other creditors to file suits to enforce their own claims during the pendency of the plaintiff-creditors suit and it is obligatory upon them to do so if their claims are likely to become time-barred before the preliminary order for administration is made: (5) it is open to persons representing the estate to pay off any of the other creditors even when such a suit is pending, and when they render an account in respect of the assets that have come into their hands they are entitled to be given full credit in respect of such payments. 55 M 26=I R 1932 M 1=A I R 1931 M 683=1931 M W N 916.

10—Where other creditors put in claims after preliminary decree it was held that they could not be asked to pay *ad velorem* Court-fee on the amount of their respective claims. A I R 1931 Mad 683=1931 M W N 916=34 L W 429=134 I C 1137=I R 1932 M 1=55 M 26.

11—If a creditor takes out letters of administration to the estate of his debtor this may operate as an extinguishment of the debt, if the debtor has assets which the creditor may retain to pay himself. But this doctrine is not applicable where only

## ADMINISTRATION (Contd)

## (C) ADMINISTRATION SUIT (Contd.)

## (2) Creditors suit by (Conclld.)

one of two obligees is appointed one of several executors of the obligor. Obiter:—The transfer of the name of a pro forma defendant from the category of defendant to that of the plaintiff cannot rightly be treated as the addition of a new plaintiff within the meaning of s. 22 of the Limitation Act. 1877. 8 Ind. Cas. 837=13 C L J 3=38 C 342.

12—No interest should be allowed from the date when sufficient assets become available to the administration for repayment of debt. 38 C 342=8 I C 837=13 C L J 3.

## Heir's rights and liabilities of (13-15)

13—One of the heirs undertaking to be responsible for his share of debts, the Dist. Judge can direct the share of such heir to be made over to him, pending administration. Such order operates as discharge of receiver to that extent. 69 I C 684=1 Pat. 667=4 P L T 209=A I R 1922 Pat. 585.

14—A mortgage-decree from co-heir cannot be executed until administration. A I R 1924 Pat 110=74 I C 487.

15—Wife as administratrix was permitted to make permanent lease for necessary purposes—Permanent lease for purposes not necessary for administration can be set aside by reversioners. A I R 1928 Cal. 412=55 C 892=47 C L J 569=107 I C 747.

## (4) Nature and scope of the suit (16-24)

16—Nature of administration suit explained. It is in essence a suit for accounts and application of the estate to the payment of all the creditors. Creditors other than plaintiff may come in under the decree and prove their debts. Those who do not come under the decree will be excluded and yet they will be bound by the accounts done under the authority of the court. 44 Cal. 890=21 C W N 310=24 C L J 448=38 I C 835.

17—Whole estate must be brought in—no variation or allocation of shares except by family arrangement. A L R 1933 R 57=A I R 1933 R 50.

18—Formal administration decree must precede actual administration. 32 Bcm. L R 414=A I R 1930 Bom. 336=125 I C 910.

19—Suit for enquiry as to assets of Mahomedan deceased, payments of his debts and division of residue among his heirs is an administration suit, and not a suit for mere partition. 28 L W 583=A I R 1928 Mad. 760=55 M L J 266=110 I C 276.

20—Claim for maintenance may be included in an administration suit, but arrears must be claimed in a separate suit. A I R 1927 Rang. 276=6 Bur. L J 105=104 I C 119.

21—If the question between the parties can be determined without an order for administration, the Court need not make such order. A I R 1923 Bom. 96=24 Bom. L R 1124=70 I C 178.



ADMINISTRATION (*Contd.*)(C) ADMINISTRATION SUIT (*Contd.*)(4) Nature and scope of the suit (*Conclld.*)

22—Decree passed declaring shares of the heirs—Subsequent suit for distribution of shares is maintainable. 11 L B R 60=64 I C 813=1921 L B 22.

23—Court is not bound to pass an administration decree in every suit by a legatee or annuitant. On deposit of legacy amount by executor, suit may be dismissed. There is no difference between suits by creditors and suits by legatees. 26 M L J 312=1 L W 372=23 I C 134.

24—A suit for legacy comes under art. 123 of Lmt. Act; a mere alternative prayer for administrator in a suit for legacy will not bring such suit under art. 120. 25 M 361=12 M L J 183.

## (5) Parties to the suit 25-26

25—Executor is the only necessary party in an administration suit by a legatee. Ind. Rul [1931] Cal. 616=58 Cal. 77 =132 I C 904.

26—Joining of parties for the purpose of watching is bad. 56 C 447=A. I. R. 1929 Cal. 477=119 I. C. 21.

## (6) Procedure and jurisdiction questions as to

27—In ordinary course, applications relating to administration are to be made to trial Court. 104 I. C. 692=29 Bom L. R. 1082=A. I. R. 1927 Bom 519 [27-39]

28—Where appeal Court is not seised of whole suit, applications regarding administration should be made to Chamber Judge. A. I. R. 1928 Bom. 34=106 I. C. 75 =29 Bom. L. R. 1529

29—A deft. cannot obtain order for discovery from his co-deft. under O. 11 r. 12 C. P. C., unless they are opposite parties i. e. an issue is raised between them at a stage at which the order of discovery is demanded. 58 C 1091=Ind. Rul. (1931) Cal. 935 =134 I C 935.

30—Bequests to charity, under will, do not require sanction of Advocate-General, for administration suit. 31 M. L. T. 63=16 L. W. 922=70 I. C. 903.

## (7) Who can bring the Suit [31-33]

31—The only proper plaintiff to recover the asset of the deceased person is [in default of evidence to the contrary] the legal personal representative of the deceased, and even if a beneficiary could sue in his own right, making the legal personal representative a defendant, his only claim would be an order for transfer of the asset to the legal personal representative to which claim all defences available against the legal representative would be open to the present defendants.

The addition of the legal personal

ADMINISTRATION (*Contd.*)(C) ADMINISTRATION SUIT (*Contd.*)(7) Who can bring the Suit (*Conclld.*)

representative as a party to a suit brought by a beneficiary is not the mere curing of some technical defect but a matter going to the substance of the plaintiff's action. 63 M L J 369=36 L W 135=126 I C 632=I R 1932 P C 136=A I R 1932 P C 145 [P. C.]

32—A relative of the deceased, though not a legal heir can apply for administration and such other relative can appear and oppose A I R 1931 Cal. 470=Ind Rul [1931] Cal 660=133 I C 212.

33—There is no need under Mahomedan Law to take out letters of administration. Nevertheless a suit for administration by an heir of deceased Mahomedan is maintainable, though no suit for partition is brought. 22 Bom. L R 1117.

## (8) When Maintainable (34-37)

34—Where the defendants were in possession of the property during the lifetime of the deceased as agents or managers on his behalf, and they continued to be in such possession and are liable to account for the property to him there is no reason why a suit for administration would not lie against persons in this capacity. 138 I C 335=A I R 1932 L 328 =I R 1932 L 450.

35—Suit for general administration does not lie against an executor acting before probate. 57 C. 1358=34 C W N 634=A I R 1931. Cal 45=129 I C 566.

36—Where only part of property is partitioned, suit for administration of the unpartitioned portion is maintainable. A I R 1929 Rang 243=122 I C 897

37—On good ground being shown, suit can be filed within 6 months from grant of probate. 70 I C 638= A I R 1922 Cal 302.

## (9) Miscellaneous. [38-42]

38—Accounts of money due to the estate by the deceased's agent may be considered by the official Referee. A I R 1930 Rang. 240=126 I C 222.

39—Where the annuitant has a charge on the corpus, the corpus can be sold, if the fund set apart for paying annuity becomes insufficient. A I R 1927 Bom 519=29 Bom. L R 1082=104 I C 692.

40—Persons in possession of property situated outside British India may claim a share in administration suit for such property. Court is empowered, however, to place the condition that on his obtaining such share he will account for it. 11 L B R 188=56 I C 530.

41—Suit—Valuation Court Fees. 17 Bom L R 574=29 I C 949 =39 B 545.

## ADMINISTRATION (Contd.)

## (C) ADMINISTRATION SUIT (Concl'd.)

## (9) Miscellaneous (38-42) (Cont'd.)

42—Assignee of portion of estate of deceased person can sue for declaration of title against third person during the pendency of a suit for adm. 43 I C 533=41 M 265=32 M L T 431=33 M L J 707=[1917] M W N 882=7 L W 298.

## (D) ADMINISTRATION LETTERS OF [43-58]

- [1] Decision as to title, inheritance, etc. [43]
- [2] Limitation [44]
- [3] Revocation [45-47]
- [4] To whom can be granted [48-51]
- [5] When granted and when not [52-58]

## [1] Decision as to title, inheritance, etc.

43—Decision not res. judicata in subsequent suit by defeated claimant for recovery of properties as heir. 43 I C 723=49 P R 1918=34 P W R 1918 =46 P L R 1918.

## (2) Limitation [44]

44—Suit for share of property of intestate—Limitation runs from the date of the judgment directing the issue of letters of adm. 7 I C. 704=15 C W N. 107=13 C L J 239.

## (3) Revocation [45-47]

45—Mere fact that one of the minor sons, on attaining majority, ratified the acceptance of a partial grant, does not amount to an equitable estoppel which would prevent the other three sons from applying for revocation of the grant. 3 Pat. L. J. 415=1918 Pat. 349=46 I. C. 117

46—Where a minor is not cited or properly represented in the probate proceedings, he is entitled to come in and have the will proved in solemn form in his presence.

A revocation case is different from the Probate or Letters of adm. proceeding and the representation of a minor is one is not effective in a proceeding for the grant or for an order in solemn form from 23 C. L. J. 79=33 I C 14.

47—Effect of revocation of Letters on previous alienation 19 C. W. N. 240=27 I. C. 715=21 C L J 88

## ADMINISTRATION (Contd.)

## (D) ADMINISTRATION LETTERS OF (Cont'd.)

## (4) To whom can be granted [48-51]

48—Where the interests of the applicants are unequal, letters should be granted to the applicant whose interest is greater.

41 I C 875.

49—On an application by heirs for letters of adm. of the whole estate the Court cannot refuse the grant. 3 Pat. L. J. 415= (1918) Pat. 349=46 I C 117.

50—A mohunt not being the owner of the property of the mutt, his successor in office cannot apply for letters of adm. 17 C. L. J. 65=16 I. C. 588.

51—Court of wards being not a "person" cannot obtain letters of adm. 25 C. 795 =2 C. W. N. 349

## (5) When granted and when not (52-58)

52—The Judge has full discretion as regards the grant of letters of adm. 96 P. L. R. 1917=42 I. C. 737.

53—Onus on propounder of the will to prove testamentary capacity—Courts not to strain, in favour of validity of will: 20 C. L. J. 501=27 I. C. 276=19 C. W. N. 826.

54—No letters of adm. will be granted where the object of the litigation is not to administer the estate, but to obtain declaration of heirship. 17 C. L. J. 65 =16 I. C. 588

55—Application for letters, by residuary legatee—Death of legatee. Substitution of heir of residuary legatee—Cause of action does not survive to heir. 45 I. C. 862 =20 Bom. L. R. 175.

56—Where a mohunt executed a document purporting to appoint a successor and making over to him as mohunt all the properties and rights of the mutt, Held that the document was not a will and probate could not be granted. Obiter;—Courts will go into question of title to the property of an intestate. 20 C L J 307=27 I C 24.

57—The Colonial practice and the colonial probates Act have not been extended to Br. India, and the practice here is to require Admn. with will annexed to the estate The Court cannot make a grant of letters of Admn. to an Attorney who is only authorised to produce to the Court the confirmation of the trust, disposition and settlement for the purpose of having it resealed or to demand, recover or collect all sums of money, etc. due to the estate of the deceased. 40 Cal. 74=18 I C 907

58—No Letters should be granted where there is no estate to be administered, especially where the suit is merely brought as a device to secure decision on disputed questions of title. 17 C L J 65 =17 I C 155.



## ADMINISTRATION OF ESTATE OF NATIVE CHRISTIANS.

see Native Christians Administration of Estates Act.

### ADMINISTRATION PENDENTE LITE.

See Probate

### ADMINISTRATION REPORTS.

—Dates for the submission of the Administration Reports and Periodical Statements are prescribed by Civ. & Cr. ord No. 24 W R Rules & Ors. of the H C P I.

### ADMINISTRATIVE OR JUDICIAL ACT.

—Test, Rel Endowment. 40 Mad. 73 (P C)

### ADMINISTRATOR. (1-28)

- [1] Accounts, suit for—[1-2]
- [2] Administrator Pendente Lite [3-4]
- [3] Appointment [5]
- [4] Duties and Liabilities [6-13]
- [5] Powers of Administrator [14-23]
- [6] Whether he is a trustee [24-26]
- [7] Miscellaneous [27-28]

See also cases under:—  
Administration.

#### [1] Accounts suit for [1-2]

1—In a suit for accounts against an administrator the cause of action arises on plff's attaining majority. 40 I C 860  
=2 P L J 642

2—Account—Suit against administrator as heir for a valid debt and payment made by him. It would follow that the money paid in settlement would be coming out of the estate of the deceased. A I R 1922 Bom. 341=70 I C 754

#### [2] Administrator Pendente lite. [3-4]

3—Passing of his accounts by testamentary Court and discharge, is no bar to a suit for account. (1912) 16 C W N 516  
=14 I C 4=39 C 587.

4—An administrator pendente lite discharges his duties of accountability when his accounts are complete and honest, and does not contain false or fraudulent entries or omissions.

Objection as to principle on which commission is charged must be taken, if at all, when the account was before the Court. (1911) 15 C W. N. 832=11 I C 182

### (3) Appointment

5—Appointment of public officer as administrator is Improper unless empowered by statute. 48 I C 954

### (4) Duties and Liabilities (6-13)

6—Heavy expenses saddled on the

## ADMINISTRATOR (Contd.)

### (4) DUTIES AND LIABILITIES (6-13) (Contd.)

estate merely on ground of inability to carry out ordinary duties, not maintainable.

A. I. R 1930 Rang. 13=124 I. C. 270.

7—The account of the administrator need not be investigated by the Court, there being no procedure or practice for doing so. 18 C. W. N. 320=24 I. C. 447.

8—Court can direct administrator to do acts necessary in the interest of parties. 44 I. C. 657.

9—Accounts being filed or passed by the Court do not relieve an administrator from the liability in respect of the sums misappropriated by him. 22 Cr. L. J. 295=33 C. L. J. 252=60 I. C. 791.

10—Administrator is liable for devastavit and negligence: 1 L. W. 1033=1914 M. W. N. 921=17 M. L. T. 18=26 I. C. 369.

11—Payment of unsustainable claims or admission of such claims, amounts to devastavit (1914) 17 M. L. T. 18=1 L. W. 1033

12—Liability of administrator de son tort to account is only to refund the moneys which he has received on behalf of the estate 36 M L J 184=51 I. C. 748.

13—After completion of administration the liability as such cases, and any subsequent acts should be attributed to him not as administrator but as beneficiary in possession, if at all. 17 M L T 61=27 I C 849.

### (5) Powers of administrator [14-23]

14—An administrator derives his title under his grant, and the grant is essential before he can sue as such. But an executor represents the estate and can sue on its behalf though probate has not been granted. 20 C W N 833=(1916) 1 M W N 455=18 Bom. L. R. 642=35 I C 323=43 I A 113 (P C.).

15—Until the grant of administration, the property of an intestate vests in the heirs sufficiently to enable them to deal with their interest. s. 191 of the Succession Act does not vest the property in the administrator before the grant of administration. 7 I C 242=8 M. L. T. 77=20 M. L. J. 984=1910 M W N 272=34 M 395..

16—Administrator can sue in tort for wrongful collection of rent A. I R 1924 Rang 282=3 Bur L. J. 25=82 I C 352.

17—An administrator's power is not deprived of till Receiver is appointed or injunction issued against him 79 I C 729 = A I R. 1924 Rang. 221=2 R 4.

18—Sale by administrator, who is also a coheir, must be taken to be of the greatest estate he could pass, 1 Bur L J 133=74 I. C. 54=A I R. 1923 Rang. 69.

**ADMINISTRATOR (Concl'd.)****(5) Powers of administrator (14-23) (Concl'd)**

19—One-third of the estate was held unreasonable for marriage—expenses. A I R 1922 Bom 341=70 I C 754.

20—Administrator is entitled to decide if the property in possession of a party to the suit belonged to the deceased. 45 B 1053 =23 Bom. L R 444=A I R 1921 Bom 187 =62 I C 24

21—One of the co-administrators can maintain a suit to recover rent making others co-defs 53 I C 478=136 P R 1919.

22—Administrator cannot compromise to the prejudice of the estate. 5 I C 236=11 C L J 346=14 C W N 451.

23—Power to compromise—Good faith necessary—If binding on co-administrators. I L W 1033=[1914] M W N 921=17 M L T 18 =26 I C 369.

**(6) Whether he is a trustee [24-26].**

24—An administrator is not a trustee for the minor heirs, and the Court cannot under S. 41 Trusts Act grant him permission to apply the property of the minors towards their maintenance and education. 11 Bur. L T 149=49 I C 277.

25—An administrator is not a trustee unless a special trust is vested in him for a specific purpose. 40 I C 860=2 P L J 642.

26—Executor is not a trustee, unless the will so constitutes him. Mere assent to a legacy does not convert an executor into a trustee unless he has separated the fund payable to the legatee and set it apart and it does not transfer the liability from the estate of the deceased to that of the executor so as to make it a debt payable by the executor's administrator. 17 M L T 61=27 I C 849.

**(1) Miscellaneous [27-28].**

27—Joinder of causes of action in suits against administrator. 8 Bom. L R 734.

28—In India the administrator of an executor is not a derivative executor. The duty of the latter falls upon a person appointed for the purpose under SS. 19 and 45 of the probate and Adm. Act. 17 M L T 61=27 I C 849

**ADMINISTRATOR-GENERAL**

—See also Adm.-Gen. Acts[a] 8 of 1855 [b] 24 of 1867 [c] 2 of 1874

**ADMINISTRATOR GENERAL—**

1—Vesting of immovable property in—handing over keys—Whether divestment. Hindu Law, Widow. 16 M L T 26.

**ADMINISTRATOR-GENERAL (Concl'd.)**

2—Letters of Admn. should not be issued to the Administrator General except on the appln. of that officer or some one of the parties concerned, 9 Bur. L T 187; 8 L B R 404=34 I C 99.

**ADMINISTRATOR-GENERALS ACT II OF 1874**

[Rep. in pt. Act I of 1879; s. 68 (3) (As to Lower Burma) Rep., Act VI of 1900, s. 48; Rep in Pt. And Am. Act IX of 1881 And Act V of 1902; Am; Act II of 1899 ss. 10 to 15; Act XII of 1891; Act VII of 1901 s. 4; Declared In force—in the Southall Parganas, Reg. III of 1872, s. 3, As amended By Reg. III of 1899, s. 3; in the Angul District; Reg I of 1894, s. 3; in the Arakan Hill District, Reg. IX of 1874 s. 3; In Upper Burma (except the Shan States) Act XIII of 1898, s. 4; In British Baluchistan, Reg. I of 1890, s. 3.]

1—s. 17—Letters of administration being granted to Adm. General the estate of the deceased vests in him with power of sale without sanction of the court. 38 Mad 1134=27 M. L. J 400=16 M L T 231=(1914) M. W N 642=26 I C 792.

2—S. 28—Suit to recover assets improperly distributed by the Adm. General—Not a suit for Admn. 38 MAD 503

16—s.35—"Shall be liable to pay costs" does not mean shall pay costs". 22 I C 262. see also 25 C 54.

3—ss.36,40—Claims covered by Adm. General's certificate are not to be considered as barred. 22 I C 262.

4—s. 52—read with s. 54—Commission is fixed on value of assets as they are ultimately distributed A I R 1922 Mad. 491=(1922) M W N 571=16 L W 711=43 M L J 347=74 I. C. 182

—s. 52—Administration commenced before Act of 1913—For purposes of commission value of assets is to be taken at the date of their distribution. (1922) M W N 571=43 M L J 347=36 L W 711=A I R 1922 Mad, 491—=74 I C 182.

5—S 52(1)—"Assets" include both immoveable and moveable property—Whether assets have been "collected" depends on facts of each case—Mere taking Letters of Administration does not entitle administrator to get commission. A I R 1926 Mad. 1026=51 M L J 331=97 I C 722.

**ADMINISTRATOR-GENERAL ACT 3 OF 1913.**

1—S. 11—Recourse may be taken to S. 11 even by an applicant who admits that there is a valid will.

The word "succession" is not restricted in S. 11 to intestate succession.

24 C W N 326—=56 I C 431.

2—S—25—Advising on disputed points of law and fact is not within the sphere of the High Court. A I R 1928 Loh. 514=111 I C 16

**ADMIRALTY**

1—The Appellate Court must accept the decision of the trial Judge as to findings in collision cases, and not interfere except for special reasons. 20 C W N 1022=31 M L J 159=(1916) 1 M W N 446=4 L W 176=35 I C 193 (P. C.)

2—A thorough enquiry should precede a prosecution under Act 1859 A I R 1930 Cal. 97=56 C. 763=31 Cr. L J 215=Ind. Rul. 1930 Cal. 104=121 I C 312.

3—Shipowners suffering damage by a bridge will have cause of action against the Bridge Company unless the latter established statutory authority to construct such a bridge A I R 1931 P. C. 59=Ind. Rul. 1931 P. C. 90=130 I C 682

**ADMIRALTY COURT ACT (1861)**

1—ss 5 and 35—(Act of 1840), s. 6. Claim for necessities can be enforced in a Colonial Court of Admiralty by a suit in rem. which can be instituted in any Admiralty Court within whose jurisdiction the ship is at the date of the suit is instituted. There must be a personal liability on the part of the owner to sustain the suit. A I R 1923 Rang. 163=1 R 78=76 I C 458.

**ADMIRALTY JURISDICTION**

See Jurisdiction

**ADMISSIBILITY**

See (1) Evidence  
(2) Evidence Act.

**ADMISSIBILITY OF UNREGISTERED DEEDS**

See Registration Act a. s. 49 and 17.

**ADMISSION**

See (1) C. P. Code, O XII  
(2) Evidence  
(3) Evidence Act ss. 17 to 30 & 115  
(4) Legal Practitioner.

**ADNA AND ALA MALIK**

See Custom (Punjab)

**ADOPTION.**

See (1) Buddhist Law—Adoption.  
(2) Buddhist Law—Inheritance.  
(3) Custom (Punjab)—Adoption.  
(4) Estoppel by Conduct.  
(5) Hindu Law—Adoption.  
(6) Injunction.  
(7) Malabar Law—Adoption.  
(8) Mahomedan Law—Inheritance.  
(9) Lmt Act—s. 9 and arts. 118, 119 and 75.

1—Adoption by a testator does not amount to revocation of Will but Will becomes ineffectual as to ancestral property against adopted son's rights A I R 1931 Lah 546=32 P L R 482=Ind Rul 1931 Lah 593=132. I C 481.

**ADOPTION-DEED**

See Stamp Act. Sec. 6 & art. 38.

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**ADULTERATION**

See Municipal Acts.

**ADULTERY**

See (1) Divorce.  
(2) Divorce Act.  
(3) Hindu law.  
(4) Husband and wife.  
(5) Restitution of conjugal Rights.  
(6) Mahomedan Law—Acknowledgment.

**ADVALOREM FEE.**

See (1) Court fees Act.  
(2) Stamp Act.

**ADVANCE FREIGHT.**

See Shipping

**ADVANCEMENT.**

See also (1) Benami  
(2) Trusts Act. s. 82.

1—There is no presumption of advancement in India. A I R 1931 Lah 419=Ind Rul (1931) Lah 804=12 Lah 546=133 I C 628=see to the same effect; A I R 1929 O 134=6 O W N 51=I R 1929; 36 O=117 I C 456.

2—There is no presumption of advancement in India in favour of the wife in the case of a purchase or deposit in wife's name A I R 1931 All 596=1931 A L J 417=Ind Rul (1931) All 541=132 I C 573; see also 6 Bom L R 975=29 B 306.

3—No presumption of advancement in the case of a purchase by a father in his son's name. A I R 1931 Bom 269=33 Bom L R 250=Ind Rul 1931 Bom 353=133. I C 241.

4—Advancement is not presumed merely on father making irrevocable gift to his son A I R. 1929 Bom. 24=30 Bom. L R 1519=Ind Rul, 1929 Bom. 105=113 I C 313.

5—Hundi at the time of the sale in son's name as executant—Father discharging the same—Presumption of advancement does not arise. Ind Rul (1930) Sind 145=125 I C 33=A I R 1930 Sind 318.

6—Policy by A in favour of his wife and children—presumption of gift in favour of daughter does not arise. 37 Mad 483=25 M L J 65=1913 M W N 697=14 M L T 363=20 I C 934 (F B)

7—Transfers in the name of wife or child do not raise presumption as to advancement 28 Bom. L R 11=93 I C 161.

8—Presumption as known in English Law applies to Anglo-Indians. A I R 1924 Rang 283=2 R 253=3 Bur L J 85.=82 I C 686.  
9—English rule of advancement. 2 B 75.

**ADVANCES.**

See (1) Contract Act. ss 171 & 222  
(2) Principal and agent.

—Suit to recover—Lmt Act art 57 does not apply. 103 P W R 1916.

**ADVERSE POSSESSION.**

See Limitation Act art. 144.

**ADVERSE TITLE.**

See Landlord and Tenant.  
See Lessor and Lessee.  
See Mortgage and Mortgagee.  
See Transfer of Property Act. s 111.  
See Lmt Act art 144

**ADVERTISEMENT.**

See Contract Act s 8.

**ADVOCATE.**

See Legal Practitioner.

**ADVOCATE—GENERAL.**

See also (1) C. P. C. ss. 92, 93, and  
O. I. r. 8.  
(2) Administration.  
(3) Letters Patent.  
(4) Religious Endowments.  
(5) Trust.

1—Under cl. 26 Letters patent (Calcutta), the High Court cannot go beyond the Adv. Gen's. certificate and enter into the merits of the case. Denial by trial judge of allegations in the certificate is binding on the High Court and conclusive  
19 C. W. N. 653

**AERONAUTICS.**

1—Aeronautics cannot be brought within the subject of Navigation and Shipping although it might be brought under the Regulation of Trade and Commerce, or the Postal Services. It comes under the subject of transport it is not a class of subject within property and Civil Rights. A I R 1932 P C 36 (41)=135 I C 754=I R 1932 P C 34 (P. C.)

**AFFIDAVIT.**

See C. P. Code o. 19 and o. 21.

**AFFILIATION.**

See (1) Buddhist Law.  
(2) Hindu Law.  
(3) Mohammedan Law.

**AGE.**

See Court of Wards Act (Local).  
See Guardians and Wards Act.  
See Majority Act.  
See Minor.  
See Evidence Act SS 32, 35.

1—Evidence as to age Horoscope-Mothers- Testimony  
13 C 189.

**AGE OF PUBERTY.**

See Mahomedan Law.

**AGENCY.**

See Contract Act ss. 182-238.  
See Principal and Agent.  
See Companies Act s. 242.  
See also Limitation Act art. 89, 120  
See Power of Attorney.

1—Authority to pledge husband's credit  
See Husband and Wife.

2—Elements necessary to constitute—Whether mere giving advice in matters of business constitutes agency—See Legal practitioners—Pleader and client.

**AGENCY RULES—GANJAM AND VIZAG.**

1—C. P. Code does not apply to the Agency tracts. 23 M L J 97-14 I C 286-11. M L T 385.

2—Decree by a Court outside the Agency area for sale of property within the area is without jurisdiction and the agency court can refuse to execute it. A I R 1923 Mad. 114 (1)=16 L W 669=(1922) M W N. 728=69 I C 559..

3—Agency and non-agency districts are distinct entities Magistrate or sessions Judge of one is not subordinate to that of the other Appeal in a criminal case from the decision of a first class Sub-Divisional magistrate in the Ganjam District lies to the Sessions Judge of the Agency Sessions Division. 23 M L J 670=12 M L T 601-17 I C 786=13 Cr. L J 850..

4—rr. 2 to 56. Rules 2 to 56 apply to Revenue Courts A I R 1930 Mad 963=1930 M W N 475=32 L W 561=59 M L J 755=54 M 92=Ind. Rul. (1931) Mad. 65=128 I C 497

5—r. 3 (2), (3)—No declaratory suit lies against cancellation of a pleader's sanad, it being a judicial act. A I R 1922 Mad. 1 (1)= (1921) M W N 830=30 M L T 76=15 L W 236=42 M L J 148=65 I C 345

6—rr. 3, 24 and 25. Assistant Commissioners order in execution proceedings is not a decree. The remedy of the aggrieved party lies by way of petition under r. 24 or by moving the Agency Commissioner under r. 25. A I R. 1923 Mad. 500=17 L W 375=(1923) M W N 244=45 M L J 78=73 I C 131

7—Rr. 10 and 16—Held that the order of the Agency Munsif in the course of an execution proceeding is not a decree, the provisions of the C. P. Code not being applicable to the case, and therefore no appeal lay against the order. 34 M L J 473.  
=47 I C 713

8—Rr. 10 (2), 20—Agent may transfer a suit exceeding Rs. 5000 to Ass. Agent for decision, even after the framing of issues.

Under r. 20 High Court may direct the Agent to review his Judgment on special grounds, but the parties have no right of appeal. When the application is in the nature of Second Appeal the High Court will not ordinarily interfere with the findings of facts. (1918) M W N 772=49 I C 811

9—Rr. 10 (4), 18, 20—Court has inherent power to re-hear and Correct mistake. On disposal of a case without notice to the parties the remedy of the aggrieved party is to apply to the same Court for a re-hearing of the case 31 M L J 319=(1916) 2 M W N 203=4 L W 240=37 I C 385.

10—R. 10 (5)—Suit for declaration under s. 73 Local Boards Act is a "suit for land" within the meaning of R. 10 (5) R 10 Cl. 5 35 M L J 284: 1918 M W N 830: 7 L W 564=45 I C 729..

11—r. 13—Petition under r. 13—High Court allowing petition and setting aside

## AGENCY RULES (Contd.)

the decree-Order was held practically a direction to review only. A I R 1930 P C 29=51 C L J 76=58 M L J 101=31 L W 199 =34 C W N 397=32 Bom. L R 481, Ind Rul (1930) P C 35=121 I C 227.

12—rr 14 and 2 (3)—District Court is not of equal or superior jurisdiction to the Agency Commissioner's Court—High Court cannot, therefore, transfer case from latter Court to former but it can transfer it to its own file A I R 1923 Mad 604=46 M 726=17 M L W 517= 32 M L T 269=(1923) M W N 277=45 M L J 8=72 I C 745.

13—Order restoring a suit dismissed for default is not a "decree" within r. 6. All petitions against the proceedings of the Agent must be submitted to Government who may then refer the matter to the High Court or the Board of Revenue. 41 M 325 =34 M L J 524=42 I C 555.

14—rr. 16 and 20—Claim petition in Agency Tracts is a suit and the decision therein as a decree and is appealable—Civil Procedure Code, O XXI, r 58 does not apply. A I R 1922 Mad 271=46 M 35=16 L W 8=(1922) M W N 314=30 M. L T 339=42 M L T 487 =66 I C 115

15—Rr. 17, 20—High Court cannot direct the Agent to revise his order declining to entertain a special appeal under R 17 such order being not a decree 27 M L J 177=25 I C 282

16—Rr. 17, 20—High Court cannot review an appellate judgment of the Ass. Agent. The only remedy of the aggrieved party is to appeal to the Agent under R. 17. 9 LW 533=52 I C 694.

17—Rr. 20, 18—Order under R 18, summarily dismissing an appeal, can be petitioned against under R 20 (16 M. 229 Diss) 36 M 128 =21 M L J 887=10 M L T 261=(1911) 2 M W N 237=12 I C 73.

18—Rr. 20, 31—Order of remand by the Agent, though not a decree within R. 20, is open to revision by the High Court. (18 M 227; 24 M 345; 27 M 266 foll) (1916) 2 M W N 269=4 L W 499=35 I C 80.

19—Rr. 22 and 16 (4)—It is not competent for Agency Munsif to attach before judgment property within Agency tract at the instance of British Indian Court. A I R 1925 Mad. 1100=48 M L J 630=88 I C 439.

20—Rr. 24 and 25—Assistant Commissioner's order in execution is not a decree—Remedy of aggrieved party lies by way of petition under r. 24 A I R 1923 Mad. 500=17 L W 375 45 M L J 78=73 I C 131

21—Rr. 26—Suit for declaration of judgment debtor's title to property is not maintainable 29 M L J 730=32 I C 226

22—R 31—A petition lies to Government to revise orders passed by the Agent in

## AGENCY RULES (Contd.)

execution proceedings. 11 M L T 385=23 M L J 97=14 I C 286.

23—R 48—Order on petition to review is not appealable to Privy Council A I R 1930 P. C 29=51 C L J 76=58 M L J 101=34 C W N 397=32 Bom L R 481=31 L W 199=Ind. Rul. (1930) P C 35 (PC)=121 I C 227

24—R-55 Order refusing to set aside a dismissal is not appealable. But the Agent to the Governor is satisfied that the order is not proper, may proceed under r. 55. A I R 1928 Mad. 48=39 M L T 458=105 I C 169

25—R. 55—Agent dismissing a petition, presented to him after expiry of period of appeal, requesting that it should be treated as appeal or petition under r. 55 High Court would not interfere in revision A I R 1929 Mad 489=Ind Rul. (1929) Mad 960=119 I C 320

26—R. 56—Merely modifies, and does not restrict S. 191 of Mad. Estates Land Act; so it is not ultra vires (1930) M W N 475 =Ind. Rul. (1931) Mad. 65 =128 I C 497

27—R. 59—The Agency Rules do not govern appeal against order of Div. officer. No reference can therefore, be made by Government to High Court—Rule 59 applies to petitions against the proceeding of the Agents to Governor or the Government Agent in respect of matters not otherwise provided for in these rules. A I R 1927 Mad. 218=38 M L T (H C) 14=98 I C 511.

## AGENT.

See Contract Act, ss. 182 to 238 and Ch. X.

See Principal and Agent.

## AGENT DULY AUTHORISED.

See Limitation Act, 1908, ss. 19, 20.

## AGENTS OF FOREIGN SOVEREIGNS ETC., BOMBAY ACT.

See Bom. Act XV of 1840.

## AGENTS, PLEADERS, MUKHTARS AND REVENUE ACT.

See Act XX of 1865.

## AGRAHARAM.

See Land Tenure.

See Madras Estates Land Act.

—Gift of an—Restriction against alienation—Validity of—See Hindu Law—Gift.

## AGRA ACT, AMENDING ACT 10 OF 1859 IN THE PROVINCE OF (14 OF 1863)

[Rep., Act XII of 1876; (in the Central Provinces and the Sambalpur District), act IX of 1883.]

## AGRA PRE-EMPTION ACT (XI OF 1922)

—Pre-emptor cannot improve his position by act of his own. A L R 1933 A 331=1933 A L J 82=1 A W R 697=A I R 1933 A 217.



## AGRA PRE-EMPTION ACT (XI of 1922.) (Contd.)

—Acquisition of status of co-sharer by stranger-vendee after suit for pre-emption and before decree therein—Right of pre-emption if defeated by—Law prior to Agra Pre-emption Act of 1922. 54 A 189 P C

—A purchaser of a few plots in a village is a mere petty proprietor as in s. 4 (7). A I R 1926 All 537=24 A L J 727=96 I C 710.

—'Land' includes buildings standing on it but to be pre-emptible, they must have been sold. A I R 1928 All 124=50 All 348=25 A L J 1061=103 I C 573.

—Marginal notes can be referred to while interpreting the sections as they are inserted under Legislature's authority. A I R 1929 All 53=51 A. 411=(1929) A L J 290 =113 I C, 442.

—It may be proved that a gift was a sale in disguise. A. I. R. 1929 All. 859=(1930) A L J 399=Ind Rul (1930) A 299=122. I C. 747.

—On the pre-emptor proving the consideration shown to him to be not true, the Court may inquire into the market-value. Where, however it is proved that the consideration was paid before the Sub-Registrar and no part of it returned the court will not decree claim on the basis of market-value, unless the Court still believes the consideration to be untrue. A. I. R. 1930 All. 363=(1930) A. L. J. 561=52 All. 532=124 I. C. 30=Ind- Rul. (1930) All. 462=127 I. C. 589.

—S. 1 (3)—The Act does not apply to Muradabad. A I R 1931 All. 317=(1931) A L J 269=132 I C 193.

—Ss. 1 (3), 3—The Act does not abolish the customary right of pre-emption in a Municipal area. A. I. R. 1927 All. 775=25 A. L. J. 839=106 I C 192.

—S. 1 (3)—Plots within Municipal limits which are governed by Local custom do not come under the Act. A I R 1930 All 372=(1930) A L J 345=Ind Rul (1930) All 881=127 I C 417.

—S. 2—Transfer made before the Act though registered after that date cannot be pre-empted. A I R 1927 All 545=25 A L J 742=103 I C 308

—S. 2 Act is not retrospective. A I R 1927 All 103 =98 I C 511

—S. 3—The proviso to s 3 may be construed to apply to all areas to which the Act applies but in which there is no right of pre-emption under s. 5. A I R 1931 All 317=(1931) A L J 269=132 I C 193

—Ss. 3 and 5—Where three mahals constituted at village, and the Wajib-ul-arzes for two only recorded a right of pre-emption, no such right could be claimed in the third mahal, unless it was shown that there was a wajib-ul-arz prepared prior to the Act in respect of this particular mahal or its village recording a custom or right of pre-emption. A I R 1929 All. 379=51 All. 604=(1929) A L J 379=Ind. Rul. (1929) All.375=115 I C 455.

## AGRA PRE-EMPTION ACT (1922) (Contd.)

—S. 3—Where a house was sold, at a price, with condition that in case of resale, it should be resold to the vendor at that price, unless he declined. It being sold to a third party, despite the vendor's offer, the latter sued for enforcement of the contract. Held, the suit did not amount to a claim for pre-emption. A I R 1929 All. 667=Ind. Rul. 1929 All. 1076=1929 A L J 1256=119 I C 836.

—S. 4—The holder of a conditional decree is not a co-sharer and has no right to per-empt the property. A I R 1931 All 405=(1931) A L J 339=Ind Rul (1931) All 363=131 I C 251.

—Ss. 4 (1) and 19—A purchaser of a share in a village, can maintain a suit for pre-emption against a stranger who has subsequently purchased another share, although 12 months from the date of the registration of the plaintiff's deed of purchase have not expired and he himself is still liable to be pre-empted by other co-sharers.

To be a co-sharer within the meaning of the definition in S. 4 (1), it is not necessary that the co-sharer should be of any particular standing. 1932. A L J 719=16 R. D 531=139 I C 862=1932 F B 87=I R 1932 A 597=A I R 1932 A 509=A L R 1932 A 949 (F B).

—S. 4 (1)—'Proprietor' in S. 4 includes both a superior and inferior proprietor. S. 11 applies to transfer by such proprietor and s 12 gives right to pre-empt. A I R 1930 All. 446=52 All 562=Ind Rul (1931) All 5=128 I C 5.

—S. 4—Manzooridar is inferior proprietor. A I R 1930 All. 446=52 All 562=Ind Rul, (1930) All 5=128 I C 5.

—S. 4 (7)—A person being a proprietor of specific plot is not necessarily a petty proprietor. He must be shown not to be entitled to such an interest in the joint lands of the mahal or to take part in the administration of its affairs. A I R 1930 All 117=1930 A L J 343=122 I C 178.

—S. 4 (1)—The purchaser, from a Mahomedan widow, of the husband's property, remaining in possession for over 12 years becomes a full cosharer within s 4 cl (1). Ind Rul (1930) All 77=120 I C 557.

—S. 4 (1)—Mere possessory title is not sufficient to be "entitled as proprietor" A I R 1929 All 739=1929 A L J 970=Ind Rul (1929) All 1095=119 I C 855.

—S. 4 (1)—Adverse possession must not be short of 12 years to be entitled as proprietor. A I R 1929 All 300=51 All 629=(1929) A L J 430=Ind Rul (1929) All 1031=119 I C 503.

—S. 4—Cosharer does not include a person who has a mere right to receive malikana dues. A I R 1929 All 618=(1929) A L J 1166=51 All 971=Ind Rul (1929) All. 907=118 I C 667

## AGRA PRE-EMPTION (1922) ACT (Contd.)

—S 4 (3)—Land includes buildings. A I 1929 All 366=(1929) A L J 398=51 All 658=Ind Rul (1929) All 666=116 I C 874.

—S 4 (7)—Muafi plot holders not owning land jointly with the cosharer in mahal nor taking part in administration, are petty proprietors. A I R 1929 All 385=51 All 594=(1929) A L J 429=Ind Rul (1929) All 464=115 I C 800

—S 4 (1)—Mere fact of being recorded as co-sharer and being in possession does not make the person co-sharer. A I R 1929 All 413=(1929) A L J 586=Ind Rul (1929)

All 463=115 I C 799

—Ss. 4 (9) 9 and 20—Ex-proprietary tenant has Pre-emption right no equal or superior to that of a co-sharer. 54 A 546 (548)=1932 A L J 397=138 I C 272=16 R D 448=I R 1932 A 388=A I R 1932 A.

372=A L R 1932 A 799.

—S 4 (10)—Transfer of immovable property by husband to wife in lieu of dower debt is a sale and is pre-emptible, although in Mahomedan Law it is not a sale. 54 A 22=A I R 1931 A 597=1931 A L J 951=133 I C 901

—S 4 (10) provides that a sale in the Pre-emption Act means as sale as defined in the Transfer of Property Act. 54 A 22=A I R 1931 A 597=1931 A L J 951=133 I C 901.

—S 4 (10)—Interchange of names of the vendor and vendee does not constitute a sale in the absence of a registered instrument A I R 1929 All 549=(1929) A L J 889=Ind Rul (1929) All 418=115 I C 642

—S. 5—The right being recorded in wajib al-arz, it is presumed to exist. A I R 1930 All 446=52 All 562=Ind Rul (1931)

All 5=128 I C 5.

—Ss 5, 11 and 12—Wajib-ul arz containing right of pre-emption applicable to portion of mahal—Right is deemed to exist throughout whole mahal. A I R 1929 All 977=1929 A L J 1212=Ind Rul (1930) All 366=

=123 I C 110.

—S. 5(a) Where the Wajib-ul-arz stated that "There is no particular rule of (based on) custom in this village, but there is one, according to the custom of the country and the Mahomedan law.

Held that the statement in the Wajib-ul-arz contained a declaration that there was a custom of pre-emption, though the entry proceeded to limit its significance. 1932 A L J 561=135 I C 834=A I R 1932 A 271=I R 1932 A 98=A L R 1932 A 683.

—S. 5 (a)—Wajib-ul-arz containing right of pre-emption according to the rights and usage of religion can be interpreted as laying down a rule of pre-emption according to the Muhammadan Law. A I R 1929 All 531=(1929) A L J 665=51 All 820=Ind Rul (1930) All 113=121 I C 241

—S.5-Entry in Wajib-ul-arz as to the right of pre-emption, being proved, the Court

## AGRA PRE-EMPTION ACT (1922) (Contd.)

will presume that there is a custom of pre-emption. A I R 1929 All. 755=Ind. Rul (1929): All 897=118 I. C. 657.

—S.5-The custom of pre-emption being recorded to be in vogue in the neighbouring villages, the right of pre-emption will be presumed. (1929) A L J 595=Ind Rul (1922): All 862=117 I C 106.

—S. 5-Custom of pre-emption recorded in wajib-ul-arz in a mauza applies to all its tolas. A I R 1928 All 50=107 I C 692.

—S. 5-Custom of pre-emption followed by a scheme being recorded to exist in the neighbouring villages, such a custom is necessarily implied within s. 5. A I R 1927 All. 277=49 All 139=25 A L J 109=98 I C 816.

—S. 5-Pre-emption may extend to plots in mahal or abadi. A I R 1926 All 179=47 All 923=23 A L J 615=L R 6 A Civ. 487=89 I C 219

—s. 5-Wajib-ul-arz and Rubkar must be construed together. A I R 1925 All. 553=23 A L J 519=L R 6 A Civ. 482=88 I C 433

—Ss. 6 and 11-Sale-deed executed by Court under a declaratory decree is sale within s. 11-Exception in s. 6 does not apply-Sale is subject to right of pre-emption. A I R 1929 All 462=51 All. 842=(1929) A L J 766=Ind. Rul. (1929) All 591=116 I C 495.

—S.7-Pre-emption under s.7 does not extend to persons incompetent to purchase under Bundelkhand Land Alienation Act.

Ind Rul (1929) All. 825=118 I C 233.

—S. 7-Persons with unqualified right under s.3, Bundelkhand Land Alienation Act, are the only persons "entitled to purchase" under s. 7. A I R 1928 All. 186=50 All. 430=26 A L J 142=107 I C 570.

—S.7-Where the vendee was a member of the vendor's agricultural tribe, but not a cosharer in the village; and the pre-emptor was such a cosharer, but not a member of the vendor's agricultural tribe, Held the pre-emptor's right was conditional, and so he was not "entitled to purchase" under the Bundelkhand Act within s.7 of this Act. A I R 1928 All 186=50 All. 430=26 A L J 142=107 I C 570

—S. 8 (c)—Industrial experiment with the object of improving the quality or of serving as a lesson to the neighbouring cultivators is promotion of agriculture, and not manufacturing industry. A I R 1930 All 337=(1930) A L J 648=Ind. Rul (1930) All 417=123 I C 753

—S. 8 (c)—Purchase of surplus land with the object of extending a factory in future is not protected by s. 8. The burden is on the purchaser to show that the case falls within the exception in s. 8. A I R 1930 All 337=(1930) A L J 648=Ind. Rul. (1930) All 417=123 I C 753.

—S. 8(c)—If the purpose for which the property is taken be omitted in the sale—

## AGRA PRE-EMPTION ACT (1922) (Contd.)

deed it is not prejudicial. A I R (1930) All 337-1930 A L J 648=Ind. Rul. (1930) All 417=123 I C 753

—S.8 (c)—applies where the land is not used for the purpose for which it was purchased, Recital as to purpose in the sale-deed is not necessary. A I R 1930 All 77=(1929) A L J 1178=51 All 1046=Ind Rul (1929) All 969=119 I C 9,

—S. (8)—Where raw material is produced by cultivation on a large scale, e. g. sugar-cane plantation, it does not come within s. 8, even though the object is to utilise the produce in an industry. A I R 1930 All 77=(1929) A L J 1178=51 All. 1046=Ind. Rul. (1929) All. 969=119 I C 9

—S.9—Right of pre-emption does not accrue on a sale to exproprietary tenant. 54 A 546=1932 A L J 397=138 I C 272=16 R D 448=I R 1932 A 388= A I R 1932 A 372 =A L R 1932 A 799.

—Ss. 9 and 20—Sale by co-sharer of his entire proprietary interest, with the result that he became an ex-proprietary tenant of the plots—Re-sale to him by purchaser—Pre-emption suit brought within one year of original sale deed—Maintainable as regards first sale but not as regards the second. 54 A 546=1932 A L J 397=16 R D 448=138 I C 272 =A I R 1932 A 372=I R 1932 A 388=A L R 1932 A 799

—R. 9—Where a village is divided into six complete pattis and one joint patti it is not a perfect partition and there being only one mahal and exproprietary tenant in any patti can resist a pre-emption against him. A I R 1929 All 448=(1929) A L J 685=Ind Rul. (1929) All 571=116 I C 443

—Ss. 10, 11—No right of pre-emption exists and no question of dividing property arises where the vendee and the pre-emptor are on the same footing A I R 1928 All 180=50 All 404=26 A L J 180=108 I C 113

—S. 10—Transfer under the sanction of a decree, though a compromise decree cannot be treated as a sale. A I R 1928 All 67=50 All 454=26 A L J 214=107 I C 682

—S. 11—Property not in possession of vendor and to be recovered from third party by suit—Transfer by vendor of his entire ownership in, for cash consideration—Vendor not entitled to any more advantage if vendee succeeded in recovering the property nor liable if vendee's suit failed—Transfer a sale within the meaning of S. 54 of Transfer of Property Act and on vendee's recovery of property by suit pre-emptible under S. 11 of Agra Pre-emption Act. 1932 A L J 851=139 I C 693=A I R 1932 A 685=I R 1932 A 573=A L R 1932 A 1193.

—S. 11—The interest to be pre-emptible must be a proprietary interest of a cosharer or petty proprietor. A I R 1929 All. 618=

## AGRA PRE-EMPTION ACT (1922) (Contd.)

1929 A L J 1166=51 All. 971=Ind Rul. (1929) All 907=118 I C 667

—Ss. 11, 12—Pre-emption may extend to an isolated plot of land. A I R 1929 All 366=51 All. 658=1929 A L J. 398=Ind Rul (1929) All. 666=116 I C 874.

—S. 11—Right of pre-emption accrues in respect of a transfer by sale-deed executed by Court in pursuance of a decree for specific performance. A I R 1929 All 462=(1929) A L J 766=51 All. 842=Ind Rul. (1929) All. 591 =116 I C 495

—S. 12 (1)—“Co-parcener in that interest” means co-parcener in interest sold and not similar petty proprietors. A I R 1930 All 372=(1930) A L J 345=Ind Rul. (1930) All 881 =127 I C 417

—Ss. 12 (1)—Right of pre-emption cannot accrue to a person whose plot is separate from the vendor's, as such person is not vendor's, coparcener. A I R 1930 All 372=(1930) A L J 345=Ind Rul. (1930) All 881 =127 I C 417

—S. 12 (2) Khata Khewat is the smaller sub-division of the mahal A I R 1930 All 312=(1930) A L J 792=Ind Rul. (1930) All 243 =122 I C 595

—S. 12 (2)—Mahal consisting of two or more complete villages or only portions of two or more villages—Pre-emption right in case of, confined to properties in same village and does not extend to shares sold in other villages though within the same mahal. 53 A 1004=1932 A L J 30=A I R 1932 A 226=137 I C 149=I R 1932 A 283=A L R 1932 A 118

—S. 12-(3) Where there are two pre-emptors, the one claiming preference must show (a) nearer relationship with the vendor and (b) common ancestor. A I R 1929 All 419=(1929) A L J 854=51 A 872=Ind Rul (1930) All 112=121 I C 224

—S. 12-(3) Bahri is a sub-division of the mahal very much like a thok, found in eastern districts of U P. A I R 1929 All 300=51 All 629=(1929) A L J 430=Ind Rul (1929) All 1031=119 I C 503

—S. 12—Petty proprietor who is a coparcener in the proprietary interest sold has preference over cosharers. A I R 1929 All 755=Ind Rul. (1929) All 897=118 I C 657

—Ss. 12, 5—Wajib-ul arz recting a right of pre-emption in the mahal s. 12 will decide as to who are entitled to exercise that right. A I R 1929 All 385=51 All 594=(1929) A L J 429=Ind Rul. (1929) All 464=115 I C 800

—S. 12-(3) “The common ancestor” must be one who is the nearest. A I R 1928 All 180=50 A. 404=26 A L J 180=108 I C 113

S. 12 (1) (2) and (3) Do not apply to a sale-deed executed on 23rd June 1922. A I R 1927 All 699=25 A L J 1095=106 I C 372

—S. 12 (3) applies where the pre-emptor claims a preferential right over the vendee by virtue of relationship with the vendor



## AGRA PRE-EMPTION ACT (1922) (Contd.)

Method of counting four degrees explained.

A I R 1927 All 739=101 I C 499

—S. 12 (3)—Person claiming preference must establish relationship not remoter than four degrees from the common ancestor. The common ancestor himself counting as the first degree. A I R 1927 All 434=49 A 655=25 A L J 471=101 I C 497

—S. 12 (1)—a co-sharer can pre-empt so long as the plot forming part of the patti remains in the patti, it matters not if it has become a petty proprietary interest. A I R 1927 All 320=25 A L J 487=100 I C 704

—S. 12 (1)—Wajib-ul-arz recting a custom of pre-emption, a right of pre-emption as to petty proprietary interest can be exercised, A I R 1927 All 320=25 A L J 487=100 I C 704

—S. 12 (3)—applies where the vendee resists claim for preemption as having equal or better right with the pfff. 98 I C 1061

—S. 12 (1)—Where no claim is brought by anyone of class I the right can be enforced successively by those who fall within the following classes. 49 A. 141=25 A L J 734= A I R 1927 All 273=98 I C 858

—S. 12 (3)—“Person claiming pre-emption” includes a vendee or proposed vendee, or contemplated vendee or intended vendee. 48 A 347=24 A L J 325=A I R 1926 All 216=92 I C I

—S. 13—Circumstances under which the payment was made must be enquired into in order to determine the proportion in which the joint pffs are to share the property 51 A 998; (1929) A L J 1049=A I R 1929 All 953=Ind Rul (1930) All 252=122 I C 604

—S. 13—The expression “persons claiming” does not include purchasers 50 A 404=26 A L J 180=A I R 1928 All 180=108 I C 113

—Ss. 13, 20—Pre-emptors equally entitled will get equal division of the property, each paying equal share of the consideration. It is immaterial who comes to Court first, provided that they all come within limitation 25 A L J 739=A I R 1927 All 664=103 I C 123

—S. 14 If a notice under s. 14 has been given, a mere failure to reply would extinguish the right. But it does not follow that if no such notice is given, there can never be a case of estoppel. 51 A 820=1929 A L J 665=A I R 1929 All 531=Ind Rul. (1930) All 113=121 I C 241

—Ss. 14, 15—Service of notice must be actual, not substituted A I R 1929 All 600= (1929) A L J 936=51 All 885=Ind Rul (1929) All 699=117 I C 347

—Ss 14 and 15 Sections 14 & 15 are not exhaustive, there can be other cases of estoppel e. g. by conduct A I R 1926 All 467=48 All 491=24 A L J 581=94 I C 397

—S. 14—If the pre emptor be informed of the intended sale, and he refuses to purchase, he cannot later sue for pre-emption

## AGRA PRE-EMPTION ACT (1922) (Contd.)

A I R 1925 All 615=L R 6 A 300 Civ=87 I C 414

—Ss. 15, 21—“Persons having a right to pre-empt” include proprietors referred to ss. 11 and 12, but would not necessarily include persons estopped from enforcing his right. A. I. R. 1931 All. 216=(1931) A. L. J. 204=131 I C 681.

—Ss. 15 and 21—Co-pre emptor's acquiescence in sale before pre-emption suit estops him but not other pre-emptors—Estoppel bars suit but does not extinguish right of pre-emption. A. I. R. 1931 All 216=(1931) A L J 204=131 I C 681.

—S. 16—The addition of the words ‘Under this Act’ at the end of s. 16 by the amending Act is not retrospective in effect A I R 1931 All 317=1931 A L J 269=132 I C 193

—S. 16—Pre-emption partly under the Act and partly under Muhammadan Law—Preemption under Muhammadan Law failing for want of demands—Claim under the Act also fails. A I R 1928 All 124=50 All. 348=25 A L J 1061=108 I C 573.

—S. 16—Pre-emption must be of the whole property. A I R 1928 All 124=50 All 348=25 A L J 1061=108 I C 573.

—S. 16—Where property is sold in parts to several vendees by one document, preemption of one part is allowed A I R 1926 All 468=48 All 489=24 A L J 534=94 I C 320.

—S. 17—Market value of property—Ascertainment of in considering of question of actual price—Not Permissible where Court can come to a definite conclusion as to actual amount of sale consideration 1932 A L J 321=A I R 1932 A 561 (563, 567)=138 I C 163. =I R 1932 A 375=A L R 1932 A 50.

—S. 17—Meaning of “Actual Price”—Amount of previous mortgage included in consideration for sale whether part of actual price where such amount is far in excess of market value of property: 1932 A L J 321=A I R 1932 A 561=138 I C 163=I R. 1932 A. 375=A L R 1932 A 50.

—S. 17—Prima facie the ostensible price mentioned in the sale-deed is to be taken as the real price, in the absence of other circumstances to the contrary. 1932 A L J 321=A I R 1932 A 561 (566)=138 I C 163. =I R 1932 A 375=A L R 1932 A 50.

—S. 17—Where the amount in the sale deed is grossly excessive and there is no other material as regards the actual price the Court should proceed to find the market value. A. I. R. 1929 All. 600=(1929) A. L. J. 936=51 All. 885=Ind. Rul. (1929) All 699=117 I C 347.

—S. 17—(1) Some evidence must be given by the pre emptor to raise a presumption that the ostensible price was not the actual price. The vendee must then satisfy the Court that the price shown in the deed was the actual price. If he fails to satisfy

## AGRA PRE-EMPTION ACT (1922) (Contd.)

the Court it should find the market-value of the property and pass a decree accordingly. A. I. R. 1927 All. 441-49 All. 689-25 A. L. J. 441-192 I C 155.

—S. 18—Two suits are assumed to be consolidated, and one consolidated decree held to be passed where the suits are in respect of the same transaction and connected by making the plff. in one the deft in the other. Party may file only one appeal provided the other party is impleaded as respondent, pro forma or otherwise A. I. R. 1930 All. 706-1930 A. L. J. 842-Ind. Rul. 1931 All. 38-128 I. C. 390-52 All 886.

—S. 18—Non compliance with s. 18 being merely irregularity does not amount to want of jurisdiction. A. I. R. 1926 All. 555-24 A. L. J. 602-95 I. C. 959.

—S. 19—proviso (as added by Local Act IX of 1929)—pre-emption suit-voluntary transfer by vendee after suit amending Act in force before decree—pre-emptor's rights not defeated. A. L. R. 1933 A. 331.

—S. 19—The right of co-sharers to pre-empt is not lost by a mere contract of sale by the co-sharers in favour of the vendees. 1931 A. L. J. 419-Ind Rul (1931) All 524-132 I C 428.

—S. 19—If the plaintiff had the status of a co-sharer up to the time the first Court passed its decree, he would be entitled to maintain the suit. It is not necessary for him to establish further that no suit to challenge his claim could have been brought. 1932 A. L. J. 109-139 I C 527-I R 1932 A. 579 (1)-A I R 1932 A. 249-A L R 1932 A. 378.

—S. 19—The word 'subsisting' cannot be read as meaning 'indefeasible'.

Quære:—Whether the subsisting right must also be preferential right. 1932 A. L. J. 719-A I R 1932 A. 509-16 R D 531-139 I C 862-I R 1932 A. 597-A L R 1932 A. 949 (FB).

—Ss. 19, 20—To be able to defeat a pre-emptor's claim, even under s. 19, the purchaser must possess an indefeasible title to the property acquired subsequently to the purchase. A. I. R. 1929 All. 765-(1929) A. L. J. 1270-Ind. Rul. (1930) All. 311-122 I C 759.

—S. 19—Purchaser obtaining gift from Hindu father during pendency of pre-emption suit and becoming co-sharer—Gift being invalid does not create indefeasible interest and so the vendee cannot successfully resist the pre-emption suit. A. I. R. 1929 All. 703-(1929) A. L. J. 1111-51 All. 990-122 I C 657-See also A. I. R. 1930 All. 550-(1930) A. L. J. 1003-Ind. Rul. (1930) All 257-125 I C 460.

—S. 19—Where all rival pre-emptors have equal rights at the date of the decree, there cannot be any preference inter se though one of them had preferential rights at the date of sale A. I. R. 1929 All. 663-(1929) A. L. J. 1109-51 All 968 Ind Rul (1929) All 1090-119 I C 850

## AGRA PRE-EMPTION ACT (1922) (Contd.)

—S. 19—Acquiring an interest in the property equal to that of the plaintiff after setting aside an ex parte decree, does not defeat the plaintiff's suit A. I. R. 1929 All 551-(1929) A. L. J. 861-51 A. 882-Ind. Rul. (1929) All 879-118 I C 527

—Ss. 19, 20—"Indefeasible interest," which a vendee is required to have, does not mean interest which cannot be defeated by a pre-emption suit. A. I. R. 1927 All 575-49 All 696-25 A. L. J. 603-102 I C 120

—Ss. 19, 20—Suit cannot be decreed where deft acquires before the decree an interest by gift which puts him on an equal footing with the plaintiff A. I. R. 1926 All 661-48 A. 616-24 A. L. J. 773-96 I C 549

—S. 19—Right to pre-empt subsists where property is retransferred to the vendor during the suit A. I. R. 1926 All 179-47 All 923-23 A. L. J. 615-L R 6 A. 487 Civ. 891 I C 219

—Ss. 19 and 20—Vendee acquiring interest in the mahal after the institution of suit for pre-emption by co-sharer but before decree can under s. 19 defeat pre-emptor's suit. S. 20 does not help him, A. I. R. 1929 All 53-51 All 411-(1929) A. L. J. 290-113 I C 442

See Also A. I. R. 1927 All. 697-103 I C 376.

See Also A. I. R. 1927 All 517-49 A. 268-25 A. L. J. 147-103 I C 367.

See Also A. I. R. 1927 All. 735-101 I C 538.

—S. 20—Every deed executed by a manager of joint Hindu family is not necessarily defeasible, A. I. R. 1931 All 211 (2)-(1930) A. L. J. 54-130 I C 448.

—S. 20—One of the joint purchasers on whose name the sale-deed stood, setting a gift of the whole, can resist pre-emption up to his fractional share. A. I. R. 1930 All 706-(1930) A. L. J. 842-52 All 886-Ind. Rul. (1931) All 38-128 I C 390.

—S. 20—Vendee does not acquire an indefeasible right by a gift of the property, if the gift is liable to be defeated. A. I. R. 1929 All 859-(1930) A. L. J. 399-Ind. Rul. (1930) All 299-122 I C 747.

—S. 20—"Indefeasible" means conferring a valid title on the obvious facts of the transaction. A. I. R. 1929 All 703-(1929) A. L. J. 1111-51 All. 990-Ind. Rul. (1930) All. 257-122 I C 657.

—S. 20—Deed of exchange executed by manager is not necessarily defeasible A. I. R. 1931 All. 211-1931 A. L. J. 54-130 I C 448.

—S. 20—Every deed of exchange executed by a manager of a joint Hindu family is not necessarily defeasible. Vendee desiring to defeat pre-emptor's right on its basis can prove its binding nature. A. I. R. 1931 All. 211-Ind. Rul. (1930) All 215-122 I C 597. (1)

## AGRA-PRE-EMPTION ACT (1922) (Contd.).

—S. 20—An interest less than a proprietary interest is not "indefeasible". A I R 1929 All 300=51 A. 629=(1929) A L J 430=Ind. Rul. (1929) All 1031=119 I C 503.

—S. 21—That a co-pre-emptor acquiesces in sale before pre-emption suit and is estopped from pre-empting does not disqualify the other pre-emptor who has not acquiesced in the same way. A I R 1931 All 216=(1931) A L J 204=Ind. Rul. (1931) All 425=131 I C 681.

—S. 21—S. 21 will intervene where persons entitled to pre-emption sue jointly with another having no such right at the date of sale, though he acquiesces it before the institution of the suit. A I R 1927 All 155=25 A L J 87=98 I C 817.

—S. 21—The expression "Persons not having such a right" does not include persons having such right but who are disqualified in equity from claiming it A I R 1926 All 722=97 I C 340

—S. 22—Under S. 22, where property is jointly purchased or fore-closed by two persons against one of whom only there is a right of pre-emption such right may be claimed as against both. The explanation added to that section says that this section does not apply where such purchaser acquires a defined interest. The defendants cannot be allowed to set up a specific share when it does not find a place in the sale-deed. 1932 A L J 757=A I R 1932 A 586=140 I C 289=I R 1932 A 647=A L R 1932 A 943

—S. 22—Co-sharer does not irrevocably lose his right to resist claim for pre-emption simply because stranger is joined with him in purchase—Stranger later selling his interest to co-sharer—Pre-emption against him is barred. A I R 1928 All 697=26 A L J 1378=110 I C 869.

—S. 22—Where the property is sold to several purchasers, one of whom has equal right with plff. to a part of the property, others being entire strangers, the plff must claim pre-emption in respect of the whole. A I R 1927 All 278=99 I C 1000.

—S. 22—Where several properties are conveyed by one joint deed to different persons, one having a defined interest in the sale-deed cannot be said to have acquired the property jointly with others A I R 1926 All 468=48 A 489=24 A L J 534=94 I C 320.

—S. 24—The person obtaining a pre-emption decree is entitled to take the property subject to the burden that existed on the date of his depositing the decretal money in Court. A I R 1931 All 447=1931 A L J 428=Ind Rul (1931) All 635=133 I C 477.

—S. 24—Until money is paid under a pre-emption decree the vendee is the full

## AGRA PRE-EMPTION ACT (1922) (Contd.).

Proprietor. 16 R D 243=13 U D 85=13 L R 122 (Rev)

—S. 24—Part of purchase money left with vendee for payment to creditors of vendor—Money not paid—Pre-emptor can neither claim credit for interest on the unpaid purchase money nor can he question the genuineness of the debts secured or unsecured, A I R 1928 All 376=26 A L J 541=110 I C 662.

## AGRA PRE-EMPTION (AMENDMENT) ACT

(VIII OF 1923)

—S. 12 Pre-emptor and vendor were co-sharers in one khata and the vendee was a co-sharer in another khata and was also a joint sharer in a third khata which was joint relating to shamilat land.

Held, that the pre-emptor had the better right. A I R 1925 All 542=23 A L J 374=L R 6 A 337 Civ.=88 I C 297,

## AGRA PRE-EMPTION (AMENDMENT) ACT

(IX OF 1929)

—Act is not retrospective. A I R 1930 All 706=(1930) A L J 842=52 A 886=Ind Rul (1931) All 38=128 I C 390

## AGRA RENT ACT XVIII OF 1873

Rep, Act XII of 1881

—S. 9—Occupancy tenancy sold as fixed rate tenancy which was in fact an occupancy tenancy. Held, in a suit to recover possession, that the plaintiff was not entitled to maintain the suit, the holding being an occupancy tenancy, and that the defendants were not estopped from denying that the holding was a fixed rate tenancy. When a plaintiff is dispossessed otherwise than in due course of law and wishes to take the benefit of s. 9 of the Specific Relief Act, he ought to institute his suit on that ground alone and not on title. 8 A L J 404.

—S. 9—Sale of occupancy rights in 1888, questioned in 1908—Mortgagee selling part of property. Held, that the sale of occupancy rights was illegal, but that the mortgagee's derivative possession during the continuance of the mortgage was that of his mortgagors, and it could not by any act on his part be changed into adverse possession. Held, further that the Civil Court was the right forum for the suit, and limitation began to run against the plaintiffs from the time they redeemed the property from the mortgagee. 8 A L J 458.

—S. 9—A fraudulent and collusive relinquishment by the occupancy tenant to the zamindar, the latter being a party to the fraud and collusion, will be void against the mortgagee. 8 A L J 695.

—S. 9—If an occupancy tenant, who had usufructually mortgaged his holding dies without an heir, his tenancy lapses to the zamindar, and with the determination of the tenancy, the mortgagee's title under the mortgage is also extinguished. 9 Ind Cas 51

## AGRA TENANCY ACT (2 OF 1901)

—The policy of the Act is to secure and preserve to a proprietor, whose proprietary rights in the mahal are being transferred otherwise than by gift or exchange, a right of occupancy in his sir lands and in the lands which has cultivated for 12 continuous years at the date of transfer. 1916 P C 59=39 I C 454=44 I A 54=39 All. 173 =15 A L J 150=19 Bom. L R 433=26 C L J 24 =21 C W N 616=32 M L J 383=21 M L T 267=5 M L W 388=1917 M W N 453.

—Usufructuary mortgage of occupancy holding before the Act—Suit for possession after the Act. 8 A L J 1301=12 I C 831.  
See also 8 A L J 117=33 All. 335.

—Act is not retrospective—Succession on the death of tenant before new Act is governed by Hindu Law as modified by Rent Act A I R 1929 All. 84=44 A 327=L R 3 A 93 =20 A L J 165=4 U P L R (A) 12=65 I C 507.

—A mortgage with or without possession before the Act cannot affect the Sir. 29 I C 565.

—The rights of a landholder under the Act are not affected by prov. Insolv. Act. A I R 1922 All. 74=20 A L J 147=44 A 296; L R 3 A 73=66 I C 214.

See also 43 A 510 (F B)=62 I C 897.

—Civil Court—jurisdiction—Declaration to hold land rent-free. 12 A L J 805=25 I C 206.

—Order of a District Judge returning a memorandum of appeal for the purpose of its being presented to the Appellate Court on the Revenue side is not appealable to the High Court 19 A L J 868=1921 A 177 =63 I C 951.

—There is no provision in the Act as to refusal to exercise jurisdiction, though it provides for the case where the suit is wrongly entertained by a Civil or Revenue Court on the merits. A I R 1926 All. 58=48 A. 168 =24 A L J 83=90 I C 353.

—Manager of a Math can acquire occupancy holding. 11 A L J 761=35 A 474=21 I C 43.

—On sale of proprietary title, the proprietor ipso facto becomes an expropriatory tenant. 36 All. 248=12 A L J 370=23 I C 102.

—A daughter's son or a collateral succeeds to the expropriatory tenancy only if he shared in cultivation. A I R 1923 All. 451 =73 I C 1030.

—Expropriatory tenancy—Acquisition by prescription. 12 A L J 93=22 I C 269.

—Sale of village—Agreement to surrender sir and khudkhash land and the penalty for its enforcement are both void. A I R 1922 All. 430=70 I C 601.

—One of the brothers not selling his sir land while the other selling his share. The former retains his share of the sir provided he is in the actual physical cultivating

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

possession of it A I R 1930 All. 459=Ind. Rul. (1930) All. 320=122 I C 768.

—House, well or tank on the occupancy holding may be sold by the tenant, but having sold them he cannot claim to redeem with mortgaged holding. A I R 1923 All. 180=79 I C 508.

—Illegal transfer by occupancy tenant does not ipso facto terminate the tenancy. The landlord must sue to eject him, And if the illegal transfer is cancelled, the tenancy continues. A I R 1923 All. 191=79 I C 232.

—Transfer by occupancy tenant of his holding is void. So a permanent lessee has possessory right against all except the true owner i. e. the zamindars. A I R 1922 All. 277 =66 I C 529.

—A fixed rate tenancy cannot be created by a landlord under Act II of 1901, but a transferable tenancy could be created before the passing of the Act. A I R 1931 All. 534=15 R. D 451=1931 A L J 432=Ind Rul (1931) All. 692 =133 I C 532.

—Tenant cannot transfer trees planted on the holding with landlord's consent. A I R 1923 All. 340=75 I C 655.

—Delivery of possession, actual or formal, is essential for relinquishment of expropriatory tenancy, unless the transferee is in actual possession and the transferor does not deny the fact. A I R 1923 All. 113=72 I C 1024.

—On the occupancy tenant relinquishing his holding in favour of the zamindar, the latter becomes entitled to redeem the mortgage, if any created by the tenant A I R 1923. All. 263=21 A L J 120=73 I C 651.

—A mortgagee holding under an illegal mortgage from an occupancy tenant is not a trespasser His possession is permissive and the tenant can recover possession from him on payment of the mortgage-money A I R 1923 All. 191=79 I C 232.

—A dispossessed usufructuary mortgagee of an occupancy holding cannot sue for possession on title, but can sue under s 9 sp Relf Act without pleading title at all A I R 1923 All. 81=20 A L J 927=45 A 124=71 I C 115.

—Mortgage with possession by occupancy tenant before the Act Mortgagor later took permanent lease of the holding from the zamindar and transferred the lease to some one. The transferee held entitled to redeem the mortgage. A I R 1923 All. 140 (2)=20 A L J 976=76 I C 862.

—Lease of sir land pending mortgage suit—sale in execution of decree—Purchaser not entitled to possession. 36 All. 248=12 A L J 370=23 I C 102 (1).

—Where the Act does not empower the landlords to resume rent-free grants, the tenant cannot be ejected so long as the land is a grove A I R 1923 All. 372=75 I C 616.

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

—Grove land let for if part of holding.  
24 I C 81.

—Groves are not land within S. 4 (2) and land held as a grove is not held for agricultural purposes and so the Act does not apply. 12 A L J 1080=25 I C 169.

—Lapse of time between the date the zemindar executes a registered permanent lease in favour of the defendant and the date of taking possession makes no difference. Mere acceptance of the rent by the lambardar from the plaintiff before the defendant took possession under the lease in no way operates as revocation of the registered lease. A I R 1923 All 257=L R 4 A Rev. 231=71 I C 447.

—Compensation from Govt to a lambardar, for a small area under the Land Acquisition Act is not a sewi income recoverable as profits by cosharers A I R 1923 All 537=L R 5 A Rev. 24=74 I C 19

—The right of a tenant to reside in house and the right of a tenant groveholder in certain villages are both limited estates the landlord being the reversioner. The landlord, however, does not succeed as heir and hence the landlord cannot be held responsible for the debt of the last holder A I R 1923 All 374=75 I C 621

—A tenant cannot be sued in the same suit in respect of different holdings A I R 1924 All 720=22 A L J 459=79 I C 560

—The heir of a deceased lambardar is not liable for the negligence or misconduct of the deceased except to the extent of the assets. A I R 1927 All 636=25 A L J 825=L R 8 A 172 Rev.=103 I C 77

—S. 1 (2)—Act does not apply to land administered by Cantonment Authorities acting under the authority of the Government of India A I R 1927 All 530=L R 8 A 194 Rev.=101 I C 638

See to the same effect, A I R 1922 All 57=L R 3 A 169=66 I C 582.

--Ss. 3 (2) (8) and 197 (a)—grove-a holding A L R 1933 A 2=1932 A L J 857

—S. 2 (3)—Compensation for improvement is allowed, but as regards thekadar, it being not clear whether he is 'Tenant' his claim must be dismissed 29 I C 478

—S. 3 Applicability See 29 I C 5

—S. 3—Restrictions on leases and agreements relating to tenancy in s. 3 apply only to tenants and not to landlords. 34 I C 148.

—S. 3—Prevents tenant and not landlord from acting to the detriment of his own interest. A I R 1928 All 698=L R 10 A 73 (Rev.)=110 I C 750.

—S. 4—Mortgagee from previous holder of an occupancy tenancy cannot question the right of the successor of the holder who is accepted by the zamindar as such successor.

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

A I R 1930 All 426=Ind. Rul. (1930) All 365 =L R 11 A 107 Rev.=123 I C 109.

—S. 4—Interest of a Thekadar in agricultural land under a lease is a "holding" and he is a "non-occupancy tenant." 39 All 254=15 A L J 227=38 I C 828.

—S. 4 (6)—Owing to the special meaning of the word "holding" we can conceive of a thekadar who is not the thekadar of a holding. But every lessee of proprietary rights cannot be a thekadar within the meaning of the Act. A I R 1927 All 78=98 I C 92.

—S. 4—'Tenant' may not be a tenant of a holding. L R 2 A 161 Rev; 19 A L J 292; 43 A 445=1921 A 128=60 I C 770.

—Ss. 4 and 19—Decision as rent-free holders in ejectment suit by Revenue Court. Subsequent suit in Civil Court is barred. 37 All 280=13 A L J 326=28 I C 432.

—Ss. 4, 58—Person using an uncultivated land for grazing purposes being a non-occupancy tenant, the suit to eject him lies in Revenue Court. A I R 1921 All 128=43 A 445=19 A L J 292=60 I C 770.

—S. 4—Rent is a payment by tenant to landlord and may include what is paid on account of the produce of tanks etc. But where parties are not landlord and tenant, payment by one to other is not rent. A I R 1925 All 561=47 A 920=23 A L J 460=88 I C 504.

—S. 4—Person obtaining land from the landholder on payment of lump sum as premium without agreement to pay rent for the express purpose of planting trees are not tenants. A I R 1924 All 795=L R 5 A 255 Rev=47 A 55=83 I C 204.

—S. 4 (5)—Under s. 4 (5) a non-occupancy tenant is a 'tenant'. A I R 1931 All 413=1931 A L J 321=15 R D 370=Ind Rul (1931) All 437=131 I C 869.

—S. 4 (5)—Grove planted with permission of zamindar on payment of rent. Held he could make a valid transfer of the grove (Per Banerji J. Contra—Grove-holder being a tenant cannot transfer in the absence of custom or contract). 11 A L J 649=17 I C 655.

—Ss. 4, 167—Grove planted on condition of payment of half the produce. Suit for such payment is a suit for rent and lies in Revenue Court. 15 A L J 623=41 I C 908 =39 A 605.

—S. 4 (2) and Ch. X—Land held as grove whether for rent or not is not land held for agricultural purposes. The word "land" in Ch. X is used in the same sense as in s. 4 (2) 11 A L J 236=19 I C 416=35 A 200.

—S. 4 (2)—Land on which a grove stands is not 'land' as defined in s. 4 cl. (2) A I R 1924 All. 795=L R 5 A 255 Rev=47 All. 55 =83 I C 204.

—S. 4—Zamindar consenting to land being turned into grove the land is deemed



## AGRA TENANCY ACT (2 OF 1901) (Contd.)

to be held for agricultural purposes. A I R 1924 All 53-45 A 640-21 A L J 576-L R 4

A 208 (Rev.)=74 I C 924.

—S. 4 (2)-A grove holder is a "tenant".  
13 I C 634.

—Ss. 4 (2), 56, 57, 58 and 167—"Agricultural purposes" do not include grazing. A suit for ejectment of a tenant from pasture land lies in Civil Court not in Revenue Court.  
15 I C 743.

—Ss. 4 (2), 19 and 54—Revenue Courts have jurisdiction to eject a grove-holder who is admitted as tenant after the death of the previous grantee, he being a non-occupancy tenant. 42 All 36-17 A L J 971  
= 2 I C 191.

—S. 4 (2)—Sale of grove carrying with it the right of occupation of the land is valid by custom. Land let for planting a grove and on which the grove is still existing is not "land" within the Act. 31 I C 979.

—S. 4—Land let for planting grove is neither land within the meaning of the Act, nor holding and rights are transferable. But holdings, not transferable, cannot become transferable after the planting of trees. A I R 1924 All 229-21 A L J 907-L R 5 A 13  
Rev.=79 I C 577.

—Ss. 4 (2), 158—Land not having been let or held for agricultural purposes within the meaning of s. 4 but acquired under a "Danpatra" cannot confer under-proprietary rights on the holder even after enjoyment of the land for the full statutory period. A I R 1924 All 53-21 A L J 576-L R 4 A  
208 (Rev.)=45 A 640-74 I C 924.

—S. 4 (3)—"Rent" includes value of the produce. Suit for such value is a suit for rent.  
15 I C 27

—Ss. 4 (3), (5) and 95 (b) The lessee of a right to cut thatching grass is a "tenant" though not a tenant of an agricultural holding. He cannot acquire occupancy rights but can sue for a declaration of the class of tenant to which he belongs under s. 95 (b) of the Act.  
1 U P L R (B R) 11-52 I C 228.

—Ss. 4 (3), 67—Suit for ejectment on account of failure of tenant to agree to pay nazrana is maintainable and the tenant can take the plea authorised by S. 67 (1):  
1 U P L R 24-52 I C 409.

—S. 4 (3)—Suit for rent against tenant who had taken lease of cutting grass is a suit for "rent" and Civil Courts have no jurisdiction.  
12 A L J 36-22 I C 16.

—S. 4 (5) Everybody who cultivates land does not thereby become a tenant. A I R 1926 All 519-24 A L J 599-95 I C 291.

—S. 4 (5)—"Landlord" is a person to whom a portion of the rent is payable, and the "tenant" is the person by whom it is payable. A I R 1927 All 745-L R 8 A 94  
(Rev.)=99 I C 534.

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

—S. 4 (5)—As regards the sub-tenant the landholder is an occupancy tenant from whom he holds. A I R 1923 All 568-L R 4 A  
450 Rev.=73 I C 947.

—S. 4 (5)—Revenue Court can eject a tenant i. e. person liable to pay rent. If so ejected he cannot sue in a Civil Court for declaration that he is still a tenant in-chief and not a sub-tenant. A I R 1927  
All 102-98 I C 263

—Ss. 4 (5) and 95—Usufructuary mortgagee paying rent to landlord does not there by become "Tenant" and a suit for a declaration of their position as usufructuary mortgagees is cognisable by a Civil Court. A I R 1921 All 110-19 A L J 702-63 I C 274.

—Ss. 4 (5), 11—A tenant though ejected and the land leased to another for a year, remained in possession and paid the rent and was readmitted on the expiry of the lease. Held there was a continuous occupation by the original tenant I U P L R  
37 (B R)=54 I C 309.

—S. 4 (9)—Where several persons hold the same land under different engagement, each is holding a different tenure. A I R 1931 All 413-1931 A L J 321-15 R D 370-Ind  
Rul (1931) All 437-131 I C 869.

—S. 4 (12) Plaint once admitted cannot be rejected on ground of any defect subsequently discovered.  
29 I C 410

—S. 4 (12)—Planting of trees is an "improvement" Therefore a grove is a land.  
29 I C 410

—S. 4 (12)—An agriculturist tenant has no right to build upon a plot in the abadi without the permission of the zamindar although he has been throwing rubbish over it for a long time. A structure built on a plot of land within the abadi is not an improvement within s. 4 (12) 10 Ind Cas 284.

—Ss. 4 (5), 34—Person occupying land without consent of the zamindar may be ejected for non-payment of rent as a non-occupancy tenant by a suit in a Rev. Court.  
9 A L J 771-16 I C 120.

—S. 6—Classification of tenants in s. 6 being all lessees including. Thekdars are inelastic, non-occupancy tenants. No adequate provision has been made for lessees holding under a sub-contract and in such cases the intention of the parties is liable to be frustrated.  
A I R 1923 All 560-74 I C 971.

—S. 8—Persons not coming within the definition of S. 8 cannot be classed as fixed rate tenants. Hence no fixed rate tenancy can be created by contract. A I R 1923 All 560-L  
R 5 A 28 Rev=74 I C 971.

—S. 9—entry is conclusive proof only as to the nature of the tenancy, not as to question of title. 34 All 285-9 A L J  
238-13 I C 643.

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

—S. 9—bars a suit challenging the nature of tenancy as recorded A I R 1921 A 158 =63 I C 711=19 A L J 683=L R 2 A 164 (Rev)=3 U P L R (All) 79=43 A 615

—S. 9—Applies to all cases of dispute as to the nature of tenancy even if the landlord is not a party (Per. Lindsay J Contra). Presumption under s. 9 can be displaced by a judicial decision in proceedings instituted before the Act or by subsequent events. A I R 1924 A 91=21 A L J 697=L R 1 A 333 Rev =74 I C 647=45 A 744.

—S. 9—Section 9 enacts a rule of evidence, and does not embody a provision to which a fixed rate tenant is "subject" within the meaning of s. 6 of Act 1915. A I R 1927 All 586=L R 8 A 142 Rev=102 I C 65

—S. 9—Refers to entries in the Record of Rights prepared before the Act. But a person recorded as a fixed rate tenant in 1911 is a "fixed rate tenant" having regard to the definition of such tenant in s. 4 (4) of Act 1915. A I R 1927 All 586=L R 8 A 142 Rev=102 I C 65

—Ss. 10, 20, 83—The policy of the Act being to secure and preserve to a proprietor, whose proprietary rights in a mahal are transferred, otherwise than by gift or exchange a right of occupancy in his sir lands and in the lands which he has cultivated for 12 continuous years at the date of the transfer, any agreement or device contrary to this policy is void. 39 All 173=21 C W N 616=32 M L J 383=21 M L T 267=5 L W 388=15 A L J 150=19 Bom. L R 433=26 C L J 24 (1917) M W N 453=39 I C 454=44 I A 54 (P C)

—S. 10—An usufructuary mortgagee's right to retain possession of the sir land mortgaged to him before Act II of 1901 is not affected by a sale of zamindari share together with the sir after enforcement of the Act A I R 1931 All 238=(1931) A L J 162=Ind Rul (1931) All 349=L R 12 A 118 Rev=15 R D 341 =131 I C 45

—S. 10—Proprietor transferring khudkhasht loses his rights, even though he had been cultivating it for 12 years, and becomes an exproprietary tenant, khudkhasht can only be held by a proprietor in possession. A I R 1923 All 347=21 A L J 331=L R 4 A 206 Rev =74 I C 286

—S. 10—Where a proprietor sells his sir land he ipso facto becomes exproprietary tenant of such land. A I R 1928 All 763=L R 9 A 309 Rev.=112 I C 617.

—S. 10—Usufructuary mortgage of khudkhasht land makes the mortgagor an exproprietary tenant. 18 A L J 944=59 I C 688.

—S. 10—Position of zamindar usufructuarily mortgaging his zamindari including sir enunciated. A I R 1931 All 238=(1931) A L J 162=Ind. Rul. (1931) All 349=131 I C 45.

—S. 10—Mortgage by conditional sale

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

gives rise to ex-proprietary tenancy in sir A I R 1929 All 864=Ind. Rul. (1930) All 220 =122 I C 738.

—S. 10—There must either be a sale in execution of decree or order, or a voluntary alienation so as to create expropriary right. No such right accrues on the passing of a foreclosure decree. A I R 1929 All 498=(1924) A L J 549=L R 10 A 266 Rev=51 A 730=Ind Rul (1929) All 732=117 I C 620..

—S. 10—Mere occupying land for many years professedly as ex-proprietary tenant does not confer upon a person ex-proprietary tenancy. A I R 1929 All 498=(1929) A L J 549=L R 10 A 263 Rev=51 A 700=Ind Rul (1929) All 732=117 I C 620..

—Ss. 10, 20, 83—Sale of sir lands—Agreement to surrender ex-proprietary rights—Possession not delivered—Suit for damages for breach of contract under—Contract Act s. 65 not maintainable. 8 A L J 826

—S. 10—Expropriary tenant cannot contract himself out of the rights conferred by s. 10. 36 All 155=12 A L J 136=22 I C 965.

—S. 10—An ex-proprietary tenant may surrender his holding but not doing so, he cannot contract himself out of the provisions of s 10. 2 U P L R (B R) 90=60 I C 245..

—S. 10—Cosharer transferring his share does not become an expropriary tenant in respect of his sir to all the cosharers but only to the transferee (Per Karamat Husain J. Contra). 9 A L J 244=13 I C 535..

—S. 10—No expropriary tenancy arises where there is an exchange of zamindari between cosharers. 33 All 570=8 A L J 329 =10 I C 845..

—S. 10—Proprietor cannot contract himself out of his expropriary rights.

58 I C 619.

—S. 10—Provisions of s. 10 being mandatory no compromise as to enhancement of rent or any other right is binding. 42 All 334=18 A L J 282=55 I C 889.

—S. 10—A proprietor mortgaged his proprietary rights without obtaining expropriary rights. After redemption of mortgage the proprietary rights were sold in execution. He could not claim expropriary rights 57 I C 47.

—S. 10—A perfect partition of a mahal would not in itself create an expropriary tenancy by reason of the provisions of s. 10 apart from the operation of ss. 122 to 127 of Land Rev. Act, 9 A L J 701=16 I C 81.

—S. 10 (5)—Parties may agree, as to lower rent than that fixed by s. 10, but such agreement to be enforceable requires an order under S. 10 (5) 16 A L J 212=44 I C 513.

—S. 10—Sir does not cease to be sir on transfer by gift whether to a co-sharer or non-co-sharer. 31 I C 906.

—S. 10 (1)—The sir land retains its

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

character in the hands of the donee if the alienation is by way of gift. In such a case, therefore, the donor does not acquire exproprietary rights. A I R 1925 All 775-871 C 698.

—S. 10—Transfer of sir by will—Exproprietary rights accrue to the transferee and not to the deceased's heirs. 32 I C 364.

See to the same effect. 32 I C 737.

—Ss. 10, 21—If a covenant to relinquish the sir lands is part of a transaction of sale or of mortgage, then the agreement to surrender will be void. But if there are distinct transactions law will not protect.

40 All 449-16 A L J 329-44 I C 988.

—S. 10 (1)—A collusive lease of Sir Land intended to defeat the law is void. Proprietors selling their property cannot deprive themselves of the rights given to them by S. 10. 56 I C 645.

—S. 10 (12)—Usufructuary mortgage of zamindari including Sir—Exproprietary tenant—Right of mortgage not affected.

13 A L J 925-30 I C 911.

—S. 10—Sale of the zamindari share including the sir, after the Act does not affect the right of a usufructuary mortgagee to possession of the sir mortgaged to him before the Act. Right of the exproprietary tenant to recover possession does not arise till his vendee has redeemed the mortgage. A I R 1931 All 238-1931 A L J 162-Ind Rul (1931) All 349-131 I C 45.

—S. 10—previous to the death of the father, the brothers had separated between themselves and on father's death they succeeded to fractional shares in the mahal. One of them sold his share and lost his proprietary title. He was entered as tenant in the Record of Rights the rent was also entered.

Held that he was bound to prove that the entry was wrong by clear evidence that his family was joint and undivided, and that he had become ex-proprietary tenant of the land in question. A I R 1928 All 415-L R 2 A 161 Rev-Ind Rul (1929) All 735-117 I C 818.

—S. 10—If the rent agreed upon and claimed be less than statutory rate proceedings under s. 36 Land Rev. Act need not be taken, A I R 1925 All 100-L R 5 A 235 Rev-82 I C 296.

—S. 10—One-fourth of share of the proprietary interest of the debt was purchased by the plff. But sir and khudkhat lands were cultivated by the debt. alone. On plff asking for one-fourth profits.

Held, that it was the duty of the plaintiff to get rent assessed on his share of the sir land and recover rent from defendants. A I R 1928 All 763-L R 9 A 309 Rev-112 I C 617.

—S. 11—Decision of the Asst. Collector in an ejectment suit is appealable to Dist. Judge. A I R 1923 All 363-82 I C 790.

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

—S. 11—If fraud is established, there is no tenancy existence at all to which the provisions of the Act would apply. A I R 1922 All 294-L R 3 A 195-4 U P L R (A) 84-66 I C 559.

—S. 11—Rent of an occupancy tenant cannot be enhanced by agreement. A I R 1922 All 55 (2)-L R 3 A 132 (Rev.)-70 I C 495.

—S. 11 "Land" does not include grove and grove-holder cannot acquire occupancy rights. 29 I C 20.

—S. 11—Mahant can acquire occupancy rights. 35 All 474-11 A L J 761-21 I C 43.

—S. 11—Math cannot be treated as occupancy tenancy. A chela cannot inherit occupancy rights of his guru. 29 I C 407.

—S. 11—Period of non-payment of rent is excluded from the statutory period. 39 I C 795.

—Ss. 11, 34—In the absence of strong evidence a person occupying is presumed to be holding without the consent of the landlord until he begins to pay rent. 31 I C 486.

—S. 11—Occupation without payment of rent does not count towards acquisition of occupancy right. 32 I C 379.

—S. 11—Occupation must be as a tenant for purposes of S. 11. 54 I C 309.

—S. 11—Occupancy right arises ipso facto by continuous occupation for 12 years, it need not be claimed. A I R 1922 All 55-70 I C 495.

—Ss. 11, 34—Holding of tenancy for over 12 years with consent of the zamindar entitles the holder to occupancy rights, although he had not been paying rent. 10 I C 112.

—S. 11—Where a father was ejected and son was let in, and the father and son continued to be members of joint family cultivating the lands in common. Held, that there was no change of tenancy. 28 I C 907.

—S. 11—Sub-letting means leasing of land at a fixed rent to a sub-tenant. Cultivation by brother amounts to continuous possession, as it is not "sub-letting". 29 I C 35.

—S. 11—A sub-lease continued for another year—the whole period of the sub-lease is excluded. 32 I C 399.

—S. 11—Where a non-occupancy tenant took a theka of proprietary share, Held, he could not count the period before the theka, but that he must complete 12 years after the cessation of the theka. 29 I C 474.

—S. 11—Where no rent was paid when there was no cultivation and the rent varied largely from year to year. The tenant claimed continuous possession on the ground that he grazed cattle when cultivation was impossible. Held that this was not the case where cultivated land was left fallow without interrupting occupation. 31 I C 458.



## AGRA TENANCY ACT (2 OF 1901) (Contd.)

—Ss. 11, 58—Cultivation for a number of previous and subsequent years—Cultivation in the intervening years presumed in the absence of evidence of another person cultivating the same during that period. 32 I C 765.

—S. 11—Ejectment for rent under S. 55 Rent Act breaks the continuity of tenancy. 32 I C 386.

—Ss. 11, 12—Lease to a relative of an ejected tenant does not amount to continuation of tenancy though the ejected tenant continues to cultivate. 1 U P L R (B R) 11

=52 I C 225.

—S. 11—Non-occupancy tenant taking mortgage cannot count the period of mortgage, nor the period of occupation prior to the mortgage, towards the acquisition of occupancy rights. 32 I C 387.

—S. 11—Tenant becoming usufructuary mortgagee—After redemption again becoming tenant—Period of mortgage is not counted towards accrual of occupancy rights. 55 I C 882.

—S. 11—Although the land is held by a mortgagee, the mortgagor may be considered to hold land within the meaning of s. 7. A I R 1925 All 748=86 I C 929.

—S. 11—Landlord may create occupancy rights in favour of the tenant. 41 All 223=17 A L J 120=49 I C 357.

—S. 11 (a)—Lease for 7 years with power of re-entry is not one within S. 11. 1 U P L R (B R) 25=53 I C 48.

—S. 11, Proviso—Period for which the land is sublet in contravention of the provisions of the Act is to be excluded. 13 A L J 1=28 I C 691

—S. 11 Proviso (a)—Admission of the tenant to the holding is the material point in deciding the commencement of a lease. If admitted at the beginning of the agricultural year the lease begins from 1st July. If admitted after 1st July mere recital of 1st July as the date of commencement has no retrospective effect. 58 I C 500

—S. 11 (e)—“Public purposes” include military purpose. A I R 1927 All 530=101 I C 638.

—S. 12—A Kabuliyat for one year, being intended to regulate rent, not length of occupation, cannot count for acquisition of occupancy rights. 29 I C 391

—S. 12—Stipulation in a lease excluding the application of s. 12 is not void either under the Act or under s. 23 Contract Act. 34 I C 148

—S. 13 applies only where landholder has power to re-admit tenant and not where he has parted with such power. A I R 1928 All 681=L R 9 A R 241 Rev=111 I C 131

—Ss. 13 (a), 58—Ejectment of father

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

under s. 58 and immediate re-letting to minor son who was living joint with the father amounts to re-admission of the father and no break of continuity. 31 I C 884.

—S. 13 (a)—If a tenant is ejected but remains in possession (or his joint is in possession), there is no break in continuity, though the name of a third person is entered in the patwari papers. 32 I C 595.

—Ss. 13 (a), (b), (c), and 14 (1) (a), 168—No limitation is prescribed for wrongfully dispossessed tenant to regain possession. 31 I C 863.

—Ss. 13 (a), (b), 14 (1) (a)—Mere attestation of the parcha at the settlement by the tenant that he is a non-occupancy tenant does not mean intention to relinquish occupancy rights. 31 I C 815.

—Ss. 13 (a) (b) and 14 (1) (a)—Quære—Whether a wrongfully dispossessed tenant should regain possession within a year to come under s. 13. 31 I C 815.

—S. 13 (b)—“Year” means calendar Year. 1 U P L R 34=54 I C 299.

—S. 13 (b)—Tenant being ejected under s. 58 the break before his re-admission is to be condoned only for the purposes of s. 11. The rent can be changed on re-admission by an agreement which need not be registered. A I R 1929 All 78=L R 10 A 101 Rev=111 I C 742.

—S. 14—the letting value to be considered is the one at the time of the exchange and not at the time of the suit for ejectment. 31 I C 482.

—S. 14—Right of exchange cannot be claimed if the tenant is not admitted to possession within one year of the loss of old holding. Landlord may give possession of the new holding before the old one is vacated. Tenant cultivating both the holdings does not lose the right of exchange. 34 I C 186.

—S. 14—A member of a joint hindu family taking lease as sole tenant. His brothers being admitted after his ejectment, the tenancy is not continuous. 56 I C 764.

—S. 14—Attachment and sale of the trees standing on the land in execution of decree against permanent lessee do not involve transfer of the interest of the lessee. 57 I C 198.

—S. 14—If a widow is proved to have directly succeeded to her husband's holding, she can add the period of husband's occupation. 2 U P L R (B R) 86=60 I C 211.

—S. 17—Division by the joint tenant of the occupancy holding with common consent does not create separate holding but the joint tenancy continues A I R 1929 All 808=(1929) A L J 1184=Ind Kul (1929) All 917=118 I C 709

## AGRA TENANCY ACT ( 2 OF 1901 ) (Contd.)

—S. 17-Permissive possession under a compromise does not entitle the tenant to carve out a fresh occupancy tenure without the consent of the zamindar. The person under possession is licensee and the license can be revoked. A I R 1929 All 808=(1929) A L J 1184=Ind Rul (1929) All 917 =118 I C 709

—Ss. 18, 28-Quaere-whether a sub-lease granted by a female exproprietary tenant is binding in perpetuity against the land holder. 32 I C 857.

—S. 18-Occupancy right lapses for want of heir. Thus mortgagee of such right is liable to be ejected by zamindar if the tenant, mortgagor died without heir. 55 I C 868.

—Ss. 18 (c), 22 (9)-Surrender by widow of the occupancy rights inherited from her husband extinguishes the rights for ever, as against herself as well as reversioners.

1 U R L R (B R) 41=54 I C 567.

—See to the same effect 1 U P L R 47 =54 I C 572 (Reversioners cannot revive the rights extinguished by surrender).

—S. 18-Being not exhaustive, does not exclude an agreement for extinguishment of tenancy. Thus where the tenant planted trees with permission and the land ceased to be agricultural the land became a "grove land."

43 A 606=19 A L J 616=63 I C 437

—S. 18 (b)-Mortgage created by tenant under express terms of the lease continues after ejectment. A I R 1925 All 580=47 A

589=23 A L J 409=88 I C 224

—S. 19-Grove-holder being a non occupancy tenant could be ejected by a Revenue Court.

17 A L J 971=42 A 36

—Ss. 20, 21, 31 and 167-If an illegal transfer is made by the tenant the landlord has his remedy in Revenue Court. Thus where a mortgagee obtained possession in execution through Civil Court it was held that the Civil Court was competent only to grant the declaration asked for, but not to grant ejectment. 13 A L J 49=26 I C 419.

—Ss. 20, 79-Person not a member of the zamindari body ejects a transferee from an occupancy tenant at his own risk. A I R 1922 All 277= 4 U P L R (A) 87=66 I C 529

—S. 20-Revenue Courts will presume the entries as to proprietary titles in revenue papers to be correct. It may be rebutted by a separate suit in Civil Court, but so far as the Revenue Court is concerned, it cannot go behind the entry, receive evidence and itself try the proprietary questions. 8 A L

J 1025 F B,

—S. 20-Insolvency Court cannot deal with occupancy holding under the Act.

A I R 1921 All 13=43 A 510=19 A L J 439 (F B) =62 I C 897

## AGRA TENANCY ACT ( 2 OF 1901 ) (Contd.)

—S. 20-Personal Covenant as to a void usufructuary mortgage is unenforceable. A I R 1922 All 134=20 A L J 318=44 A 486 =67 I C 792.

—Ss. 20 and 31-Land-holder has as against the transferee all the rights possessed by the transferor in case the latter dies without leaving any heirs. A I R 1924 All 841=78 I C 531

—Ss. 20 (2), 25 (1)-Lessee of an occupancy holding, without notice of mortgage, suing mortgagee for possession, is not entitled to possession without having paid the mortgage-money. 16 A L J 137=43 I C 514=40 A 228

—S. 20-Mortgage of occupancy holding being void, mortgagor is entitled to get back possession on payment of mortgage money. 16 A L J 747=47 I C 857.

—S. 20-Occupancy tenant cannot sue for possession without returning mortgage money. But once ejected, the mortgagee cannot recover possession. A I R 1924 All 710=78 I C 539.

—S. 20-Occupancy tenant can sue to eject mortgagee in possession after payment of mortgage money. A I R 1923 All 191=79 I C 232.

—S. 20-The Usufructuary mortgage of zamindari and sir land cannot continue to hold the property as mortgagee of the exproprietary tenancy after sale of the zamindari and sir, and is liable to be ejected. 9 Ind Cas 553.

—S. 20-Submortgagee is entitled to recover the money from the mortgagee. 19 I C 745=35 A 405.

—S. 20-Fresh delivery of possession is not necessary in the case of relinquishment of exproprietary tenancy in favour of person already in possession. A I R 1923 All 113=72 I C 1024.

Ss. 20, 21 -An occupancy tenant cannot transfer his interest to his landlord except by relinquishment. Thus a mortgage by him in favour of landlord is void. (1912) 10 A L J 176=16 I C 981.

—S. 20-Occupancy tenant-Mortgagor relinquishing in favour of the zamindar, is a transfer of the right of redemption. 64 I C 418

—S. 20-Surrender of occupancy holding by tenant-mortgagor to zamindar-zamindar can redeem A I R 1923 All 263 (1)=21 A L J 120=73 I C 651.

—S. 20-Occupancy holding-Mortgage with possession before the Act-Permanent lease of the same property obtained from the landlord-Transferee of the lessee is entitled to redeem the mortgage A I R 1923 All 140=20 A L J 976=76 I C 862

—S. 20-Equity of redemption can be given in gift A I R 1925 All 358=23 A L J 201=47 All 424=86 I C 741

## AGRA TENANCY ACT ( 2 OF 1901 ) (Contd.)

—S. 20 (2)—Exproprietary tenant cannot mortgage equity of redemption of existing mortgage of sir plots. A I R 1928 All 590=L R 9 A 237 Rev=Ind Rul (1929) All 670 =116 I C 878

—S. 20—Interest of exproprietary tenant is not transferable 96 P R 1914=212 P L R 1914=13 P W R 1914=24 I C 630

—Ss. 20, 83—Transfer of expropriatory rights being unlawful suit for damages for failure to deliver possession does not lie (1911) 11 I C 17=8 A L J 826=33 A 695

—S. 20—If a tenancy has not been transferred in the way laid down by s. 20 (2) it cannot be bequeathed. A I R 1927 All 632=L R 8 A 261 Rev=193 I C 237

—S. 20—Where an occupancy tenancy was acquired by a member of a joint Hindu family, his throwing of the profits of the Tenancy into the common stock would not make the tenancy a part of the assets of the joint family otherwise it would amount to Court sanctioning transfer otherwise than under s. 20. 40 All 314=16 A L J 225 =44 I C 717

—S. 20—Occupancy holding cannot be sold in execution of any decree A I R 1921 All 118=43 A 547=19 A L J 473 (F B)=63 I C 264

—S. 20 (3)—Transfer does not include appointment of Receiver in execution proceedings against thekadar to collect arrears of rent and utilise them. A I R 1925 All 72=46=A 924=81 I C 741.

—S. 20 (2)—Where on occupancy holding and an appurtenant house were mortgaged it was held that neither could be sold in execution of a decree under the mortgage. 33 All 136=8 A L J 190=9 I C 931

—Ss. 20, 21—House in town belonging to the occupancy tenant is transferable and can be sold for mortgage or other decree unless proved to be appurtenant to the holding. 45 I C 546.

—S. 20 (2)—Expropriatory holdings cannot be sold in execution of a decree. A purchaser cannot recover possession of the lands or of the trees on the plot. 41 All 346=17 A L J 302=50 I C 430.

—S. 20 (6)—Trees on expropriatory holding are not liable to attachment and sale. 54 I C 805.

—S. 20—Decree-holder against permanent lessee can attach and sell trees standing on the land. 57 I C 198=2 U P L R (A) 283.

—S. 20—Mango trees planted presumably with landlord's consent on occupancy holding are not transferable. A I R 1923 All 340=75 I C 655.

—S. 20—Transfer does not include will. A I R 1924 All 508=5 L R 5 A 179 (civ) =84 I C 669.

—Ss. 20, 21—Do not forbid or prohibit

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## AGRA TENANCY ACT ( 2 OF 1901 ) (Contd.)

transfer but only declare it to be void. A I R 1930 All 1=(1930) A L J 45=Ind. Rul. 1910 All 328=122 I C 872=52 A 338.

—S. 20—Zamindar and tenant cannot by agreement override the provisions of s. 20 A I R 1925 All 63=82 I C 289

—S. 20—Landlord may create heritable and transferable tenancy. A I R 1930 All 315=14 R D 350=Ind Rul (1930) All 916 =127 I C 516.

—S. 20 (2)—Mortgage of occupancy holding is not unlawful but merely inoperative—Mortgage of such holding along with other property—Other property becomes liable for whole debt. A I R 1929 All 894=L R 10 A 269 Rev=Ind Rul (1929) All 1033=119 I C 505

—S. 20 (3)—Same meaning is to be applied to the word "transferable" in cl. (3) as in cl. (2). A I R 1926 All 432=48 A 385=24 A L J 489=95 I C 1048.

—S 20 (3)—Apart from s. (20) (3) there is no bar to the creation of a tenancy heritable and transferable. No particular mode of expression is required. Act of 1901 does not effect transferability of such tenancies created before 1901. A I R 1931 All 534=(1931) A L J 432=15 R D 451=Ind Rul (1931) All 692=133 I C 532.

—S. 20 (3) A landlord can create a heritable and transferable tenancy by executing registered lease in grantee's favour A I R 1931 All 534=15 R D 451=1931 A L J 432=Ind Rul. (1931) All 692=133 I C 532

—S 20 (3) Interest of a thekadar is heritable but not transferable unless there is provision to the contrary. A I R 1926 All 432=48 A 385=24 A L J 489=95 I C 1048

—S. 20—Interest of a thekadar is not transferable 82 I C 289=A I R 1925 All 63

—S 20 (3)—Interest of a permanent lessee is not transferable though so stated in the lease A I R (1929) All 612=L R 10 A 360 Rev=Ind Rul (1929) All 879=118 I C 527

See to the same effect 93 I C 1005 =A I R 1926 All 412

—S 21—The mortgage of a cultivatory holding is void but if created the party benefited thereby must reconstitute the benefit 8 A L J 931.

—S. 20 (3)—Express condition in lease make it transferable. A I R 1925 All 580=47 A 589; 23 A L J 409=88 I C 224.

—S. 21 (2)—Mortgage before the Act; mortgage obtaining decree for possession after the Act is entitled to possession. 37 All 278=13 A L J 300=28 I C 278.

—S. 21—Mortgage created before the Act, but mortgagee entering possession after the Act, is governed by the Act. So if the mortgagee is dispossessed he cannot recover possession because in an invalid transaction the position of one in possession is stronger and prevails. 32 I C 593.

## AGRA TENANCY ACT ( 2 OF 1901 ) (Contd.)

—S. 21—Zamindar accepting rent from the mortgagee; tenant relinquishing, the mortgagee becomes mere tenant of the zamindar liable to be ejected by him. 30 I C 70

—S. 21—Validity of mortgage of occupancy holding-surrender of holding if affects rights of the mortgagor. 39 All 186 =15 A L J 47=39 I C 85,

—S. 21—Tenant planting trees on waste land of the village has no right to sell them. 25 I C 152,

—S. 21—Mandidhari rights are no higher than occupancy rights. The fact that the holder of the former himself cultivates makes no difference, 1 U P L R 10=52 I C 238.

—S. 22—Chelas can succeed to sir land as succession to sir land is governed by Hindu Law, not by s. 22, L R 4 A 210 (Rev.)

—S. 22—Even an interest in part of a holding is governed by s. 22, 62 I C 103=2 U P L R (A) 417.

—S. 22—Succession to tenant of a joint occupancy holding in separate possession of a specific plot is not governed by s. 22, but goes to the co-owners sharing in the cultivation. 16 A L J 459= 46 I C 387.

—S. 22—Sons of pre-deceased son are entitled to succeed along with surviving sons to the tenancy rights of the deceased. A I R 1925 All 786=87 I C 668.

—Ss. 22, 14—Grove being not land held for on agricultural purpose, s. 22 does not govern succession to such land, and Civil Courts have jurisdiction over it. 12 A L J 1080=25 I C 169.

—S. 22—Service tenure devolves under ordinary Hindu Law Mere fact of a denial of liability to render service by rent-free grantee would not disentitle him to a dhcre for possession, provided the right was established. 13 A L J 150=27 I C 720.

—S. 22—Devolution under s. 22 does not take place merely on death of one of the Hindu coparceners. 93 I C 98 (A)

—S. 22—Devolution of interest of a joint holding is governed by s. 22 2 U P L R (A) 417=62 I C 103

—S. 22—Succession to Hindu female in possession of occupancy tenancy as such is governed by Hindu Law, as s. 22 does not provide for such a case 38 All 197=14 A L J 127=32 I C 771

—S. 22—A female absolute owner can create a mortgage and the mortgagee is entitled to possession as against husbands heirs A I R 1925 All 420=47 A 600=23 A L J 368 =88 I C 290

—S. 22—Widow of an occupancy tenant who died before 1873 remaining in possession for 12 years and acquiring holding in her own right can make a valid gift and succe-

## AGRA TENANCY ACT (2 OF 1901) (Contd)

ssion to her would be governrd by s 29. A I R 1922 [All 31=44 A 376=20 A L J 181 =A 65 I C 824.

—S. 22—Widow holds separately. She cannot be a cosharer with husband's relations even with zamindar's consent 2 U P L R (B R) 16

—S. 22—A Hindu widow, entitled to her husband's occupancy holding before the Act, dying after the Act, would pass succession to husband's brother, though he was not a sharer in cultivation. L R 3 A 283 (Rev)

—S. 22—Widow continuing in cultivation after husband's death acquires occupancy rights but forfeits them on re-marriage. L R 4 A 259 (Rev)

—S. 22—Joint interest in exproprietary rights would accrue to co-widows selling their proprietary rights. L R 3 A 61 (Rev)

—Ss. 22, 82—Interest of a Mahomedan widow succeeding to her husband is limited liable to come to an end on her death or re-marriage. She cannot, therefore, relinquish to the prejudice of the reversioner. 9 I C 894

—Ss. 22 and 58—Mohomedan widow succeeding to the occupancy holding of her husband before the Act does not forfeit her rights on re-marriage. L R 3 A 311 (Rev)

—S. 22—A Jat widow who succeeded to the holding of her husband while the Rent Act of 1881 was in force, would not lose by re-marriage her life-interest in the holding. 29 I C 399

—S. 22—Widow loses her interest on re-marriage. S. 2 of Act XV of 1856 does not apply to the interpretation of present section. 32 I C 801=42 I C 1135

—S. 22—A joint Hindu family holding the tenure, death of one member does not entitle the widow to succeed as under s. 22. Tenure devolves on the remaining members. 42 All 668=18 A L J 769=57 I C 272

—S. 22—A boy adopted into another family ceases to be a lineal descendant of his natural father. Thus he cannot succeed to his natural brother in preference to the latter's illegitimate son. 37 All 7=12 A L J 1231=27 I C 34.

—S. 22—Personal law of the parties cannot affect the provisions of s. 22. Grandsons are "male lineal descendants" and may be granted a decree for joint possession. (1912) 9 A L J 488=14 I C 181=34 A 419

—S. 22—The words "shall devolve" mean tenants cannot alter by will or other testamentary disposition the line of inheritance prescribed by the section. 13 R D 188; L R 10 A 75 Rev.=111 I C 718

—S. 22—Guardian looking after minor tenant's cultivation is deemed to be sharing in cultivation. 47 P W R 1916=32 I C 916

## AGRA TENANCY ACT (2 OF 1901) (Contd)

—S. 22—In the case of owner dying before, and his widow dying after the Act, the collaterals who were not in joint cultivation with him could not succeed after the widow, 26 I C 23

—S. 22—Illegitimate sons of sudras can succeed. L R 4 All 141 (Rev)

—S. 22—Illegitimate sons of an occupancy-tenant, who was not a Sudra, and who also alleged that they were his chelas, were not entitled to succeed in either capacity. 8 A L J 731

—S. 22—"Male lineal descendant" includes an illegitimate son of a sudra. A I R (1927) All 410=100 I C 650

—S. 22—A distant collateral who shared in cultivation cannot succeed when a nearer collateral is alive but who cannot succeed because he did not share in cultivation. 29 I C 417

—S. 22—There is no indication as to preference over of near descendants over the remote ones. A I R 1925 All 786=87 I C 668

—S. 22—Collateral not sharing in cultivation with deceased is not preferred, to collateral in possession. A I R 1930 All 518=L R 11 A 41 (Rev)=14 R D 117=Ind Rul (1930) All 885=127 I C 421

—S. 22—Sharing in cultivation amounts to sharing in whole khata. 1 U P L R (B R) 44

—S. 22 (b) (c)—If the heir entitled to under s. 22 be living, a collateral cannot succeed even though sharing in cultivation. 2 U P L R (B R) 23

—S. 22—There can be no sharing in cultivation during sub-lease. L R I A 137

—S. 22 (e)—Grandfather's brother's son can succeed whether the guardian of a minor shared in his cultivation depends on whether the agricultural stock of the guardian was pooled and the cultivation of the two holdings carried on jointly. 3 U P L R (B R) 77

—S. 22—Sharing in cultivation does not include helping in cultivation during illness; and stronger proof is necessary in cases of persons having separate holdings. 3 U P L R (B R) 85

—S. 22—Mother or father sharing in cultivation is not sufficient for son to succeed. L R 2 A 210 (Rev)

—S. 22—Daughter's son not sharing in cultivation cannot succeed. L R 3 A 353 (Rev)

—S. 22—Person cultivating on behalf of another cannot be said to share in cultivation. 4 U P L R (B R) 51=L R 3 A 359 (Rev)

Contra: 32 I C 916.

—S. 22—Collateral sharing in cultivation through agent is not entitled to succeed. L R 3 A 408 (Rev)

## AGRA TENANCY ACT (2 OF 1901) (Contd)

—S. 22—No collateral can succeed who did not share in the cultivation. L R 4 A 181 (Rev)

—S. 22—Cosharing with widow having only a life tenure is not sufficient. Joint living and cultivation with the last male owner must be proved. L R 4 A 234 (Rev)

—S. 22—Sub-letting is no sharing in cultivation and as such a daughter's son or a collateral is not entitled to succeed to exproprietary tenancy. A I R 1923 All 451=L R 5 A 21 Rev. See also A I R 1923 All 18=70 Ind Cas 820=73 I C 1030.

—S. 22—Tenancy in possession of mortgagee at the time of tenant's death—Prospective heir of the tenant can be said to have share in cultivation. A I R 1925 All 794=85 I C 690

—S. 22—"Sharing in cultivation" does not necessarily mean actual ploughing. A I R 1926 All 465=94 I C 190

—S. 22—Sharing in the cultivation of any part of the holding is sufficient. 29 I C 320

—S. 22—A share in cultivation means any share up to the entire cultivation of the holding. 13 A L J (Rev) 9=29 I C 427

—S. 22—Petty work by a boy of 8 or 9 is not "sharing in cultivation". 1 U P L R (B R) 36=54 I C 285

—S. 22—Where the cultivation is personal the sharing must be personal, but where a member of an agriculturist family attempting to eke out resources of the family by some extra work away from home does not cease to "share in the cultivation" 29 I C 22=8 S L R 329

—S. 22 (c)—Cosharing in cultivation by collateral must be with the principal tenant not with the latter's widow. Cosharing in cultivation of part of the holding is sufficient. 57 I C 51

—S. 22—Finding, based on assumptions, as to jointness of cultivation cannot be sustained. 2 U P L R (B R) 88.

—S. 22 (c)—Assisting in cultivation is "sharing in cultivation". 1 U P L 4=52 I C 185 (B R)

—S. 22—Mere admission of a stranger does not amount to transfer. 2 U P L R (B R) 92=60 I C 250

—S. 22—S. 22 does not apply to succession to tenancies under a lease executed before 1873. In such a case the terms of the lease govern the succession. L R 2 A 177 (Rev)

—S. 22—S. 2 preserves the rights of succession acquired under the old Act. 32 I C 767

—S. 22—Succession to tenant dying before the new Act is governed by the old Act. A I R 1922 All 84=44 A 327; 20 A L J 165=35 I C 537



## AGRA TENANCY ACT (2 OF 1901) (Contd)

—S. 22—Daughter does not succeed after widow. L R I A 141 (Rev)

—S. 22—Daughter succeeding while the Rent Act of 1881 was in force is a full tenant as such her son was entitled to succeed her. 23 I C 100

—S. 22—Male occupancy tenant dying before the new Act—Succession by widow—widow dying after the new Act—Brother's right to succeed without proving share in cultivation. 29 I C 548

—S. 22—Last male occupancy tenant dying before, and his widow dying after the Tenancy Act. In such a case the old Act would apply under which daughter's sons could succeed without sharing in cultivation. 30 I C 804

S. 22—Daughter's son being not a collateral he need not share cultivation with the grandfather to inherit the holding, under the old Rent Act. Right of reversion already vested in him at the death of the grandfather is not affected by the introduction of the new Act. 33 I C 330

—S. 22 (c)—If the occupancy tenant died before the new Act, his brother would succeed on the death of the former's widow, irrespective of whether or not he shared in cultivation. 1 U P L R 30=53 I C 85 (B R)

—S. 22—Expropriary rights, acquired by two persons in full right, would survive to one of them on the other dying without heirs. 31 I C 864

—S. 22—Where an occupancy tenant died before the Act leaving two daughters, one indigent and the other rich, and was succeeded by the former, held that the rich daughter was, entitled to inherit upon the death of the indigent daughter, in preference to the latter's son. 7 A L J 293=5 Ind. Cas. 384 =32 A 314.

—S. 22—Occupancy tenant dying before the Act. His widow dying after the Act. The daughter cannot succeed after the widow, if the right is not vested in her at the death of the last full tenant. 20 I C 7

See Contra: 30 I C 215

—S. 22—In a case where old Act applies, a daughter is entitled to succeed as against brothers and nephews. 37 All

658=13 A L J 947=30 I C 215

—S. 22—An uncle cultivating jointly with nephew inherits on the latter's death. 29 I C 9

—S. 22—Uncle sharing in cultivation with nephew succeeds the latter (Per-campbell J M Contra). 29 I C 409

—S. 22—Thakedar is any person who holds a tenure created by the act of zamindar. A Zamindar can create subordinate rights of any character e. g. to allow succession according to Hindu Law. 29 I C 649.

## AGRA TENANCY ACT (2 OF 1901) (Contd)

—Ss. 23, to 30, and 57 (b)—Defts holding land as batarau maurasi and the lease money being subject to revision at settlement Held, the lease was permanent heritable and as such exempt from the provisions of ss. 24 to 30. 33 I C 524.

—S. 22—Two persons jointly cultivating, one is entitled to redeem the mortgage of the portion created by the other. A I R 1924 All 147=74 I C 755

—S. 22—Land reverts to the landlord on tenant dying without heirs, but the landlord is not liable for the debts of the deceased. A I R 1923 All 374=75 I C 621

—S. 22—Sons and grandson's are equally entitled to enter their names in place of the deceased tenant. 3 U P L R (B R) 78

—S. 22—There is survivorship among cotenants, though the rule is modified by contract Act ss. 42 and 45 A I R 1930 All. 350=L R 11 A 90 Rev=(1930) A L J 811 =Ind. Rul. (1930) All 228=122 I C 404.

—S. 22—Two persons becoming expropriary tenants, the tenancy reverts to the other on the death of one without heirs. 31 I C 864

—S. 22—Sale reserving permanent tenancy right creates ordinary tenancy governed by s. 20. 1 U P L R (B R) 45

—S. 22—Successors-in-interest cannot redeem a mortgage effected by tenant. 2 U P L R (A) 417=62 I C 103

—Ss. 23 to 30—Apply to thakedars as they are tenants. A I R 1923 All 560=74 I C 971=5 L R A Rev. 28.

—Ss. 24, 25—There is no sub-lease where nothing is agreed to be paid in cash or kind. A I R 1927 All 567=49 A 820 =25 A L J 633=L R 8 A 139 Rev.

=112 I C 205

—Ss. 24, 25—There is no sub lease where occupancy land is granted for a fixed term in consideration of discharging debts. Such transaction is usufructuary mortgage falling entirely within T. P. Act, s. 58. A I R 1927 All 567=49 A 820=25 A L J 633=L R 8 A 139 Rev.=102 I C 205

—S. 24—Realisation of whole money before occupation by sub-tenant prevents a sub-lease. A I R 1927 All 785=102 I C 809=8 L R A (Rev) 214.

—Ss. 25, 31—Sub-lease by occupancy tenant for more than 5 years under the Act of 1881 is valid. Even assuming such sub-lease to come under the Act of 1901, s. 31 of that Act makes such sub-lease voidable by the landlord, but not void A W N (1905) 53 =2 A L J 156.

—Ss. 25—Where the sub-letting is from year to year for over 5 years, each sub-letting contravenes, s. 25. 30 I C 770.

—S. 25—A sub-lease contravening s. 25 is unenforceable A I 1923 All. 453=L R 5 A 31 Rev=73 I C 981.

## AGRA TENANCY ACT (2 OF 1901) (Contd)

—S. 25 (4)—Occupancy tenancy held by males; females and minors sublet in the life-time of the minors and females and again sub-let after their death but within 2 years of the former sub-letting—The sub-lease was held illegal. L R 3 A 83 (Rev.)

—S. 25 (4)—Expropriatory tenancy held jointly by members of both sexes sublet for more than five years. Tenants were held liable to ejectment L R 3 A 272 (Rev.)

—S. 25 (4)—One of the joint tenants being a female does not make it a female tenancy. 1 U P L R 7=52 I C 178 (B R.)

—S. 25—A bond was executed in favour of certain person. On the next day a sub-lease to son for 5 years at annual rental was created. Held, the sub-lease was not within s. 25 L R 3 A 505 (Rev.)

—S. 25—Suit between the occupancy tenant and his shikmi is not affected by a sub-lease for more than 5 years. L R 4 A 340 (Rev.)

—S. 25—Where the two transactions—a lease of occupancy holding for 5 years, and an arrangement to appropriate rent in lieu of interest on a loan—were distinct it was held not to be a usufructuary mortgage A I R 1930 All 375=(1930) A L J 332=L R 11 A 46 Rev=Ind Rul (1930) All 889=127 I C 425.

—S. 28—A perpetual lease by a widow having only life interest is not binding on the landholder after her death 29 I C 23.

—S. 28—Sub-lease by widow with right until death or re-marriage is valid to that extent only. L R 1 A 149 (Rev.)

—S. 28—A lease by a female expropriatory or occupancy tenant in her own right is binding on the landlord even though her interest ends before the expiry of the lease. 32 I C 713.

—S. 28—Quaere—whether a permanent lease by an expropriatory tenant is binding on the landholder. 32 I C 857.

—S. 28—Extinction of expropriatory rights makes the sub-lessee lessee of the landholder. Period towards accrual of occupancy right begins after the lease expires. L R 2 A 185 (Rev.)

—S. 28—does not apply to sub-letting by sir holder. L R 3 A 44 (Rev.)

—S. 28—Death of occupancy tenant terminates the sub-lease. L R 3 A 101 (Rev.)

—S. 28, 57 (a)—Occupancy rights are coextensive with interest of usufructuary mortgagee or sub-lessee of occupancy holding A I R 1930 All 352=(1930) A L J 599=Ind Rul (1930) All 842=126 I C 362.

—Ss. 30 and 111-A—Where an occupancy tenant is wrongly entered in Record of Rights as raiyat at fixed rate, the landlord can sue for enhancement of rent under s. 30

## AGRA TENANCY ACT (2 OF 1901) (Contd)

without getting the entry declared wrong. 2 P L J 124=1 P L W 434=(1917) Pat 108=39 I C 85..

—S. 31—Occupancy holding—Illegal transfer by tenant—Suit to eject in Civil Court barred. 13 A L J 49=26 I C 419..

—Ss. 31, 34—Expropriatory tenant not suing within 6 months of his dis-possession, loses his rights. 30 I C 811..

—S. 31 (2)—applies to a suit (a) for the cancellation of the transfer, or (b) for the ejectment of the tenant together with the transferee, or (c) for both the reliefs (a) and (b). In case (b) above, it is only if the object of the suit is to terminate the tenancy and to eject the tenant and his transferee that S. 31 (2) can apply. The ejectment of the transferee, assuming he is only a trespasser, will not necessarily imply extinguishment of the right of the tenant. 1932 A L J 567=16 R D 429=13 L R 266 (Rev)=139 I C 346=I R 1932 A 558=A I R 1932 A 473=A. L R 1932 A 854..

—S. 31 (2)—Limitation for a suit for ejectment on the ground of illegal sub-letting is one year. When there are several acts of illegal sub-letting, a fresh cause of action will arise in respect of each successive act. L R 3 A 329 (Rev.)

—S. 31—Landlord must get a sub-lease declared void within one year of the transfer. A I R 1923 All 401..

—Ss. 31, 20—Although a landholder cannot challenge a transfer after limitation, he has as against the transferee all the rights of the transferor on the latter dying without heirs. A I R 1924 All 841=78 I C 531..

—S. 31—does not apply to a mortgage of occupancy holding executed before the Act. 31 I C 456.

—Ss. 31, 25 and 57 (d)—S. 31 applies even to sub-lease in contravention of Act. L R 4 A 182 (Rev.)

—S. 32—Civil Court can entertain suit for partition of joint family which might include an occupancy holding. But that the Court could give the occupancy holding to one party taking from that party equivalent in value or a simple decree that the parties were entitled jointly to the holding. 36 All 461=12 A L J 696=24 I C 235..

—S. 32—Suit for possession of a portion of a holding lies. All that s. 32 lays down is that no court will entertain a suit for splitting up of a holding or distribution of the rents. 37 All 656=13 A L J 919=30 I C 89.

—S. 32 (2)—Where holding is divided among cotenants, a suit for possession of specific plots lies against cotenants, but not against landlord. A I R 1925 All 53 =80 I C 941



## AGRA TENANCY ACT (2 OF 1901) (Contd)

—S. 32-A suit for possession of a portion of an occupancy holding is not maintainable. A I R 1926 All 140=89 I C 19

—S. 32-Where one cosharer is kept out of possession by Co-tenants, suit by him for profits or damages is not barred A I R 1925 All 697=87 I C 782

—S. 32- does not apply to a suit to recover a fractional share in a holding against a person in lawful possession. A I R 1924 All 304=73 I C 462

—S. 32-Suit for ejectment Cannot be dismissed on the ground that all co-sharers under a bona fide division of a holding are not made parties. L R 4 A 195 (Rev)

—Ss. 33, 34-A tenant in possession under an agreement to pay rent is not affected by s 34, but is liable to pay the rent agreed upon, under s 33. 51 I C 15

—Ss. 34 and 63-It is within the competence of the landholder to treat a person occupying land without his consent as a non-occupancy tenant and to sue for his ejectment in the Revenue Court. A person occupying land without the consent of the landlord is a person who enters in possession without the express consent of the landlord and without any previous arrangement with him. 1932 A L J 605=16 R D 450=13 L R 225 (Rev.)=I R 1932 A 444=138 I C 552=A I R 1932 A 643 (646)=A L R 1932 A 1008

—S. 34-Suit under s 34 is not subject to any period of limitation. I U P L R 18 =52 I C 469 (B R)

—S. 34-Suit under-No limitation is prescribed. I U P I R 18=52 I C 469

—S 34-Tenant holding with consent of zamindar does not come under s 34 10 I C 224

—S. 34-does not apply to person coming into occupation with the landlord's consent. A I R 1925 All 812 =87 I C 590

—S. 34-Cultivation to the Knowledge of zamindar does not amount to consent A squatter treated as tenancy can-not count period of prior cultivation for accrual of occupancy rights. L R 3 A 7 (Rev)

See also L R 3 A 6 (Rev.)

—S. 34-applies to land held without consent. L R I A 23 (Rev.)

—S. 34-An owner of equity of redemption is not necessarily a person occupying with consent of the landlord and therefore the usufructuary mortgagee is entitled to eject such owner. 40 All 300=16 A L J 249 =44 I C 919

—S. 34-tenant is presumed to be holding without consent of landlord, till he begins to pay rent. 31 I C 486

—S. 34-Possession of land by deft. without consent of the owner entitles the owner to the rent for the period. 11 A L J 377=20 I C 188

## AGRA TENANCY ACT (2 OF 1901) (Contd)

—S. 34-Possession of land without consent of the owner entitles the owner to sue for rent even though the deft. were not in possession at the date of the suit. 35 All 512=11 A L J 786 =20 I C 892 (F B)

—Ss. 34, 95-Rent must have been agreed upon or fixed by court for a right of suit to arise. There is no difference on this point between the old and the new Acts. 8 A L J 1087=12 I C 180

—S. 34-Cause of action for rent under s. 34 is not part of the cause of action to recover possession and therefore not barred by O 2, r 2 of c p c. 35 All 512=11 A L J 786=20 I C 892 (F B)

—S. 34-Agreement to pay rent or assessment by Court is essential for a suit for rent by thakedars. A I R 1923 All 402 =75 I C 596

—S. 34-Rent-free tenant cannot be ejected under s 34. 2 U P L R (B R) 119

—S. 34-Held that non-payment of rent for 26 years, 12 of which had expired before the Act would not entitle the person to occupancy rights. 29 I C 235

—S. 34-Landlord may bring a suit for ejectment in a civil court without claiming or receiving rent, as the relationship of landlord and tenant commences only after rent has been paid or assessed. 17 A L J 646=50 I C 734

—S. 34-Occupancy tenancy without payment of rent for a long period is no defence. L R 3 A 157 (Rev)

—S. 34-Occupancy right accrues only after payment of rent. A I R 1926 All 678 =96 I C 187

—S. 34-Rent fixed by compromise between mortgagee proprietors in possession as lessee can be recovered by auction purchasers of proprietary interest after the mortgage is redeemed. A I R 1927 All 109 =98 I C 146

—S. 34-If a mortgagee enters the land after dispossession, he can be ejected as a trespasser. 2 U P L R 65=57 I C 8 (B R)

—S. 34-Express contract is necessary for a right of re-entry. 2 U P L R (B R) 160

—S. 34-High Court cannot entertain an appeal against the order of remand passed by District Judge. L R 2 A 55 (Rev)

—S. 34-applies to eject trespasser as tenant. 2 U P L R (B R) 90=60 I C 238

—S. 34-Suit by mortgagor for redemption, without showing when he reported the redemption, does not lie. 4 U P L R (B R) 46

—S. 34-does not apply to questions of civil nature. L R 3 A 137 (Rev)=4 U P L R (B R) 75

—S. 34-Tenant encroaching upon fixed rate holding can be ejected. L R 4 A 189 (Rev)

—S. 34-For an ejectment of a sub tenant, the zamindar should proceed under s. 34. L R 4 A 212 (Rev)

## AGRA TENANCY ACT (2 OF 1901) (Contd)

—Ss. 34, 177-If proprietary title is pleaded, appeal lies to District Court. A I R 1923 All 558=73 I C 584

—S. 34-applies to suit for recovery of rent by mortgagees from purchasers of the equity of redemption sold behind the back of the mortgagees A I R 1923 All 347=21 A L J 331=L R 4 A 206 Rev =74 I C 286

—S. 34-Ejection suit-Failure to plead s 34 is not fatal-Person in occupation without land holder's consent can be ejected as a non-occupancy tenant. A I R 1925 All 210=82 I C 651

—Ss. 34 and 199-Defendant can have question of proprietary right referred to Civil Court. A I R 1925 All 210=82 I C 651

—Ss. 34, 4 (5)-If the plff. be proved to be an occupancy tenant, in a suit for ejection, the debt will be treated as tenant, unless he proves extinguishment of plaintiff's right of occupancy. A I R 1927 All 212=L R 8 A 67 Rev=99 I C 531

—S. 34—Tenant under s. 34 does not include a trespasser A I R 1927 All 720=L R 8 A 297=105 I C 878

—S. 34—Suit for rent against all debts. in possession of land. If one of them were to die the suit will be against the other without bringing on record the representative of the deceased A I R 1928 All 555=L R 9 A 215 (Rev.)=Ind Rul (1929) All 528=116 I C 96

—Ss 34, 58, 79-Suit by tenant to eject some cosharers comes under ss. 34 and 58, and not s. 79 A I R 1930 All 398=(1930) A L J 684=Ind Rul (1930) All 453=124 I C 21.

—Ss. 34 and 58-Grove is not land and s. 34 does not apply. 32 I C 395.

—Ss. 34 and 58-Sowing of fodder crop would not alter a grove to agricultural holding so as to render the occupant liable to ejection. I U P L R 48=54 I C 626 (B R)

—S 34—Grove is not altered into agricultural land by pasturing cattle on it 2 U P L R (B R) 147.

—S 34—Grove-holder turning the land to cultivation may be treated as tenant liable to be ejected 2 U P L R 67=56 I C 980 (B R).

See also : 2 U P L R (B R) 72.

—S. 34—Grove-holder cultivating the land after the trees are cut down can be treated as a tenant and ejected L R 2 A 36 (Rev)

—S. 34—Tenant with long occupation cutting down grove-suit for ejection lies L R 3 A 160 (Rev.)

—S. 34—Applies to land taken possession of being cultivated or allowed to remain fallow, unless debt. sets up adverse title. L R 2 A 156 (Rev.)

—S. 34—Person in possession for more than 12 years—Landlord may elect to treat

## AGRA TENANCY ACT (2 OF 1901) (Contd)

him as trespasser or a tenant A I R 1923: All, 419=73 I C 212.

—S. 34—Person acquiring title by adverse possession cannot be ejected A I R. 1929 All 211=L R 10 A 179 (cr.)=Ind Rul. (1929) All 314=114 I C 890..

—Ss. 34, 156—Occupation without consent of the landlord or prescription for 12 years makes the person unassessable under s 34 or 156, but not so if the period be less than 12 years. A I R 1930 All 411=(1930) A L J 1032=Ind Rul (1930) All 683=125 I C 475.

—S. 35 Rent enhanced by oral agreement, if followed by payment, becomes "rent previously payable" under s 35 33 I C 417.

—Ss. 35, 41—Oral agreement not sufficient to enhance rent of an expropriary or occupancy tenant. A I R 1926 All 342=93 I C 1.

—S. 35—Registered agreement is essential for variation in the rate or kind of rent. L R 3 A 279 (Rev.)

—S. 35—" Sharing in cultivation " would include assisting an old uncle A I R. 1930 All 441=Ind Rul (1930) All 559=124 I C 559.

—S. 36—Expropriary rights can be claimed by adverse possession. Sir retains. its as such in the hands of an adverse owner. 31 I C 893.

—S. 36—Ex-proprietary rights arise from the date of the sale. Under s. 36 (2) rent becomes payable from that date. 13 U P L R (B R) 94 (1).

—S. 36—Usufructuary mortgage of sir—Contract to pay interest in case possession. not delivered—Mortgagee is entitled to interest on failure to get his name mutated or to have rent assessed A I R 1923 All 377=71 I C 382.

—S 36—Section does not apply to suit for recovery of value of fruits—'Exact' does not cover the direct appropriation of produce on the spot. A I R 1924 All 125=45 A 725=21 A L J 646 L R 4 A 331 (Rev.)=74 I C 502.

—Ss. 37 (b) and 43—Where land is held under a compromise which provides that the tenant is to be the permanent lessee and is to pay rent at a certain specified rate but is not given any proprietary right in the land, the tenant belongs to a class of persons covered by S 37 (b) A suit for enhancement of his rent, therefore, is maintainable under S. 43, 16 R D 273=13 L R 182 (Rev.)

—Ss. 37 and 121—Occupancy holding—dispute as regards quantity of share—suit for declaration and division of tenancy—jurisdiction A L R 1933 A 16=1932 A L J 349

—S 39—Where a decree for enhancement did not mention the date of enhancement. Held that enhancement took effect from date of appellate decree L R 2 A 179 (Rev.)

—Ss 40 (3) 44, 57—Suit for declaration that debt has no interest in the holding lies in Civil Court 631 I C 97

## AGRA TENANCY ACT (2 OF 1901) (Contd)

—Ss. 41, 43—Dismissal of a suit for enhancement does not bar a fresh suit  
31 I C 866.

—S. 41—Agreement to pay enhanced rent is valid provided there has been no legal enhancement within ten years of the agreement  
10 I C 465

—S. 41—Rent enhanced within ten years of legal enhancement by registered agreement can be recovered 39 All 318=15 A L J 117=37 I C 1001

—Ss. 41, 97—Agreement for enhancement, if not registered, must be in writing and attested under s. 97  
34 I C 369.

—S. 41—Agreement to enhance rent must be registered A I R 1922 All 55 (2)  
70 I C 495.

—Ss. 41, 35—Oral agreement is not sufficient to enhance the rent of expropriatory or occupancy tenancy A I R 1926 All 342  
=93 I C 1

—Ss. 43, 49—Where rent has been fixed in perpetuity by an agreement, the suit for enhancement lies under s. 49 and not under s. 43  
31 I C 459.

—S. 43 (a)—In enhancement, of account must be made of exemplar area of extent sufficient to make certain that the rates arrived at are really prevailing rates.  
31 I C 866 (U P B R)

—S. 43—In a suit for enhancement the tenants are entitled to demand that the enquiry should conclusively show the rates prevalent, and the trial is not proper where there is nothing to show how the rates applied were obtained, or what was the exemplar area accepted or how the rates were worked out.  
31 I C 889.

—Ss. 43, 44—Rents can only be enhanced in accordance with prevailing rates; assessment of fair rates is unknown to the law. To find out prevailing rates is to take the average rate which can be calculated with reference to the area held at each rate and not a mere arithmetical average of the various rates  
1 U P L R 23=52 I C 405.

—Ss 43 (a) 44 (a) Enquire as to rates—Villages with land of similar quality in the same settlement circle can be considered.  
2 U P L R (B R) 39=L R I A 87 (Rev)

—S. 43—Quaere—whether the land not recorded as occupancy can be taken into consideration 4 U P L R (B R) 45=L R 3 A 406

—S 43 (1) (b)—In enhancement rise in prices by competition rates should be considered  
L R 4 A 48 (Rev)

—S. 43—Suit for enhancement of rent for one holding was paid in lump is not maintainable. The rent for that holding must first be determined.  
32 I C 734

—S. 43 Rise in prices can be estimated by comparing prices at the date of fixing rent and date of suit. Exceptional prices

## AGRA TENANCY ACT (2 OF 1901) (Contd)

temporary conditions should not be considered  
2 U P L R 83=57 I C 816 (B R)

—S. 43 A compromise with mukararidars will not bar a suit for enhancement by thekadars.  
4 U P L R 20 (Rev).

—Ss. 43, 44—Settlement Officer can apply circle rates during settlement, but an Asst. Collector trying suit for enhancement cannot do so. Latter must examine exemplars of his own selection 4 U P L R (B R) 90.

—43 to 46—Recorded rent must be decreed by Court except in case of clerical error. A I R 1924 All 429=46 A 316=22 A L J 212=L R 5 A 52 (Rev.)=78 I C 863

—Ss. 47 and 17—Where the parties compromised as to enhancement of rent and dropped the ejectment proceedings, but the compromise was not made part of the decree and also was not registered, it was held that the compromise was inoperative 14 A L J 57=34 I C 234.

—S. 47—Provision in a lease for increase of rent in last year of the lease confers no right on the tenant to continue in possession after the expiry of the lease and s. 47 does not apply to such a case.  
2 U P L R 36=56 I C 43

—S. 47 A—Slips containing extracts from record of rights are not instrument of agreement.  
L R 4 A 151 (Rev.)

—S. 47 A—Tenant will not be protected merely by oral agreement proved by the Record of Rights.  
L R 4 A 151 (Rev.)

—S. 47—An unregistered agreement for enhancement cannot be pleaded in an ejectment suit L R 1 A 115 (Rev.)=2 U P L R (B. R.) 94=60 I C 260

—S. 47—Agreement for enhancement is not binding unless registered. It makes no difference that the terms had been embodied in a decree. A I R (1931) All 118= (1930) A L J 324=Ind Rul (1930) All 315=122 I C 763

—S. 47—Where a tenant agreed to pay higher rent on Zamindar's undertaking not to eject for 5 years, he cannot be ejected before 5 years.  
L R 4 A 363 (Rev.)

—Ss 47, 13 (b)—Agreement for change of rent on re-admission of the tenant need not be registered. A I R 1929 All 78=L R 10 A 101 Rev=111 I C 742

—S. 47—One of the joint tenants cannot agree with the landlord, as to enhancement. A I R 1928 All 214=L R 9= A 63 Rev.=108 I C 703

—S. 47—"Rent payable" means rent actually payable at the time of making the record. A I R 1928 All 365=L R 9 A 137 (rev.)=Ind Rul. (1929) All 529=115 I C 273

—Ss. 49, 43—Perpetual rent cannot be fixed by agreement.  
31 I C 459

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

—Ss. 49, 97—Attestation by Revenue Court is necessary to an agreement to enhance rent less than Rs. 100 Endorsement showing consent and identity of parties is sufficient attestation. A I R 1927 All 106=98 I C 503

—Ss. 50, 154—Former proceeding for assessment on rent free land but no rent being actually assessed is no bar to a suit for resumption. 29 I C 5

—S. 51—Thakadar or lessee is also protected by S 51 A I R 1924 All 906=22 A L J 758=L R 5 A 241 Rev.=80 I C 8 =45 A 840

—S. 51 (5)—Order suspending or remitting arrears of rent—Distrain of crops by Zamindar is not an offence under S 188 I P Code 13 A L J 619=30 I C 722=16 Cr, L J 674

—S. 51—Remission of Govt. revenue granted—Biswadaran Sahiq are entitled to benefit of remission 19 A L J 681=64 I C 153

—S. 52—Decree for arrears of rent obtained—Decree not satisfied with 15 days—Suit for ejectment filed—Held a tenant can pay the decretal amount at any time before the order for ejectment is passed. 29 I C 496

—S. 52—Proceedings under s. 52 are not necessary to alter grain-rent. 33 I C 419

—S. 52—Previous notification is necessary for a suit under s. 52. L R 3 A 432 (Rev.)

—Ss. 56, 57—A suit to eject a tenant from pasture land lies in civil court 15 I C 743

—S. 56—Applies to sub-lease for life at fixed rent of a portion of occupancy holding suit to eject does not lie in Civil Court. A I R 1923 All 343=71 I C 381

—S. 57 (d)—Tenant planting trees in contravention of a contract is liable to be ejected. 10 I C 28

—S. 57 (b)—Landholder; without whose written permission, the tenant has planted trees, must sue such tenant within one year L R 3 A 106 (Rev.)

—S. 57 (b) and 177—Suit for ejectment—Appeal—Brick-Klin on part of land—Ejectment from whole see Sch I Group B. 13 A L J 302=28 I C 298=37 A 272

—S. 57 (b)—Where a tenant construct a building on a small portion of his holding he can be ejected from that portion only I O L J 276=24 I C 783

See to same effect L R 3 A 429 (Rev.)

—S. 57 (b)—Entry as fixed rate tenancy means tenancy for agricultural purposes—tenant is liable to be ejected for building a house L R 3 A 401

—Ss. 57, 65, 167—Cutting of trees is not necessarily detrimental to land within s. 57. 40 All 646=16 A L J 621=46 I C 971

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

—S. 57 (d)—Tenant cannot be ejected for sub-letting grove land A I R 1923 All 168=71 I C 350.

—S. 57—Turning agricultural land into grove creates liability to ejectment—Period is one year A I R 1924 All 430=22 A L J 70=L R 5 A 34 Rev=79 I C 599.

—S. 57—Where a land was leased for agricultural purposes, but used by the lessee for non-agricultural purposes it was held the—Landlord cannot be presumed to have contracted out of his privilege under s. 57 even though there was no agreement for ejectment on the ground of non-agricultural use A I R 1928 All 698=L R 10 A 73 Rev=110 I C 750

—S. 57 (d) and Sch C No. 18—Ex-proprietary tenant subletting for more than 5 years—Suit for ejecting the sub-lessee who set up title under zuripeshgi lease—Held Sch C applied and appeal lay to Revenue Court 41 All 270=17 A L J 189=49 I C 732

—S. 57 (c)—Lease for seven years—Provision for re-entry does not make tenant a tenant-at-will. L R 3 A 242 (Rev.)

—S. 57, 59—Tenant who pays full amount of the decree but not interest and costs cannot be ejected merely on the latter ground L R 3 A 258 (Rev)

—S. 57 (a)—Tenant should not be ejected before the expiry of the year for which decreed arrears are due L R 3 A 287 (Rev)

—Ss. 57, 59—Failure to pay decretal amount for arrears of rent does not entail forfeiture L R 3 A 345 (Rev)

—Ss. 57 and 63 (a)—Alienation by Hindu widow—Reversioners cannot eject alienee unless they get the alienations set aside. A I R 1923 All 367=75 I C 681

—S. 57 (a)—Tenant cannot be ejected without decree on the ground of non-payment of rent despite a Contract to that effect A I R 1923 All 14=77 I C 927=20 A L J 769=45 A 5

—S. 57—Contract for ejectment for non-payment of rent is void. A I R 1928 All 698=L R 10 A 73 Rev=110 I C 750

—Ss. 57 (c), 58 (b)—S. 58 (b), and not s. 57 (c) applies to condition in an agreement relating to evacuation of land leased A I R 1925 All 679=85 I C 575

—Ss. 57, 177—It is only in cases falling under s. 177 (a) (b) (c) (e) or (f) that appeal lies to Dist. Judge from decision by Asst. Collector A I R 1927 All 564=L R 8 A 74 Rev=102 I C 184

—Ss. 57 (b) 66—Suit based on s. 57 (b) does not come under s. 66 A I R 1928 All 624=L R 9 A 232 Rev=12 R D 419 Ind Rul (1929) All 539=116 I C 283

—Ss. 58, 95, 167—Non-occupancy tenant

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

-Lease from agent of zamindar-Suit in ejectment by the zamindar in Revenue Court  
-Subsequent suit in Civil Court for declaration of the invalidity of the lease is maintainable as the authority of the agent to execute a lease was not in issue in the Revenue Court 23 I C 705

-S. 58-A mortgagee of sir land is entitled to possession. A subsequent mortgage of zamindari rights does not affect his position 25 I C 272

-S. 58-Father was ejected and the land was re-let to his joint minor son. Held the tenancy was continuous. 31 I C 884

-Ss. 58, 79-A grove holder cannot sue to eject a landlord who took forcible possession of the grove unless he proves that he was the tenant of the landlord. 31 I C 453

-S. 58-The fact that land let for agricultural purposes is now converted into other uses is no bar to an ejectment under s. 58. 32 I C 576.

-S. 58-A suit for ejectment brought in the 12th year of occupation can lie even though the tenant had a right to hold for 12 years. 33 I C 427.

-S. 58-Usufructuary mortgage of a grove is a valid transfer and vests the mortgagors rights in the mortgagee 34 I C 84.

-Ss. 58 and 177 (c)-Ejectment suit-Plea of tenancy from third person-Held question of proprietary title being issue appeal lay to the District Judge 38 All 465  
=14 A L J 666=35 I C 739

-S. 58-In an ejectment suit, the deft's plea that he holds the land as his own khud kash without liability to pay rent to any one raises a question of proprietary title and appeal lies to Dist. Judge 2 U P L R (B R) 53=56 I C 549

-Ss 58 177-Claim that land is khud khash is a question as to proprietary title, L R 3 A 300 (Rev)

-Ss. 58, 177, cl. (c). In a suit for ejectment under section 58 if the defendant raises a question of proprietary title an appeal lies to the District Judge A I R 1923 All 414=71 I C 308

-Ss. 58, 83-Agreement to surrender expropriary rights is unenforceable. But if after a sale-deed has been executed and an occupancy tenancy has come into existence, surrender of expropriary rights is good. 36 I C 1007

-S. 58-An occupancy tenant whose tenancy was created before the Act cannot prejudice his mortgagee's right by surrendering his tenancy. 39 All 186=15 A L J 44=39 I C 585

-S. 58-It is possible that one of several tenants of the same tenancy should

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

be liable to ejectment while others may not be so liable. A I R 1931 All 413=1931 A L J 321=15 R D 370=Ind Rul (1931) All 437  
=131 I C 869

-S. 58-Person abandoning sir rights cannot take part in subsequent partition among cosharers. 2 U P L R (B R) 84.

-Ss. 58 34-A suit for ejectment under s. 58 does not lie against a grove holder who does not pay any rent nor does s. 34 apply to such a suit. 32 I C 395

See to the same effect. 31 I C 498.

-S. 58-Grove-holder can be ejected, as he is a tenant 4 U P L R 55 (B R)=L R 3 A 356 (Rev)

-S. 58-Revenue Court cannot eject a party from a grove. 39 I C 771

-S. 58-Suit for ejectment with respect to a grove is maintainable L R 3 A 88 (Rev)

-S. 58-Where land is given for planting trees, the grove holder cannot be ejected under s. 58 unless there is some special custom or contract to that effect But where an established grove is let for rent a suit for ejectment will lie under s. 58 L R 4 A 71 (Rev)

-S. 58-Non-occupancy tenants can be ejected where part of a grove is let out for cultivation, the whole land is deemed to be let or held for agricultural purpose L R 3 A 399 (Rev).

-S. 58-In an ejectment suit the plff. produced a lease for 8 years in answer to the defts. plea of acquisition of occupancy rights. Held that by producing the lease the plff. had changed his cause of action and that he was not bound to base his claim on the lease. 56 I C 977.

-Ss. 58 34-Ejected tenant holding over is a trespasser. 2 U P L R (B R) 122

-S. 58-Holding on sufferance without payment of rent does not create any right 2 U P L R (B R) 93=L R 1 A 43 (Rev)=60 I C 253

-Ss. 58 and 34-Tenant failing in an ejectment suit does not necessarily become a person holding without consent. L R 1 A 194 (Rev.)

-S. 58-Lease by mortgagee in possession binds the mortgagor even after redemption. 3 U P L R (B R) 9.

-S. 58-No period of limitation is prescribed for an ejectment suit. 3 U P L R (B R) 32.

-S. 58 (a)-Tenant, who has sublet, in contravention of the law, must be sued within one year from the date of the sublease. L R 2 A 63 (Rev.)

-Ss 58, 63-A suit for rent and for possession of land used for grazing is in fact one for ejectment and lies in Revenue Court. 43 A 445=19 A L J 292=60 I C 770.

-S. 58 (b)-If a suit under A. 58 (b) in Revenue Court were dismissed, appeal lies to Dist Judge; and if appeal is allowed



## AGRA TENANCY ACT (2 OF 1901) (Contd.)

no revision lies to High Court. A I R 1921 All 236-19 A L J 596-63 I C 891.

—S. 58—Revenue papers reciting that a tenant holds under a seven years registered lease would not give any right if the lease was not in existence. 4 U P L A (B R) 83.

—S. 58—Mortgage of occupancy rights extinguishes on extinction of occupancy right. L R 3 A 304 (Rev.)

—S. 58—Simple mortgage before the Act and also a usufructuary mortgage including sir land—Purchaser under decree on simple mortgage could eject the subsequent mortgagee, as the proprietor did not get proprietary rights in sir. L R 3 A 305 (Rev.)

—S. 58—In a suit for ejectment it is for the tenant to show that he has a permanent right to stay on the land and that he cannot be ejected by the proprietor. A I R 1924 All 915-L R 5 A 163 Rev-82 I C 594.

—S. 58—Expiry of theka at or before current agricultural year is a ground for ejecting a thekadadar, and it is for the plff to prove clearly that deft had no right to remain in possession. A I R 1926 All 248 -91 I C 863.

—S. 58—A squatter can be treated as sub-tenant, by the occupancy tenant, and be sued as such, even though he happens to be a landlord. A I R 1927

All 727-L R 8 A 295 Rev-106 I C 307.

—Ss. 59, 60—Utmost care and due and reasonable diligence is necessary in service of notice. 32 I C 17.

—S. 59—The Board will not interfere in revision of the ejectment order passed by the lower Court after allowing time to the tenant. But if the tenant asked for adjournment and paid considerable sum, and the Court refused extension for the balance and ordered ejectment and refused an application to accept the balance after 4 days. Held, the application of the tenant to accept the balance and cancel ejectment was one for review. L R 2 A 235 (Rev.)

—Ss. 59 and 60—Proceedings under s 59 are not proceedings in execution. Consequently the Assistant Collector can recognise a payment by the judgment-debtor outside Court. L R 3 A 297 (Rev.)

—S. 59—Where decision in Rev. Court is obtained by fraud, a suit will lie in Civil Court for a declaration that it does not affect plaintiffs' rights even though a Civil Court has no jurisdiction to set aside the proceedings in a Revenue Court. A I R 1922 All 294-66 I C 559.

—S. 59—An ejectment under s. 59 breaks the tenure even if the tenant continued to occupy the same land. L R 4 A 217 (Rev.)

—Ss. 59 and 61—O. 22 r. 2 of c. p. c

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

applies to proceedings for ejectment under s. 59. L R 4 A 261 (Rev.)

—Ss. 60, 185—In a notice under s. 60 time runs from the date of the issue of the notice. Omission to state date is a material irregularity. 30 I C 788.

—Ss. 60, 61—The Asst. Collector was held to have committed a gross and palpable error of law in ordering ejectment before expiry of 15 days required by ss. 60 and 61. 32 I C 755.

—S. 61—Where an application for the deposit of decretal amount was dismissed but a subsequent application to reconsider the first application was treated as an application for review and deposit was allowed to be made. Held, that the Court's order amounted to one allowing further time under s. 61. 3 U P L R (B R) 69.

—S. 63—Months, specified in the Act for filing ejectment suits, are prescribed for administrative convenience, not for limitation. 55 I C 926.

—S. 63—Suit for ejectment must be filed within the time fixed in the Act, the bar being as rigid as that of limitation. 3 U P L R (B R) 32.

—S. 63 (2)—Period fixed for filing a suit being not a period of limitation, in the ordinary sense, a suit for ejectment will not fail by reason of not bringing on the record all the necessary parties before the date fixed for filing such a suit. L R 3 A 393 (Rev.)

—S. 63—A cosharer who can collect rent is a landlord for the purposes of the Act and can sue in ejectment. A I R 1924 All 165-L R 4 A 329 Rev-74 I C 197.

—S. 63—Where tenants never pay any rent to plffs, mafidars, nor did they ever assert their title to the land to the knowledge of the plffs, they were held to be sub-tenants and liable to be ejected. A I R 1924 All 293-L R 4 A 221 Rev-74 I C 681.

—Ss. 63 and 34—Ejectment of person occupying land without landlord's consent—Landlord's suit for, treating him as a non-occupancy tenant—Jurisdiction to entertain—Revenue Court has. 1932 A L J 605-16 R D 450-138 I C 525-I R (1932) A 444-13 L R 225 (Rev.)=A I R 1932 A 643 (646)=A L R (1932) A 1008.

—S. 65 (2)—Suit for injunction and damages against tenant using water from a well in one holding for irrigating other plots of land, which he held as subtenant from another landlord, lies in Civil Court and not in Rev. Court. A I R 1925 All 571-85 I C 537.

—S. 65—Authoritative report and notice to the tenant are necessary for a conditional order of ejectment. L R 3 A 429 (Rev.)

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

—S. 65—The section may be used where there are used for non-agricultural purposes is small. A I R 1928 All 698=L R 10 A 73 Rev=110 I C 750

—S. 65—The fact that in a previous suit the ex-proprietary tenants were given benefit of s. 65 does not disentitle them from getting the benefit of s. 65 in a fresh suit. A I R 1928 All 624; L R 9 A 232 Rev =Ind. Rul (1929) All 539=116 I C 283.

—S. 66 (1)—Power to grant time for ejectment of sub-tenant is discretionary with the Court and when exercised judicially will not be interfered with in appeal. 1 U P L R 7=52 I C 178 (B R).

—S. 66—Board will not interfere with the discretion in the lower Courts under s. 66. 3 U P L R (B R) 62.

—S. 65—Omission to consider applicability of s. 66 is a ground for revision, unless if the point was considered and the benefit of the section refused. 30 I C 770.

—S. 66—Benefit of section should not be given to sub-tenants for long period but may be given to tenant who was formerly a co-sharer. L R 2 A 100 (Rev.)

—S. 66—Where a tenant asked for the benefit of s. 66, but the commissioners did not decide the point, it was held that there was a ground for interference in revision. L R 4 A 39 (Rev.)

—Ss. 66—A tenant subletting and taking benefit of s. 66 cannot again sub-let in contravention of the provisions of the Act. A I R 1928 All 624=L R 9 A 232 Rev =Ind. Rul. (1929) All 539=116 I C 283. See also. L R 3 A 435 (Rev.)

—S. 66—Does not apply to a suit based on s. 57 (b). A I R 1928 All 624=L R 9 A 232 Rev=Ind. Rul. (1929) All 539=116 I C 283.

—Ss. 67, 197—Court cannot alter the nature of the suit. Dist Judge must dispose of an appeal before him as if the suit had been instituted in the right Court to try the same. 16 I C 339.

—S. 67—The pleas of acquisition of occupancy rights and that the ejectment suit was the result of the deft's refusal to pay enhanced rent can be raised as alternative defences to an ejectment suit. L R 4 A 249 (Rev.)

—S. 68—A thekadar has the ordinary powers of a landlord including the power to grant a lease. A I R 1922 Oudh 216=80 I C 199.

—S. 73—The ejectment takes effect from the beginning of that year though formal possession is given shortly after the beginning of the next Fasli year. L R 4 A 68 (Rev)

—S. 73—A decree in ejectment takes effect from 1 st. July even if possession is actually delivered later. L R 4 A 334 (Rev.)

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

—S. 75—Status of tenancy is not affected by payment under temporary arrangement. L R 1 A 142 (Rev.)

—S. 75 (2)—Where tenant is allowed to remain in possession till crops are cut, he cannot count this period towards acquisition of occupancy rights. L R 4 A 371 (Rev)

—S. 75—Events subsequent to the date of the cause of action will not be considered except in exceptional cases. A I R 1929 All 341=(1929) A L J 267=L R 10 A 166 Rev.=Ind. Rul. (1930) All 786=126 I C 225

—S. 75—Compensation for rose trees depend upon their age, condition and prospective flower producing capability at the material date. A I R 1929 All 341=(1929) A L J 267=L R 10 A 166 Rev.=Ind. Rul. (1930) All 786=126 I C 226

—S. 75—Landlord is bound to exercise his option before he come to Court, and an option once exercised cannot be resiled. A I R 1929 All 341=(1929) A L J 267=L R 10 A Rev. 166=Ind. Rul. (1930) All 786=126 I C 226

—S. 76 (1)—Jasmine and bela plants come within the category of standing crop or other ungathered product. 7 A L J 397 =6 Ind. Cas. 74=32 A 458.

—Ss. 77, 35 and 273—A tenant does not ipso facto become a trespasser on the day when the period of his lease expires. The tenant cannot be ejected otherwise than in accordance with the provisions of s. 77. A I R 1931 All 198=L R 12 A 35 Rev=15 R D 162=Ind. Rul. (1931) All 185 =129 I C 553

—S. 78—Compromise in an ejectment suit does not give any fresh statutory tenure L R 2 A 59 (Rev)

—S. 79—Does not apply to dispute between tenants. 28 I C 452

—S. 79—Grove-holder does not become a tenant ipso facto on bringing the grove under cultivation; he cannot, therefore, sue under s. 79 on dispossession. 29 I C 447

—S. 79—Where a tenant agreed to relinquish but not surrender, and the zamindar let the holding to another. Held, it amounted to illegal dispossession. 31 I C 794

—S. 79—Suit by rent-free grantee for possession against zamindar lies in Civil Court. 42 All 412=18 A L J 388 =55 I C 594.

—S. 79—Suit by rent-free grantees against the zamindar for possession lies in Civil Court. A I R 1924 All 479=L R 5 A 103 Rev=79 I C 587

—S. 79—Does not apply where the dispossession is not by the landlord. In such a case suit for possession will lie in



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Civil Court. A I R 1924 All 678=22 A L J 713=82 I C 251=46 A 717.

—Ss. 79 and 169—Revenue Court cannot entertain suit against a person other than land-holder even though landlord authorizes him to eject plaintiff. A I R 1926 All 531=24 A L J 591=95 I C 36

—S. 79—Suit by tenant in an undivided mahal lies in Civil Court on dispossession by co-sharer. A I R 1924 All 572=22 A L J 570=16 A 690=84 I C 117

—S. 79—Against alienees of widow who had become proprietors by subsequent partition does not fall within s. 79 as there is no case of ejection of the plaintiffs by the landlords. (1931) A L J 603=Ind Rul (1931) All 681=133 I C 473

—S. 79—Does not apply to auction-purchaser of the ejected tenant's interest, not in possession. 88 I C 224=A I R 1925 All 580=23 A L J 409=47 A 589

—S. 79—Does not apply to tenant not in possession and hence not ejected. A I R 1930 All 311=L R 11 A 50 Rev=Ind Rul (1930) All 910=127 I C 588

—S. 73—Transferee of occupancy tenant is not a person "rejected". Suit by such transferee for possession lies in Civil Court and the ordinary law of limitation applies. A I R 1927 All 26=97 I C 550

—S. 79—Some heirs of a Mahomedan occupancy tenant being recognised as tenants by landlord in compromise in ejectment suit, the other heirs can sue for possession in Civil Court. Ind Rul (1929) All 815=A I R 1929 All 868=118 I C 47

—S. 79—Suit for possession under s. 79 lies only in Revenue Court. 56 I C 946

—S. 79—The plaintiffs are the tenants of the lands in dispute. They had not been ousted by the whole body of the proprietors. Defendants 1 to 4 are only some of the proprietors and any dispossession of the plaintiffs by them cannot be treated as a dispossession of a tenant by the landholder. The suit is conizable by the Civil Court and is governed by the 12 years rule of limitation. 1931 A L J 1098=16 R D 120=13 L R 24 (Rev)=135 I C 555=1 R 1932 A 91=A I R 1932 A 134 (136)=A L R 1932 A 135

—Ss. 79, 167—Only Revenue Courts can take cognizance of a suit for possession by person professing to be an occupancy tenant. L R 4 A 291=71 I C 447=A I R 1923 All 257

—S. 79—Provisions of Rent Act cannot be evaded by filing suit in Civil Court. A I R 1922 All 317=L R 3 A 233=69 I C 811

—Ss. 79, 167—A Revenue Court's decree cannot be declared void by Civil Court on ground of unlawful proceedings, especially in view of the tenant's remedy under s. 79. A I R 1928 All 621=26 A I J 834=12 R D 628=113 I C 829

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—Ss. 79, 81—Where a lessee from the zamindar dispossession a previous lessee he must be deemed to have been disposed by the zamindar and a suit within 6 months lies under s. 79. 13 A L J 295=21 I C 914

—Ss. 79, 167—Mortgagee in possession of fixed rate holding—Payment of rent by him to landlord—He is a tenant within the meaning of s. 79 and a suit for possession of such holding lies in Revenue Court (1912) 10 A L J 178=16 I C 1007

—S. 79—Mortgage of fixed rate tenancy—Ejectment of Tenant—Purchase by mortgagee in execution of his decree—Held that the mortgagee was never in possession even constructively and had not been dispossessed within s. 79, and therefore, Civil Court could entertain the suit for possession. 13 A L J 329=28 I C 302

—S. 79—Mortgagee—purchaser of a holding taking possession—Subsequent dispossession by zamindar—Suit for possession being within s. 79 lay in Revenue Court. 39 All 455=15 A L J 502=39 I C 944

—S. 79—Fixed rate tenancy mortgaged—Dispossession of mortgagee—The mortgagor's cause of action against the landlord arises from the date of the dispossession of the mortgagee. I U P L R 33=54 I C 293 (B R)

—S. 79—Fixed rate tenancy—succession—successor dispossessed by zamindar—suit for possession lies in Revenue Court. 36 All 55=12 All L J 29=22 I C 668

—S. 79—Tenant wrongfully dispossessed loses his rights, unless he sues the landlord within six months for possession. 4 U P L R 15 Rev

—Ss. 79, 95—Suit by tenant for declaration that he is the son of the last tenant and for possession—Suit brought after 2 years from dispossession—Declaratory relief useless. 11 A L J 310=35 All 299=18 I C 957

—S. 79—On wrongful ejectment by landlord omission to apply to recover possession within 6 months by tenant bars his remedy and extinguishes his rights also. 66 I C 856=4 U P L R A 104=A I R 1922 All 124

S. 79—Suit by tenant against zamindar for possession must be brought within 6 months of dispossession. L R 5 A 15 Rev=73 I C 1012=A I R 1923 All 517

—Ss. 79 and 81—Suit for dispossession by tenant against subsequent lessee from the zamindar is governed by 6 months rule of limitation. A I R 1923 All 517=L R 5 A 15 Rev=73 I C 1012

—S. 79—Where a mortgagor obtained formal possession on redemption, but not actual possession within 6 months, the occupancy tenancy was held to be extinguished. A I R 1927 All 551=L R 8 A 106 Rev=101 I C 591

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

—S 79—Suit for ejectment by real tenant can be brought within ordinary period of limitation acceptance of rent from trespasser does not amount to his recognition as tenant nor does it mean that the suit is brought through zemindar's agency A I R 1929 All 196 = L R 9 A 180 Rev = Ind Rul (1929) All 332 = 114 I C 908

—S 79 Person having expropriatory rights can sue purchaser of sir land for possession even if the purchaser was the mortgagee of the land purchased L R 4 A 318 (Rev)

—S 79 (1)—Suit for value of the crops removed by the lessors is in effect a suit for compensation for ejectment against landlord and lies only in Revenue Court 13 A L J 102 = 27 I C 532 (1)

—S 79 (b)—Suit for value of crops wrongfully cut and taken by landlord lies in Civil Court, plff. not alleging dispossession. 18 A L J 434 = 58 I C 511.

—S 79—Illegal delivery of possession decreed in favour of a landlord, who has withdrawn from the ejectment suit and failed to prove that the respondent was an occupancy tenant, should be set aside. Such an order under s 79 puts the parties in their original position. 2 U P L R (B R) 109

—S 79—Suit for possession does not lie until the area in which expropriatory rights were to be granted is defined 4 U P L R (B R) 33 = L R 2 A 70 (Rev).

—Ss 79 and 87—A Tahsildar's finding as to abandonment on an application under s. 87 is not admissible in evidence in a suit under s. 79 L R 3 A 175 (Rev)

—S 79—Grove is not a holding A I R 1922 All 301 = 3 U P L R A 117 = 19 A L J 749 = 64 I C 248 (F B)

—S 79—Dispossession of groveholder for 6 months does not take away his right, as grove is not a holding. A I R 1925 All 776 = 88 I C 540.

—S 79—Adverse possession cannot be claimed by a sub-tenant against permanent lessee from occupancy tenant. A I R 1922 All 277 = 66 I C 529.

—S 79—On death of tenant names of wife, brothers and sister's son were recorded—Suit by brother after wife's death for possession on declaration that sister's son had no right is barred by s. 79 A I R 1922 All 317 = 69 I C 811.

—S 79—Ejectment by a cosharer who is not a lambardar is not an ejectment by the land-holder. A I R 1924 All 507 = L R 5 A 116 Rev = 77 I C 1025.

—S 79—does not apply where the ejectment by lambardar jointly with another co-sharer but not under Tenancy Act A I R 1927 All 629 = L R 8 A 237 Rev = 104 I C 465

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—S. 79—One of the cosharers ejecting tenant otherwise than in accordance with the provisions of the Act s. 79 does not apply A I R 1927 All 212 = L R 8 A 67 Rev = 99 I C 531

—S. 79—On dispossession by one of many landlords, the tenant can sue for possession in Civil Court A I R 1928 All 206 = L R 9 A 35 Rev = 108 I C 132

—Ss 79, 34, 58—Where a tenant is dispossessed not by or on behalf of the whole body of cosharers, a suit by the tenant to eject the cosharers lies under ss 34 and 58 and not under S 79 A I R 1930 All 398 = (1930) A L J 684 = Ind Rul (1930) All 453 = 124 I C 21

—S 79—Ejectment by landlord means by all co-sharers A I R 1924 All 431 = 22 A L J 113 = L R 5 A 37 Rev = 78 I C 1041.

—S. 79 = Applies only to forcible ejectment, and not to ejectment by mutual consent. 78 I C 1026 = A I R 1924 All 834

—S 79—Applies where there has been constrictive as well as actual or physical ejectment 79 I C 566 = A I R 1924 All 678

—S 79—Applies whether the ejectment was constructive, actual physical or without any force L R 9 A 124 Rev = 113 I C 721

—S 79—Applies only when a tenant is ejected otherwise than in accordance with the provisions of the Act A I R 1928 All 532 = L R 9 A 238 Rev = 26 A L J 820 = 111 I C 238 = 50 A 857

—S 79—Applies to a suit by deceased tenants brother for possession against the illegitimate son of the tenant, who was in possession after the tenant's death. The fact that the zamindar did not defend is immaterial. L R 5 A 257 Rev = 79 I C 318 = A I R 1924 All 615

—S. 79—Sale of sir land was occupied by relinquishment of expropriatory rights—Relinquishment was repudiated at mutation and in proceeding under s. 36, U. P. Land Revenue Act—Expropriatory holding of vendor demarcated—S 79 would not extinguish vendor's claim—The expropriatory holding itself came into existence as a defined area only after the termination of the proceedings under s. 36 of the Land Revenue Act A I R 1927 All 126 = 98 I C 907

—S 79—Usufructuary mortgage by occupancy tenant—Tenant applying for his name to be recorded as occupancy tenant—Objection by zamindar was successful—Tenant did not sue within six months—The successful objection does not amount to an ejectment as the tenant was not in actual possession. A I R 1927 All 270 = 99 I C 561

—Ss. 82, 22—Widow cannot relinquish her limited rights to the prejudice of the reversioner 9 I C 894

—Ss. 83, 85—where a minor's expropriatory holding is surrendered by the guardian, the zamindar cannot refuse to accept

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it on the ground that it is not for the benefit of the minor. A I R 1927 All 546=L R 8 A 158 Rev=101 I C 804.

—S. 83—Tenant can surrender without landlord's consent by simply giving up lands—Liability for rent exists only for first year of non-occupation. A I R 1925 All 815=86 I C 872.

—S. 87—Sometimes it is better for the landlord not to proceed under s. 87 e. g. as a means of preventing the sub-tenant from acquiring occupancy rights. L R 4 A 56 (Rev.)

—S. 87—Where a cousin cultivated in the absence of the tenant, acquiescence of zamindar amounts recognition of cousin as holding on behalf of the absent tenant. L R 3 A 226 (Rev)=4 U P L R (B R) 58.

—S. 87—Abandonment by leaving village without arranging for payment of rent is question of fact—Tenant's intention must be seen. A I R 1929 All 218=L R 10 A 201 Rev=113 I C 817.

—See to the same effect L R 4 A 58 Rev

—S. 87—Method of proving abandonment is not confined to proceeding under s. 87 L R 4 A 188 (Rev.)

—S. 87—Mere entry in the patwari papers as to abandonment is not a sufficient proof. L R 4 A 139 (Rev.)

—S. 87—Where a tenant leaves village for more than 12 years without arranging to pay rent. The zamindar can prove abandonment without filing notice. L R 10 A 201 Rev=A I R 1929 All 218=113 I C 817.

—S. 87—In Agra, where the law differs from that in Oudh, it must be proved that the tenant left the village without any arrangements for the cultivation of the holding. L R 4 A 286 (Rev.)

—S. 87—To prove abandonment it must be proved that the tenant left the village without any arrangements for cultivation. L R 4 A 173 (Rev.)

—S. 87—Where a tenant leaves the village without making arrangements for cultivation of his land and payment of rent it constitutes abandonment. Mere leaving is insufficient. 33 I C 488.

—S. 87—Suit for ejectment against a sub-tenant is maintainable only when the tenant dies without heirs. 32 I C 586.

—S. 88—Landlord's consent is essential for the occupancy tenant to plant trees. Permission to plant is not permission to sell. A I R 1925 All 796=87 I C 64.

—S. 88—Non-occupancy tenant cannot plant trees without written consent of the zamindar. 86 I C 329=A I R 1925 A 702.

—S. 88—Occupancy tenant—Improvement made by consent of 17 out of 18 zamindars—Court will not compel the occupancy tenant

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to destroy it at the instance of the 18th zamindar. A I R 1923 All 281=79 I C 77.

—S. 88—Trees planted presumably with landlord's consent are not transferable. 75 I C 653=A I R 1923 A 340.

—S. 92 (1)—Tenant can claim compensation in equity for improvement effected over area larger than that included in the zamindari. 3 U P L R (B R) 34.

—S. 94—where cosharers decline to join as co-plaintiffs for recovery of rent, any co-sharer can bring a suit to the extent of his share. 17 I C 488.

—Ss. 90, 40—Agreement by tenant not to claim compensation for improvements made without consent of zamindar is illegal. 10 I C 465.

—Ss. 90 and 40—An agreement to pay enhanced rate is not illegal unless there has been a legal enhancement within 10 years of the agreement. 10 I C 465.

—Ss. 90 and 40—Distinct promises for same consideration. Illegality of one does not affect the others. 10 I C 465.

—S. 95—Assistant Collector's decree in suit under—Appeal to District Judge from, —Maintainable where defence is that defendants are owners in possession of the lands as their khudkasht. 1931 A L J 1098=16 R D 120=13 L R 24 (Rev)=135 I C 555=I R 1932 A 91=A I R 1932 A 134=A L R 1932 A 135.

—S. 95—Landlord cannot ask for declaration under s. 95 and at the same time, assert lapse of tenancy owing to the tenant dying heirless. A I R 1931 All 33=(1930) A L J 1251=14 R D 656=Ind Rul (1931) All 260=130 I C 292.

—S. 95—A suit, in which the main object is to obtain declaration to tenancy, lies in Revenue Court, although one of the reliefs standing singly can be entertained by Civil Court. A I R 1929 All 613=(1929) A L J 1026=L R 10 A 356 Rev=Ind Rul (1929) All 887=118 I C 583.

—Ss. 95, 167—Civil Court cannot entertain a suit complaining of wrong decision of collector regarding boundary. A I R 1929 All 442=L R 10 A 278 Rev=Ind Rul (1929)=All 662=116 I C 870.

—S. 95—Suit by tenant claiming ownership of grove for damages caused to trees lies in Civil Court. A I R 1923 All 134=45 A 191; 21 A L J 33=76 I C 12.

—S. 95—Only the Revenue Court can try a suit as to status of tenant. Where two reliefs are claimed, one triable by civil and the other by Revenue Court, Civil Court can grant relief only as to the portion triable by it. A I R 1923 A 568=L R 4 A 450 Rev=73 I C 947.

—S. 95—An exparte order based on Pativari's Report does not operate as res

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judicata in a later suit for declaration of ex-proprietary rights. L R 4 A 374 (Rev.)

—S. 95—Period of joint cultivation does not count towards acquisition of occupancy rights. L R 4 A 350. (Rev.)

—S. 95—Suit for declaration of status is not bad merely because some cosharers have not joined. L R 4 All 306 (Rev.)

—S. 95 Oral agreement for enhancement is not enforceable in Revenue Court A I R 1922 All 55 (2)=70 I C 495=L R 3 A 132.

—S. 95—Suit ostensibly for declaration challenging deft's adoption but really for preventing the deft, from holding as occupancy tenant does not lie in Civil Court. A I R 1927 All 780=25 A L J 799=L R 2 A 211 (Rev)=103 I C 128.

—Ss. 95, 167—Suit ostensibly for declaration of status, in Civil Court, but really with the object of forestating suit in Revenue Court. is not triable by Civil Court. A I R 1922 All 372=68 I C 247=20 A L J 570=44 A 692.

—Ss. 95, 167—An appeal in a suit under s. 95 lies to Revenue Court and not to the Dist Judge. A I R 1922 A 372=68 I C 247=20 A L J 570=L R 3 A 235=4 U P L R (A) 194=44 A 692.

—Ss. 95, 167—Suit in which deft claims to be an occupancy tenant lies in Revenue Court. A I R 1922 All 372=20 A L J 570=L R 3 A 235=4 U P L R (A) 194=44 A 692=68 I C 247.

—S. 95—Suit for declaration as to landholder's name cannot lie. L R 3 A 458 (Rev.)

—S. 95—Recorded sub-tenant suing landlord and the recorded occupancy tenant that he is tenant-in-chief. The suit lies in Revenue Court. 4 U P L R (B R) 73=L R 3 A 363 (Rev.)

—S. 95—Entries in Record of rights as to nature of land held as conclusive proof. L R 3 A 302 (Rev.)

—S. 95—Registered lease for 7 years—Suit for declaration of occupancy right is maintainable and is not premature I R 3 A 85 (Rev.)

—S. 95—Declaratory suit by adopted son of a deceased tenant lies in Revenue Court. L R 3 A 5 (Rev.)

—S. 95—Declaratory suit by mortgagee of fixed rate tenancy lies in Civil Court. 63 I C 274=19 A L J 702=1921 A 110.

S. 95—S. 95 does not apply to a suit between on occupancy tenant and alleged trespassers. 63 I C 97 (All.)

—S. 95—Mere plea that plaintiff is not a tenant does not amount to a plea of jurisdiction. 43 A 368=19 A L J 120=2 U P L R (A) 435=51 I C 44.

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—S. 95—Jurisdiction is not affected by denial by deft, L R 2 A 6 (Rev.)

—S. 95—Suit under s. 95 only when the vendor is in possession. L R 2 A 144 (Rev.)

—S. 95—Suit should be brought during the tenancy L R 1 A 9 (Rev.)

—S. 95—Does not apply to fixing new rents. 2 U P L R. (B. R.) 147.

—S 95 and 167—A suit for a declaration in respect of certain customary dues payable to the zamindar by the ryots of the village is cognisable by the Civil Court and not by a revenue Court 34 All 358=9 A L J 431=14 I C 138.

—S 95—When a question of proprietary title had been raised in the first Court, the Dt. Judge must entertain the appeal. (1911) 8 A L J 894=12 I C 107

—S 95—Questions arising outside the sphere of landlord and tenant are not within the jurisdiction of the Rev. Courts and the decision of the latter Court in such a case does not operate as res judicata in a Civil Court 37 All. 223=13 A L J 278=27 I C 913

—Ss 95 and 97—Ejectment of tenant from year to year—Tenant holding under lease—Suit to set aside lease whether res judicata. 12 A L J 1232

—S 95—Matter between rival claimants to a tenancy is cognisable by a Civil Court and not by a Revenue Court, as it is outside the sphere of landlord and tenant. 35 All 14=10 A L J 408=17 I C 376

—S. 95 and s 167—Suit by a plaintiff alleging that the defts, are his zamindars and that he is their occupancy tenant and asking for a declaration to that effect will not lie in a Civil Court. 43 I C 652

—Ss. 95, 177, 199, 201—The question whether the plaintiff or the defendant is the occupancy tenant of a land is maintained in a Civil Court 18 I C 220

—Ss. 95 & 202—A Revenue Court can determine the status of the defendants when referred to under s. 202, even though the case be not quite in accordance with O 2 rr 1 and 2 of C. P. C or though the defendants did not want their status to be determined. I U P L R (B R) 32=53 I C 82.

—Ss. 95 & 167—A suit by plaintiff for being declared as an heir to a occupancy tenant is not cognisable by the Civil Court, because the suit prays for a declaration of tenancy right. 36 All 48=21 I C 859=11 A L J 1022.

—S. 95—Perpetual lease—Suit to set aside—jurisdiction—"Matter about which suit might have been brought" see Agra Ten Act ss. 167 & 95. 13 A L J 354.

—S. 95—As to legality of proceeding under compromise see. 22 I C 124.

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—S. 95—When rent is neither fixed nor agreed upon by the parties the Court has no power to fix it. The Court can only ascertain what in fact was the rent payable. 37 All 12=12 A L J 1131=25 I C 121 (1)

See to the same effect : 29 I C 604.

—Ss. 95, 177 (f)—Appeal lies to Dist. Judge in all suits where a question of jurisdiction has been decided. 15 A L J 319=39 I C 87.

—S. 95—A landholder wishing to get rent for the period of tenancy must either come to an agreement with the tenant as to the rent to be paid or get it fixed by the court while the tenancy subsists. 8 A L J 1087=12 I C 180.

—Ss. 95, 167—Civil Courts have jurisdiction to determine a dispute between rival claimants to an occupancy tenancy. 15 I C 33.

—S. 95 & 167—S. 95 does not apply to the case of disputes between rival claimants to a tenancy. It only contemplates the case of landlord and tenant and an existing tenancy. 8 A L J 1009.

—Ss. 95 & 167—S. 95 does not apply to disputes between rival claimants to a tenancy. 33 All 795=11 I C 268=8 A L J 1009.

—S. 95—When a tenant is in occupation of land without an agreement and without a decree of Court fixing any rent, a landlord can sue for determination of the amount of rent payable and also for the arrears of rent payable. 42 I C 898.

—S. 95—A declaratory suit that the plffs. are the sole tenants and not joint with defendants to which the zamindar is no party can be determined only by the Revenue Court. 12 A L J 1322=26 I C 718.

—S. 95—As to court-fee payable on a suit for declaration of tenancy. 16 A L J 167.

—S. 95 and 167—Suit for ejectment—revenue Court whether competent to go into the question of validity of the lease. 37 All 41=12 A L J 1252=26 I C 731

—S. 95—When once a suit is brought by a tenant for declaration of rate of rent and the Court declares it a subsequent suit by a landlord claiming higher rent is not maintainable. 2 U P L R (A) 369=57 I C 683

—S. 97—Compromise to pay enhanced rent—Not made, decree of Court and unregistered—Inoperative. 14 A L J 57=34 I C 234.

—S. 97—Where there is a contract for permanent lease, the proper remedy for a thekadar is to sue for specific performance; he cannot sue under s. 96 in a Revenue Court. 75 I C 605=A I R 1923 A 398 (2)

—S. 97 (2)—An endorsement of kanu-

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nga on the counterpart of a lease was on interpretation, held to be a sufficient compliance with s. 97 (2) L R I A 7 (Rev.)

—S. 97—Attestation must be made within 4 months after execution. L R 3 A 293 (Rev.)

—S. 97—Presentation and not attestation must be within 4 months 98 I C 521.

—S. 97—Attestation by Deputy Collector is sufficient. L R 4 A 237 (Rev.)

—Ss. 97, 41—Landlord, tenant and the kanungo signing a mers' entry of a figure in the khatauni does not constitute agreement for enhancement A I R 1925 All 123 (1)=82 I C 332

—S. 97—does not apply where the rent is enhanced to more than Rs. 100 Such agreement must be registered. A I R 1928 All 352=26 A L J 455=L R 9 A 157 (Rev.) =109 I C 793

—S. 97 (3) Endorsement of document by Revenue officer is tantamount to Registration, taking effect from the day of execution and taking priority over a subsequent document though registrable prior to the former 37, All 59=12 A L J 1265=26 I C 458.

—Ss. 99, 230—tenant ejected from his holding by land-lords—suit for possession lies in the revenue court—ejectment by all land-lords necessary. A L R 1933 A 23=1932 A L J 684=A I R 1933 A 44=16 R D 561.

—S. 99—Suit for damages for dispossession lies in Civil Court if the cause of action arose before 1926 A I R 1930 All 365=(1930) A L J 769=131 I C 686.

Ss. 102 and 104—Suit for rent in or its price lies only in Revenue Court 68. I C 985=20 A L J 771=A I R 1923 All 50=45 A 7

—S. 104—Rent was by division of crops Suit for such rent lies if the tenant does not deliver due share. 2 U P L R (B R) 68.

—S. 106—Where several cases of appraisement of crop were dealt with as one case without notice to parties and without any inspection or estimation of the crop and without appointing a person legally qualified as third assessor the procedure was held to be entirely illegal and fit for the interference of the Board in revision L R 3 A 49 (Rev.)

—S. 108—Question as to who is entitled to the rent, plff or a third person, is a question of proprietary title. A I R 1927 All 509=L R 8 A 202 Rev=103 I C 286.

—Ss. 108(3), 33—Where a tenant holds under different rights the notice which confuses plots of different rights is illegal. 2 U P L R (B R) 153.

—S. 108—Entries of payments in a pocket-book do not amount to receipts within the meaning of this section and a



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presumption of a full acquittance of all demands till the date of entries cannot be made. 8 A L J 505=10 I C 1002

—Ss. 130, 151, 154—Mere entries of facts as found, by an officer on a revision of settlement without a decision on a question of right is not a judicial decision within the meaning of s. 151, 11 A L J 277 =18 I C 734

—Ss. 131 & 194—One co-sharer cannot as sole proprietor sue to eject the tenants until the partition is confirmed by the commissioner. I U P L R (B R) 31=53 I C 76 (B R)

—S. 142—Matter under s. 142 can only be tried by Revenue Court. 75 I C 922= A I R 1924 All 828.

—S. 146—A cause of action in favour of the plff for a suit for damages for loss of property distrained under this section arises when it is lost damaged or destroyed or the loss, destruction or damage comes to his knowledge. 8 A L J 503=10 I C 502.

—S. 146—Suit for damages for wrongful distraint—Cause of action arises from the date on which the distraint ended—Limitation three months from the said date. A I R 1923 All 146 (F B)=45 A 209=L R 4 A I (Rev)=73 I C 299.

—S. 146 para (3)—Suit for value of crops alleging that crops were mis-appropriated shortly after distraint and that some time afterwards decree for arrears of rent was obtained, execution of which was applied for by plaintiffs' arrest—S. 146 does not apply so as to make the case exclusively cognizable by Revenue Court A I R 1929 All 669=(1929) A I J 890=L R 10 A 363 Rev=51 A 926=Ind Rul (1929) All 626=116 I C 802

—S. 146—Civil Court can entertain suit in which questions of tort broader than in distraint and injury therefrom is involved A I R 1929 All 669=(1929) A L J 890=L R 10 A 363 Rev=51 A 926=Ind Rul (1929) All 626=116 I C 802

—Ch. X—A suit for assessment on the ground that the defendants who where rent-free grantees of the groves had ceased to be so because of their violation of a condition is one triable by a Civil Court. 12 A L J 449=24 I C 98

—Ch. V—a Revenue Court has no power to eject a party from a grove. 39 I C 771

Ch. X—Grove can be resumed but not the land given for grove. L R 4 A 276 (Rev)

—Ch. X—does not apply where a co-sharer agrees to hold less than his share in consideration of payment of Revenue by other sharers 9 O & A L R 213=L R 4 A 46 (rev)

**AGRA TENANCY ACT (2 OF 1901) (Contd.)**

—Ch. X—It is only the proprietor who can sue for resumption 3 U P L R (B R) 57.

Ch. X—Suit by rent free grantee for rent wrongfully realised by zamindar from sub-tenant lies in Civil Court but not a suit for declaration that plaintiff by long and continued holding as rent free grantee has become the proprietor of the land A I R 1921 All 195=43 A 325; 19 A L J 89=60 I C 831

—Ch. X—Applies to all rent-free holdings. L R I A 23 (Rev)

—S. 150—Where a proprietor owns the mahal entirely separate from mauflands Ch. X does not apply A I R 1930 All 353 =Ind Rul (1930) All 519=124 I C 471

—Ss. 150, 167—Civil Courts are not excluded from jurisdiction over grove 92 I C 134=A I R 1927 All 232

—S 150—No revision lies in Dist. Judge refusing petition of appeal in a suit under Sch IV group C No 39 and under ss. 150 and 154 A I R 1923 All 580=45 A 567=21 A L J 524=L R 4 A 223=75 I C 280

—Ss. 150, 151—Apply to pankar lands and rent-free lands held under contract with the zamindar. Reservation of sir rights—Covenant does not run with the land. L R 2 A 129 (Rev),

—S. 150—In a case where land is held free of rent with the consent of the landholder, the landlord should proceed by a suit under this section. There is a distinction where it is held with consent and without consent 30 I C 789

—S. 150—A holder of a perpetual lease of land under which the lessor reserved to himself the right to receive an annual payment together with the right to re-enter is a proprietor. 40 All 656=16 A L J 619 =46 I C 920.

—Ss. 150 and 177—When a question of proprietary title is raised in the Court of the settlement officer appeal will lie to the Dt. Judge 15 A L J 200=37 I C 818

—S 150—A declaratory suit by a plff. in a Civil Court that the defendant is only a rent-free grantee is barred because of the former decision of Revenue Court in a resumption suit of a rent-free grant in which the defendant was recognised as a full proprietor 9 I C 813

—Ss. 150, 156—Rent can be assessed upon grove land only on proof of custom to that effect. But it is liable to assessment of rent if it is subsequently brought under cultivation. 34 I C 155

—Ss. 150, 153, 154, 158—An agreement reserving a certain area for himself free from any payment, in a sale of his proprietary rights in a village, is contrary to law. 32 I C 4



## AGRA TENANCY ACT (2 OF 1901) (Contd.)

—Ss. 151 (b), 158—A vendor, in a sale of zamindari, reserving rent free; in perpetuity, certain area, acquires a rent-free holding in that area, within s. 157 (b) 32 I C 10.

—S. 154—Rent-free grant for the purpose of certain puja falls within s. 154 (c) and is not resumable under cl. (b) 126 I C 229=1930 A L J 641=A I R 1930 All 291 But see 103 I C 424

[Grant of land for worship is within s.] 154 (1).

—S. 154—A rent-free grant, with no services attached, but with condition not to sell or mortgage, can be resumed if the condition is broken. 95 I C 717.

—S. 154—Tenure must have been held for a specific service 2 U P L R (B R) 157

—S. 154—A rent-free grantee cannot be forcibly dispossessed by a zamindar. 36 I C 958

—Ss. 154, 177 (f)—A suit for resumption is triable only by a Revenue Court. Even if a plea of jurisdiction is raised an appeal cannot lie to a Civil Court. 58 I C 661=2 U P L R (A) 416.

—Ss. 154, 158—Portion converted into a grove does not alter the character of a rent-free land, and inasmuch as it fulfilled the terms of s. 158 it was not liable to resumption 40 All 60=15 A L J 867=42 I C 956.

—Ss. 154, 177—In a suit for resumption of rent-free land the Revenue Court held that the land was resumable, and passed a decree. The decree was affirmed in appeal but Board of Revenue reversed it on revision. On remand Asst. Collector held that s. 158 applied, that the deft. was a proprietor and proceeded to fix the revenue. Held, he was right in determining the matter upon remand. 17 A L J 195=49 I C 747=41 All 318.

—S. 154 (b)—In a resumption suit of a muafi land held for specific service which was no longer required the plaintiff must allege that specific service and a notice to that effect must be given. 29 I C 554.

—S. 154 (b)—The specific service that is no longer required must be mentioned in a notice for resumption of land held on a service tenure. 33 I C 772.

—S. 154 (b) (c), 158, 177 (c)—An appeal lies to the D. Judge from the decision of the asst. Collector in a suit for resumption of land held rent-free; defendant claiming to be a proprietor. 29 I C 710.

—Ss. 153, 158—S. 156 applies to a suit for assessment of rent. The Act is not well-drafted and headings of chapters should not be relied upon 45 I C 534.

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

—Ss. 156, 177 (e)—If a defendant raises a plea of proprietary title in a suit under s. 156, the Revenue Court cannot examine that plea. It is a function of the Civil Court. 1 U P L R (B R) 16=33 I C 190.

—S. 157—A rent-free grantee cannot count, towards acquiring occupancy rights, the term during which the land has been subject or otherwise transferred in contravention of ss. 21 and 25 should not be counted. L R 3 A 321 (Rev.).

—S. 158—Muafi lackhiraj cannot be assessed with revenue. A I R 1930 All 353. =Ind. Rul. (1930) All 519=124 I C 471

—S. 158—If a question of proprietary title is raised in a suit for resumption, appeal lies to Dist. Judge. A I R 1923 All 313=21 A L J 189=71 I C 773=L R 4 A 84 (Rev.)=45 A 336.

—S. 158—Where land is granted in favour of an idol, the priest in charge is not the grantee nor is his successor to the grantee. A I R 1922 All 312=44 A 169=19 A L J 964=65 I C 371.

—S. 158 Land recorded as Haqqiat Muta-farriqa is presumed to be exempted from assessment on its own merits and that it had not been granted by the zamindars during British rule. L R 3 A 418 (Rev.).

—S. 158—A land held as haqqiat muta-farriqa free of revenue direct from Govt. is not a rent-free holding and a suit to assess revenue upon it cannot lie. 33 I C 507.

—S. 158—Mortgage of rent free holding is not an absolute transferee and thus is not a successor to the grantee. 32 I C 766.

—S. 158—Muafi Khai means that the grant is an absolute one for charitable purposes and is not resumable. Such a land held for 50 years and more by two successors to the original grantee is liable to assessment of Revenue only. 31 I C 898.

—Ss. 158 & 167—Only a Revenue Court can decide a suit for a declaration that muafi rights have ripened into proprietary rights. 41 All 37=16 A L J 881=46 I C 764.

—S. 158—It is not necessary to prove who the original grantee was. The section also does not require that the succeeding person must necessarily be the heir of the person who preceded him. 10 I C 39.

—Ss. 158 and 177 (c)—In a resumption suit against a muafider the muafider pleaded proprietary title. An appeal in such a case will lie to the District Judge. 29 I C 484.

—S. 158—The word "successors" includes not only an heir but also a transferee 33 A 553=8 A L J 539=11 I C 514.

—S. 158—A survivor in a Hindu Joint family is a "Successor." 14 A L J 878=34 I C 26.

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

—S. 158—On a decision of a Revenue Court on a question of successor an appeal will lie to the District Judge. 14 A L J 878=34 I C 26.

—S. 159—A Lambardar, who goes on paying Revenue even after partition on behalf of other co-sharers, need not prove prior collection of arrears or that he paid it from his own pocket, in a suit for recovery of sub revenue against co-sharer. A I R (1929) All 689=(1929) A L J 869=Ind. Rul. (1929) All 941=118 I C 93.

—Ss. 159, 160—A lambardar who sells his property but continues to be recorded as lambardar, can recover from his vendee money paid as revenue on citation being issued by revenue authorities but the suit lies in Civil Court. A I R 1930 All 302=51 A 897=(1929) A L J 1081=L R 11 A 39 Rev.=14 R D 36=Ind Rul.(1929) All 683=117 I C 107

—S. 159—A lambardar is entitled to 5 per cent of the land revenue payable by the co-sharers, unless there is a special agreement. L R 10 A 155 Rev.=113 I C 746

—S. 159—The lambardar can recover from the co-sharers revenue paid by him on their behalf though latter paid revenue subsequently into the treasury without informing the lambardar. A I R 1925 All 95=80 I C 916.

—Ss. 159 to 162, 164, 165—Where cross-objections introduce a question of title appeal lies to Dist. Judge. A I R 1923 All 170=77 I C 955.

—S. 159—An agreement by a vendee to pay revenue on land reserved by vendor does not bind a transferee. 39 All 166=15 A L J 17=38 I C 647

—Ss. 159, 160—S. 159 contemplates a suit by a lambardar for arrears of revenue whether such revenue has actually been paid or not. The limitation for such a suit is three years from the date when the revenue became payable. 9 A L J 581=15 I C 733.

—Ss. 159, 160—S. 160 contemplates a case where arrears of revenue have actually been paid by one co-sharer for another. The limitation for such a suit is three years from the date of payment. It applies to a Lambardar also. 9 A L J 581=15 I C 733.

—S. 159—The liability of a co-sharer for revenue is joint and several. 42 All 311=18 A L J 121=55 I C 74.

—S. 159—"Co-sharer" explained. 42 All 311=18 A L J 121=55 I C 74.

—S. 160—O. 21 of C P C applies to Revenue Courts. 1930 A L J 1177=128 I C 231=14 R D 482=Ind. Rul. 1931 All 23=A I R 1930 All 556.

—S. 160—Lambardar can recover revenue even though the recorded co-sharers are

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

made responsible for the revenue. A I R 1927 All 641=L R 8 A 246 Rev.=103 I C 305

—S. 160—Entry recording usufructuary mortgagee's name in revenue records—Court cannot go behind the record. 75 I C 663=A I R 1923 All 344.

—S. 160—Suit for arrears of revenue by one co sharer against another—Defaulting cosharer not in possession at the time of the default—Held, the suit was not maintainable. 14 I C 578.

—S. 161—There is no right of interest under s. 161. A I R 1929 All 29=L R 9 A 366 Rev.=113 I C 758

—S. 161—Does not apply to a suit by assignee of assignee and one not for arrears of revenue. A I R 1929 All 781=(1929) A L J 724=L R 11 A 65 Rev=Ind Rul (1930) All 534=124 I C 534

—S. 161—Plot proprietor is co-sharer A I R 1927 All 641=L R 8 A 246 Rev.=103 I C 305

—Ss. 163, 164—In a suit for profits against lambardar all cosharers can join in one suit. A I R 1929 All 668=(1929) A L J 1098=L R 10 A 361 Rev.=51 A 994=Ind Rul (1930) All 250=122 I C 602

—S. 163—The mention of the last day for division of profits by the 'Destur dehi' of the village must be taken to fix the date and as binding on the co-sharers. A I R 1931 All 405=15 R D 621=131 I C 137

—Ss. 163, 164—A cosharer can claim a share in gross rental as well as actual realisation, unless he is thereby getting twice or unless his claim is barred. Cause of action for gross rental, claimed on a plea of negligence arises on 1st August following the close of the fasli year to which the claim relates but where the claim is for arrears collected on account of past years the cause of action arises on the 1st of August following the year in which those arrears are collected. A I R 1924 All 481 (F B)=22 A L J 610=L R 5 A 189 Rev.=46 A 791=84 I C 158

—Ss. 163, 164—Cause of action for profits arises on their becoming payable, that is when they are devisable under s. 163 A I R 1922 All 348=20 A L J 95=L R 3 A 20=64 I C 988

—S. 164—If the plaint were presented prior to a Revenue Court order such order will not deprive the plff. of his right to sue for profits for the years during which his name was entered in the village record A I R 1929 All 378=L R 10 A 287 Rev=Ind Rul. (1929) All 1009=119 I C 433

—S. 164—Where there was no special circumstances why a big proportion of the rents were not collected during normal years and where no accounts were produced

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

nor any suits for arrears brought it was held the burden shifted on the lambardar to show that he was not negligent L R 9 A 303-Ind Rul 1929 All 600-116 I C 744-A I R 1928 All 767

See also 75 I C 553-A I R 1923 All 335

-Ss. 164 and 167-A cosharer can sue the heirs of lambardar in a Civil Court for a declaration as to his share of profits out of the collections deposited in Court. A I R 1928 All 556-L R 9 A 192 Rev-Ind. Rul (1929) All 433-115 I C 769

-Ss. 164, 201-Where the proprietor and the lambardar were brothers it was held that the Court could not go into the question of jointness or separation of the family. Presumption under s. 201 (3) would apply even if the parties were members of joint Hindu family L R 8 A 168 Rev-103 I C 346-A I R 1927 All 810-25 A L J 706

-S. 164-Suit for profits of several years-Accounts of all years have to be gone into A I R 1927 All 405-L R 8 A 92 Rev-100 I C 743

-S. 164-Mere fact that large proportion of rents was remaining uncollected is not sufficient to prove lambardar's negligence L R 8 A 92 Rev-100 I C 743-A I R 1927 All 405

-S. 164-Where a mortgagor remained in possession as lessee and continued to collect rent even after the expiry of the lease, it was held that the mortgagee was not entitled to sue for profits A I R 1923 A 346-75 I C 666

-S. 164-Lambardar is entitled to the collection charges even though he does the work himself. 75 I C 553-A I R 1923 All 335

-Ss. 164, 165-A decree in favour of a cosharer may be based either on gross rental or on actual collections. In the latter case arrears of previous years are also included, except for suits under S. 165 A I R 1922 All 501-L R 3 A 471-70 I C 753

-S. 164 (a)-Profits should be allowed on actual collections unless negligence proved. A I R 1922 All 111-20 A L J 313-67 I C 521

See also-A I R 1923 All 216-4 U P L R (A) 33-65 I C 643

-S. 164-That the decrees obtained by lambardar were not executable does not warrant an inference as to negligence. 65 I C 648-A I R 1923 All 216

-S. 164-Purchaser of a share can sue Lambardar for profits in Revenue Court only. A I R 1922 All 397-65 I C 530

-Ss. 164, 163-Limitation runs from the date when profits become divisible A I R 1922 All 348-20 A L J 95-64 I C 988

-S. 164-Decision of a Civil Court as to title pending a suit for profits oper-

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

ates as res judicata in Revenue Court A I R 1922 All 356-64 I C 954-20 A L J 61 =49 A 250

-S. 164-A Suit for possession is barred when a prior suit for profits had been dismissed on the ground of defendant's title by adverse possession A I R 1921 All 59-19 A L J 279-3 U P L R (A) 47-62 I C 684

-S. 164 (2)-A decree cannot be obtained both on basis of gross rental and for arrears of past years collected during the year in question A I R 1921 All 314-43 A 29-60 I C 643

-S. 164 (2) In a suit for profits where s. 164 (2) does not apply, plaintiff can be given a decree on the basis of the actual collections in that year for whatever year, past or present A I R 1921 All 314-43 A 29-18 A L J 863-2 U P L R (A) 272-60 I C 643

-Ss. 164 and 201-Amendment of khewat during pendency of suit should not be considered by Court in a suit for profits A I R 1921 All 396-43 A 177-18 A L J 1008-2 U P L R (All) 386-59 I C 639

-S. 164-A decree under this section can be passed either on the basis of actual collections or gross rental; but not on both the cases together. 60 I C 45-2 P L R A 272-43 A 29-18 A L J 863

-S. 164-Lambardar's negligence or misconduct is a mixed question of law and fact and the finding of fact is binding on the High Court in second appeal 60 I C 643-2 U P L R (A) 272-43 A 29-18 A L J 863

-S. 164-Great arrears in rent solvency of the tenants absence of any justifying circumstances etc. were proved by a co-sharer in a suit filed by him against the lambardar for share of profits. The onus was shifted on the defendant to show otherwise 37 All 595-13 A L J 851-30 I C 550

S. 164-Profits of sir and khudkhast land must be included in the claim. 38 All 223-14 A L J 252-33 I C 119

-S. 164-An agreement by a khudkhast Lambardar with a mortgagee to pay low rent for creating ex-proprietary tenancy does not affect other co-sharers. 18 A L J 942

-S. 164-A claim for rent from shops, houses and market is not a claim falling under this section and a suit for such a claim is cognisable by a Civil Court. 38 All 322-14 A L J 419-34 I C 275

-Ss. 164, 194-In a lambardari mahal, the lambardar is the only person who has a right to institute suits against defaulting tenants for the recovery of arrears of rent which accrued due prior to his appointment but which are not time-barred. 42 All 414 =18 A L J 435-56 I C 112.

## AGRA TENANCY ACT ( 2 OF 1901 ) (Contd.)

—Ss. 164, 194—Distinction should be drawn between the degree of responsibility attaching to a lambardar in respect of arrears prior to his appointment and after his appointment. 42 All 414=18 A L J 435=56 I C 112.

—S. 164—Where a lambardar has falsified the accounts he is liable to pay interest on the amount of profits awarded to the plff. 4 O L J 708=44 I C 415.

—S. 164—Co-shareres possessing considerable areas as sir and Khudakhist—Matters to be taken into consideration in calculation of profits discussed. 16 A L J 146=44 I C 542.

—Ss. 164, 201—Subsequent amendment of record by a Revenue Court has no retrospective operation. 18 A L J 1008 (44)=43 A 177=50 I C 639=2 U P L R (A) 386.

—S. 164—The legal representative of a deceased lambardar is liable for the collections actually made as well as collections not made by the deceased through negligence; but only to the extent of the assets received by him from the deceased. 40 All 246=16 A L J 193=43 I C 636 (F B).

—S. 164 (2)—The keeping of accounts by a patwari does not exonerate the lambardar from his duty of maintaining them. 26 I C 515.

—S. 164 (2)—The burden to prove that the lambardar is liable to account is on the plaintiff. That done, the lambardar will have to prove the accounts. 26 I C 515.

—S. 164—Burden of proof as to why large sums were not collected etc. will shift on the deft. lambardar, if the plaintiff co-sharer proves the defendant's negligence, in a suit for his share of rents. 10 A L J 529=17 I C 914.

—S. 164—There is no difference in the meaning of s. 164 of the Tenancy Act and s. 209 of the Rent Act. 10 A L J 529=17 I C 914.

—Ss. 164, 193—In a suit by a co-sharer against the lambardar, the lambardar cannot claim the deficiency in one year as set-off against the profits of the succeeding year. 14 I C 121.

—Ss. 164, 197—Upon the dismissal of a suit for profits by a Revenue Court on the ground of want of jurisdiction, the appellate Court's duty is to treat the suit as properly instituted and to deal with it on the merits. 9 I C 848.

—S. 165—If the rights and the liabilities of the lambardar are in question in a suit under S. 163, the answer to the issue cannot be different to that to be given to an identical issue arising in a suit under S. 164. The conjoint effect of Ss. 164, 165 and 194, in the absence of a custom entitl-

## AGRA TENANCY ACT ( 2 OF 1901 ) (Contd.)

ing a co-sharer to make collections for himself alone, and in respect of his share, is that the lambardar alone is entitled to collect the rent and to divide the profits in his hands among the co sharers, including himself, in proportion to their shares, after deducting public charges and incidental expenses. He is not entitled to do otherwise. 54 A 240=1932 A L J 129=16 R D 132=13 L R 65 (Rev.)=I R 1932 A 408=138 I C 445=A I R 1932 A 98=A L R 1932 A 474.

—S. 165—A co-sharer as such cannot be held liable for anything more than the excess which he has collected and which is due by him to other co-sharers. To hold otherwise would involve the treatment of all co-sharers as though they were lambardars and that is not the intention of the Tenancy Act. 54 A 240=1932 A L J 129=16 R D 132=13 L R 65 (Rev.) I R 1932 A 408=138 I C 445=A I R 1932 A 98=A L R 1932 A 474.

—S. 165—The lambardar, in the array of the defendants, cannot be treated as a lambardar, but must be treated as a co-sharer and therefore he is entitled to deduct out of the collections made by him his full share of the profits of the mahal, the balance alone being divisible amongst the other co-sharers. 54 A 240=1932 A L J 129=16 R D 132=13 L R 65 (Rev.)=138 I C 445=I R 1932 A 408=A I R 1932 A 98=A L R 1932 A 474.

—S. 165—Court can decree plff's whole claim in a suit by a cosharer, who is not a lambardar, against another cosharer for his share of profits on entire rental, where the deft. pleads non-collection of entire rent but fails to produce his account books. L R 11 A 16 Rev=Ind. Rul, 1929 A 1027=119 I C 499=A I R 1929 All 702.

—S. 165—A cosharer's right to recover excess is subject to the other sharers' right to the excess. A I R 1927 All 623=L R 8 A 323 Rev=25 A L J 1057=105 I C 745.

—S. 165—Profits of sir and Khudkhast lands must be included in calculating profits of a mahal; and in this connection the rent of the sir land is to be assessed at a proper rate and not with reference to the farzi rate entered in revenue papers. L R 8 A 177 Rev=102 I C 139=A I R 1927 All 791.

—S. 165—Claim under s. 165 for account cannot be joined in a suit by one co-sharer against another for rent. A I R 1926 All 282=92 I C 1046.

—S. 165—Heirs of a deceased lambardar are not liable for the profits not collected by the deceased. A I R 1925 All 810=88 I C 447

—S. 165—Suit by assignee for profits can lie in Revenue Court. 88 I C 298=A I R 1925 All 765

—S. 165—Person engaged by lambardar

## AGRA TENANCY ACT ( 2 OF 1901 ) (Contd.)

for collection cannot be joined as defts. 86

I C 400=A I R 1925 All 701

—S. 165—Lambardar is entitled to settle the accounts by suing the cosharers for excess profits 75 I C 330=A I R 1924 All 935 (2)

—Ss 165, 164—Cosharers are not liable to another co-sharer for rent not collected by them A I R 1922 All 501-70 I C 763.

—S. 165—Does not apply to a suit by purchaser of khudkhash land against the vendor for profits because it is treated as a suit for rent. 77 I C 382=A I R 1922 All 319

—S. 165—The lambardar mortgagor can redeem from the day the collections are deposited, A I R 1922 All 275

—S. 165—In a suit for profits against lambardar unassessed exproprietary rent will not be taken into account L R 3 A 260-4 U P L R (A) 200-77 I C 1032.

—S. 165—In a case where the purchasers allow the vendors to remain in possession of land bought without the assessment of rent, a suit by the purchasers, for their share of profits is not maintainable, 14 A L J 209-32 I C 617.

—S. 165—A suit by a cosharer for profits against a co-sharer lambardar is not bad in law; because a co-sharer by becoming a lambardar does not cease to be a co-sharer 29 I C 473.

—Ss. 166, 201—A lessee continuing to be recorded as such even after the expiry of the lease is a proprietor within the meaning of s 166 and the presumption that he can institute a suit for share of profits is to be drawn in his favour, 9 A L J 152 34 A 250-13 I C 975.

—Ss. 167, 31 (2)—Transferee from tenant—Ejectment of, on footing of his being only a trespasser—Suit for—Lies in Civil Court. 1932 A L J 567-16 R D 429 13 L R 266 (Rev)=139 I C 346= I R 1932 A 553=A I R 1932 A 473.

—S. 167—A purdanashin lady suing for a declaration that a perpetual lease made by her through ignorance is not binding on her—the suit lies only in Revenue Court. A I R 1928 All 614=Ind Rul (1929) All 780=L R 9 A 216 Rev.=118 I C 172.

—S. 167—A decision by a Revenue Court that a tenant is a grove-holder will bar a subsequent suit in a Civil Court to eject that tenant on the ground that he was a licensee A I R 1928 All 343=Ind Rul (1929) All 779=L R 9 A 141 Rev = 118 I C 171

—S. 167—A Revenue Court decree cannot be declared void by a Civil Court on the ground of unlawful proceeding in that Court especially when tenant has remedy under s. 79 A I R 1928 All 621-26 A L J 834=113 I C 829

## AGRA TENANCY ACT ( 2 OF 1901 ) (Contd.)

Ss. 167, 2 (5)—Tenant, against whom an ejectment decree is passed by Revenue Court, cannot sue in a Civil Court, for declaration that he is an occupancy tenant 98 I C 263=A I R 1927 All 102

S. 167—First suit in a Revenue Court to eject the deft. as subtenant, second suit for ejectment as trespasser in Civil Court is barred. A I R 1927 All 70-48 A 774 24 A L J 1009-98 I C 983 (F B)

—S. 167—High Court has no power of revision under s. 167 A I R 1926 All 398 (F B)=24 A L J 437-95 I C 559

—S. 167—Deals only with original proceedings A I R 1926 All 113-48 A 104 23 A L J 965-92 I C 282

—Ss 167, 177—High Court can, under s. 115 C. P. C. hear in revision an order of Dist Judge under s. 177 A I R 1926 All 113-92 I C 282-23 A L J 965-48 A 104

—Ss. 167, 199—Deft. raising question of title in an ejectment suit was directed to file suit in Civil Court within 3 months Having not filed such suit within 3 months he was held barred even though the suit in Revenue Court had not concluded A I R 1925 All 615-88 I C 684-23 A L J 529-47 A 904.

S. 167—does not apply where two brothers claim an occupancy holding one against the other. Such suit is maintainable in Civil Court. A I R 1926 All 45-88 I C 592

—S. 167—Civil Court can entertain a suit for declaration that the plff. is joint in occupancy with the deft. 88 I C 247=A I R 1925 All 465-23 A L J 449-47 A 616

—S. 167—Mortgagee of zamindari plots who is a recorded co-sharer can claim joint possession but not mesne profits Civil Courts cannot entertain such cases A I R 1925 All 746-87 I C 444

—S. 167—Civil Court cannot change a Revenue Court's decision under s. 167 even indirectly. A I R 1924 All 744-79 I C 960 22 A L J 466-46 A 570

—S. 167—Civil Court can entertain a suit between two rivals as such suit is not governed by s. 167. A I R 1924 All 603-78 I C 1008.

—S. 167—Decision by Revenue Court in a dispute between two rival claimants cannot be re-opened by a Civil Court. 78 I C 1008=A I R 1924 All 609

—S. 167—Revenue Court has exclusive jurisdiction over matter within S. 167. Civil Court will not try suit calculated to reverse Revenue Court's decision in such matter. A I R 1925 All 194=L R 5 A 138 Rev=78 I C 628

—S. 167—Civil Court can entertain a suit for possession of trees in a grove. A I R 1923 All 134-L R 3 A 530 Rev=76 I C 12-21 A L J 33-9 O & A L R 277-45 A 191

—S. 167—No revision lies against an



## AGRA TENANCY ACT (2 OF 1901) (Contd)

order of the District Judge refusing to entertain appeal under the Act. A I R 1923 All 580=45 A 567=21 A L J 524=L R 4 A 223 Rev=75 I C 230

-S. 167—Suit for a declaration under s. 95 (a) with the real object to have a declaration against both the zemindar and the son of the tenant who was recorded as such that the plaintiffs were the occupancy tenants of the holding can only be brought in a Court of Revenue. A I R 1924 All 102 =74 I C 220

-S. 167—Suit for a declaration between two rival tenant can be brought in a Civil Court, unless it is a device to evade the provisions of the Act. A I R 1923 All 257=L R 4 A 291 (Rev)=71 I C 447

-S. 167—Landlord can sue only in Revenue Court for damages for non-cultivation of land by which he was deprived of his Balai rent, L R 3 A 477=20 A L J 771=4 U P L R (A) 206=68 I C 985=45 A 7 =1923 A 50

-S. 167—Revenue Court cannot pass a decree in a case where one of the two rival zamindars fraudulently enters the other's name as sub-tenant, obtains exparte decree for rent, and sues for ejectment. And if such decree is passed it furnishes a fresh cause of action. 3 U P L R (A) 21 =65 I C 101

-S. 167—Order in appeal against the decision of an Asst. Collector—High Court has no power to revise. 17 A L J 1057=1 U P L R (H. C.) 142=52 I C 756=42 All 83

-S. 167—An ejectment suit against the defendant as trespasser or in the alternative to declare him as a tenant if so found, is within the jurisdiction of a Civil Court. 13 A L J 843=30 I C 545

-S. 167—A Revenue Court's decision ejecting a party deciding him as a sub-tenant cannot be challenged in a civil suit; because the Revenue Court has exclusive jurisdiction in such matters. 41 All 97=16 A L J 933 =48 I C 470

-Ss. 167, 79—A suit in a Civil Court, by a descendant of an original resumed musafi, to recover possession as proprietor is not maintainable since he is a mere tenant. 13 A L J 857=30 I C 552

-Ss. 167, 65—A suit by a landlord for damages against tenants alleging the cutting down of trees by the tenants is cognisable by a Civil Court. 40 All 646=16 A L J 621=46 I C 971

-Ss. 167, 95—If the matter set up in defence is one in respect of which a suit can be brought in a Revenue Court within the meaning of s. 167, the Civil Court should wash off its hands with that suit. 37 All 254=13 A L J 364=28 I C 552

-S. 167—A suit for declaration of

## AGRA TENANCY ACT (2 OF 1901) (Contd)

rights to receive rent instituted by a perpetual lessee against the grantor-zamindar is cognisable by a Civil Court. 39 A 675 =15 A L J 745=42 I C 575

-S. 167—As a general rule where there is a doubtful and difficult question of jurisdiction depending partly on facts it is the duty of Courts of first instance to ascertain and determine the facts if it is possible to do so. -per Walsh J. 39 A 675 =15 A L J 745=42 I C 575

-S. 167—The question whether a usufructuary mortgagee must give up possession to his mortgagor when the latter becomes an expropriatory tenant is not a question reserved exclusively for the Revenue Courts. 9 A L J 547=15 I C 438

-S. 167—Suit in Civil Court for declaration that relationship of landlord and tenant does not exist is not maintainable where the Revenue Court has in a prior suit declared that he is not a tenant. 17 A L J 922=1 U P L R (A) 64=51 I C 143

-Ss. 167, 169—No revision lies to the High Court from an order of a Revenue Court under s. 167. The remedy in the Civil Court is by appeal in cases in which right to appeal is given. 41 All 226 =17 A L J 123=49 I C 362.

-S. 167—Order of an asst. collector rejecting an application for restitution however erroneous, cannot be revised by the High Court. 52 I C 640.

-S. 167—Suit for arrears of rent by an assignee is cognisable by a Revenue Court only. Such a Suit though below Rs.500 is not of a small cause nature and a second appeal will lie to the High Court. 12 A L J 98=22 I C 337.

-Ss. 167, 180, 185—The defendant recorded as fixed rate tenant, denied being tenant of plaintiff in suit for rent before Revenue court the Dt. judge in appeal held plot as no "land" A Revision application was made. Held per Walsh J. that the District judge's decision in appeal from Revenue court is Civil court's decision and was therefore subject to revision. Held per Piggot J. that no revision lies as the Dt Judge had not acted with material is regularity or had refused to exercise jurisdiction. 14 A L J 281=35 I C 279.

-S. 167—When once a suit for ejectment brought in Revenue Court on the ground that the defendants were sub-tenants, is rejected, the court holding the defendants as joint-tenants a subsequent Suit in a civil court for ejecting the defendants on the ground that they were trespassers is barred by this section. 41 All 203 =17 A L J 60=49 I C 118.

-Ss. 175 and 179 No appeal can lie to the Commissioner from the order of the Assistant Collector where there is no



## AGRA TENANCY ACT (2 OF 1901) (Contd.)

abatement. 4 U P L R (B R) 103=L R 4 A 10 (Rev.)

—Ss. 175, 177—S 175 applies both to appeals to the Revenue Court and to civil Court; and an order of a revenue Court staying or refusing to stay suit under para. 18 of sch. II of the C. P. Code is not a "decree" within s 177 of this act and no appeal lies against such an order to the Civil Court 40 All 219=16 A L J 231=43 I C 531

—S. 176—an order of Asst. Collector of II class rejecting an application for revised is appealable to the collector under s. 176 31 I C 912.

—S. 177 (e)—Deft claiming to be Khudkhash holder, Civil Court Jurisdiction will arise and appeal lies to The District Judge. L R 9 A 183 Rev=Ind Rul (1929 ) All 335 =114 I C 911

—S. 177—In a suit by expropriatory tenant against sub-tenant plff right to recover rent was questioned, Held the question of proprietary title is raised and appeal lies to District Judge A I R 1928 All 409=Ind Rul. (1929) All 325=L R 9 A 175 Rev =114 I C 901

—S. 177—Where a dispute as to proprietary right existed at the time of appeal but the question was abandoned subsequently it was held not to have the effect of depriving the Dist. Judge of the jurisdiction to hear the appeal. L R 10 A 134 Rev=113 I C 748=A I R 1929 All 67

—S. 177 (e)—Where question of proprietary title in issue in the Court of first instance as well as in appeal an appeal lies to the District Judge A I R 1928 All 264 =L R 9 A 61 Rev=108 I C 733

—S. 177—Where a plea in ejectment was that the tenant permitted third person to build on tenancy plot it was held that no question of proprietary title was involved A I R 1927 All 564=L R 8 A 74 Rev=102 I C 184

—Ss. 177, 57—Only those decrees of Asst. Collector which come under cls. (a), (b), (c), (e) or (f) of s. 177 are appealable to the Dist. Judge A I R 1927 All 564=L R 8 A 74 Rev=102 I C 184

S. 177 (f)—Where the question of jurisdiction was raised, but later withdrawn and no issue was framed as to that question by Asst. Collector Held that cl. (f) did not apply A I R 1927 All 564=L R 8 A 74 Rev =102 I C 184

—S. 177 (f)—Facts alleged in the plaint are assumed to be true when plea of jurisdiction is raised L R 7 A 382=96 I C 172

—Ss. 177, 167—High Court can, under s. 115 of c. p. c. revise orders of Dist. Judge under s. 177. 23 A L J 965=A I R 1926 All 113=92 I C 282=48 A 104

—S. 177—Remand order by Dist. Judge

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## AGRA TENANCY ACT (2 OF 1901) (Contd.)

under s. 177—is not appealable but revisable. 23 A L J 965=A I R 1926 All 113=92 I C 282=48 A 104

—S. 177—Where a tenant pleaded that he held the land as khudkhash and as proprietor. Held it was a question of proprietary title. L R 5 A 251=83 I C 202=A I R 1925 All 30.

—S. 177—It is for the trial Court to decide whether the plea is bona fide or not. A I R 1924 All 476=L R 5 A 183 Rev.=83 I C 251.

—S. 177—An appeal from the decision of an Assistant Collector, First Class, in an ejectment suit lies to the District Judge A I R 1923 All 368=82 I C 790.

—S. 177 (e)—Question as to mortgage rights is a question of proprietary title. 74 I C 914=A I R 1923 All 562.

—Ss. 177 (e), 34—Plea that the deft. was occupying land without permission raises question of proprietary title. A I R 1923 All 558=L R 5 A 14 Rev.=73 I C 584.

—S. 177—Expression "in all suits" means suits of any description within sch. IV. A I R 1923 All 313=21 A L J 189=45 A 336=L R 4 A 84 Rev.=71 I C 773.

—Ss. 177, 198—Where a question as to proprietary title is decided by Revenue Court, remedy under s. 198, is an additional remedy but does not prevent an appeal lying to the District Judge under s. 177, cl. (e). A I R 1923 All 414 (2)=71 I C 308.

—177 (f)—Plea of jurisdiction must be based on an assumption that the allegations in the plaint are true. A L R 1922 All 424=70 I C 578.

—S. 177—Order passed by Revenue Court under s. 144, C P C is not appealable, but its decree is A I R 1922 All 71 =44 All 283=20 A L J 133=65 I C 798.

—S. 177—Order refusing restitution by Revenue Court is not a decree and is not appealable, A I R 1922 All 71=44 A 283 =20 A L J 133=L R 3 A 97=65 I C 798.

—S. 177—The valuation of suit for the purposes of appeal under s. 177 should be taken to be the value as found by the Court and not the one claimed by plaintiff. A I R 1922 All 47=80 I C 183.

—S. 177—In a suit to eject defendant as a sub tenant, the latter pleaded that he was proprietor; Held, question of proprietary title was involved in the original Court. L R 3 A 403 (Rev.).

—S. 177—Revenue Court is not deprived of jurisdiction if the question of proprietary title raised is not bona fide. L R 3 A 274 (Rev.).

—S. 177—Claim to hold land as khudkhash raises a question of proprietary title. L R 3 A 265 (Rev.).

—S. 177—Where the plea of propri-

## AGRA TENANCY ACT ( 2 OF 1901 ) (Contd.)

etary title is bona fide appeal lies to the District Judge. L R 3 A 228 (Rev.)

—Ss. 177 (f), 95—Where the deft denied plff's being a tenant and objected that the plaint did not refer to Jurisdiction. Held, that it was not a plea of jurisdiction. 19 A L J 120=A I R 1921 All 190-61 I C 44 =43 A 368.

—Ss. 177, 95—Ordinarily, appeal lies to the Commissioner and not to Dt. Judge, unless plea of jurisdiction is raised or decided. A I R 1921 All 190-43 A 368-19 A L J 120=2 U P L R (A) 435-61 I C 44

—S. 177—No appeal lies to Dist. Judge in a case in which no question of jurisdiction is decided. 2 U P L R (B R) 95-60 I C 262.

—S. 177—Question whether relationship of landlord and tenant exists between the parties is a question of proprietary title. L R 2 A 143 (Rev.)

—S. 177—Plaintiff claiming as occupancy tenant and filing ejectment suit against defendant sub-tenant and the latter pleaded that he was not a sub-tenant but held directly from the landlord. No question of proprietary rights was involved. L R 1 A 108 (Rev.)

—S. 177 (e)—Where question of proprietary title is involved the Commissioner must return the appeal to Dt. Judge. But a patently futile plea of proprietary title is not enough to bring s. 177 (e) into action. L R 1 A 67 (Rev.)

—Ss. 177, 58—Deft. setting a title as mortgagees of the proprietary right held appeal lies to Dist. Judge. 35 A 156-11 A L J 135-18 I C 282.

—S. 177—Order refusing to stay a suit is not a decree—No appeal. 43 I C 531.

—Ss. 177, 195 (1)—Where the decree of a Revenue Court is severable, an appeal may be preferred to a Civil Court against that part dealing with proprietary title, and to the Commissioner as to portions not so dealing. 15 A L J 6-37 I C 771.

—Ss. 177, 185—Orders in suits appealable under s. 177 are by s. 185 outside the revisional jurisdiction of the Board of Revenue. Board cannot therefore interfere with an order under O 9 R 9 of C P Code. 1 U P L R (B R) 29-53 I C 69.

—S. 177—An order of ejectment in a suit by a usufructuary mortgagee in which defendant pleads that he is not plaintiff's sub-tenant, is not appealable to the D. J., as no question of proprietary title is involved. 58 I C 760.

—S. 177—The words "proprietary title" refer not to a disputed title to a tenure or tenant's right but only to the "Zamindar." 58 I C 760.

—S. 177—In an ejectment suit the defendant pleaded that his lands were

## AGRA TENANCY ACT ( 2 OF 1901 ) (Contd.)

khuddkhist, an appeal will lie to the Dt. Judge because a question of proprietary title is raised. 36 All 183-12 A L J 251 =22 I C 964 (F B.)

—S. 177—If proprietary title was in issue in a suit for ejectment; but the lower Court found against the deft. it does not cease to be a "matter in issue in the appeal" and appeal lies to Dist. Judge. 31 I C 857.

—Ss. 177, 178—The defence, in an ejectment suit, being that they were not plaintiff's tenants but they were lessees from other persons is one which raises a question of proprietary title and an appeal will lie to the Dt. Judge, 16 A L J 239-44 I C 720.

—S 177 sch. B—A suit for recovery of immoveable property was valued at Rs. 44 the rent payable for the year next before the date of presenting the plaint Held it was properly valued. 12 A L J 933-25 I C 975.

—S. 177 sch. B—Where valuation is less than Rs. 100 no appeal will lie. 12 A L J 933-25 I C 975.

—S. 177—Whether deft. is holding as sub-tenant or as khuddkist is a question of proprietary title 55 I C 801.

—S. 177 (e)—Plea, in an ejectment suit, of tenancy from third person is a question of proprietary title. 14 A L J 656.

—S. 177—Plea, in a suit for assessment of revenue, that a third person is a zamindar. Held a question of proprietary title was raised and appeal lay to Dist. Judge. 8 I C 817-8 A L J 36-33 A 260.

—S. 117 (e)—An appeal under this section lies to the Dt. Judge in cases in which the question of proprietary title is in issue between the parties both in the original court and also in the appeal, 21 I C 870

—S 177 (e)—If in an ejectment suit, the defendant co-sharer claims to hold the land as proprietor, a question of proprietary title is raised and an appeal lies to the Dt Judge 57 I C 321

—S. 177 (e)—The question whether the defendant is a co-tenant or a sub-tenant of the plaintiff is one which does not relate to proprietary title and therefore an appeal will not lie to the Dt. Judge. A I R 1921 A 290-18 A L J 923-43 A 18-57 I C 205

—Ss. 177 (e) and 198—In an ejectment suit the defendant alleges that a third person is the proprietor, a question of proprietary title is raised; and so an appeal will lie to the Dt. Judge. 31 I C 853

—Ss. 177 cl (e) and 195—If a question of proprietary title is in issue in the first court as well as in the appeal, the appeal will lie to the Civil Court under s. 177 cl. (e) 39 I C 958

—S 177 (e)—Setting up a claim of proprietary title by adverse possession by the defendant in an ejectment suit raises a

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

question of proprietary title and an appeal will lie to the Dt. Judge. 55 I C 930

—S 177 (f)—In a suit where plea of jurisdiction is raised, and decided an appeal lies to the Dt. Judge 42 All 91=17 A L J 1072=1 U P L R 136=52 I C 779 (H C).

Ss. 179, 95—Appeal from a suit under s. 95 lies to the Commissioner only 97 I C 241=A I R 1926 All 725

—S 180 (2) (a)—Where a question of proprietary title is raised appeal lies to Dist Judge. 73 I C 1030=A I R 1923 All 451.

—S 180 (2) (b)—If a question of jurisdiction has been decided at a previous stage by the Dt. Judge, the second appeal will lie to him even if no question of proprietary title of jurisdiction is raised. 12 A L J 367=23 I C 320.

—Ss. 180 (2) and 193—The order of a Dt. Judge passed in second appeal under s 180 (2), is not appealable to the High Court 38 All 181=14 A L J 84=35 I C 27

—S. 181—Where the Collector has not properly considered the evidence, the Board can vary his decision. L R 3 A 500 (Rev)

—S 181—Appeal does not lie to the Board from orders in miscellaneous proceedings. 3 U P L R (B R) 69

—Ss 181, 182—Dt. Judge's remand order passed under O 41, r 23, C P Code is not appealable 35 I C 105

—S 181—Appellate decree passed ex parte by a commissioner, reversing or modifying the decree appealed against, is appealable to the Board 29 I C 345.

—S. 182—Appeal to Dist. Judge—Memo returned to be presented to the Appellate Court on Revenue Side—Order of return is not open to appeal to High Court. 63 I C 951=19 A L J 868=1921 A 177

—S 182—There is no third appeal to the High Court, from a decision of the Dt. Judge passed in appeal, from an appellate order of the Collector. 12 I C 139.

See also A I R 1926 All 233=92 I C 3

—S. 185—Failure to consider evidence in a ground for revision under s 185. L R 4 A 193 (Rev)

—S. 185—Collector has no power of review except on the ground of some clerical errors on the face of the record L R 4 A 146 (Rev)

—S. 185—Failure to deal with plea is a material irregularity and is a ground for revision. L R 3 A 208 (Rev)

—S. 185—Board has power of revision over all orders of Revenue Court. L R 2 A 92 (Rev)

—S 185—An Assistant Collector refused to set aside an order for dismissal of a suit for default. The decree in suit would have been appealable. Held that

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

revision lies against such an order. L R 2. A 22 (Rev).

—S 185—Omission to consider questions raised is sufficient ground to interfere in Revision. L R 4 A 191. (Rev)

—S 185—Outside the scope of this section, the Board of Revenue interferes in revision only when gross and palpable errors of law are committed, doing substantial injustice. 22 O C 72=52 I C 159.

—S 185—The action of an occupancy tenant mutating tenancy in favour of his sons has no legal effect and his rights as an occupancy tenant do not cease 29 I C 676.

—S 185—The Court's omission to compare a patwari's map with the one in the record form is such an irregularity as to merit a revision 33 I C 414.

—S. 193 (g)—There is no provision for set off; separate suit is the only remedy. A I R 1928 All 536=L R 9 A 186 (Rev)

=Ind Rul. 1929 All 324=114 I C 900

—S 193 (i)—Assignee of an interest in suit was not brought on record and decree passed in favour of original plaintiff—On death of plaintiff, assignee, as an heir is entitled to execute the decree though no mutation of names has been effected in his favour. A I R 1927 All 492=L R 8 A 113 (Rev)=101 I C 580.

—S 193 (k) "Standing timber" does not include fruit trees. A I R 1927 All 254 =49 A 330=25 A L J 199=L R 8 A 135. (Rev)=101 I C 287

—S. 193 (1)—Any isolated plot in a mahal is not a share of the mahal. 88 I C 613=A I R 1925 All 743.

—S. 193—Execution sale, which ought to have been held by Collector, is not vitiated if held by Asst. Collector, A I R 1925 All 743=88 I C 613.

—S. 193 (g)—Sub-Tenant of exproprietary tenant paying off rent decree against exproprietary tenant cannot plead payment as set off in suit for rent against himself by exproprietary tenant. 87 I C 713=A I R 1925 All 824.

—S. 193 (g)—Defendant's unsatisfied decree cannot be set off against plaintiff's vendor in a suit under the Act. A I R 1924 All 341 (F B)=46 A 398=22 A L J 217=L R 5 A 65 (Rev)=83 I C 403

—Ss. 193 (a), 167—In suit for profits against lambardar by transferee of co-sharer, insolvency of co-sharer can be pleaded before transfer. A I R 1924 All 341 (F B)=46 A 398=22 A L J 217=L R 5 A 65 (Rev)=83 I C 403.

—S. 193—Proceedings under Tenancy Act are not affected by Provincial Insolvency Act, 1907—Hence suit for rent against tenant who is an undischarged bankrupt can be maintained. A I R 1921 All 13 (F B)=43 A 510=19 A L J 439=62 I C 897

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

—S. 193—Order of remand passed in a suit under this act is not appealable; provisions of C P C not applying. 14 I C 176  
See also; 1906 A W N 5-3 A L J 20-28  
A 283; L R I A 70 (Rev)

—S. 193—Upon the dismissal of his suit by the first court to declare him as a proprietor of a muafi, the plaintiff appealed to the Higher Court which recognised him as a rent free grantee of that much land as stood in his name, and remanded it to the lower Court for determination of the revenue that would be payable by him. No second appeal to the High Court would lie because this Act does not differentiate a preliminary decree from a final one; and the order being one for remand. 40 A 652-16 A  
L J 711-47 I C 1008.

—S. 193—Orders as distengnished from decrees under this Act are not appealable.  
1 U P L R 12-52 I C 241 (B R)

—S. 193 (e)—Signature of authorised agent sufficient. 31 I C 859

—S. 193 (g)—The lessee cannot get a set-off in respect of an amount wrongfully collected by the lesser as rent, in a suit by the former against the latter for arrears of rent. 13 I C 150

—S. 193 (g)—The loss of a receipt need not be proved by the person alleging payment, and the payment can be proved by other evidence. 13 I C 150

—S. 194—Co-sharer in village whether an agent for other co-sharers. See 54 A 240  
=1932 A L J 129-16 R D 132-13 L R 65  
(Rev)=138 I C 445-I R 1932 A 408-A I R  
(1932) A 98-A L R (1932) A 474

—S. 194—No co-sharer is entitled to collect part or whole of the rent of a tenant and a tenant making payment to any one of them, not being the lambardar, cannot get a discharge in a suit for arrears of the rent brought against him by the lambardar, who will be entitled to a decree in respect of the entire rent, the tenant having his remedy of refund from the co-sharer who collected in contravention of S. 194 and the local custom referred to. 54 A 240-1932 A L J 129-16 R D 132-13 L R 65 (Rev)=138 I C 445-I R 1932 A 408-A I R 1932 A 98-A L R 1932 A 474

—S. 194—Suit by one cosharer for the whole of rent is bad, but the flaw can be corrected by joining the other cosharers even after the period of limitation so far as regards plff's. share. Ind. Rul. 1930 All 444  
=123 I C 828-A I R 1930 A 309

—S. 194—One co-sharer taking possession of part of joint land and leasing it perpetually without the consent of the other co-sharers, the latter can claim joint possession without getting the lease cancelled. A I R 1928 All 525-L R 9 A 223 Rev=Ind Rul (1929) All 315-114 I C 891

## AGRA TENANCY ACT ( 2 OF 1901 ) (Contd.)

—S. 194—In the absence of custom one cosharer cannot sue for whole rent, unless he sues as an agent for the other cosharers. A I R 1927 All 505-49 A 918-25  
A L J 582-L R 8 A 225 Rev=103 I C 379

—S. 194—Vendor of a share becoming exproprietary tenant is a tenant of whole body of co-sharers, and all of them must join in the suit for cannot alone sue for rent of such holding in absence of special contract. A I R 1927 All 206=L R 8 A 77 (Rev)=99 I C 528-

—S. 194—Purchaser of proprietary rights in the mahal is entitled to the rights of cosharer, even if he is a tenant in that mahal. A I R 1926 All 544-95 I C 48

—S. 194—Two cosharers not agreeing to evict a tenant, tenant even if he is the cosharer himself can stay on 95 I C 48-A I R 1926 All 544

—S. 194—Where a cosharer is in exclusive possession of sir and khudkhasat he need not join other cosharers in a suit to eject the sub-tenant A I R 1925 All 775=  
=87 I C 698

—S. 194—Lambardar is prima facie entitled to recover rent on behalf of all cosharers if not so entitled he cannot sue to recover his share alone 87 I C 197-A I R 1925 All 817

—S. 194 (1)—It is presumed that a lambardar sues for rent or ejectment as an agent of the cosharers. Such presumption, however is rebuttable. 80 I C 732-A I R 1925 All 49

—S. 194—All cosharers need not be made parties in a suit to eject non-occupancy tenants by one cosharer where phatbandi is existence and is formally recorded 77 I C 760-A I R 1923 All 559

—S. 194—Lambardar can allow tenants to build a kuchcha building on the land belonging to joint patti A I R 1923 All 532-L R 5 A 33 Rev.=73 I C 495

—S. 194—Authority to collect rent by one of several thekadars need not be in writing. L R 4 A 324 (Rev)

—S. 194—Some of the lambardars suing to eject the others who never claimed rent cannot intervene to protect the tenants. L R 4 A 321 (Rev)

—S. 194—Pending the appeal in an ejectment suit the tenant purchased the zamindari interest; Held, the mere ground that if the suit had been then instituted it would be dismissed under s. 194 was no justification for allowing the appeal. L R 4 A 202 (Rev)

—S. 194—Lambardar granting a khabuliya which was attested by some cosharers who had realised rent on it. Held inference that the lambardar had implied authority from the co-sharers is justifiable L R 3 A 525 (Rev)

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

-S. 194 (1)-Lambardar is not necessarily entitled to collect rents with reference to s. 194 (1) Either an agreement of the co-sharers or a special custom must be proved  
L R 3 A 457 (Rev)

-S. 194-All coshares must join in granting a lease but not in suing to eject a trespasser in the Civil Court L R 3 A 445 (Rev)

S. 194-A Lambardar is entitled to do all necessary acts relating to the management of the estate for the common benefit including collection of rent settlement or ejection of tenants etc. L R 3 A 359 (Rev)

-S. 194-All cosharers must join where a mortgagee from some of them sues for ejectment. L R 3 A 213 (Rev)

-S. 194-Where the cosharers agree to collect rent separately all must join in a suit for ejectment unless the suit is by a common agent. L R 3 A 221 (Rev)

-S. 194-If a co-sharer refuses to join the lambardar in a suit for ejectment the latter cannot proceed with the suit by making the co-sharer a defendant L R 3 A 29 (Rev)

-S. 194-Plea of non-joinder cannot be raised for the first time in appeal. 3 U P L R (B R) 63

-S. 194 In a suit by a tenant joint-tenant should be joined especially when he was made a defendant with opportunity to raise objections L R 1 A 9 (Rev)

-S. 194-Non joinder of some co-sharers in an ejectment suit cannot be cured by joining them as pro forma defendants 2 U P L R (B R) 164

-S. 194 (3)-Covers money suits only 2 U P L R (B R) 164

-S. 194-Person in possession of portion under Civil Court is a cosharer 2 U P L R (B R) 163

-S. 194-Even a single person out of many against whom a decree is passed can file an appeal despite the fact that others do not join him This section does not apply to appeals. 29 I C 558

-S. 194-A suit by a lambardar against co-sharers for excess of profits from sir and khudakhist in possession of latter is not maintainable as he is not an agent of the co-sharers. 34 All 98-8 A L J 1245 =12 I C 920

-S. 194-A lambardar being an agent of the co-shearers can bring an ejectment suit against a tenant without joining the co-sharers as plaintiffs 36 All 441-12 A L J 606-24 I C 178 (F. B)  
See also 28 I C 838

-S. 194-A lease, to acquire the status of a tenancy, must be granted by all the co-sharers. 1 U P L R (B R) 5-52 I C 145 (B R.)

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

-S. 194-Suit by one co-sharer for arrears of Rent is not maintainable, in the absence of a custom or contract to the contrary. 25 I C 531.

-S. 194-If the khata is joint, the lambardar, is such, can alone bring a suit for ejectment of a non-occupancy tenant, without joining the other co-sharers as plaintiffs. 11 A L J 742-21 I C 38.

S. 194-A cosharer can sue separately for rent if there is a particular contract overriding this section. 45 I C 652.

-S. 194 (1)-In the event of one of the brothers being abroad, the remaining can bring an ejectment suit, the presumption being that they are his agent. 32 I C 781.

-S. 195-Order of an assistant collector, in a suit for rent under s. 4 of the Paragana of Kaswar Raj, Act, is appealable to the Dt. Judge. 14 I C 123.

-S. 195-Only in case of doubt as to jurisdiction of a Revenue or a Civil Court, will a reference under this section lie to the High Court. 14 I C 123.

-Ss. 196 and 197-Section should be read together-Both deal with institution of suit in wrong Court-Both sections assume that the trial Court has entertained the suit and disposed of it on the merits. It is only in such a case that the Court could remand the suit or frame issues or direct additional evidence to be taken as contemplated by sub-s. (2), A I R 1926 All. 58-48 A 168-24 A L J 83-93 I C 353.

-Ss. 196, 197 Do not apply where the ground of the suit forfeiture due to denial of title. A I R 1922 All 274-69 I C 799.

-S. 196-Objection to jurisdiction cannot be raised on appeal or second appeal -Limitation to be applied to that suit is the one which would have applied if the Suit had been brought in the right Court. A I R 1922

All 124-4 U P L R (A) 104-66 I C 856.

-Ss. 196, 197-Civil Court cannot entertain a suit for ejectment on the ground of invalid lease. L R 3 A 134.

-Ss. 196, 197-Apply where one cosharer in present possession sues another cosharer for mesne profits for previous years. A I R 1921 All 112-61 I C 385-19

A L J 194,

-Ss. 196, 197-The former section applies to suits in which an appeal necessarily lies to the Dt. Judge or High Court irrespective of their institution in a civil or a Revenue Court.

Neither section applies to an ejectment suit filed in a civil court and thrown out for want of jurisdiction. 12 A L J 902-24 I C 700 (2.)

-S. 196-Objection as to jurisdiction not being taken in the first court or in the lower appellate court, cannot be pleaded in the High Court. 9 I C 1005,



## AGRA TENANCY ACT (2 OF 1901) (Contd.)

S. 197—High Court and District Court can on appeal treat a suit wrongly brought in a Revenue Court as if brought in a Civil Court. A I R 1927 All 720=L R 8 A 297 (Rev.)=105 I C 878.

Ss. 197 and 196—objection to jurisdiction taken in the trial Court—Appellate Court having all the materials necessary for decision before it should dispose of the case as if it was filed in the proper Court A I R 1926 All 708=L R 7 A 410 Rev=96 I C 789.

—S. 197—Revenue Court cannot entertain a suit for ejectment in respect of land situated in Cantonments area. A I R 1922 All 57=66 I C 582.

—S. 197—Cantonments area does not come within the Act. Secretary of state is the absolute owner of such land. Where the S. of S. brought a suit in a wrong Court on a wrong cause of action, he was made to pay the whole costs. A I R 1922 All 57=L R 3 A 169 (Rev.)=66 I C 582.

—S. 197—Procedure under s. 197 should be followed in a suit for profits against lambardar for negligence. Claims of Nazrara and Haqchaharam can be included in such suit. L R 3 A 149.

—S. 197—does not apply to the suit in which deft. claims to be tenant. C4 I C 426 =19 A L J 850=1921 A 58.

—S. 197—a suit for declaration of invalidity of a lease does not lie in a civil court. 37 I C 358.

S. 197—a notification of the High court empowering a sub-judge to hear all appeals from the decrees and orders of a Munsif applies to Revenue appeal also; and the sub-judge can dispose them of as effectively as a Dt. Judge. 46 I C 736.

—S. 197—In appeal, from the Revenue Court's decision in an ejectment suit, the Dt. Judge should decide the issue of jurisdiction pleaded in the Revenue Court by the defendant but left undecided. 29 I C 565.

—S. 197—Transfer of an appeal in a suit cognisable by Revenue Court to subordinate Judge—Powers exercisable by the latter—Bengal N. W. P., and Assam Civil Courts Act s. 9. 37 All 232=29 I C 633.

—S. 197—Munsif returning plaint for presentation to the Revenue Court—Order remanding the case to the Munsif—Second appeal does not lie. 8 A L J 312=33 A 479=9 I C 666.

—S. 198 (2)—Prior suit in Revenue Court by malguzar to eject tenant—Defence that he was servant of a third person added as defendant. No issue as to status of third person framed—Subsequent suit in Civil Court by the third person claiming land as grove is not barred by the decision in Revenue

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

Court nor is he estopped by it. A I R 1929 All 17=L R 9 A 289 Rev=12 R D 703=Ind Rul (1929) All 374=115 I C 454.

—S. 198—Protection is available only when the relation of landholder and tenant does not exist and the defendant has already paid the rent claimed in good faith to a third party. A I R 1927 All 745=L R 8 A 94 Rev=99 I C 534.

—S. 198—Prior exparate decision for rent will debar deft. from challenging plff's right to sue for rent in a subsequent suit for rent for subsequent years. A I R 1927 All 145=98 I C 981=L R 7 A 406 Rev.

—S. 198—Question whether a matter of proprietary title is in issue does not depend on whether the case is within s. 198; it must be answered independently of s. 198 A I R 1926 All 312=24 A L J 337=92 I C 995 =L R 7 A 49 Rev.

—S. 198—No question of proprietary title can arise between a tenant and his sub-tenant, A I R 1926 All 312=92 I C 995=24 A L J 337=L R 7 A 49 Rev.

—S. 198 (2)—Deft. pleading like in third person in a rent suit, such third person can be joined as party. But the question of title decided between him and plaintiff is not res judicata between them and can be re-agitated in Civil Court. A I R 1925 All 574 See also 71 I C 1017 =85 I C 302=L R 6 A 53 Rev.

—S. 198—Payment must have been actually made and in good faith. Payment subsequent to suit is not sufficient. 19 A L J 298=A I R 1921 All 105=60 I C 837=43 All 448

—S. 198—If a tenant, pleads that he has paid the rent in good faith to a third person, this section applies. But the section has no bearing to a case where the relation of a tenant is not denied, and the payment is not given to any one because of the obstruction of a third person claiming property in the land, 7 A L J 1198 =8 I C 1098=33 A 61.

—S. 198—An ejectment suit by a former tenant, against a new tenant created by the zamindar because of the former tenant's abandonment of the village, does not lie in view of the fact that the defendant has in good faith made payments to the zamindar. 33 I C 69.

—S. 198—The payment of rent by a tenant to the existing lambardar is valid, the partition being imperfect and a second lambardar not appointed. Good faith can be presumed in such a case. 1 U P L R (B R) 4=52 I C 139.

—S. 199—Option once exercised cannot be altered. L R 10 A 189=Ind. Rul. 1929 All 613=116 I C 789=A I R 1929 All 164.

—S. 199 (3)—Decision under, operates as res judicata. A I R 1927 All 717=49 A.



## AGRA TENANCY ACT (2 OF 1901) (Contd.)

606-25 A L J 387-L R 8 A 122 Rev=101 I C 501.

—S. 199 (1) (a)—All the pliffs to the ejectment suit must be made debts in the declaratory suit in Civil Court. L R 8 A 108 Rev=100 I C 520=A I R 1927 All 398.

—S. 199 (1), (2)—Where a Court directs a suit to establish title to be filed within a certain period it must be so filed otherwise s. 199 (2) will come into operation. Party cannot take shelter under another pending suit to which he is a party. A I R 1927 All 200-L R 8 A 46 Rev=98 I C 1019.

S. 199—Suit, filed within 3 months of of Revenue Courts order, withdrawn with permission to bring fresh suit—Fresh suit filed within 4 days is not barred A I R 1927 All 98-L R 8 A 5 Rev=98 I C 516

S. 199—Revenue Courts can decide question of title only in specified cases—Decision of Record Officer on question of title is not res judicata in subsequent ejectment proceedings. A I R 1926 All 682 =96 I C 24

—S. 199—Civil Court can declare as to plaintiff's rights to trees only A I R 1923 All 540=21 A L J 434-74 I C 349

—S. 199—Asst. Collector's decision under s. 199 (b) operates as res judicata in a subsequent suit. L R 5 A 26 (Civ.)=73 I C 460=A I R 1923 All 556.

See also 66 I C 915=A I R 1922 All 129.

—Ss. 199, 200 and 201—Decision of Revenue Court is not res judicata in Civil Court except where sections 199 to 201, apply Where however the point under the Tenancy Act is itself within the jurisdiction of the Civil Court, it can decide it, 4 U P L R (A) 90=66 I C 714.

—S. 199—Court must decide title when the question as to legal representatives arises in a suit for profits or it must refer the parties to Civil Court. 4 U P L R (A) 9=63 I C 103.

—S. 199—Does not apply to a Suit by an alleged tenant against an alleged landlord; but not the reverse. 41 All 369=17 A L J 352=49 I C 591

—S. 199—Order under s. 199 to file suit in Civil Court within 3 months—Effect of delay—No question of limitation 37 All 94=13 A L J 31=27 I C 511

—S. 199—When a Revenue Court directs the defendant under this section to file a suit in a Civil Court, the limitation period provided by this Act applies, and not that prescribed by the Limitation Act. 4 A L J 713=A W N 1907, 282=30 A 44

—S. 199—An appeal lies to the Dt. Judge against the decision of a Revenue Court in an ejectment suit, the defendant claiming proprietorship 13 A L J 3 (Rev)=28 I C 693

## AGA TENANCY ACT (2 OF 1901) (Contd.)

—S. 199 cl. (a)—A suit filed following the Revenue Courts order under this section does not amount to a reference to the Civil Court by that Court. 39 I C 859

—S. 199—This section is restricted to questions of title to land. A decision of a Revenue Court passed not under this section is not res judicata. 15 I C 239.

—S. 199 (a) and (b)—Choice to be made before fixing issue. L R I A 24 (rev)

—S. 201 (3)—Definite decision is necessary to remove the presumption arising under s. 201 (3) A I R 1929 All 378-L R 10 A 287 (Rev)=In Rul (1929) All 1010=119 I C 433

—S. 201 (3)—Suit for profits—Entries in revenue register as to plaintiffs share are conclusive—Prior judgment though inconsistent with such entries does not operate as res judicata A I R 1929 All 155=L R 10 A 159 (Rev)=Ind Rul (1929) All 598 =116 I C 742

See also

L R 3 A 146

—S. 201 (3)—If the person is recorded cosharer at the date of the suit, the presumption is irrebuttable A I R 1929 All 32 =L R 9 A 125 (Rev)=113 I C 732

See also A I R 1927 All 810=25 A L J 706=L R 8 A 168 Rev=103 I C 346

—S. 201 (1)—Person who, by mistake in record, is compelled to pay the revenue of the person in actual possession can sue the latter under s. 201 (1) and not under cl. (3)—Court can determine question of possession A I R 1925 All 50=46 A 512=83 I C 245.

—S. 201 (3)—Suit for profits by the usufructuary mortgagee against mortgagor lambardar is maintainable A I R 1924 All 719=L R 5 A 174 Rev=22 A L J 518=79 I C 538

—S. 201—Presumption of correctness of an entry in Record of Rights does not arise merely because it is not corrected for 2 Years inspite of an order of a competent authority 71 I C 992=A I R 1923 A 401

—S. 201 (3)—Suit for profits against lambardar by Hindu co-parceners whose names are entered for each moiety in khatwat is maintainable A I R 1922 All 332=44 A 616=69 I C 208

—S. 201—Decision of Revenue Court on proprietary title in pursuance of jurisdiction under ss. 199 and 201 is res judicata 66 I C 915=A I R 1922 All 95=20 A L J 340

—S. 201—Where a record is altered prior to the suit for profits but relating to the period of profits the Court trying rent suit should give effect to the intention of the order altering the record A I R 1922 All 102=L R 3 A 140=44 A 413=4 U P L R (A) 188=20 A L J 243 =66 I C 125

—Ss. 201 (3) and 164 Decision of Civil Courts on question of title pending appeal

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

from a decree of Revenue Court the Appellate Court should give effect to Civil Courts decision. A I R 1922 A 356-44 A 250-20 A L J 61-L R 3 A 17-64 I C 964

—S. 201—Suit for profits—Revenue papers altered by Revenue Court during pendency of suit in Civil Court filed on question of title—Revenue Court holding in the suit for profits that entries in revenue record during years in suit were correct—Plaintiff was entitled to obtain profits in respect of the share which stood recorded in his name at the date of the institution of the suit and during the years for which profits were claimed A I R 1921 All 124 -43 A 697-19 A L J 732-63 I C 976  
See also 43 A 177-59 I C 639-A I R 1921 All 396

—Ss. 201, 99—Civil Court can question the decision of Revenue on question of title only when the latter proceeds upon an entry in revenue papers as conclusive on the question of title. 62 I C 684-A I R 1921 All 59-19 A L J 279

—S. 201—Where plff. is recorded as four-anna sharer the Court cannot go behind the record. L R I A 182 (Rev.)

—S. 201—The presumption under cl. (3) of s. 201 is not conclusive. A W N 1906, 316-4 A L J 3-29 A 148

S. 201—If a plaintiff in a suit for profits happens to be a recorded co-sharer, the presumption to be drawn under this section be in his favour 4 A L J 27-A W N 1907, 5-29 A 158.

—S. 201—Entries in Revenue papers are presumed to be correct and are considered as sufficient proof to prove title unless they are rebutted.

This section applies only to suits under the provisions of chapter XI. I I C 426

—S. 201—If a recorded co-sharer declared by a Civil Court to have no title, brings in a Revenue Court a suit for profits and if during the continuation of that suit his name is removed from the Revenue papers as per Civil Court's decision, the favour of presumption allowed by this section cannot be given to him. 29 I C 509.

—S. 201—A plaintiff is not barred from instituting a suit for profits merely because he is not a recorded co-sharer. In such a case if his title comes into question the Revenue Court is given an option to try it itself or to refer the plaintiff to a Civil Court. 16 A L J 504-46 I C 115.

—S. 201 proviso—Exparte decree for mesne profits—Subsequent suit by judgment-debtor not barred. 8 A L J 1084-11 I C 710 -34 A 22.

—S. 202—Does not apply where the plea of tenancy is raised after the Act of

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

1926; s. 273 applies. A I R 1931 All 33 -Ind Rul (1931) All 260-130 I C 292.

—S. 202—Deft. pleading tenancy in a suit for ejectment in Civil Court, the case should be referred to Revenue Court. Ind. Rul. 1931 All 135-129 I C 263-A I R 1930 All 795

—S. 202—Suit in Civil Court for possession of land—Reference made to Revenue Court under s. 202—Case decided by Civil Court in accordance with Revenue Court's decision—In appeal, Appellate Court finding lower Court wrong in making reference—Party held competent to raise question of competency of the reference and further Appellate Court held not bound to dispose of suit according to Revenue Court's decision if it finds that the Civil Court was not entitled to make reference to Revenue Court. A I R 1930 All 458-Ind. Rul. (1930) All 499-124 I C 403.

—S. 202—Suit for ejectment against tenant—Tenant's suit in Revenue Court for declaration that he was an occupancy tenant—Civil suit stayed upon defendant's request under s. 10, Civil Procedure Code—His suit in the Revenue Court rejected—Civil suit decreed in landlord's favour—In appeal defendant cannot contend that Civil Court should have proceeded under s. 202. A I R 1928 All 366; L R 9 A 138 (Rev.); Ind. Rul (1929) All 531-116 I C 275.

—S. 202—Lease of specific areas with possession, with option to the lessee to cultivate the land himself. Held, the lease was for agricultural purposes. A I R 1927 All 657-25 A L J 1025-L R 8 A 264 (Rev.) -104 I C 292.

—S. 202 (2)—Where the Civil Court wrongly referred the parties to Revenue Court, it was held that the Revenue Court's decision is not appealable to Civil Court. A I R 1925 All 125-22 A L J 909-82 I C 317.

—S. 202—Applies where deft. pleads tenancy in a suit for ejectment. A I R 1923 All 534-L R 4 A 167 (Rev.)-73 I C 953.

See also: 42 A 222-18 A L J 214-2 U P L R (H C) 79-54 I C 381-L R 1 A 38 (Rev.)

—S. 202—A Civil Court cannot decide the bona fides or otherwise of a claim to tenancy. A I R 1923 All 439-L R 5 A 21 (Rev.)-71 I C 475.

—S. 202—Lease for collecting rent and zemindari dues is not for agricultural purposes—S. 202 does not apply to set it aside. A I R 1922 All 449-4 U P L R (A) 209-20 A L J 731-44 A 748-70 I C 968.

—S. 202—Deft. holding under a valid lease can be ejected as trespasser by a suit in Civil Court. A I R 1922 All 449-44 A 748-20 A L J 731-70 I C 968.

## AGRA TENANCY ACT (2 OF 1901) (Contd.).

—S. 202—Applies to an ejectment suit in which the defence is sub-tenancy. L R 3 All 21 (Rev.)=65 I C 251.

—S. 202—Suit for zamindari property is not one relating to agricultural holding 19 A L J 890=64 I C 605=L R 3 A 144 Rev =A I R 1922 A 442.

—S. 202—Applies only to agricultural holding. 19 A L J 890=64 I C 605=L R 3 A 144 Rev=A I R 1922 All 442.

—S. 202—Time allowed for institution of suit in Revenue Court cannot be extended. Civil Court will decide against the party if the latter fails to proceed in Revenue Court in time. 64 I C 491.

—Ss. 202, 197—Defence that he is tenant not of the plff. alone but of entire proprietary body-s. 202, still applies. 19 A L J 850=64 I C 426=A I R 1921 All 58.

—S. 202—This section contemplates agricultural holdings and not groves. 30 I C 48.

—S. 202—Ejectment suit against a trespasser lies in a Civil Court only. This section should be applied if in such a suit the defendant puts forth the tenancy plea. 42 All 222=18 A L J 214=2 U P L R (H C) 79=54 I C 381 (H C).

—S. 202—If an ejectment suit is brought in a Civil Court alleging forcible possession by defendants whose tenancy has ceased because of a Revenue Court's decision, and the Court decides that the tenancy is subsisting, the proper order for the appellate Court to pass would be one remanding the case under s. 202, in view of the fact that it is within the power of a Revenue Court to resettle a terminating tenancy question. 38 All 533=14 A L J 734=35 I C 41

—S. 202—This section must be applied to that part of the suit brought in a Civil Court relating to agricultural holding. 39 A 254=15 A L J 227=38 I C 828

—S. 202—A suit in a Civil Court was brought against the defendant as trespasser who raised the plea of tenancy. So he was referred to the Revenue Court. That Court allowed his declaratory suit overruling the jurisdiction objection. On appeal to the Dt. Judge it was held that no appeal lies to him, the objection of jurisdiction being quite untenable. 40 All 177=16 A L J 590 =47 I C 891

—S. 202—The decision of a Revenue Court that the defendant is not a tenant cannot be disputed again in a Civil Court. 14 I C 347

—S. 202—Decision of a Revenue Court obtained by the defendant to civil suit, establishing his tenancy, cannot be questioned by the Civil Court. 17 I C 302

S. 202—The plainting of trees does not necessarily alter the character of a sir land as such. 17 I C 302

—S. 202—When once a Revenue Court

## AGRA TENANCY ACT (2 OF 1901) (Contd.)

has given a decision on the question of tenancy, that question cannot again be raised, because in the absence of fraud the said decision is final. 11 A L J 691=20 I C 917

—S. 202—This section should not be applied in case of an unenforceable mortgage. 10 A L 513=17 I C 520

—S. 202—Court's failure to conform to the provisions in s. 202—Appellate Court should have directed the defts. to institute a suit within 3 months in a Revenue Court, and not order remand. 203 A W N 1904=27 A 167

—S. 202—Suit for ejectment—Defence of existing tenancy—Time allowed to file suit in Revenue Court—Deft. having failed to file such suit the Civil Court decreed the suit—On appeal the Judge held that deft. was a tenant of the plff. and dismissed the suit. Held, the Judge was not competent to entertain the question. 28 I C 568=13 A L J 249

—Sch. 1 Group (b)—An ejectment suit brought by a plaintiff against a perpetual lessee on the ground that the defendant has done an act inconsistent with the terms of the lease comes under s. 57 (b) and an appeal will lie to the Dt. Judge from the decree of an Asst. Collector. The defendant if the case is proved against him, will be liable to ejectment from the whole of the holding. 37 A 272=13 A L J 302=28 I C 298.

—Sch. IV, No. 16—Prior suit for profits for certain decreed on basis of gross rental—Subsequent suit for share of uncollected arrears of previous years, filed three years after the profit for those years became payable, is barred L R 9 A 288 (Rev)=Ind Rul 1929 All 602 =116 I C 746=A I R 1928 All 762.

—Sch. IV No. 8—Ejectment suit—Zamindar getting possession of zamindari within one year of suit—Suit is not barred L R 2 A 100 (Rev)

—Sch. IV, No. 18—Illegal sub-letting—Suit for ejectment must be filed within one year. 3 U P L R (B R) 15

—Sch. IV No. 30—Tenant wrongfully ejected—His failure to sue within 6 months for possession will extinguish his right. 66 I C 856=A I R 1922 All 124

—Sch. IV, Group C, No. 32—A suit by a plaintiff claiming as a reversioner of the last tenant, against a zamindar who had purchased the land from the said last tenant for possession and for mesne profits is one cognisable by a Revenue Court under this heading. The limitation for such a suit is 6 months from the date of dispossession. 36 All 55 =12 A L J 29=22 I C 668

## AGRA TENANCY ACT 3 OF 1926

—Mukhtarnama empowering the Mukhtar to admit tenants, the landlord cannot object to such admission even though the

## AGRA TENANCY ACT (3 OF 1926) (Contd.)

Mukhtarnama was executed prior to 1926 and tenants admitted after that year. 16 R D 85=13 U D 38=13 L R 5 (Rev)

—Suit instituted before but decided after the Act—Appeal is governed by old Act. A I R 1929 All 745=Ind Rul (1929) All 1003=119 I C 231

—Ss. 3 (2) and (15) and 14—On the sale of proprietary rights of the various co-sherrers in the pattis in question their rights in the trees along with their proprietary rights in the pattis passed to the present plaintiff. It is true that the land on which the grove in dispute were situate was the Sir land of the transferors but the sir rights were confined to the land and obviously did not extend to the trees. By the loss of their proprietary rights the transferors undoubtedly acquired ex-proprietary rights in their Sir, but such ex-proprietary rights would be confined only to the land and would have no connexion whatsoever with the trees of the groves in question. A I R 1932 A 653 (654-5)=17 R D 99=13 L R 383 (Rev)

—S. 3 (3)—An order granting review is not a decree and no second appeal lies. A I R 1931 All 605=(1931) A L J 595=15 R D 547=Ind Rul (1931) All 674=L R 12 A 283 Rev=133 I C 466

—S. 3 (4)—Revenue Court has exclusive jurisdiction over suit to recover rent payable by licensee for cutting grass. 1930 A L J 550=I R 1930 A 400=L R 11 A 110 Rev=123 I C 384=A I R 1930 A 399=52 A 566

—S. 3 (6)—Mortgagee's tenants do not become trespassers on the redemption of the mortgage so as to entitle the mortgagor to sue them for ejectment through the Civil Court A I R 1931 A 743=(1931) A L J 887=15 R D 688.

—Ss. 3 (7) and 19—The person holding land at the commencement of the new Act from a rent-free grantee who was liable to have his rent fixed under S. 187 a sub-tenant and is not entitled to acquire statutory rights. 16 R D 419=13 L R 237 (Rev.)

—S. 3 (11)—Replacing of fallen trees in a grove for purpose of manitaining grove is a mere repair and not an improvement (1932) A L J 1026 (1028)=16 R D 591.

—S. 3 (11)—No cause of action accrues to landlord where no special damage ensues by tenant constructing well close to, but outside his holding on party land. I R 1929 A 413=L R 10 A 280 Rev=115 I C 637=A I R 1929 A 544.

—S. 3 (15)—Where considerable portion of the land contains trees so as to make it uncultivable it is a grove. I R 1929 A 728=L R 10 A 272 Rev=117 I C 616=A I R 1929 A 557.

## AGRA TENANCY ACT (3 OF 1926) (Contd.)

—S. 3 (15)—A finding that a land having guavas planted on it is a grove-land made before the passing of the Act, III of 1926, does not operate as res judicata in a suit filed after Act III of 1926. 16 R D 555=13 L R 315 (Rev)=13 U D 162.

—S. 3 (15) The words "planted thereon" indicate that land on which trees of spontaneous growth stand is not grove-land. 16 R D 426=13 U D 92=13 L R 289 (Rev)

—S. 3 (15)—Land—Grove itself not included in—Only grove land included. A I R 1932 A 653 (655)=17 R D 99=13 L R 383 (Rev.)

—Ss. 4 and 7—Planting of grove on sir land—Sir character is not lost. A I R 1930 All 655=1930 A L J 1249=Ind Rul (1931) All 163=129 I C 435.

—S. 52-of the Transfer of property Act does not apply to a case where a person purchases certain land and cultivates it as his khudhasht which becomes his sir under S. 4 (d) of the Agra Tenancy Act, III of 1926, while a suit for pre-emption against the above purchase is pending. The vendee acquires ex-proprietary rights against the pre-emptor and cannot be ejected as a trespasser. 16 R D 243=13 U D 85=13 L R 122 (Rev.)

—S. 5—Prescribes rule to determine whether right of pre-emption exists in mahal 1929 A L J 1212=I R 1930 A 366=123 I C 110=A I R 1929 A 977 F.B.

—Ss. 5, 11, and 12—"Mahal" means existing mahals A I R 1929 A 977=I R 1930 A 366=1929 A L J 1212=123 I C 110 F.B.

—S. 6 List of classes of tenants mentioned in Exhaustive. 16 R D 273=13 L R 182 (Rev.)

—Ss. 8, 29 and 82—The aim of S. 8 of Agra Tenancy Act, III of 1926, is to make void any agreement that would restrict a tenant from exercising rights conferred on him by the Act, but it does not make void an agreement which allows a tenant to exercise rights beyond the Act. 16 R D 37=12 L R 385 (Rev.)

S. 13—Prima facie a fixed rate tenant is liable to pay rent shown in settlement record against the holding which can, however, be rebutted by tacit acceptance of lesser amount for years by landlord and in the absence of proof of assertion of right to recover larger sum at any time since entry was made. 1931 A L J 360=Ind Rul (1931) All 395=L R 12 A 174 Rev=15 R D 505=131 I C 555.

—Ss. 14 (5) & 15—Usufructuary mortgage of ex-proprietary holding in terms of S. 14 (5)—Stipulation in, for mortgagee's retention of full possession and enjoyment of mortgaged property including trees appertaining to holding—Mortgagee cannot be deprived of benefit of (Vide last para of S. 15). 1932 A L J 574=13 L R 277

## AGRA TENANCY ACT (3 OF 1926) (Contd.)

(Rev)=A 1 R 1932 A 539-I R 1932 A 671  
(2)=140 I C 534=16 R D 428=A L R 1932  
A 1002.

—Ss. 14 (5), 15 (5)—Where the mortgagor expressly agreed in writing that in the event of his being declared as ex-proprietary tenant the mortgagee should retain full possession and enjoyment of the grove: Held, that there was valid waiver of ex-proprietary rights and the mortgagor was bound by his agreement. A I R 1931 All 378=135 I C 116=15 R D 557=L R 12 A 288 Rev.

S. 15—Where a person sells his proprietary rights in land and on the same day executes a registered instrument by which he confers occupancy rights in his sir in favour of some near relations of the vendee the latter transaction is void under S. 15 The ex-proprietary rights accrue in favour of the vendor and the occupancy rights created in favour of the relations of the vendee do not take effect. 16 R D 276=13 L R 185 (Rev.)

—S. 15—Transfer of share in mahal—Vendor becomes ex-proprietary tenant of all co-sharers and not vendee alone—Holding cannot be relinquished in favour of vendee alone, A I R 1929 All 803=(1930) A L J 65 =Ind Rul (1930) All 262=122 I C 662.

—S. 15 (5)—Usufructuary mortgage of sir—Execution of a simultaneous agreement waiving ex-proprietary rights—Sale of equity of redemption to a third person—Mortgagor has dormant ex-proprietary rights "in posse" which would come to him on redemption. 16 R D 511=13 U D 410=13 L R 348 (Rev.)

S. 15 (5)—Where mortgagor gives the mortgagee full and absolute possession of the sir land and keeps no right whatever for himself and no claim to ex-proprietary rights is made, there is a clear waiver of such rights. The word "waiver" implies a positive rather than an active attitude. 16 R D 511=13 U D 410=13 L R 348 (Rev.)

—S. 16—Occupancy rights can be acquired by Hindu joint family under a lease. I R 1930 A 916=127 I C 516=A I R 1930 A 315.

—S 17 (1) (g) Where a co-sharer has received good money for the execution of a lease conferring occupancy rights on the lessee, he is estopped from exposing its illegality under S. 17 (1) (g) on the ground that its execution has not been agreed to in writing by his two major sons. The sons may challenge the lease but the father cannot. 16 R D 397=13 U D 102=13 L R 174 (Rev.)

—S 19—Where a collateral who has not shared in cultivation with the deceased tenant has been admitted to the holding under a misapprehension, he cannot acquire statutory rights and can therefore be ejected by notice. 16 R D 443=13 U D 113 A=13 L R 187 (Rev.)

## AGRA TENANCY ACT (3 OF 1926) (Contd.)

—S 19—In order to establish rights as statutory tenant it is necessary to prove that the tenant has been admitted to the land by the land-holder. A mere entry in the Patwari's papers that a person is a statutory tenant and the issue of a receipt by the proprietor in the name of that person under a mistaken belief that he was a statutory tenant is not sufficient. 16 R D 220=13 U D 74=13 L R 114 (Rev.)

—S 19—The position of the lessee is that of a tenant. He is not a trespasser and, as a tenant, he has the rights of a tenant given to him by the Tenancy Act, and he can be ejected only under the provisions of that Act. The lease can be challenged under the terms of S 52 T P Act. But the Civil Court. We can go no further than this. It cannot give a decree for profits, and cannot order ejectment of the lessee. These questions must be determined by the Revenue Court. 1932 A L J 572=16 R D 597=139 I C 166=I R. 1932 A 541=A I R 1932 A 480=A L R 1932 A 873

—S 19—Mortgagor is bound by a tenancy created by the mortgagee, who is so authorised so to do, on redemption. If he wants to terminate it, he must bring a suit under the Act. I R 1930 A 877=126 I C 829=A I R 1930 A 413.

—S 19—"Statutory tenant" should be a person in possession as a tenant at the commencement of the Act or a person who is after the commencement of the Act, admitted as a tenant. A I R 1930 All 304 = (1930) A L J 637=Ind Rul (1930) All 785 =126 I C 225

—S. 19 (b)—Proviso—Land used for casual or occasional cultivation in bed of river within meaning of. 16 R D 579=13 L R 381 (Rev.)

—S. 23—Occupancy holding cannot be mortgaged—Mortgagor can regain possession at will. L R 9 A 212 Rev=117 I C 831=I R 1929 A 751=A I R 1928 A 552

—S 23 (1)—Ex-proprietary holdings do not vest in the Receiver in insolvency as they are not saleable. Rents payable in future by sub-tenants cannot be assigned by the Receiver or attached by the Court. [Powers of Court over rent discussed.] L R 12 A 200 Rev=(1931) A L J 680=15 R D 531=Ind Rul (1931) All 687=133 I C 479

—Ss 24 and 25—Female tenants—Classification of—Female tenant holding life interest—Rights of—Not extended by new Act. 16 R D 422=13 L R 239 (Rev.)

—S 24—Where an occupancy plot becomes a grove, a Bandhu can succeed as heir. I R 1929 A 812=118 I C 186=A I R 1929 A 777

—S. 24 (proviso)—"Sharing in cultivation" relates to the holding in question, not any holding of deceased. 122 I C 414 =I R 1930 A 238=A I R 1930 A 108



## AGRA TENANCY ACT ( 3 OF 1926 ) (Contd.)

—S. 26—The principle of survivorship has no application to a tenancy-in common 16 R D 335=13 U D 108=13 L R 170 (Rev)

—S. 27—Question as to the quantity of sir of a particular cosharer is one of title. 128 I C 396=I R 1931 A 44 A I R 1930=A 657

—Ss 29 (4) & 82—Sub-letting by occupancy tenant—Registered instrument—Necessity—Contravention of the provisions of S 29 (4)—Sub-lease voidable at option of landlord 16 R D 125=13 L R 127 (Rev)

—Ss 29 (6) & 82—Where during the pendency of an ejectment suit under S 82 on the ground that the tenant has illegally sub-let his holding, the tenant dies and is succeeded by his widow and minor sons, a decree for ejectment for illegal sub-letting by the deceased cannot be passed against the widow and the minor sons. They are protected by s. 29 (6) and are not subject to the restrictions contained in sub Ss. (1) (2) and (5) of the section. 16 R D 284=13 L R 177 (Rev)

—Ss. 34 and 83—Where there is no satisfactory evidence of subletting by a tenant-in-chief, the tenant-in-chief should be given the benefit of S 83, but he must eject his sub-tenant to be saved from ejectment for illegal sub-letting 16 R D 377=13 U D 107=13 L R 187 (Rev)

—Ss. 34 and 99—Sub-lease voidable—Avoidance of at the instance of tenant-in-chief—Tenant-in-chief forcibly dispossessing the sub-tenant at a season when the latter is performing works of cultivation—Sub-tenant can sue under s. 99 for recovery of possession and compensation. 16 R D 510=13 U D 142=13 L R 343 (Rev)

—S 34—Mortgage of occupancy holding is invalid as against the landlord 12 R D 597=112 I C 436=A I R 1929 O 116

—S. 37—Suit for partition of grove holding between tenants lies in Revenue Court 14 R D 357=131 I C 686=1930 A L J 769=A I R 1930 A 365

—S 37—Division of holding under s. 37, can only proceed after the Court making the partition has ascertained the interest of each co-sharer in it. Where the interest of the parties has been ascertained by the Civil Court, it is not possible for the Revenue Court to go behind the decision of the Civil Court. 16 R D 379=13 U D 106 13 L R 161 (Rev)

—Ss. 37, 24, 25 & 121—Co-tenants—Partition of holding—Effect of—New tenancy not created nor mode of succession prescribed by Ss. 24 and 25 changed. 1932 A L J 1024=16 R D 595

—S 37—Part of land originally taken for agricultural purposes converted into abadi with or without consent of landlord—

## AGRA TENANCY ACT (3 OF 1926) (Contd.)

There is no interference with the original engagement—Suit for division lies in Revenue Court, A I R 1930 All 219=(1930) A L J 303=Ind Rul (1930) All 939=127 I C 587

—S 40 (1)—The mere fact that a certain portion of land is liable to flooding is no ground for considering it as unsuitable for farming on improved lines. 16 R D 218=13 U D 75=13 L R 115 (Rev)

—S. 40 (2)—Where land has been acquired by the landlord under S 40 (1) and it is impossible to give the tenant suitable compensation from land with similar advantage in the same village or even in the adjacent mahal, it is equitable to give compensation in the village in which the tenant wishes to receive it 16 R D 218=13 U D 75=13 L R 115 (Rev).

—S. 44—A co-sharer alone without the consent of other co-sharers is not entitled to sue a person for ejectment. 16 R D 444=13 U D 115=13 L R 192 (Rev.)

—S. 44—Joint occupancy tenants—Perpetual lease by one of, without consent of other—Suit by latter against former and lessees for declaration of invalidity of lease and for possession in event of plaintiff being found to be not in possession—Maintainable under S. 44 1932 A L J 521.

—S. 44—The word used in S. 44 is not "landlord" but "landholder" A "landlord" is a proprietor while a "landholder" is a person to whom rent is or would be payable. For purposes of S 44 a recorded occupancy tenant is a "landholder" and as such he can sue to eject a trespasser. 16 R D 384=13 U D 101=13 L R 156 (Rev.)

—S. 44—Where the widow of an occupancy tenant is illegally dispossessed by her husband's reversioners, a suit by her for recovery of possession is maintainable. 16 R D 386=13 U D 61,

—Ss. 44 and 99—Where a tenant has been unlawfully ejected from his occupancy land by a co-sharer who is not the sole proprietor and he brings a suit for recovery of possession under S. 99 within six months the suit cannot fail merely on the ground that he should have sued the co-sharer under S. 44. 16 R D 271=13 L R 189 (Rev.)

—S. 44—Lambardar being a landholder under s. 3 (6) can eject cosharers who stealthily get into possession 123 I C 106=I R 1930 A 362=A I R 1929 A 869.

—Ss. 44 and 230—Civil Court can entertain a suit by landlord against trespasser, though there is a remedy under s. 44 in Revenue Court. 126 I C 225=1930 A L J 637=I R 1930 A 785=A I R 1930 A 304; See also 100 I C 471=L R 8 A 104 Rev=A I R 1927 A 346.

—S. 45—Where the manager grants lease in excess of his powers, but the te-



## AGRA TENANCY ACT (3 OF 1926) (Contd)

nants are let into possession and are paying rent regularly, such tenants cannot be ejected as trespassers, 26 A L J 1313=L R 9 A 321 Rev=116 I C 491=I R 1929 A 587 =A I R 1928 A 617.

—S. 45—Suit for declaration—Court cannot pass an order regarding rent except with the full consent of both parties. 14 R D 711.

—S. 58 and 63—Suit for ejectment of tenant with lease only for gathering thatching grass is cognizable by Revenue Courts—Such suit dismissed by Revenue Court as being non-cognizable.—Suit between same parties in Civil Court—Matter of jurisdiction cannot be pleaded as res judicata. A I R 1930 All 254=L R 11 A 42 Rev=(1930) A L J 352.

—Ss. 59 (3) and (4)—Rate generally payable by statutory tenants, for land of the same classes of soil should be ascertained and the rate should be determined accordingly as required by s. 59 (4) 14 R D 592.

—S. 72—Alluvial tracts—Section applies to, except where remission of rent is claimed in such tracts under any local custom. 1932 A L J 495=138 I C 84 (2)=16 R D 406=I R 1932 A 365=A I R 1932 A 481=A L R 1932 A 808.

—S. 72—Remission under—Grant of—Local custom—Remission claimed by tenant under an alleged—Failure to prove custom—Remission under S. 72 may be granted even in case of, 1932 A L J 495=138 I C 84 (2)=16 R D 406=I R 1932 A 365 =A I R 1932 A 481=A L R 1932 A 808.

—S. 79 and 80—Rent arrears due by tenant other than a permanent tenure-holder and a fixed-rate tenant—Suit for—Instalment decree in, under O. 20, r. 11, C P C—Not permissible. 54 A 521=1932 A L J 315=16 R D 325=138 I C 254=I R 1932 A 380=13 L R 146 (Rev.)=A I R 1932 A 436 =A L R 1932 A 223.

—S. 79—Notice should be served personally. Where a party is reported absent second notice should be issued after an interval. 14 R D 714.

—S. 79—Person purchasing the property, during ejectment proceedings, of a tenant in execution of money decree, is bound by the ejectment proceedings, and cannot in a subsequent suit by landlord raise the plea that the tenant being a grove holder could not be ejected for rent L R 10 A 175 Rev=116 I C 792=I R 1929 A 616 =A I R 1929 A 159.

—Ss. 80, 248 (3), 252—Order for ejectment under s. 80—Power of Revenue Board to set aside such order—Power to revise order rejecting review of such order—(1931) A L J 529=15 R D 498=L R 12 A 243 Rev,

—S. 81—Where an application for arr-

## AGRA TENANCY ACT (3 OF 1926) (Contd)

ears was contested and converted into suit, the landlord can, in a subsequent suit for arrears claim ejectment as additional relief—Tenant can plead bar of Civil Procedure Code, O. II, r. 2 A I R 1930 All 527=Ind Rul. (1930) All 481=124 I C 177.

—S. 82—transfer of grove in execution of decree against grove holder—validity challenged by a land-holder—jurisdiction of civil court—necessary parties—forum of appeal, A L R 1933 A 2=1932 A L J 857,

—S. 82—Although the transfer was by means of a sale in execution of a decree against the tenant, the remedy of the landholder was to sue in the Revenue Court under S. 82 impleading both the tenants and his transferee. 1932 A L J 857 =16 R D 564=13 L R 357 (Rev.)=A I R 1932 A 701=A L R 1933 A 2.

—S. 82—Where, an occupancy tenant makes a mortgage of his land to one of the landholders, both of them can be ejected by a suit by the whole body of the landholders. 16 R D 204=13 U D 64=13 L R 94 (Rev.)

—S. 82—Permanent lessee—Status of—Lessee given no power of transfer—Liability to ejectment for executing mortgage with possession of the land covered by the lease. 16 R D 39=13 U D 99=12 L R 388 (Rev.)

—S. 82—Voluntary and involuntary transfer—No distinction in section between 1932 A L J 857=13 L R 357 (Rev.)=A I R 1932 A 701=16 R D 564=A L R 1933 A 2.

—S. 83—Where a tenant has done his best to eject his sub-tenant but has failed, and is sued for ejectment on the ground of illegal sub-letting he is entitled to the benefit of S. 83. 16 R D 555=13 L R 315 (Rev.)=13 U D 162.

—S. 83—The new Act preserves the right to sue for sub-letting under the old Act. 14 R D 748.

—S. 83—New Act coming into force while the period of limitation under the old Act lasts for a suit for ejectment for illegal sub-letting, limitation under the new Act will apply. 14 R D 710.

—S. 84—Section 269 would not override the bar of limitation which is placed on suits for ejectment under s. 84 of the Act. A I R 1931 All 553=15 R D 435= (1931) A L J 408=L R 12 A 209 Rev=Ind Rul. (1931) All 549=132 I C 805.

—S. 85 (2)—Costs Award of—Discretion as to under S. 35 C P C—Applicability of, to cases covered by S. 85 (2) of Agra tenancy Act. 16 R D 290=12 U D 335

—Ss. 86, 110 and 112—A fixed rate tenant allowing his sub-tenant to plant trees on his land cannot sue the sub-tenant for ejectment as a mere sub-tenant 16 R D 544=13 L R 327 (Rev.)=13 U D 148

## AGRA TENANCY ACT (3 OF 1926) (Contd)

—S. 92—Civil Court can entertain a suit for damages for cutting crops if the tenant is not dispossessed by such cutting; but if the tenant is dispossessed (1931) A L J 692—Ind Rul (1931) All 699—L R 12 A 331 Rev=15 R D 564=133 I C 539

—S. 99—Dispossession of tenant by a co-sharer not sole proprietor—Suit under S 99 by tenant—Maintainability of—See under this act—Ss. 44 & 99 (1931) 16 R D 271=13 L R 189 (Rev)

—S. 99—Ejection of a person under a Civil Court decree whether lawful or unlawful is an ejection and if subsequently a suit is brought under S. 99 for recovery of possession on the ground of wrongful dispossession the suit is governed by serial No. 12 of Group B of the act and, if brought after the period of six months provided therein, it is barred 16 R D 178=13 U D 49=13 L R 49 (Rev)

—S 99—Where a lessee has no knowledge of the proposed sale of the leased land before hand, he must be considered to have taken the lease of land in good faith; and if he is ejected by the vendee he can recover possession under S 99 16 R D 441=13 U D 117=13 L R 197 & 291 (Rev).

—S. 99—A proprietor who had executed a Zuripeshgi lease with the condition that the lessee was to have the fruit, subsequently relinquished his sir rights and sold the lands. On the lessee being ejected by the vendee, held that the lessee having acted in good faith was entitled to remain in possession until evicted in due course of law and was entitled to recover possession from the vendee. 16 R D 441=13 U D 117=13 L R 197 & 291 (Rev.)

—S. 99—Provision of—Nature of—Substantive rights dealt with by it whether Rule of procedure or adjective law only. 54 A 299 (307, 315, 322-3)=136 I C 145=I R 1932 A 145=A I R 1931 A 635 (F B).

—S. 99—Sub-tenant—Dispossession forcible by tenant-in-chief of—Suit by sub-tenant for recovery of possession and compensation—Maintainability. See under this Act—Ss. 34 & 99. 16 R D 510=13 L R 343 (Rev.)

—S. 99 (b)—Claiming through—Means holding a derivative title from the landholder and not merely raising a plea by way of defence or making a false claim without the shadow of title. 54 A 299 (311, 314)=136 I C 145=I R 1932 A 145=A I R 1931 A 635 (F B)

Ss 99 and 230—Co-tenants—Suit by one of, against another, for declaration of title and, in the alternative, for possession—Cause of action (i. e., the wrongful ejection or the wrongful prevention from obtaining possession) for the suit arising before the

## AGRA TENANCY ACT (3 OF 1926) (Contd)

Act of 1926 came into force—S. 99 inapplicable to suit—Suit therefore cognisable by Civil Court. 54A 299=136 I C 145=I R 1932 A 145=A I R 1931 A 635 (F B).

—Ss. 99 & 230—Tenant ejected from holding by land-holder or person claiming as landholder—Suit by, for, possession against such person—Revenue Court alone can entertain—Ejection of tenant by entire body of land-holders not a condition of such jurisdiction. 1932 A L J 864=13 L R 361 (Rev)=16 R D 561=A L R 1932 A 1168.

—S. 99—Two interpretations being possible as regards s. 99 the one which leave the law unchanged must be preferred to the one which radically alters it. 1930 A L J 256=124 I C 540=I R 1930 A 540=A I R 1930 A 193 F B=52 A 501

—S. 99—Plff, who is ejected by the deft. on basis of relinquishment deed must apply his remedy under s. 99 within six months. 119 I C 252=L R 10 A 367 Rev=I R 1929 A 1004=A I R 1929 A 656.

—S. 99—Dispossession of grove holder from grove and appropriation of fruit before the Act of 1926 entitles the Civil Court to entertain a suit for possession and mesne profits. 1929 A L J 1157=124 I C 478=I R 1930 A 526=A I R 1930 A 158.

—S. 99 (1)—Where a suit by permanent lessee against land-holder for possession involves redemption of mortgage, a separate suit for mortgage is not necessary, and the suit for possession and redemption lies in Civil Court. 121 I C 223=L R 10 A 346 Rev=I R 1930 A 111=A I R 1929 A 616

—Ss. 99 and 121—Suit for declaration of joint tenancy and possession with defendants—Defts. alleging to be sole tenant—Suit lies in Revenue Court. 1929 A L J 849=I R 1929 A 689=117 I C 337=A I R 1929 A 571=51 A 853 F B

See also 109 I C 419

—Ss. 99; 121—Tenant must be deemed as claiming through land-holder—He need not declare to that effect. A I R 1929 All 571=(1929) A L J 849=51 All 853=Ind Rul (1929) All 689=117 I C 337 (F B)

—Ss. 99 and 230—Plaintiff alleging himself to be a tenant suing a defendant treating him as a trespasser, for possession and compensation regarding a holding. Defendant pleading tenancy. Suit is still maintainable in the Civil Court even after having regard to ss. 99 and 230. A I R 1930 All 193 (F B)=(1930) A L J 256=Ind Rul 1930 All 540=52 A 501=124 I C 540

Overruling 118 I C 588=13 R D 756=L R 11 A 14 Rev=I R 1929 A 892=1929 A L J 940

—Ss. 99 and 230—A suit failing under s. 99 is triable by Revenue Court even though relief for injunction is joined 1930 A L J 256=I R 1930 A 540=A I R 1930 A 193=124 I C 540 F B=52 A 501.

## AGRA TENANCY ACT (3 OF 1926) (Contd.)

—S. 103—A surrendered holding can be settled with any tenant. A I R 1929 All 196= I R 9 A 180 Rev=Ind Rul (1929) All 332 =114 I C 908

—S. 110—Well being not a tank can be constructed without any proof of local custom. 115 I C 637=L R 10 A 280 Rev=I R 1929 A 413=A I R 1929 A 544

S. 121 (2)—Landholder is a necessary party in a suit against a person who is not a landholder. 1929 A L J 849=I R 1929 A 689=117 I C 337=A I R 1929 A 571=51 A 853 F B

—S. 121—Joint occupancy tenants—Perpetual lease by one of, without consent of other—Suit by latter against former and lessees for declaration of invalidity of lease and for possession in event of plaintiff being found not to be in possession—maintainability of. See under this Act—S. 230—1932 A L J 521

—S. 121—Tenant—Suit by, for declaration of exclusive ownership of well situated in land claimed by him as his tenancy—Defendant admittedly Zamindar of said land denying that plaintiff was tenant of that land and alleging that well had been made by him (defendant)—Case covered by S. 121 and Revenue Court alone has jurisdiction to entertain suit. 1932 A L J 815=16 R D 497=13 L R 342 (Rev)=A I R 1932 A 663 =A L R 1932 A 1096

—S. 121—Provision in—Nature of—Substantive rights dealt with by—Provision not mere matter of adjective law. 54 A 299 (322)=136 I C 145=I R 1932 A 145=A I R 1931 A 635 (F B)

—Ss. 121 and 37—Co-tenants of holding—Suit by one against the others for declaration as to quantity of share held by each party—Jurisdiction to entertain—Revenue Court has. 1932 A L J 849=16 R D 560=13 L R 356 (Rev)=A I R 1932 A 693=A L R 1933 A 16

—S. 121—A suit for declaration of title and maintenance of joint possession of tenancy is cognisable by the Revenue Courts alone even in the cause of action had arisen before the new Act of 1926 (1931) A L J 85

—S. 123—Proprietor has right to obtain declaration that a tenant is occupancy tenant of a limited and not the whole area. 16 R D 52=12 U D 143

Ss. 123 and 124—Tenants giving up certain plots to a person whose Khudkhasht was subsequently entered under the orders of the Record Officer—case does not fall under s. 124. 14 R D 630

S. 132—Does not enable the lambardar to free himself from the trammels of S. 265 932 A L J 507=16 R D 403=A I R 1932 A 416=A L R 1932 A 945

—Ss. 132 and 138, and Sch IV, Group

## AGRA TENANCY ACT ( 3 OF 1926 ) (Contd.)

A. Serial No- 4—Rent payable in kind by division of crops—Money equivalent of three years' arrears of—Recovery of—Suit for—Maintainable. 54 A 89=A I R 1932 A 149=134 I C 457=1931 A L J 1094=16 R D 66=12 L R 428 (Rev)

—S. 160—Co-sharer who pays from excess collections on his own part is not entitled to bring a suit against another co-sharer. He must show he made the payment from his pocket when he can recover it. 14 R D 597=L R 11 A 267 Rev=(1931) A L J 60=Ind Rul (1931) All 255=130 I C 207

—S. 165—A cosharer, who is recorded as entitled to a separate share, can obtain his share, though member of Hindu joint family with lambardar. A I R 1930 All 313 =(1930) A L J 286=Ind Rul (1930) All 918 =52 A 436=127 I C 518

—S. 181—Where the distraint is fraudulent and collusive, third person has no relief under the section. 119 I C 284=I R 1929 A 988=A I R 1929 A 845

—S. 184—Suit in ejectment against persons recorded as occupancy tenants bila lagan and in cultivating possession for more than 12 years—Defts. cannot plead occupancy rights under the new Tenancy Act. 14 R D 712

—S. 184—"Bila Lagan" is not necessarily a rent-free grant—Presumption under s. 184 is not retrospective. 14 R D 640

—S. 187 Rent-free grantee liable to have his rent fixed under—Person holding land at commencement of Act from—Status of. See under this Act—Ss. 3 (7) and 19. 16 R D 419

—S. 193 (c)—Plea of payment is not plea of set-off. 1930 A L J 1267=I R 1931 A 281 =A I R 1931 A 62=130 I C 489

—S. 197 (d), (f)—Grove-land can be let for raising crops. Crops may be grown under and among the trees. I R 1930 A 619=1930 A L J 1089=124 I C 763

—S. 197—Planting of new trees to replace fallen trees—Grove-holder's right prior to Act as to—Not taken away by Act. 1932 A L J 1026 (1027)=15 R D 591

—S. 197—Suit to eject groveholder on the ground that trees had been lost and land had ceased to be grovelies in Revenue Court under ss. 86 (1) and s. 197. A I R 1931 All 664=Ind Rul (1931) All 651=133 I C 411

—S. 197—Occupancy plot becoming grove can be transferred if there is nothing to show that the zamindar has made any objection to the transfer A I R 1929 All 777=Ind Rul 1929 All 842=118 I C 85

—S. 197 (a)—On becoming vacant the grove-land becomes in the absence of custom or contract to the contrary non-occupancy land and replanting cannot be made without permission. The fact that the replanting is made very shortly after the disappearance of the old trees is immaterial 16 R D 231

13 L R 195 (Rev)

## AGRA TENANCY ACT ( 3 OF 1926 ) (Contd)

—S 197 (a)—Person changing character of land granted for maintaining grove can be ejected—No express or implied abandonment is necessary. A I R 1929 All 557=L R 10 A 272 Rev=Ind Rul (1929) All 728=117 I C 616

—S 197 (b)—Grove of ex-proprietary tenant can be sold in execution of a decree of Civil or Revenue Court (1931) A L J 694 =15 R D 563=L R 12 A 276 Rev

—S. 197 (b)—Transfer of an interest greater than that of the transferor entitles the paramount owner to sue for cancellation of the deed or for declaration that his title is not affected by the deed. I R 1929 A 540=L R 9 A 164 Rev=116 I C 284= A I R 1928 A 360

—S 197—Grove-holder's interest is transferable in Oudh. 102 I C 626=A I R 1927 O 297=1 Luck 91

—S 198—In a suit for ejectment the sub-tenant pleaded tenancy under another person who was made party. Decree in that suit does not bar a subsequent suit by the latter in Civil Court for declaration of title 118 I C 379=L R 10 A 284 Rev=I R 1929 A 859=A I R 1929 A 548

—S 198—Plff. on failure to recover rent, can bring a suit in Civil Court for a declaration, but not for a decree for possession which he must seek in Revenue Court. A I R 1929 All 576=L R 10 A 258 Rev=Ind Rul (1929) All 351=115 I C 127

—Ss 199, 200—Validity of lease could be investigated even under Act of 1901. A I R 1927 A 657=L R 8 A 264 Rev=104 I C 292=25 A L J 1025

—S 212—The kadar's right to sue for recovery of possession as against landlord—suit not barred. A L R 1933 A 258=1933 A L J 10=I A W R 809=A I R 1933 A 43

—Ss. 212, 230—As s. 212 deals only with a matter of procedure and not with any vested right, it is applicable to cases where cause of action accrued before the new Act. (1931) A L J 844=15 R D 684=Ind Rul (1931) All 834=134 I C 450.

—Ss. 212, 230—A suit for possession by a thekadar who was not put in possession at all falls within s. 212 and can be brought only in a Revenue Court even though the cause of action had accrued before new Act. (1931) A L J 844=15 R D 684=Ind Rul (1931) All 834=134 I C 450.

—S. 221—A lambardar cannot sue as lambardar one or more co-sharers for any sum due by reason of their holding as sir khudkhat excess land. 25 A L J 1057=105 I C 745=L R 8 A 323 Rev=A I R 1927 A 623

—S. 225—Co-sharer—Profits—Arrears of—Suit against lambardar for—Interest on arrears—Rate of, to be allowed—Date of decree—Date of realisation—Rates up to. 1932 A L J 93=16 R D 110=A I R 1932 A 178 (180)=137 I C 166=13 L R 29 (Rev)=I R 1932 A 278=A L R 1932 A 383.

## AGRA TENANCY ACT ( 3 OF 1926 ) (Contd)

—S. 226—The report of the Assistant Collector as to the income is admissible under s. 35 of the Evidence Act. His estimate is, at least, a relevant fact, though certainly not conclusive. 54 A 125=137 I C 255=I R 1932 A 294=1932 A L J 1=13 L R 7 (Rev)=16 R D 78=A I R 1932 A 196 (158)=A L R 1932 A 121.

—S. 226 (2)—Lambardar—Suit for profits against—Liability of lambardar in—Basis of—Gross rental—Actual collections or. 1932 A L J 93.

—S. 226 (3)—Suit for settlement of accounts and profits—Deductions on account of unrealisable arrears it—Must be based on some evidence which can be acted upon and not on mere conjecture. 54 A 125=137 I C 255=1932 A L J 1=16 R D 78=13 L R 7 (Rev)=I R 1932 A 294=A I R 1932 A 196=A L R 1932 A 121.

—Ss. 226 and 227—Groves—Co-owners of—Fruits of groves jointly owned by—Sale price of, realised in entirety by one of co-owners—Suit by other co-owner for his share of, and not for share of profits of Mahal—Jurisdiction of Civil Court to entertain—Not barred by any section of Agra Tenancy Act. 17 R D 99=13 L R 383 (Rev)=A I R 1932 A 653 (655.)

—S. 227—Applicability—Hindu joint family—Widow of deceased member of—Profits relating to share of her deceased husband in the joint estate owned by the surviving member of the family and payable to widow under a deed in nature of family settlement—Suit by her against surviving member for—S. 227 inapplicable to. 1932 A L J 177=16 R D 190=A I R 1932 A 272=13 L R 144 (Rev)=135 I C 836=I R 1932 A 100=A L R 1932 A 1207.

—S. 227—Where a person under an instrument in the nature of a family settlement has the right to have and enjoy the profits of the property without having the rights of possession, partition or transfer which are the incidents of ownership, such a person is not and cannot be deemed to be a "co-sharer" within the orbit of the Agra Tenancy Act. 1932 A L J 177=16 R D 190=A I R 1932 A 272=13 L R 144 (Rev)=135 I C 836=I R 1932 A 100=A L R 1932 A 1207.

—Ss. 227, 240, 247—No appeal lies from an order of remand passed on a suit under s. 227. Order XLIII, r. 1, C P C does not apply as a whole to suits under the Act. (1931) A L J 599=15 R D 543=Ind Rul (1931) All 621=L R 12 A 277 Rev=133 I C 301.

—S. 227—In a suit against a cosharer for negligence in collection, decree cannot be based on gross rental. I R 1930 A 745=125 I C 761=A I R 1930 A 640.

—S. 227 (2)—Production of Siyaha is not enough. 125 I C 761=I R 1930 A 745=A I R 1930 A 640.

## AGRA TENANCY ACT (3 OF 1926) (Contd.)

—S. 227—Accounts filed not showing plaintiff's share as co-sharer, but crediting lambardari haq and claiming from the defendants-co-sharers the whole of the excess in value of their khudkhasht and sir land over the amount due to the defendants by reason of their fractional share—Plaintiff should be held as suing as lambardar. A I R 1927 All 623=25 A L J 1057=L R 8 A 323 Rev.=105 I C 745.

—S. 230—Joint occupancy tenants—Perpetual lease of occupancy lands by one of, without consent of other—Suit by latter against former and lessees for declaration of invalidity of lease and for possession in event of plaintiff being found to be not in possession—Jurisdiction to entertain—Revenue Court has, and therefore Civil Court has not. 1932 A L J 521=16 R D 434=A I R 1932 A 460=A L R 1932 A 993.

—Ss. 230 & 99—Co-tenants—Suit by one of, against another, for declaration of title and, in the alternative, for possession—Jurisdiction to entertain. See under this Act—Ss. 99 and 230. 54 A 299 (F B).

—Ss. 230, and 99—Tenant ejected from holding by landholder or person claiming as landholder—Suit by, for possession against such person—Jurisdiction of Revenue Court to entertain—Ejection of tenant by entire body of landholders not a condition of. 1932 A L J 834.

—Ss. 230, 44—Civil Court can entertain a suit by landlord against trespasser. I R 1930 A 785=126 I C 225=A I R 1930 A 304.

—S. 230—Revenue Court alone can entertain a suit for ejection where debts are admitted by plff to be joint tenants. I R 1930 A 566=124 I C 712=A I R 1930 A 434.

—S. 230—So long as the suit or application specified in Sch. IV, can be heard by the Revenue Court the jurisdiction of the Civil Court is completely ousted. A I R 1929 All 571=Ind Rul (1929) All 689=(1929) A L J 849=51 A 853 (S B)=117 I C 337.

—S. 230—Civil Court cannot grant mere declaration that relinquishment by a third party is not binding on the plff. 1929 A L J 13=112 I C 391=L R 9 A 272 Rev=A I R 1928 A 538=51 A 114.

—S. 230—Decision of Revenue Court as to plff's status operates as res judicata in a subsequent civil suit. A I R 1927 All 613 =L R 8 A 235 Rev=102 I C 887.

—S. 231—Section 231, while providing for applicability of Limitation Act, s. 5 does not exclude applicability of rest of Limitation Act to suits and proceedings under Tenancy Act—Time taken in obtaining copies is excluded. A I R 1929 All 745 =Ind Rul (1929) All 1003=119 I C 251.

—S. 236—A cosharer in undivided mahal must sue in Revenue Court, and not in Civil Court, for joint possession and

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## AGRA TENANCY ACT (3 OF 1925) (Contd.)

mesue profits, the cosharer who is in possession of property by collecting rent for co-parcenary body. A I R 1929 All 810 =Ind Rul (1929) All 78=120 I C 558.

—Ss. 240, 249—No appeal lies to the High Court against a District Judge's order allowing an appeal against an order granting a review. It is not also open to revision. A I R 1931 All 605=(1931) A L J 595=15 R D 547=Ind Rul (1931) All 674=L R 12 A 283 Rev=133 I C 456.

—Ss. 240, 249—The whole of O 43, r 1 C P C does not apply to revenue cases. An order refusing to restore revenue appeal dismissed for default—is not appealable. (1931) A L J 854=15 R D 681=Ind Rul (1931) All 646=133 I C 405.

—Ss. 242 (3) 252 and 253—Question of jurisdiction when decided in the first Court and is also in issue in appeal—appeal lies to the District Judge under s. 242 (3)—High Court can revise the order of the first Court under s. 253—applicability of s. 252. A L R 1933 A 258=1933 A L J 10=1 A W R 809 =A I R 1933 A 43.

—Ss. 242 and 248—Order refusing to set aside sale—Appeal lies to High Court where subject-matter of suit exceeds Rs. 5,000. A I R 1930 All 15=Ind Rul (1930) All 13=(1930) A L J 224=120 I C 125.

—S. 242—Suit filed while old Act was in force—New Act coming into force before decree taking away the right of appeal—Right of appeal in respect of the particular suit is not taken away—Right of appeal is to be decided according to the law existing on date of institution of suit. A I R 1928 All 437=50 A 965=L R 9 A 270 Rev=26 A L J 998 (F B)=111 I C 6.

—Ss. 242 and 248—Suit for arrears of rent under old Act—Value exceeding Rs. 100 but below Rs. 200—Ex parte decree passed—Application made for setting it aside but rejected—Order rejecting it passed after coming into force of present Act—New Act governs right of appeal and appeal lies to District Judge. A I R 1928 All 143=L R 9 A 18 Rev.=109 I C 207

—S. 242 (1) (a)—“Subject-matter” refers to subject-matter of suit and not appeal—value of suit exceeding Rs. 200—Value of appeal below Rs. 200—Appeal lies to the District Judge. A I R 1930 All 97=52 A 442 = (1930) A L J 336=126 I C 365.

See also A I R 1929 All 845=Ind Rul (1930) All 845=(1930) A L J 215=119 I C 3.

—S. 242—Appeal lies to Dist. Judge where question of proprietary title is raised A I R 1927 All 727=L R 8 A 295 Rev=106 I C 307.

See also A I R 1930 All 455=Ind Rul (1931) All 149=52 A 714=(1930) A L J 1065=129 I C 373.

—Ss. 243 and 270—Defence under s.



## AGRA TENANCY ACT (3 OF 1926) (Contd)

270 that rent was paid in good faith to third person in a suit for rent under s. 132 does not involve a question of title and no appeal lies to District Judge under s. 243 A I R 1929 All 512=(1929) Ind Rul (1929) All 414=L R 10 A 277 Rev=115 I C 638.

—S. 243—No third appeal lies against a decree of Assistant Collector, Second Class.

A I R 1926 All 161=90 I C 995.

—S. 244—No appeal lies from an order in appeal from an order but not decree. 1930 A L J 1065=129 I C 373=I R 1929 A 149=A I R 1930 A 455=52 A 714.

—S. 246—Decree passed in second appeal by District Judge—appeal to High Court—whether maintainable. A L J 1933 A 148=1933 A L J 121=1 A W R 160=A I R 1933 A 260.

—S. 246—A lambarder can sue to eject trespasser or squatters from abadi if the suit for the benefit of whole body of co-sharers. A I R 1930 All 630=L R 11 A 204 Rev=14 R D 425=Ind Rul (1931) All 78=128 I C 606.

—S. 247 and 264—Suit cognisable by Revenue Court—Execution of decree in—Claim to property attached in—Order of Assistant Collector, Second Class, on—Collector's order in appeal from—Suit under O. 21, r. 63, C P C to upset—Maintainable. 1932 A L J 514=16 R D 438=A I R 1932 A 502=13 L R 284 (Rev.)=A L R 1932 A 755.

—S. 248 (3)—Order of Dist. Judge on appeal remanding the suit against lambarder for profits is not appealable. 1929 A L J 885=L R 11 A 2 Rev=117 I C 110=I R 1929 A 686=A I R 1929 A 586.

—S. 249—A Remand order under O. XL I. r. 23 C P C is not appealable whether it was made for assessing profits. A I R 1931 All 415 (1)=Ind Rul (1931) All 337 =15 R D 625=(1931) A L J 901=131 I C 33 (1.)

—S. 249—A remand order by Dist Judge in appeal is not appealable. 1929 A L J 863=L R 11 A 13 Rev=I R 1929 A 420=115 I C 644=A I R 1929 A 560.

—S. 249—No appeal lies from order in execution. A I R 1930 All. 91=Ind Rul (1930) All 259=122 I C 415.

—Ss. 249, 248 & 264—Execution of decree for profits made by Revenue Court—Appellate order of District Judge in—Second appeal from—Not maintainable. 54 A 573=A I R 1932 A 273=16 R D 293=13 L R 199 (Rev)=1932 A L J 365=138 I C 583 =I R 1932 A 467=A L R 1932 A 272 (F B.)

—S. 249—Section 249 has to be read with reference to the heading above s. 247 A I R 1930 All 455=Ind Rul (1929) All 149 =52 A 714=(1930) A L J 1065=129 I C 373.

—S. 252—The failure of a Court to

## AGRA TENANCY ACT (3 OF 1926) (Contd)

take notice of a matter of fact which has never been laid before it is no ground for revision under. S 252. 16 R D 447=13 U D 113 B=13 L R 297 (Rev.)

—S. 252—Revenue Board can revise order rejecting review of order under s. 80. 1931 A L J 529=L R 12 A 243=15 R D 498.

—S. 253—Revenue Court—interlocutory—order refusing stay—revision—competency of A L R 1933 A 358.

—S. 253—Applications referred to in—Not confined to those specified in Groups C to E of the fourth schedule. 54 A 405=A I R 1933 A 14.

—S. 253—Interlocutory order—Revision against—Competency of—Conditions of, are (1) order must have been passed on an application and (2) appeal from it must lie to District Judge but not to High Court. 54 A 405=A I R 1933 A 14.

—S. 253—Letters Patent appeal against decree in second appeal—Treatment as revision of and interference sue motu in—Power of—High Court has. 54 A 573=1932 A L J 365=16 R D 293=13 L R 199 (Rev)=138 I C 583=I R 1932 A 467=A I R 1932 A 273=A L R 1932 A 272 (F B.)

—S. 253—Revenue cases—Appellate order of District Judge in—Revision to High Court against—Not competent. 54 A 573(579-80, 595-6, 602-3)=A I R 1932 A 273 =16 R D 293=13 L R 199 (Rev)=1932 A L J 365=138 I C 583 (2)=I R 1932 A 467=A L R 1932 A 272 (F B.)

—S. 253—Revenue cases—Original Court—Order of—Revision of—High Court's power of—Order affirmed on appeal by District Judge and his order not revisable by High Court—Power in case of. 54 A 573=A I R 1932 A 273=1932 A L J 365=16 R D 293=13 L R 199 (Rev)=138 I C 583 =I R 1932 A 467=A L R 1932 A 272 (F B.)

—S. 253—Revenue Court—Suit for profits—Dismissal for default of—Order setting aside and restoring suit—Revision to High Court against—Incompetent. 1932 A L J 863=16 R D 481=13 L R 244 (Rev) =A I R 1932 A 589=A L R 1932 A 1223.

—S. 253—Revision under—Competency of—Conditions of, are (1) termination of proceedings in suit or application and (2) appeal lying to District Court but not to High Court. 54 A 405=A I R 1933 A 14.

—S. 253—Suit for profits—Stay of, pending appeal from decree in Civil suit raising question of proprietary right—Application for—Order of Assistant Collector refusing—Revision to High Court against—not competent. 54 A 405=A I R 1933 A 14.

—S. 253—District Judge is not a subordinate Court within s 253 and no revision lies from his orders. A I R 1931 All 605=L R 12 A 283 Rev=15 R D 547=Ind

## AGRA TENANCY ACT ( 3 OF 1926 ) (Contd.)

Rul (1931) All 674=(1931) A L J 595=133 I C 466.

—S. 253—No revision lies to High Court from an order of an Assistant Collector rejecting the plaint in a suit for declaration of title and possession of an occupancy holding against a mortgagee of the holding. A I R 1931 All 582=L R 12 A 207 Rev=15 R D 535=Ind Rul (1931) All 828=134 I C 252.

—S. 253—The power of revision under the section relates to the decision of the Subordinate Revenue Court, not to the decision of the Dist. Judge on appeal. 1930 A L J 1055=14 R D 457=L R 11 A 217 Rev=I R 1930 A 723=125 I C 579=A I R 1930 A 656.

S. 253—There is no revision against filing of complaint under s. 476 B of Cr. P C by a Dist. Judge on appeal from the decision of the Assistant Collector. A I R 1929 All 898=Ind Rul (1930) All 4=L R 10 A Cr. 147=30 Cr. L J 1148=13 A I Cr. R 1=(1929) Cr. Cas 490=120 I C 116.

—S. 253—There is no power of revision except under s. 253—High Court has no power of revision of order by District Judge, though ultra vires illegal or irregular. A I R (1929) All 735=Ind Rul (1929) All 819=51 A 1020=118 I C 227.

—S. 253—Suit for profits decided by the Revenue Courts—Valuation of suit not exceeding Rs. 200—No revision lies as no appeal lies to District Judge. A I R 1929 All 586=Ind Rul 1929 All 686=(1929) A L J 885=L R 11 A 2 Rev=117 I C 110.

—S. 253 (C)—Material irregularity—C P C-S 48 (2)—Application of, without-recording a finding that there was any fraud of the judgment-debtor which prevented the execution of the decree at some time within 12 years immediately before the application for execution is a material irregularity within S. 253 (c) of the Tenancy Act. 54 A 573=A I R 1932 A 273=1932 A L J 365=16 R D 293=13 L R 199 (Rev)=138 I C 583 (2)=I R 1932 A 467=A L R 1932 A 272 (F B.)

—S. 254—Board of Revenue cannot refer abstract question of law—Number of cases pending before Board—Boards desiring High Court's opinion—One of these pending cases should be submitted to the High Court together with a statement of the facts of the particular case and a statement of the conflicting opinion of the members who are dealing with it. A I R 1927 All 491=49 A 711=25 A L J 519=102 I C 261.

—S. 264—Provincial Insolvency Act—Applicable to suits and proceedings under the Tenancy Act of 1926—S. 6 (a) of U P General Clauses Act—Effect. 54 A 616=1932 A L J 402=138 I C 112=16 R D

## AGRA TENANCY ACT ( 3 OF 1926 ) (Contd.)

466=A I R 1932 A 434=13 L R 332. (Rev.) =I R 1932 A 373=A L R 1932 A 645.

—S. 264—Nankar cannot be set off against rent. A I R 1930 All 179=Ind Rul (1930) All 240=122 I C 416.

—S. 264—No set-off can be allowed under Tenancy Act. A I R 1930 All 168=(1929) A L J 1103=Ind. Rul. (1930) All 80=120 I C 560.

—S. 265—Lambardar cannot ordinarily grant a lease of joint property for long years without the consent of the co-sharers. Adequacy of rent is not the only consideration. L R 10 A, 165 Rev=13 R D 518=Ind. Rul (1929) All 288=114 I C 752.

—S. 265—Lambardar—undivided mahal—power of—agreement with purchasers of a share regarding collection of rent—validity. A L R 1933 A 45=1932 A L J 1029=16 R D 583=A I R 1933 A 91.

—S. 265—Lambardar in undivided mahal—Purchaser of share in mahal—Agreement by lambardar with, for collection of his share of rent separately—Binding on other co-sharers. 1932 A L J 1029=16 R D 583=A L R 1933 A 45.

—Ss. 265 and 266—Lambardar—Rent—Collection of—Right of—Decision prior to Act as to—Not res judicata after Act. 1932 A L J 507=16 R D 403=A I R 1932 A 416=A L R 1932 A 945.

—Ss. 265 and 266—Lambardar—Rent arrears accrued due prior to Act—Collection of—Right of—Subject to limitations imposed by Ss. 265 and 266. 1932 A L J 507=16 R D 403=A I R 1932 A 416=A L R 1932 A 945.

—S. 265—Where by an imperfect partition, a village was divided into two pattis and one of the pattis was allotted to the plaintiff and the defendant, who was the lambardar, and who continued to act as such, claimed a right to collect rent of the whole village including the patti allotted to the plaintiff. Held, (1) that the lambardar had no right to collect rent of the plaintiff's patti, (2) that the suit was not barred under s. 253 (b), U. P. Land Revenue Act. Difference between perfect and imperfect partition discussed. Ind Rul (1931) All 839=134 I C 455.

—S. 265 (1)—Lambardar—Rent—Collection of—Right of—Patti in mahal in which lambardar himself is no co-sharer and has no proprietary interest—Rent of land in—Collection of—Right of—Lambardar has no—S. 132 of the Act—Effect of. 1932 A L J 507=16 R D 403=A I R 1932 A 416=A L R 1932 A 945.

—S. 266—Suit for rents—necessary parties all the co-owners—power to appoint agent to collect. A L R 1933 A 45=1932 A L J 1029.

—S. 266—It is only the possessor of proprietary right who can let land. Tenancy

## AGRA TENANCY ACT (3 OF 1926) (Contd)

can be created by all the co-sharers jointly, and any attempt by only one of them to create a tenancy must be declared to be ineffectual. 1932 A L J 477=A I R 1932 A 457=140 I C 204=A I R 1932 A 637=16 R D 409=A L R 1932 A 795.

—S. 266—The lessor by merely admitting the lessee as a tenant cannot be deemed to have assigned his proprietary or possessory right in the lands. 1932 A L J 477=140 I C 204=16 R D 409=A I R 1932 A 637=A I R 1932 A 457=A L R 1932 A 795.

—S. 266—A lease by one of the co-sharers only is one granted by an unauthorised person and it confers no right upon the lessee. There is nothing to prevent the lessor from joining the other co-sharers to eject one who is found to possess no right in respect of the land in dispute. 1932 A L J 477=A I R 1932 A 457=140 I C 204=16 R D 409=A I R 1932 A 637=A L R 1932 A 795.

—S. 266—applies to tenants and the words "co-sharers in any right, title or interest" in the first sub-section that section are not confined to co-sharers in proprietary interest only. 16 R D 604=13 U D 128.

—S. 266—Some co-sharers not impleaded—Suit though bad under s. 266 should not be dismissed—Opportunity should be given to bring the co-sharers on record. A I R 1929 All 847=Ind Rul (1929) All 832=118 I C 240.

—S. 266 (1)—Court should not decree ejectment at the instance of one only of the co-sharers. 117 I C 339=L R 11 A 735 Rev.

—I R 1929 A 691=A I R 1929 A 609.

—S. 266 (4)—The word "tenant" does not include a transferee of a tenant. That sub-section has been framed to deal with the case of tenants who after acquiring proprietary rights refuse to discharge their liabilities as tenants. 16 R D 204=13 U D 64=13 L R 94 (Rev.)

—S. 268—Suit for possession by person ejected by lambardar through third person lies in Revenue Court both under old and new Act. A I R 1930 All 519=Ind Rul (1930) All 499=123 I C 681.

—S. 268—High Court will not allow the plea of jurisdiction to be raised in second appeal if not already raised in the trial or first Appellate Court. 14 R D 66=A I R 1929 A 875=L R 11 A 20=118 I C 523

—Ss. 268 and 269—S. 269 does not apply where the suit is initially cognizable by a Revenue Court and in which no appeal is provided for to the Civil Court. A I R 1930 All 713=(1930) A L J 1233=Ind. Rul. (1930) All 898=127 I C 434.

—S. 269—A suit triable by Revenue Court can be disposed of by Civil Court under s. 269. A I R 1931 All 553=15 R D 435

## AGRA TENANCY ACT (3 OF 1926) (Contd)

=L R 12 A 209 Rev=Ind Rul (1931) All 549=(1931) A L J 408=132 I C 805.

—S. 271—appeal, return of—proprietary title—question raised by respondent in cross-objections—jurisdiction—ousting of—applicability of O. 7 r. 10 and S. 107 (2), C. P C A L R 1933 A 85 (2).

—S. 271—Competent Court in s. 271 means the Court which would take cognizance of a suit involving title to the property and of the suit in which the question of title may be fairly and ultimately decided. A I R 1931 All 28=14 R D 654=(1931) A L J 8=L R 11 A 300 Rev=53 A 62=Ind Rul (1931) All 639=133 I C 319.

—S. 271—Where in a suit for profits a question of title is raised, the Revenue Court must remit the issue to the proper Court. If the case is sent to an inferior Court, High Court can transfer it to the proper Court. A I R 1931 All 28=Ind Rul (1931) All 639=14 R D 654=L R 11 A 300 Rev=(1931) A L J 8=53 A 62=133 I C 319.

—S. 271—Suit for profits between co-sharers—Question of proprietary title decided by Civil Court after trial of Revenue Court's decree but before decree in appeal—Appellate Court should give effect to it. A I R 1930 All 313=52 All 436=(1930) A. L. J 286=Ind Rul (1930) All 918=127 I C 518.

—Ss. 271 (4) and 242 (3)—Ejectment suit—Dismissal on ground other than question of proprietary right, decision on question of proprietary right being in plaintiff's favour, on basis of finding of Civil Court—Appeal by plaintiff—Cross-objection by defendant in, raising question of proprietary right—Commissioner's jurisdiction ousted in case of—Return of memo, of appeal to plaintiff for presentation to proper Court—proper course 1932 A L J 1085=A L R 1933 A 85.

—S 271 Expl 1—Plea of proprietary right untenable and intended solely to oust jurisdiction of Revenue Court—Trial Court need not act under s 271 first part A I R 1930 All 647=Ind Rul. (1930) All 878=126 I C 830

—S. 271, Expl. (2) Suit for ejectment alleging defendant to be a subtenant—Defendant pleading that he is zemindar and the land in controversy is his khudkasht—Question of proprietary title is not involved. A I R 1928 All. 764=(1929) A L J. 289=L R 10 A 97 Rev=113 I C 755.

—S. 273 After commencement of a tenancy, the tenant cannot be ejected otherwise than in accordance with s. 77. A I R 1931 All 198=L R 12 A 35 Rev=Ind Rul (1931) All 185=15 R. D 162=129 I C 553

—S. 273—When a Civil Court remits an issue to Revenue Court, it must accept the finding of such Court 15 R D 16=L R

**AGRA TENANCY ACT (3 OF 1926) (Contd.)**

11 A 362 Rev=A I R 1931 A 91=I R 1931  
A 559=1931 A L J 889=132 I C 815

—S 273—Civil Court is bound to refer the matter to the Revenue Court when the defendant pleads tenancy right even though in the opinion of the Civil Court the defendants clearly have no title as tenants and are mere trespassers 1931 A L J 529=15 R D 498=L R 12 A 343 Rev.

See also I R 1930 A 245

=A I R 1931 A 211=122 I C 597;

and A I R 1927 A 369=25 A L J 545

=L R 8 A 250 Rev=103 I C 27

and A I R 1927 A 346=L R 8 A 104

=100 I C 471

—S 273—The Civil Court can refer to the Revenue Court only the question of tenancy and not the class of tenancy to which the defendant in an ejectment suit belongs, A I R 1931 All 198=L 12 A 35 Rev=Ind Rul (1931) All 185=15 R D 162=129 I C 553

—S 273—After coming into force of the Act of 1926, s. 273 should be applied and not s. 202 of the old Act. A I R 1931 All 33=(1930) A L J 1251=14 R D 656=Ind Rul (1931) All 260=130 I C 292

—S. 273—Civil suit lies for avoiding the decision of Revenue Court holding the debt to be tenant. I R 1929 A 1012=L R 10 A 293=119 I C 436=A I R 1929 A 387

—Ss.—273 and 44—Suit for ejectment against trespasser may be filed either in Civil or in Revenue Court—S 44 and s. 273 should be consistently construed A I R 1927 All 346=L R 8 A 104 Rev=100 I C 471

—Sch II, List 2 Serial No 2—A set-off is not admissible in the Revenue Court A I R 1929 All 691=Ind Rul (1930) All 146=121 I C 386

—Sch II Serial No 10—Where a tenant-in-chief borrows money from A and the arrangement is that A is to hold the land on a rental of Rs. 47, out of which he is to pay Rs. 35 direct to the landlord and the balance he is to keep to himself as interest, in a suit for the recovery of rent by the tenant-in-chief, a plea of non-payment of Rs 12 by A is not one of set off 16 R D 388=13 U D 59

—Schedule IV—Group B Serial No 12—A tenant is given six months in which to sue for recovery of possession and the time from which this period begins to run is the time when the wrongful dispossession takes place. If the period of wrongful dispossession begins from July 1928 and suit is instituted in April 1929, in the absence of evidence that a portion of the intervening period should be excluded from the period to be counted for limitation, the right to recover possession is barred by limitation, 16 R D 195=13 U D 63=13 L R 97 (Rev).

**AGRA TENANCY ACT (3 OF 1926) (Concl'd.)**

—Sch IV Group F Serial No 3—A decree for recovery of possession with costs is not a money decree 16 R D 385=13 U D 78 AGREEMENT.

See cases under. :—

- (1) Arbitration—Agreement
- (2) Contract—Agreement
- (3) Contract Act Ss 2, 23, 28, 62, and 74
- (4) Estoppel
- (5) Evd Act S 92
- (6) Hindu Law—(a) Adoption  
(b) Maintenance  
(c) Partition
- (7) Landlord & Tenant—Lease—Agreement
- (8) Mortgage—Redemption—Agreement
- (9) Principal & Agent
- (10) Registration Act s. 17, and s. 49
- (11) Specific Performance
- (12) Sp Relief Act Ss 22, 42, 56 and 57
- (13) Stamp
- (14) Stamp Act Ss 3 (11), 3 (13), 7 and 14; Sch I arts 5 (c) and 14 (a); and Sch II art, 11
- (15) Transfer of Property Act Ss 6, 59, 105 and 106

**AGRICULTURAL HOLDING**

See landlord and Tenant  
See lease  
See Tenancy Acts (Local)

**AGRICULTURAL LEASE**

See Landlord and Tenant  
See Lease  
See T P Act s. 107, 108, 116, 117

**AGRICULTURAL PURPOSES**

See Land landlord and Tenant  
See Lease  
See Tenancy Acts (Local)  
See T P Act, s 117  
See Lmt Act art 116

See also for a full discussion on the meaning of the term "Agricultural Purposes"—A I R 1931 M 659=I R 1931 M 794 =34 L W 185=61 M L J 648=134 I C 42 =54 M 900

**AGRICULTURAL TENANTS**

see (1) Landlord and Tenant  
(2) Lease  
(3) Tenancy Acts (Local)  
(4) T P Act Ss 116, 117

**AGRICULTURAL TRIBES.**

See Custom—Alienation.

**AGRICULTURAL YEAR.**

See Instalment Bond.

**AGRICULTURIST.**

See (1) C. P Code s. 60  
(2) C. P Code—Attachment  
(3) Deccan Agriculturist

**AGRICULTURIST (Contd.)**

Relief Act (a) Bom Act 17 of 1879

(b) " " 23 of 1881

(c) " " 22 of 1882

(d) " " 23 of 1886

(4) Punjab Act XIII of 1900

(5) Custom—Punjab—Inheritance

**AGRICULTURISTS LOANS ACT (12 of 1884).**

—S. 5—Revenue Court alone can entertain a claim arising out of recovery of money due under the Act. 19 A L J 360  
=62 I C 544=A I R 1921 A 80.

S. 5—Amount paid under protest for the release of the property attached can be recovered by a suit but the person paying such amount has no right to claim damages against Govt. L R 8 A 274 Rev  
=25 A L J 1002=105 I C 621=A I R 1927 A 672 (S B).

**AHIRS**

See Hindu Law—Inheritance

**AHMEDABAD TALUKDARS ACT**

See Bombay Guzerat Talukdars Act VI 1888.

See Bombay Ahmedabad Talukdars Act VI of 1862.

**AIR AND LIGHT**

See Easements Act

See Injunction

**AJMERE MERWARA REGULATION**

See Regulations—(A) Imperial Regulations—Reg. I of 1877

**AJMERE MUNICIPALITIES REGULATION**

See Regulations—(1) Imperial Regulations—Reg I of 1877

**AKYAB**

See Bur Act XVII of 1875 ss. 31, 66

**ALA MALIK**

See Custom—Punjab—Inheritance

See Mortgage—General

**ALIEN**

See also (1) English Law—Aliens

(2) Injunction—Aliens

(3) Prob & Adm Act s. 3

(4) Alien Enemy

A foreign subject comes within the purview of all acts in force in British India, if he chooses to come into this country, unless indeed any such act especially exempts foreigners. The French law does not purport to give its subjects any privilege or immunity in foreign countries, nor would any such French law, if it existed, be of any avail in British India. There is no provision in International law nor under any convention or treaty, which protects foreigners from the law of the land, once they enter into British India. 33 C W N 1088 (1096-7)=A I R 1932 C 753  
=1932 Cr C 796.

—Raja of Faridkot is not an alien. A I R 1929 Lah 1=10 Lah 447=Ind Rul 1929 Lah 222=114 I C 62.

**ALIENATION**

See also cases under :—

(1) Buddhist Law—Alienation  
(2) C. P. Code S. 64, O. 32, r. 4 (1), Sch III r. 10.

(3) Custom—Punjab—Alienation

(4) Fraud of Creditors

(5) Fraudulent Transfers

(6) Guardian and Ward

(7) Gift

(8) Hindu Law—(a) Alienation

(b) Gift

(c) Inheritance

(9) Mahomedan Law—Alienation

(10) Malabar Law—Alienation

(11) Sale

(12) T. P. Act

(13) Will

—Condition against alienation see T.

P. Act s. 10

—Condition against alienation in a decree see T. P. Act s. 11

—By widow of occupancy rights see

Punjab Tenancy Act. s. 59 (5)

—Of leasehold interest see Lease

—Of mortgage property pending sale under a decree see Mortgage—Possession under Mortgage.

—Of service lands see Inams.

—Limitation for suit to set aside alienation of Math property, or of trust property see Lmt Act art. 134

—Limitation for suit to set aside alienation by guardian see Lmt Act s. 28 and art. 44

—An alienation made pending a temporary injunction is not void. 253 P L R 1914=145 P W R 1914=25 I C 180.

—An alienee, who obtains no valid rights under by alienating cannot maintain a suit for possession of the property. 17 I C 436.

—In a partition according to revenue shares, latest settlement record must be followed. 29 P W R 1916=33 I C 1006.

—Of cantonment land—See 10 Bom L R 287=12 C W N 465=4 N L R 65=7 C L J 401=3 M L T 339=18 M L J 199=14 Bur L R 102=35 C 478 P C.

**ALIENATION, LIMITATION, ANCESTRAL LAND ACT.**

See Punjab Limitation (Ancestral Land Alienation) Act I of 1900

**ALIENATION OF LANDS ACT, BUNDELKHAND.**

See Bundelkhand Alienation of Land Act II of 1903 (U P).

**ALIENATION OF LAND ACT, PUNJAB.**

See Punjab Alienation of land Act XIII of 1900

**ALIEN ENEMY.**

See also cases Under:—

(1) Contract Act Ss. 23, 56 & 65

(2) C. P. Code S. 83



**ALIEN ENEMY (Contd.)**

- (3) War-Contract.
- (4) Trading with enemy Ordinance IV of 1914

—A neutral or natural subject voluntarily residing in enemy country is an "alien enemy" 9 Bur L T 176=37 I C 88.

—The term "alien enemy" includes a neutral subject who has a commercial domicile in an enemy country and who has no intention to remove that domicile to a neutral country. 21 Bom L R 934=53 I C 372=44 B 61.

—Place of business or commercial domicile during the war is the test of a person being alien enemy, not his nationality 70 I C 344=A I R 1923 N 121.

—The debtor of an alien enemy is not entitled to suspension of interest from date of hostilities to date on which creditor alien enemy obtained license to trade. 44

Bom. 1=21 Bom L R 785=52 I C 522.

—An alien enemy who has been licensed to trade in Br. India, has access to the courts and may bring suits therein. 9 Bur L T 51=31 I C 888.

—Suit by or against an alien enemy is maintainable in British Indian Courts in accordance with the laws of procedure. And the fact of the debt being interned is immaterial as it does not cut down his liabilities, 20 C W N 691=23 C L J 493=35 I C 951=40 C 1140.

—Accepting a bill of exchange drawn against goods coming from another country and payment of their price after prohibition of trade with that country amounts to trading with enemy. A contract subsequently becoming illegal cannot be enforced 9 Bur L T 99=33 I C 96.

**ALIMONY.**

See also cases under:—

- (1) Divorce.
- (2) Divorce Act S. 36
- (3) Parsee Marriage and Divorce Act 1865 Ss. 33-35.
- (4) Mahomedan Law-Divorce.

**ALLOWANCE ACT TODA GIRAS.**

See Bom Act VII of 1887.

**ALIYASANTHANA LAW.**

See (1) Hindu Law—(a) Custom.  
(b) Maintenance.  
(c) Partition.

(2) Malabar Law.

—Limitation as to suit for maintenance See Lmt Act arts 127, 128 and 129.

—Junior members of family can show that the Judgment-debtor did not represent the family when the debt was incurred 17 M L J 260=2 M L T 368=30 M 447.

**ALLAHABAD HIGH COURT.**

Decree or order passed by it in exercise of its appellate jurisdiction is not necessarily a decree or order passed "On appeal" 55 B 785=33 B L R 1476=136 I C 183=A I R 1932 B 90=A L R 1932 B 125

—It cannot be too emphatically laid down that no litigant is entitled to have any say in the selection of the Judges who are to constitute any Bench. 1932 P C L 544 (Cr)=33 P L R 785=138 I C 878=I R 1932 L 543=A I R 1932 L 502=A L R 1932 L 544 (Cr)=1932 Cr C 679=33 Cr L J 675 (F B)

Fees of Counsel—Higher scale fees are usually awarded to Counsel. In the absence of taxing masters they are graduated according to the valuation fixed by the plaintiff—Fanciful valuation is therefore to be avoided. A I R 1924 All 652=46 A 553=22 A L J 446=88 I C 212.

High Court of Kumaun is not a Court Subordinate to Allahabad High Court for purposes of revision. A I R 1923 All 291=71 I C 991.

**ALLAHABAD HIGH COURT RULES.**

—R. 80-A certificate of the fees filed after the date originally fixed for hearing, but before the date on which the case was actually heard, was held to have been filed within time. 11 I C 3.

—R. 80 (1)—Fees not paid till after the commencement of hearing cannot be taxed. The proviso to R. 80 only gives a court a discretion to accept certificate for fees filed after the commencement of hearing, but no such discretion is given as to allowance of fee on taxation not paid before 1st hearing. 8 A L J 109=9 I C 422=33 A 374.

—Chap I, R. 1 (14)—Single Judge can dispose of an application for notice to printer and publisher of newspaper to show cause why they should not be convicted for contempt of Court—Application coming through jail authorities—Judge can dispose of it in Chambers A I R 1930 All 483= (1930) Cr. Cas 702=(1930) A L J 665=Ind Rul (1931) All 14=128 I C 14.

—Ch I R 3—Where an appeal from a decree is pending in the High Court, a single Vacation Judge can grant stay of execution of the decree. 18 A L J 1121

—Chapter II rule 3—Application under no limitation for. 1932 A L J 1069=A I R 1933 A 111=A L R 1933 A 35

Chap. II r. 12—Application for setting aside ex parte decree made on 3rd December, 1926 with tender of decretal amount—Amount actually paid into treasury on 6th December, 1926, the 5th being holiday—Tender is valid. A I R 1927 All 608=102 I C 523

—Ch. III, r. 2—A copy of the judgment of the first Court must be forwarded

## ALLAHABAD HIGH COURT RULES (Contd.)

with the memo of second appeal. A I R 1921 All 23-43 A 660-19 A L J 598-63 I C 338

—Chap. III, r. 3—Certificate about absence of evidence or admission must be produced and though appeal is admitted to hearing the matter cannot be argued. A I R 1924 All 433-22 A L J 244-L R 5 A 91 Rev=78 I C 164

—Ch. III r. 6 para 2—The rule conflicts with the provisions of the Letters Patent, and is, therefore, ultra vires. I R 1931 A 30-128 I C 238-A I R 1930 A 558

Ch III r. 37—Where The Court appoints a person, other than an Amin, to prepare map, it must fully specify the reasons for doing so. I R 1929 A 774-A I R 1929 A 446-118 I C 166

—Ch IV r 5—Property gifted not inherited, whether within the rule see 14 A L J 669

—Chap IV, Rr 5, 8—A sale by an Amin of Court of an ancestral grove garden occupied by a house is invalid as the sale should be by the Collector. 36 All 33-21 I C 831-11 A L J 1009

—Ch. IV, r. 8—'Ancestral property'—gift intervening—property not ancestral—execution—sale not to be by Collector. A L R 1933 A 272 (2)=1933 A L J 91-1 A W R 228

Chap. IV, r. 9—Suit for profits as legal representatives of deceased person—Right denied—Court should decide the question of title as a Civil Court or refer the parties to a Revenue Court by an order in writing 4 U P L R (A) 9-93 I C 103

—Ch IV r. 9—Civil Court cannot question the procedure of Collector as to the decree transferred to him for execution 19 A L J 232-62 I C 672-A I R 1921 A 225

—Ch V r. 5—Where a case is dismissed for default of counsel who is not paid fully, the case cannot be restored. 26 A L 1393-110 I C 772-A I R 1928 A 718

—Ch VI r. 8—Case once passed over cannot be repeated 26 A L J 1393-110 I C 772 A I R 1928 A 718

—Ch VII r. 3—Non-compliance with r. 3 is only irregularity. 1929 A L J 718-I R 1929 A 503-116 I C 23-A I R 1929 A 403

—Ch IX r 25—The Appellant wanting to set aside a decree must lay before the Court all the evidence on which the decree has been based. Ind Rul (1929) All 685-117 I C 109

—Chap. XVI, r. 2—Applies to suits and applications which are tried on the original side by the High Court itself and not to suits tried by subordinate Courts. A I R 1928 All 51-50 A 238-25 A L J 972-107 I C 34

—Ch. XVI, R 22—An affidavit to authenticate the payment of fees to a pleader was filed by an agent of the party and it

## ALLAHABAD HIGH COURT RULES (Contd.)

was stated that the payment was made by means of a cheque of a third person: Held that this was sufficient. 32 I C 194

—Chap. XVII, r. 15—Omission to pay poundage fee along with an application under O XXI, r. 89, C P C is only an irregularity. The Court can entertain the application and give time for payment. Ind Rul

(1931) All 647-133 I C 407

—Chap. XXI, r. 1—Fee actually paid to the legal practitioner and not fee merely promised to be paid, even though such promise is evidenced by a promissory note, bond or any other instrument. 54 A 490 (493)=1932 A L J 272-136 I C 817-A I R 1932 A 337-A L R 1932 A 716

—Ch XXI r. 1—Has the force of law 54 A 490 (493)=1932 A L J 272-136 I C 847-A I R 1932 A 337-A L R 1932 A 716

—Ch XXI r. 1—If the legal practitioner admits the receipt and karinda of the client admits payment of fees, the fee should be allowed under the rule. 50 I C 87-17 A L J 270-41 A 246

—Ch XXI r. 1—The first day fixed for hearing after the framing of issues is the first day of hearing for the purposes of the rule. L R 5 A 582 Civ-82 I C 73-A I R 1925 A 98

—Ch XXI r. 1—Objection as to award of costs, not taken in the lower Court, cannot be taken for the first time in High Court. 70 I C 527-A I R 1923 A 334

Chap. XXI, r. 1—In granting Letters of Administration to the estate of a minor, fees can be allowed only if the Judge is satisfied of payment of fees before the hearing. 61 I C 804

—Chap. XXI, r. 1 (1)—Certificates of fees must be tendered to the proper officer of the Court on or before the day first fixed for the hearing of the case. 18 A L J 638-2

U P L R (A) 234-42 A 524-57 I C 203

Chap XXI, r. 20—Only fee provided in r. 22 is allowed, though the case has been sent back to the lower Court for trial de novo A I R 1930 All 437-Ind Rul (1930) All 202-121 I C 826

—Ch. XXI R. 21—Pleader's fee is to be calculated under the rule where Plaintiff is returned for presentation to proper court 40 All 515-16 A L J 426-45 I C 985

—Ch. XXI r. 21—Where claim is withdrawn on the day fixed for contest full Counsel's fee must be allowed if the debt has already paid full fees to his Counsel 96 I C 754-A I R 1926 A 733-48 A 696

—Ch. XXI r. 26—Rule 26 and not r. 22 applies to taxation costs in contested application for probate 25 A L J 972-107 I C 34-A I R 1928 A 51-50 A 238

—Part II-R 26—Vakil carrying on family business is not deemed to be ente-

**ALLAHABAD HIGH COURT RULES (Contd.)**

ring into trade or business within the meaning of R 20 17 A L J 1147=1 U P L R 139=52 I C 638

**ALLAHABAD HIGH COURT COMPANY RULES.**

—Rr. 54 to 59—List framed and notice issued under r. 54—Party applying on date fixed for postponement of entry of their name Application rejected and name entered—No further notice under r. 57 is necessary to make party liable as contributory A I R 1930 All 357=(1930) A L J 139=1nd Rul (1930) All 87=126 I C 819

**ALLOTMENT.**

See Hindu Law,

**ALLUVIAL LAND.**

See Alluvian.

See Beng. Act IX of 1847, ss. 1, 6, 14 C 67 (F B)

**ALLUVION AND DILUVION.***Synopsis*

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See Also Bengal Alluvion & Diluvion Act 1847

See Also Bengal Alluvial Lands Act, 1920

See Also Regulations-(2) Bengal Regulations-Reg. XI of 1825

See Also Landlord and Tenant—Accretions to Tenure.

See Also Riparian Rights.

**(1) Accretions Grandual and Sudden 1-10**

1—Rights to accretions by alluvion arises irrespective of whether bed belongs to Government or private owner A I R 1930 Mad 181=53 M 202=1nd Rul (1930) Mad 447=123 I C 31

2—There is no accretion where the actual course of a river produces change

**ALLUVION AND DILUVION (Contd.)****(1) Accretions Gradual and Sudden (Contd.)**

each year in reformed land after the inundation season. I R 1930 S 161=A I R 1929 S 61=123 I C 193.

3—There is no gradual accretion in case of change of course by abnormal flood in a non tidal river and the plaintiff cannot claim to follow the river and take possession of all the intervening lands A I R 1927 Bom. 16=29 Bom. L R 1405. =105 I C 715.

4—Right of accretion to land cannot be claimed when there is recurrence of submersion and reappearance due to frequent and violent changes in the course of the river. 15 C L J 281=14 I C 609.

5—The question whether accretion war gradual does not arise where the land retains its identity A I R 1927 O 363=104 I C 426=1 Luck 315.

6—Question whether accretion was gradual does not arise in case of re-formation in situ. 26 C W N 913=35 C L J 580= A I R 1922 C 337=69 I C 74.

7—Gradual accretion to land on either side of a public navigable river forms part of the estate of the riparian owner of the bank. A I R 1923 P C 1=50 I A 121=32 M L T 162=1923 M W N 511=45 M L J 444=77 I C 1048=50 C 446 P C.

8—In India alluvial accretions cannot be acquired by private owners unless such accretion has formed in a slow and imperceptible manner by a regular alluvial process—English and American law discussed 22 M L T 57=40 I C 896=40 M 1083

9—Accretions must be gradual—Word gradual only defines a test relative to the conditions to which it is applied—Rate of progress with English rivers and those in India need not be same A I R 1922 P C 105=15 L W 389=42 M L J 589=35 C L J 463=20 A L J 438=26 C W N 318=30 M L T 112=(1922) M W N 381=49 I A 67=45 M 207 (P C)=67 I C 1.

10—Where the plaintiff claimed a certain block of land situated on the coast near the mouth of a river as an accretion to the mainland which belonged to him but where it was found that it was first formed as an island separated from the mainland by a strip of water which gradually dried up with the result that it was added on to the mainland held it cannot be treated as an accretion to the plaintiffs land and that it belongs to the crown.

The accretion must be gradual and imperceptible When it is sudden or perceptible, the land gained belongs to the Crown. 2 M W N (1911) 261

**ALLUVION AND DILUVION (Contd.)**

**(2) Adna and Ala Maliks, rights of 11**

11—In the Patti Kathpalwali (Punjab) where lands washed away re-appear, the Adna maliks have a right to be reinstated on payment of customary dues to the Ala maliks. A I R 1931 Lah 486-12 Lah 318 =Ind Rul (1931) Lah 677-32 P L R 683-132 I C 837.

**(3) Adverse Possession and Limitation. 12-16.**

12—Possession and use for 30 years of lands of another, which were washed away but had re-formed in opposite village, destroys the rights of the original owner 4 O W N 1008-106 I C 86=A I R 1927 O 519.

13—Land being submerged in rainy season every year—No title can be acquired by adverse possession.. A I R 1921 Cal 277-34 C L J 465-66 I C 923.

14—A chur which was found to be a re-formation in situ of plff's land was occupied for some years by Govt. It was then claimed by defts, as their property, and Govt. made over possession, to them. On plff's suing to recover possession, defts. pleaded limitation and to make out their plea claimed to tack on to their own occupation the period of Govt's possession.

Held, that the defts did not derive their liability to be sued "from or through" the Revenue authorities within the meaning of S. 2 (4) of the Lim. Act and that their plea must fail. 44 Cal 858-32 M L J 505-21 C W N 642-15 A L J 398-25 C L J 487-19 Bom. L R 480-22 M L T 310 = (1917) M W N 482-6 L W 117=I Pat L W 593-40 I C 337-44 I A 104 (P C)

15—Acts necessary to constitute adverse possession of chur land see 23 C W N 80

16—Submerged Land-Fishery Rights. Exercise of if adverse possession 23 I C 42

**(4) Churs in Navigable Rivers 17—19**

17—The principle applicable to newly formed chur lands in which both parties merely scrambling for possession is that possession lies with him who has title 56 C L J 263=A I R 1933 C 199=A L R 1933 C 53

18—The pleading in a suit relating to to chur lands newly formed should not be construed too strictly, unless one must do so for some very good reason. In the case of chur lands which are constantly going under water and reforming it is very diffi-

**ALLUVION AND DILUVION (Contd.)**

**(4) Churs in Navigable Rivers (Contd.)**

cult, until a full investigation based upon a proper survey and comparison of maps is made, to premise with any degree of certainty whether a claim would really lie on the ground of a new formation as being reformation in situ or a contiguous accretion. 56 C L J 263=A I R 1933 C 199=A L R 1933 C 58

19—The original owner retains ownership over land formed in a river which is identifiable and is identified A I R 1927 Oudh 559-105 I C 148

**(5) Custom. 20-21**

20—Dhardhura custom is not opposed to equity—It applies also to more violent changes of the course of a stream—Occasional hardship on one side or the other is no ground for its abrogation. A I R 1927 All 221-49 A 195-25 A L J 213-99 I C 557

21—The Wajib-ul-urz of a village recorded an agreement that occupancy tenants will have no right to land reappearing after being carried away by the stream.

Held, that the entry was inoperative, because (1) the agreement was void for want of consideration; (2) the parties to the agreement who were subject to the Customary Law in alluvion matters, were not at liberty to enter into a contract providing that they and their descendants shall not in future be subject to that rule, 4 P R Rev. 1912-8 P W R Rev. 1912-15 I C 942.

**(6) Deep-Stream rule 22.**

22—Merely because the boundaries extend in the river ad medium flum the increment cannot be said to be forming part of the estate adjoining the river. 29 C W N 1-1924 M W N 588-35 M L T 146-47 M L J 48=A I R 1924 P C 175-51 I A 241-80 I C 1023-51 C 802 P C.

**(7) Evidence 23**

23—Suit for possession of land recorded against the name of plaintiff and shown to have been under water and likely to have continued under water till within 12 years. Presumption is that it did so continue and that the plaintiff's possession also continued. 10 P L T 122=Ind Rul (1929) Pat 410= 117 I C 202.

**ALLUVION AND DILUVION (Contd.)****(8) Mortgager and Mortgagee 24**

24—Mortgagee not in possession is not entitled to accretion 21 A L J 409=L R 4 A 206 :Civ=75 I C 35=A I R 1923 A 500 =45 A 461.

**(9) Occupancy rights in accretions 25**

25—Occupancy rights in accretions to non-occupancy holding arise only by 12 years' continuous cultivation of the accretion 29 I C 37.

**(10) Ownership, Questions as to 26-28.**

26—Pargana Farkia-Ganges river flowing into Gandak and washing adjoining land—Accreted land still goes with ownership of bank A I R 1925 P C 213=50 M L J 194=22 L W 645=4 Pat 788=30 C W N 169=3 Pat L R 309=(1926) M W N 69=7 P L T 19=52 I A 279=(1925) M W N 549 (P C)=89 I C 737.

27—In India the presumption that riparian landlords are owners of river-beds is rebuttable. As regards accretions in non-tidal and non-navigable rivers, the ownership vests in riparian owners.

Submersion of land in water does not take away the owner's title, if the land is identifiable. 12 L W 371=55 I C 770.

28—Consent-decree in previous suit not inter-parties, and constructive possession of owner of submerged lands during diluvion, have no force or validity in a suit for declaration of title to chur lands. 19 C W N 565=29 I C 156.

**(11) Procedure 29—30**

29—Parties treating accreted lands as separate tenures can maintain a separate suit for rent of such land. 83 I C 602=A I R 1924 C 649=51 C 396

30—Suit by Govt. as proprietor claiming certain alluvial lands. It appeared that the Govt. had no title to the lands and that the right of Govt. to assess revenue upon them was declared long ago. Held having regard to the allegation of title and past conduct of the Govt. the court ought not, at this stage of the case in appeal, to change the entire form of the suit and to make a declaratory decree. 14 C L J 98=11 I C 718.

**(12) Submersion and Re-formation 31-40**

31—The holder of ryotwari land does not retain his rights over such land during submergence, unless he continues paying yearly the assessment or rent due to Govt.

**ALLUVION AND DILUVION (Contd.)****(12) Submersion and Re-formation (Contd.)**

A I R 1926 P C 18=94 I C 501=53 I A 64=43 C L J 378=50 M L J 391=24 L W 9=1926 M W N 585=28 Bom L R 865=49 M. 249 P C.

32—Forfeiture of diluviated land will not ensue on abatement of rent. Question is one of intention. 75 I C 955=A I R 1924 Pat 213=2 Pat 839.

33—The original owner retains his ownership over the land during submergence. I R 1929 Pat 430=10 P L T 207=117 I C 318.

34—Land washed and subsequently re-appearing is property of the original owner. I R 1930 S 161=A I R 1929 S 61=125 I C 193.

35—Ordinarily, the original owner is deemed to be in possession of his submerged land. 83 I C 8=A I R 1925 N 164.

36—River changing its course and washing lands away. The original owner retains his rights over such lands, though re-formed adjoining another's land 9 O L J 518=73 I C 727=A I R 1923 O 102

37—Original owner can recover his lands which were washed away but had re-formed subject to the custom of the district if any. 31 P L R 1912=118 P W R 1912=14 I C 799.

38—Submerged land would not belong to the original owner if it is so completely abandoned as to merge again like any other derelict land into the public domain as part of the sea or river of the State. A I R 1926 Bom. 467=28 Bom. L R 641=95 I C 950.

39—Submersion and reformation in situ.—Not an accretion to the neighbouring land 29 C L J 564=24 C W N 211=52 I C 673.

40—When alluvial lands are formed into separate estates for the purposes of assessment only, and if they reappear after submergence, they cannot be treated as part and parcel of the parent estate. They will be considered as new alluvion. 14 C L J 98=11 I C 718.

**(13) Zamindar, rights of 41-42**

41—Part of mouza including defendant's howlas sub-merged—After re-formation zamindar of mouza is entitled to possession if defendant is not able to prove that re-formed lands were in his howlas. A I R 1929 P C 200=33 C W N 984= (1929) M W N 616=50 C L J 509=30 L W 1024=57 M L J 776=Ind Rul (1929) P C 347=120 I C 51 P C.

42—Every zamindar is entitled to the



**ALLUVION AND DILUVION (Contd.)****(13) Zamindar right of (Contd.)**

accretion according to his share 12 R D 51  
 =A I R 1929 O 15=111 I C 370  
 —Applicability of English law of accretion to Burma see. 10 R 1.

**(14) Miscellaneous 43**

43—How alluvion and diluvion affect right of several fishery—Jalkar. 27 M L J 417 P C.

**ALTAMGA GRANT.**

See Mahomedan Law.  
 See Grant.

**ALTAMGAH ENAM.**

See Grant.  
 See Mahomedan Law.

**ALTERATION.**

See (1) Contract—Alteration of.  
 (2) Deed—Alteration of.  
 (3) Will.  
 (4) Nag Instr Act s. 87.  
 (5) Contract Act s. 62.  
 (6) C P C (1908) or, 6.  
 —Plaintiff cannot be allowed to take advantage of his own fraud, not even to the extent of claim admitted by the other party. 25 I C 667.

**ALTERATION OF ACKNOWLEDGMENT.**

See (1) Acknowledgment.  
 (2) Limitation Act s. 19,

**ALTERATION OF DEEDS.**

See Contract—Alteration.

**ALTERATION OF LAW.**

See Precedents.

**ALTERNATIVE CLAIMS.**

See (1) C P Code O VI  
 (2) Pleadings.  
 (3) Practice.

**ALTERNATIVE DEFENCE.**

See Pleadings.

**ALTERNATIVE PLEADINGS.**

See (1) C P Code O 6.  
 (2) Pleadings.  
 (3) Practice.

**ALTERNATIVE PLEAS.**

See (1) C P Code O 6.  
 (2) Pleadings.  
 (3) Practice.

**ALTERNATIVE PRAYER.**

See (1) Pleadings.  
 (2) C P C Or 6.

**ALTERNATIVE RELIEF.**

See C P Code Or. 6

**AMARAM GRANT.**

See Grant.

**AMARAM TENURE.**

See Land Tenure.

**AMBIGUITY.**

See Deed—Construction of deed.  
 See Evidence act, 1872, Ss. 93 To 98.  
 See Will—Construction.  
 See Stamp act, 1862, 1 Ind. Jur N S 107.  
 See Interpretation of statutes.

**AMEEN.**

See (1) C P C O 26.  
 (2) Amin.

**AMENDMENT OF DECREE.**

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**ANIMALS**

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—The person on whose land a wild animal is killed is entitled to the animal; but as against others the property in the animal vests in the killer, though the latter may be resisted by the owner and other assistants by way of rescuing the animal. 81 I C 82=A I R 1924 Pat 564=3 Pat 549.

—The owner of a tame elephant retains his rights over it when it escapes and is recaptured by another, provided it was tame at the time of the recapture. 64 I C 831=A I R 1921 L B 1=11 L B R 71.

—The principle governing ownership in wild animals freely moving is this:—they belong to the person on whose premises they are found for the time being. Absolute title to such animals cannot be claimed by anybody. 1918 Pat 232=49 I C 198.

—Complete Capture and possession of an animal render it one's property. 15 O C 183=15 I C 972.

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- (29) U P. Act II of 1901 Ss. 117, 175, 177.  
 (30) Prov. Insolvency Act 1907 S. 46 (4).  
 (31) Registration Act Ss. 72-74.  
 (32) Act I of 1894 S. 18, S. 54.  
 (33) Punjab Court Act 1899.

## (1) Abandonment of plea

1—Plea involving questions of fact (e.g. question of legal necessity for an alienation) if abandoned in the lower Court by admission, cannot be raised in appeal. A I R 1931 Nag. 147=14 N L J 84=Ind Rul (1931) Nag. 118=133 I C 390.

## (2) Abatement of appeal

See also C P C O 22

2—O. 22 does not apply where a party dies before an appeal is filed. 26 S L R 362

3—Abatement rules of C P C do not apply. Where the respondent dies before filing the appeal. But delay in applying for his legal representative to be brought on record may be excused, especially where the deceased respondent is the sole respondent. 1932 P O L 434=33 P L R 116=138 I C 277 =I R 1932 L 469=A I R 1932 L 305=A L R 1932 L 434

4—O 22 C P C does not apply in case of death of party between hearing of appeal and pronouncing of judgement. 1932 A L J 1069

5—Dismissal of an ejectment suit by certain cosharers-tenants against another cosharer—Appeal by plffs.—Death of one of the plffs, pending the appeal and his legal representative was not brought on record—Dismissal of appeal on merits—Second appeal by remaining plff. against the dismissal lies; there is no abatement. 26 S L R 362=A I R 1932 S 220 A L R 1932 S 298

6—Trial Courts decision is the operative decision in case of abatement of appeal. 1932 A L J 615

7—Appeal against dismissal of a suit for partition between two branches only of a joint Hindu family does not abate in toto merely by reason of a junior member of plff. branch dying pending the appeal and his legal representative having not been brought on record within time allowed. 13 L 483=33 P L R 842=A I R 1932 L 641 =A L R 1932 L 796 (Civ)=1932 P C L 796 (Civ)

8—Appeal which abates against one of the joint decree-holders abates against all. 35 L W 105=A I R 1932 M 212=137 I C 319 =I R 1932 M 368=1932 M W N 152=A L R 1932 M 227

9—Where, therefore, in a suit brought by the owners of a firm in their individual names a decree was passed in favour of the plaintiffs and pending the appeal by the de-

## APPEAL (Contd.)

## (2) Abatement of appeal (Contd.)

fendants therefrom one of the plaintiffs died and his legal representatives were not brought on record in time and there was no evidence to show what the rights of the plaintiffs were inter se, held that the entire appeal abated. 1932 A L J 219=135 I C 245=I R 1932 A 69=A L R 1932 A 171

10—Similarly, appeal by plff. against decree for mesne profits against several defts; some of the defts. dying and their legal representatives not brought on record; entire appeal abates. 11 P 538=13 P L T 711=140 I C 300 =I R 1932 P 316=A I R 1932 P 327=A L R 1932 P 751

11—So also, entire appeal abates on death of one of the mortgagee-respondents without bringing his legal representative on record, where the shares of the co-mortgagees are not definite. (1932) P C L 49 (Civ)=33 P L R 38=A L R 1932 L 49

12—If the appeal can proceed without bringing the legal representative of the deceased respondent, it abates against that respondent only, but if the appeal cannot so proceed, it abates as a whole. The test is whether, in the event of the appeal being allowed against the remaining respondents, there would or would not be two contradictory decrees in the same litigation with regard to the same subject-matter. 1932 P C L 49 (50) (Civ)=33 P L R 38=A L R 1932 L 49

13—If the subject-matter be inseparable and indivisible as respects various respondents, and if contradictory decrees would have to be passed, entire appeal abates on death or one of the respondents whose legal representative is not brought on record. 13 Lah 70 (85-6)=A I R 1932 L 281=137 I C 820 =I R 1932 L 379=A L R 1932 L 390 (Civ) =1932 P C L 390 (Civ)

14—Plaintiffs, tenants, sued, under S. 104-H of the Bengal Tenancy Act for the correction of an entry in the Record of Rights as to their status and for a declaration that the rent settled was illegal. The trial Court dismissed the suit and the plaintiffs preferred an appeal. Pending the appeal some of the plaintiffs died and the appeal was allowed to abate as regards them. Held, that the entire appeal did not abate thereby, because the causes of action were separate and it was competent to one of the tenants to institute a suit of the kind which is now the subject-matter of the appeal. 58 C 1341=I R 1932 C 157=135 I C 797=A I R 1932 C 134 =A L R 1932 C 99

15—Appeal by creditors, against dismissal of their application for adjudication, abates on death of the debtor, pending the appeal, and the debtor's sons cannot be impleaded as his representative; S. 17 of Pro Ins. Act not applying to such a case. 13 Lah. 396=135 I C 196=32 P L R 803=I R 1932 L 68 =A I R 1932 L 121 (1)

**APPEAL (Contd.)****(2) Abatement of appeal (Contd.)**

16—Abatement of representative appeal See *C P C* 1 r. 8

20—Legal representative of a respondent, against whom appeal has abated, wishing to be brought on record, must apply under *C P C* O 22 r. 4, but he need not apply for setting aside the abatement. 36 L W 169-139 I C 574 (1)=A I R 1932 M 527-I R 1932 M 755 (1)=A L R 1932 M 1296.

17—Reversioner of a minor's father, whose application for appointment as guardian was dismissed, appealed against the dismissal—His death during pendency of the appeal—Abatement. 39 I C 379=18 p L R 1917.

**(3) Additional Evidence.**

See also *C P C* S. 107 and O 41, r. 27 and rr. 23 & 25.

18—Additional evidence can be admitted only when the Court requires it, not when a party applies for it. The Court must record reasons and the power should be exercised very sparingly. Party cannot be allowed to patch up weak parts in appeal. A I R 1931 P C 136 (1931) A L J 458-53 C L J 390-33 Bom L R 988-35 C W N 841=Ind Rul (1931) P C 197=(1931) M W N 733-34 L W 175-53 A 190-61 M L J 665-132 I C 613 (P C).

19—Fresh evidence will not be allowed on the ground that it was discovered after the filing of the appeal. 9 M L T 323=1911 M W N 136=9 I C 251.

20—The legitimate occasion for the admission of additional evidence by an appellate Court arises, when, on examining the evidence as it stands, some inherent defect becomes apparent. 10 I C 332

**(4) Addition of Parties in appeal.**

See *C P Code* O. 41, r. 20.

**(5) Admiralty Case.**

21—In Admiralty case, conclusions of fact of Trial Judge must be accepted. 20 C W N 1022=31 M L J 159=4 L W 176=1 M W N 446=35 I C 193=A I R 1916 P C 73.

**(6) Admission of Appeal.**

See *C P Code* O 47, r. 4

**APPEAL (Contd.)****(7) Admission of document in appeal.**

22—A document to impeach witnesses cannot be admitted in appeal when no opportunity is given to witnesses to explain.

41 I A 76-1 O L J 57=12 A L J 125=26 M L J 153=1914 M W N 137=16 O C 386=19 C L J 165=18 C W N 521=22 I C 103=16 Bom L R 141=15 M L T 125=35 A 93 P C.

**(8) Adverse finding in a favourable decree, appeal against.**

See also *C P Code* S. 11—Heard and finally decided—Adverse Finding.

23—Where a decree is favourable to a party but a finding in it is adverse to that party, no appeal lies against such finding. 17 M L T 85=25 I C 991.

24—Party not entitled to appeal when decree in his favour—Finding upon unnecessary issue. 9 I C 1030=120 P L R 1911=101 P W R 1911.

25—Party not entitled to appeal when decree in his favour. 120 P L R 1911=9 I C 1030=101 P W R 1911.

**(9) Amendment**

See also *C P Code* Ss. 151, and 152.

26—On amendment of a decree an appeal lies from amended decree alone even if it challenges original decree. A I R 1931 Cal 578=35 C W N 251=Ind Rul (1931) Cal 699=133 I C 571.

27—Limitation begins to run afresh, in case of amended decree, only as regards the parties affected by the amendment. 78 I C 525=A I R 1924 C 898.

28—Plff will be allowed to claim equitable relief even in appeal and have his pleadings treated as amended, if necessary, where the debt is obviously at default. 82 I C 964=A I R 1925 C 434.

29—Amendment can be allowed in appeal where the plff. omitted to seek amendment in lower Court due to bona fide mistake. A I R 1924 Pat 310=76 I C 347=2 Pat 919=5 P L T 315.

30—Order amending decree is not appealable. A I R 1923 L 147 (2)=73 I C 679.

**(10) Appellate Jurisdiction. 31-32**

31—Hearing on preliminary question whether an appeal lies is an exercise of jurisdiction by appellate Court just as much as a hearing on merits. 11 P 187 (226)=A I R 1931 P 306=12 P L T 915=133 I C 753=A L R 1932 P 1 (F B).

32—Order in an incompetent appeal preferred to proper appellate Court is an order of appellate Court though in fact no



**APPEAL (Contd.)****(10) Appellate Jurisdiction (Contd.)**

appeal lay. 11 P 187 (219)=A I R 1931 P  
306=12 P L T 915=133 I C 753= A L R 1932  
P 1 (F B).

**(11) Arbitration Award, Appeal against.**

See (1) Arbitration

(2) C P C s. 104 and Sch II, para 16.

33—Whether appeal lies against decree  
based on award see. 19 I C 403.

**(12-a) Burden of Proof.**

See Onus *infra*.

**(12-b) Compromise Decree.**

34—Compromise between some of the  
parties to a partition suit—Appeal by per-  
son not parties to the compromise, compe-  
tency of see. 27 I C 242.

**(13) Connected Cases.**

35—One appeal does not lie where cases  
are governed by one judgment but not  
consolidated. 15 C W N 994=10 I C 415.

36—Where suits were connected, but  
an appeal was filed only in one, and the  
findings in the suits were conflicting, it  
was held that the Judge could deal with  
the appeal before him and go into such  
matters as were necessary for the decision  
of the appeal. 56 I C 282.

37—Cases governed by one judgment  
but not consolidated—Held, that there  
should be as many appeals as there were  
original cases, and not one consolidated  
appeal against all the orders. 15 C W N  
994=10 I C 415.

**(14) Consent Decree.**

38—Appeal from consent decree is not  
maintainable. 37 C W N 134=9 O W N  
929=139 I C 545=36 L W 631=A I R 1932 P  
C 231 (P C).

See C P Code s. 115

See Practice

**(15) Conversion of appeal into revision. 39.**

39—Converting into revision—Power of  
Court—Punj. Courts Act s. 70 (1) (b). 44  
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**(16) Costs.**

See Also under C P C s. 35

See Also under Letters Patent cl. 15

40—No appeal lies against an order for  
costs unless question of principle is invol-  
ved. 56 I C 334=47 C 67.

**APPEAL (Contd.)****(16) Costs.**

41—An order of costs is appealable  
only when a question of principle is invol-  
ved or where the Court has not exercised  
proper discretion or where the Court has  
misapprehended a fact or law. A I R 1930  
L 234=114 I C 710.

42—Second appeal lies where the first  
Appellate Court interferes with the Lower  
Court's order as to costs. 25 O C 385=10  
O L J 20=A I R 1923 O 155=73 I C 222.

43—Trial Court dismissing suit with  
costs to deft. Appellate Court holding suit  
not maintainable but another deft. substi-  
tuted—Costs not awarded—the first deft.  
can appeal against the latter portion of the  
order. 34 C L J 475=66 I C 903=A I R 1921  
C 156.

44—An order as to costs is not a  
“Judgment” and is not appealable as such.

26 M L J 356

See also

17 M L J 569

45—Where a decree is final there can  
be no appeal against its direction as to  
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**(17) Court—fees.**

46—Where a memo of appeal is rejected  
on the ground of nonpayment of deficient  
court fee a fresh memo, with proper court  
fee is permissible. 59 C 388=A I R 1932 C  
482=138 I C 643=1 R 1932 C 483.

47—Receiving of appeal in a case  
where insufficiency of court-fee appears  
on the face of the memo is without  
jurisdiction. The proper procedure in such  
a case is to return the memo to the party  
presenting it. 59 C 388=A I R 1932 C 482=138 I C 643=1 R 1932 C 483.

48—Court-fee—Mortgage Suit—Decree  
declaring priority in respect of another  
mortgage—Appeal to get rid of priority—  
Valuation. 3 Pat L J 323.

49—As to appeal against order rejecting  
plaint for non-payment of additional court  
fee See-80 P R 1914=167 P W R 1914=265  
P L R 1914=25 I C 565.

50—appeal against a portion of a  
decree—Payment of court-fee on portion  
of decree appealed against—Basis of the  
whole decree, if can be questioned. 38 Mad  
18=16 I C 877.

51—No appeal lies to the High Court  
from an order of a District Judge rejecting  
a memorandum of appeal on the ground  
that the deficiency of stamp for the  
memorandum was not put in within the  
time allowed. There was no decree made  
at all in the lower appellate Court, the  
appeal not having been admitted in the  
register of appeals thereof. A W N 1883, 255.

**APPEAL (Contd.)****(17) Court—fees (Contd.)**

52—Redemption suit—court-fees See  
30 I C 322-2 O L J 257.

**(18) Cross-Appeal.**

See Objections by Respondent *infra*.

**(19) Decree, Preliminary and final.**

See also cases under C P C Ss. 2, 96 and 97.

53—Appeal against final decree is not necessary where a preliminary decree is set aside on appeal, 27 P L R 180-93 I C 851-  
A I R 1926 L 534.

54—Second appeal from preliminary decree does not lie if no first appeal from final decree is filed. 71 I C 290-A I R 1924 C 543.

55—A refusal to set aside an *ex parte* preliminary decree is not appealable 29 C W N 640-A I R 1925 C 790-90 I C 380.

56—Appeal from preliminary decree after passing of final decree, is maintainable. 37 Mad 455-22 M L J 217-14 I C 394-11 M L T 69-(1912) M W N 117. See to the same effect 10 A L J 19-34 A 493-16 I C 157 and See also 13 I C 134-34 A 186-9 A L J 19.

57—Where in a partition suit appeal was preferred from preliminary decree, the final decree which was based upon the preliminary decree ceases to exist as soon the preliminary decree is modified by the appellate Court. 16 O C 225-21 I C 570.

58—Preliminary decree declaring plaintiff entitled to amount of his claim—Subsequent passing of final decree—Appeal against preliminary decree after passing of final decree (1913) M W N 140-16 I C 380.

58 (a)—Appeal lies against a preliminary mortgage decree directing commissioner to take accounts and embodying certain conclusions. A L R 1933 C 65-56 C L J 221-A I R 1933 C 316.

**(20) Default of appearance.**

59—Respondents not appearing at first hearing—Subsequent appearance, if allowed, 24 I C 1007.

60—Effect of dismissal of an appeal for default is as if no appeal had been preferred and the findings of a trial Court are *res judicata*. A I R 1931 Sind 170.

**(21) Delay in Filing**

See Lmt. Act S. 5

**APPEAL (Contd.)****(22) Dismissal of Appeal**

See also Default of Appearance *supra*  
61—As to distinction between decree in summary dismissal of appeal under C P C O 41 r. 11 and dismissal after hearing the parties see 11 Pat 499

62—Decree in the case in case of dismissal of appeal is appellate decree. 135 I C 858-I R 1932 R 74-A I R 1932 R 54

63—As to the nature of application for restoration of the appeal which is dismissed for default in payment of paper book costs see 36 C W N 246-A I R 1932 C 641

64—Where one Bench admits the appeal and the final hearing takes place before another Bench, the latter is bound by the order of dismissal under S. 421, A L R 1933 P 105

**(23) Estoppel**

65—Where parties agree to the decision of the Board on appeal as to the validity of an award, neither of them can raise objection to jurisdiction. A I R 1922 P C 374  
=3 M L T 19-44 M L J 758-1923 M W N 372-49 I A 366-18 L W 537-70 I C 777-27 C W N 660-37 C L J 336-50 C 1 (P C)

65 (a)—Where one party does not accept the offer of the other party to be bound by the decision of the trial Court, the other party is not estopped from exercising his right of appeal 75 I C 619-A I R 1923 A 373

**(24) Evidence**

66—Document not proved or accepted by trial Court cannot be relied upon in appeal 16 R D 181-13 L R 88 (Rev)

67—Irregular admission of secondary evidence without objection by first Court—Objection not allowed on appeal 26 I C 939

68—Objection to admissibility of evidence cannot be taken in appeal. 31 I C 600  
=184 P W R 1915

**(25) Execution Proceedings**

See also cases under C P C Ss. 2 and 47 and O 21

**(26) Ex parte Judgment**

(68) a—*Ex parte* award not set aside under O. 9. r. 13 Civil P. C—Appeal against order not competent A L R 1933 C 21-59 C 1057

**(27) Finding of Facts.**

—69—Appellate Court ought not to lightly upset a finding of fact based on

APPEAL (*Contd.*)(27) Finding of Facts (*Contd.*)

evidence. 55 M 385=62 M L J 103= A I R 1932 M 167=135 I C 585=1931 M W N 1253 =34 L W 849=I R 1932 M 169=A L R 1932 M 157.

—70-Finding of fact of trial Judge seeing witnesses in the box and in a position to note their demeanour will not be interfered with by Appellate Court unless strong grounds are made out for so doing. 33 Cr L J 900=1932 Cr C 587=140 I C 23= I R 1932 S 170=A I R 1932 S 143.

—71-Where the testimony of parties is conflicting, the appellate Court should not reverse the finding of the lower Court unless there is a sufficient ground for so doing. 28 L W 737=A I R 1928 P C 277= 111 I C 169.

—72-Where the judgment of the lower Court is shown to be wrong then it should be reversed on appeal, but not if the appellant merely shows the possibility of judgment on either the one side or the other being wrong. 5 P L T Sup. 1=93 I C 454= A I R 1925 Pat 68 See also 13 O L J 167= 91 I C 1014.

—73-Appellate Court can judge upon questions of fact which do not depend on witnesses' demeanour and manner in the box. 91 I C 705=A I R 1926 C 643.

—74-Appellate Court must form its own conclusion on the evidence, but must also respect the trial Judge's opinion. 33 C L J 34=59 I C 814=A I R 1921 C 677=24 C W N 860=47 C 1043.

—75-Appellate Court must give proper weight to the opinion of the trial Judge as to demeanour, intelligence etc, of the witnesses in box before him on pure questions of fact. A I R 1923 P C 62=45 M L J 242 =18 L W 148=1923 M W N 580=84 I C 696 P C.

—76-Appellate Court must give proper weight to the trial Court's verdict where the only question is which set of witnesses is to be believed. A I R 1931 Oudh 256=8 O W N 131=L R 12 A (O) 67=15 R D 80= Ind Rul (1931) Oudh 292=132 I C 532 See to the same effect, 39 B 386; and A I R 1925 S. 35=18 S L R 55=78 I C 534.

—77-The appellate Court should be slow to differ from the opinion of the trial Judge as regards the value of testimony of the witnesses unless there are good grounds for it. 9 O W N 145 (151)=139 I C 740=33 Cr L J 932=I R 1932 O 390.

—78-The Privy Council will attach greater weight to appellate Court's opinion in case of conflict between trial Judge and appellate Court as to credibility of a witness examined on commission. 62 M L J 320=A I R 1932 P C 13=36 C W N 137=8 O W N 1378=35 L W 118=59 I A 1=136 I C

APPEAL (*Contd.*)(27) Finding of Facts (*Contd.*)

385=6 Luck 556=1932 A L J 663=I R 1932 P C 81=A L R 1932 P C 7 (P. C.).

—79-Findings of fact of the lower Court cannot be challenged—Appellant must show that deductions by the trial Judge from those facts are wrong. 27 C W N 231=80 I C 485=A I R 1923 C 182=50 C 399.

—80-Appellate Court must not give great weight to the decision of the first Court where such decision is based on the statement of witness whose credibility is not impeached and is not supported. A I R 1917 P C 214.

—81-Where credibility of a witness is in question inference from facts by trial is not necessarily binding. A I R 1921 P C 221.

—81(a)-So me of the principal witnesses examined on commission—Finding of fact is not necessarily binding. A I R 1925 S 16.

—82-Inference from fact is a question of law 16 M L W 473=43 M L J 556=1922 M W N 639=71 I C 330=A I R 1923 M 54.

—83-Finding as to the reasonable rate of interest is a finding of fact and one within discretion of trial Court. 69 I C 758=A I R 1922 A 335.

—84-Interpretation of deed is not a question of fact and may be raised in appeal. 11 L B R 356=1 Bur L J 117=A I R 1923 R 61=68 I C 887.

—85-Appellate Court cannot go into question of fact. 1922 Pat 363=4 P L T 367=1 Pat L R 55=69 I C 613=A I R 1923 Pat 29=2 Pat 243.

—86-A party not raising a question of fact in the trial Court cannot raise it at a subsequent stage. 68 I C 972=1923 L 98.

—87-Appellant questions a finding of fact at his own risk. 48 I C 225=1918 P C 10=21 O C 104=5 O L J 440.

## (28) Forum of Appeal.

See Also cases under :—

- (1) Act XL of 1858 S. 28.
  - (2) Act X of 1859 Ss. 209, 153, 77, 26, 28, 160, 229, 119.
  - (3) Act IX of 1861 S. 1.
  - (4) Act VI of 1862 S. 9.
  - (5) Act XXI of 1863 S. 27.
  - (6) Act XXVI of 1867 S. B. art 11.
  - (7) Act VII of 1870 S. 7 cl. 9, 17, 7, cl. 4, 11.
  - (8) Act VI of 1871 S. 22.
  - (9) Act III of 1873 S. 13.
  - (10) Punjab Courts Act 1884 S. 39, 40.
  - (11) Act VII of 1887 S. 8.
  - (12) Oudh Civ Courts Act S. 18.
- 88-Forum of appeal is determined by

## APPEAL (Contd.)

## (28) Forum of Appeal (Contd.)

the amount ascertained by the trial Court to be due to plff. A I R 1930 L 725=I R 1930 L 378=31 P L R 258=122 I C 730=11 Lah 359. See to the same effect A I R 1928 L 157=29 P L R 320=110 I C 631=9 L 23.

—89—Value of the original suit fixes the jurisdiction throughout the subsequent litigation in its several stages. 53 M L J 437=106 I C 616=A I R 1927 M 977=39 M L T 417=26 L W 539=1927 M W N 863=50 M 857.

—90—Forum depends upon the claim made and not decision thereon. 72 I C 389 (1)=A I R 1923 L 284.

—91—Trial Court's value determines forum in case of acceptance by plff. of value fixed by trial Court. 6 Luck 426=A I R 1931 O 58=130 I C 339.

—92—Where the trial Court found the value of the suit to be higher than that fixed in the plaint and called on the plaintiff to make good the deficiency in the court-fee and the plaintiff made good the deficiency only in order to prevent the rejection of the plaint and preferred an appeal contending that the plaint valuation ought to have been accepted by the Court below, held that the plaintiff could not be treated as having accepted the valuation of the trial Court. 6 Luck 426=A I R 1931 O 58=130 I C 339.

—93—The value of the suit for purposes of appeal, is the amount at which the claim is stated in the plaint. Interest accrued pendente lite should not be added. A I R 1931 Cal 159=52 C L J 589=Ind Rul (1931) Cal 396=58 C 829=130 I C 876.

94—Forum is determined by the value assigned by the plaintiff in his plaint unless it appears that, either purposely or through gross negligence, the true value of the suit has been altogether misrepresented in the plaint or the plaintiff has accepted the valuation fixed by the Court below. 6 Luck 426=A I R 1931 O 58=130 I C 339.

95—Valuation by plff is not conclusive where there is a deliberate over or under valuation with a view to suit being tried or appeal heard by a different Court or where the plff acts recklessly. I R 1931 O 147=7 O W N 1188=A I R 1931 O 58=130 I C 339.

96—The value of the suit which determines forum of the appeal, is the real value of the subject matter, and not the value which might have been, through error and caprice, stated by the plaintiff. 14 C L J 159=11 I C 228.

97—Where plaintiff sues for an ascertained sum, the defendant denies liability in toto the Court finds defendant liable and directs issuing of commission to ascer-

## APPEAL (Contd.)

## (28) Forum of Appeal (Contd.)

tain amount due and the defendant appeals denying his liability in toto he is bound to value appeal according to plaintiff's valuation of the plaint. A I R 1931 Pat 335=Ind Rul (1931) Pat 365=10 Pat 458=133 I C 355.

—98—Value of the subject-matter shall be deemed to be the value put upon it on amendment. 2 U P L R (A) 316=18 A L J 741=57 I C 134.

99—The price, found by the trial Court, to be paid by the pre-emptor decides the forum of appeal. A I R 1928 L 670=111 I C 129=10 L L J 277.

100—Where the suit was worth less than Rs. 5000 but the decretal amount exceeded that sum owing to addition of interest Held, appeal lies to the Dist Judge. A I R 1931 C 159=52 C L J 589=I R 1931 C 396=130 I C 876.

101—Where the suit was worth less than Rs. 5000, but the value exceeded owing to the decretal amount of mesne profits Held, the value of the suit must be taken to exceed Rs. 5000. A I R 1927 C 616=45 C L J 462=103 I C 639.

See also to the same effect A I R 1926 C 378=42 C L J 267=91 I C 9.

102—Valuation cannot be based on the assumption that a ground not taken in memo. of appeal, but which the appellant proposes to take in argument, is likely to be successful. I R 1931 Pat 29=A I R 1930 Pat 605=128 I C 795=11 P L T 629.

103—Execution of decree for over Rs. 5000—Appeal lies to High Court. 85 P L R 1918=86 P W R 1918=44 P R 1919=46 I C 584.

104—Suit for more than Rs. 5000—Decree by High Court in first appeal—Appeal from order in execution lies to High Court. 35 C L J 106=68 I C 575=A I R 1922 C 247.

105—Valuation—Pre-emption suit see 26 P R 1914=152 P L R 1919=23 I C 908.

106—Sale proclamation is not the valuation for the purposes of appeal. 16 C W N 970=17 I C 88.

## (30) Insolvency.

See also Prov. Insolv. Act Ss. 3, 15, 16 (2), 36, 43, 46.

107—Appellant becoming insolvent during pending of appeal, the only person who can continue the appeal is the Receiver 18 I C 922=24 M L J 231, 13 M L T 211, (1913) M W N 172.

## (31) Interlocutory Order.

108—Where final decree is made and no appeal is preferred therefrom the question

**APPEAL (Contd.)****(31) Interlocutory Order (Contd.)**

whether appeal lies from interlocutory order is undecided. 36 C W N 816-A I R 1932 C 783-139 I C 123.

109—No appeal lies from an interlocutory order admitting or excluding a document 49 P W R 1913-18 I C 309.

110—From interlocutory order—Disallowance of—that fresh attachment, necessary—No appeal. 34 All 530-10 A L J 56-15 I C 50.

**(32-a) Judgment.**

111—Where a Subordinate should have considered each case separately, but in fact considered them en bloc it was held that the appeals were not properly dealt with A I R 1924 Pat 245-78 I C 593-1923 P H C C 339.

112—An appellate judgment is coram non iudice where no appeal lies and must be set aside. A I R 1931 Lah 344 (1)=Ind Rul (1931) Lah 916-12; Lah 602-134 I C 292-32 P L R 863

**(32-b) Law governing Appeal.**

See Right of Appeal *infra*.

**(33) Limitation.**

See Also Cases under:—

Limitation Act Ss. 3, 4, 5, 12, 14, 29 (1), and art 182.

113—On fresh ground being raised with Court's permission, the plea of limitation can be raised at any time before decision. 25 A L J 591-102 I C 1-A I R 1927 A 589-49 A 809.

114—A Judge can receive an appeal on the last day of limitation after Court hours if there was sufficient cause for not presenting it within Court hours. A I R 1931 Lah 671-32 P L R 417=Ind Rul (1931) Lah 778-133 I C 442. See to the same effect, 45 A 727.

**(34) Letters Patent appeal under**

See cases under:—

- (1) Letters Patent (Calcutta) cl. 15
- (2) Letters Patent (Madras) cl. 15
- (3) Letters Patent (Bombay) cl. 12
- (4) Letters Patent (N. W. P.) S. 10

115—The Letters Patent Bench dismissed the plaintiffs suit on the sole ground that the plaintiffs were out of possession at the date of the institution of the suit and that

**APPEAL (Contd.)****(34) Letters Patent appeal under (Contd.)**

therefore they were not entitled to maintain a suit for declaration of title. The result of that decision is that other decisions in the case in the High Court and Court below, throughout the litigation, were wiped out and the ultimate ground on which the plaintiff's suit stood dismissed was the ground on which the judgment of the Letters Patent appeal proceeded 1931 A L J 1098-16 R D 120-13 L R 24 (Rev) =135 I C 555-I R 1932 A 91-A I R 1932 A 134-A L R 1932 A 135.

**(35) Minor**

116—In case of a minor the proper person to prefer appeal on his behalf is his next friend, because the latter's appointment continues for the whole lis. A I R 1931 Lah. 655-32 P L R 460=Ind Rul (1931) Lah. 781

117—Filing of appeal on behalf of a minor by person other than guardian for suit is only an irregularity. Objection on that ground if not taken in appeal cannot be taken in second appeal. 16 R D 553

**(36) Nature and effect of appeal**

118—Appeal is merely a continuation of the suit. 24 C L J 514-36 I C 641

118 (a)—Where an appeal lies the finality of the decree is qualified. Consequently were pending an appeal a suit is instituted on the same cause of action and between the same parties the proper course for the Court of the second action is to adjourn the action pending the decision of the appeal in the first action. A I R 1931 P C 263=(1931) A L J 833-61 M L J 420-34 L W 565-36 C W N 1=Ind Rul (1931) P C 283-134 I C 331 (P C)

**(37) New Case**

119—Appellant cannot set up fresh story different from that set up in grounds of appeal. 2 O L J 371-30 I C 374

120—New Case not to be made in appeal. 19 C W N 772-29 I C 216

121—Point newly raised for the first time in appeal not allowable Arms Act, Ss. 19 and 20-33 P L R 1914-1 P W R 1914 cr. 15 cr. L J 506-24 I C 594

**(38) New Plea**

122—New plea cannot be raised A I R 1924 C 467-39 C L J 140-82 I C 934-23 C W N 131.



## APPEAL (Contd.)

## (38) New Plea (Contd.)

123—Appeal Court will not entertain a plea in argument for the first time A I R 1922 O 236=25 O C 189=9 O L J 235=69 I C 730.

124—A point not raised in the trial Court but which was raised in the first appeal and not decided can be raised in second appeal. A I R 1931 Rang 314=135 I C 328

125—Per sulaiman, A C J—If there were a real estoppel against the defendant which would prevent him from now pleading that the plaintiff should have gone to the execution department, when he himself got him sent to the regular side, I would allow the point to be raised, because it would be an abuse of the process of the Court to permit the plaintiff being sent from pillar to post I would not however, say that personal estoppel is a question of public policy

Per Boys, J—In 53 All 65 it is suggested that a new point may be taken where it is a matter of public policy. The present I consider to be such a case and to come within that suggested rule. I would therefore, have allowed the point to be taken. 54 A 25 (33, 42)=A I R 1931 All 490=1931 A L J 715 (F B)=36 I C 236

126—Appellate Court will not go into an allegation of fact not made before trial Court 11 P 445(451)=13 P L T 719=A I R 1932 P 261=I R 1932 P 229=139 I C 397=A L R 1932 P 360

127—Question of fact which cannot be decided upon the record before the appellate Court cannot be raised in appeal. 7 Luck 454=9 O W N 60 (83)=I R 1932 O 205=137 I C 102=A I R 1932 O 123=ALR 1932 O 217

128—New point involving investigation of facts will not be allowed in appeal 1932 P C L 951 (Civ)=33 P L R 514=A I R 1932 L 444=A L R 1932 L 951 (Civ)

129—Plea by tenant of existence of mutual, open and current account between parties disentitling landlord to sue for rent alone was not allowed in appeal for first time because investigation of facts was necessary. 1932 P C L 6 (Civ)=33 P L R 323=A L R 1932 L 6 (Civ)

130—Though, as a rule, the appellate Court will be reluctant to investigate facts for the first time in appeal, there is nothing in law to prevent it from doing so when the interests of justice so require. 11 P 513 (517)=13 P L T 623=139 I C 843=I R 1932 P 259=A I R 1932 P 286=A L R 1932 P 672,

—131—Plea of invalidity of transfer of property by undischarged insolvent was allowed to be taken in appeal as the debt, in suit had questioned the title of the insolvent and his competency to transfer, though the point was not

## APPEAL (Contd.)

## (38) New Plea (Contd.)

specifically pleaded. The question cuts at the root of the controversy and so is allowable in appeal. 9 O W N 523=138 I C 808=A I R 1932 O 244=I R 1932 O 332.

—132—Estoppel against a party cannot confer jurisdiction on a Court when it has none, and an appellate Court may feel it to be its duty to intervene if the absence of jurisdiction is patent on the record, or a new glaring fact, e. g., the death of a party which nullifies all proceedings against him, may for the first time be brought to the notice of the appellate Court which it cannot ignore. 54 A 25 (33-4)=A I R 1931 A 490=1931 A L J 715 (F B)=134 I C 236.

—133—Plea of jurisdiction can be raised in appeal where facts are not in dispute 77 I C 795=A I R 1924 C 233=50 C 948.

—New plea—jurisdiction challenged—entertainability of A L R 1933 A 2=1832 A L J 857.

—134—New points of law can be raised if further evidence is not necessary A R 1924 Pat 446=5 P L T 576=78 I C 889=2 Pat L R 58=3 Pat 236

—135—New points of law involved in the pleadings can be raised in appeal A R 1925 R 71=88 I C 167=2 R 495.

—136—Although a party cannot claim permission to raise a new point of law, the Court itself is not precluded from deciding the case on such a new point. 54 A 25=A I R 1931 A 490=1931 A L J 715 (F B)=134 I C 236.

—137—A pure question of law to be argued on admitted facts and going to the root of the case can be allowed to be raised for the first time in appeal. 54 A 65= A I R 1932 A 510.

—138—Plea of ejectment, on the ground that properties being trust properties a permanent lease was invalid, cannot be taken for the first time in appeal on failure of ejectment based on alleged forfeiture for non-payment of rent. 88 I C 392.

—139—Plea of adverse possession, raised but not fought out, cannot be raised in appeal. 28 C W N 46=81 I C 29=A I R 1924 C 245.

—140—Plea contesting validity of notice cannot be raised for the first time in appeal 1 Bur L J 87=70 I C 834=A I R 1923 R 13.

—141—Nor the plea of special limitation under B T Act 69 I C 194=1924 C 463.

—141—Nor a new point requiring evidence, 20 A L J 92=A I R 1922 A 346=64 I C 952.

—142—An objection to admission of a document cannot be raised for the first time

**APPEAL (Contd.)****(38) New Plea (Contd.)**

in appeal. 63 I C 958 See to the same effect as to the copy of a document A I R 1922 Pat 565=3 Pat L T 397=67 I C 628=1 Pat 606.

—143—Mixed question of law and fact admitted in trial Court cannot be raised in appeal 1932 A L J 1081=A I R 1933 A 104.

—144—A plea of undue influence in procuring a mortgage-bond based upon onerous and unconscionable nature of stipulation as to payment of compound interest was not permitted to be raised in appeal for first time. 1932 P C L 73 (Civ)=A L R 1932 L 73 (Civ).

—145—Plea by deft of absence of cause of action against him is not permissible where the point was not taken by him in his written statement and where, on the contrary, the suit was vigorously contested by him on the merits. 34 B L R 18=A I R 1932 B 442=I R 1932 B 585=140 I C 242=A L R 1932 B 770

—146—Appeal from creditor's petition for adjudication. Point as to absence of proof of the departure of the insolvent from his place of business with intent to defeat or delay creditors cannot be raised in appeal. 136 I C 733=I R 1932 L 269=1932 P C L 871 (Civ)=33 P L R 151=A I R 1932 L 264=A L R 1932 L 871.

—147—Plea of res judicata will be allowed in appeal when all necessary materials for decision of plea are on the record and the opposite party will not be prejudiced by the plea being allowed. 9 O W N 1052.

—148—New point involving radical change of case will not be allowed in appeal e. g., case in trial court proceeding on foot of a valid trust; and in appeal denying existence of such trust. 59 C 586 (601)=36 C W N 193=137 I C 500=54 C L J 328=1 R 1932 C 326=A I R 1932 C 356=A L R 1932 C 748.

—149—Objection as to non joinder of parties cannot be raised for the first time in 2 N L R 45.

**(39) Non-appealable Orders.**

See also cases under C P C S 2 (2).

—150—Decision of Lower Appellate Court on appeal from such order—Appeal to the High Court incompetent—Revision, proper remedy. 18 M L T 145=30 I C 380.

**(41) Onus.**

151—Appellant cannot succeed in his appeal unless he shows that the judgment below is manifestly wrong. 9 O W N 1171.

If all he can show is nicely balanced

**APPEAL (Contd.)****(41) Onus (Contd.)**

calculations which lead to equal possibility of the judgment on either the one side or the other being right, he has not succeeded. 56 B 501=34 B L R 791=A I R 1932 B 386=1 R 1932 B 571=140 I C 171=A L R 1932 B 819.

152—The appellant must show the judgment appealed against to be wrong. A I R 1920 P C 132.

153—Cogent reasons for reversal of decree below are necessary. 137 I C 301=33 P L R 41=1 R 1932 L 337.

154—Onus lies on the appellant to show that the judgment appealed against is wrong. Mere doubts as to the correctness of the decision do not justify its reversal 1928 M W N 98=110 I C 21=A I R 1928 M 489.

See the same effect the following Cases—A I R 1926 O 522=96 I C 14; and 1926 N 255=91 I C 1044; and 89 I C 703; and 28 C W N 131=39 C L J 140=A I R 1924 C 467=82 I C 934; and A I R 1925 O 224=80 I C 683; and A I R 1922 P C 39=20 A L J 22=42 M L J 253=35 C L J 116=26 C W N 322=3 P L T 311=24 Bom L R 346=15 L W 417=30 M L T 234=1922 M W N 95=65 I C 305 P C.

**(42) Order directing Criminal Prosecution.**

155—Appeal against order dismissing application requesting Judge to take action and send party to Criminal Court See 12. A L J 684=25 I C 327.

**Order directing or refusing abatement of Suit,**

156—Order of abatement of suit is appealable as a decree though no formal decree has been drawn up. A I R 1931 Pat 353=10 Pat 471=Ind Rul (1931) Pat 415=133 I C 767.

157—An appeal lies from an order under s 367, C P C for abatement of suit. 2 N L R 7

**Order disposing two different Cases.**

157 (a)—Separate appeals are necessary against an order disposing of two different cases. But the Court will allow the appellant to rectify the error. 53 P L R 1921=56 I C 69 (2)=A I R 1921 L 346=1 L 368=78 P W R 1920.

**Order favourable, appeal against.**

157 (b)—Where an appeal was filed against an order which was in appellant's favour

**APPEAL (Contd.)****Order favourable appeal against (Contd.)**

and not against him and which had already been set aside on review Held, the appeal must fail. 3 L L J 572=A I R 1921 L 395.

158—Order of restitution under s. 151 C P C is appealable if the Court passing the order had Jurisdiction under s. 144 C P C. 35 C W N 105=53 C L J 49=A I R 1931 C 779.

See to the same effect :—A I R 1927 C 285=31 C W N 290=100 I C 735;

and 15 C W N 725=8 I C 26;  
and 15 C L J 89=16 C W N 736=13 I C 365.

**Order for restitution.**

159—Appeal lies against an order for restitution under s. 144 C P C. 53 C L J 49=35 C W N 105.

**Order in election proceedings.**

160—Appeal against order of Judge in election proceedings of a trustee under the provisions of a scheme settled by court see 7 Bur L J 298=24 I C 915.

**Order in execution proceedings.**

161—Order staying or refusing stay of execution is not appealable as a decree. A I R 1931 Rang 221=9 R 354=Ind Rul (1931) Rang 267=133 I C 491.

162—Order refusing stay of execution is not appealable. A I R 1922 L 400=68 I C 49  
See also s. 47 C P C

163—No appeal lies against order overruling objections to execution proceedings. A L R 1933 M 501=37 L W 749=64 M L J 735=1933 M W N 460.

164—Against order setting aside sale under B T Act S 173—C P Code S 47 not applicable. 19 C L J 81=20 I C 191.

165—Order for delivery of possession to execution purchaser not one under s. 27 nor appealable. 20 C L J 433=19 C W N 835=25 I C 267.

166—Order under s. 73 C P C between parties to the suit, appealable. 29 M L J 96=(1915) M W N 334=39 M 570=17 M L T 427=29 I C 231.

167—Order refusing to allow decree-holder to withdraw his bid—No decree—No appeal. 19 C W N 633=21 C L J 174 =27 I C 805.

**APPEAL (Contd.)****Order passed without Jurisdiction.**

168—Order passed without jurisdiction is appealable. 131 I C 141=32 P L R 293 =A I R 1931 L 96.

169—Where an order, if passed with Jurisdiction, would have been appealable, would nevertheless be appealable if passed without jurisdiction. 23 A L J 845=A I R 1925 A 737=89 I C 630=47 A 934.

See to the same effect 20 C W N 967 =24 C L J 235=35 I C 348.

**Order, provisional or conditional**

170—No appeal lies from an order which is provisional or conditional or which does not result in a final decree 22 A L J 345 =79 I C 363=A I R 1924 A 376=46 A 372 =L R 5 A 238 (Civ)

171—A preliminary order in execution is appealable, though execution case is subsequently dismissed. And, if the appeal succeeds, execution will proceed as per appellate judgment I R 1929 A 415=115 I C 591=A I R 1928 C 804

**Order refusing appeal to be filed.**

—172—Order of Sub-Court refusing to allow a suit to be filed in forma pauperis is appealable. 1933 M W N 197=A L R 1933 M 512.

**Order refusing injunction.**

—173—Against order refusing injunction—Appellant to show order wrong—Order discretionary. 19 C L J 305=22 I C 710.

**Order recognising transfer of decree.**

—174—Order recognising transfer of decree is appealable. 2 L W 109=26 I C 944.

**Order refusing to entertain plaint returned.**

—175—against order refusing to entertain plaint returned under S. 23, of Prov. Small Cause Courts Act. See 18 C W N 380=18 I C 325.

**Order regarding application for probate.**

—176—No appeal lies against an order refusing to allow a party to oppose an application for Probate on the ground that he has no locus standi. 18 C L J 612=22 I C 276.

177—From order refusing grant of letters of administration. See 35 A 448=22 I C 98.

**APPEAL (Contd.)****Order regarding application for probate (Contd.)**

—178—No appeal lies against an order refusing to allow a caveat to oppose the grant of probate of a will on the ground that he has no interest sufficient to enable him to appear in the probate proceedings. High Court can, however, deal with it as order under S. 115 of the C. P. Code. 19 C W N 1169=21 C L J 292=28 I C 578.  
See also 18 C L J 612=27 C 539.

**(85) Order rejecting memo of appeal.**

—179—Appeal lies against order rejecting memorandum of appeal for deficient court fee. A I R 1922 N 62=18 N L R 15=67 I C 225.

**(86) Order returning memo of appeal.**

—180—Order rejecting memo of appeal is not a decree. 59 C 388.

—181—No appeal lies against the order of Dist Judge returning memorandum of appeal for presentation to Rev. App. Court 63 I C 951=19 A L J 888=1921 A 177

**(91) Orders—Miscellaneous.**

182—Substance and not the form of an order should be looked to. 14 L W 15=1921 M W N 390=63 I C 961=1921 M 417.

183—No appeal lies against an order which is fully carried out and no stay is asked for. 23 C L J 310=33 I C 685.

184—Against order purporting to be under s. 108, (A) of B T Act Second appeal also lies. 19 C L J 251=19 I C 916.

185—Order under inherent power is not appealable. A I R 1931 Lah 344 (1)=Ind Rul. (1931) Lah 916=12 Lah 602=134 I C 292=32 P L R 863.

**(92) Parties.**

See under C P C O 41 r. 20 and r. 33.

186—Appeal by deft. against joint decree in favour of co-plffs. One of the plffs. dying before the filing of appeal and his heirs not brought on record. Held the appeal is not maintainable. 13 P L T 717= A L R 1932 P 759.

187—Where the heirs of a deceased respondent were necessary parties but were not joined the appeal as against respondent on record is not maintainable, because, otherwise, there would be in existence two inconsistent decrees one of the High Court and the other of the District Court with respect to the subject-matter of the suit. 9 R 624=A I R 1932 R 16 =135 I C 645=I R 1932 R 53=A L R 1932 R 32.

188—Six persons applied to the Revenue Court for partition of a Mahal. Defendant

**APPEAL (Contd.)****(92) Parties (Contd.)**

filed an objection that 17 bighas odd land which was recorded as his exclusive property should be treated as the shamlat land of all the co-sharers. The partition officer dismissed the objection. Defendant appealed to the District Judge making only the 6 applicants for partition as respondents to the appeal :

Held that the other co-sharers were necessary parties to the appeal and that as they had not been impleaded the appeal was incompetent. 9 O W N 687=I R 1932 O 401=140 I C 483=13 L R 319 (Rev.)=16 R D 490=A I R 1932 O 288=A L R 1932 O 595.

189—Party against whom no relief is claimed can be impleaded in appeal. 5 N I. J 192=66 I C 217=A I R 1922 N 213.

190—Order confirming sale of insolvent's property—Auction-purchaser and Official Receiver are necessary parties to the appeal. 68 I C 716=A I R 1923 L 58.

191—Appeal cannot be heard where the appellant-deft. omits to join one of the joint plffs. a respondent. Bringing him on record after the death of another respondent after limitation is of no avail. 4 P L T 170=1923 Pat 207=1 Pat L R 103=A I R 1922 Pat 606=69 I C 624=1 Pat 699.

192—An appeal will not affect the rights of the deft. who is not made a party in the appeal. 71 I C 475=A I R 1923 Pat 404.

193—Pending an appeal from interlocutory order the trial Court can entertain an application by the representative of the deceased party to the joined in the suit. 25 Bom L R 308=75 I C 743=A I R 1923 B 303.

194—Receiver appointed—Deft. who is not entitled to present possession, is not a necessary party to the appeal from interlocutory order. 28 C W N 86=77 I C 783.  
=A I R 1924 C 456.

**(93) Practice.**

See under Practice—Appeal.

195—Where an appeal was insufficiently stamped as to the relief of possession, but the relief was later given up, it was held that the prayer for possession should be struck out without dismissing the whole appeal. 95 I C 905=A I R 1926 L 477.

196—Party for whom a document is necessary should get it printed and not the party producing it. A I R 1926 L 292=27 P L R 301=8 L L J 114=94 I C 635.

197—Appellate Court will interfere with the discretion of the lower Court with caution. 35 C L J 78=68 I C 9=A I R 1922 C 42.

198—Court will not interfere in appeal with the discretion properly exercised by

## APPEAL (Contd.)

## (93) Practice (Contd.)

the lower Court. 41 C L J 186=86 I C 1029=A I R 1925 C 711.

199—Similarly, as to discretion exercised under ss. 148 and 149 of C P C 3 Pat L R 22=6 P L T 4=1924 P H C C 355=A I R 1925 Pat 299=85 I C 172=4 Pat 190.

200—Appeal against discretion of one Judge is difficult to succeed. A I R 1923 A 44=20 A L J 801=70 I C 805=45 A 66

201—Question whether auction-purchaser in a suit on mortgage by a widow got any title on extinction of the widow's interest includes the question whether the mortgage was for legal necessity. 73 I C 244=50 I A 179=1923 M W N 620=38 C L J 299=26 O C 228=33 M L T 289=10 O L J 379=28 C W N 790=18 L W 88=45 M L J 215=A I R 1923 P C 90.

202—Decision of lower Court on preliminary point—High Court may refuse to hear on other points without affidavit. 59 I C 706=A I R 1922 L 416=3 L 285.

203—Judgment stating that certain admission was made should not be doubted lightly by the Appellate Court—Party aggrieved should apply to the Judge without delay and ask for rectification or review of the Judgment. 34 C L J 302=66 I C 433=A I R 1921 C 584.

204—Appellate Court should not differ from the trial Court's submission that certain witnesses should not be believed; but it may come to a different conclusion on basis of important fact not within the knowledge of the trial Court. 47 I A 177=A I R 1921 P C 93=18 A L J 717=22 Bom L R 1362=39 M L J 41=28 M L T 98=1920 M W N 413=2 U P L R 179=25 C W N 73=13 L W 4=58 I C 386=42 A 487 P C.

205—Operation of the original decree is not suspended or interrupted by mere filing of appeal. 17 A L J 514=36 M L J 557=21 Bom L R 632=23 C W N 721=1919 M W N 258=30 C L J 71=26 M L T 131=10 L W 416=50 I C 444=46 C 670 P C.

206—Appeal against an order passed on one date cannot be treated as one against a decree of different date. 31 I C 4.

## (94) Pre-emption.

207—Appeal against pre-emption decree—"Suit to stand dismissed on default of payment"—Subsequent order of dismissal—Decree—Appeal and second appeal. 17 O C 14

208-210—Appeal against order allowing payment after time limited by decree for possession see C P Code s. 48.

## (95) Presentation, irregularity in,

211—Where the defect in presentation was remedied subsequently: Held, that the

## APPEAL (Contd.)

## (95) Presentation, irregularity in (Contd.)

appeal must be deemed to have been properly filed on its first presentation. Ind

Rul (1931) Lah 882=134 I C 114.

(Dissenting from 19 I C 674.

See under C P C Ss. 109 to 112 and O 45.

## (96) Privy Council

212—Appeal to privy council in cases under Land Acquisition Act see. 21 I C 427=18 C L J 123.

213—Maintainability of appeal to Privy Council in case of decree appealed from made professedly with the consent of parties A L R 1933 P C 185 (1)=36 L W 631=64 M L J 84=37 C W N 134.

## (97) Questions as to Competency.

214—Where the decree appealed against cases to exist, second appeal cannot be heard. 166 P R 1919=96 P L R 1919=111 P W R 1919=55 I C 763.

215—Suit by persons as proprietors of a firm—Death of one respondent—No substitution of legal representative—Appeal, competency of see. 28 C L J 268.

See also C. P. Code O. 30 R 4

216—Appeal does not lie against a finding of the lower Court as to sufficiency of security to allow a party to draw money deposited in Court. 1930 M W N 1096=32 L W 742=A I R 1931 M 38=59 M L J 892=I R 1931 M 270=129 I C 462.

217—High Court can refuse to admit an appeal where the stamp Reporter endorses as to insufficiency of the Court-fee. 26 A L J 1199=118 I C 228=50 A 980=A I R 1929 A 75.

But see Contra 21 A L J 333=74 I C 757=A I R 1923 A 349.

218—Where a pujari was dismissed by the temple Committee, and the deft, installed in his place, the deft, can appeal against the decree obtained by the pujari declaring the Committee's decision illegal. 110 I C 702=A I R 1928 M 854.

219—Where a decree for mesne profits is passed against all cotrespassers, the decree in its entirety only can be challenged in appeal. 48 C L J 350=A I R 1928 C 180=106 I C 300=55 C 666=48 C L J 350.

220—Where a decree for possession is passed against three defts, an appeal by one who admits that he has no title to the property is not maintainable. 1916 P C 14=4 O L J 4=19 O C 141=24 C L J 291=18 Bom L R 846=14 A L J 1024=34 M L J 505=4 L W 288=1916 M W N 120=20 M L T 164=20 C W N 1149=43 I A 173=35 I C 958=38 A 44) (P C).

[On appeal from 14 O C 170=11 I C 676]

221—Appeal under O 42, r 1 (1) C P C is the only remedy against rejection of an



## APPEAL (Contd.)

## (97) Questions as to Competency (Contd.)

application under O 22, r. 10 C P C 103 I  
C 643=A I R 1927 N 307.

222—Decree on review supersedes original decree 96 I C 384=A I R 1926 C 943=30 C W N 738

223—No appeal lies against a finding as to the status of agriculturist 94 I C 72=A I R 1926 B 237=28 Bom L R 307

224—Where a decision is appealable, refusal to pass such decision is also appealable A I R 1925 C 932=89 I C 761=52 C 662

225—No appeal lies against an adverse finding in a favourable decree. 20 L W 734=1925 M W N 141=47 M L J 743=A I R 1925 M 264 (2)=84 I C 945.

226—No appeal lies against a favourable decree with view to attack the grounds of the decree. 34 C L J 489=64 I C 689=A I R 1921 C 217.

227—In a rent suit, deft's denial of plff's title was overruled, but the suit was dismissed as the plff. did not prove relationship of landlord and tenant. Held, the plff. can appeal, as also the deft. 33 C L J 384=63 I C 520=A I R 1921 C 380.

228—There is no right of appeal against interlocutory orders after the disposal of the suit. 40 C L J 291=84 I C 674=A I R 1925 C 218.

229—Appellate Court should decide at the hearing whether appellant is really affected by the lower Court's order. A I R 1925 C 561=78 I C 881.

230—Parties requesting the Court to have a local inspection and agreeing to abide by its decision after such inspection—Decree passed accordingly—Right of appeal is not lost. 17 L W 303=1923 M W N 154=44 M L J 258=72 I C 149=A I R 1923 M 444=47 M 39.

231—Suit instituted in Court of Munsif with small cause Court powers—Munsif succeeded by one not having such powers but trying the suit—Appeal lies from the decree. 19 A L J 838=64 I C 573=A I R 1922 A 161=44 A 59.

232—Appeal by one deft—Decree set aside on review by another deft during pendency of appeal. Appeal must fail. 140 P R 1919=1 L L J 191=54 I C 966.

233—Where redemption money is not paid as per order of the lower Court appeal may be heard. 99 P R 1916=37 I C 125

234—Party accepting benefit under a conditional decree cannot appeal. A I R 1929 C 796=123 I C 661=33 C W N 711. See to same effect A I R 1924 C 380=72 I C 554.

## (98) Question of fact.

See Finding fact *supra*

## APPEAL (Concl'd.)

## (99) Receiver

See Cases under C P C O 40 and O 43 r. 1.

235—No appeal against direction in passing accounts. 14 C L J 445=12 I C 780.

## (100) Rehearing of Appeal.

See Cases under. C P C O 41, r. 2f.

## (101) Remand.

See cases under C P C O 43 r. 1 and O 43. r. 23.

236—It is hardly in accordance with precedent that a Court of appeal should, after sending a case back to the trial judge for the purpose of having a necessary party brought before the Court, proceed (before the new party has been joined or heard and without considering what defences may be available against him) to indicate the order which the trial judge should make when he tries the case in the presence of the proper parties. 63 M L J 369 (378-9)=136 I C 632=36 L W 135=I R 1932 P C 136=A I R 1932 P C 146 (P. C.)

237—Remand of case for fresh evidence will not be allowed where party had a free hand in summoning of witnesses but did not choose to summon and examine them at the trial. 136 I C 17=32 P L R 874=I R 1932 L 193=A I R 1932 L 135=A L R 1932 L 19.

238—No appeal lies from order of remand by Dist. Judge in a suit under Mad. Estates Land Act Ss. 192, 112 and 114. 1 L W 667=25 I C 425.

## (102) Revenue Court, order of, appeal against.

239—Appeal against order of revenue Court disallowing objection in partition proceedings without regular trial on title, lies to District Court or Judicial Commissioner's Court. 1 O L J 86=23 I C 965.

## (103) Review.

See Also C P C S 114 and O 47.

240—Successful Termination of an application for review presented before appeal—whether can be proceeded with after appeal see. 41 I C 497=44 C 1011.

241—Application for—Appeal against original decree or order filed prior to—Competency of—Rejection of review petition—Order of—Grant of review and rehearing of case on merits and decree passed—Effect of—Distinction. See C P C—O 47, r. 4—55 M 871 (873).

## APPEAL (Contd.)

## (104) Revision.

See Cases under C P C S. 115.

242—Relief not obtainable by appeal cannot be obtained by revision 103 I C 670=A I R 1927 M 859.

243—Right of appeal depends on actual order A I R 1924 A 144=21 A L J 667=L R 5 A 26 Civ=74 I C 905=45 A 649.

244—Test for determining the right of appeal is the nature of the order and the allegations made. 21 I C 748.

245—Whether right of appeal is a test for res Judicata See 19 C L J 34=21 I C 979; See also C P C s. 11.

## (105) Right of Appeal.

246—Only party aggrieved has a right of appeal 10 O L J 229=9 O & A L R 577=26 O C. 374=A I R 1924 O 52=76 I C 763.

246(a)—Party not aggrieved cannot appeal. 98 P L R 1922=A I R 1921 L 349=67 I C 868.

247—Person not having an interest adversely affected by decree or order of lower Court or not having an interest in subject matter of litigation has no right of appeal even though a party in the lower Court. 56 B 16 (20,22)=A I R 1932 B 78=136 I C 491=33 B L R 1495=I R 1932 B 187=A L R 1932 B 160.

248—Persons not parties to the suit cannot appeal 12 P W R 1919=79 P R 1919=49 I C 381.

249—Person not a party to the suit but brought on record after the decree on the ground that he was the real owner of the property in question cannot appeal. 5 P L J 256=1 P L T 159=2 U P L R (Pat) 83=55 I C 881.

250—Aggrieved party has a right of appeal from an order which is appealable but which the Court has omitted to pass. 55 M 689=62 M L J 550=35 L W 565=1932 M W N 234=A I R 1932 M 462=A L R 1932 M 364=I R 1932 M 801=139 I C 877.

251—Tenant can appeal against decree against lessor 36 C L J 491=71 I C 1=A I R 1923 C 90.

252—Right of appeal is not a matter of procedure but one of substance. A I R 1932 N 101=I R 1932 N 97=139 I C 296=28 N L R 83=A L R 1932 N 137.

253—Right of appeal is not a matter of procedure. 26 M L J 227=15 M L T 156= (1914) M W N 216=1 L W 172=22 I C 775.

254—Specific provision as to the right to appeal is necessary; it cannot be presumed to exist by recourse to a rule of analogy or of logic. A I R 1931 All 72= (1931) A L J 13=Ind Rul (1931) All 838=134 I C 454.

## APPEAL (Contd.)

## (105) Right of Appeal (Contd.)

255—There is no right of appeal unless given by law or some Statute I R 1929 L 613=30 P L R 643=117 I C 69=A I R 1929 L 593=10 L 596 F B.

See to the same effect:—A I R 1922 L 369=69 I C 585=3 L 296; L R 6 A 191 civ=A I R 1925 A 380=87 I C 51=47 A 513 F B; 29 M L J 730=32 I C 226; 27 C L J 115=43 I C 758=45 C 926; A I R 1930 B 486; 21 M L T 77=5 L W 168=38 I C 818.

256—Express enactment conferring right of appeal is necessary. It cannot arise by implication. A I R 1932 N 101=28 N L R 83=139 I C 296=I R 1932 N 97=A L R 1932 N 137.

257—Rule expressed or arising by necessary implication alone can confer right of appeal 78 I C 138=A I R 1925 O 260.

258—Every decision of a Court is not necessarily appealable. 30 P L R 417=I R 1929 L 405=A I R 1929 L 815=115 I C 533.

259—Act of parties cannot modify the right of appeal. I R 1931 O 60=7 O W N 843=128 I C 732=A I R 1930 O 434.

260—Party applying for revision can object to jurisdiction so as not to lose his right of appeal. 1930 A L J 997=A I R 1930 A 873=52 A 947.

261—Relief should not be refused by the Appellate Court merely on the ground that review has also been filed. I R 1929 s. 53=114 I C 101=A I R 1929 S 32.

262—Appeal being a substantive right a Statute abolishing such right must do it expressly or by necessary implication. A I R 1928 L 627=113 I C 520=10 L 165 F B.

See to the same effect:—26 A L J 406=A I R 1928 A 168=108 I C 575; and 110 I C 719=26 A L J 1317=A I R 1928 A 708=50 A 865.

263—502—Any restriction on right of appeal must be very strictly construed and in favour of the subject. 35 C W N 752 = A I R 1931 C 642=134 I C 1196=59 C 19

264—Law governing the decision of an appeal in case of alteration of law pending the appeal is the law as altered. 13 L 178

265—As to effect of new law on right of appeal in a pending action see 84 P W R 1912=156 P L R 1912=1 P R 1913=15 I C 725

266—273—Right of appeal is governed by the Act in force at the date of filing the appeal and not at the date of the original suit. 253 P L R 1914=25 I C 180

274—Intention of legislature—Right of appeal not to be extended beyond the statute, by implication of inference. 28 M L J 96=27 I C 921

275—Where the lower Court has treated an objection as one under s. 47, C. P. C., appeals even if it ultimately turns out that proceedings do not properly come

**APPEAL (Contd.)****(105) Right of Appeal (Contd.)**

under that section. Ind Rul (1931) All  
758=133 I C 902

276—Where a power of attorney conferred power to take all proceedings connected with a litigation : Held, it included power to lodge an appeal 29 Ind Cas 895 followed in 32 P L R 7=Ind Rul 1931 Lah 719=132 I C 895

277—Benefit under decree or order—Person enjoying—Appeal from decree or order—Right of—Effect on. See Decree—Benefit under.

278—Where an objection in execution proceeding was really one under S. 47 C. P. C., but the objector misdescribed it as one under O. 21, R. 58 and the Court acting under a misconception dealt with it under that rule, the order made by it nevertheless operated as a decree and was therefore appealable under S. 47 137 I C 258=33 P L R 496=I R 1932 L 315=A I R 1932 L 376

279—What Court does or purports to do and not what it ought to have done is the test 137 I C 258=33 P L R 496=I R 1932 L 315=A I R 1932 L 376

280—Appeal and second appeal are merely successive stages of a suit. 1932 A L J 745

281—Ex parte decree can be appealed against where C P C O IX r. 13 is not resorted to 45 M L J 805=79 I C 968=A I R 1924 M 107

282—Question of service of summons is confined to C. P. C. O IX; it cannot be considered in an appeal from ex parte decree 2 Bur L J 282=79 I C 506=A I R 1924 R 137=2 R 108

283—Suit for a declaration that a certain vacant site is not liable to attachment and sale in execution of a decree—Appeal lies. 2 L L J 158

284—Appeal lies only from final decree under Naval Prize Act 1864 s. 5. A I R 1919 P C 192

285—Where the right of appeal is subject to grant of leave, the memo of appeal must be accompanied by a petition for such leave. 33 I C 773

286—Non-compliance with the conditions imposed by the decree does not destroy the right of appeal. 55 I C 375

**(106) Second Appeal**

See Cases under (1) C P Code S. 100  
(2) Second or Special Appeal.

287—Second appeal will lie in cases where the lower Appellate Court has no jurisdiction 32 C W N 57=A I R 1927 C 633=45 C L J 566=104 I C 199

**APPEAL (Contd.)****(106) Second Appeal. (Contd.)**

See to the same effect A I R 1926 Pat 164=7 P L T 264=91 I C 799  
and A I R 1924 A 183=75 I C 1053

**(107) Small Cause Suit**

288—Trial of a small cause suit as original suit does not alter the character of the suit and decree in such suit is not appealable 40 C 537=21 I C 120  
See to the same effect 25 B 417;  
and also 23 M L J 373

**(108) Stay of execution**

—Appeal against order staying execution see C P Code S. 47  
—Appeal against order accepting security for stay of execution see C P Code S 47

**(109) Subsequent Events**

289—Appellate Court can vary a decree on the basis of events subsequent to the decree. A I R 1931 Bom 280=33 Bom L R 266=Ind Rul (1931) Bom 356=133 I C 244

**(110) Two decrees in same terms, appeal against one**

290—Where there are two decrees in the same terms and there is an appeal against one only which is reversed, the other decree is still subsisting 25 I C 266

**(111) Valuation**

See Forum of Appeal *supra*

**(112) Miscellaneous**

291—Succession Certificate—Act S. 4 for whole debt, when application for partition only. 42 Cal. 10

292—Specific Relief Act S. 9—Suit for possession and damages 8 A L J 910=11 I C 38

293—No right of appeal which has become vested in a litigant shall be affected by the Civ. Pro. Code. 1908, S. 154, S. 310—A Civ. Pro. Code. 1882, confers a special right on the judgment debtor, and before he can avail himself of the benefit of the section, he must comply strictly with the terms of the section. 9 M L T 259=21 M L J 631=1911 M W N 143=9 I C 937.

294—Where the respondent has, pending the appeal, removed the crop in dispute, the only course open to the Court is to direct him to pay to the appellant its net-value, i. e., the gross value minus the expenses of cultivation. 10 M L T 190.

**APPEAL (Contd.)****(112) Miscellaneous (Contd.)**

295-299—No appeal can be preferred by an appellant when the decree of the lower Court has been entirely in his favour. No appeal would lie even if the matter were res judicata. 10 M L T 291=2 M W N 1911, 303.

**APPEAL TO PRIVY COUNCIL.**

See C P Code Ss. 109 to 112 and O 45.

**APPEARANCE,**

See C P Code O 1.

**APPELLANT.**

See C P Code Ss. 96—112 and O 41—O 55.

**APPELLATE COURT.**

See C P Code.  
See Practice.

**APPELLATE DECREE.**

See C P Code O 41 rr. 35-37.  
See Appeal.

**APPELLATE JUDGMENT,**

See C P Code. O 41  
See Appeal.

**APPELLATE—JURISDICTION.**

See C P Code Ss. 96—112 and O 41—O 45.

See Appeal.

**APPELLATE ORDERS.**

See C P Code.

**APPLICATION.**

See C P Code.

**APPOINTED HEIR.**

—Power of dismissal. 17 C W N 1045.

**APPOINTMENT**

See also.

- (1) Hindu Law-will
- (2) Will

**APPORTIONMENT**

See also.

- (1) Landlord and Tenant
  - (2) Lease.
  - (3) Mortgage.
  - (4) T. P. Act 36, 82, 85 etc.
- Road cess—Co sharers—Basis of apportionment. See Beng. Cess Act, Ss. 43 and 48 25 I C 366

**APPROBATE AND REPROBATE**

See Hindu Law-Widow—

- (1) Maintenance.
- (2) Estoppel.

**APPROPRIATION OF PAYMENTS.**

See cases under:—

- (1) Accounts
- (2) Contract Act Ss. 59 to 61
- (3) C P C 1908 Or. 34
- (4) Debtor & Creditor
- (5) Limitation Act Ss. 19 & 20

**APPROVAL BY GOVERNMENT**

—What it signifies—Implication of power to disapprove—Approval to acting appointment, if for permanent post. Digwari. 18 C W N 1036

**APPROVER**

See (1) Evd Act Ss. 114, 133  
(2) Evidence

**APPURTENANCE**

See Landlord and Tenant  
See Easements  
See Easements Act

—An appurtenance is an accessory, an appendage, an adjunct to the principal. 13 A L J 846=30 I C 549

**ARBITRATION**

*Synopsis.*

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See also Cases under:—

- (1) C. P. Code S. 89 and Sch II
- (2) Arbitration Act
- (3) Sp. Relief Act Ss 21, 30, 39

**(1) Appeal 1-15.**

See also cases under C P Code S. 104 cl. 4.

1—No appeal lies against a decree passed on award after dismissing objections. If such appeal is entertained, it is reversible. L R 5 A 191 Civ=A I R 1924 A 688.

2—Where both parties to a suit referred the matter to the Court and agreed to be bound by the decision of the court, and agreed not to prefer an appeal: Held, that no appeal lay from the decree, nor had the court power to review the same. 38 C 421=9 I C 296.

See to the same effect. 23 B 752.

3—Even consent of parties cannot make appealable a decree which is passed in terms of award. 29 I C 408.

4—No appeal lies to the District Judge from an order of an Assistant Collector, first class, directing that an award

**ARBITRATION (Contd.)****(1) Appeal (Contd.)**

made on a matter referred to arbitration without the intervention of the Court should be filed. 8 A L J 1090.

5—Order of Asst. Collector directing an award, made outside the Court, to be filed, is not appealable. 8 A L J 1090.

6—An appeal lies, when there is no award in fact or when there is a void award. When there was no proper compliance with the requirements of S. 516 of the C P C 1882 the award was ineffectual and in fact void, and an appeal lay from the decree or judgement based upon the award made by the arbitrators. 14 C L J 143=11 I C 988.

7—As a rule, an award is final except for corruption and illegality apparent on the face of the award. 3 U B R 36=44 I C 622.

8—Objection as to authority to refer not having taken in the lower Court, the question cannot be raised in appeal. A I R 1931 Pat 92=130 I C 810.

**(2) Arbitration Clause in Contract 9-34.**

See also T P Act s. 130.

**Synopsis**

- (1) Burden of Proof-9
- (2) Construction-10-15.
- (3) Effect-16-17
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- (2) Arbitration Clause—(Contd)

**(1) Burden of proof-9**

9—The party must show (a) that there are disputes between him and the opposing party arising out of or in relation to the contracts entered into between them and (b) that there is an agreement between them in writing to submit those disputes or differences to arbitration within the meaning of the term "submission" as defined in S. 4 (b) of the Arbitration Act in order to give effect to the arbitration clause. 34 B L R 697=I R 1932 B 372=138 I C 337=A I R 1932 B 341.

**(2) Arbitration Clause—(Contd.)****(2) Construction-10-15.**

10—Agreement containing arbitration clause—Contract made under terms of, and containing words "Conditions as per agreement with you"—Provision for arbitration in agreement imported into contract in



**ARBITRATION (Contd.)****(2) Arb. Clause (Contd.)****(2) Construction (Contd.)**

such a case. 55 M 93=54 C L J 372=58 I A 381=33 B L R 1536=134 I C 1080=61 M L J 623=8 O W N 1066=3; C W N 1287=1931 A L J 1116=34 L W 676=A I R 1931 P C 289=A L R 1932 P C 63 (P C).

11—Clause providing reference to arbitration but not barring suit to enforce claim. Held, the claim cannot be enforced by arbitration after limitation. A I R 1929 Sind 55=107 I C 435.

12—Articles of an unregistered association of a chamber of commerce providing for compulsory arbitration in some cases and optional in others, for disputes arising between its members—Association registered later on—Chamber has no jurisdiction to decide disputes arising out of transactions prior to its registration. A I R 1927 Bom. 553=29 Bom L R 1087=104 I C 174.

13—Where a clause provides for reference any dispute that arise out of the contract different references may be made and arbitrations held in respect of various disputes at different times. 86 I C 393=A I R 1925 S 242.

14—'Any dispute' was held to include case of non-delivery of a portion of goods. A I R 1923 Lah 453=5 Lah L J 146=4 Lah 168=73 I C 459.

15—Agreement between buyer and seller stating that all the terms of contract with importing firm were to apply—arbitration clause in latter contract referred to disputes arising under that agreement alone—Arbitration clause would not apply to agreement between buyer and seller. A I R 1921 Cal 767=33 C L J 145=60 I C 909.

**(2) Arb. Clause (Contd)****(3) Effect-16-17**

16—Where one of the parties to a contract agreed to abide by the decision of the other in case of dispute. Held he was bound by the decision unless the decision was arbitrary or unjust. A I R 1930 Sind 17=Ind Rul (1929) Sind 154=117 I C 778.

17—Clause providing for reference is not a condition precedent to commence legal proceedings. A I R 1931 Bom 41=32 Bom L R 1319=Ind Rul (1931) Bom 70=128 I C 614.

**(2) Arb. Clause (Contd)****(4) Enforcement-18-21**

18—Transfer of a contract, between principal and agent containing arbitration clause, to trustees under composition deed executed by agent merely transfers to the trustees assets and property of the agent including his outstandings but not the

**ARBITRATION (Contd.)****(2) Arb. Clause (Contd.)****(4) Enforcement (Contd.)**

right contained in the arbitration clause. 26 S L R 368=A I R 1932 S 128=139 I C 596.

19—Assignee of subject-matter of contract by act of one of parties thereto cannot enforce the arbitration clause. Queare as to the case of transfer by operation of law. A I R 1932 S 128.

20—The clause in contract should not be lightly set aside. A I R 1930 Bom 185=32 Bom L R 43=54 B 278=Ind Rul (1930) Bom 301=124 I C 797.

21—Reference and award by tribunal other than that contemplated by the clause of an insurance policy but in itself legal—Award is valid. A I R 1926 Sind 8=88 I C 878.

**(5) Provision as to appointment of arbitrator or umpire 22-25.**

22—The clause allowing so many days for appointing arbitrator—Clear days commencing from midnight to midnight are to be allowed. 99 I C 554=A I R 1927 S 126.

23—Submission to two arbitrators by one party alone, instead of each party nominating his own arbitrator, according to arbitration clause is valid. Appointment is complete even when a reference is drawn up and has been accepted by the arbitrator subsequently. 99 I C 554=A I R 1927 S 126.

24—Where it was provided that an arbitrator should be appointed by one party for the other after seven days from despatch and not from receipt of notice Held that the terms must be enforced irrespective of the delivery of notice. Contract providing appointment of arbitrator by one party for the other after seven days from despatch and not receipt of notice to other party unless sufficient cause for not enforcing the terms were shown. A I R 1929 Sind 58=109 I C 262.

25—Where it was provided that on one party failing to appoint arbitrator, decision given by arbitrator appointed by other party shall be final. Held, the clause covered case of appointment of fresh arbitrator by party when one already appointed had declined to act and so the arbitrator appointed by other party could not act as sole arbitrator. A I R 1930 All 584=(1930) A L J 1147=Ind Rul (1930) All 762=126 I C 10.

**(2) Arb. Clause (Contd)****(6) Stay of Suit 26-29.**

26—If in the case of an agreement to refer to arbitration, difficult questions are likely to arise. Such as would inevitably

**ARBITRATION (Contd.)****(2) Arb. Clause (Contd.)****(6) Stay of Suit (Contd.)**

entail a special case being prepared and reference to the Court made by an arbitrator, the Court may refuse stay of suit. Otherwise the agreement must be respected. 53 C L J 321=35 C W N 514=58 C 1107=Ind Rul (1931), Cal 833=134 I C 529.

27—A small portion of the subject-matter not being within the scope of the arbitration clause, while the main subject-matter is within it, stay of proceedings cannot be refused. 53 C L J 321=35 C W N 514=58 C 1107=Ind Rul (1931) Cal 833=134 I C 529.

28—Clause binding all defendants—suit on contract—application to stay competent to one defendant. A L R 1933 S 63=26 S L R 407.

29—Where a clause to refer provides for a stay of suit, the reference may be made irrespective of limitation. A I R 1929 Sind 5=107 I C 435.

**(2) Arb. Clause (Contd.)****(7) Subsequent agreement, 30**

30—Held, that subsequent agreement did not affect arbitration clause contained in prior Contracts, 55 M 93=54 C L J 372=58 I A 381=33 B L R 1536=35 C W N 1287=1931 A L J 1116=34 L W 676=A I R 1931 P C 289=134 I C 1080=A L R 1932 P C 63 (P C)

**(2) Arb. Clause (Contd.)****(8) When Implied 31—32.**

31—A submission clause may be imported into a contract by reference to another contract containing such a clause. A I R 1931 P C 289=8 O W N 1066=35 C W N 1287=61 M L J 623=34 L W 676 (P C)=134 I C 1080.

32—Fresh reference can be made on award on prior reference proving abortive. The arbitration clause in such a case still subsists. A I R 1922 All 219=20 A L J 377=L R 3 A 277=44 A 472=4 U P L R (A) 69=67 I C 487.

**(2) Arb. Clause (Contd.)****(9) When operative 43-44**

33—If there is no real difference or dispute between the parties, there is no scope for the operation of the clause providing for reference to arbitration. A I R 1931 Bom 164=33 Bom L R 51=Ind Rul (1931) Bom 268=130 I C 588.

34—Award under an arbitration clause is not valid if other clauses in the contract are not complied with. A I R 1922 All 522=44 A 481=20 A L J 385=66 I C 691.

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**ARBITRATION (Contd.)****(3) Arbitration under Special Acts and Regulations.**

See Cases under:—

- (1) Act 32 of 1839.
- (2) Act 6 of 1857.
- (3) Act 10 of 1859.
- (4) Act 28 of 1860, Ss. 21, 28.
- (5) Act 20 of 1863
- (6) Act 17 of 1873
- (7) Ben Act 13 of 1848
- (8) Ben Act 6 of 1880, Ss. 3, 44 (2)=55, 56
- (9) Ben Reg. 7 of 1882
- (10) Bom Reg. 7 of 1827
- (11) Bom Act 6 of 1873, S. 33
- (12) Bom Act 17 of 1879, S. 47, 15 B
- (13) C. P. Land Revenue Act 19 of 1873, Ss. 221 and 222, 231
- (14) C. P. Act 18 of 1881, S. 87
- (15) C. P. Act 9 of 1883, Ss. 87, 88
- (16) Dekkan Agricultarist Relief Act 17 of 1879
- (17) N. W. P. Rent, Act 18 of 1873
- (18) Oudh Estates Act.
- (19) Pun. Act 17 of 1887
- (20) Punjab Land Revenue Act (1887) S. 158
- (21) Regulation 7 of 1822
- (22) U. P. Act 19 of 1873, S. 220, 222, 229, 230, 231

See Also Arbitration Act.

See Also C. P. Code 1908 S. 89, and sch II

**(4) Award 35—119.***Synopsis*

- (1) Award against Firm 35 (a)—39
- (2) Award during pendency of suit, 40—41
- (3) Award—grounds of setting aside 42—51
- (4) Award—validity of 52—62
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## ARBITRATION (Contd.)

## (4) Award (Contd.)

- (17) Registration of Award.
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- (26) Award-Miscellaneous 119

## (1) Award against Firm 35-39.

35 (a)-Suit against firm-managing partner's authority to refer matters in dispute to arbitration-estoppel by subsequent conduct A L R 1933 A 263=I A W R 82.

36-Award against firm is good and is governed by O. 21. R 50. C P C. 13 L 327=A I R (1931) L 736=33 P L R 598.

37-There can be an award against a firm. 34 B L R 737 (741-2)=A I R 1932 B 375=A L R 1932 B 791.

38-In dealings between two firms A and B, the amount due to the firm A from the firm B was paid in full to the former by the guarantee-brokers. Subsequently the firm A obtained the award against the firm B for the amount due to them. Held (1) that the award was not invalid on the ground that the firm A had already received payment from the guarantee brokers for anything recovered under the award. (2) The mere fact that the guarantee brokers were partners of the firm B did not alter application of the above rule. Any payment made them in one capacity could not be treated as a payment made in another capacity. 9 I C 712=4 S L R 195.

39-Award can be made against a firm. 25 I C 955

## (2) Award during pendency of suit 40-41.

40-Award made without intervention of Court in a pending suit amounts to adjustment of suit by agreement within meaning of O. 23, R. 3, C. P. C. and must be given effect to under that rule. 11 P 237=A I R 1932 P 205=I R 1932 P 173-138 I C 82=13 P L T 434=A L R 1932 P 342

41-Reference-Award during pendency of suit-No application for stay of suit-Award not valid. 47 Cal 752

See Also 46 C 1041; and 41 M 115

## ARBITRATION (Contd.)

## (4) Award (Contd.)

## (3) Award—grounds of setting aside 42-51.

42-An award cannot be set aside on the ground of its being wrong on merits 6 O W N 1315=L R 10 A 190 Rev=I R 1929 O 195=114 I C 803=A I R 1929 O 334 =4 Luck 234

43-Mistaken view of real rights by the parties as well as by the arbitrators is a good ground for setting aside the award. 5 P L T 255=A I R 1924 Pat 49=73 I C 542=2 Pat 554

44-Error in law made by an arbitrator—Validity of award not affected by 6 Luck 423 (424)=A I R 1931 O 6=129 I C 322

45-error apparent on the face of the award—meaning of—no extraneous considerations—not appearing on record—should be avoided. A L R 1933 S. 127

46-An award was given in England according to English Law as per arbitration clause in the contract. The party aggrieved sought to set it aside in Madras High Court and pleaded irregularity and want of notice, but no steps by way of a motion were taken under English Procedure. Held, the award could not be set aside. 49 I A 174=36 C L J 444=26 C W N 642=30 M L T 291=1922 M W N 396 =16 L W 33=43 M L J 422=24 Bom L R 1245=74 J C 616=A I R 1922 P C 120=45 M 496 P C

47-Error of law cannot be made a ground to set aside an award unless such error is apparent in the award or document forming part of the award. 28 C W N 261=80 I C 151=A I R 1924 C 499

48-Mere error on the part of the expert tribunal would not suffice to set aside their decision of matters of skill unless there is fraud 22 Bom L R 420 (P C.)=76 I C 630

49-Land acquisition case. Award is not generally set aside merely because it is against the weight of evidence. A I R 1928 P C 267=29 L W 445 O W N 805= (1929) M W N 44=110 I C 251

50-A party cannot see the effect of an award and then come to court to set it aside. 25 I C 955

51-Insignificant interest of arbitrator in subject-matter, not a ground for setting aside award. 19 C W N 165

## (4) Award—validity of 52-62

52-Award by a Judge who is no more a Judge but who is alleged to have been appointed arbitrator is valid only if parties fully understood the effect thereof. 4 U B

R 171=76 I C 170=A I R 1924 R 358.

53-Collusive action of arbitrators vitiates award. 29 C W N 610=46 M L J

## ARBITRATION (Contd.)

## (5) Award (Contd.)

## (4) Award—Validity of (Contd.)

334=1923 M W N 711=33 M L T 361=2 Bur L J 260=77 I C 63=A I R 1923 P C 156=1 R 451 P C.

54—Award altering legal Course of devolution of estate is nevertheless binding on the parties. A I R 1931 O 6=129 I C 322=6 Luck 423.

55—Mahomedan Law—Gift by one person to another of a Guzara for the lifetime of the latter with a continuance in favour of the male heirs of the donee—Award providing for Decree on foot of Valid. 6 Luck 423=A I R 1931 O 6=129 I C 322.

56—An award taking contracts not in the form sanctioned by the Bombay Cotton Contracts Act is illegal and void. If the illegal portion cannot be separated from the valid part, the whole award is invalid. A I R 1931 Bom 343=55 B 503=Ind Rul (1931) Bom 513=33 Bom L R 759=134 I C 705.

57—Where a portion of an award is not valid and two portions are inseparable whole award is invalid. 34 B L R 697=I R 1932 B 372=138 I C 337=A I R 1932 B 341.

58—Award not signed by one of the arbitrator is not invalid provided the proceedings took place before all the arbitrators. 51 I C 378.

59—Decision of arbitrators in accordance with the arrangement effected by the parties is valid as an award. 51 I C 378.

60—The validity of an award, does not ordinarily depend upon the place in which it is executed. If the award is intended to have effect in British India it cannot be held to have no effect because it was executed in a Native State. 2 Pat L W 156=(1917) Pat 241=42 I C 617.

61—Contract for delivery of goods made at Lahore—Agreement to refer dispute to arbitrations of Karachi merchants—Non-delivery—Covers not non-delivery—Validity of clause even otherwise, doubtful. 54 P W R 1913=124 P L R 1913=18 I C 316.

62—Record of a settlement agreed, on by the parties, by a person appointed to act as mediator, is merely a Contract between those who have signed it. It has not the force of an award. 53 I C 283.

## (5) Binding nature of an award 63-70.

63—Award vests title immediately—Non-filing of award or refusal by Court to decree on it does not alter its binding force. 28 C W N 140=37 C L J 542=72 I C 128=A I R 1924 C 72

64—Award is not binding unless it is valid and proceeding of arbitrator fair and honest. 65 I C 497=A I R 1922 L 149

65—Where the award restricted the

## ARBITRATION (Contd.)

## (5) Award (Contd.)

## (5) Binding nature of an award (Contd.)

servient owner from building a wall so as not to interfere with the plff's rights it was held that the Servient owner cannot construct caves or use the plff's chibutra. A I R 1929 Oudh 437=6 O W N 854=Ind. Rul. (1930) Oudh 212=124 I C 356.

66—A party cannot contest the award when he has represented to the other party, to the prejudice of the latter, that he was going to abide by the award. Signing award does not by itself render it more binding. 77 I C 41=A I R 1924 N 14

67—Rights awarded under arbitration cannot be denied by defendant on the pre-text that property is public trust property. A I R 1924 All 818=22 A L J 776=L R 5 A 585 Civ=46 A 856=81 I C 851

68—Parties are bound by the decision on pure question of law if warranted by the scope of the reference. 19 C W N 948.

69—Award between Calcutta purchaser and London purchaser of goods for him, not binding on the Calcutta buyer. 43 Cal 77

70—Rules of the British Indian Association and Financial Commissioner are not exhaustive. Award, outside the scope of the rules is nevertheless binding. 2 O L J 269=30 I C 249

## (6) Compromise setting aside award 71-72

71—Compromise sanctioned by arbitrators is a contract A I R 1928 Mad 23=101 I C 386.

72—Court will not accept a compromise setting aside award unless such compromise is beneficial to the minor. 21 A L J 81=L R 4 A 329 Civ=74 I C 133=A I R 1923 A 267=45 A 263.

## (7) Construction 73-77

73—Fire Assurance—Loss caused by fire includes loss caused by water used in extinguishing fire by stagnation. 13 M L T 11.

74—Under a reference to arbitration with regard to "debts, whether due in respect of mortgage bonds or other deeds or not" an award as regards a lease and usufructuary mortgage is not beyond the reference and ultra vires. 10 N L R 74=24 I C 863.

75—Reference as to "debts due under bonds etc."—Award dealing with lease and mortgage—Whether beyond reference. See 10 N L R 74.

76—The words "no right to demand accounts or cash" in the award by which the members of a joint family had become divided were held to include receipts under

**ARBITRATION (Contd.)****(4) Award (Contd.)****(7) Construction (Contd.)**

a usufructuary mortgage previous to the award, though the award had not dealt with such receipts. 17 O C 33-1 O L J 159-18 C W N 426-27 M L J 128-22 I C 315 P C.

77—Under an award of the British Indian Association, the appellant's predecessor-in-title was granted a village rent free "in perpetuity." Held, that the award did not confer any under proprietary right nor did the use of expression "in perpetuity" imply an extension of interest beyond the life-time of the grantee. 12 I C 324.

**(8) Effect and nature of award 78-84.**

78—Award is an agreement of parties expressed by third person chosen by them 89 I C 829=A I R 1926 N 52.

79—Partition effected by award See Hindu Law—Joint Family—Partition—Award Effecting.

80—Award benefits and binds parties to submission and their representatives—Award on the interpretation of an Oudh talukdar's will be considered. A I R 1928 P C 202-3 Luck 372-32 C W N 1120-48 C L J 418-5 O W N 565-29 L W 793-56 M L J 601 (P C)=113 I C 113.

81—Where a claim for compensation merges in the award the payment of any money directed by the award is a simple claim for money of a kind cognizable by a Court of Small Causes, 3 U B R (1918) 109-49 I C 62.

82—Where certain property was directed to be divided in accordance with a decree based on an award and a Commissioner was appointed to divide the same, mere failure to pass a final decree confirming the division by the commissioner was held not to invalidate the orders passed by the Court. 14 M L T 157=1914 M W N 144-20 I C 908.

83—A document purporting to be an award may amount to something more. If the parties sign an award in token of their acceptance of the arbitrators' decision dealing with immoveable property, it may become a deed of partition. 19 C L J 123-18 C W N 475-20 I C 860.

84—When can an award operate to transfer property. See 17 O C 103.

**(9) Enforcement of award or decree 85-86**

85—Public policy—Contravention—Agreement to refer non-compoundable offence to arbitration—Award, not enforceable 47 I C 505.

86—Suit on an award is not a suit for specific performance of a contract, but one

**ARBITRATION (Contd.)****(4) Award (Contd.)****(9) Enforcement of award or decree (Contd.)**

for compensation for non-compliance with the terms of the award, and for purposes of limitation is governed either by art. 116 or art. 120 of the Limitation Act. 8 A L J 1138

**(10) Failure to sign—87**

87—Failure of an arbitrator to sign the award is a legal flaw, but when it was at the instance of a party, such party cannot take advantage of his own misdoing. 20 A L J 392=L R 3 A 299-66 I C 499=A I R 1922 A 233

**(11) Filing of Award-88-93**

88—Court can transpose a respondent to an application to file an award as an applicant even after expiry of limitation. The principle of s. 22, Limitation Act, applies. Ind Rul (1931) All 650; (1931) A L J 863; 133 I C 410

89—If a party having a clear knowledge of a defect did submit to the arbitration going on it is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award. (1931) M W N 961=34 L W 725

90—Some of the parties being minors and not properly represented an application to file award was dismissed. Held, the award is nevertheless valid and enforceable as against other parties. 30 C W N 529-52 I A 265-6 L R P C 160=A I R 1925 P C 216-89 I C 773-5 R 186 P C.

91—Award filed in Sind Judicial Commissioner's Court—Same day non-applicants filing a suit at Lahore and getting an ex parte decree cancelling the contract and holding that the reference to arbitration was invalid and restraining the applicant and arbitrator from filing the award—Lahore decree operated as res judicata and the award filed at Karachi must be taken off the file. A I R 1924 Sind 60-81 I C 1024

92—An award obtained without intervention of Court can be enforced without filing it into Court. 4 O L J 487-42 I C 116

See Also 18 C W N 475-19 C L J 123-20 I C 860; and 33 C 881

93—Award dealing with immoveable property is not compulsorily registrable under Regis. Act. s. 17 (b) 18 C W N 475-19 C L J 123-20 I C 860

See Also 7 P L R 532 and 12 C L J 158

94—It is a matter of procedure and not of substance that the party complaining of the invalidity of an award would have



**ARBITRATION (Conclud.)****(4) Award (Conclud.)****(11) Filing of Award (Conclud.)**

to apply to the court to have the document taken off the file. An interlocutory injunction should not be granted upon novel considerations interfering with arbitrators by reason of difference in practice between the Arbitration Act and the provisions of the English rules. 47 Cal 611=31 Cal L J 167=24 C W N 612=55 I C 778 [following 23 C W N 811]

95—An award does not require registration and it is not necessary that it should be made a rule of Court 1917 Pat 241=2 Pat L W 156=42 I C 617

See to the same effect 18 I A 73=70 P R 1891=6 Sar 26=15 Ind Jur 284=18 C 414 P C and 10 P R 1917; and 20 I C 860; and Regis. Act s. 17

96—When the parties after appointing arbitrators settled independently by a compromise deed signed by the parties and the arbitrators: Held, that the deed could not be treated as an award and an application to file it in Court as an award could not be granted. 48 P L R 1915=28 I C 298

97—A suit on pro-note being dismissed for insufficient stamp, plaintiff thereupon made an ex parte reference to arbitration. The award being delivered, plaintiff sued to have it filed. The contention of the plaintiff was that subsequent to the execution of the pro-note, defendant so altered it as to convert it into an instrument of higher value. Held that the subsequent conduct of defendant could not revive the rights and obligations under the indent which had been extinguished but might furnish ground for a suit intort. 9 I C 896

98—An order of a Court refusing to file an award does not operate as res judicata in respect of a subsequent suit brought to enforce it, inasmuch as no appeal lies from the order refusing to file it. 8 A L J 315

**(12) Form of award-99-101**

99—Where the parties agreed to refer the matter to two persons who after investigation drew up a receipt which was signed by the parties concerned. Held that though the proceedings were informal, they were in the nature of an arbitration and so receipt was an award. 18 C W N 617=26 I C 228=41 I A 142 (P. C.)

100—As to validity of oral award see 17 O C 108

101—Where the parties themselves arrived at a settlement and then called in certain arbitrators who merely wrote and signed the award dictated by the parties, which was also signed by the parties. Held, that the document was none the less an

**ARBITRATION (Conclud.)****(4) Award (Conclud.)****(12) Form of award (Conclud.)**

award and good without registration. 10 P R 1917=134 P L R 1914=101 P W R 1914=22 I C 412

**(13) Marwari Chamber of Commerce 102-103**

102—Award made during pendency of suit between same parties regarding same subject matter is bad. 17 S L R 223=85 I C 893

103—Under r. 21 of the Rules of Marwari Chamber of Commerce, the vice-chairman has no power to extend time for making award, unless specially empowered by the Chairman. 32 Bom L R 1650=129 I C 886=A I R 1931 B 125

**(14) Objections to an award 104**

104—Objections to an award can be filed despite acceptance of such award and the Court cannot shorten time for filing such objections. 76 I C 33=A I R 1924 O 344.

**(15) Person not a party to award-105**

105—Third person, in whose favour a decree based on award creates a charge and embodying a razinama between the parties to the award, can enforce it. 29 L W 609=56 M L J 295=I R 1929 M 686=117 I C 302=A I R 1929 M 379.

**(16) Proof of award-106-107.**

106—Award outside suit must be proved A L R 1933 M 459.

107—The fact and validity of an award can be proved by proof of the award in the absence of agreement to refer to arbitration. I R 1929 A 645=116 I C 853=A I R 1929 A 415.

**(17) Registration of award.**

See Registration Act Ss. 17, 49.

**(18) Remedy after decree on award-108.**

108—Remedy after decree on award is by way of execution and not by way of separate suit on the same cause of action. 70 I C 300=A I R 1922 C 73.

**(19) Remission of award-109.**

109—Remission of award amounts to implied recognition of jurisdiction. A I R 1931 P C 289=8 O W N 1060=35 C W N 1287=61 M L J 623=34 L W 676=134 I C 1080 (P C).

**ARBITRATION (Contd.)****(4) Award (Contd.)****(20) Repudiation of award-110-112**

110—One of the parties to the reference a minor—mother acting as guardian on behalf of minor—award whether void or voidable. A L R 1933 B 285=34 B L R 285.

111—A person basing his whole claim on an award cannot challenge the conditions therein. A I R 1931 Oudh 6=7 O W N 1055=Ind Rul (1931) Oudh 98=129 I C 322

112—The minor alone can repudiate the act of the guardian in the case of an award against the minor, he must do so by review or separate suit. A I R 1931 Cal 211=52 C L J 298=35 C W N 3238=58 C 628=130 I C 209.

**(21) Single award covering many contracts 113-114**

113—The decision on a question within jurisdiction is not final and can be raised in the objections raised to the filing of the award. A single award on one submission of disputes under several contracts is valid. The provisions of C P C are not strictly applicable to arbitration proceedings. Questions affecting arbitrators' jurisdiction, the Court has to consider apart from the award 4 S L R 196=9 I C 712.

114—Provisions of the C P Code as to joinder of claims cannot be applied strictly to proceedings in arbitration. A single award covering many contracts is not invalid especially where defts have not been prejudiced in any way. 4 S L R 196=9 I C 712.

**(22) Stay of execution pending appeal-115.**

115—Stay of execution of award pending appeal. See C P C O XLI r. 5.

**(23) Successive awards-116.**

116—There may be successive awards even in the same matter. Where there are several and separate contracts the right conferred by the arbitration clause is not exhausted as soon as a complete award is made upon the first reference. 31 Cal L J 391=24 C W N 775=56 I C 828.

**(24) Suit after submission to award-117**

117—A suit on old contract does not lie after submission to an award. 21 A L J 380=L R 4 A 216=72 I C 615=A I R 1923 A 518=45 A 472.

**(25) Title on strength of award-118.**

118—Where exclusive title is set upon the strength of an award, the award must be produced. A I R 1926 Oudh 522=96 I C 14.

**ARBITRATION (Contd.)****(4) Award (Contd.)****(26) Award—Miscellaneous 119.**

119—Award relating to right of management of village temples passed into a decree of court—Right of villagers to modify. 1917 M W N 595.

**(5) Bengal Chamber of Commerce Rules. 120-123.**

120—An award by the Beng. Chamber of commerce was sought to be set aside by defts. on the ground that the Chamber acted in excess of jurisdiction in having made the award in favour of the plffs. disregarding the fact that contract in question was made by plffs. who had no principals and the contract was not therefore enforceable. Held that as there was custom in the market by which brokers are held liable upon such contract and such custom being well-known to the Chamber the award was properly made and valid. Ss. 230 and 236 not applying to the case. 20 C W N 365=35 I C 3.

121—If a party to a contract has agreed to submit to an arbitration of the Beng. Chamber of Commerce; he is bound by the rules of that chamber in the matter of hearing and adjudicating on such disputes. 42 Cal 1140=19 C W N 820=21 C L J 584=30 I C 681. 33 C 1169.

122—Rule 6 (g) of Beng. Chamber of Commerce provides that parties shall not without the express permission of the arbitrators be entitled to appear. 39 C 669=16 I C 153.

123—Mere omission to appoint an umpire under R VI of Beng. Chamber of Commerce does not vitiate the award. 16 I C 153=39 C 669.

**(6) Delhi piece Goods Association 124.**

124—On disagreement between arbitrators either party can apply to the Association to appoint an umpire 1931 A L J 20=A I R 1931 A 136 (2).

**(7) Duties and Powers of Arbitrators 125-156.**

(1-a) Bombay Cotton Trade Ass. Rules. 125

(2) Decision beyond reference or affecting third party 126-129.

(3) Delegation of powers-130

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(6) Enquiry as to the contract itself, 133-134.

(7) General duties and powers-135-138.

(8) Partition Case-139-142.

(9) Private enquiries-143.

(10) Reference relate to firms-144-147.

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- (11) Resignation or end of duties.  
148  
(12) Successive awards—149  
(13) Things not within his powers—  
150-152.  
(14) Miscellaneous—153-156.

**1 (a) Bom Cotton Trade Ass. Rules.**

125—Petitioners entered into contracts to purchase cotton from the respondents. But the cotton tendered being of inferior quality was rejected under Rule 52 of Bom. Cotton Trade Ass. Resp. claimed damages of Rs. 25050 and the matter was referred to arbitration under Rule 13, despite petitioner's protest. The arbitrators awarded the damages, Held that the arbitrators had mis-construed Rule 53. It was resp. and not petitioner who broke the contract. The award could be set aside if there was an error of law patent on the face of it  
21 Bom L R 1037=53 I C 799=44 B 780.

**(2) Decision beyond reference or affecting third Party.**

126—Prejudice will not be lightly presumed. 90 I C 932=A I R 1926 S 27.

127—Disputes between parties in relation to a contract the very factum of which is denied are not disputes which the arbitrators have jurisdiction to decide, 34 B L R 697=I R 1932 B 372=138 I C 337=A I R 1932 B 341.

128—Decision on matters not within the reference or affecting interests of stranger is void. 19 C W N 948.

129—Where the award is in excess of the amounts in differences the arbitrator has acted beyond his jurisdiction and the award should be returned for reconsideration. 25 I C 951 See Also 33 C 1169.

**(3) Delegation of Powers.**

130—Arbitrators can delegate only ministerial acts. Where members of a committee agreed to be bound by the decision of the Committee; Held, that they were not bound by the decision of arbitrators appointed by the Committee as the Committee could not delegate their powers  
Ind Rul (1931) All 691=133 I C 531.

**(4) Disqualification.**

131—Person unknown to one of the parties or personally interested in the subject-matter of the award should not act as arbitrator  
19 C W N 165=31 I C 597

**(5) Duty to hear parties**

132—Where the parties agreed to refer to the arbitration of a particular person, but later one of the parties refused to submit Held, the arbitrator was not bound

**ARBITRATION (Contd.)****(7) Duties Powers etc. (Contd.)****(3) Duty to hear parties (Contd.)**

to give him further opportunity to be heard.  
25 I C 951.

**(6) Enquiry as to the contract itself.**

133—Arbitrators can, on reference made to them, decide what the terms of a contract are. 24 C W N 567=59 I C 439.

134—Forgery—Disputes arising from contract—Power of arbitrator to determine existence of contract itself. 24 C W N 567.

**(7) General duties and powers.**

135—Arbitrator must give sufficient notice of time and place, 33 Bom L R 1357.

136—Award must strictly comply with the terms of reference both in substance and in form. A I R 1930 Sind 170=Ind Rul. (1930) Sind 33=121 I C 161=24 S L R 145.

137—Arbitrators must act judiciously but procedure in Civil Procedure Code does not ipso facto apply to arbitration proceedings. A I R 1930 Sind 170=24 S L R 145 Ind Rul (1930) Sind 33=121 I C 161.

138—Arbitrator must act impartially and judiciously A I R 1930 All 675=(1930) A L J 1373=131 I C 552.

**(8) Partition Case.**

139—Difference between arbitrator and Commissioner—Partition made by person nominated by parties and appointed by court—Objections. 25 I C 227.

140—Held, that the arbitrator had power to decide whether the will in question on its true construction rendered the property a wakf property and as such inalienable and impartible, 26 S L R 111=140 I C 724=A I R 1932 S 137=A L R 1932 S 199.

141—Where arbitrators are appointed to make a partition of certain property, in the absence of express directions, they have an unfettered discretion as to the mode of partition and the consequent allotment of shares. Where the property does not admit of partition, or where the division is calculated to seriously impair enjoyment, the arbitrators can properly refrain from dividing the property into small portions. 1932 A L J 331=137 I C 198=I R 1932 A 317=A I R 1932 A 348=A L R 1932 A 727.

142—Arbitrators were appointed to make partition of certain property. Held, that wide and extensive as the powers of the arbitrators were, they did not authorise them to refrain from dividing such of the assets as were capable of division I R 1932 A 317=1932 A L J 331=137 I C 198=A I R 1932 A 348=A L R 1932 A 727.

**ARBITRATION (Contd.)****(7) Duties Powers etc. (Contd.)****(9) Private enquiries.**

143—Private enquiries cannot be made by arbitrator unless expressly authorised to do so. 1930 A L J 944=I R 1931 A 4=128 I C 4=A I R 1931 A 276=52 A 938.

**(10) Reference relate to firms.**

144—Arbitrator laying down principles according to which accounts are to be settled—Award is not indefinite or incomplete I R 1930 L 771=126 I C 579=A I R 1930 L 425.

145—Where a firm is a party to a reference to arbitration, the arbitrators have not to decide who the partners are, unless that question is referred to them. It is only necessary for them to inquire who the partners are because they have to serve notices of meetings and of the making and of the filing of the award upon the partners. When a party elects to go against a firm, the question whether a particular person is or is not a partner of such firm and is bound by the decree or the award as the case may be is a question which can be dealt with either in execution proceedings or in a separate suit. 34 B L R 737=A I R 1932 B 375=A L R 1932 B 791

146—Reference relating to the whole dispute as to dissolution of partnership including taking accounts includes power to decide what property was to be taken into account. A I R 1928 Lah 157=107 I C 756=9 L 380.

147—In case of disputes between firms, the arbitrators must enquire who the partners are to discover whether they have jurisdiction. Arbitrators have power to decide how far their jurisdiction extends, though the decision is not final. Decision as to liability of any individual as partner of the firm is a decision on their jurisdiction. 4 S L R 196=9 I C 712.

**(11) Resignation or end of duties.**

148—On delivery of award an arbitrator becomes functus officio—His authority cannot be revived by the award being set aside. 108 I C 186=A I R 1928 L 170.

**(12) Successive awards.**

149—Successive awards can be made if within express or implied authority. Such awards are binding and can be filed under provisions of Civil Procedure Code. A I R 1930 Lah 425=12 Lah L J 254=Ind Rul (1930) Lah 771=126 I C 579.

**ARBITRATION (Contd.)****(7) Duties Powers etc. (Contd.)****(13) Things not within his powers.**

150—Arbitrator cannot give to anybody right to apply to the Court for any direction. 31 C W N 517=45 C L J 597=102 I C 108=A I R 1927 C 562.

151—Arbitrator cannot vary by his award the ordinary principles of personal law. 112 I C 296=A I R 1929 O 178.

152—Arbitrators cannot themselves extend the time for filing of award 16 L W 657=70 I C 353=A I R 1923 M 222.

**(14) Miscellaneous.**

153—Obiter dictum of arbitrator is not binding. 1929 A L J 620=I R 1929 A 481=116 I C 1=A I R 1929 A 465.

154—Payment to arbitrator is not payment into Court. 3 Bur L J 6=80 I C 238=A I R 1924 R 263.

155—Where the plff. not knowing and the arbitrator not giving any indication that the award was merely preliminary sued to set it aside, it was held that the suit was not premature and subsequent conduct of arbitrator would not vitiate it—Decree subsequently passed in terms of final award was not res judicata A I R 1930 All 581=(1930) A L J 1147=Ind Rul (1930) All 762=126 I C 10.

156—Arbitrator can be examined except on matters which are within his jurisdiction and on which his decision is final—Extraneous evidence cannot be admitted. A I R 1924 Sind 51=19 S L R 152=76 I C 84.

**(8) Duties and powers of Court 157-169**

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**ARBITRATION (Contd.)****(8) Duties and Powers of Court.****(1) Acting as arbitrator.**

157—Judge cannot act as arbitrator without consent of parties I R 1930 R 241=125 I C 257-A I R 1930 R 8.

158—Where the parties merely requested the Court to decide by local inspection without any intention to be bound by such decision, Held, the decision was not an award and was appealable. L R 6 A 122 Civ=85 I C 608-A I R 1925 A 348.

159—Parties asking Court to dispose of the case on examination of the marks in a trade mark case. Held the decision was not award as the parties had not intended to abide by the decision. 18 S L R 306=76 I C 309-A I R 1924 S 134.

160—Where the Court itself acts as arbitrator no separate award need be passed inviting the parties to put in objections before passing a decree. Such an award is in itself a decree.

Where in a suit the parties agreed that the Judge should give his decision without any witnesses being called, and that they would abide by his decision. Held, that the decision was in the nature of an award and that no appeal lay against it. 3 U B R (1917) 36=44 I C 622

**(2) Appointment of arbitrator or umpire.**

161—Court empowered to appoint an umpire, in case the arbitrators fail to appoint—Appointment of by Court on the umpire appointed by arbitrators refusing to act is valid. A I R 1927 Lah 123=99 I C 654

**(3) Compelling arbitrator or parties.**

162—A Court cannot to compel a private arbitrator to arbitrate against his own will. If an arbitrator after having recorded some evidence and submitted his decision upon some of the issues, refuses to arbitrate any further, the Court cannot threaten with a charge of contempt of Court. An order conveying such threat and an award forced thereby would be set aside in revision. 18 A L J 952

**(4) Execution of award.**

163—Award not specifying definite amount but only indicating manner of calculation is not final—Court proceeding to execute such award to allow a party to recover a sum arrived at by his own calculation acts without jurisdiction A I R 1925 Rang. 155=84 I C 824=2 R 587 F B.

**(5) General duties.**

164—Death of one arbitrator—Contract to sell—Extent to be fixed by arbitrators

**ARBITRATION (Contd.)****(8) Duties and Powers of Court (Contd.)****(5) General duties (Contd.)**

-whether court can fix the extent 28 M L J 662.

165—Question of umpires authority is to be decided by Court —34 M L T 238.

**(6) Powers of High Court**

166—High Court will not interfere where an award granting joint decree against debts as heirs of the deceased is set aside for one debt, not being a party to the reference I R 1931 A 259=1931 A L J 100=130 I C 291=A I R 1931 A 242

167—High Court has inherent jurisdiction to stay execution under an award where the application to set aside an award has been rejected and an appeal to the High Court is pending therefrom. A I R 1931 Bom 384=33 Bom L R 702=Ind Rul (1931) Bom 448=133 I C 864

168—Award beyond terms—Objections disallowed by Court—High Court has no power to interfere, even if the lower Court has come to a wrong conclusion on a question of law or fact if he cannot be said to have acted illegally or with material irregularity. A I R 1923 Lah. 194 (1)=73 I C 558.

**(7) Summoning arbitrator as witness**

169—Application for summoning arbitrator as witness—Judge not allowing—refusal illegal A L R 1933 L 498=34 P L R 379.

**(9) East India Cotton Asso. Rules-170**

170—Rule 43-A—Purposes of arbitration include appointment as umpire—Nominate means finally appoint—Rules about extension relate to arbitrators, not umpires—Rules in R 58 refer to trading rules. 26 Bom L R 84=79 I C 769=A I R 1924 B 370.

**(10) Evidence, 171-177**

171—Oral evidence may be allowed in certain cases but not as regards things e. g. evidence as to market rates on a particular date which are within the knowledge of arbitrators generally. A I R 1927 Cal. 237=44 C L J 422=100 I C 299.

172—Award of arbitrators appealed to Appeal Committee of Calcutta Baled Jute Association—Parties not satisfied on question of fact—Committee not precluded by rules to take fresh evidence—Failure to take fresh evidence amounts to misconduct and their award must be set aside—Instead of referring back the matter to same Committee Court set aside award and dealt with the matter itself. A I R 1927 Cal. 601=31 C W N 686=103 I C 634.



**ARBITRATION (Contd.)****(10) Evidence (Contd.)**

173—Where parties knew of umpire's appointment but had not received notice of the date of hearing failure to take evidence in presence of parties will not vitiate award if parties do not apply for re-hearing. A I R 1921 Sind 27=15 S L R 68=63 I C 141

174—Parties can retract evidence provided it is possible for the arbitrator to exercise a judicial discretion without such evidence. 7 S L R 113=24 I C 264

175—A copy of an award is admissible in evidence under s. 55 of Evid. Act 2 Pat L W 156=1917 Pat 241=42 I C 617.

176—Mere decision of an arbitrator, unsupported by evidence cannot confer jurisdiction on such arbitrator. 44 A 481=20 A L J 385=L R 3 A 289=4 U P L R (A) 64 =66 I C 691

177—Arbitrators can take evidence outside the jurisdiction of the subject provided the award is within jurisdiction. 4 S L R 196=9 I C 712

See also 49 A W N 1904=1 A L J 29.

**(11) Ex parte Proceedings-178-180**

178—Notice in ex parte proceeding is necessary but omission is not material if party not prejudiced. 27 C W N 933=80 I C 510=A I R 1924 C 524

179—Prejudice to the absent party vitiates ex parte procedure of arbitrators. 27 C W N 933=80 I C 510=A I R 1924 C 524

180—Proceedings ex parte as regards one party—No relief sought against him—The party is not necessarily not interested—Reference to arbitration without his joining is void. I R 1929 L 770=118 I C 434=A I R 1929 L 174.

**(12) Family Settlement-181-184**

181—Courts of equity uphold family settlements, even when they are not in legal form. A I R 1924 Nag, 14=77 I C 41

182—Principles as to family arrangements are more lenient than in case of arbitration award. 5 P L T 255=73 I C 552 =A I R 1924 Pat 49=2 Pat 554

183—Award is not a family settlement. It binds only the parties to it or their representatives. 10 O L J 535=26 O C 133=75 I C 626=A I R 1923 O 185.

184—Award invalid as such may be valid as family arrangement. See Minor-Guardian of Arbitration-Reference To.

**(12-a) Interest-185-186**

185—Interest can be awarded after the date of award and damages decreed. 27 C W N 933=80 I C 510=A I R 1924 C 524

186—Interest cannot be awarded after the date of the award. 27 C W N 494=77 I C 769=A I R 1921 C 576

**ARBITRATION (Contd.)****(13) Limitation-187-193**

See also Limitation Act 1908 S. 14 and arts. 14, 45, 46, 113, 115, 120, 142, 144 and 158

187—Award not made rule of Court within limitation does not become invalid. A I R 1930 Oudh 51=L R 11 A 32 Rev =Ind Rul (1930) Oudh 256=124 I C 448

188—Limitation applicable to the enforcement of relief giving by the award depends upon the nature of that relief; if it relates to immovable property, the limitation provided for such property will apply. 4 O L J 487=42 I C 116

189—Award, not being a contract, Lmt. Act art 120 applies. 31 I C 816

190—Claim though time barred can be referred to arbitration. 100 I C 890=A I R 1927 S 177

191—Suit for damages for breach of contract—Conditional acknowledgement—Condition to be fulfilled. Lim. Act. S. 19 31 M L J 231

192—Disputes about taking of accounts of partnership—Death of arbitrator—Termination of arbitration—Suit for dissolution—Limitation—Time if runs during pendency of arbitration. 33 M L J 4

193—Acceptance of award if an acknowledgment within S. 9 of the Lim. Act. 28 I C 864

**(14) Majority Decision-194-200**

194—Agreement between parties to abide by majority decision does not mean that the arbitration may be conducted by a majority or by less than the full number of arbitrators. (1931) M W N 961=34 L W 725

195—Where majority opinion was agreed to prevail, but two of the arbitrators did not act at all. Held the award was void. A I R 1928 Mad 983=112 I C 669

196—In a private arbitration, one of the arbitrators refusing to take part, the award is not valid and submission cannot be pleaded as a bar to suit. 8 O L J 585=65 I C 339=A I R 1922 O 108

197—Absence of one of six arbitrators at hearing does not make it invalid if parties agree to be bound by the decision of the five. Ind Rul (1931) Nag 60=130 I C 156=13 N L J 237=A I R 1931 N 66

See to the same effect A I R 1926 N 405=95 I C 89; and A I R 1928 N 173=107 I C 525; and A I R 1928 M 1025=55 M L J 429 F B; and 47 A 637 F B; and 51 B 908

198—A majority award cannot be set aside merely on the ground of minority absents and rendering infructuous. 52 M L J 357=100 I C 634=A I R 1927 M 436

199—If some of the arbitrators are absent

**ARBITRATION (Contd.)****(14) Majority Decision (Contd.)**

it is the duty of the parties to object at that time and not to allow the proceedings to go on with less than the full number of arbitrators. (1931) M W N 961=34 L W 725

200—Majority decision is not valid, unless so provided. 8 O L J 585=65 I C 339=  
A I R 1922 O 108

**(15) Misconduct of Arbitrators 201-202**

201—Award based on enquiries made by arbitrator before execution of agreement to refer or behind back of party—Arbitrator guilty of misconduct and award invalid in such a case. 1932 P C L 868 (Civ.)  
=A L R 1932 L 868 (Civ.)

202—Seeking outside advice on matters of law amounts to misconduct when the arbitrator in effect leaves to the outsider the burden of deciding any issue in the case; but not when he merely takes advice upon the general rules of law bearing upon the case. 55 M 93=A I R 1931 P C 289=33 B L R 1536=35 C W N 1287=54 C L J 372=1931 P C 288=34 L W 676=61 M L J 623=8 O W N 1066=134 I C 1080=58 I A 381=1931 A L J 1116=A L R 1932 P C 63 (p. C.)

**(16) Reference or Submission to Arbitration**

203-244

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**(1) Agreement to refer must be mutual 203-204**

203—Reference not bona fide—Award incomplete—Necessary party not present—Award is not valid. 32 Bom L R 639=34 C W N 484=123 I C 187=51 C L J 400=I R 1929 P C 177=A I R 1930 P C 100.

204—Parties must have mutually agreed to submit to arbitration. If once so agreed, subsequent insolvency of one party does not destroy the mutuality; and if it does destroy neither party can enforce it. 19 S L R 24=95 I C 750=A I R 1926 S 209.

**(2) Dispute as to Trusteeship-205**

205—Dispute as to trusteeship cannot be referred to arbitration 1917 Pat 93=1 Pat L W 260=38 I C 297.

See Also  
and  
and

32 A 503;  
30 A 137;  
21 B 335.

**(3) "Dispute" meaning of-206-208**

206—A point as to which there is no dispute cannot be referred to arbitration. 86 I C 393=A I R 1925 S 242.

207—"Dispute" includes mere failure to pay a claim. 17 S L R 15=80 I C 969=A I R 1924 S 105

208—The appellant wanted information from the respondents to Judge whether the goods supplied were or were not according to the contract. He demanded the production of the basis and shipment samples. The respondents declined to comply with the request. Held, that there was no "dispute" which could be and had been validly referred to arbitration since there was no assertion of right by appellant and consequently no repudiation by respondent. A I R 1921 Cal 342=33 C L J 545=64 I C 798.

**(4) Effect & Nature of-209**

209—Reference to arbitration does not destroy the ordinary common law right to go to Court. 88 I C 929=A I R 1925 C 809=52 C 453.

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211—Submission to arbitration requires agreement in writing though unsigned by either party—Invalid submission vitiates arbitration. 20 S L R 335=81 I C 834=A I R 1925 S 144.

**(6) Hindu family 212-213**

212—Where a manager sues impleading minor members as pro forma defendants he can get them exempted from the suit and refer to arbitration. Ind Rul 1931 All 656=133 I C 416.

213—Manager of joint Hindu family—Power to refer disputes—See 10 N L R 74.

**(7) Lapse of agreement 214.**

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215—Award on a dispute between widow and sister of deceased Mahomedan as to dower and distribution of estate Award not fixing dower or making good widow's legal right to one-fourth—Held the award was valid as warranted by submission. A I R 1918 p C 223.

216—Whether governed by Mahomedan Law. 8 A L J 746.  
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**(9) Minor. 217-221.**

217—Minor—Guardian of—Arbitration—Reference to. See Hindu Law—Minor—Guardian of—Arbitration.

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220—Minor—Leave of court necessary in pending suit. 52 I C 327.

221—Reference—minor—sanction of Court—No presumption that award was sanctioned by Court. 35 I C 675.

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**(12) Partner-224-229.**

224—Partner—Reference by. See Partnership—Partner—Arbitration.

225—Firm may be a party to a reference. 34 B L R 737=A I R 1932 B 375=A L R 1932 B 791.

226—(i) One partner of a firm cannot refer on behalf of the firm. [118 I C 906; 23 A 135; A I R 1926 A 91. followed (ii) But if a decree is passed on such reference against the firm the executing Court cannot question its validity ( 5 L 54; 44 C 27, followed) Ind Rul (1931) Lah 798=133 I C 558.

227—Decree on award is binding, and will operate as res judicata even though it is not in accordance with the terms of reference. 59 I C 89.

228—Where a partner enters into an agreement with an arbitration clause, the other partners will be bound by the submission if they fail to repudiate it but act upon it, whether or not the former had originally power to enter into such agreement. A I R 1931 P C 289=80 W N 1066=35 C W N 1287=61 M L J 623=34 L W 676 (P C)=134 I C 1080.

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233—Proceedings under S. 145; Cr P. Code not to be referred to arbitration. 2 Pat L J 86

**ARBITRATION (Contd.)****(16) Reference to Arbitration (Contd.)****(16) Reference as to part of dispute.**

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**(19) Revocation of agreement to Refer 238**

238—Agreement to refer to arbitration out of Court cannot be revoked except for good reasons. 12 A L J 529=23 I C 758=36 A 354.

**(20) Rights of Parties 239-242**

239—Parties agreeing to abide by the decision of Arbitrators, such decision is binding and is relevant in a suit involving the subject-matter of arbitration. 99 I C 620=A I R 1927 M 426

240—Parties choosing their own arbitrators who settle claims irrecoverable in Court; such settlement is nevertheless valid. 23 A L J 561=A I R 1925 A 503=88 I C 768=47 A 637.

241—Authority to refer to arbitration cannot be challenged in appeal if not challenged in lower Court. 130 I C 810=A I R 1931 Pat 92

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247—Order superseding award in a pending suit is a 'case decided' and can be revised under s. 115, C P C. Ind Rul (1931) All 656=133 I C 416

248—An order setting aside an award is not a case decided within the meaning of s. 115 C P C and therefore no revision, lies from such an order. (1931) A L J 842

249—Revision is generally objectionable in cases of awards and a Court should not interfere unless it finds not only an illegality committed but some substantial harm resulting from that illegality. (1931) M W N 961=34 L W 725.

250—Award passed—Altered on review—Appealable or only by Revision. 31 M L J 827

251—An arbitrator cannot review his own award 99 P R 1917=107 P W R 917=41 I C 59.

252—Order rejecting objections to—Application for revision—Court-fee—Court Fees Act, 1870 sch. I, art 13, 4 P L R 1911 =9 Ind Cas 388=13 p W R 1911

**(19) Revocation or withdrawal from Arbitration 253-258**

253—Submission once made cannot be revoked except for good reasons. 96 I C 325

253(a)—No revocation except on very strong grounds. 7 Bur L T 279=1914 U B R 26=27 I C 31

254—An application to Court to appoint new arbitrators amounts to an abandonment of the previous proceedings. 24 Bom L R 361=67 I C 913=A I R 1922 B 436=46 B 854

255—Nothing was done for a long time since reference when the plaintiff served a notice to revoke the arbitration. After the notice the arbitrators met and continued to sit for several days. No one took the least notice of the notice of revocation. Held, that under the circumstances the award was not invalid and could not be set aside. 16 P L R 1912=43 P W R 1912=13 I C 32.

256—Insolvency or issue of vesting order not a revocation—Vesting order at the time of reference, effect of—Official Assignee not a necessary or proper party to enforcement of award. 5 S L R 4=12 I C 188.

257—A suit to enforce an award is not an application to file an award. If a party gives notice of his withdrawal, the arbitrators need not give notice of further hearing. 7 Bur L T 279=(1914) II U B R 26=27 I C 31.

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258—The omission to give notice of the meeting of the arbitrators and of the trial, to a party who has prior to such meeting notified to the arbitrators his withdrawal from the submission does not invalidate the award. 7 Bur L T 279=(1914)

II U B R 26=27 I C 31.

See Also 29 M 44

**(20) Stay of Arbitration Proceedings 259**

259—An arbitration proceeding is to be stayed when a plff. impeaches a contract on equitable grounds. 31 Cal L J 158=55 I C 817.

See to the same effect:—23 C W N 534.

**(21) Waiver of Objection 260-263**

260—Appearance under protest does not waive objection as to Jurisdiction. 29 Bom L R 1087=104 I C 174=A I R 1927 B 553.

See to the effect. A I R 1931 B 343=33 Bom L R 759=I R 1931 B 513=134 I C 705=55 B 503.

261—Once parties appearing before arbitrators object to jurisdiction they do not waive their rights by proceeding with the case before arbitrators. A I R 1931 Bom 81=Ind Rul (1931) Bom 97=32 Bom L R 145=128 I C 881.

262—Objection as to want of notice not raised is not to be deemed to have been waived. 26 Bom L R 84=79 I C 769=A I R 1924 B 370.

263—Where parties agree to refer to arbitration various causes of action they must be deemed to have waived objections as to misjoinder. 24 S L R 145=I R 1930 S 33=121 I C 161=A I R 1930 S 170.

**(22) Withdrawal of Suit on Award.**

See C P Code O 23, r. 3.

**(23) Miscellaneous 264**

264—Suit to enforce part of award—Maintainability—Small Cause Court—Jurisdiction. 22 C W N 66.

**ARBITRATION ACT 9 OF 1899**

See Also cases under C P C Sch II and Ss. 141, 151 and O 39.

See Also Specific Relief Act S. 21

Decree on award under a nullity—enforceability of award—application for execution of decree can be regarded as one for execution of award. A L R 1933 P C 95=57 C L J 143=37 C W N 401=37 L W 321=35 B L R 327=142 I C 324=64 M L J 341=A I R 1933 P C 61.

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—Decree superseding the award, cannot be passed. Such decree will be treated as nullity in execution proceedings, and execution on the basis of the award will be granted. 35 C W N 537=58 C 1018.

—The U P Arbitration (Amendment Act) makes all references in U P references under the Indian Arbitration Act. A I R 1931 All 703 (1)=Ind Rul (1931) All 657=133 I C 417.

—The Act applies only to private arbitration. *Per Cur.*

—It applies even where parties to a suit engage in arbitration without an order of Court. A I R 1931 Rang 58=Ind Rul (1931) Rang 121=9 R 39=131 I C 57.

See to the same effect A I R 1922 C 404=69 I C 808=49 C 608.

—An action can be brought to set aside a private award provided there was no contract for a reference or the contract, if made, was fraudulent. A I R 1922 Lah 369=3 Lah 296=59 I C 585.

—The Act does not provide for a motion for administration of an estate, the remedy is administration suit or originating summons A I R 1927 Cal 562=31 C W N 517=45 C L J 597=102 I C 108.

—In case of private arbitration Civil Court cannot issue commission to a witness for evidence. A I R 1922 Bom 444=24 Bom L R 853=47 B 250=75 I C 221.

—Agreement to refer being impeached the arbitration proceedings can be stayed by the Court, 15 S L R 5=70 I C 864= A I R 1921 S 114

—An agent can be authorised by his principal to refer the matter to arbitration. 73 I C 609.

—O 21, r. 2 of C P C applies to awards under the Act. 97 I C 321=A I R 1927 S 66.

—In default of a party notice is necessary if the arbitrators intend proceeding ex parte. A I R 1924 C 524=27 C W N 933=80 I C 510.

—Allowing interest after the date of the award is not necessarily ultra vires 27 C W N 933=80 I C 510.

—Extension of time by Court without an express application and due notice to other party is bad A I R 1931 Bom 125=32 Bom L R 1650=129 I C 886=55 B 462.

—Award upheld by Court does not necessitate a separate decree. 31 C W N 517=45 C L J 597=102 I C 108=A I R 1927 C 562.

—Ss. 2 Proviso and 11—Act applies to all references made under the Companies Act—Companies Act. S. 152 (3)—effect of A L R 1933 L 2=3 P L R 1048=141 I C 64=A I R 1933 L 44.

—Reference to arbitration can be made



## ARBITRATION ACT 9 OF 1899 (Contd.)

to High Court although portion of the subject matter is outside jurisdiction. A I R 1930 Cal 468=Ind Rul. (1930) Cal. 812=34 C W N 268=127 I C 60

—Ss. 2, 3, 4, 8 and 9—Matter having been referred to the arbitration of five panchayatdars the Court could not give any relief nor appoint another panch in place of the one refusing to act. A I R 1931 Mad 170=Ind Rul. (1931) Mad 412=54 M 198=33 L W 60=60 M L J 498=130 I C 668

—Ss. 2, 15, 19—The Court has under S. 90 full powers to stay a suit provided that there is specific understanding before the parties to refer the matter in dispute to arbitration. 22 Bom L R 842=1921 B B 185=57 I C 997

—S. 2—A suit under a contract was brought at Karachi and referred to arbitration there. Held the Court at Amritsar had jurisdiction to stay the suit. A I R 1931 Lah 66=Ind Rul (1931) Lah 337=130 I C 769

—Court at Karachi at which the suit is brought and to which reference to arbitration is made can stay the suit. A I R 1931 Lah 66=Ind Rul. (1931) Lah 337=130 I C 769

—Award relating to property situate in the Presidency Town in which the parties are living can be filed in such Presy Town. A I R 1929 Mad 31=Ind Rul (1929) Mad 338=29 L W 227=56 M L J 35=114 I C 818

—S. 2—The Court of a place where even a part of the cause of action arises has jurisdiction to file the award based on the contract to which the cause of action relates, 8 S L R 107=27 I C 129

See Also 5 S L R 97=12 I C 662

—Mere fact of goods lying at Karachi does not give the Karachi Court jurisdiction to file award if no part of the cause of action arose at Karachi. 16 S L R 293=80 I C 303=A I R 1924 S. 4

—Ss. 2, 4 (b), 5 and 119—Mere fact that a reference to arbitration is made does not prevent a suit; but it would be otherwise if award also was given before the suit. 13 S L R 193=56 I C 150

—Ss. 2, 4 (a), and 19—The filing of a suit does not invalidate a pending arbitration.

An order for stay of the suit is good, though made after the award. Under sec 19 such an order can be made both before and after reference or award. It is the Court in which the suit is filed that has power to stay the suit under sec. 19. If no stay of the suit is obtained an award made after the suit is filed is invalid. 13 S. L. R. 8=52 I C 130

## ARBITRATION ACT 9 OF 1899 (Contd.)

—S. 3—Where agreement to refer to arbitration is made with company, Court cannot file it under such. II, para 17. A I R 1929 Lah. 246=Ind Rul (1929) Lah 789=118 I C 533

—S. 3—Companies Act. 1913, S. 152—Agreement to refer under—Award made pursuant to—Application to file. under Para 20. of Sch. II—Not permissible—Sub-Court has no jurisdiction to entertain application. 13 P L T 169=136 I C 445=I R 1932 P 109=A L R 1932 P 315

—S. 3—Arbitrators must decide the dispute according to the terms of the contract, and it is implied that every defence open in a Court of Law can be equally so for the arbitrator's decision. A I R 1929 P C 103=Ind Rul (1929) P C 129=56 C 1018=56 I A 128=(1929) A L J 254=33 C W N 485=29 L W 682=56 M L J 614=6 O W N 473=49 C L J 462=31 Bom L R 741=(1929) M W N 516 (P C)=115 I C 713

—S. 4—Under the Act there must be an agreement between the parties in writing to submit their differences to arbitration. It is, of course, not necessary in all cases that both parties should sign the written agreement to refer. If the submission is in writing and is binding on both parties as their agreement or as the equivalent in law to an agreement between them, the statute is satisfied. 34 B L R 697=I R 1932 B 372=138 I C 337=A I R 1932 B 341

—S. 4—It is not necessary for a valid submission that the acceptance should be in writing. A I R 1931 Bom 81=Ind Rul (1931) Bom 97=32 Bom L R 1451=128 I C 881

—S. 4—In the case of a contract governed by the Bombay Cotton Contract Act, the by-laws providing for reference to arbitration coupled with agreement between parties to abide by them amount to a submission in writing. A I R 1931 Bom 81=Ind Rul (1931) Bom 97=32 Bom L R 1451=128 I C 881

—Ss. 4 and 15—Oral submission—Award made on—Suit contrary to terms of—Award is a good defence to, 63 M L J 610=1932 M W N 988=36 L W 486=139 I C 355=A I R 1932 M 745=I R 1932 M 659=A L R 1932 M 1456=56 M 85

—Ss. 4, 15—S. 4 applies only to written submission. Where there has been such a submission to the award is enforceable in the manner prescribed by S. 15 of the Act. Where the award is made on an oral submission it is not enforceable in the manner prescribed by the Act, though it may be valid and enforceable otherwise than under the Act. 63 M L J 610=1932 M W N 988=36 L W 486=139 I C 355=A I R 1932 M 745=I R 1932 M 659=A L R 1932 M 1456=56 M 85

## ARBITRATION ACT 9 OF 1899 (Contd.)

—S. 4 (b)—Term as to reference appearing on an indent form. Held, the submission was valid and binding. 2 U P L R (A) 243=18 A L J 652=59 I C 75=42 A 525

—S. 4.—To constitute a submission, there must be a written agreement to refer. The signatures of both parties are essential. A mere document carrying the terms of agreement but not signed by any party does not fall within the meaning of sec. 4, there is a vital difference between such a document and written agreement. The assent and signature of either party need not be on a single paper. They may be on a separate paper provided it contains all the terms of the agreement. 19 I C 925=6 S L R 278

—S. 4.—Sec. 4 requires that the submission to arbitration must be written and binding on both parties. Their actual signatures are not necessary. 12 S L R 55=49 I C 135

—S. 4 (b)—An agreement to refer need not be signed by both parties. I R 1929 C 524=117 I C 540=A I R 1929 C 97=32 C W N 1101=56 C 118

—S. 4 (b)—Bombay Cotton Contracts Act (XII of 1922)—By-laws 38-A and 82 of—Dispute in relation to a contract—Dispute as to factum or existence of a contract if a—Written agreement to refer dispute to arbitration—Contract repudiated and acceptance not proved—Effect—Jurisdiction of arbitrators to decide dispute in case of. 34 B L R 697=A I R 1932 B 341=138 I C 337=I R 1932 B 372

—S. 4 (b)—A written agreement does not mean that each party has to sign a document containing the terms. The plain acceptance of a document containing all the terms is sufficient. 18 A L J 652, doubted. A I R 1931 All 136 (2)=Ind Rul (1931) All 484=53 A 384=(1931) A L J 20=132 I C 324

—S. 4.—Parties may by their conduct agree to terms of business one of which is reference to arbitration. A I R 1931 Bom 81=Ind Rul (1931) Bom 97=32 Bom L R 1451=128 I C 881

S. 4 (b)—Submission must be in writing and signed by both parties or their agents authorized therefore. A I R 1926 Cal 938=53 C 65=95 I C 21

—S. 4 (b)—One party referred his claim to an association. Arbitrators appointed by the Assoc. laid the claim before the other party who gave a signed and written answer to the claim. Held there was a written agreement within s. 4 (b). A I R 1921 All 273=43 A 348=19 A L J 132=61 I C 269

—S. 4 (b)—An unsigned document containing the terms of the submission to

## ARBITRATION ACT 9 OF 1899 (Contd.)

arbitration agreed to orally by both parties is valid. A I R 1931 All 136 (2)=(1931) A L J 20=132 I C 324=53 A 384

—Ss. 4 and 8 (2)—The petition of compromise in a suit for accounts amounts to a submission which includes reference to arbitration within the meaning of s. 4 A I R 1924 Lah 405=71 I C 817

—Ss. 4 and 19—The existence of a difference or dispute is an essential condition for submission to arbitration. A I R 1931 Bom 164=33 Bom L R 51=Ind Rul (1931) Bom 268=130 I C 588.

—S. 4—Where claim is statute barred no disputes can be referred to arbitration. 19 S L R 24=95 I C 750=A I R 1926 S 209.

—S. 4—Award under an agreement under which only one party had option to refer is not valid. A I R 1929 Sind 83=Ind Rul (1929) Sind 188=118 I C 220.

—S 4 (6)—The meaning of 'Submission' can be gathered from series of document comprising the agreement. A clause fixing time for appointment of arbitrator should be strictly adhered to And so an award passed disregarding the clause is bad in law. The mere refusal and failure to appoint an arbitrator within the period fixed in agreement don't amount to waiver. The award must be enforceable as a decree. 42 All 525=18 A L J 652=2 U P L R 243=59 I C 75.

—S. 4—Until acceptance which need not be in writing, by arbitrator on reference signed by both parties, there is no appointment of arbitrator submission includes both arbitration clause and a reference. A I R 1924 Sind 91=17 S L R 93=76 I C 660.

—Ss. 4 (a), 19—Order refusing stay of proceeding is not appealable but may be revised under s. 116 C P C. A I R 1931 Lah 644=Ind Rul 1931 Lah 600=132 I C 850=13 L 59

—Ss. 4, 19—Under r. 8 of Beng Chamber of Commerce Rules institution of suit after reference immediately take away the jurisdiction of the arbitrators. But the suit cannot retrospectively affect the validity of the reference when it was made or the portion of the arbitration proceedings before the suit. 47 C 849=25 C W N 62=61 I C 380.

—Ss. 4, 19—Award pending suit is ineffective unless the suit was stayed. 60 I C 895=47 C 752

—Ss. 4 (a), and 19—A court is competent to pass an order for stay of a suit filed by one party; and the award given thereafter is good. 13 S L R 8=52 I C 130.

—Ss. 4, 5, 19—The word 'Submission' in Sec 4 covers both arbitration clause as well as reference. Where one of the parties files a suit in respect of the same subject matter, the Court may stay proceeding in its inherent power. But the proper course

## ARBITRATION ACT 9 OF 1899 (Contd.)

in such cases is that the court should either adjourn the trial till the award or oblige the plff. to obtain leave of the court for revoking the reference. 10 S L R 1=35 I C 536.

—S. 4—A contract for sale of goods contained a clause to refer disputes to arbitration. Held withholding of payment was such a dispute and that arbitrators could allow interest on the money withheld. 23 C W N 704=54 I C 285=46 C 534.

—Ss. 4, 12—In deciding proper 'Submission' the contents of the document or bond should be fully construed according to Sec 4 Arbitration Act. The court can extend time for making award under Sec 12 of the said Act even after the award has been given. The court is bound to keep regard both to the justice of plff's claim as well as to the justice of method's of enforcing it. The High Court has every revisional jurisdiction in the matter. 16 I C 861=5 S L R 89

—S. 4—Option to one of the parties does not remove the agreement from the operation of s. 4. A I R 1926 Sind 27=90 I C 932

—S. 4—A Bill-of-Lading giving option to ship-owner as to the place for determining claims. Held, that unless the ship-owners exercised their option the parties would be able to file proceedings in the Courts of the port of destination as alternatively provided by the Bill. A I R 1925 Bom 449=49 B 854=27 Bom L R 1098=89 I C 866

—S. 5—Court should not lightly revoke submission to named arbitrators.

A I R 1928 Sind 195=111 I C 700

—Ss. 5 and 8—A valid submission cannot be revoked without leave of Court. If the arbitrator refuses or neglects to act procedure in s. 8 should be followed. Fresh appointment cannot be made without revocation of the previous submission.

11 S L R 101=44 I C 360

Ss. 5, 15—Filing of an award under s. 15 is part of 'the same proceeding' before the arbitrators. 16 I C 153=39 C 669.

—S 5—Misjoinder of parties and causes of action in arbitration proceedings does not involve a question of jurisdiction. But if an objection to misjoinder is taken and the arbitrators ignore it, the objection can be raised before the Court charging the arbitrators with misconduct and the decision of the Court on it is not open to revision.

11 I C 274.

—S. 5—Arbitrators can inquire into and decide whether the signature is of the party to submission and if the Signature represents a partnership, who those partners are. 11 I C 274.

—S. 5 An order refusing to set aside

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an award based on evidence recorded by the Court is not bad in law where the Judge also looked at the evidence recorded by the arbitrators. 11 I C 274.

—Ss. 7 and 11 to 15—On award having been given the arbitrator is functus officio and cannot exercise the power given to him by s. 7 unless the Court remits to him if satisfied that an honest mistake has been made. A I R 1923 All 31.

—S. 7—Reference and award under a policy of insurance but by Tribunal other than one contemplated by the clause is nevertheless valid if otherwise legal in itself. 88 I C 878=A I R 1926 S 8.

—Ss. 8, 9—Sections 8 and 9 do not apply to a submission wherein the dispute is referred to five panchayatdars, as these sections apply only to cases where there is a 'single arbitrator or but two arbitrators'. The Court has hence no power to fill up vacancy if one of the five declines to act. A I R 1931 Mad 170=33 L W 60=54 M 198=Ind Rul (1931) Mad 412=60 M L J 498=130 I C 668.

—S. 8—Order of the death of an arbitrator can only be made under the Act and then only on fulfilling the conditions as to notices under s. 8 A I R 1926 C 730=94 I C 177=43 C L J 292.

—S. 8—Does not apply to independent appointment of second arbitrator. A I R 1924 Sind 29=17 S L R 164=83 I C 539.

—S. 8—New appointment, when there are already appointed arbitrators who are willing to act, is void, when the arbitrators refuse to act new arbitrators can be appointed only when appointment is subject to acceptance communication in clear and unequivocal language of appointment ipso facto confers powers on the arbitrators. 76 I C 261=A I R 1925 S 12.

—Ss. 8 (1) (b), 19—One party having refused to appoint its arbitrator, the other appointed a sole arbitrator under s. 9 who afterwards refused to act. Held the procedure in s. 9 and not one in s. 8 (1) (b) is to be followed. 107 I C 435=A I R 1929 S 55.

—Ss. 8 and 9—Applicability does not depend upon whether ultimately a single arbitrator or two are appointed. A I R 1927 Sind 177=100 I C 890.

—Ss. 8 (1) (a) (b) (c) (d) and 19—Submission to three named arbitrators who after acting for a time refused to proceed further—Court cannot interfere and appoint other arbitrators in their place 21 Bom L R 308=50 I C 411=43 B 809.

—S. 8 (1) (b)—There was a mutual agreement to refer two arbitrators, one of whom refused to act; Held, s. 8 (1) (b) applies, as the expression "an appointed arbitrators" can mean one of two appointed arbitrators A I R 1929 Cal 177=56 Cal 848=49

**ARBITRATION ACT 9 OF 1899 (Contd.)**

C L J 19=33 C W N 418=Ind Rul (1929)  
Cal 481=116 I C 625.

—S. 8 (2)—A party, entitled to a share in profits, asserted his right to be represented at the audit. He appointed his arbitration and referred the matter to him but the other party did not appoint his arbitrator and an application was made to Dist Judge who decided that dispute had arisen and directed the parties to nominate arbitrators within certain time. Held the order of the Dist Judge was not appealable. 71 I C 817=A I R 1924 L 405.

Ss. 9 & 8 (1) (b)—Where a sole arbitrator under S. 9 refuses to act, the procedure to be followed is not that laid down in s 8 (1) (b), but that in s. 9 A I R 1929 Sind 55=107 I C 435

—S. 9—Where the sole arbitrator refuses to act then vacancy has to be filled in accordance with s. 9 A I R 1927 Sind 177=100 I C 890.

—S. 9—A dispute having arisen was referred to two arbitrators, one by each party, one of the arbitrators refused to act after appointment and, therefore, the other acted as sole arbitrator and made an award; Held, the award must be set aside. English Arbitration Act does not apply. 110 I C 290 (P C).

—S. 9—If arbitrators appointed by one party refuse to give adjournment to move the High Court to have their appointment set aside, their refusal does not amount to misconduct, 40 M L J 166=(1921) M W N 148=29 M L T 245=14 L W 42=44 M 406=62 I C 205.

—S. 9 (a) and (b)—When reference to two arbitrators one by each party is made one party refusing to appoint the other can appoint sole arbitrator. A I R 1925 Bom 469=49 B 706=88 I C 90.

—S. 9—The section does not limit the number of arbitrators—Parties can add new arbitrators and the party acquiescing in such addition is estopped from objecting on this ground. A I R 1921 All 64=43 A 453=19 A L J 343=62 I C 426.

—S. 9 (b)—Applies only in absence of contract providing otherwise. A I R 1921 Mad 58=44 M 406=14 L W 42=(1921) M W N 148=40 M L J 166=62 I C 205.

—S. 9 (b)—Contract in contravention of provisions of s. 9 excludes the operation of the section. The decision made by a single arbitrator chosen by one party only would be invalid. A I R 1922 P C 374=37 C L J 336=27 C W N 660=(1923) M W N 372=18 L W 537=50 C 1=49 I A 366=32 M L T 19=44 M L J 758=70 I C 777.

—S. 9—Sellers electing to have private arbitration destroys buyer's remedy to arbitrate through public tribunal. A I R 1924 Cal 828=51 C 657=82 I C 769

**ARBITRATION ACT 9 OF 1899 (Contd.)**

—S. 9—Official Receiver or trustee in bankruptcy is not party within S. 9 nor can he be compelled to be a party where the bankrupt's estate is debtor and not creditor. A I R 1926 Sind 209=19 S L R 24=95 I C 750.

—S. 9—Does not apply to contract entered into by the parties themselves. A I R 1930 All 584=(1930) A L J 1147=Ind Rul (1930) All 762=126 I C 10

—S. 9—Party desiring to enforce submission clause must specify nature of dispute and nominate his arbitrator first. A I R 1929 Sind 58=109 I C 262.

—S. 9—Filing of suit despite reference—Specific performance cannot be enforced but only stay of suit can be asked for. 25 C W N 62=61 I C 380=A I R 1921 C 244.

—S. 9 (b)—Defect of absence of notice under s. 9 (b) can be waived by failure to object in time. 62 I C 737=A I R 1921 P C 123=25 C W N 794=13 M L W 318=1921 M W N 24=30 M L T 194=17 N L R 37=48 I A 12=48 C 493.

—S. 9 (b)—In case of more arbitrators, one of them must be appointed convener. Non attendance at meetings may under certain circumstances be construed as refusal to act as arbitrator and on such refusal followed by non-appointment of another man one arbitrator would suffice. A I R 1930 All 675=(1930) A L J 1373=131 I C 552.

—Ss. 10, 12—In case of private reference Court cannot, despite consent of parties, issue commission for the examination of witnesses. A I R 1922 Bom 444=47 B 250=24 Bom L R 853=75 I C 221.

—S. 10—Where an umpire is appointed on disagreement between arbitrators, he must re-hear evidence if so requested. 15 S L R 68=63 I C 141.

—S. 10—Party cannot apply to Court for order directing umpire to state a case. 39 M L T 563=27 L W 267=1928 M W N 132=107 I C 793=A I R 1928 M 107

—S. 10—Umpire is not bound to state special case except to High Court—Aggrieved party should apply immediately to revoke submission—If he does not, he cannot question award after it is passed. A I R 1921 Cal 576=27 C W N 494=77 I C 769.

—S. 10—Interest on damages awarded cannot be granted by arbitrator. A I R 1921 Cal 576=27 C W N 494=77 I C 769.

—S. 10—Rules relating to appeals under C P C do not apply to cases under the Act. A I R 1924 Rang 47=2 Bur L J 193=I R 661=76 I C 525 (2)

—S. 10—Mere error of law not distinctly appearing on face of record is no ground for remission. 69 I C 995=A I R 1922 C 447=47 C 646.

## ARBITRATION ACT 9 OF 1899 (Contd.)

—S. 10—Although an arbitrator can Pass no order as to costs, the Court will not set aside an award merely because the arbitrator has dealt with the question of Costs. 8 S L R 136=27 I C 526

—S. 10—The Costs of filing an award falls outside the jurisdiction of arbitrators. 5 S L R 89=12 I C 637  
See also 17 S L R 93=76 I C 660=A I R 1924 S 91

—S. 10 (b)—Opinion of the Court is not binding on the arbitrators, nor can it operate as res Judicata. 79 I C 986=A I R 1925 S 83

—S. 11—When the question when an arbitrator in India becomes functus officio comes to be decided, the line will have to be drawn somewhere in the procedure which is laid down in s. 11 for getting the award into Court. The procedure laid down by the Act is that the various Stages to be found in ss. 11 to 15 are to be followed in the same chronological order as the numerical order of the sections. An application to set aside is not as a rule within the jurisdiction of the Court, until some application or attempt has been made to file the award or some other similar step is taken to enforce it. A I R 1923 All 31

—S. 11 (2)—Mere receipt of the award by the Court is the filing of the award. No special order need be passed. The award filed is enforceable as a decree of the Court unless it is remitted for reconsideration or set aside. A I R 1931 Sind 160  
See also 14 S L R 217=60 I C 942

—Ss. 11, 16—An award filed in Court under s. 11, can be transferred for execution to another Court even though the Arbitration Act is not in force in the local area in which the executing Court is situated. A I R 1931 Nag 170=Ind Rul (1931) Nag 171=134 I C 683

—S. 11—Contract to send goods from Cawnpore to Karachi—Goods not sent—Breach of contract takes place at Cawnpore, but award can be filed in Karachi. A I R 1922 Sind 32=15 S L R 74=64 I C 674

—S. 11—Decision of Committee of Appeal, on appeal from umpire's award according to contract by parties, can be filed. A I R 1927 Cal 647=55 C 180=31 C W N 730=103 I C 648

Contra 102 I C 395=A I R 1927 Cal 391=31 C W N 446

—S. 11—Pending a suit, the parties can refer to a private arbitration but the award cannot be filed either under Sch. II, or Arbitration Act—It can be filed only as adjustment under Civil P C O XXIII, r. 3 A I R 1921 Sind 65=16 S L R 174 (F B)=81 I C 653.

—Ss. 11 and 15—Notice of filing is

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not necessary—Exparte procedure without notice is liable to be set aside. 60 I C 987 =47 C 951

—S. 11 (2)—Failure to give notice of filing award is not fatal. 95 I C 378=A I R 1926 S 242:

—S. 11 (2)—Notice not served—Award is invalid. 102 I C 800=A I R 1927 R 197 =5 R 174.

—S. 11—Filing of award is a ministerial act. Application by one of two arbitrators to file award is good. 8 S L R 302=29 I C 602.

See also 102 I C 800=A I R 1927 R 197=5 R 171

—Ss. 11, 13, 14, 15—An award can be filed under the Act not on application of the parties but at the instance of the arbitrator; and when the award is filed, the result is, not that there is a suit in which a decree has been passed, but that there is an award which shall be enforceable as though it were a decree. 17 C W N 395 =18 I C 978=40 C 219

—S. 11 (2)—Written submission to arbitration not filed with award as required by High Court rules—Award not signed by all arbitrators—Award cannot be accepted by the Court either under Arbitration Act or under Sch. II, Civil P C A I R 1929 Mad 31=29 L W 227=56 M L J 35=Ind Rul (1929) Mad 338=114 I C 818.

—S. 11—Arbitrator receiving fees beforehand—No misconduct. 17 L W 648=75 I C 850=A I R 1924 M 274.

—S. 11—One arbitrator resigning and refusing to sign the view of the majority—Award is not invalid. 76 I C 1007=A I R 1923 L 44.

—S. 11—Requires the award to be in writing and signed. 3 Bur L J 102=82 I C 802=A I R 1924 R 319.

—S. 11—Act applies only to awards made pursuant to this Act. 95 I C 21=A I R 1926 C 938=53 C 65:

—S. 11—In case of patent ambiguity in award Court cannot enquire to ascertain what interpretation should be accepted; nor can it examine the umpire as to the meaning of the award because Umpire becomes functus officio after the award is published. A I R 1927 Bom 428=29 Bom L R 660=104 I C 94.

—S. 11—Reference to arbitration under contract—Contract denied—Application for injunction to restrain arbitration proceedings—Injunction not to be granted. 23 C W N 311

—Ss. 11 (2), 14—An award is final under the Court in which it is filed remits it or sets it aside. 14 Bur L R 129=4 L R 249

—S. 11 (2)—Order returning the award for complying with s. 11 (2), is not a judg-



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ment within cl. 13, Letters Patent (Rang).  
A I R 1928 Rang 110=6 R 25=Ind Rul (1929)  
Rang 89=114 I C 521

—Ss. 11 (2), 15—Order refusing to set aside an award is a Judgment and is appealable under Letters Patent (Cal) s. 104 (f) C P C does not apply. 46 I C 687=45 C 502

—S. 11 (2)—An order dismissing an application to set aside award is not a decree and not appealable as such. 14 Bur L R 129=4 L B R 249

—S. 11 (2)—Order setting aside award is not appealable either under the Act or under C P C. 6 L B R 88=5 Bur L T 155 =17 I C 902.

—S. 12—Time can be extended by Court even after passing of the award 129 I C 886=A I R 1931 B 125

—S. 12—Court can extend time even after expiry of the original period 32 Bom L R 193=I R 1930 B 329=125 I C 425=A I

R 1930 B 462

See also 88 I C 878=A I R 1926 S 8

See also 6 S L R 146=19 I C 374

—S. 12—The Court before granting extension of time must see that the case is fit for such a grant; it should not merely consider whether or not the arbitrator had been diligent. 8 S L R 269=28 I C 85

See also 19 S L R 251=78 I C 521=A

I R 1925 S 150

—Ss. 12 and 13—Appellate Court can extend time under O 41, r. 33 of C P C. 54 I C 668=46 C 1059

—S. 12—Arbitrators cannot extend time. 16 L W 657=70 I C 353=A I R 1923 M 222

—S. 13—Where no party is at fault in not applying for extension of time, time should be extended. 27 L W 51=1928 M W N 107=54 M L J 49=109 I C 70=A I R 1928 M 69=51 M 103 F B

—S. 13—Remission of award without fixing time for its return—Court can extend time for its delivery. A I R 1928 Mad 69 =27 L W 51=51 M 103=(1928) M W N 107 =54 M L J 49 (F B)=109 I C 70

—S. 13—Refusal to extend time for the submission of an award remitted to the umpire on an application under s. 13, is a judgment within Letters Patent cl. 15. A I R 1928 Mad 69=51 M 103=27 L W 51 =(1928) M W N 107=54 M L J 49 (F B) =109 I C 70

—S. 13 (1)—No appeal lies from an order remitting award owing to arbitrators misconduct Provisions of appeal in C P C do not apply to cases under Arbitration Act A I R 1924 Rang. 47=2 Bur L J 193=I R 661=76 I C 525.

—S. 13 (1)—Remand-order for making fresh award amounts to refusal to file award and is not appealable 76 I C 525 =A I R 1924 R 47=2 Bur L J. 193= I R 661.

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—S. 13—Appellate Court can interfere where judicial discretion is not exercised in not remitting an award. 16 L W 657 =70 I C 353=A I R 1923 M 222.

S. 13—Court can grant remission only on grounds specified in s. 14. A I R 1924 S. 51=19 S L R 152=76 I C 84

—S. 13—Where amount payable is not specified but the rule of calculation is given, remission should be refused, Error of law must be one which appears on the face of the award or of a document forming part of it. 69 I C 995=A I R 1922 C 447=49 C 645

—Ss. 13 (1), 14—Where arbitrator is not guilty of serious misconduct but merely of not exercising proper discretion the award cannot be set aside, but may be remitted; nor can award be set aside where Court is divided as to the merits of the dispute. 34 C L J 39=66 I C 389=A I R 1921 C 657

—Ss. 13, 14, 15—Parties consenting to a partial amendment of the award—Unnamed portion of the award is enforceable as decree. 34 C W N 268=I R 1930 C 812=127 I C 60=A I R 1930 C 468.

Ss. 13, 14, 15—Powers of arbitrators are directly derived by the agreement of submission. Where one of the parties to arbitration is a firm, the other party can not proceed against either the firm or its members individually. In the latter case (i.e. members individual) arbitrators are competent to determine whether a particular member is or is not a member of the firm But in the former case the arbitrators have no jurisdiction to decide the question of partnership and the liability of the individual member. The question of liability is to be determined by a competent Court in execution proceeding or by a separate suit. 6 S L R 127=19 I C 363.

—S. 14—Arbitration procured by fraud misrepresentation or mistake is arbitration "improperly procured" A I R 1932 S 20 =136 I C 806=I R 1932 s. 66

—S. 14—An objection to jurisdiction can be raised under S. 14. It seems to be covered by the words "an arbitration has been improperly procured" which include the case of an arbitrator who has been illegally or improperly appointed. 33 P L R 365=137 I C 846=A I R 1932 L 378=I R 1932 L 364

—S. 14—Ordinarily it was open to the respondents to institute a suit to set aside the award on the ground that the arbitrator had no jurisdiction to make it, but in this case, as he had raised the objection before the arbitration Court which had given a decision on it the suit is barred by the rule of res judicata 33 P L R 365=137 I C 846=A I R 1932 L 378=I R 1932 L 364

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—S. 14—Objection to award permissible under—Objection challenging factum of the reference so far as the party objecting is concerned and going to the root of the jurisdiction of the arbitration is an objection to award permissible under the section A I R 1932 S 20-136 I C 806-I R 1932 S. 66.

—S. 14—Objection filed under relating to matter on basis of which a suit to set aside award is competent—Disallowance of Separate suit by the same party to have same matter inquired into again—not maintainable. A I R 1932 S 20-136 I C 806-I R 1932 S 66.

—S. 14—Words "arbitration and award" in s. 14 and "award" in para. 15, Sch. II, Civil P C., are same A I R 1930 Bom 431 =32 Bom L R 389-54 B 696=Ind Rul. (1930) Bom 401=126 I C 305.

—S. 14—Appellate Court has wider jurisdiction to review awards than the Court of first instance. I R 1930 M 372=122 I C 516=A I R 1930 M 723

—S. 14—Party obeying award can object to the award but a party accepting benefit, even under protest cannot raise objections. I R 1930 S. 36=121 I C 164=A I R 1930 s. 195

—S. 14—Discovery of additional evidence Matter cannot be retried. I R 1930 S 36=121 I C 164=A I R 1930 s. 195

—S. 14—A party cannot afterwards allege that consent to submission was obtained by representation. I R 1930 S. 36=121 I C 164=A I R 1930 S. 195

—S. 14—Where there is only legal as opposed to moral misconduct on the part of the arbitrator, Court can remit the matter. 25 I C 391=41 C 313

—S. 14—Where an arbitrator passes an award without informing either party and not allowing sufficient time to produce evidence, the award must be set aside. 25 I C 391=41 C 313

—S. 14—A suit can be brought to impeach an award on grounds not included within s. 14, 24 C W N 454=31 C L J 283 =56 I C 541

S. 14—Clause in the submission not to dispute award is not binding 11 S L R 43=42 I C 705

—S. 14—No misconduct where the arbitrators act within authority given by reference. I R 1930 S. 33=24 S L R 145=121 I C 161=A I R 1930 S 170

S. 14—Subject matters of arbitration and suit being different the award is not invalid. But if they are same the award is ultra vires A I R 1929 Lah. 564=30 P L R 445=Ind Rul (1929) Lrh 618=117 I C 74. See also 3 Lrh 296=A I R 1922 Lah 369=69 I C 533

—S. 14—An *ex parte* award will be

## ARBITRATION ACT 9 OF 1899 (Contd.)

set aside if sufficient cause is shown for non-appearance. 8 S L R 110=27 I C 135

—S. 14—An arbitrator must be given proper opportunity to explain before determining whether he has misconducted himself in overvaluing the property. 22 S L R 295=113 I C 360=A I R 1928 S. 171

—S. 14—Award passed at A—Suit to set it aside in B Court—Subsequent application under s. 14 at A—Another application under s. 60 C P C to stay proceedings at A on account of pendency of suit at B—A Court held not barred to go into same grounds 23 S L R 427=112 I C 318=A I R 1928 S 169

—S. 14—Where agreement to refer is impeached injunction will be issued to stay proceedings but not where a suit is instituted prior to the award. In both cases the arbitrators proceed at their own risk. Proceedings to file award though not suits under s. 10 C P C are litigious proceedings and are governed by the same principles of general law as are laid down for suits in s. 10 C P C. 4 S L R 187=9 I C 707

—S. 14—Application to set aside an award lies only in that Court in which award is sought to be filed A I R 1928 Sind 169=23 S L R 427=112 I C 318

—Ss. 14, 19—Valid submission to named arbitrators before suit—Application for stay of suit under S. 19 is competent. But, before obtaining an order to stay suit the deft. attempts to oust the jurisdiction of the Court by appointing arbitrators and obtains an award the award is invalid 7 S L R I-20 I C 504.

—S. 14—Sch II, III—Mere failure to pay is a dispute. There is no provision to compel parties to settle exact points of dispute before making reference 5 S L R 7 N=12 I C 187

—S. 14—Taking an independent legal advice is a misconduct A I R 1928 Mad 107=39 M L T 563=27 L W 267 (1928) M. W N 132=107 I C 793

—S. 14—Misconduct after the award will not be considered 95 I C 378=A I R 1925 S 242

—S. 14—It is with the Court to decide as to propriety of reference A I R 1928 Mad 107=39 M L T 563=27 L W 267=(1928) M W N 132=107. I C 793.

—S. 14—Arbitrators, absence at sitting held by umpire or want of their signatures on award are no grounds for invalidating the award. A I R 1926 Sind 242=95 I C 378

—S. 14—An award under English Arbitration Act can be enforced by Indian Courts but it cannot be set aside on ground of misconduct by such Court 95 I C 21 =A I R 1926 C 938=53 C 65.

—S. 14—Arbitrators admitting improper evidence and misled by it—They are

## ARBITRATION ACT 9 OF 1899 (Contd.)

guilty of legal misconduct and it is also an error of law patent on the face of the award. A I R 1924 Sind 75-17 S L R 133 83 I C 353.

—S. 14—A Suit can be brought to set aside an award on the ground of the absence of contract to refer or cancellation of such contract before actual reference.

A I R 1924 Sind 25-81 I C 782

—S. 14—When there is no contract of reference the party has a remedy under s. 14 of Arb Act as well as under s. 39 of Sp. Rel. Act 17 S L R 15-80 I C 969=A I R 1924 S. 105

—S. 14—Award challenged on the ground that there was no submission to arbitration—Remedy lies in a regular suit and not an application under s. 14. 69 I C 568-47 C 806.

—S. 14—No. appeal lies against order setting aside award 79 I C 920=A I R 1925 S 218.

—S. 14—Objections to the award raised and disallowed—Suit on the same ground cannot be brought. 19 S L R 360-76 I C 953=A I R 1925 S. 42.

—S. 14—Misconduct includes neglect of duties and responsibilities; it does not always mean moral turpitude 76 I C 275=A I R 1924 S 132.

—S. 14—Arbitrators can perform ministerial acts in the absence of parties e. g. receiving statements and documents before enquiry etc. 17 L W 648-75 I C 850=A I R 1924 M 274.

—S. 14—Appellate Court will not interfere in absence of misuse of discretion by trial Court A I R 1924 Sind 132-76 I C 275.

—S. 14 and 15—Award alleged to be passed without jurisdiction can be questioned by a separate suit, even after its execution. A I R 1922 P C 374-44 M L J 758-49 I A 366-37 C L J 336-27 C W N 660=(1923) M W N 372-18 L W 537-32 M L T 19 (P C)-70 I C 777-50 C I P C.

—S. 14—Arbitrators proceeding without notice of enquiry to parties vitiates the award. A I R 1923 Mad 222-16 L W 657-70 I C 353.

—S. 14—Suit for declaration that award not filed in Court is not binding on plaintiff is one under Specific Relief Act, s. 42 and not under s. 14 and can also be filed in Subordinate Judge's Court. A I R 1922 Lah 26-4 Lah L J 12-68 I C 187.

—S. 14—Burden lies on the party alleging that the Umpire had acted illegally and refused him hearing in answer to the application to file the Umpire's award. The party must have objected at the time to the Umpire's proceedings in making final award without hearing his witnesses. The duties of an Umpire are the same as those

## ARBITRATION ACT 9 OF 1899 (Contd.)

of arbitrators. 3 U P L R ( All ) 60-64 I C 706.

—S. 14—Umpire required to ascertain damages on basis of future profits that would have accrued if breach of contract had not occurred finding no material to arrive at his estimate but passing award considering all circumstances—Award cannot be set aside. A I R 1930 Mad 723-Ind Rul (1930) Mad 372-122 I C 516.

—S. 14—A condition in a Bill of Lading stated that any disputes thereunder etc should be decided by the British consul at Bushire. Held that the clause should be treated as a submission to arbitration and Civil Court will be Justified in considering whether or not there were good and substantial reasons for not Compelling the plffs to resort to that remedy 15 S L R 88=A I R 1921 S 202.

—S. 14, 9 (b)—Arbitrator cannot be compelled to grant injunction if the case does not fall within s. 9 (b) Grounds for refusing adjournment discussed. A I R 1921 Mad 58-40 M L J 166-44 M 406-14 L W 42=( 1921 ) M W N 148-62 I C 205.

—S. 15—Award neither remitted nor set aside—remains filed and capable of execution A L R 1933 P C 95-37 C W N 401-37 L W 321.

—S. 15—No appeal lies from an order under S. 15—Appeal treated as a revision. 5 S L R 61-10 I C 211.

—S. 15—Award on submission cannot be made decree of Court—It is only to be filed in Court. I R 1930 L 526-124 I C 318=A I R 1929 L 882.

—S. 15—An award is a decree for the purposes of execution only. I R 1929 C 408-32 C W N 608-115 I C 584=A I R 1928 C 840.

—S. 15—Appeal lies against order in execution of an award. A I R 1929 Lah 228-Ind Rul (1929) Lah 408-115 I C 536. See also A I R 1921 Sind 132-18 S L R 245-79 I C 477.

—S. 15—Enforcement of an award under the Act against a firm cannot be refused. C P C, O 21, r. 50 applies to such awards. 23 S L R 422-112 I C 126=A I R 1929 S 28.

—S. 15—And in such a case questions as to partners constituting the firms is to be enquired into by the executing Court. A I R 1925 Sind 293-19 S L R 1-86 I C 101.

—S. 15—Award against a firm—Individual partners not served with notice of arbitration or of filing the award—Award cannot be executed against them A I R 1927 Bom 428-29 Bom L R 660-104 I C 94

—S. 15—Execution applications for awards filed in Chartered High Courts

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under s. 15 are governed by Art 183 of Lmt Act A I R 1927 Cal 853=31 C W N 1097=104 I C 808.

—S. 15—Provisions of C P C and Lmt. Act regarding execution apply. 27 C W N 666=77 I C 868=A I R 1924 C 117. See Also 6 L L J 564=75 I C 927=A I R 1924 L 544.

—S. 15—Award enforced by execution—Suit still lies to have it declared void—Award when filed is to be executed like a decree but is not decree itself A I R 1922 P C 374=18 L W 537=49 I A 366=50 C 1=32 M L T 19=37 C L J 336=44 M L J 758=27 C W N 660=(1923) M W N 372 (P C)=70 I C 777.

—S. 15—Application for execution of award is not for execution of order under Dek. Agr. Relief Act s. 22, 14 S L R 217=60 I C 942.

—S. 15—Parties adversely affected by the award which is filed must be given opportunity to move for its remission or setting aside before such award becomes enforceable. 66 I C 796=A I R 1922 S 6.

—S. 15—Registrar of the Rangoon High Court filing award without complying with the High Court rules and the provisions of the Act, filing is illegal Court must rectify matters and begin afresh under its inherent powers. 102 I C 800=A I R 1927 R 197=5 R 171.

—S. 15—Order directing award to be filed is not necessary under the Act 107 I C 793=39 M L T 563=27 L W 267=1928 M W N 132=A I R 1928 M 107.

—S. 15—In a suit for partition and possession referred to arbitration if the award merely declares the share of the parties it should be remitted to the arbitrator, for a declaratory award is incapable of execution. 6 S L R 146=19 I C 374

—S. 17—Order as to costs cannot be passed by Court where reference to arbitration has been held not valid 54 M L J 580=1928 M W N 228=27 L W 803=109 I C 175=A I R 1928 M 370.

S 19-S. 104 (1) (e), C P C relates to an order under para. 18 of Sch. II thereto and is inapplicable to the Arbitration Act The Arbitration Act is complete in itself and not affected by rules as to appeal laid down in the C P C With reference to Sch II 13 L 59=A I R 1931 L 644=132 I C 850=33 P L R 887.

—S. 19—No appeal lies from an order under s. 19 A I R 1931 Lah 66=Ind Rul (1931) Lah 337=130 I C 769.

See Also 82 I C 81=A I R 1923 s. 25; and 183 P W R 1908=144 P R 1908; and 17 S L R 195=81 I C 759=A I R 1923 S 38 (F B).

—S. 19—Order staying suit is appeal-

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able. A I R 1925 All 154=47 A 179=L R 5 A 756 Civ=22 A L J 1031=85 I C 341.

—S. 19—After appearance, meaning of Stay-order granted—Appeal against order granting—Onus. 12 S L R 34=48 I C 434.

S. —19—Order refusing to stay proceeding under s 19 is not a judgment within Letters Patent (Rangoon). Art. 13 —No appeal lies. A I R 1929 Rang. 287=7 R 481=Ind Rul (1930) Rang 18=120 I C 225.

—Ss. 19 and 4—"Court" means the Court of Dist Judge as used in s. 4., and the application for stay should be made to Dist Court 13 S L R 23=52 I C 139 F B.

Per Prall J deffering—"Court" means trying Court and not Dist Court and application for stay must be made to trying Court. This view was upheld in later cases—A I R 1931 L 644=I R 1931=132 I C 850 and A I R 1931 S 106=I R 1931 S 142=134 I C 398. But See 13 P L T 169=I R 1932 P 109=A L R 1932 P 315=136 I C 445.

—S. 19—"Court" means trial Court and not District Court I R 1931 L 337=130 I. C. 769=A I R 1931 L 66 (relying on A I R 1921 A 219; and A I R 1921 B 185; and A I R 1928 B 275.) See to the same effect. 19 A L J 495=63 I C 813=A I R 1921 A 219=43 A 553; and 60 I C 951=47 C 1020 (stay is in discretion of trial Court).

—S. 19—Suit disputing validity of contract containing submission clause—Reference under the clause during pendency of suit is competent. A I R 1928 Sind 91=22 S L R 429=107 I C 220.

—S. 19—Where a contract containing arbitration clause is avoided due to reasons "dehors" the clause cannot be enforced. A I R 1929 Bom 242=53 B 573=31 Bom L R 426=Ind Rul (1930) Bom 53=121 I C 437.

—S. 19—Defendant not served and not having entered appearance, applying for copy of plaint and for leave to enter appearance—Acts are not "steps in proceedings"—Any act in the nature of an application to the Court indicating that a party was willing that the suit should proceed, would be a step within s. 19 A I R 1925 Cal 801=52 C 453=88 I C 929.

—S. 19—Any application to the Court is a "step in the proceedings" irrespective of its nature or intention. 10 S L R 190=40 I C 81.

—S. 19—Deft's counsel orally asking for further time to file a written statement in reply to the Court's question is a step in the proceeding. 28 C W N 771=81 I C 846=A I R 1924 C 789.

—S. 19—Party applying for injunction restraining arbitration must prove that

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balance of convenience was against arbitration. 15 S L R 5=70 I C 864=A I R 1921 S 114.

—S. 19 Matter must be proved to have been agreed to be referred to arbitration. 34 C L J 173=66 I C 741=A I R 1921 C 255.

—S. 19—Party opposing the stay of suit must show why matter should not be referred to arbitration as per agreement. A I R 1921 Cal 244=47 C 849=25 C W N 62=61 I C 380.

See Also 31 Bom L R 21=A I R 1929 B 385=117 I C 417=A I R 1929 B 119=53 B 271.

—S. 19—In an application for stay of suit it is prima facie the duty of the Court to stay the suit and the onus is on the party opposing to show why he should not be bound by his agreement to refer. 13 S L R 201=56 I C 76.

—S. 19—Court should stay suit upon proof of agreement—Plaintiff must prove grounds for not staying suit—Refusal to stay the suit on the sole ground that there was a breach of warranty on the part of one of the defendants is irregular exercise of jurisdiction and is revisable. A I R 1924 Sind 49=75 I C 1041.

—S. 19—English decisions subsequent to English Arbitration Act should not be applied—English Courts exercising greater control over arbitration should not be the main reason for refusing stay. A I R 1929 Bom 119=53 B 271=31 Bom L R 21=Ind Rul (1929) Bom 385=117 I C 417.

—S. 19—Suit will not be stayed where prima facie case of fraud is made out 39 C L J 504=83 I C 934=A I R 1924 C 796.

—S. 19—Suit must be stayed absolutely when matter is referred to arbitration 19 A L J 495=63 I C 813=A I R 1921 A 219=43 A 553.

—S. 19—Principles of granting stay discussed. 60 I C 951=47 C 1020.

See Also. 45 M L J 653=33 M L T 103=1923 M W N 772=18 L W 752=76 I C 1011=A I R 1924 M 336=47 M 164.

—S. 19—An arbitration tribunal in which the ultimate decision rests with the nominee of a class having a particular interest is not an impartial tribunal. In such a case the Court should retain its jurisdiction to try the suit. 12 S L R 41=47 I C 783.

—S. 19—In a suit upon a cross contract merely for the determination of the amount payable by one to the other the debt is not entitled to a stay order pending a reference to arbitration. 14 S L R 99=58 I C 799.

—S. 19—Presidency Small Cause Court can stay. 30 Bom L R 661=111 I C 641=A I R 1928 B 275=52 B 420.

—S. 19—On point of law having arisen the Court may refuse stay if it is a

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point which should properly be decided by Judge. 19 S L R 168=98 I C 151=A I R 1926 S 286.

—S. 19—Arbitrators can decide questions of law and the mere fact that a difficult or complicated question of law is raised is not sufficient to take the matter out of the arbitrator's hands 13 S L R 201=56 I C 76.

—S. 19—Suit by Receiver of an adjudicated bankrupt—Contract by the bankrupt containing arbitration clause—Difficult question of law involved—Sufficient cause to refuse stay of suit. 8 S L R 50=27 I C 138.

—Ss. 19 and 2—High Court can order stay proceedings pending in Presidency Small Causes Court—Letters Patent (Calcutta), cl. 12 is no bar. A I R 1930 Cal 51=56 C 755=33 C W N 888=Ind Rul (1930) Cal 158=121 I C 574.

—S. 19—Bill of lading containing clause to refer to arbitration—arbitrators and umpires to be residents of London—submission to be made a rule of High Court of England—suit for short deliveries—application for stay maintainable in India—Contract Act s. 28—applicability. A L R 1933 S 63=26 S L R 497=139 I C 769=I R 1932 S 157=A I R 1932 S 111.

See to the same effect. A I R 1930 B 185=32 Bom L R 43=I R 1930 B 301=124 I C 797=55 B 278.

—S. 19—Scope of—contract between the parties to refer disputes to arbitration—would not oust the jurisdiction of the civil Courts, A L R 1933 L 146=33 P L R 1020=A I R 1933 L 79.

—S. 19—Party should apply for stay at the earliest opportunity. 22 S L R 269=107 I C 434=A I R 1928 S 94.

—S. 19—No application for stay lies where dispute does not arise out of the contract. 82 I C 81=A I R 1923 S 25.

—S. 19—Conflicts with r. 43 of Cal. Small Cause Court; so application under s. 19 should be made promptly before decision as to costs, Application in High Court is sufficient appearance. A I R 1930 Cal 51=56 C 755=33 C W N 888=Ind Rul (1930) Cal 158=121 I C 574.

—S. 19—Provided all the defendants are bound by the submission clause, it is not at all necessary for all of them to apply for stay, or to show their willingness to submit disputes to arbitration. It is sufficient if one of them does so, and wishes to take advantage of the submission clause A I R 1932 S 111=139 I C 769=I R 1932 S 137.

—S. 19—Parties can claim stay of suit as of right. Omission to object to litigation is not fatal. A I R 1924 Mad



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336=45 M L J 653=18 L W 752=33 M L T  
103 (H C)=(1923) M W N 772=47 M 164  
=76 I C 1011

—S. 19—Suit not stayed—Award is no bar to the suit— 95 I C 481=A I R 1926 S 86

—S. 19—Withdrawal or dismissal of a suit during pendency of which the award had been passed revives the award and the award is valid A I R 1928 Sind 169=23 S L R 427=112 I C 318

—Sch. 1 cl. (3)—Arbitrators delivering award more than three months after the date of a notice calling on them to act but within three months of the day when they began to hear the reference—Award is valid. 20 A L J 272=L R 3 A 227=66 I C 907=A I R 1922 A 106=44 A 432

—S. 19—Suit stayed—Award passed—Decree passed on award—Stay order cannot be set aside—Stay order is sufficient to dispose of the suit—No final decree dismissing the suit is necessary—19 A L J 19=2 U P L R (A) 387=59 I C 784=A I R 1921 A 275=43 A 279

—S. 19—Suit filed before arbitration began—Award come to during suit—Stay of suit not obtained—Award is not invalid but it cannot be filed till stay application is disposed of—In such cases the correct order is to reject the award and order it to be represented after the Court disposes of the application under s. 19 or otherwise ceases to be seized of the case without adjudication on the merits. A I R 1924 Sind 146=17 S L R 228=87 I C 83

—S. 19—Filing of suit despite agreement to refer, deft omitting to apply for stay amounts to waiver. A I R 1922 All 48=44 A 292=20 A L J 128=L R 3 A 96=65 I C 795

—S. 19—Purchaser signing indent form containing arbitration clause. The agent telegraphed the order without mentioning the arbitration clause. Held, the clause was nevertheless binding. 32 C W N 1101=A I R 1929 C 524=117 I C 540=A I R 1929 C 97=56 C 118

—S. 19—Where in spite of reference under arbitration clause a suit was brought Held, the award is of no effect unless suit has been stayed pending arbitration. 38 C L J 67=60 I C 895=A I R 1921 C 770

—S. 19—Party repudiating contract cannot be allowed to rely upon a subsidiary term in the contract and demand a reference to arbitration, 14 S L R 91=58 I C 790

—S. 19—Suit can be brought to impeach clause for arbitration. 14 S L R 123=61 I C 141

—S. 19—A clause in marine insurance policy providing for reference to arbitra-

## ARBITRATION ACT 9 OF 1899 (Contd.)

tion all disputes in England amounts to a submission to arbitration. 26 Bom L R 224=A I R 1924 B 381=89 I C 523

—S. 19—On construction of a clause to refer to arbitration. Held, it related both to the case of short delivery as well as non-delivery. A I R 1923 Lah 453=5 Lah L J 146=4 Lah 168=73 I C 439

—S. 19—Contract—Arbitration clause in—Enforcement of—Assignee of subject-matter of contract by act of one of parties thereto—Enforcement of clause by—Enforcement of clause against—Permissibility Distinction. A I R 1932 S 128

—S. 19—Agreement to refer to arbitration must be pleaded at earliest time. A I R 1923 All 139=20 A L J 975=L R 4 A 22 Civ=71 I C 144

—S. 19—Failure in having differences solved by arbitration does not affect the validity of the arbitration clause though the arbitration was found to be invalid but parties believed it to be valid all the time. A I R 1929 All 455=51 A 874=(1929) A L J 877=Ind Rul (1929) All 572=116 I C 444

—S. 19—Contract for delivery of goods—Extension of time for delivery is not a new term varying the whole but a new term about inspection of goods is such a term, and in the latter case arbitration clause in the original contract has no effect. 17 C W N 1098=21 I C 217=41 C 35

—S. 19—Mere threat to file suit does not mean unwillingness to submit to arbitration. 22 S L R 286=106 I C 565=A I R 1928 S 97

—S. 19—Mere intention to apply for stay is not a submission to Court's jurisdiction. 22 S L R 286=106 I C 565=A I R 1928 S 97

S. 19—Court merely correcting plff's name during arbitration after stay of suit does not destroy arbitrators jurisdiction, and the suit does not become a new suit. 43 C L J 297=94 I C 182=A I R 1926 C 722

—S. 19—Power of Court extends only so far as stay of proceedings. After such stay the arbitration takes place by reason of the submission by parties. A I R 1926 Cal 722=43 C L J 297=94 I C 182

—S. 19—Filing of suit renders subsequent proceedings before the arbitrators null and void but it has no retrospective effect. 25 C W N 62=61 I C 380=47 C 849

—S. 19—Party has a choice as to file a suit or to refer to arbitration as per agreement but costs will fall on the deft if he led plaintiff to file suit. A I R 1924 Mad 336=47 M 164=18 L W 752=33 M L T 103=(1923) M W N 772=45 M L J 653=76 I C 1011

**ARBITRATION ACT-9 OF 1899 (Contd.)**

—S. 19—Time in respect of readiness and willingness to refer to arbitration is to be determined when a party brings the suit and the other party is called upon to hear. 22 S L R 286=106 I C 565=A I R 1928 S 97

S. 19—Objection to the stay of suit on the ground that the suit was based on an alleged custom which was inconsistent with the contract. Held the arbitrators had power to go into the question of custom. 14 S L R 74=58 I C 506

—S. 19—Bengal Chamber of commerce can on stay of suit under s. 19, appoint new arbitrator and proceed with the arbitration. 25 C W N 62=61 I C 380 =A I R 1921 C 244

—S. 19—Vender and purchaser under C. I. F. Contract—Arbitration clause in with reference to dispute between parties in connection with the agreement—"Bills of exchange drawn by vendor's bank on purchaser for invoice value of goods and endorsed by it to vendor after acceptance by purchaser—Vendor's suit on—Stay of cannot be ordered. 1932 A L J 1055=A L R 1933 A 101

**ARBITRATOR.**

See Arbitration.

See Civ Pro Code 1903. sch II.

See Arbitration Act 1899.

**ARCHAKA.**

See (1) Hindu Law-Rel Endow.

(2) Religious Endowments.

**ARCHITECT.**

See Contract—Breach of Contract.

**ARIAT**

See Mohmedan Law-Gift.

**ARMS**

See Arms Act 1878

**ARMS ACT II OF 1878**

[Rep. in Pt., Act XII of 1891; Declared in force—In the Sonthal Parganas. Reg. III of 1872, s. 3; as Amended by Reg. III of 1899, s. 3; In Upper Burma (Except the Shan States) Act XIII of 1898, s. 4.]

S. 25—A magistrate has no power to make search under Sec 25 of the Arms Act, unless he first satisfies the condition imposed by the said section. 39 Cal 953=10 A L J 193 =16 C L J 231=16 C W N 865=23 M L J 32=14 Bom L R 717=39 I A 163=(1912) M W N 769=12 M L T 171=16 I C 501=13 Cr L J 693 P C.

**ARMY ACT (44 & 45 Vict. C. 58)**

—Ss. 136, 144—Pay of a non-commissioned officer cannot be attached in execution of Civil Court decree. 11 Bur L T 130=3 U B R 20=42 I C 90

—Ss. 136, 151—Pay of an officer of H. M's. regular force is exempt from

**ARMY ACT (44 & 45 Vict. C. 58) (Contd.)**

attachment in execution of a money decree.

9 I C 1023=8 A L J 487=33 All 529

See also 17 I C 13=37 B 26

—S. 136—As to attachment of salary of an Honorary Commissioned officer of the Indian Subordinate Medical service sec. 17 O C 91=23 I C 935

—S. 144—Army Act applies to military assistant surgeon and therefore his pay is exempt from attachment. 14 O C 92 =10 I C 719

—Sec 145—of the Army Act would prevail over the provisions of the C P Code 21 Bom L R 137=50 I C 427=43 B 368

**ARMY ACT 8 OF 1911**

—Ss. 2 and 120—Pay of the Army Asst. Surgeon is exempt from attachment A I R 1926 All 122 (2)=48 A 73=23 A L J 929=L R 6 A 578 Civ=89 I C 882

—S. 120—Portion of pay set aside towards security is pay withheld and not liable to attachment although ordered to be refunded. A I R 1930 Lah 105=Ind Rul (1930) Lah 132=120 I C 676

—S. 120—Salaries and allowances of persons coming under the Act are protected, despite regimental orders providing such persons are to be treated as civilians. A I R 1930 Lah 105=Ind Rul (1930) Lah 132=120 I C 676

**ARMY REGULATIONS**

—A transfer which otherwise legally valid cannot be avoided under the rules in App IV of Vol II, as these rules have no force of law though a person taking Cantonment land subject to those rules is bound by them. 22 A L J 354=L R 5 A 242 Civ =78 I C 642=A I R 1924 A 415=46 A 427

**ARRACK**

See Madras Abkari Act 1 of 1886.

**ARRANGEMENT**

See also Hindu Law-Family Atrange-ment.

**ARREARS**

See C P Code, s. 60.

See Hindu Law-Maintenance

See Landlord and Tenant

See Mesne Profits

See Mahomedan Law-Maintenance

**ARREARS OF MAINTENANCE**

See Crim. Pro. Code, s. 488

See Hindu Law-Maintenance

See Mahomedan Law-Maintenance

See Maintenance

**ARREARS OF RENT**

See Landlord and Tenant

See Rent

—Limitation for suit to recover arrears of rent. See Lmt Act art. 110.

**ARREARS OF SUBSCRIPTION**

—To a newspaper-limitation for a suit to recover see Limitation Act, 1908, art. 42

**ARREARS, SALES OF LAND FOR REVENUE**

Act I of 1845

[Rep., (In Bengal and Eastern Bengal),  
Act XI of 1859; (In Punjab), Act XII of  
1873; (In Agra, except certain areas), Act  
XIX of 1873.]

See also cases under :—

(1) Enhancement of rent

(2) Sale—Sale for arrears for Revenue and Cess.

(3) Mortgage

(4) Benami Transactions

See also "Hindu Law Joint Family."

—S. 26—Lakhiraj lands are within the  
exception in the section. 5 B L R 529=13

M I A 438=14 W R 28 P C

—S. 26 (3)—A Khudkhash Kudeemee  
ryot having a right of occupancy at a fixed  
rent (but not a mere Khudkhash for 12  
years) cannot be evicted under s. 26 (3) by  
the Auction-purchaser. [1 W R 6

**ARREST**

See C P Code ss. 55-59 and 134-136  
and O 21, rr. 37-40

**ARREST BEFORE JUDGMENT**

See C P Code s. 94, O 38, rr. 1-4

**ARREST OF SHIP**

See Salvage

**ARTICLED CLERK**

See Calcutta High Court Rules r. 98

**ARTICLES OF ASSOCIATION**

See Companies Act

See Company

See Stamp Act Sch. art 18.

**ARTIFICER**

See workman's breach of contracts  
at XIII. of 1859

**ARTIZANS**

(1) C P Code S 60

(2) Words and Phrases

(3) Workman's Breach of Contract Act

**ASCETICS**

See also (1) Hindu Law-Inheritance

(2) Hindu Law—Succession to Religious Persons

(3) Hindu Law—Rel. Endowments.

**ASSAM AND BENGAL LAWS**

See Bengal and Assam Laws Act VII  
of 1905

**ASSAM, BENGAL AND AGRA CIVIL COURTS.**

See Bengal N W Provinces and Assam  
Civil Courts Act (XII of 1887)

**ASSAM FOREST REGULATION VII of 1891.**

—S. 17—When a claim filed or objec-  
tion taken before a Forest Settlement  
Officer under the Regulation is disallowed  
and no appeal is preferred, the final noti-  
fication declaring the forest to be a reser-  
ved forest cannot be impeached. 24 C W

N 645=58 I C 338=47 C 889

**ASSAM LAND AND REVENUE REGULATION**

(I of 1886)

—S. 10—Illegal closure of the depot  
by Collector—Dismissal of recruiting officer

—Liability of Sec of State—Torts of  
Public servant. 37 Mad 55=24 M L J 429

=1913 M W N 158=19 I C 353

**ASSAM LAND AND REVENUE REGULATION**

(I OF 1886) (Contd.)

—Ss 3 (b), 97 (3), (b) and 96—A  
revenue Court has jurisdiction under s. 97  
to effect a partition of an estate when the  
lands of that estate in whole or in part,  
are joint with lands of other estates. A  
partition affecting distribution of revenue,  
should be effected not by a Civil Court  
but by Revenue Court. 30 C L J 489=47

Cal 354=55 I C 180

—Ss. 97 (3), (b) and 96—A Revenue  
Court has jurisdiction under s. 97 to effect  
a partition of an estate when the lands of  
that estate in whole or in part, are joint  
with lands of other estates. A partition  
affecting distribution of revenue, should  
be effected by Revenue Court only. 30 C

L J 489=47 C 354=55 I C 180

—Where a statute confers jurisdiction,  
it impliedly grants also the power to do  
such acts, adopt such measures, and employ  
such means as are necessary to its execu-  
tion. A I R 1922 Cal 118=26 C W N 381=

47 Cal 354=30 C L J 489=55 I C 180

—Ss. 6, 71—Does not entitle a pur-  
chaser to eject any tenant having a right  
of occupancy or to enhance the rent except  
according to law.

If a raiyat uses the land for more  
than 12 years for agricultural purpose, the  
mere fact that a part of the land is still  
covered by jungle, cannot prevent him  
from acquiring a right of occupancy—even  
though the landlord under whom he held,  
had no title to the land (s. 6). 23 C L J

638=29 I C 834

S. 8 Subl c l. (b)-S. 8 (1)—The mere  
recognition by the grantor of a third person  
as successor of the original grantee does not  
affect the rights of heirs. 15 C L J 241=13

I C 377

—S. 12—It is not open to the Civil  
Court to examine the correctness or suffi-  
ciency of the reasons, if once it appears  
that the revenue authorities have Complied  
with the provisions of R. 57. 24 C W N 149

—Ss. 23 and 154—The Civil Court  
has Jurisdiction to entertain a suit regard-  
ing the boundary dispute, if the order of  
the Deputy Commissioner deciding the  
dispute, does not purport to be passed  
under s. 23. 53 I C 529.

—S. 28 proviso 2 and 4—Right of  
Government to assess revenue is barred by  
limitation if property is held without assess-  
ment for 60 years. 43 Cal 973=20 C W N

576=23 C L J 506=32 I C 774

—Ss. 35, 36, 39 and 154 (1)—Where  
the revenue authorities refused to register  
the names of some persons who were out  
of possession, it was held that a suit in a  
Civil Court—for declaration of titles etc—  
was maintainable.

Ss. 35 and 36 have no application to  
cases of refusal of settlement by Revenue  
authorities.

## ASSAM LAND AND REVENUE REGULATION

( 1 OF 1886 ) (Contd.)

Sub-section (1) of s. 154 is controlled by the concluding clause of s. 39. 23 C W N 540=22 C L J 328=31 I C 424.

—Ss. 63, 67—Sale for arrears of revenue—Joint proprietors—Adverse possession before sale—Not an incumbrance—Suit by purchaser for possession—Limitation. 44 C 412

—S. 70—When a sale is held under S. 70 the purchaser is entitled to take that estate as against the defaulting proprietors which includes a person acquiring title by adverse possession to the estate sold. 24 C L J 60=37 I C 252.

—Ss. 70, 79, 80 and 85—A person who was in adverse possession of lands and who had not at the time of sale under S. 70 completed the statutory period required to confer a good title on him—was not a defaulting proprietor. Adverse possession is to be reckoned from the date when the sale becomes final under S. 80. 24 C L J 62=37 I C 239.

—S. 70—Adverse possession is an incumbrance in connection with a sale under the section. 20 C L J 210=23 I C 119

—S. 70—Encumbrance, Meaning of—Adverse possession for statutory period before sale. 31 I C 801

—S. 80—Date of confirmation in the sale certificate is not conclusive. A I R 1928 Cal 870=32 C W N 778=Ind Rul (1929) Cal 430=115 I C 606

—S. 80—Lmt Act. art. 142 or 144 governs the suit by auction-purchaser under s. 80 to recover possession. Symbolical possession is a good defence so far as any defaulting proprietor was concerned if the suit is brought within 12 years. A I R 1928 Cal 870=32 C W N 778=Ind Rul (1929) Cal 430=115 I C 606

—S. 86—Rights of the members of a joint Hindu Family are not affected by the section. 64 I C 260

—S. 97—Questions as to the mode in which the partition is to be carried out must be raised before the revenue authorities.

A person can claim imperfect partition from revenue authorities under S. 97. 49 Cal. 236=46 I C 967

—S. 97—If some or all the lands included in the estate are the joint lands of several estates the right to partition is not negated. Where a Statute confers jurisdiction power to carry its execution is implied. 26 C W N 381=69 I C 814=A I R 1922 C 118

—S. 97—Revenue Court alone can entertain an application for partition of portion of estate. 65 I C 83

—S. 154 (1)—The section preserves the right of Civil Court to determine the

## ASSAM LAND AND REVENUE REGULATION

( 1 OF 1886 ) (Contd.)

shares of the parties. A I R 1928 Cal 130=55 C. 448=32 C W N 248=105 I C 647

—S. 154—Does not bar a suit for declaration of title and possession by co-sharer. 19 C W N 1068=30 I C 690

—S. 154—S. 154 is no bar to a suit for a declaration that certain plots of land settled first with the plaintiff by the Revenue authorities had been wrongly included in the settlement with the defendant. 17 C L J 118=18 I C 745

—S. 154—The section does not always bar a suit for partition of a revenue paying estate, 77 I C 715 =A I R 1924 C 233=50 C 948

—Ss. 154 (1), 39—S. 154 (1) is governed by last clause of S. 39. 22 C L J 328

## ASSAM MUNICIPAL ACT 1 OF 1923.

—S. 30—Chairman cannot delegate his powers without written order—Act done by Vice chairman with the chairman's express or implied consent is not invalid. 48 C L J 293=112 I C 780=A I R 1928 C 357

## ASSAULT.

See Torts.

See Damages.

## ASSESSMENT.

See also cases under;—

(1) Beng. Act IV of 1876 ss. 75, 77, 79  
(2) Assam Land and Revenue regulation s. 28.

(3) Contract Act S. 69

(4) Bombay Land Revenue Code.

(5) Landlord and tenant.

(6) Rent.

(7) Revenue

(8) Regulations—Beng. Reg. II of 1805 s. 2.

(9) Mortgage

—In assessing a tax based on the annual letting value of premises, the annual income derived from the premises cannot legally form the basis of calculation. 16 Bom L R 121=23 I C 779=38 B 293.

—As to principles of assessment in case of lease of certain lands for crushing salt see. 20 BOM L R 639

—Ryotwari lands—Right of Govt. to impose any assessment at their discretion. 1914 M W N 388

Limitation as to right of Govt to impose assessment see. 28 M L J 392.

—Of damages may be approximately stated in plaint with offer to pay additional Court-fee if more damages are found due—S. 50 Civ. Pro. Code does not prevent it—Court Fees Act 1870, s. 11, 17 M L J 625

—Refund by way of contribution by Government—Jurisdiction of Civil Courts. 13 M L T 293.

**Assessment, Land Revenue, Madras Act.**

See Madras Land Revenue Assessment Act (I of 1876)

**Assessment of new lands, amending Act IX of 1847.****ASSESSOR.**

See Land Acquisition Act 1870

**ASSETS.**

See also (1) C P Code Ss. 50, 53-73  
(2) Insolvency Act.

Assets what are—Administration suit—Neg. securities ended over to Banks for loans by deceased. 18 C W N 631-41 C 771-26 I C 284.

**ASSIGNEE.**

—Whether an assignee of promissory note can sue after assignment made C P Code S. 20 (c). 31 M L J 816-5 L W 246-37 I C 681.

—Assignee will be estopped from denying assignor's title. 18 C W N 1194-19 C L J 313-24 I C 387.

—Whether an assignee of an assignee can be brought on record when first assignee not on record. C P Code O. 20 R 12, 18 C W N 450-20 I C 685.

**ASSIGNMENT.***Synopsis.*

- (1) Effect. 1-9
- (2) Assignment *Peulenti Lite* 10
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- (4) Equitable assignment 12-15
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- (6) Mortgage assignment of 17-23
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See also cases under;—
  - (1) Benami Transactions.
  - (2) Champerty.
  - (3) Contract act Ss. 23 and 62
  - (4) Contracts Suits on.
  - (5) C P C (1908) Ss. 58, 64, 73, 143 and order 20 rr. 2, 7, 12 order 21 r. 13, order 34, r 6
  - (6) Debtor and creditor.
  - (7) Guardian.
  - (8) Hindu Law—Alienation.
  - (9) Limitation Act S. 22 and arts 61, 95, 97, and Sec 6 and 8.
  - (10) Mahomedan Law—Gift.
  - (11) Mortgage.
  - (12) Negotiable Instruments Act. Ss. 48, 51, and 78
  - (13) Negotiable Instruments—Hundies Pro—Note.

**ASSIGNMENT (Contd.)**

- (14) Registration Act S. 17
- (15) Transfer of property Act Ss. 3, 6, 53, 55, 59, 108, 130 to 137.

**(1) Effect 1-9**

1—Assignment of debt includes arrears of interest accrued due before assignment. T P Act S. 8, 27 I C 896-37 A 177.

2—Where a person transfers his property the consideration in part for the transfer being the discharge of a debt due to his creditor, the assignee and not the assignor unless otherwise provided, gets the benefit of any remission made by the creditor of the assignor. 9 M L T 79-9 I C 208.

3—Insolvency of judgment-debtor—Substitution of Official Assignee for judgment-debtor—Notice under S. 248 of the C P Code of 1882—Necessity for—Sale without notice—Effect—Insolvent Debtors (India) Act, S. 49-27 M L J 150 (P C)=1914 P C 129-42 C 72-41 I A 251-16 Bom L R 814-20 C L J 555-18 C W N 1058-24 I C 304.

4—Assignor has a lien of the nature of a trust or charge on the moneys received under the assignment of right to collect rent. The assignor's position is not that of an unsecured creditor in case of assignee's bankruptcy. A I R 1924 Mad 780-47 M L J 528-(1924) M W N 701-82 I C 960.

5—Personal covenants by a purchaser do not bind his vendee. A I R 1924 Mad 358-18 L W 610-(1923) M W N 780-76 I C 1003.

6—Assignee of a promissory note is entitled to make good any mistakes in calculations of interest. 44 M L J 685-18 L W 210-74 I C 785-A I R 1923 M 667-46 M 259.

7—Property in possession of tenant if assigned, assignee is bound to enquire from tenant as to extent of his rights in the premises. A I R 1927 Cal 270-91 I C 113.

8—In a suit on a pro-note by the assignee, the executors cannot question the validity of assignment for want of consideration but they can satisfy themselves that the assignee is the legal holder of the note and able to give a good discharge. 37 All 99-13 A L J 19-27 I C 509.

9—Where a person assigns property (decrees) in favour of another for a definite sum to be paid by the assignee to a third party, and if the assignee fails to pay to the third party as agreed upon, the assignor can recover the same. 36 Mad 364-21 M L J 983-(1911) 2 M W N 227-10 M L T 300-12 I C 353.



**ASSIGNMENT (Contd.)****(2) Assignment Pendenti Lite. 10**

10 Pending attachment—Effect on, by dismissal of execution proceedings for default—Fresh attachment directed by court. Execution. 19 C L J 248.

**(3) Burden of proof 11**

11—If the Court decides a question of fact on the evidence adduced by the parties to the suit the decision stands good even though no specific issue was framed, provided the parties are not prejudiced thereby. In the case of an assignment it is the assignee who has to prove the reality of the consideration. 10 I C 291=9 M L T 407

**(4) Equitable assignment 12-15**

12—Assignment of property not then in existence cannot operate according to its tenor though it may create equitable rights. A I R 1931 P C 203=Ind Rul (1931) P C 276=134 I C 324

13—Assignment—debtor agreeing to pay creditor out of a specific fund—operates as an equitable assignment. A L R 1933 L 71 =A I R 1933 L 102

14—Authority to collect amount of decree and pay himself out of the collections is an equitable assignment. 43 I C 385.

15—Payment out of fund—When operates as equitable assignment, C P Code. O 20=38 Mad 500

**(5) Fraud effect of 16**

16—Fraud in—Of creditors—Single Creditor cannot sue to cancel assignment. T P Act S 53. 42 I C 498

**(6) Mortgage, assignment of 17-23**

17—When an assignee of the mortgage institutes a mortgage suit, a decree-debt subsequent to the date of the assignment against the assignor cannot be allowed to be set-off.

The doctrine of equitable set-off is confined to unascertained sum arising out of the same transaction. 40 Mad 683=20 M L J 615=(1916) 1 M W N 351=34 I C 859

18—Mortgage—Voidable on the ground of fraud or undue influence—Payment by mortgagor after notice from assignor asking not to pay—Validity off—Effect of decree setting aside assignment. 27 M L J 134

19—Where in a mortgage suit, one defendant, also assignee of a mortgage from another defendant put forth his claim as such assignee, the Court is bound to adjudicate upon his claim, instead of making

**ASSIGNMENT (Contd.)****(6) Mortgage assignment of (Contd.)**

him a party expressly as assignee. 9 M L T 410=9 Ind Cas 643

20—Of—Mortgage—Right of assignee to recover full amount of mortgage. 215 P L R 1914

21—Mortgage—Consideration for, not to be questioned by mortgagor. 28 I C 825.

22—Mortgagee privy to collateral agreement between mortgagor and tenant. Subsequent assignee of mortgagee's interest is bound by the agreement. 91 I C 113=A I R 1927 C 270.

23—Rent paid in advance to landlord who had assigned, the assignee is not bound by such payment which cannot be regarded as rent at all. 91 I C 113=A I R 1927 C 270.

**(7) Notice of Assignment :24.**

24—Debtor is entitled to a valid discharge for payment made by him to the assignee after the fact of a assignment was communicated to him and the before the assignment was set aside by the assignor by giving him a notice. 27 M L J 134=15 M L T 331=1 L W 419=23 I C 607

**(8) Rights of third parties 25-26**

25—A third party can impeach an assignment, even though admitted by the assignor, on the ground that the whole transaction was a sham transaction. 12 Bur L T 9=51 I C 530

26—An adverse party cannot object to the assignment as invalid for want of consideration but he can do so if the assignor being a party to the litigation pleads that it was fictitious and without consideration. 43 I C 74

**(9) What amounts to assignment 27-29**

27—Compromise with a benamidar does not amount to an assignment. 25 I C 555

28—A society undertook to a pay a particular person by a contract with a member. The person is entitled to the money, though the member can change the nomination or even make the fund his own by merely observing the formalities of the rules. 33 M L J 476=42 I C 677

See also 39 M L J 391=60 I C 239 =43 M 728.

29—Lien for unpaid purchase money—Assignment of, to be by conveyance—Impaired transfer, not to be recognised. T P Act Ss. 12 and 55 (4). 32 M L J 347=1917 M W N 166=3 J I C 405

**ASSIGNMENT (Contd.)****(10) Miscellaneous Cases 30-34**

30—The proposition that an assignment of the income means an assignment of the corpus is not of universal application. It depends upon the term of the grant and its construction. Where the gift or devise is not of specific share of the rent or profit of the property, the proposition has no application. 11 P 288=A I R 1932 P 33=12 P L T 817=136 I C 417=A L R 1932 P 373.

31—Consideration for—Absence of—Plea by third party of—not maintainable. 138 I C 876=A I R 1952 A 648=I R 1932 A 504=A L R 1933 A 48

32—Admissions by assignor, how far binding on assignee. Evidence Act, S. 18. 202 P L R 1914=108 P W R 1914=25 I C 144

33—As to the rights of the assignee of Government—revenue See 8 A L J 534=10 I C 144 and also 7 M 258.

34—Assignment of toddy license to sell is not valid. 25 I C 42.

**ASSIGNMENT OF CHOSE IN ACTION**

See Assignment.

See Transfer of Property Act, 1882, Ss. 131 to 135.

See C P Code O 21, r. 16

**ASSIGNMENT OF DECREE**

See Civ. Pro. Code, 1908, O. XXI, r. 16

**ASSIGNMENT OF REVENUE**

See Revenue

**ASSIGNMENT OF TRADE MARK**

See Trade Mark

**ASSIGNMENT, POLICIES OF INSURANCE (MARINE AND FIRE)**

Act V 1866,

[Rep. in Pt., Act IX of 1872; Act X of 1877; Act XII of 1879, s. 99; Act XXVI of 1881; Residue Rep., Act II of 1900, s. 5.]

See also cases under:—

Negotiable Instruments—summary Procedure.

**ASSOCIATION**

See (1) Community

(2) Company

(3) Companies Act 1882 s. 4

—Bombay Native Share and Stock Brokers' Association—nature of, A L R 1933 P C 185 (2)=59 I A 318=56 B 374=36 L W 906=63 M L J 623.

**ASSURANCES, REGISTRATION OF ACT 16 OF 1854**

See Registration Acts.

**ASURA MARRIAGE**

See Hindu Law—Marriage.

**ASYLUMS, LUNATIC**

See Lunatic Asylums Act (XXXVI of 1858)

**ATET PROPERTY**

See Buddhist Law—Inheritance

**ATTACHABLE PROPERTY.**

See C P Code SS. 60 to 64 and O 21 rr. 41 to 57.

**ATTACHED PROPERTY.**

See C P Code SS. 60 to 64 and O 21 rr. 41 to 57.

**ATTACHMENT.**

See C P Code Ss. 60 to 64 and O 21, rr. 41 to 57,

**ATTACHMENT BEFORE JUDGMENT.**

See C P Code O 38.

**ATTACHMENT OF PERSON.**

See C P Code O 38.

**ATTENDANCE IN COURT.**

—As to attendance of civil prisoners when required as parties to suits or witnesses in civil suits. Cir. No. 45, dated the 12th October 1866, 6 W R Civ. Cir. Order p 12.

**ATTESTATION.**

See Alienation.

See Evidence Act ss. 68 and 115 and 71

See Hindu Law—Will—Attestation.

See T P Act ss. 3, 58, 59, 82 and 123

See Deed.

—Attestation by reversioner Estoppel —see 159 P L R 1914=66 P W R 1914=25 I C 724

—Attestation by reversioner to alienation by widow does not create estoppel; only raises presumption of necessity. 10 Pat 352=12 P L T 521=Ind Rul (1931) Pat 417=134 I C 129

—Mere attestation of a document does not bring home its contents to the attester Ind Rul (1931) Lah 791=32 P L R 295=133 I C 551

—A person attesting a document which affects his interest is presumed to know the nature of its contents 19 I C 255

But see 71 I C 43

And see 17 O C 157

—Knowledge of the contents of the document will not be imputed to the witness attesting, 51 I C 621.

—Independent evidence of consent is essential for an estoppel. A I R 1922 P C 20=26 C W N 201=30 M L T 249=49 C 334=49 I A 16=18 N L R 1=42 M L J 433=24 Bom L R 557=35 C L J 409=15 L W 486=20 A L J 305=65 I C 954

—Attestation does not by itself imply consent. 18 I C 289

See to the same effect 3 C L J 576 =10 C W N 551=33 C 613; and 22 C L J 452=20 C W N 210=32 I C 468.

—Consent to and knowledge of the correctness of the recitals in the deed will be presumed if the person attesting is an adult man of sound mind having an interest in the property affected by such deed 50 I C 274

**ATTESTATION (Contd.)**

—When a superior proprietor attests a deed of gift, with knowledge of its provisions, and recognizes the donee as transferee of the property, the inference is that he gave his consent to the transfer and that such a consent is binding on his son.  
13 I C 613=15 O C 67.

—Amendment introduced by Act X of 1927, to the definition of 'attested' in s. 3, Transfer of Property Act, is retrospective. The meaning is not controlled by general saving clause, (111 I C 407, distinguished).  
A I R 1931 Nag 95=13 N L J 202=Ind Rul (1931) Nag 97=132 I C 449.

—It may be presumed that an attesting witness signed after the executant had signed.  
53 C L J 586=Ind Rul (1931) Cal 879=134 I C 767.

Trade mark-of—When it implies personal work or supervision by owner in manufacture not assignable  
40 C 840-22  
I C 372

**ATTESTING WITNESS.**

See Attestation.  
See Evidence Act s. 115.  
See T P Act s. 59.

**ATTETPA PROPERTY**

See Buddhist Law—Inheritance

**ATTORNEY.**

See (1) Legal Practitioner  
(2) Power of Attorney.

**ATTORNEY AND CLIENT.**

See Legal Practitioners—Attorney and client.

**ATTORNEY'S CLERK**

See Legal Practitioner

**ATTORNMENT.**

See Landlord and Tenant  
See Lessor and Lessee  
See T P Act s. 116.

**AUCTION.**

—Suit by highest bidder, for specific performance is not under Roman Dutch Law, suit maintainable unless conditions of sale indicate to the contrary. A I R 1918 P C 219

**AUCTION PURCHASER.**

See (1) C P Code Ss. 47, 65 and O. 21  
(2) Execution-sale in execution.  
(3) Lis Pendens.  
(4) Hindu Law—Joint family.  
(5) Revenue Sale.  
(6) Sale  
(7) Vendor and Purchaser.

—Not a subsequent transferee—Nor a person having an interest in the property within the meaning of S 53, T P Act.  
39 Bom L R 507.

**AUCTION SALE.**

See Execution of decree.  
See sale.  
See Execution—sale in execution.  
See C P C or .

**AUCTION SALE (Contd.)**

—Agreement not to bid for consideration not illegal.  
10 I C 627.

—A signed memorandum showing the parties thereto the subject-matter and the terms of the contract, is necessary in all contracts including auctions where the subject-matter of the contract is either land or any interest in land. Auction sales of land in India are usually Court auction sales, to which of course this rule would not apply, but by such sales a sale certificate is always granted in the Court which would take the place of the signed memorandum. In other auction sales, such as a sale by a Municipal Committee, the law as set forth above should be followed and a signed memorandum should be prepared. This view of the law will not in any way conflict with S 44 C P Municipalities Act. 28 N L R 130=A I R 1932 N 128=A L R 1932 N 256.

—Where everybody present at a putni sale held under the Bengal Putni Taluqs Regulation VIII of 1819 was under the impression that if the rent was paid in the course of the day it would be accepted and the sale would not be effective, held that an auction held under such circumstances was not a sale with free and unrestricted competitive bidding which was its essential characteristic and was not a sale which could be upheld. A I R 1933 C 54=36 C W N 888.

See also mortgage—sale of mortgaged property.

**AUDITOR**

See Company

**AULAD**

See will—Construction.

**AUSTRALIA COMMONWEALTH PATENTS ACT 1903-1909.**

—S. 4—Expression "Commonwealth" is to be taken in its geographical sense.  
A I R 1921 P C 228

—S. 6—The section deals with the right which a contract confers and not with the power to make the contract. A I R 1921 P C 228.

—S. 71—Amendment of specification—Applicant for—Onus of proof on. A I R 1932 P C 266 (268)=139 I C 657= I R 1932 P C 312 (P. C).

—Ss. 80 and 81—Amendment of specification—Application under S. 71 for—Jurisdiction of Court to deal with—Application properly launched under S. 71—Action for infringement or proceeding for revocation instituted subsequent to. A I R 1932 P C 266 (268)=I R 1932 P C 312=139 I C 657 (P. C).

—Ss. 87 (2), 92—Govt may use invention under license from patents and in such a case may end Contract by notice.  
A I R 1921 P C 228.

### AUSTRALIA (NEW S. W.) CROWN LANDS ACT 1884

—If the question whether minerals include limestone is to be decided without reference to the Act circumstances as at the date the grant should be examined.

A I R 1921 P C 224

—Held that grant not referring in terms to the Act but containing indications that it was issued under the Act must be treated as so issued. Held also that minerals do not include limestone.

A I R 1921 P C 224.

### AUSTRALIA NEW SOUTH WALES MINING ACT (1906)

—Ss. 46 and 70—Public is not entitled mining minerals granted by the Crown to private purchasers. A I R 1921 P C 224.

### AUTHORISED AGENT.

See (1) Principal and Agent.  
(2) Contract Act ch. X

### AUTHORITIES LOCAL—LOAN (AMENDMENT)

See Local Authorities Loan (Amendment) Act. (V of 1907).

### AUTO-WHEEL.

—tax on auto-wheel—Fiscal enactment must be construed strictly. 14 A L J 850-36 I C 877

### AVERAGE.

See Beng. Tenancy Act s. 30 (a)

### AVUBHAVOM TENURE.

See Landlord & Tenant. See Land Tenure.

### AWANS

See Custom (Panjab)  
See Custom (General)

### AWARD

See Arbitration  
See Arbitration Act  
See C P Code, O XXIII, r. 3 and Sch. II

See Land Acquisition Act 1894  
See Registration  
See Registration Act, s. 17 (2)

### AYAUTAKA STRIDHAN

See Hindu Law—Stridhanam

### AZIAS

See Mahomedan Law—Waqf

### BABEE

See Mehomedan Law—Endowment

### BABUANA

See Grant  
See Hindu Law  
See Impertible Estate  
See Maintenance

### BAD FAITH

—Insolvency under Civ. Pro Code, 3 B L R App. 14 (b).

चैल डे. अ. अ. (१) १८

### BADI

See Hindu Law—Gift

### BADNI CONTRACTS

See Contract Act s. 30

### BAI-BIL-WAFA

See Mortgage—Construction  
See T P Act, ss. 58 and 98

### BAIL-BOND

See Contract Act ss. 23, 24

### BAILEE

See Bailment  
See Contract Act ss. 148 to 152 and 178, 181

### BAILOR AND BAILEE

See (1) Bailment  
(2) Contract Act ss. 148-152

### BAILMENT

See Carrier  
See Contract Act, ss. 148-152 and 178 and 181

See Railways Act

—Right of both bailor and bailee to sue wrongdoer for recovery of thing bailed or for damages. 22 C L J 319.

—Negligence—Onus on plff.—Duty of bailee to produce all available evidence  
Contract Act, Ss. 151 and 152. 27 C L J 615.

### BALANCE OF ACCOUNT.

See Accounts.  
See Limitation Act.

### BALCONY

See Also Municipal Acts (Provincial)

### BALLAVACHARYA GOSWAMI

See Hindu Law (1) Ballava charya.  
(2) custom.

### BANDHUS

See Hindu Law (1) Inheretance  
(2) Succession

### BANK

See also (1) Banker & Customer  
(2) Accounts

Payment of its debts in the ordinary course of business as a going concern is not by itself a preference by bank of certain creditors. 10 R 143-137 I C 638-I R 1932 R 144-A I R 1932 R 75-A L R 1932: R 159.

—Customer—Cheque of—Cashing of, within 24 hours—Bank under a duty as to  
—Loss caused to customer by omission of Bank to do so—Bank liable to make good. 7 Luck 116 (120)=8 O W N 800=134 I C 411=A I R 1932 O 283

—Officer of—Notice to, in his private capacity and not as officer of Bank—Bank not affected by. 1932 P O L 625 (640) (Civ.)=A L R 1932 L 625 (Civ.)

Meaning of—Whether Treasury is a bank. Neg. Ins. Act. Ss. 5 and 6. 43 Mad 816=39 M L J 377

**BANK (Contd.)**

—The employee of a bank who deposits money with the bank is on a par with other creditors. 16 Bom. L R 733-27  
I C 343

**BANKER AND CUSTOMER.***Synopsis.*

- (1) Banker's Lien.
- (2) Fraud or Mistake.
- (3) Payment by banker of forged cheque.
- (4) Nature of relation.
- (5) Set-off.
- (6) Insolvency of Banker.
- (7) Entry in pass-Book.
- (8) Miscellaneous Cases.

**SEE ALSO CASES UNDER:—**

- (1) Contract Act s. 171.
- (2) Lmt Act, arts 59, 60 and 145.
- (3) Stamp Act 1879 Ss. 3 (6), and 34.

**(1) Bankers Lien.**

—A banker has no lien on securities delivered to him for a special purpose inconsistent with lien 78 I C 596-A I R 1925  
S 142.

**(2) Fraud or Mistake.**

—Money of third party held in fiduciary capacity—Investment by him of, with his banker, in breach of trust—Third party's suit against banker for recovery of money —Maintainability of—Party to—Customer not a necessary party. 55 M 541-137 I C 622-62 M L J 281-35 L W 150-1932 M W N 3-A I R 1932 M 247-A L R 1932 M 419.

—Payment to, by customer—Proof, by payment to cashier or other official—No necessity to prove fraud or by whom it was committed. 9 Bur L T 160-34 I C 176.

—Banker knowingly making himself party to misappropriation of trust funds is liable to refund. Direct notice from party is not necessary. A I R 1919 P C 184

—Bank note was issued by Bank—Note was mutilated by honest accident—Note identifiable, but its number missing—Bank was held liable. A I R 1928 P C 116  
=28 L W 880-55 M L J 627-110 I C 127.

—Bank making payment through mistake in respect of cheque countermanded by drawer is not entitled to refund of amount from payee. I R 1930 L 847-127 I C 225-A I R 1930 L 852-111 L 667

**BANKER AND CUSTOMER (Contd.)****(3) Payment by Banker of forged cheque**

—Money was cashed on forged cheque —Owner of cheque book is not to bear loss unless gross negligence intimately connected with the transaction is proved, A I R 1924 Rang 264-3 Bur L J 22-80  
I C 261

—Banker paying forged draft—Forgery owing to customer's negligence—Banker's negligence in accepting—Liability of Banker  
13 Bom L R 835

—Banker negligently paying forged draft is liable if the negligent Act of the customer is not the proximate cause of the loss. 36 Bom. 455-13 Bom. L R 835  
=12 I C 257

**(4) Nature of relation**

—A person collecting money for another is a trustee—Money collected being for a specific purpose does not pass in insolvency to the agent's trustee in bankruptcy. But when he is asked to repay on demand, it is no trust and the cestui que trust can follow trust property though mixed up with other property. 79 P R 1915  
=171 P W R 1915-31 I C 215

—Ordinarily a banker is liable as a debtor, but for money held for special purpose and for money collected he is liable as a trustee. 39 M 1081-30 M L J 245-19 M L T 129-(1916) 1 M W N 186-32  
I C 965-3 L W 168

—Neg security endorsed to Bank for loans taken—Bank, if endorsee for value. Administration. 41 Cal 771

—A creditor, by demanding money for special purpose from his debtor cannot by the act of simple demand transform his debtor into a trustee. 21 M L J 127-6 I C 213-34 M 128-(1910) M W N 427-7 M L T 416

—A Banker holding moneys of customer as a secretary and a treasurer are liable as a trustee. 35 M 712-21 M L J 920-10 M L T 124-11 I C 769

**(5) Set-off.**

—A banker is entitled to set off what is due to a customer on one account against what is due from him on another account, although the moneys due to him may in fact belong to other persons. A I R 1925 Sind 142-78 I C 596.

—An agent had deposited with his principal who was also a banker under another name. In a suit by principal for sale proceeds in agent's hands—Agent can set off amounts deposited. A I R 1921 P C 103-15 L W 201-24 C W N 1004 (P C)-76  
I C 944.



**BANKER AND CUSTOMER (Contd.)****—(6) Insolvency of Banker.**

—Money represented by cheques which are treated as not finally cleared is not part of the assets of the Bank. A I R 1925 Cal 54-40 C L J 223-84 I C 1018.

—Where A and B entered into a contract and A deposited a sum of money in a Bank specified by B in B's name as security for the due performance of the contract and the bank became insolvent; Held the Bank was only an agent of B and B was liable to pay the amount to A. A I R 1931 Lah 849-133 I C 881.

—A person employed to collect money is liable as a trustee. 79 P R 1915-171 P W R 1915-31 I C 215.

**(7) Entry in pass-book.**

—Quaere—Whether the return of his pass-book by a customer without comment constitutes a stated and settled account and operates as an estoppel precluding the customer from disputing the entries therein to the prejudice of the bank. 59 C 662-138 I C 653-I R 1932 C 479 (2)=A I R 1932 C 521=A L R 1932 C 1229.

—Overdraft advances to—Compound interest on—Agreement to pay—Presumption of—Pass-Book—Entries in—Presumption of agreement from—Circumstances justifying. 59 C 662-138 I C 653-I R 1932 C 479 (2)=A I R (1932) C 521=A L R 1932 C 1229

**(8) Miscellaneous Cases.**

Overdraft advances to—Compound interest on—Charge of—Acquiescence in or ratification of—Finding as to—Evidence justifying. 59 C 662-138 I C 653-I R 1932 C 479 (2)=A I R 1932 C 521=A L R 1932 C 1229

—Branches are agencies—Cheque drawn on one branch cashed by another—Cashing done on credit of person presenting, the latter does not act as the Bank of the drawer. 10 P L T 73-I R 1929 Pat 222=A I R 1929 Pat 193-115 I C 558-8 Pat 430

—Amount due under fixed deposit receipt, and payable to either or survivor, whether Bank can appropriate the money towards debt due by one of them alone. A I R 1928 Lah 316-111 I C 554

—In the case of a fixed deposit in the names of 'Mr. and Mrs. A repayable to either or survivor' there is no evidence of gift of husband's interest to wife. Mrs. A is not entitled to more than half of the money deposited. A I R 1931 All 596- (1931) A L J 417-Ind Rul (1931) All 541-132 I C 573.

See Also

23 A L J 662 P C.

**BANKER AND CUSTOMER (Contd.)****(8) Miscellaneous Cases (Contd.)**

—In suit to enforce security, interest not allowed until demand in writing. A I R 1924 Pat 295-69 I C 212.

—A cheque was cashed by bank in good faith. Held, its title was not affected even if the manager knew that the cheque would be attached. 62 I C 792.

—Advances by part-payments by customer—Whether mutual and reciprocal accounts—Lim Act Art 86, not applicable. Lim. Act Art 85. 103 P W R 1916.

—Fixed deposit receipt—Whether Neg. instrument—Customer handing receipt endorsed with letter to Bank to pay—Action thereon by Bank—Whether delivery T. P. Act S 130 38 Bom 618.

**BANKER'S BOOKS EVIDENCE ACT (XVIII OF 1891).**

[Am., act I of 1893; Act XII of 1900; declared in force—in the Sonthal parganas, reg. III of 1872, s. 3; as amended by reg. III of 1899, s. 3; in upper Burma (except the Shan states), act XIII of 1898, s. 4]

See also Evidence Act, 1872, ss. 74, 76. 34

S. 6—Order under—Party to suit not ordinarily entitled to obtain, against other party to suit without notice being given to him, otherwise special circumstances should be set forth in the affidavit to justify the case for making an order without notice to the other side. 34 B L R 743-A I R 1932: B 428=A L R 1932 B 812:

**BANKER'S LIEN**

See Contract Act S. 171

**BANK PRESIDENCY ACT**

—See Presidency Banks Act (XI of 1876).

**BANKRUPT**

Agreement to sell or mortgage—Subsequent bankruptcy—Whether enforceable against official assignee. Specific Performance. Insolvency and Provincial and Presidency Towns Insolvency Acts, 15 M L T 92:

**BANKRUPTCY**

See also (1) Debtor and Creditor

(2) Insolvency

(3) Insolvency Act

(4) Pres. Town Ins. Act

(5) Prov. Ins. Act

**BANKRUPTCY ACT (ENGLISH 1813.)**

—S. 44—There is no conflict between English Bankruptcy Act. s. 44 and Presidency Towns Insolvency Act. s. 52 (1) (a) Indian Act, because where one holds property in trust he is the real owner and therefore, the real and reputed ownership are in the same person. A L R 1930 Cal 171-56 C 1074-Ind Rul (1930) Cal 185-121 I C 745.

—Ss. 53, 167—On adjudication, the property vests in the trustee in bankruptcy

**BANKRUPTCY ACT (ENGLISH 1813) (Contd.)**

and so the adjudicated bankrupt in England is not proper party to suit A I R 1930 Cal 388=34 C W N 53=Ind Rul (1930) Cal 627=125 I C 851.

—S. 102—S. 4 of Prov. Ins Act Indian can be invoked if an application under s. 53 of the Act is barred. Insolvency Court in India can assume jurisdiction under s. 4 of the Provincial Insolvency Act in cases where the Bankruptcy Court in England would exercise jurisdiction under s. 102 of the English Bankruptcy Act. A I R 1927 Sind 66=97 I C 321.

**BANKRUPTCY ACT 1883.**

S. 40—Provision of — Insolvency—Interim Receiver—Appointment of—Effect—Attachment of money due to insolvent before vesting in receiver—Creditor entitled to appropriate for his debt. Prov. Ins. Act. Ss. 13 (2), 16 (6) and 34 (1). 42 Cal 289.

—S. 118—Indian Court's Jurisdiction to act in aid of proceedings in England—Request necessary. 38 C 542=12 I C 14.

**BANKRUPTCY ORDINANCE ( STRAITS****SETTLEMENT 1882 )**

—S. 30 (4)—Hindu Son is not jointly bound with father to pay latter's debt—His liability is not joint and several—Adjudication and assignment of bankrupt's property is not assignment of immoveables or moveables 1916 M W N 271=4 L W 422=20 M L T 318=35 I C 918=31 M L J 386=40 M 581.

**BAPTISM.**

Register of—Statement of date of birth in a, how far evidence of age—Attestation of a sale-deed, when operates as estoppel. 2 N L R 34.

**BAQUALS.**

See Hindu Law—Adoption.

**BARAN LAND.**

See Pun Act XVI of 1887, s. 16

**BAR COUNCILS ACT (28 of 1926 )**

—Under the Act the Court, when a complaint is made, can only dismiss it summarily or else refer it to a Tribunal of the Bar Council to inquire into. The Court would not generally be justified in dismissing a petition summarily unless it was satisfied that, even if the allegations alleged in the petition be proved, there would be no case for taking action. 34 B L R 443 ( 446 ) = 1932 Cr C 303=138 I C 543=I R. 1932 B 401=A I R 1932 B 199=A L R 1912 B 337.

—The Act governs the inherent Jurisdiction of Court as regards proceeding against a legal practitioner. A I R 1930 All 225=( 1930 ) A L J 402=52 A 619=Ind Rul (1930) All 635 (F B)=125 I C 477.

—A legal practitioner who was found guilty was made to pay the fees of the

**BAR COUNCILS ACT (28 of 1926)**

counsel who appeared for the Bar Council 1930 M W N 216.

—Ss. 8 and 9 (d)—Where an application by a first grade pleader for re-admission as Advocate was objected to, by the Bar Council on ground of suspicious conduct of the applicant and he again applied under Oudh Civil Rules r. 285. Held the Bar Council had acted honestly and without prejudice and the admission must be refused I R 1930 O 275=6 O W N 1080=124 I C 659=A I R 1930 O 121=5 Luck 615.

—S. 8—Weight should be attached to recommendations of Bar Council. A I R 1930 All 22=( 1929 ) A L J 1105=Ind Rul (1930) All 411=123 I C 683.

—Ss. 8, 14 — Pleaders enrolled as advocates in the Madras High Court under the Act are entitled to act and plead in the insolvency jurisdiction of the High Court. A I R 1928 Mad 1182=28 L W 545=( 1928 ) M W N 856=55 M L J 551=113 I C 876=52 M 92.

—S. 9, r. 1, Proviso (a)—The clause " practised in one or more of the Courts of the Court subordinate to the Allahabad High Court " as used in the rules framed under s. 9 means " practised in one of the Courts in this province. " A I R 1930 All 887=(1930) A L J 839=Ind Rul ( 1931 ) All 36=128 I C 388.

—S. 9—Applications for enrollment should be decided by Bar Council on merits; and admission should not be refused unless Bar council is convinced that the applicant does not deserve admission. A I R 1930 Oudh 121=6 O W N 1080=5 Luck 615=Ind Rul ( 1930 ) Oudh 275=124 I C 659.

—Ss. 10, 11, 13—The tribunal to which complaint is referred by High Court through Bar Council must decide definitely either way. It cannot drop proceedings for want of prosecution. A I R 1930 Cal 574=57 C 724=Ind Rul (1930) Cal 750=126 I C 558.

—Ss. 10 and 19 (2)—Procedure—Notice issued by High Court—Act came into force—Notice is ultra vires and a nullity.—Procedure in s. 10 must be followed—Letters Patent (Allahabad), s. 8. A I R 1928 All 439=26 A L J 1039=29 Cr L J 998=51 A 76 (F B)=112 I C 214.

—S. 12—The High Court can assess costs directed to be paid to the Advocate by the complainant. The Court can direct an enquiry by the Registrar as to the sums paid by Advocate and complainant. A I R 1931 Cal 680=35 C W N 293=134 I C 1270.

—S. 12—Dismissal of complaint—Costs of inquiry—Payment by complainant of—Order for—Jurisdiction of Court to pass—Semble Court has no jurisdiction. 34 B L R 443=1932 Cr C 303=I R. 1932 B 401=138 I C 543=A I R 1932 B 199=A L R 1912 B 337.

**BAR COUNCILS ACT (28 OF 1926) (Contd.)**

—S. 12—The High Court will not unless there is very good reasons to do so throw over the findings of fact which have been arrived at by the tribunal. A I R 1931 Cal 680=35 C W N 293=134 I C 1270.

—S. 12 (3)—While considering the finding of a Tribunal, the High Court cannot hear the complainant. A I R 1931 Cal 680=35 C W N 293=134 I C 1270.

—S. 12—It is open to the High Court in a proceeding under s. 12, Bar Councils Act, to hear the complainant and in an ordinary case it would be its duty to do so. Section 12 (3) of the said Act is not intended to exclude the right of the Court, to hear any person other than the persons mentioned in that clause. A I R 1931 Cal 680=35 C W N 293=134 I C 1270.

—S. 12—Under s. 12 the correct procedure is for the Advocate-General to open by submitting the report of the tribunal to the Court then the Advocate concerned is entitled to be heard and then if necessary the Advocate-General will reply. The original petitioner is not entitled to be served with notices or to be heard on the hearing before the Court. A I R 1931 Bom 557=33 Bom L R 1215.

—S. 12 (2) (3)—(i) Where the members of the Tribunal of the Bar Council differ, High Court can consider reports both of majority and minority, (ii) A Bench of 3 Judges can hear such enquiries; (iii) (Reilly J)—Enquiry before criminal prosecution is irregular where Advocate is accused of a grave criminal offence. 34 L W 19=61 M L J 148=32 Cr L J 1085=Ind Rul (1931) Mad 785=54 M 857=134 I C 33.

—S. 14—The entry of a person's name in the roll of Advocates entitles him as of right to practise in the Courts of the province even though it be one where he served as a Judge of the High Court. A I R 1931 P C 22 (2)=60 M L J 179=33 Bom L R 409=8 O W N 255=35 C W N 321=12 P L T 169=53 C L J 68=Ind Rul (1931) P C 49=33 L W 381=1931 A L J 255=(1931) M W N 208=10 Pat 375=130 I C 305 P C.

**BAR COUNCIL RULES (ALLAHABAD).**

—R. 1—"High Court" means "Chartered High Court". A I R (1930) All 91=(1929) A L J 1195=Ind Rul (1930) All 350=122 I C 894.

—R. 1—Benares State Chief Court is neither High Court nor Court subordinate to Allahabad High Court. A I R 1930 All 91=(1929) A L J 1195=Ind Rul (1930) All 350=122 I C 894.

**BARKI SERVICE.**

See Grant;  
See Inam.

**BARODA.**

—Testator subject to—State—Will executed at Baroda—Disposition of immo-

**BARODA (Contd.)**

veable property in British India—Jurisdiction Court in British India. 20 B 607.

**BAR OF SUIT,**

See C P Code O 2. r. 2.

**BARRED DEBT.**

See Contract Act 1872 s. 25 (3).

**BARRISTERS.**

See Legal Practitioner.

**BARRISTAR'S CLERK.**

See Legal Practitioner.

**BAR TO SUIT.**

See C P Code S 47 and O 2 r. 2.

**BASEE GRANT.**

See Grant.

**BASTU LAND.**

See Landlord and Tenant.

**BATHING GHAT.**

See Also Right of Suit—Customary rights.

**BATWARA PAPERS.**

See Revenue Papers.

**BED OF RIVER.**

See Alluvion and Diluvion.

See River.

**BEGAR.**

—Wajib-ul-arz recognising zamindar's right to gratuitous assistance or begar—Such begar becomes village cess within s. 4 (3) of C P Land Revenue Act 1881. 6 N L R 117=8 I C 276.

**BENAMI TRANSACTIONS (1-185)***Synopsis*

- (1) Acquiescence and estoppel (1)
- (2) Admissions by benamidar whether bind real owner (2-3)
- (3) Benamidar if a representative in a court sale. (4)
- (4) Benamidar if a trustee. (5-8)
- (5) Benamidar's liabilities. (9)
- (6) Benamidar's rights (10-43)
  - (a) Right to sue.
  - (b) Right to execute decree.
  - (c) Right to transfer.
- (7) Benamidar, suit against. (44-45)
- (8) Burden of Proof. (46-59)
- (9) Decree against Benamidar if binding against real owner. (60-61)
- (10) Fraud. (62-79)
- (11) Parties. (80-81)
- (12) Payment to benamidar (82-83)
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- (14) Purchaser at a court sale (158)
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- (16) Real owner's liabilities. (160-161)
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**BENAMI TRANSACTIONS (Contd.)**

ser from benamidar. (174-175)

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See also cases under:—

- (1) Appeal right of
- (2) Assignment
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- (4) C P C order o. 20 r. 12 order 21 rr 2 (3), 15, 16, 61, 89 and s. 11 (Parties-Benamidar) order 33 rr 5-7
- (5) C P C s. 66 and order 21 rr. 16 66, 70 and 84 to 94.
- (6) Declaratory decree
- (7) Deed-Construction
- (8) Estoppel
- (9) Evidence Act s. 92.
- (10) Evidence-Parol evidence
- (11) Fraud
- (12) Fraudulent transfers
- (12A) Hindu Law-Benami
- (13) Limit. Act articles 11, 11 A, 47, 62, 120, 182.
- (14) Mahomedan Law-Gift
- (15) Mortgage
- (16) Negotiable instruments-Pro-notes
- (17) Parties to suits
- (18) Plaint
- (19) Pleadings
- (20) Rent suits
- (21) Sale
- (22) Sale in execution of decree
- (23) T P Act S. 53
- (24) Vendor and Purchaser

### (1) Acquiescence and estoppel (1)

1—Evinence—There is no estoppel by deed in India-Parties to the deed can prove the real truth of which both were aware of. A I R 1931 Lah 419; Ind Rul (1931) Lah 804=12 Lah 546=133 I C 628

### (2) Admissions by benamidar whether bind real owner (2-3)

2—Benami—proceedings against benamidar—beneficial owners bound. A L R 1933 A 281=1 A W R 261

3—But admissions of Benamidar of title of a third person are not so binding. A I R 1924 Mad 749=19 L W 567=34 M L T 264=78 I C 52

### (3) Benamidar if a representative in a court sale (4)

4—Right of a benamidar-purchaser to sue is not barred by. S. 47 of C P C 44 Bom 322=22 Bom L R 296=56 I C 349

Benamidar—purchaser for a decree-holder can sue in his own name without making the latter a party such a purchase for a decree-holder is not invalid for want of leave to bid under S 234 of C P C of 1882 44 Bom 352=22 Bom L R 296=56 I C 349

**BENAMI TRANSACTIONS (Contd.)**

### (4) Benamidar if a trustee. (5-8)

5—Position of—No beneficial interest—Represents true owner—Relative legal position that of trustee. Benamidar, right of suit. 46 Cal 566 (P C)

See Also. 45 Cal 909 (P C)=1918 P C 35=45 I C 770

6—Benamidar is a trustee for the real owner. 78 I C 359=1924 Oudh 321=11 O L J 92

See Also A I R 1924 Pat 185=1 Pat L R 316 Civ=77 I C 252

7—See to the same effect. A I R 1928 Cal 666=48 C L J 135=112 I C 458.

See also A I R 1925 Oudh 120=11 O L J 619=27 O C 175=82 I C 333.

8—But compare the following cases:—held that a Benamidar is not a trustee property so called although his liabilities are similar in some respect. A I R 1929 Mad 268=55 M L J 856=29 L W 56=Ind Rul (1929) Mad 420=115 I C 340.

### (5) Benamidar's liability (9)

9—Benamidar is not liable in contract or as an agent for money realised in his own name under Benami-Mortgage. (1915) M W N 215=28 I C 495.

### (6) Benamidar's. Rights 10-13

- (a) right to sue or
- (b) right to execute decree
- (c) right to transfer (25-70)

10—Property in name of—Possession of—Suit for—Right of—Benamidar has, without making real owner a party to the suit 34 B L R 164=137 I C 560=I R 1932 B 301=A I R 1932 B 190=A L R 1932 B 367

11—Mortgage—Benamidar—A suit on a mortgage in his own name can be brought by a benamidar. The mortgage transaction can be put an end to without the beneficiary being brought on the scene of all. A I R 1931 Oudh 285=8 O W N 660=Ind Rul (1931) Oudh 354=132 I C 402 (F B).

12—Execution proceeding—A benamidar has a right to continue execution proceedings. A I R 1931 Oudh 69=7 O W N 1203=Ind Rul (1931) Oudh 151=130 I C 343.

13—A benami-mortgagee can sue without making the real owner a party. 41 Mad 435=(1918) M W N 107=43 I C 935.

See 36 M L J 68PC  
See 42 Mad 348 (F B)

14—In a suit by a benamidar, real owner is not a necessary party. 52 I C 324.

15—A benamidar with a clean case can sue in his own name. 55 I C 836

16—A benamidar can maintain a suit in his own name. 33 I C 615=18 O C 363.

## BENAMI TRANSACTIONS (Contd.)

## (6) Benamidar's Rights (Contd.)

17—A benamidar can sue for redemption. 56 I C 599=2 U P L R (Pat) 185

18—Benamidar cannot sue where he sets up a title as against the real owner. Suit in ejectment based on title by a benamidar is not maintainable. (1918) M W N 226=7 L W 201=43 I C 801.

But see 46 Cal 566 (P C) and 42 M 348 (F B)

19—A benamidar, setting up exclusive right, cannot sue for possession without joining the real owners as plaintiffs 9 I C 487.

20—Benamidar can maintain a suit for property without the real owner. 55 I C 431.

21—Benamidar cannot sue for possession from the real owner. Obiter; The fraudulent grantor or giver—loses his right to claim the aid of law in recovering his property only if the contemplated fraud has been carried out. 35 C 551 (P C)=12 C W N 562=7 C L J 528=5 A L J 290=14 U R L T 108=10 Bom L R 590=18 M L J 277=4 M L T 12=4 L B R 266=35 I A 98 referred to (Twomey J.) Mandaya v. M A E. 17 I C 918=5 Bur L T 166.

22—He cannot sue the real owner A I R 1923 Cal 536 But he can sue for the removal of obstruction to access of light and air. A I R 1921 Cal 560=35 C L J 43=64 I C 581.

—See to the same effect: 88 I C 249=1925 M 1005.

23—Benamidar mortgagee can sue either for sale or foreclosure. A I R 1924 Pat 458=3 Pat 81=5 P L T 142=75 I C 378. See also 33 C L J 369=63 I C 244.

See 42 M 348=36 M L J 296=9 L W 362=25 M L T 351=(1919) M W N 299=50 I C 309 (F B.)

See also: 44 B 352=56 I C 349=22 Bom A L R 296.

24—See also following cases on this point.

See 18 O C 363=33 I C 615.

See 41 M 435=(1918) M W N 107=43 I C 905.

25—A I R 1930 Nag 273 also A I R 1929 Pat 1=7 Pat 726=9 P L T 822=113 I C 732.

See A I R 1928 Cal 666=48 C L J 135=112 I C 458. (Suit against trespasser.)

See A I R 1923 Cal 281=67 I C 741. See 52 I C 324 (Pat).

See A I R 1923 All 10=70 I C 849.

See A I R 1925 Mad 22=47 M 896=(1924) M W N 733=32 M L T 29=47 M L T 415=83 I C 74 (F B.)

See A I R 1921 Lah 129=4 Lah L J 378=62 I C 799.

See Contra 40 I C 610 (Pat).

## BENAMI TRANSACTIONS (Contd.)

## (6) Benamidar's Rights (Contd.)

See 45 I C 794 (Pat.)

26—A benamidar—mortgagee—has got a right of suit. 37 A 113=13 A L J 24=26 I C 507.

27—Right to sue on mortgage C P Code O 34 Rr. 1 and 7. 19 C L J 193=18 C W N 814.

28—Benamidar's right to sue or execute a decree 9 Ind Cas 40=9 M L T 137=(1911) 1 M W N 5.

29—Real owner can sue if benami owner is co-defendant. A I R 1921 Cal 653=33 C L J 369=63 I C 244.

30—Suit upon mortgage by benamidar—Maintainability—Plea of benami by opposite party—Estoppel. 29 C L J 434=53 I C 59.

31—Right of—suit for possession of immoveable property. 24 I C 801.

32—Mortgagor cannot question right of suit of a benamidar—mortgagee. 8 Bur L T 240=8 L B R 205=29 I C 892.

33—A benamidar can institute a for eclosure-suit, 19 C L J 193=18 C W N 814=20 I C 499—Also for joint possession. 60 I C 708.

34—A benamidar cannot sue for partition. 43 Cal 504=22 C L J 259=31 I C 189 But see 46 Cal 566 (P C)=46 I A 1=1918 P C 140=49 I C 1.

35—Benamidar cannot sue for possession of lands purchased at a Court Sale. See also 45 I C 794. But see above cases this principle abrogated.

36—Right of Suit or execution by—Not entitled to Muthu Kumara Ascri in re. 9 I C 40=(1911) 1 M W N 5=9 M L T 137. See also 40 I C 610 this principle not accepted see cases cited above.

37—Benamidars or their nominal vendees cannot themselves bring suits in ejectment, the onus of proving the benami nature is on the person who alleges it. 18 M 469 this is not the law now for which see the cases cited above.

38—A benamidar transferee of a decree can execute. 37 All 414=13 A L J 557=29 I C 593.

39—All parties to transaction knowing benami nature—Defence that party suing is benamidar real owner unwilling to enforce his claim—Suit by benamidar to enforce claim is not tenable in such circumstances. A I R 1930 Rang 130=7 R 797=Ind Rul 1930 Rang 134=121 I C 806.

40—Suit for land—Right of suit—Limitation Act art 149—Suit by assignees from Government 17 M L J 174=30 M 245 (F 31 M 461; R 12 C L J 357=7 Ind Cas. 156

41—He can sue also in cases governed by Deccan Agriculturists' Relief Act s. 12



**BENAMI TRANSACTION (Contd.)****(6) Benamidar's Rights (Contd.)**

have to be observed by the Court in a suit by a benamidar. A I R 1926 Bom 115 =49 B 832=27 Bom L R 1240=91 I C 353.

42—A benamidar cannot sue to set aside a sale under decree passed against the real owner, A I R 1927 Mad 659=101 I C 165.

43—Leave to sue as pauper not to be granted. C P Code O 33 Rr. 5, 6 and 7=50 I C 520=1919 Pat 232.

**(7) Benamidar, suit against 44-45.**

44—Sale to wife—Benamee—Onus—Purchase from Hindu widow without inquiry—Validity. 6 W R 312

45—Where a plff cannot claim pre-emption as against the real vendee he could not claim pre-emption against benamidar alone, A I R 1924 All 802=L R 5 A 616 Civ=80 I C 42

**(3) Burden of Proof. (46-59)**

46—The onus is clearly upon the person alleging a transaction to be benami to show that the person who appeared as the owner on the face of the deed is not the real owner. 1932 P C L 47 (49) (Civ.) =33 P L R 33=136 I C 270—I R 1932 L 222 (1)=A I R 1932 L 193 (I)=A L R 1932 L 47 (Civ)

47—In ordinary cases of benami the onus is on the party who asserts benami, and in the absence of such evidence the Court is bound to presume that title passed to the purchaser under the deed. 11 P 9 (21)=136 I C 299=13 P L T 298—I R 1932 P 75=A I R 1932 P 129=A L R 1932 P 58

See also:—A I R 1932 P C 15=A L R 1932 P C 7=62 M L J 320=36 C W N 137=136 I C 385=6 Luck 556

48—The burden of proving that a conveyance was benami is on the person who alleges it. A I R 1926 Nag 109, approved. A I R 1931 Nag 91=13 N L J 213=Ind Rul (1931) Nag 65=130 I C 817

49—The onus is heavily on him who alleges the transaction as benami when it is strongly presumed not to be so, on transferor's debts being paid by the ostensible vendee and he making cash payment. 29 I C 970

50—Property bought in wife's name—Burden of proving benami lies on party asserting it. A I R 1925 Oudh 243=82 I C 832

51—A party to a deed is presumed to be real owner the onus of proving otherwise is on the Person alleging the same. A I R 1930 Rang 218=Ind Rul (1930) Rang 365=127 I C 381

**BENAMI TRANSACTIONS. (Contd.)****(8) Burden of Proof (Contd.)**

Similarly held in:—1925 Oudh 243=82 I C 832

52—See to the same effect:—A I R 1929 Sind 195=Ind Rul (1930) Sind 186=125 I C 218

So also A I R 1931 Nag 91=13 N L J 213=130 I C 817

53—See to the same effect:—A I R 1922 P C 84=43 M L J 104=20 A L J 545=35 C L J 554=24 Bom L R 951=31 M L T 94 (P C)=67 I C 444

54—Party setting up a benami case must prove that money was paid by him. Purchase, made in the name of a minor son by the father with his money is not necessarily a benami one. 74 P L R 1914=22 I C 536

55—Burden of proof of benami nature of sale lies primarily upon the person alleging it except when no proof of title or possession is forthcoming from the opposite party. 34 I C 617

56—Persons defending on the basis of benami must themselves prove such nature of the transaction. 29 I C 696=20 C W N 254

57—The onus of proof of benami transaction lies upon the person who sets up such case. 24 I C 10=1 M L W 451

58—Onus—Transfer by registered deed—Benami transaction, allegation of. 15 C 20=14 I A 127, P C=5 Sar. 71

59—Properties in the judgment debtor's names also in another's name were attached. They instituted a suit, on rejection of their claim application. Under s. 106 Evidence Act the onus was on the wife who claimed ownership to show that purchase-money belonged to her and she was enjoying the property. They failed to discharge the onus. So it was taken that the properties belonged to the husband. 17 M L J 339

**(9) Decree against Benamidar if binding against real owner, (60-61.)**

60—Benamidar is a mere trustee and as such, the result of an action by or against him is fully binding on real owner. 46 Cal 566=36 M L J 68=17 A L J 66=9 L W 335=23 C W N 521=12 Bur L T 122=1 U P L R (P C) 1=49 I C 1=46 I A 1 (P C)=1918 P C 140

See to the same effect: 56 I C 386 and 54 I C 633

61—Purchase made by a joint fund of several persons in the name of one of them, creates a resulting trust. 56 I C 386

A presumption of a benami transaction is raised in case of purchase in the name of one member of a Hindu joint family. 56 I C 386

**BENAMI TRANSACTION. (Contd.)****(10) Fraud (62-69)**

62—Real owner—Suit by benamidar against, for recovery of possession of property—Plea by real owner in, of both parties being in pari delicto—Maintainable. If in a suit by the ostensible mortgagee for possession the defendant claims to be the real beneficiary under the mortgage transaction there is no bar either under the general law or under the provisions of the Punjab Alienation of Land Act to the defendant pleading the joint fraud of himself and the plaintiff and by proving the true facts to defeat the latter's claim, there being ample provision in the law to set matters right after it has been determined that the provisions of the statute had been evaded by a colourable transaction having been entered into. 13 L 713=139 I C 17=33 P L R 851=A I R 1932 L 503 (512, 513)=A L R 1933 L 113 (Civ)=1933 P C L 113 (Civ) (F B)

63—Fraudulent transaction—Aid of Court—A person cannot plead his own fraud in order to invoke the assistance of the Court, if the purpose of that fraud has been effected. (1931) M W N 470

64—Evidence of fraud—Must be conclusive—Mere suspicion is insufficient. A I R 1924 Pat 459=3 Pat 522=5 P L T 223 =78 I C 796

See also A I R 1921 Pat 397=2 P L T 728=62 I C 611

65—Deft. must prove fraud. 94 I C 33 =1926 C 850

—Non payment of consideration for sale—Fictitious transaction. Sale 19 C L J 239

66—Nature of—Test T P Act s. 53. 17 O C 173

67—In a transferee's suit for possession of property, the transferor, who has conveyed it benami to defraud the creditors and has succeeded cannot plead that it was benami. 32 M L J 484

68—The difference between a Benami and sham transfer is that in former legal title is intended to be transferred—In latter no interest, is intended to be transferred. A I R 1925 Mad 1005=(1925) M W N 232=88 I C 249

See also : 36 M L J 180=25 M L T 12=9 L W 22=50 I C 593

69—Benami—Fraudulent preference—Benami clearly distinct from fraudulent prevalence—Difference often slurred. T of P Act, s. 53. 44 Cal 662 (P C)

70—A Public servant purchasing in the name of another to avoid the Departmental rules is not fraudulent. A I R 1923 Cal 154=36 C L J 82=68 I C 648

71—See also Benami Transactions—Real owner's right to sue.

—cast off in order to defraud others, yet if he has not defrauded any one, the Court

**BENAMIDAR TRANSACTION. (Contd.)****(10) Fraud (Contd.)**

will not punish his intention by giving his estate away to another whose retention of it, is an act of gross fraud. The Court might well allow the transferor to plead the real facts even though the plea involved a declaration by the defendant of his own turpitude. This is allowed not for his own sake but on grounds of public policy. A I R 1923 Cal 90=36 C L J 491=71 I C 1

See also :—99 I C 949=1927 Rang 86 =4 R 429.

72—See to the same effect. A I R 1924 Oudh 321=11 O L J 92=78 I C 359=A I R 1923 All 504=45-A 396=L R 4 A 418 Civ=21 A L J 303=72 Ind Cas 92

73—Transfer—Fraud of creditors—Fraud not carried out—Right of transferor to recover back property. T P Act s. 53. 52 I C 866

—The real owner can recover property only before fraud is carried out. 52 I C 866

74—Transfer fraud of creditors—Fraud completed—Real owner not allowed to set up his title. T P Act, s. 53. 52 I C 402

See to the same effect :—91 I C 776 =1925 M 1016=22 M L W 313.

75—Fraudulent benami deeds, simply executed but not given effect are passed by predecessor-in-title. A party can recover possession against the party claiming on such document. 23 C 460

76—Fraudulent unauthorised purchase can be avoided by the real owner. 7 Bur L T 8=23 I C 363

77—Plaintiffs sued for possession under a sham sale-deed, The defendants pleaded that it was benami. Plffs, urged that defts on the maxim memo allegons turpindinem, suam, audiendus est, cannot plead their own fraud,

But that maxim gives way to in pari delicto potior est conditio possidentis as the deft was in possession. Thus he is permitted to set up true facts. 21 P R 1916=197 P W R 1915=33 I C 255

78—to defraud creditors can be set aside before fraud is carried out. A I R 1929 Pat 127=10 P L T 138=Ind Rul (1929) Pat 266=115 I C 890

See also 16 N L R 129=59 I C 285

79—In case of fictitious transfer a Stranger can challenge the payment of consideration—27 All 271 P. C., explained. A I R 1923 Cal 521=37 C L J 122=74 I C 392

**(11) Parties (80-81)**

Benamidar if a necessary Party (133-134)

80—Benamidar is not a necessary party to a suit regarding benami transaction. 4 Bur L T 74=10 I C 779

**BENAMI TRANSACTIONS (Contd.)****(11) Parties (Concl'd.)**

See also cases under this heading under "Benamidar's right to sue" supra  
81—A benamidar is not a necessary party to a suit relating to the benami transactions 4 Bur L T 74=101 C 779.

**(12) Payment to benamidar (82-83)**

82—Payment to benamidar will bind real owner if made without notice and objection by him A I R 1922 Mad 176=41 M L J 393=45 M 84=14 L W 371=(1921) M W N 642=69 I C 642

83—Payment to the real owner under a rent-deed in benamidar's name is a defence 26 M L J 597=25 I C 679.

**(13) Proof and pre-sumption of Benami and doctrine of advancement.**

See also cases under this heading under "Burden of Proof" supra (84-157)

84—Father purchasing in the name of infant daughter—Marriage of daughter—Sale deed placed upon a tray on the occasion of, and sent for the inspection of her father-in-law Held to be a gift, 59 I A 1=6 Luck 556=62 M L J 320=36 C W N 137=8 O W N 1378=35 L W 118=136 I C 385=I R 1932 P C 81=1932 A L J 663=A I R 1932 P C 13=A L R 1932 P C 7 (P C)

85—The mere fact of marriage does not raise a presumption with regard to any property standing in the name of a wife that the beneficial interest must be in her husband.

The rule laid down in 48 M 605 (P C) depended upon the essential element that there was a purchase by a husband in the name of his wife. A I R 1932 C 829 (830-31)=36 C W N 1158

86—Mutation in the name of Benamidar is not strange in colourable transactions. the ostensible working must be in line with the cloak. The question is who is working behind the scene 7 Luck 131 (159-60)=8 O W N 593=132 I C 51=A I R 1931 O 333

87—It is unlikely that a person who enters into a benami transaction should go about proclaiming the fact to everybody. 11 P 9 (21-2)=136 I C 299=13 P L T 298=I R 1932 P 75=A I R 1932 P 129=A L R 1932 P 58.

88—Wife—Sale-deed standing in name of—No Presumption that property conveyed by it belonged to her husband. 1932 P C L 47 (49) (Civ)=33 P L R 33=136 I C 270=I R 1932 L 222 (1)=A I R 1932 L 193 (1)=A L R 1932 L 47 (Civ)

89—Benami—Genuine gift or—Evidence—Registered deed—Gift under.

**BENAMI TRANSACTIONS (Contd.)****(13) Proof and pre-sumption of Benami and doctrine of advancement (Contd.)**

By a registered deed of gift a Mahomedan Oudh talukdar made over a portion of his property to his wife. The reason recited in the deed that he desired to provide his wife with an alternative residence at the place where the property gifted was situated was to say the least of it, understandable. The portion assigned to her contained the Zenana quarters, where she ordinarily put up when accompanying her husband, the evidence of his other gifts to her shewed that he had a great desire to provide for her future comfort on a generous scale. But during the talukdar's lifetime she exercised no individual acts of ownership, property was occupied by the servants of the estate that repairs were done at the talukdar's expense, and that no mutation of names was made in the Government records. The deed was however, handed over to the donee and remained in her possession. Held that the onus lay on those who disputed the gift.

Held also that the above facts were not sufficient to establish that the transaction was merely colourable and there was no doubt that the talukdar intended to make a genuine gift of the property to his wife. 59 I A 1=6 Luck 556=62 M L J 320=36 C W N 137=8 O W N 1378=35 L W 118=136 I C 385=1932 A L J 663=A I R 1932 P C 13=I R 1932 P C 81=A L R 1932 P C 7 (P C)

90—Purchase—money—Source of not established—Finding of benami may be justified 59 C 1242 (1244-5)=55 C L J 394=A I

R (1932) C 825=A L R 1932 C 601.

91—Father purchasing in the name of his infant daughter—Gift intended by—Evidence as to—Very little evidence will be sufficient. 59 I A 1=6 Luck. 556=62 M L J 320=36 C W N 137=8 O W N 1378=35 L W 118=136 I C 385=1932 A L J 663=I R 1932 P C 81=A I R 1932 P C 13=A L R 1932 P C 7 (P C)

92—In Benami matters the source of purchase money is the chief test 1932 P C L 47 (48) (Civ)=33 P L R 33=136 I C 270=I R 1932 L 222 (1)=A I R 1932 L 193 (1)=A L R 1932 L 47 (Civ)

93—Daughter—Father's purchase in name of—No presumption of advancement in case of. (Sir George Lowndes). Nawab Mirza Mohammad Sadiq Ali Khan v. Nawab Fakar Jahan Begam. (1931). 59 I A 1=6 Luck 556=62 M L J 320=36 C W N 137=8 O W N 1378=35 L W 118=136 I C 385=1932 A L J 663=I R 1932 P C 81=A I R 1932 P C 13=A L R 1932 P C 7 (P C)

94—Husband and wife—Where source of a sale transaction flowed from the

## BENAMI TRANSACTIONS (Contd.)

## (13) Proof and presumption of Benami

## and doctrine of advancement (Contd.)

husband, and the transaction stood in the wife's name, it is benami and the wife is a benamidar. A I R 1931 Oudh 177=8 O W N 349

95—Presumption—In India, there is no presumption of an intended advancement in favour of wife or child. [47 I A 275=55 All 235, referred to] A I R 1931 Bom 269 =33 Bom L R 250=Ind Rul (1931) Bom 353 =133 I C 241

96—Resulting trust—Presumption of advancement—In the case of a purchase by a father in his son's name that is a resulting trust. There is no presumption of advancement in India A I R 1931 Bom 269=33 Bom L R 250=Ind Rul (1931) Bom 353=133 I C 241

97—Source of purchase-money is the best test. A I R 1931 Lah 419=Ind Rul (1931) Lah 804=12 Lah 546=133 I C 628.

98—Village papers—Mere formal entries of name of alleged benamidar in—Of very little value as evidence of reality in a Benami transaction. 7 Luck 131 (150)=A I R 1931 O 333=8 O W N 593=132 I C 51.

99—Evidence—Surrounding circumstances—Relationship of parties, and their motives and subsequent conduct are of much assistance in deciding whether a transaction was benami. A I R 1931 P C 175= (1931) A L J 550=34 L W 7=35 C W N 925=8 O W N 936=(1931) M W N 931=33 Bom L R 1251=Ind Rul (1931) P C 317=134 I C 669 (P C)

100—Proof of—Circumstantial evidence. Beng. Rev. Sale Law S. 14. 18 C W N 1071.

101—In a true benami transaction oral evidence of its real nature is admissible when the nominal and the real purchasers dispute it. Benamidar obligor Can never be proved the real obligor or obligee, Benami-transactions are always triangular. 18 Bom L R 134=33 I C 396.

102—English rule of the presumption of advancement is applicable to domiciled Europeans. 39 M L J 296 (P C)

—So also to persons of European nationality. 128 I C 721=1930 O 441.

—But does not apply to Indians. 97 I C 998=1927 M 90.

103—No presumption of benami among Turkmans. A I R 1927 Rang 102=4 R 522=100 I C 250.

104—Gift to daughter—and sister on the occasion of daughter's marriage to sister's son—Nature of gift to sister. Presumption Hindu Law Joint Family, Gift. 28 I C 365.

105—Contracts cannot be 'benami' the question to be considered here is whether

## BENAMI TRANSACTIONS (Contd.)

## (13) Proof and presumption of Benami

## and doctrine of advancement (Contd.)

a person contracts for himself or another's agent. When the transferee's wife was to be benefited the conveyance in transferee's name does not make the transfer benami 5 L W 228=38 I C 188.

106—Plaintiff sued to recover certain property defendant pleaded that plaintiff benamidar. The deed was acted upon was not benami plaintiff was given a decree. A I R 1922 P C 84=43 M L J 104=20 A L J 545=24 Bom L R 951=35 C L J 554=31 M L T 94 (P C)=67 I C 444.

107—Alleged Real owner paid consideration and was in enjoyment of profits—name appearing in public records he was held real owner. A I R 1928 Oudh 28=105 I C 191.

108—A person against whom a mortgage decree was passed in pursuance of which property mortgaged was sold, raised money on mortgage's just before sale and the property was Purchased by his wife, who had no private means. Held, that the purchase was benami. 31 I C 586 (A)

On appeal 53 I C 54=23 C W N 71 (P C)

109—No presumption of the transaction being sham arises where the gift was not disputed for several years even after death of donor A I R 1922 Oudh 178=8 O L J 439= 66 I C 222.

110—Deed in possession of mortgagor—No presumption that mortgagee is benamidar for mortgagor A I R 1923 Bom 429=79 I C 136.

111—Distinction between benami and advancement pointed out. A I R 1929 Oudh 97=3 Luck 521=6 O W N 1251=Ind Rul (1929) Oudh 321=117 I C 385.

112—Lease in favour of a permanent concubine but lessor cultivating land—Concubine living with lessor—Presumption is that the cultivation was on her behalf. A I R 1927 Nag 386=103 I C 143.

113—In a benami purchase the source of the purchase-money is an important but not the only point, but the possession and receipt of rents also must be looked to the father being alive, in the case of a Mahomedan grandfather purchasing in the name of grandchild, there is no presumption of advancement. But where it is proved that the purchase was not for purchaser's benefit then the person named in the deed is prima facie the beneficiary. 7 N L R 159.

114—Courts should not approach Benami transactions with scrupulous vigour. They are favoured in India Court's decision should not rest upon suspicion but upon legal grounds established by legal testimony 23 C W N 321=(1919) M W N 507=53 I C 54 (P C)=1918 P C 137. (on appeal from 37 I C 586)

**BENAMI TRANSACTION (Contd.)****(13) Proof and presumption of Benami and doctrine of advancement (Contd.)**

115—When the purchase is in wife's name, no presumption of benami nature can be made for the husband. 17 I C 740

116—In a purchase in son's name, presumption of its being benami is made. The son has to prove his sole interest in it. Son's responsibility to prove the reality is heavy when the rights of creditors are in issue. In India, English principal of 'advancement' is inapplicable. 9 Bur L T 35=35 I C 12

—Purchase in son's name—Rights of creditors involved—Burden is more heavily on son to prove reality. 9 Bur L T 35 35 I C 12

117—Purchase by Hindu in the name of Mahomedan mistress. It was a benami transaction. No presumption of advancement in India. Benami transactions are unobjectionable and has a curious similarity to English doctrine—the trust of the legal estate results to the man who pays the purchase-money. 37 All 557=13 A L J 991=19 C W N 1207=22 C L J 516=29 M L J 335=18 M L T 248=(1915) M W N 757=2 L W 830=17 Bom L R 1006=30 I C 299=42 I A 202 (P C).

118—Source of purchase money—possession and receipt of rent are very important. Father alive—No advancement to a grandson. A Mahomedan grandfather joins grandson's name, his father existing in purchase of property. The mere entry of his name is not sufficient to show that it was for his benefit. 7 N L R 159=12 I C 721

119—Slight evidence is sufficient to prove. A I R 1927 Cal 140=98 I C 129

See also A I R 1926 Nag 262=9 N L J 130=92 I C 25

See also A I R 1925 Oudh 213=82 I C 832

120—See also A I R 1921 P C 69=25 C W N 409=(1921) M W N 80=62 I C 356.

See also (1919) M W N 507=23 C W N 331=53 I C 54 (P C) On Appeal from 31 I C 586

121—English doctrine of advancement in favour of children does not apply in India. 2 Lah L J 353 So too, it does not apply where person advancing money is disqualified from purchasing himself e. g. executor purchasing the property in the will in the name of his son. A I R 1919 P C 253

122—source of purchase money custody of documents is not conclusive A I R 1925 Mad 980=86 I C 272

but is good evidence in absence of other circumstances. A I R 1925 Oudh 243=82 I C 832

**BENAMI TRANSACTION (Contd.)****(13) Proof and presumption of Benami and doctrine of advancement (Contd.)**

See to the same effect : 97 I C 487=1927 All 59

123—See to the same effect—even where the purchase is jointly in the names of wife and son's or big portion purchased in wife's name and insignificant portion in one's own name are important as evidence, A I R 1925 Mad 95=47 M L J 622=21 L W 336=85 I C 855

124—Where a purchase is made in the name of a female of a joint Hindu family that Hindu joint family is benami. A I R 1921 All 185=43 A 711=19 A L J 787=63 I C 676

—But where a gift was intended and it was proved no Benami was presumed in case of a son. 68 I C 372=1923 Pat 187

125—The doctrine applies to Anglo Indians. A I R 1924 Rang 283=2 R 353=3 Bur L J 85=82 I C 685

126—Court is to be guided by reasonable probabilities surrounding circumstances the relations between the actual purchaser and the alleged benamidar and the after dealings of the parties with the property. Ostensible purchaser minor and having no source to pay purchase money. Father all along in possession presumed to be real purchaser. A I R 1925 Oudh 366=12 O L J 142=86 I C 874

127—See also :—A I R 1924 Cal 467=28 C W N 131=39 C L J 140=82 I C 934

128—The person who pays the money is presumed to be owner—A I R 1925 Lah 511=7 Lah L J 298=26 P L R 358=88 I C 289

—Hindu joint brothers—Purchase by one is not presumed to be benami for the other. A I R 1925 Mad 448=21 L W 226=86 I C 886

129—Ordinarily the presumption is that he who pays money is real owner but it is a rebuttable. A I R 1925 Pat 68=5 P L T Sup 1 (F B)=93 I C 454

130—See also A I R 1923 Cal 228=27 C W N 305=36 C L J 396=70 I C 555

See also A I R 1921 Cal 101=25 C W N 544=33 C L J 201=62 I C 348

See also 38 I C 561 (Pat.)

See also 21 C W N 280=32 I C 267

See also A I R 1921 Sind 20=15 S L R 84=62 I C 1002 A I R 1924

Cal 523=28 C W N 62=81 I C 667

See also A I R 1926 Nag 109=22 N L R 49=88 I C 699

See also A I R 1923 Cal 113=36 C L J 208=72 I C 698

131—Purchase by husband in wife's name presumed to be for husband's benefit.



**BENAMI TRANSACTION (Contd.)****(13) Proof and presumption of Benami and doctrine of advancement (Contd.)**

—Advancement doctrine does not apply in India. A I R 1925 P C 181=27 Bom L R 1076=29 C W N 1013=(1925) M W N 717=48 M 605=3 Pat L R 290=23 A L J 662=52 I A 286=42 C L J 8=49 M L J 109=23 L W 138 (P C)=88 I C 327

132—See to the same effect:—A I R 1926 Cal 597=54 C 251=30 C W N 346=93 I C 834

133—But it is otherwise if purchase is by wife's own money—No presumption exists that property standing in a woman's name is not hers. A I R 1928 Mad 708=109 I C 539

134—Practice of benami is not common in Burma—Purchase by father in the son's name held to be for the son. A I R 1928 Rang 220=6 R 203=1110 I C 646

—Money deposited by husband in the name of himself and wife payable to either or survivor—held to belong to husband. A I R 1928 P C 172=32 C W N 817=29 P W R 429=55 I A 235=48 C L J 119=28 L W 66=5 O W N 668=30 Bom L R 1384=55 C 944=26 A L J 1215=55 M L J 651=(1928) M W N 917=109 I C 723 (2)

135—Presumption of Benami arises in case father purchases in the name of the son. The test is. Source for the acquisition. A I R 1928 Lah 397=10 Lan L J 93=111 I C 596

136—See to the same effect. A I R 1930 Sind 318=Ind Rul (1930) Sind 145=125 I C 33

Presumption is that apparent title is the real title. A I R 1929 Pat 289=8 Pat 396=10 P L T 60=Ind Rul (1929) Pat 67=117 I C 867

See also A I R 1921 Pat 397=2 P L T 728=62 I C 611

137—A transaction cannot be partly real & partly sham, A I R 1922 Bom. 107=46 Bom. 85=23 Bom L R 873=64 I C 364

138—There must be affirmative evidence—Mere suspicion is insufficient. A I R 1922 P C 336=16 L W 190=3 Pat L T 529=31 M L T 209=49 I A 312 (P C)=67 I C 914

138—Purchase by decree-holder benami for very small price in satisfaction of his mortgage decree—Evidence not enough to prove benami. A I R 1922 P C 336=16 L W 190=3 Pat L T 529=31 Mad L T 209=49 I A 312=I Pat 733=21 A L J 23=27 C W N 294=44 M L J 718=37 C L J 430=26 Bom. L R 630=67 I C 914.

139—Where husband was living with his wife to whom he had sold the property and he was involved in debt is not sufficient proof of benami. A I R 1924 Pat 333=4 P L T 54=72 I C 1003

**BENAMI TRANSACTION (Contd.)****(13) Proof and presumption of Benami and doctrine of advancement (Contd.)**

140—Where the purchaser was a servant of the vendor. Possession of title deeds by vendee is not of any weight—Vendor had embarked in litigation, and a decree was pending against and was apprehensive of a claim for mesne profits, Held, to be benami transfer. A I R 1923 All 613=45 A 515=21 A L J 421=L R 4 A 512 Civ=76 I C 370

141—Sale deed executed where a power-of-attorney would suffice—Motive for benami purchase is not reasonable. A I R 1929 Sind 195=Ind Rul. (1930) Sind 186=125 I C 218

A suing for declaration that he is real owner though B's name is shown as purchaser, B's making entries in A's account books about the whole purchase money is no evidence in A's favour. A I R 1929 Sind 195=18 Ind Rul (1930) Sind 186=125 I C 218

142—Where a debt was found due and the transfer was to pay the same it cannot be regarded as benami. A I R 1921 Pat 395=2 P L T 577=63 I C 111

143—Source of purchase-money, motive and—Subsequent conduct of parties, and possession of property are principal tests of benami 32 I C 267

144—Source of purchase money is the test of benami purchase.—43 Cal 660=30 M L J 529=20 M L T 10=(1916) 1 M W N 382=3 L W 471=20 C W N 522=24 C L J 1=18 Bom L R 418=33 I C 452 (P C) also 31 I C 586

145—Source of purchase money and possession of real owner are constructive notices of benami nature 46 P R 1918=45 P L R 1918=33 P W R 1918=43 I C 556

146—Purchase by father in the name of the son is benami Transferee having notice of son's title cannot be allowed to urge estoppel. 73 P R 1918=159 P W R 1918=47 I C 367

147—The High Court in Second appeal can interfere on a question of fact in case of inadequate discussion of evidence 38 I C 561

—Benami motive, the relation of benamidar and the principal, possession of document of title and the Source of money are the points of benami transaction 38 I C 561.

148—Onus of proof of shamness of transaction lies upon him who alleges it.

Recitals in the deed should be challenged within reasonable time Benami does not mean Sham 57 I C 689

149—Doctrine of advancement being inapplicable in India, no presumption of gift arises when a father purchases in son's name. 8 Bur L T 87=25 I C 402

**BENAMI TRANSACTION (Contd.)****(13) Proof and presumption of Benami and doctrine of advancement (Contd.)**

Benami transaction can be proved by proving benami intention of the purchaser in spite of his advancing the purchase money. 224 P L R 1913=133 P W R 1913=19 I C 770

150—Absence of consideration and possession, or inadequacy of sale price warrants an inference of sham transaction. 24 I C 924=1 M L W 376

151—Sale in name of wife and son—Presumption. Hindu Law Widow 16 M L T 26

152—Purchase in the name of wife merely does not raise the presumption as to ownership of the husband. 3 Pat L W 341=39 I C 530

153—Purchase made by the father with his own money in the name of his son does not necessarily make it a benami one 77 P W R 1916=33 I C 733

154—Satisfactory evidence of a purchase advance raises a presumption of a benami transaction 2 O L J 584=32 I C 365

155—Want of possession and title-deeds raises a presumption of a benami purchase (1918) Pat 323=48 I C 746

156—One T a Burmese, who was heavily indebted made a legal partition and vested the share in his daughter by first wife. The paternal grand-mother of the daughter undertook to take charge of the daughters share until the daughter's majority. Subsequently T's creditors proceeded against daughter's property by way of execution but failed. The father subsequently made a composition with his creditors at a very low amount T, however, continued in possession. Daughter sued for possession of the lands from her father who contended that the deed was fictitious. Held that father had failed to prove that the transaction was fictitious A I R 1929 P C 55=56 M L J 244=29 L W 669=(1929) M W N 235=33 C W N 513=31 Bom L R 311=49 C L J 167=Ind Rul (1929) P C 107=7 R 4 (P C)=114 I C 595

157—The parties were relatives. There was litigation during the pendency of which the suit properly was mortgaged. The mortgager was a law agent. The evidence showed that mortgagor handed over the amount in order to save the mortgagor's property from Court sale—Deed was in A's possession—Accounts not produced and mortgage amount not mentioned in the insolvency proceedings. Held that the transaction was sham. A I R 1929 Mad 268=55 M L J 856=29 L W 56=Ind Rul (1929) Mad 420=115 I C 349

**BENAMI TRANSACTION (Contd.)****(14) Purchaser at a Court-sale. (Civil or revenue) (158)**

158—Certificate of sale obtained by Benamidar has no effect against real owner. A I R 1931 Pat 64=11 P L T 898=Ind Rul (1931) Pat 16=10 Pat 234=130 I C 257

**(15) Real owner not party if bound by delivery of symbolical possession (159)**

159—Real owner not party to the suit or execution proceeding is not bound by delivery of Symbolical possession in execution against benamidar. 22 C W N 807=46 I C 104.

**(16) Real owner's liability (160-161)**

160—A benamidar is an agent and as such a lease given by him is binding unless benamidar's authority is withdrawn to lessee's knowledge. A I R 1929 Sind 195=Ind Rul (1930) Sind 186=125 I C 218.

161—So also a lease taken in Benamidar's name makes the real owner liable under it and knowledge of landlord at the time of lease is not necessary. 64 I C 515=2 P L T 740.

**(17) Real owner's rights (162-173)**

162—It is estoppel alone which can prevent the true owner from disputing the acts of his benamidar. 58 C 1371=A I R 1932 C 167=135 I C 433=I R 1932 C 113=A L R 1932 C 142.

163—Registration—Real owner is not a representative of the benamidar and cannot present for registration a document standing in the latter's name or sue under s. 77. A I R 1931 Cal 664=Ind Rul (1931) Cal 719=58 C 681=133 I C 591.

164—Benamidar is a mere name, and as it has been called a mere mask. Behind the name of the fictitious owner there is the real owner and also behind the mask is the person who is the real owner of the property. There is, therefore, nothing which prevents the person behind the mask to take off the mask and to appear in proper person before the Court. 55 C L J 82.

165—Suit by real purchaser—Conveyance from benamidar, if necessary. Resjudicata and C. P. C. S. 11. 24 I C 17

166—Purchase in Court-sale under Bengal Land Revenue Sales Act, 1859, Ss. 36 & 37, cls. 1 and 4—Real purchaser's right of suit for possession—Benami purchaser or purchaser under S. 37. 23 I C 917

167—Beneficial owner can maintain a

**BENAMI TRANSACTION (Contd.)****(17) Real owner's rights (Contd.)**

suit in names of benamidar. A I R 1929 Pat 664=8 Pat, 585 Ind Rul (1929) Pat 657 =120 I C 17

168—Suit by real owner on mortgage in favour of, making the benamidar a party—No defence by benamidar—Maintainability. C P Code, O 34, R 1. 38 All 122

169-170—A suit for recovery of money paid in preserving the estate in Court auction by a real owner is maintainable. 21 C W N 1130=42 I C 516

171—No title is acquired to property purchased bonafidely from a benamidar after his adjudication, as against his Official Assignee.

—Real owner can sue the benamidar for title and possession. 20 C W N 554=23 C L J 463=34 I C 435

172—Real owner being impleaded as Co-defendant benamidar's suit for money should not be decreed. 54 I C 21

173—A transfer by a benamidar is effective only to the extent of his share in the property. 25 C W N 841=11 L W 241=50 I C 678 (P C).

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**(18) Rights and liabilities of purchaser from Benamidar, (174-175)**

174—Faudulent transfer by benamidar—Real owner's right to challenge—Bona fide transferee for consideration.

A benamidar is a trustee passes good value for a transaction. The beneficial owner might make the trustee personally liable, but the transaction with the third party should stand. But if the latter acts in collusion with the benamidar knowing the title of the real owner the transfer will not be upheld. 58 C 1371=A I R 1932 C 167 (169)=135 I C 433=I R 1932 C 113 =A L R 1932 C 142

175—A transfer by a Benamidar is valid & the transferee there by becomes the real owner. 42 I C 715=13 N L R 197 See also 68 I C 332=1922 N 226

**(19) Miscellaneous Cases (176-185)**

176—Plea of—Suit for rent—Landlord benamidar—Registration under Land Registration Act—Effect. B T Act, Ss. 60 and 153. 24 I C 118

177—Tenancy in C P can be held benami—If so held with landlord's consent real tenant cannot be ejected as trespasser. Ind Rul (1929) Nag 284=118 I C 684

178—Lease in A's name—Money belonging to A and others—other's right against A are not affected—Same principle applies, whe-

**BENAMI TRANSACTION. (Contd.)****(19) Miscellaneous Cases (Contd.)**

ther lease is granted voluntarily or lessor is compelled to give it under C P Land Revenue Act, s. 107. A I R 1927 Nag 207=100 I C 772

179—Auction sale—Benami purchase—Real purchaser in possession—Suit for declaration by him—Maintainability. C P Code S. 66 25 I C 810.

180—Benami Auction Purchaser Possession with real owner—Suit against benamidar on the basis of possession, not maintainable. C P Code S. 66. 29 I C 787.

181—Purchase in sale under Bengal Public Demands Recovery Act. 1. C L J 412

182—No assignment can be made in benamidar's favour. A I R 1923 Oudh 3=26 O C 201=9 O & A L R 29=72 I C 877.

183—If can claim as creditor to insolvents estate. Pres Towns Insolv. Act S. 86 And Sch II Ss. 25, 26 And 27. 20 C W N 995.

184—Mortgage suit—Defendant represents beneficiary, T P Act S. 108 (h). 23 I C 762.

185—Person with voidable title can give good title to a bona fide transferee without notice of defective title. A I R 1924 Mad 67=45 M L J 175=17 L W 763 =72 I C 559

**BENARAS HINDU UNIVERSITY ACT**

S 20—University appointed as executor—Probate—Power to obtain. 23 O C 28=56 I C 335

**BENCH AND BAR**

—The witness who is being troubled by the counsel should be protected by the Court, Duties of bar and the bench discussed (1917) Pat 230=2 Pat L W 83=40 I C 318

**BENEFICIAL INTEREST**

See Trust.  
See Trusts Act.  
See Oudh Estates Act.

**BENEFICIAL OWNER**

See (1) Contract Act  
(2) Trust  
(3) Benami Transactions

**BENEFICIARIES**

See also (1) Prob & Adm Act Ss 37, 45  
(2) Trust  
(3) Trust Act  
(4) Benami Transactions

**BENEFIT SOCIETY**

—A society intended to give pensions to widows and children of subscribers is a benefit society. 11 M 253

—In a co-operative Benefit society, the subscriber sued the manager for refund

**BENEFIT SOCIETY (Contd.)**

of his subscriptions. Held that it was for the plff. to prove that he was entitled to the refund if he refused to subscribe further, but the onus to prove that he is not so entitled lies on the defendant, if responsible for the breach 77 P R 1918 =157 P W R 1918=107 P L R 1918=47 I C 415

—The effect on rights, to fixed deposit, of the nominated payee and heir-at-law, also the rights of stranger and beneficiary are well discussed in 39 M L J 391=43 M 728

—In an unregistered voluntary Association, a member according to rules, could nominate his beneficiary, and if he does so the nominee will be benefited. If they agree that the nominee should receive the policy for money paid, he also will get it 33 M L J 476=42 I C 677

**BENEFIT TO ESTATE**

See Guardian and Ward, etc.

See Hindu Law-Joint Family-Manager  
See Minor

**BENGAL ABKARI CALCUTTA MADRAS TOWN**

[Rep (in Calcutta), Ben Act II of 1876 (in Madras) Mad Act I of 1886]

**BENGAL AGRA AND ASSAM CIVIL COURTS**

ACT XII OF (1887)

See Bengal-N W P and Assam Civil Courts Act.

**BENGAL ALLUVIAL LANDS ACT 5-OF 1920**

—Ss 5, 6—Where an appeal memorandum against a decree passed by a Civil Court on a reference under s. 9, was stamped with Court-fee of Rs. 20 only. Held, that the Court-fee was sufficient. In a reference under s. 5 the Court has only to declare the person entitled. It is the Collector's duty under s. 6 to deliver possession. 35 C W N 181=58 C 710=Ind Rul (1931) Cal 670=132 I C 222

—Ss 5, 6—On the Civil Court giving a decision as to what person has a title to the land the Collector exercising jurisdiction under s. 6 is to put the person stated in the order as to be entitled to the land in possession thereof. 58 C 710 =35 C W N 181=Ind Rul (1931) Cal 670=133 I C 222

—S. 10—Stays earlier proceedings including attachment proceeding I R 1930 C 609=33 C W N 1115=125 I C 737=A I R 1929 C 646

**BENGAL ALLUVIAL LAND SETTLEMENT**

ACT (XXXI OF 1858)

—[S 3 rep act I of 1903; Rep in Agra (except certain areas), act XIX of 1873; in C. P. and the Sambalpur District Act XVIII of 1881; in Assam (except the Lushai Hills), Reg I of 1886 Declared in force—Throughout Bengal (except the Sambalpur District) and Eastern Bengal, except as re-

**BENGAL ALLUVIAL LAND SETTLEMENT**

ACT (XXXI OF 1858) (Contd.)

gards the Scheduled Districts act XV of 1874, s. 6 in the Sonthal Parganas Reg III of 1872 S. 3 as amended by Reg. III of 1899 s 3]

S. 1—Unwillingness of Zamindar or proprietor to whose estate land is added by alluvial accession to take the settlement is a condition of Govt's. right to take Khas possession of accreted land. 11 P 750

—S. 1—Government is not debarred from entering into separate engagement as regards the accreted land and the parent estate with the proprietor at a later survey. 110 I C 8=48 C L J 163=32 C W N 906=55 I A 289=A I R 1928 P C 193=55 C 1037 P C

—S. 1—Alluvial land settled as a separate estate ceases to have any connection with the original estate. 77 I C 707 =38 C L J 47=A I R 1924 C 197=50 C 822

—S. 2—Where land was held by the defendant under a lease granted by the plaintiff (a co-sharer) and other co-sharers, and afterwards Government effected settlement with the Plff. as regards the alluvial accretion, in a suit by the Plff. for the recovery of rent, it was held that in respect of his share, he was entitled to realise rent at the rate mentioned in the terms of the lease and that in respect of the remaining he was entitled to realise rent at the rate assessed by the settlement authorities. 19 C L J 614=26 I C 215

**BENGAL ALLUVION AND DILUVION ACT.**

(IX OF 1847)

(Supplemented. A D S. 7 rep., Ben Act IV of 1863; s. 8 Rep. Act XIV of 1870; formal words in ss. 2, 5, 6 and 9, and part of s. 4, Rep. Act VI of 1874; s. 1 Rep. in Pt. Act XII of 1891; ss. 4 5 6 9 Rep. in Pt. Act I of 1903; Rep. (in Assam except the Lushai Hills), Reg. I of 1886; Declared in force—throughout Bengal (except the Sambalpur district and eastern Bengal, except as regards the scheduled Districts, act XV of 1874, s. 6; in the Sonthal parganas, Reg. III of 1872, s. 3, as amended by Reg. III of 1899, s. 3.)

Unwillingness of Zamindar or proprietor to whose estate land is added by alluvial accession to take the settlement is a condition of Govt's right to take khas possession of accreted lands. 11 P 750

—Lands covered by Decennial and Permanent Settlement do not come under the Act. 75 I C 955=A I R 1924 Pat 213=2 Pat 839

—Plaintiff a co-sharer and patnidar. Diarah proceedings were taken as to accretions. Zemindar refusing to take settlement was granted malikana. Plaintiff was recorded as tenant through sub-tenants.

## BENGAL ALLUVION AND DILUVION

## ACT (IX OF 1847) (Contd.)

Plaintiff is entitled to claim accretions as appertaining to his patni tenures, but he cannot be compelled to take settlement of the accreted lands by Government. A I R 1928 Cal 808=Ind Rul (1929) Cal 301=33 C W N 385=55 C 1355=115 I C 43

—If lands are accreted lands they can be assessed. 71 I C 849=36 C L J 336= A I R 1923 C 247

—Churs formed in bed included in proprietor's land is assessable. 29 C W N 195=86 I C 110=A I R 1925 C 447

—Lands within the limits of settled estates which were covered with water and afterwards reformed are not lands gained by alluvion. Act IX of 1847 is inapplicable to such lands. Where the Board of Revenue claims to subject the owner of such lands to an additional assessment, the claim is illegal and the owner can appeal to the Civil Court to reverse such decision. 17 C 590=17 I A 40 P C

—Where alluvial lands appertaining to a parent estate are converted into separate estate solely for purposes of assessment and settlement and never lose their relation to the parent estate but are made the subject of temporary settlements, and are treated for fiscal purposes only, as separate estates and any of the alluvial lands disappear by reason of submergences under the river, they can no longer be treated as constituent parts of those estates and in the event of their reappearance they will have to be dealt with as new alluvial formation to which the provisions of Act IX of 1847 would be applicable. 14 C L J 98=11 I C 718

—Ss. 1, 3, 5, 6—Simpler procedure than that contained in Reg II of 1819 is provided by the Act. New survey in s 3 is intended for changes by alluvion dereliction but not changes for possession. Any such new map in S. 6 refers to new map according to new survey. Without Revenue Survey Map Act could not be applied. Section 31 of the Regulation is not affected or repealed by Alluvion Act. A I R 1924 Cal 913=39 C L J 454=83 I C 446.

—Ss. 1, 3 and 6—Revenue authorities cannot go behind survey at the time of Permanent Settlement. What is liable to be assessed with revenue is land not previously assessed. To decide whether the land sought to be assessed is added in revenue paying land the Court has to determine the land included in the estate at the time of Perm. Settemt. for which the revenue survey map is valuable but not conclusive evidence. Where in 1848, a separate estate was created and settled with the predecessors of the plaintiffs, by reason of the refusal of the predecessors of the

## BENGAL ALLUVION AND DILUVION

## ACT (IX OF 1847) (Contd.)

defendants, the new estate became a separate estate independent of the original estate in all respects. The fact that the proprietors of the original estate had a right to receive malikana does not affect the question. A I R 1924 Cal 197=38 C L J 47=50 C 822=77 I C 707.

—S. 3—Where the owner of a permanently settled estate agreed to duly pay assessment on accreted land Held that the same rate as that of other accreted land and not of permanently settled estate is contemplated. A I R 1928 P C 193=48 C L J 163=32 C W N 906=55 C 1037=55 I A 289 (P C)=110 I C 8.

—Ss. 3 to 6—No assessment can be made in case of a zamindari created in 1861 and a taluq created in 1871 and no survey made. A I R 1923 Cal 233=36 C L J 345=50 C 276=70 I C 510.

—Ss. 3 and 6—As to whether special surveys are necessary for assessment of revenue, see. 65 I C 76.

—S. 3—'Changes' means changes brought about by action of river or sea change caused by annexation of another's land by a proprietor is not contemplated. A I R 1921 Pat 268=2 P L T 81=59 I C 298.

—S. 6—Where the Government "owner" of the Sunderbans granted a lease of certain lands, the lessee was not allowed to claim the abatement of the rent on the ground of diluvion as the lessee is not the holder of an estate paying revenue directly to the Government and as such Act IX of 1847 is not applicable. Diara proceedings for assessment of revenue by Board of Revenue were a nullity where land is bounded by a river which is not a public navigable river at the date of the grant, the boundaries extend up to the middle of the rivers concerned. 24 C W N 737=58 I C 778.

—S. 6—S 24 of Beng. Reg. 11 of 1819 does not provide for a suit to contest the order of the Board of Revenue. A I R 1926 Cal 924 (F B)=53 C 952=43 C L J 542=30 C W N 774=98 I C 728.

—S. 6—Order under s 6 is final only for purposes of assessment. Diara proceedings are not binding as between under-tenure-holders claiming adversely to each other under different proprietors. A I R 1926 Cal 523=43 C L J 152=91 I C 718.

—S. 6—Irregular procedure should be objected to before Board of Revenue. Fundamental irregularity is a good ground in a Court of Law. Burden of proving irregularity, is on objector. Superimposing maps to detect accretion is not irregularity. A I R 1924 P C 175=47 M L J 48=51 I A 241=(1924) M W N 588=35 M L T 146=51 C 802=29 C W N 1 (P C)=80 I C 1023.



**BENGAL ALLUVION AND DILUVION****ACT (IX OF 1847) (Contd.)**

—S. 6—No assessment if land not "added" 36 C L J 336=71 I C 849=A I R 1923 C 247.

—S. 6—Land must be "added" to entitle the Crown to assess it. Burden of proof is on the Crown. Revenue and Thak maps to determine "added land" there must be a comparison between old and new survey maps. A I R 1923 Cal 233=50 C 276=36 C L J 345=70 I C 510.

—S. 6—Churs formed subsequent to settlement of 1793 are to be treated as unsettled. Non-navigable rivers are liable to assessment though river bed belongs to zemindar. A I R 1922 P C 6=42 M L J 61=26 C W N 619=35 C L J 92=49 C 103=48 I A 565=67 I C 835.

—S. 6—Notice served for the purposes of assessment under s. 7 of Act IX of 1847 can be amended. 65 I C 76.

**BENGAL ALLUVION AND DILUVION REGULATION. XI OF 1825.**

See cases under Regulation—(2) Bengal Regulation—Regulation XI of 1825.

**BANGAL AND ASSAM LAWS. VII OF 1905.**

—Repeal of effect See 9 C L J 92=18 C W N 394=21 I C 1004.

**BENGAL, BANK OF, ACT (IV OF 1862.)**

See Bank of Bengal.

**BENGAL, BIHAR, OPRISSA AND ASSAM LAWS ACT VII OF 1912.**

—As to the effect of ss. 3 and 18 see 19 C L J 92=18 C W N 394=21 I C 1004.

**BENGAL CERTIFICATE ACT.**

Sale for pulbandi charges—Estate advertised for sale for arrears of revenue and not for pulbandi charges—Acceptance of arrears of revenue by Collector—Validity of sale. Bengal Land Revenue Sale Law Ss. 5, 18 and 33. 42 Cal 765 (P C).

**BENGAL CESS ACT IX OF 1880**

Ss. 64-A, 64-B Ins., Act VII of 1881: S 9 AM (In Bengal), Ss. 10, 13, 42, (1), 43, 44, 45, 46, (3), 108, Schs. A and C, Am. S 40-A Ins (In Bengal and Eastern Bengal). Ben Act II of 1881: Ss. 110 to 181 and S. 182 (a), (b), (c), (e), (g), and (h) Rep., Ss. 9, 40, 108 Rep In PT., Ss. 4, 38, 82, 83, 89, 109 AM (In Eastern Bengal and In Places In Bengal In Which Ben. Act III of 1885 is Declared In Force), Ben Act III of 1885, S. 2; S. 1 Rep In PT., S. 29, Example B, A M; Act. I of 1903; S 109 A M (In Places In Bengal In Which Ben Act III of 1885 is in Force). Ben Act V of 1908, S. 64.]

—Sale for cess arrears—Purchase by certificate debtor at, without Court's permission—Not valid—11 P 701 (741)=A L R 1933 P 65

—Auction sale. for road cess—Purcha-

**BENGAL CESS ACT IX OF 1880 (Contd.)**

ser priority on Beng Ten. Act, S. 65 I Pat L J 161=36 I C 498

—Suit for cesses with penalty in respect of revenue-free tenures is treated as suit for rent—If value is above Rs. 100 second appeal lies. A I R 1930 Cal 145=33 C W N 1000=Ind Rul (1930) Cal 635=125 I C 859

—If it be proved that the two years which are to be compared for the purposes of cess fall under the same re-valuation, the doctrine of res judicata will apply, but not in other cases. A I R 1927 Pat 58

—Ss. 4, 5, 6—Where aggregate rent was being paid under a kabuliyat in respect of land over which hauts were held, Held, the kabuliyat amounts to a demise and the sum payable to the lessor is 'rent' liable to assessment irrespective its being called by the parties, rent or license fees. A I R 1930 Cal 739=57 C 655=Ind Rul (1931) Cal 129=129 I C 177

—S. 4—To rank as cultivating raiyat the cultivation must be personal. I R 1930 Pat 607=126 I C 303=A I R 1930 Pat 305

—S. 4 Payment of rent exceeding Rs. 100 by cultivating raiyat makes him a tenure-holder and liable to pay cess under S. 41 (2) I R 1930 Pat 531=125 I C 563=11 P L T 212=A I R 1930 Pat 322

—S. 4—The rent of Rs. 100 must cover the entire land cultivated by the person in question. A I R 1928 Cal 508=55 C 1305=47 C L J 545=32 C W N 610=113 I C 240

—S. 4—"Annual value" includes damages for use and occupation—Payment under kabuliyat for use and occupation is "annual value". A I R 1929 Cal 129=55 C 1328=Ind Rul (1929) Cal 329=115 I C 185

—S. 5—Rent in case of an ancient lease does not include cess, A I R 1927 Pat 58

Ss. 5, 52 and 64—No cess can be levied on a rent-free tenure except after the publication of extracts from the valuation roll. Liability for road-cess is personal. Encumbrance cannot be annulled. Previous decree for cess is not res judicata, 3 P L T 282=1922 Pat 167 Sup=65 I C 138=A I R 1922 Pat 303

—S. 6—If the conveyance of land for hant amounts to demise giving control over the land and not a mere license, the rent in respect of the hant is profits derived from the land assessable under S. 6 I R 1931 C 129=129 I C 177=A I R 1930 C 739=57 C 655

—S. 6—"Net annual profits" include royalty. A I R 1929 Pat 110=10 P L T 544=Ind Rul (1929) Pat 299=116 I C 523

—S. 6—The rule ejusdem generis does not cover the expression "other"

**BENGAL CESS ACT IX OF 1880 (Contd.).**

immoveable property " I R 1929 C 329=115  
I C 185=A I R 1929 C 197=55 C 1328.

—S. 6—Lessee of mining rights need not pay cess to lessor 8 P L T 410=1926 Pat 265=97 I C 476=A I R 1926 Pat 430.

—Ss. 6, 72, 76, 80, 81 Schedule E.—The plaintiff owner who received rents and royalty over the profits of the mine was assessed for 'cess'. It was held that the Return under S. 72 was concerned not only with mine owner's profits but with the net profits which include the owner's royalty and hence the plff. was rightly assessed. Liability for 'cess' is on both the occupier & the 'owner' as he intention is that all persons are liable for it who enjoy its benefits. 8 A L J 140=13 C L J 124=9 I C 311=15 C W N 201=38 C 372=21 M L J 365=9 M L T 196=13 Bom L R 82= (1911) 2 M W N 53=38 I A 31 (P C).

—Ss. 6, 72, 76, 80, 81 Sch. E.—The plaintiff-owner used to receive royalty on profits of coal-mines over and above the rents and he was assessed for cess on royalty. It was held that Return under s. 72 was not with regard to mine-owner's profits but was for the general net profits and this included the owner's royalty. The word 'owner' in s. 81 means 'proprietor' but as in the case of land, both the 'owner' & the 'occupier' are liable for 'cess'. The act holds all persons who benefit by "roads & other means of communication" or "works of public utility" out of cesses liable for its payment. 8 A L J 140 P C=9 M L T 196=15 C W N 201=13 Bom L R 82=9 I C 311=21 M L J 365

—Ss. 14 & 20—A suit for rent by the landlord under a Kabulyat is not governed by s. 14 Cess Act and in spite of s. 20, the Courts can give to the plff. landlord greater sum than that shown in the return. 37 I C 755

—S. 20—The Cess Act is a fiscal act, the object being that no land should escape assessment. A zemindar does not lose his claim to rent, though he may be criminally liable for it if he through mistake or others makes false return by interchanging lands of different classes. 27 I C 304

—S. 20-A landlord cannot get more rent than mentioned in Road Cess Return though there may be a mistake or the rent is due before the Return. 19 I C 249

—S. 20-A landlord cannot recover higher rent than in the Road Cess Return unless there is a material change in the holding, but the change in area by remeasurement or encroachment does not take it out of S. 20. The act cannot be overridden by Record of Rights or by entry in jama Wasi baghi 1 Pat L J 521=(1917) Pat 312=2 Pat L W 421=38 I C 109.

—S. 20-Rents at higher rate than that

**BENGAL CESS ACT IX OF 1880 (Contd.)**

mentioned in the return cannot be recovered by a landlord because his statement in the Road-Cess-Return amounts to more than an admission. 53 I C 202

—S. 20 & Sch. A part 1—S. 20 bars a suit against raiyat or tenure holder when their names are mentioned in a return under part I Sch. A because the return should have been under part II or III as the case may be with their names mentioned. 15 I C 424

—S. 20—In the return under Cess Act a holding was wrongly entered in Part I for Part II but such false entry does not bar rent suit under S. 20 (a). 2 Pat L J 653=2 Pat L W 41=43 I C 501

—S. 20—Due to disputes a landlord honestly entered in the Road Cess Return a tenant's land as zemit. A rent-suit for such was held as not barred under S. 20 Cess Act. 2 Pat L W 42=43 I C 497

—S. 20 (a) When the landlord enters a tenure in Part I Sch. A in the Cess-Return cannot sue for rent for that tenure, unless he proves that the rent of tenure for which he brings the suit was created after the return was filed 2 Pat L W 38=41 I C 404

—S. 20 (b) As S. 20 (b) cannot apply to bhaoli batai holding that Sec. does not preclude a landlord from recovering more than the 'annual value' as his share mentioned in the return of Bhaoli batai land produce 2 Pat L J 617=2 Pat L W 35=41 I C 61=(1913) Pat 166

—S. 20 (b)—Where rent was to be paid in paddy, though the price of the paddy was mentioned in the cess return, Held, the suit to recover arrears of paddy is not suit for rent and s. 20 does not apply, A I R 1929 Cal 31=111 I C 142

—S. 20—Landlord can recover rent at the rate settled under s. 105 B T Act even though the road cess return showing a lesser rate was filed prior to proceeding under S. 105 B T Act. 3 P L T 141=1922 Pat 57=4 U P L R 23=65 I C 3=A I R 1922 Pat 55

S. 20—Omission to mention bhaoli in the Road Cess Return does not preclude the landlord from claiming produce rent for the same. 59 I C 875

S. 26—Variation or annulment of valuation made by Collector cannot be questioned in Civil Court. A I R 1929 Pat 743=10 P L T 785=Ind Rul (1929) Pat 517=118 I C 325

—S. 26—Collector having decided that a person is tenure-holder, suit for declaration that he is otherwise is barred. A I R 1929 Pat 743=10 P L T 785=Ind Rul (1929) Pat 517=118 I C 325

S. 40—S. 40 applies only where cess covers the entire district—S. 40 is imperative wherever it applies. A I R 1927 Cal 322=54 C 119=31 C W N 329=100 I C 887

**BENGAL CESS ACT IX OF 1880 (Contd.)**

—S. 41—Cess-Rent if includes-Suspension of rent if involves suspension of cess—Bengal Tenancy Act-S 3 (5)—Effect.  
36 C W N 72

—S. 41—In absence to the contract to the contrary the liabilities for cess under S. 41, of the landlord and the tenant must be determined according to the statute. 22 C L J 571  
=33 I C 352

Ss. 4 and 41—S. 41 distinguishes a tenure-holder from a cultivating raiyat and not from a raiyat and so a raiyat may be a tenure-holder under the Cess Act. 15 C L J 428=14 I C 177

—S. 41 (3)—'Faid Rewaji Bhaoli' is admissible under s. 35 Evi. Act as a public record being part of the Record of Rights. Each cultivating raiyat shall pay half the Road and Public Works cesses, to the person to whom he pays rents, calculated according to previous sub-sections and the cess which the raiyat has to pay to the landlord is dependant on the rents payable each year. Where the payment of rent is in kind the tenant must give  $1\frac{1}{2}$  seers per maund, whatever be the value. 1 Pat L W 677=39 I C 505

—S. 41 (2)—Liability to pay cess can be varied by contract. A I R 1930 Pat 322 =11 P L T 212=Ind Rul (1930) Pat 531=125 I C 563

See Also 68 I C 937=A I R 1922 C 300

—S. 41—There must be an express provision in the contract exempting from liability under s. 41. A I R 1930 Pat 322 =11 P L T 212=Ind Rul (1930) Pat 531=125 I C 563

—Ss. 41, 47 and 58—Penalty under s. 58 is not payable but is recoverable—Limitation of money claim will apply to suit under s. 58. A I R 1929 Pat 331=8 Pat 358=Ind Rul (1929) Pat 557=118 I C 733

—S. 41 (3)—A cultivating raiyat will be assessed more liberally than a holder of a tenure. A I R 1928 Cal 508=55 C 1305 =47 C L J 545=32 C W N 610=113 I C 240

—S. 41 (3)—Cultivator paying less than Rs. 100 as rent should pay rate half that of tenure-holder. 8 P L T 643=102 I C 365=A I R 1927 Pat 270=6 Pat 13

—S. 41—Amount of cess can be ascertained from a valuation roll. A I R 1928 Cal 406=47 C L J 464=110 I C 349

—Ss. 41, 107—But the valuation roll does not affect the status of the tenant under B T Act—Civil Court cannot question the statements. A I R 1926 Pat 175 =90 I C 621

—S. 41—Raiyat must pay cess to landlord. 6 P L T 214=87 I C 439=A I R 1925 Pat 473

—S. 41—Irrespective of whether rent is payable in cash or in kind, cess is pay-

**BENGAL CESS ACT IX OF 1880 (Concl'd.)**

able in respect of all lands held by a cultivating raiyat. 26 C W N 368=68 I C 662

—S. 41—Contract to pay cess is not illegal. A I R 1922 Pat 303=3 P L T 282 = (1922) Pat 167 (Sup)=65 I C 138

—S. 41 (2)—Cess payable by tenure holder-basis of calculation-rent altered but not annual valuation-whether landlord entitled to contribution. A I R 1933 C 218 =60 C 145=A I R 1913 C 246

—Ss. 43, 44, 46, 48 and 95—When a separate revenue account is opened, a co-proprietor to determine his share of the cess otherwise than on land-revenue basis can prefer objection under s. 44. By s. 48 a co-sharer who pays more cesses than his proportionate interest in the estate can recover from his co-sharers amounts of their interests, the words "proportionate to his own interests" meaning share of the estate & not to its valuation or income. The basis for distribution is the land revenue and not the valuation for road-cess. If a co-sharer sues for money paid by him in excess to his share, he must prove that the valuation submitted by him is correct because under s. 95, that return can go in evidence only against him & not in his favour. 20 I C 152=25 I C 366

—S. 47—The procedure for cess-levy is the same as for recovering of rents under s. 47, which Sec. cannot be restricted by any contract between the tenant & the landlord, who may waive his claim for interest on rent & yet he will be liable for interest on cess. Under s. 47, the remedy would be a suit and the damages may be a sale of land or damages at 25 p.c according to s. 68 B T Act. 23 C L J 603 =34 I C 111

—S. 50—Land held "without payment of rent"—Means rent-free land and not land in respect of which rent is payable but is temporarily suspended because of forcible dispossession by landlord. 36 C W N 72 =137 I C 696=I R 1932 C 365=A I R 1932 C 335

—Ss. 50, 52, 54, 56, 58 and 62—Where the holder of revenue-free tenure submits a return under s. 14, and there has been a valuation the lands not coming within s. 33, s. 50 must apply. Further notices under s. 51 and in certain cases also notices under s. 54 are necessary. The liability of the holder of the rent free lands will arise only under s. 56 and his liability to penalty only under s. 58 and his liability to pay statutory interest under s. 62. A I R 1930 Cal 145=33 C W N 1000=Ind Rul (1930) Cal 635=125 I C 859

—Ss. 52 and 52 (a)—Notice under s. 52 published before the Amendment Act can be certified subsequently publication of notice should be strictly proved before liability

**BENGAL CESS ACT IX OF 1880 (Contd.)**

for cess can arise. A I R 1926 Cal 736-92  
I C 48

—S. 54—Notice under s. 54 is a condition precedent to liability to pay cess. A I R 1924 Pat 205-72 I C 1

—Ss. 54 & 56—Plaintiffs cannot recover road cess on the basis of revaluation of 1907, unless notice under s. 54 is published. 44 I C 32

—S. 64 A—Rules under Sch III of B T Act govern the limitation for suit under s. 64. A. 95 I C 843=A I R 1926 C 1069

—S. 95—Cess returns—Not admissible as evidence in favour of the person submitting them. 11 P 701=A L R 1933 P 65

See Also 13 P L T 648=A I R 1932 Pat 36; and 92 I C 104=A I R 1926 C 727; and 79 I C 412=A I R 1925 C 493

—S. 95—Road cess return—Is admissible against party filing it. A I R 1931 P C 221-35 C W N 921=Ind Rul (1931) P C 270-54 C L J 280-133 I C 734 (P C)

—S. 95—A cess return can be used in evidence by or against a third party, not party to the preparation of the return; Provided that such a return does not offend against s 95 it may be adduced in evidence if otherwise it is admissible under the Evidence Act. A I R 1926 Cal 856-53 C 615-43 C L J 425-30 C W N 803-95 I C 72

—S. 95—Statement in Return that land is in khas possession of landlord can be questioned. A I R 1925 Cal 408-79 I C 412

—S. 95—S. 95 of the Road-cess qualifies s. 21 Evidence Act in so far as the road-cess return can never be admitted in evidence in favour of the maker thereof; also such returns are admissible not only against its makers but also against others. 39 C 995=18 I C 61

—S. 95—A return is not admissible on landlord's behalf merely by the fact that it was successfully used in evidence by a tenant against him formerly. S. 95 not being exhaustive limits s. 21 of the Evidence Act by excluding the admission of cess-returns in favour of the persons by or on whose behalf they are filed. But a return filed by a ticcadar or temporary lessee can be admissible in his zemindar's favour as the return by defendant's predecessor in interest has great value in landlord's favour. 39 Cal 1005=15 I C 284

—S. 95 : A cess return filed by the certificated guardian on a minor's behalf cannot be admitted in evidence in minor's favour, under s. 95 if such guardian is not the authorised agent. 18 C W N 1076-25 I C 125

**BENGAL CESS ACT IX OF 1880 (Contd.)**

S. 95—Although under s. 95 B. T. Act the return is admissible in evidence against the landlord or any claimant through him a tenant's title is not lost if the landlord makes any entry at the back of his tenant in such a return. 49 I C 736

—S. 95—Road-cess Return filed by widow is not barred under s. 95 from evidence in reversioner's favour. 18 G L J 633-22 I C 594

—S. 98—Prerogative rights of the crown as to debts due to the crown are not affected by s. 171. A I R 1926 Cal 781-51 C 328-96 I C 37

—S. 182 (I)—Rule 30 is not ultra vires as cl. (1) of s 182 a quite general. A I R 1927 Cal 322-34 C 119-31 C W N 329-100 I C 887

—S. 182—Rule 57 is ultra vires even if made under s. 182. A I R 1926 Cal 856-53 C 615-43 C L J 425-30 C W N 803-96 I C 72

**BENGAL CHAMBAR OF COMMERCE RULES**

R. X.—Arbitration Rules relating to disclosure of names of Arbitrators is contemplated. 39 Cal 669

**BENGAL CHAUKIDARI ACT**

See Bengal Village Chaukidari Act, (VI of 1870.)

—S. 24—Vendor and pre-emptor both Muhammadans—Vendee a Hindu—Muhammadan. Law of pre-emption does not apply in absence of Local Custom among Hindus as to pre-emption. A I R 1926 Cal 685-30 C W N 272-93 I C 18

**BENGAL CIVIL COURTS ACT (VI OF 1871).**

See Bengal N W P and Assam Civil Courts. Act

**BENGAL COUNCIL REGULATION.**

—Oath of allegiance, Omission to take Effect. Specific Relief Act S 42. 41 Cal 384. BENGAL COURT FEES AMEND. ACT 4 OF 1922.

—The act is not ultra vires. 27 C W N 812-75 I C 466=A I R 1924 C 115-50 C 597.

—Even though property is situated outside Bengal, Court-fee will be levied at enhanced rate if probate or letters of adm. is granted in Bengal A I R 1924 Cal 115-50 C 597-27 C W N 812-75 I C 466.

—S. 17—The Act is not retrospective. So the court-fees on a probate application under old law is valid even though the probate was issued after the new Act A I R 1924 Cal 987-39 C L J 209-84 I C 751.

**BENGAL COURT OF WARDS ACT 4 OF 1870**

[Rep. In Pt. Act XII of 1873. Rep ( In Bengal and Eastern Bengal and locally in Assam) Ben Act IX of 1873.]

## BENGAL COURT OF WARDS ACT (IX OF 1879)

—The jurisdiction exercised by the Court of Wards is an exercise of power essentially sovereign power—Public interest and the interest of the revenue are clearly the object of the powers given. 59 C 1289 =36 C W N 606=55 C L J 542=A I R 1932 C 834.

—Court of Wards—Origin and history of. 59 C 1289 (1293-6)=36 C W N 606=55 C L J 542=A I R 1932 C 834.

—Act is limited to persons subject to jurisdiction of ordinary Courts—Disqualified Ruling Chief—Charge of his personal property, whether in State or in British India, is a matter for Political Department, A I R 1930 Pat 357=Ind Rul (1930) Pat 497=125 I C 145.

—Agreement by manager to grant a prospecting license and mining lease is valid. 84 I C 178=A I R 1925 Pat 259=3 Pat 968.

—A suit for specific performance to execute a lease will lie against the minor if the Board of Revenue refuses to order the manager to execute the lease. A I R 1925 Pat 259=3 Pat 968=84 I C 178.

—Lease granted with sanction of Commissioner is void as against wards, in so far as it exceeds the sanction A I R 1921 Cal 789=39 C L J 102=81 I C 744.

—Guardian can compromise a suit without leave of Court. A I R 1921 P C 22=40 M L J 201=48 Cal 469=48 I A 27=19 A L J 171=23 Bom L R 698=33 C L J 211=25 C W N 797=14 L W 253=(1921) M W N 115=29 M L T 202 (P C)=59 I C 911.

—Ss. 6 (a), 9 & 27; A disqualified proprietor under S. 6 (a) is not disabled to get an extended period of limitation. The possession of the court of wards is his possession and in a sale by the court of wards time runs from the date of purchaser's possession. 17 A L J 202=23 C W N 531=29 C L J 355=25 M L T 341=21 Bom L R 611=(1919) M W N 318=50 I C 202=46 I A 60=46 Cal 694=36 M L J 210 (P C).

—S. 6 (a)—Debtor's widow made ward of court—Suit to recover debt from widow without making manager of Court as her guardian is not maintainable when whole estate is not taken over. 20 C W N 31=22 C L J 522=32 I C 1.

—Ss. 6 (c), 51—Suit against disqualified proprietor under court of wards—Manager of Court of wards is not a necessary party 5 Pat L W 92=46 I C 316.

—S. 6 (e)—Tenant declared ward of court on expiry of tenancy—Suit by landlord for rent regarding tenancy—Manager must be made a party otherwise the decree cannot be satisfied by property in the hands of the manager 17 C L J 601=20 I C 484.

## BENGAL COURT OF WARDS ACT

(IX OF 1879) (Contd.)

S. 6 (e), 7 and 35—After declaration under s. 6 (e), management of any property coming to the proprietor by inheritance or otherwise automatically vests in the Court of Wards—An order under S. 35 is an order once for all and taking possession completes charge of the Court of Wards. A I R 1925 Pat 179=4 Pat 172=6 P L T 400=(1924) Pat 310=84 I C 620.

Ss. 6, 7, 10—Jurisdiction of Civil Court to appoint Court of Wards as guardian of person and property of lunatic, though property not revenue paying. 29 C 638=7 C W N 20.

—Ss. 6, 27, 35—Right of Court of Wards to sue on bond executed in the name of prior executor-manager. 31 C 89.

—Ss. 10 and 10, B—Effect of non-production of claim with notice 9 A L J 558=15 I C 729.

Ss. 10-A, 64-A—Under S. 64-A of the Court of Wards Act, the notice must be published in the Gazette and the Judge's office as well as in several other ways. The words "the date of the publication of the notice" ought to be construed as meaning the date of the last publication under s. 64-A. Therefore where a claim is brought within six months of the last publication of the notice, under s. 10 A of the Act, the claimant creditor is entitled to subsequent interest. 9 Ind Cas 621.

—S. 10 B—The right of a plaintiff as creditor of a deft. ward remains unaffected not-withstanding the provisions of s. 10-B. 17 C L J 399=19 I C 840.

—Ss. 13 A, 51 and 55—Estate retained by Court on account of unpaid debts—Sale in execution—Application to set aside by Judgment debtor not acting through Court of Wards does not lie—Release of estate pending appeal from order dismissing application does not give a fresh start to limitation. 20 C W N 852=34 I C 86.

—S. 15—Court of Wards can give acknowledgment of debt and execute promissory notes. 34 I C 205=43 C 211.

—Ss. 18, 35—Where certain properties belonging to the idols were transferred by the Court of Wards. Held, that the transfer was invalid and art. 91 of Lmt. did not apply to suit to set aside the same. 19 C W N 1193=28 I C 818.

—Ss. 18, 57—Compromise by Court of Wards—Sanction of Court on behalf of minor—Ward unnecessary party—C P C O. 32, r. 7 inapplicable. 37 I C 971=44 C 829.

—Ss. 35, 6 (e) and 7—After declaration under s. 6 (e) management of any property coming to the proprietor either by inheritance or otherwise automatically vests in the Court of Wards—An order under s. 35 is an order once for all and taking possession completes charge of the



## BENGAL COURT OF WARDS ACT

(IX OF 1879) (Contd.)

Court of Wards. A I R 1925 Pat 179=(1924) Pat 310=4 Pat 172=6 P L T 400=84 I C 620

—Ss. 39, 40—Approval of the Court of Wards to a submission to arbitration need not be in writing if the submission is a good one & subsequent approval is obtained.

Permission of the District Judge for a reference to arbitration by the Court of Wards is not necessary. 51 I C 999

—Ss. 40—Manager's Capacity to preempt. 39 C 915=16 C W N 553=15 C L J 483=9 A L J 525=14 Bom L R 436=23 M L J 28=11 M L T 361=(1912) M W N 486=15 I C 659=39 I A 101 (P C)

—Ss. 40, 41—Court can adjust accounts between Court of Wards estate and other estates. A I R 1929 Pat 369=8 Pat 86=Ind Rul (1929) Pat 631=119 I C 903

—Ss. 41, 47 & 58—Manager appointed by Court of Wards—Misfeasance and negligence of—Damages caused to person whose estate was under management by—Civil suit against manager lies. 59 C 1289=36 C W N 606=55 C L J 542=A I R 1932 C 832.

—Ss. 41, 47 & 58—Manager appointed by Court of Wards—Misfeasance and negligence of—Damages caused to person whose estate was under management by—Suit by him against Secretary of State for India in Council for—Not maintainable. 59 C 1289=36 C W N 606=55 C L J 542=A I R 1932 C 832

—S. 48—Right of decree-holder against ward to execute decree not affected by the section. 18 C W N 1055=19 C L J 406=22 I C 694

—S. 51—Suit against ward as represented by the manager for money advanced on bahikhata account is proper—(Obiter)—Appeal by ward personally was not competent. A I R 1928 Pat 177=6 Pat 373=103 I C 717

—S. 51—Work of guardian ad litem ceases after decree. For purposes of execution manager can be appointed as guardian. 39 C L J 590=28 C W N 963=84 I C 68=A I R 1925 C 23

—S. 54—Notices must be served upon the manager through the Collector. 3 Pat. L W 218=45 I C 404

—S. 55—Manager of a Court of Wards can institute a suit without Court's Sanction to save limitation; but the suit shall not be proceeded with without the order of the Court. If the suit is proceeded with without such order, all proceedings subsequent to the filing of the plaint should be set aside. 22 C W N 419=27 C L J 125=43 I C 184

But see 23 C W N 876=55 I C 261

—S. 55—Suit for balance of sale price

## BENGAL COURT OF WARDS ACT

(IX OF 1879) (Contd.)

or "grā" is a suit for rent. 23 C W N 876=55 I C 261

—S. 60—On appointment of Common manager under B T Act all co-sharers do not become Wards of Court. A I R 1929 Cal 790=33 C W N 847=Ind Rul (1930) Cal 320=123 I C 320

—S. 60—Surrender by a widow who is a Ward of Court in return for a monthly allowance is void unless permission of Court is obtained. 94 I C 830=1926 P C 2=24 A L J 250=43 C L J 259=50 M L J 332=1926 M W N 332=7 P L T 223=5 Pat 290=28 Bom L R 841=31 C W N 49=53 I A 11

—S. 60—Widow can relinquish without sanction if it is a bonafide surrender and not a transfer. A I R 1923 Pat 492=2 Pat 607=4 P L T 335=73 I C 822

—S. 60 A—Property in charge of the Court of Wards as part of the estate of the ward is not liable to attachment without the sanction of the Court in execution of a decree on a contract entered into by the ward without the leave of the Court during his wardship. 12 Pat L T 227

—S. 64—A—General notice to the creditors—non-presentation of claim to collector interest loss of. 9 A L J 558=15 I C 729

—S. 70, r. 15—Commissioner cannot be compelled to sanction lease if he insists on sanction from Board of Revenue. A I R 1925 Pat 259=3 Pat 968=84 I C 178

## BENGAL DACCA CONSERVANCY ACT VI OF 1870

—S. 6—Vesting of the channel of Dholi Khal in Municipality was held to include the bed of the channel. 18 I C 849

## BENGAL DISORDERLY HOUSES ACT 3 OF 1908

A man when prosecuted under a special act is not considered as prosecuted and hence no damages for malicious prosecution can be given, and so Article 23 of Sch. I of the Limitation Act of 1908 will not apply; but can be compensated for libel within one year the suit for libel must be instituted under Art. 24. 18 C L J 352=20 I C 768

## BENGAL DISTRICT MUNICIPAL IMPROVEMENT ACT 3 OF 1864

[Rep. Ben Act V of 1876.]

See Municipality

—S. 87—See Beng. Act III of 1884, s. 363

## BENGAL DISTRICT ROAD CESS ACT (X OF 1871)

[Rep. (In Assam), Act V of 1897; (In Bengal and Eastern Bengal), Ben. Act IX of 1880.]

## BENGAL DRAINAGE ACT 6 OF 1880

[Rep. In Pt and Am. Ben Act II of 1902; s. 1 Rep In Pt, Ss. 60 to 63, Rep. Act 1

**BENGAL DRAINAGE ACT 6 OF 1880 (Contd.)**

of 1903; Declared In Force In The Southal Parganas. Reg. III of 1872. S. 3 as Amended by Reg. III of 1899. S. 3.]

—Ss. 2, 42 and 50—A rent free holder is a tenure holder. The owner of the estate is liable to the collector for the apportionment costs of the drainage; in return the owner on application to collector can recover the same from the tenure holder. **52 I C 832**

—S. 44—being permissive, cannot restrain a landholder or a superior tenant from recovering the instalments under Ss. 42 and 44. **29 I C 399**

—Ss. 32, 35, 42 (b)-44. A suit by landlord to recover drainage charges from tenant falls under cl. 8 of Sch. II of small cause Court Act and is not a suit of a small cause nature under s. 586 C P C 1882. In order that the sum should be recoverable, the tenant must have been benefited by the works; and the Commissioner's report will not be prima facie evidence in favour of the landlord. **17 C W N 499-20 I C 536**

Ss. 36, 36-A, and 38—By an engagement entered into by the landholder under s. 38 to pay up summarily the amount due under the provisions of Public Demands Recovery Act, thy landowner who gave engagement can only be made liable and not the subsequent purchaser who is not made liable. **18 C W N 944-19 C L J 610-23 I C 782**

—S. 37—Absence of notice vitiates certificate proceedings as service is not optional. **A I R 1926 Cal 367-87 I C 339**

**BENGAL ELECTORAL RULES**

—S. 29—Ambiguity as to rule is to be decided by Governor. **A I R 1924 Cal 761 -51 C 279-39 C L J 58-79 I C 1042**

**BENGAL EMBANKMENTS ACT (II OF 1882)**

[ S. 16 Rep s. 17 Rep. in Pt., Act IX of 1890; ss. 1, 2, 46 Rep in Pt. Act I of 1903 ]

—Any Contract entered into by a landlord with his tenant by which the landlord alone agrees to pay the pulbundi charges is not against public policy, and the Bengal Embankment Act does not affect it. As the landlord can realise out of Court under s. 47, the tenant can take shelter of the Court even on mere suspicion without waiting to defend. **41 Cal 130-18 C W N 86-18 C L J 337-20 I C 488**

—Estate advertised for sale of revenue only—Validity. **42 Cal 765-19 C W N 507-28 M L J 480-29 I C 290-1914 P C 30-42 I A 58 (P C)**

—Ss. 6, 76, 79, 80—Leases prior to the Act Containing stipulations contrary to the Act are superseded. "Existing embank-

**BENGAL EMBANKMENTS ACT**

( II OF 1882 ) (Contd.)

ments" mean embankments existing at the date of the addition and not date of notification under s. 6. The last clause of s. 6 is merely directory. **29 C L J 328-23 C W N 572-50 I C 669-46 C 825.**

—S. 6—The provisions regarding publication of the latter part of s. 6 and s. 80 are not mandatory but only directory. **A I R 1931 Cal 43-58 C 874-35 C W N 163-Ind Rul (1931) Cal 507-131 I C 859.**

—Ss. 56, 57, 68, 86—The Collector is authorised to assess the embankment charges on tenures after due notice; and the tenure-holders are bound to pay those sums to the zemindar. The Collector's order is not subject to any contract. S. 86 enacts that order passed under s. 68 shall be final. The Civil Courts, therefore, cannot modify or alter such orders. **10 Ind Cas 192.**

—Ss. 59, 68 and 74—Tenure split up at instance of zemindar—Collector on zemindar's representation that there was only one tenure making apportionment of embankment charges—Zemindars cannot bring to sale all tenures by taking proceedings under S. 74, against holder of one tenure. **A I R 1930 Cal 797-57 C 1001-Ind Rul (1931) Cal 246-129 I C 774.**

—S. 68—Civil Court cannot interfere with the order of collector even though it be wrong **A I R 1924 Cal 154-37 C L J 585-70 I C 784.**

—Notice is not essential for fixing liability for the embankment costs. **59 C 255-35 C W N 1239-137 I C 147-A I R 1932 C 267-I R 1932 C 270.**

—S. 69—Service of notice may be presumed under S. 114 of evd. Act. **59 C 255-35 C W N 1239-137 I C 147-A I R 1932 C 267-I R 1932 C 270.**

—S. 69—A provision in an engagement that no demand shall be made either for an excess jama or for any other imposition over and above the aforesaid mokorri-jama is not sufficient to preclude the zemindar from recovering embankment costs which is subsequently imposed by Statute on the tenure-holder. **35 C W N 1239**

—S. 74—Any agreement between the Zamindar and the Patnidhar is not against the policy of law as it is not prejudicial to the Government. When a Zamindar can realise charges from the patnidhar without going to the Court, the suit to restrain the Zamindar for exacting the charges is maintainable on basing an agreement between them even though before the present Act. **41 C 130-18 C L J 337-20 I C 488-18 C W N 86.**

—S. 74—Patnidar never called on to pay is not a defaulter—"From defaulter" means under the defaulter. **A I R 1926 Cal 1158-96 I C 574.**

## BENGAL EMBANKMENTS ACT

(II OF 1882) (Contd.)

—S. 74 proviso applies also to a transferee from the defaulter.—From the defaulter is not restricted to the meaning under the defaulter. A I R 1930 Cal 797 =57 C 1001=Ind Rul (1931) Cal 246=129 I C 774.

Contra A I R 1926 Cal 1158=96 I C 574.

—S. 75 (b)—“Embankment”—Sluice annexed to an embankment is within definition of. A I R 1933 P 40=13 P L T 652.

—S. 76 (b)—“Existing embankment”—Means embankment existing at the time when the addition is made.—Expression used in contradistinction to “new embankment.” A I R 1933 P 40=13 P L T 652.

—S. 76 (b)—“Existing embankment”—Means embankment as it existed at the date when the additions were made and not the embankment as it existed at the date of the notification under S. 6.

Permission of the Collector is therefore necessary even for repairs, if those repairs involve additions to the embankment in the state that it is when these repairs begin. 60 C 1313=6 C W N 877=56 C L J 15=A I R 1933 C 3=141 I C 647.

—S. 76 (b)—The provision as to further publication is directory and not mandatory and the notification comes into effect one month after the date of its appearance in the Calcutta Gazette even in the absence of such further publication. A I R 1933 P 40=13 P L T 652.

—Ss. 87 and 4—Section 87 applies to all public embankments inclusive of the embankments enumerated in Sch. D to Bengal Embankment Act VI of 1873. A I R 1921 Cal 761=39 C L J 577=84 I C 22.

—S. 87—The person claiming abandoned embankment must prove not merely that it lies in his estate but that it was originally taken from his estate. A I R 1921 Cal 761=39 C L J 577=84 I C 22.

—S. 86—Apportionment of cesses by Civil Court. A I R 1930 Cal 797=Ind Rul 1931 Cal 246=57 C 1001=129 I C 774.

## BENGAL ENCUMBERED ESTATES ACT (VI OF 1876)

See Chota Nagpur Encumbered Estates Act.

## BENGAL ESTATES PARTITION ACT (VIII OF 1876)

—A person getting as his share a part of the holding, partitioned under this act, is with respect to that part a sole landlord. There is no provision in this act against such a division. 10 C W N 818.

—The partition of a tenancy into separate tenancies without the consent of the tenant is not invalid. 1 Pat L J 270=2 Pat L W 440=37 I C 440.

## BENGAL ESTATES PARTITION ACT

(VIII OF 1876) (Contd.)

—A Butwara Khasra prepared under this Act is not a record within the meaning of s. 35 of the Evidence Act and is useless for the purpose of rebutting the presumption raised by an entry in the record of rights. 17 C W N 779=17 C L J 462=18 I C 143.

—A sale by the tenant of an entire separated tenancy constitutes abandonment. 2 P L W 440=1 Pat L J 270=37 I C 440.

—A suit for partition of a mouza jointly appertaining to two estates lies in civil court and does not come under s. 24 C P C A I R 1931 Cal 104=34 C W N 895 Ind Rul (1931) Cal 351=130 I C 287.

—Ss. 25, 119—An objection as to the defect of parties cannot be taken in the appellate court, when it was not taken in the first court though there was an opportunity to do so. 16 C W N 639=13 I C 123.

Ss. 25, 119—A civil Suit for a declaration that defendants are not tenants is maintainable where a collector in the partition proceedings has recognised the defendants as tenants. 16 C W N 639=13 I C 123.

—S. 116—See Limitation Act Art. 14.

—S. 119—Rights of tenure holder are not affected by the partition proceedings, even though such tenure holder is also one of the proprietors. A I R 1926 Pat 162=5 Pat 8=7 P L T 257=90 I C 817.

—S. 149—Questions of title are outside the scope of the revenue officer carrying out the partition. A I R 1928 Cal 41=55 C 392=33 C W N 1219=105 I C 149.

## BENGAL ESTATES PARTITION ACT (V OF 1897)

(Declared in force in the sonthal Parganas, Reg. III of 1872 s. 3 as amended by Reg III of 1899 s. 3)

—In a suit for contribution, the revenue assigned at the Butwara proceedings under this act, is conclusive to that assigned under the Rev. sale Law. 33 I C 721.

—Revenue Courts are not subject to directions by Civil Courts. 10 P L T 58=A I R 1929 Pat 66=120 I C 754=A I R 1930 Pat 43.

—Collector cannot deal with questions of title. A I R 1931 Cal 29=52 C L J 247=Ind Rul (1931) Cal 360=130 I C 232.

—Civil Court can deal with all questions except matters relating to apportionment of revenue. A I R 1931 Cal 29=52 C L J 217=Ind Rul 1931 Cal 360=130 I C 232.

—Act provides system of tribunals from the Deputy Collector to the Board of Revenue with exclusive jurisdiction subject to the express provisions of the Act permitting interference of the Civil Court. A I R 1930 Pat 130=11 P L T 494=8 Pat 830=Ind Rul (1930) Pat 152=121 I C 456.

## BENGAL ESTATES PARTITION ACT.

(V OF 1897) (Contd.)

—If a land of the undivided joint estate let out as shikmi by one co-sharer, is allotted, on partition by the collector under this Act, to another co-sharer, that other co-sharer is not bound by the shikmi.

21 C L J 603=181 C 240.

—Ch VI—Butwara papers are admissible in evidence to prove a landlord's title against the tenants if they were parties to the Butwara proceedings.

37 I C 895.

—Sale by widow—Non registration of vendee's name—Partition under—Right of vendee to lands allotted to vendor.

9 I C 67.

—Private partition, however old, bars a re-partition.

43 I C 393.

—S. 3 (XI)—“Parent estate” continues to be so though there is a previous private partition.

A I R 1928 Pat 343=7 Pat 510=9 P L T 267=109 I C 609.

—Ss. 4, 99—If the land sold by one co-sharer to the vendee be given to other co-sharers, the vendee has a remedy to demand equivalent land from the vendor or his legal representative.

21 C L J 599

=30 I C 418

—Ss. 4, 99—An anomalous burden and not an incumbrance is created, if in a sale of khamar lands by one co-sharer to another a condition is inserted for the payment of Govt. revenue by the vendee through the vendor. To safeguard his interest before the butwara authorities, the vendee should get himself registered.

21 C L J 599=30 I C 418

—Ss. 4 cls. (2), (4), 5, 27—If a party to a partition owns some common lands as well as separate land, the increase in value of his separate land does not entitle his co-sharers for compensation at his expense. The words “his interest in all the land and undivided shares held by him” mean the sum of his interests in the different portions of land and shares in the estate, and not an interest proportionate to his liability to the Government Revenue.

14 I C 225

—S. 4 (2)—An application by some of the co-sharers to have the partitioned interests held jointly is maintainable.

A I R 1924 Pat 187=2 Pat 403=87 I C 274

—S. 5 (3)—Sub-cl. (3) of s. 5 applies only to cases where a proprietor, having an undivided share, held in common tenancy in specific mouzas, which formed part of the parent estate but where he has no interest which extends over the whole estate. A proprietor of a mahal comprising of two mouzas and who possesses a fractional interest in each, is not entitled to claim an allotment in each mouza representing his assets in that mouza.

A I R 1924 Pat 187=2 Pat 403=87 I C 274

## BENGAL ESTATES PARTITION ACT

(V OF 1897) (Contd.)

—S. 5 (3), (5)—S. 119 bars a civil suit to correct the error of Revenue Court in proceeding under s. 5 (5) instead of under s. 5 (3). A I R 1924 Pat 187=2 Pat 403=87 I C 274

—Ss. 6, 84—S. 6 and not s. 84 applies where a party applies for separation and partition and the estate is declared to be under separation and partitions—Costs are to be levied on all proprietors.

A I R 1930 Cal 265=56 C 1079=Ind Rul (1930) Cal 187

=121 I C 747

—S. 7—Collector can decide upon the objection as to existence of previous private partition.

A I R 1928 Pat 343=7 Pat 510=9 P L T 267=109 I C 609

S. 7, 12 (2), 13 and 22—Partition by Civil Court—decree sent for execution to revenue Court. Whether the latter can ignore the Civil Court's decree.

1 Pat L W 51

38 I C 593

—Ss. 7, 12 (2), 22 and 28—Partition by Civil Court does not bar a partition under the Act.

1 P L W 51=38 I C 593

—Ss. 7 and 99—An estate partitioned under the Act, is not necessarily presumed to be a common tenancy. The private arrangement in s. 7 may be subject to the application of s. 99 but if it is found that the estate was held not in common tenancy but in severalty in pursuance of some private arrangement, s. 99 will not apply. Unless the plaintiffs suing in ejectment, can bring their case within s. 99 they must take their estates subject to the tenures of the defendants.

A I R 1926 Cal 433=87 I C 581

—Ss. 7, 76, 99—Section 99 applies only where the estate is held in common tenancy by the proprietors and does not apply where there has been a private partition. Therefore, a patnidar is entitled to retain possession of land allotted to his lessor in private partition by the Collector.

9 I C 539=15 C W N 426

—S. 7—Collector can partition and Civil Court will not interfere unless the decision is clearly wrong. Partition under s. 7 must be complete.

A I R 1924 Pat 594=3 Pat 614=3 P L R 62 Civ=78 I C 653

—S. 7—Formal document is not necessary to prove previous partition.

A I R 1924 Pat 209=4 P L T 629=(1924) Pat 21

=75 I C 1036

—Ss. 7 and 99—Test is holding land in severalty under private arrangement.

A I R 1923 Cal 279=68 I C 500

—Ss. 10, 11, 12—Partition of revenue paying estate—A decree for partition can be executed by Civil Court, but such Court cannot partition the liability for revenue, nor can it re-open the partition

## BENGAL ESTATES PARTITION ACT

(V OF 1897) (Contd.)

except on review. 1918 Pat 134=5 P L W  
9=4 P L J 29=45 I C 895

—Ss. 21, 29—It is the Collector alone who is to try the objections raised after notification under s. 21. 1 Pat L W 219  
=38 I C 833

—S. 23—Deals with objections relating to a question of right or title or extent of interest. A I R 1924 Pat 211=1 P L R 386=4 P L T 633=75 I C 1046

—S. 25—Limitation as to a suit to contest the order under s. 29 is 4 months from the passing of the order. 2 P L T 130=6 P L J 41=61 I C 90

—S. 25—Objection to partition before Collector on the ground of prior partition disallowed—Civil suit for declaration that Revenue Court has no jurisdiction to effect partition is not barred by s. 25. A I R 1924 Pat 211=1 P L R 386=4 P L T 633=75 I C 1046

—S. 25—The section does not apply in case of a suit for declaration that collector cannot partition as a private partition has already taken place. 1 P L R 258=74 I C 642=A I R 1923 Pat 441

—S. 25—does not bar a civil suit but protects proceedings before the Collector from being stopped by civil suit. A I R 1924 Pat 209=4 P L T 629=(1924) Pat 21=75 I C 1036

—S. 26, 29, 94—Civil Court cannot reopen the partition, made by Revenue Court, as regards a portion of the estate. Proper remedy is to apply under s. 26. 1 Pat L W 711=39 I C 165

—S. 28—Question of title cannot be dealt with by the Dept. Collector. A I R 1931 Cal 29=52 C L J 247=Ind Rul (1931) Cal 360=130 I C 232

—Ss. 29, 119—Even though the Collector has passed an order directing partition, Civil Court can entertain the question as to previous partition. A I R 1929 Pat 332=10 P L T 167=8 Pat 763= Ind Rul (1929) Pat 639=119 I C 911

—S. 29—The words after 'the Collector has recorded a proceeding under s. 29 do not contemplate ultimate order of the Board confirming Collector's order. A I R 1921 Pat 39=6 P L J 41=2 P L T 130=61 I C 90

—S. 29—Partition, under this Act should follow Civil Court partition, as far as possible. 1 P L W 219=38 I C 833

—Ss. 37, 38 and 111—A Collector cannot set aside the order passed by the Deputy Collector under ss. 37 and 38 and if he does set aside his order is not an order passed under s. 37. Jurisdiction of a Civil Court to question the correctness of the order is not barred. A I R 1930 Cal 265=56 C 1079=Ind Rul (1930) Cal 187=121 I C 747

## BENGAL ESTATES PARTITION ACT

(V OF 1897) (Contd.)

—Ss. 44—Entries in butwara papers can be put in as evidence, to show the relationship of landlord and tenant and of rents payable by the defendant, in a suit for rent. 53 I C 19

—S. 44—This section gives to the Partition Dy. Collector power to assess rent. 53 I C 19.

—Ss. 44 to 50—No revenue or rent was being paid by the holders of zeriat land to the proprietors registered in collectorate. Held that the holders were liable to same rent as was payable by similar lands in the neighbourhood. A I R 1923 Pat 391=71 I C 395.

—S. 64, 65—A Dy. Collector can under S. 65 allow one proprietor to remain in the occupation of the land though allotted to another, if he agrees to pay the annual rent. 41 I C 14.

S. 46 (c)—a khasra not prepared according to Batwara act is no good basis for determining the rent. 5 P L W 6=36 I C 513.

—S. 46—Tenants are not bound by the decision of the Deputy Collector as to rent. A I R 1928 Pat 409=9 P L T 480=110 I C 363.

Ss. 48, 49 and 50—A Record of Rights prepared under the Act, for purposes of partition is binding upon the landlord. 63 I C 194.

—Ss. 48, 49 and 50—Presumption attaching to an entry in the Cadartaral or revisional survey does not arise in the case of batwara entry. A I R 1930 Pat 376=Ind Rul 1930 Pat 665=126 I C 905.

S. 49—The value of Sairat rent is not equivalent to the assets of ordinary rent. A co-sharer merely accepting the system of valuation before the papers were adopted under s. 49 will not be estopped. 1 Pat L R 259.

—Ss. 49 and 119—'Kasht' and 'bakasht' denote possession of proprietors and tenants—Record of Rights and batwara khatian showing plaintiff's possession—Dispossession—Suit for possession after an order under Cr P C s. 144 is not barred by s. 119. A I R 1922 Pat 193=3 P L T 13=65 I C 586.

Ss. 51, 52, 55, 58, 119—Partition by Revenue authorities—Jurisdiction to set aside. 5 Ind Cas 454.

—S. 54—Batwara papers prepared by Amin—Admissibility of, in evidence against landlord. 49 I C 984.

—S. 57—Civil Court cannot interfere with order under s. 57 of Deputy Collector dealing with mode of partition and allotment A I R 1931 Cal 29=52 C L J 247=Ind Rul (1931) Cal 360=130 I C 232.



## BENGAL ESTATES PARTITION ACT

(V OF 1897) (Contd.)

—S. 57—A declaratory suit for title does not amount to a suit to set aside the order of Deputy Collector within Art. 14 Lim. Act. A I R 1931 Cal 29=52 C L J 247=Ind Rul (1931) Cal 360=130 I C 232.

—S. 57—On objection being made as to a share in the parent estate the Deputy Collector should at least enquire into the fact of possession. Where the settlement record is before the Collector he can rely on it for determining the questions of possession, and not merely entry in land registration register. A I R 1931 Cal 29=52 C L J 247=Ind Rul (1931) Cal 360=130 I C 232.

—S. 57—A declaratory decree affecting a Collector's order, the Court can ask the Collector to effect partition on the basis of the decree. A I R 1931 Cal 29=52 C L J 247=Ind Rul (1931) Cal 360=130 I C 232.

—S. 57—Very long possession and acquiescence in the separate holding of the lands in the estate are sufficient to prove complete partition and the fact that original partition proceedings were lost is no ground for disturbing the existing divisions. A I R 1923 Pat 441=1 P L R 258=74 I C 642.

—S. 59 (2)—Partition-papers will be relied upon in case of discrepancy between such papers and map. A I R 1924 Cal 245=28 C W N 46=81 I C 29.

—S. 61—For all practical purposes the decision of the Collector is final. I R 1929 Pat 684=11 P L T 99=120 I C 44=A I R 1930 Pat 149.

—Ss. 64, 65—The Civil Court in making a partition should as far as possible follow the principles of this act. 6 I C 450.

—Ss. 65, 119—a Civil Court has no power to disturb a partition when it has been already effected. 1 Pat L T 507=56 I C 149.

—Ss. 65, 119—It is during the partition alone that a Dy. Collector can make an order under S. 65 and that too before he has submitted the same for the Collector's sanction. 1 Pat L T 507=56 I C 149.

—S. 77—The Collector has jurisdiction to partition the estate when a formal partition according to s. 7 is not made.

Explanation to s. 77 implies that s. 77 does not apply to *zeriat* or *bakasht* lands in direct possession of the proprietors.

Purchaser from a proprietor may enforce his purchase under S. 99 against the lands allotted to his vendor.

It is within the jurisdiction of the Civil Court to decide title or extent of interest not only between the proprietor and a stranger, but also between the

## BENGAL ESTATES PARTITION ACT

(V OF 1897) (Contd.)

proprietors enter *se* even after the completion of partition. 5 Pat L J 456=1 Pat L T 374=57 I C 328.

—S. 81—The purchaser of a portion of a non-transferable occupancy holding cannot successfully resist a suit for eviction by a co-sharer landlord. A I R 1931 Cal 576=35 C W N 109=Ind Rul (1931) Cal 590=132 I C 638.

—S. 81—A transferee prior to partition of a non-transferable holding can be ejected after partition under the Act. A I R 1928 Cal 560=47 C L J 618=112 I C 202.

—S. 81—Collector will split up a tenure i. e. completely sever in parcels only where it is equitable to do so. A I R 1928 Cal 560=47 C L J 618=112 I C 202.

—S. 81—(Obiter)—Decision as to rate not based on actual facts of the case is not a nullity. A I R 1928 Pat 409=9 P L T 480=110 I C 363.

—Ss. 81, 119—Order under s. 81 is not a nullity unless set aside by a suit. 29 C W N 221=86 I C 14=A I R 1925 C 437.

—S. 82—Jurisdiction of Civil Court cannot be taken away by an order under s. 82. A I R 1921 Pat 259=2 P L T 342=(1921) Pat 342=63 I C 361.

—S. 82—Jethau land-Grantee not registered in Collector's register—Revenue in respect of such land cannot be separately assessed on partition. 2 Pat L W 186=42 I C 391.

—Ss. 83, 119—A Dy. Collector has no jurisdiction to pass an order under s. 83 regarding a *putni* tenure created by one of the proprietors without the consent of others. s. 116 is inapplicable to such an order. A declaratory suit to get the order void is maintainable and art 120 of the limitation act applies. 49 I C 965.

—Ss. 88, 119—Held that *pliffs* not being persons aggrieved by an order under s. 88 had no right to bring a declaratory suit in Civil Court. 19 C W N 1322=32 I C 167.

—S. 89—The omission of the Revenue authorities to fix a rent, caused by the mistake of the Court and parties, is no ground for an ejectment suit by a proprietor to whom the land on which the dwelling house of the defendant-proprietor stood, was allotted in a partition proceeding. Upon the assessment of rent the plaintiff will be entitled to a decree for it, and in that case no question of limitation will arise because of the non-assessment of rent. 13 I C 498=18 C L J 19.

—Ss. 94, 95—Partition destroys separate accounts. 78 I C 723=A I R 1924 Pat 586=3 Pat 581.

—S. 99—*Tertium quid* between common tenancy and several holding is not

## BENGAL ESTATES PARTITION ACT

(V OF 1897) (Contd.)

contemplated by the Act. Grants of a share in specified mouzas themselves portions of an estate in common tenancy come under s. 99. A I R 1927 P C 117=53 M L J 117=54 C 586=54 I A 196=8 P L T 255=(1927) M W N 437=31 C W N 885=39 M L T 170=26 L W 642 (P C)=101 I C 359

—Ss 99, 76, 77 and 78—One co-owner holding specific piece of land as a joint owner does not affect the rights of other co-sharers. He cannot create a tenure on such lands to the prejudice of other co-sharers. But position is different when he holds such lands in severalty under an agreement from other co-sharers. A I R 1927 Cal 65=97 I C 539

—S. 99—Applies where lands are held in severalty under a private arrangement, though not complete 68 I C 500=A I R 1923 C 279

—S. 99—Does not apply where lands are held in different parcels. 97 I C 372=A I R 1927 C 62

—S. 99—Does not apply in case of mortgage of specific property A I R 1924 Pat 91=1 P L R 366=74 I C 877

—S. 99—"Portion of estate" means a specific portion 29 C W N 202=86 I C 120=A I R 1925 C 456

—S. 99—If under a private partition certain lands go to the exclusive share of a co-sharer and if he creates a tenure, the tenure is binding on the allottee of these lands under a subsequent partition by the Collector.

Relief cannot be claimed by a plaintiff by abandoning his case and adopting that of the deft. 43 Cal 103=20 C W N 319=21 C L J 605=30 I C 420

—S. 99—This section applies only when lands are held jointly by the proprietors and not in severalty in pursuance of a private arrangement between the parties. Hence a putnidar of a separated share is not bound by a subsequent butwara by the Collector. Government's non-recognition of the private partition for revenue purposes is a separate question altogether. 15 C W N 426=9 I C 539

—S. 113—There is neither revision under s. 114 nor an appeal under s. 113 against a Commissioner's order rejecting an appeal against a preliminary order of the Collector admitting a partition application 1 Pat L W 120=38 I C 827

—Ss. 113, 114—No appeal lies to Board of Revenue against Commissioner's order refusing to confirm partition by Collector; nor does revision lie against Collectors order under s. 11 (c) dismissing partition. 1 P L W 313=1 Pat L J 491=38 I C 356

## BENGAL ESTATES PARTITION ACT

(V OF 1897) (Contd.)

—S. 113 (c)—"Confirming or amending a partition" under this section means a definite amendment disposing of the case.

Only in a case where a partition has been recasted and confirmed by the commissioner, that an appeal will be to the board against an order making allotment 2 Pat L W 114=41 I C 580

—S. 119—A tenants' suit for declaration of title, to an occupancy holding allotted to the defendant on partition commencing under the old act but concluding after the new act came in force is maintainable under this section.

The burden of proof, that a partition concluded under new Act was in fact made under old Act lies on the parties who allege it. 3 Pat L W 266=43 I C 359=1918 Pat 164

—S. 119—The principle guiding the Dy. Collector while making a partition of an estate is to give a complete holding to each sharer as far as possible. 5 Pat L W 6=36 I C 513

—S. 119—Collector cannot interfere with the order of Deputy Collector under ss. 37 and 38. A I R 1930 Cal 265=Ind. Rul. (1930) Cal 187=56 C 1079=121 I C 747

—S. 119—Does not take away the right of suit under general law, nor oust the jurisdiction of Civil Court as to questions of title A I R 1931 Cal 29=Ind. Rul. (1930) Cal 360=52 C L J 247=130 I C 232

—S. 119—It is intended to give the revenue authorities power to deal with all matters arising out of batwara proceedings and where a partition has been effected by the revenue authorities the Civil Courts have no jurisdiction to disturb the same. A I R 1930 Pat. 13=10 P L T 584=Ind. Rul. (1930) Pat. 66=120 I C 754

—S. 119—Civil Courts should not lightly interfere with Revenue Court's jurisdiction. A I R 1927 Pat. 286=8 P L T 477=103 I C 313

—S. 119—Civil Court can interfere with acts of Collector, only as under s. 119 A I R 1928 Pat 343=7 Pat 510=9 P L T 267=109 I C 609.

—S. 119—Civil Courts cannot interfere with the order of the collector allotting separate estates on final order from Commissioner. A I R 1930 Pat 130=Ind Rul (1930) Pat 152=11 P L T 494=8 Pat 830=121 I C 456

—S. 119—Civil Court cannot entertain a suit for declaration of title to land included on partition in defendant's estate A I R 1924 Cal 245=28 C W N 46=81 I C 29.

—Ss. 119, 49—Civil suit for possession is not barred. 3 P L T 13=65 I C 586=A I R 1922 Pat 193.

—Ss. 119, 82—Dismissal of claim as to

## BENGAL ESTATES PARTITION ACT

(V OF 1897) (Contd.)

rent free land in Batwara proceeding bars a subsequent suit. 63 I C 2.

—Ss. 119 and 94—Civil Court can entertain a suit against order of collector refusing to put the party in possession of land allotted to him. A I R 1925 Cal 953=29 C W N 839=89 I C 193.

S. 119—Civil suit lies where objection, as to certain plots not belonging to the estate under partition is raised and no adjudication given on the question, but the plots allotted in the final partition award. A I R 1926 Pat 421=6 Pat 73=7 P L T 779=(1926) Pat 236=96 I C 632.

—S. 119—Civil Court can give relief to the lessees from co-sharer claiming that their tenure should not be reduced by the act of partition authorities and they should be declared to be tenants under the co-sharers holding their tenancy under the partition. A I R 1927 Cal 65=97 I C 539.

—S. 119—A purchasing co-sharer retains his right in case of Collectorate partition after purchase of raiyati holding and allotment as bakasht land to takhta of another co-sharer. A I R 1926 Pat 263=5 Pat 281=7 P L T 170=93 I C 1091.

Ss. 119 and 5 (3) (5)—Cl. (3) applies to proprietors having interest in some villages out of the total number of villages constituting the estate—Proceeding under sub-cl. (5) instead of sub-cl. (3) is not a basis for civil suit. A I R 1924 Pat 187=2 Pat 403=87 I C 274.

## BENGAL EXCISE ACT VII OF 1878.

—S. 16—A license given under this Act is purely personal and a licensee cannot sub-let his shop or transfer his license, or allow any person to sale liquor. 15 C W N 169=9 I C 115.

## BENGAL FERRIES ACT I OF 1866.

AMENDING BENG. REG. XVI OF 1819

(Rep. Ben Act I of 1885 and Act XII of 1891).

—S. 9—Commissioner's approval is not confined to the terms of the lease. 7 P L T 337=96 I C 623=A I R 1926 Pat 318.

—S. 16—Limits of ferry in s. 16 are not the same as under Bengal Municipal Act 1884 and Act 1 of 1884. 25 C L J 639=21 C W N 601=35 I C 782

## BENGAL GENERAL CLAUSES ACT (I OF 1899)

—S. 8 (c)—Effect of Chota Nagpur Ten. Act 1908 s. 11 (4) is not to alter the previous law. 1917 Pat 63

—S. 8 (c)—Repeal of enactment—Retrospective operation—See 9 Ind Cas 805

—S. 22—Power to fix date includes

## BENGAL GENERAL CLAUSES ACT

(I OF 1899) (Contd.)

power to postpone it. A I R 1927 Cal 704=31 C W N 926=103 I C 890

—S. 25—Repealed Act—Notification issued under applying a particular provision of that Act to an area—Effect of, is not to extend the corresponding provision in the new Act to that area on repeal of the old Act. 59 C 1007=36 C W N 11=1 R 1932 C 409=A I R 1932 C 315=138 I C 28

BENGAL GHATWALI LAND REGULATION 2<sup>o</sup> OF 1814

See Regulations—Bengal Reg. 29 of 1814.

## BENGAL INDIGO CONTRACTS ACT 10 OF 1836

[ S.5, rep. act VIII of 1868; s. 1, rep. Act XIV of 1870; Formal words in Ss. 2, 3, 4, Rep., Act XVI of 1874; Rep. (In Assam), Act XII of 1891.]

## BENGAL LANDLORD AND TENANT PROCEDURE ACT VIII OF 1869.

SEE ALSO CASES UNDER.

(1) Landlord and Tenant.

(2) Limitation Act ss. 4, 5.

—Civil Procedure Code does not apply to sales under the Act. A I R 1927 Cal 752 31 C W N 1016=104 I C 180.

—Holding can be sold in execution of a decree obtained by a 16 annas landlord for arrears of rent thereof. A I R 1921 Cal 124=25 C W N 554=66 I C 46.

—Ss. 14, 20, 76 Rep in pt., Act VII of 1870; Rep. (In Bengal and Eastern Bengal) Act VIII of 1885).

—A raiyat occupying land for more than 12 years without title acquires an occupancy Right. 29 I C 834

—S. 6, 4, 20—An under raiyat who is in possession of land for 12 yrs, acquires an occupancy right by virtue of prescription. The Bengal Act of 1859 did not make any distinction between raiyat and under raiyat as made by the Bengal T Act 55 I C 251

—S. 14, 18—Delay in the institution of a suit by a landlord since the commencement of the dispute does not entitle him to get the prevailing rate ascertained according to the rate brought into existence by him after dispute. 21 C L J 576=30 I C 1

—S. 14 & 29—A notice of enhancement must be given more than three months before the suit. This does not mean that the suit must follow all at once. It may be brought within limitation period of the suit. 53 I C 52

## BENGAL LANDLORD AND TENANT PRO.

## ACT VIII OF 1869 (Contd.)

S 18—Meaning of "Prevailing rate 21  
C L J 576=30 I C 1

—S. 20—Where there is extortionate and unconscionable interest in a registered kabulyat the appellate court has powers to award a reasonable interest by way of compensation under Sec. 74 of contract Act. There by also the original Contract in the kabulyat is rendered unenforceable and null and void and therefore no written agreement under Sec. 21. 23 C W N 291=49 I C 805

—S. 27—Where a tenant is dispossessed by a co-sharer landlord, the special limitation given under s. 27 Act VIII of 1869 is of no avail for recovery of possession by the tenant. 32 I C 510

See to the same effect:—A I R 1926 C 555=91 I C 677

—S. 52—A transferee from a tenant is entitled to make a deposit. A I R 1929 Cal. 133=32 C W N 1166=Ind. Rul (1929) Cal 585=117 I C 697.

—S. 52—Bengal Tenancy Act (1885), s. 66 (2)—A transferee of a non-transferable occupancy holding cannot make the deposit under s. 66 (2), Bengal Tenancy Act or s. 52 of Act VIII of 1869. A I R 1927 Cal 752=31 C W N 1016=104 I C 180

—S. 52—The Executing court has no jurisdiction to extend the time fixed for payment of decree amount, after the appeal court has refused to do so. 21 C W N 749=38 I C 467.

—S. 52—Does not entitle a mortgagee of a non-transferable holding to make a deposit under this section. A I R 1929 Cal 572=34 C W N 31=Ind. Rul. 1930 Cal 335=123 I C 447.

—S. 52—In executing of decree for rent a land lord proposed to eject a tenant of a non-transferable holding under Sec. 52 Bengal Act. To avoid the ejectment a third person a transferee from the tenant made a deposit in the court. It was held that the deposit was rightly made. 23 C W N 132=49 I C 766.

—S. 53—A lessee holding over after the term has expired can be ejected without notice unless the landlord has consented to the holding over. 24 C L J 30=37 I C 201.

—S. 59, 64, 65—In Shylhet Dist. a non-transferable holding can not be sold either by way of execution of a decree of co-sharer of his part or by way of a decree of whole rent. 22 C W N 563=45 I C 762

—S. 66—See cases under S. 59.

—Under sec 102—The right of appeal under Sec 102 is given only when questions of entrancy or varying the rent title or

## BENGAL LANDLORD AND TENANT PRO.

## ACT VIII OF 1869 (Contd.)

Conflicting claims to be determined. A mere question as to the amount payable is non appealable Sec 153 of B. T. Act allows appeal only when there is a decision on a question of amount of rent annually payable but there is no provision under s. 102 30 I C 277.

—S. 102—There is no second appeal in a claim of rent below Rs 100 and in which there are no question arising for decision. The term 'Dist Judge includes an additional Dist Judge. 49 I C 519.

## BENGAL LAND REDEMPTION AND FORECLOSURE REGULATION 17 OF 1806

See Regulation—(2) Bengal Regulations, Reg. 17 of 1806

## BENGAL LAND REGISTRATION ACT (VII OF 1876)

—The only Managers whose names can be entered in Register D are Managers as defined in the Act i. e, Managers appointed by Collectors, Court of Wards, Civil or Criminal Courts or Managers of minors or idiots or who or trustees or executors. Ind Rul (1931) Cal 630=53 C L J 524=133 I C 102

—A persons name can get on the register only when he proves notice to have been served on all parties affected. 126 I C 769

—A proprietor is not bound to register himself under the Act. 85 I C 747=1926 C 420

—Registration of name—Evidence of possession. see 21 C L J 253=20 C W N 51=27 I C 465

—Relationship of landlord and tenant. 9 C 517=12 C L R 141

See Also 10 I C 363

—Ss. 3, 78—Zamindar with whom chakran lands are settled not being a "proprietor" S. 78 does not bar a suit brought by a Zamindar simply on the ground that the section can not be rightly applied to penalise a plff. for failure to do what it is impossible for him to perform. 19 C L J 236=20 I C 250=18 C W N 158

—S. 4—Registers kept under—Purpose of, is to show revenue paying and revenue-free lands separately. 59 C 629=I R 1932 C 421=138 I C 157=36 C W N 215=A I R 1952 C 446

—S. 4—Ambiguous entries in the general register are not conclusive. 32 C W N 650=48 C L J 1=55 M L J 56=30 Bom L R 1343=28 L W 807=109 I C 392=A I R 1928 P C 130

—S. 10 (g) (ii)—Registration is not invalidated merely by failure to mention name of each mouza. A I R 1930 P C 83=34 C W N 285=58 M L J 218=51 C L J 162=Ind Rul (1930) P C 50=32 Bom L R 520=31 L W 561 (P C)=121 I C 514

## BENGAL LAND REGISTRATION ACT

( VII OF 1876 ) (Contd.)

—S. 38.—Bar in s. 38 applies inspite of previous amicable payment of rent by tenant or that tenant was brought on land by piff. 26 C L J 90=41 I C 477

—Ss. 42, 52 and 55.—Where two applicants claim assumption of charge of endowment. Collector must order the name of that party in whose favour he finds possession to be recorded. 3 P L T 406=1 Pat 68=65 I C 135=A I R 1922 P 315

—S. 42, 53, 88 and I P C S 193.—Rules passed by the Revenue Board under Sec. 88 in cases where they refer to procedure as to presentation, admission and verification of an application have the force of law. A person asking for land Registration is bound to make a true declaration upon the subject matter; and a false declaration is deemed to be offence under s. 193 I P C. =11 I C 595=38 C 368

—S. 44.—The term 'Estate' does not include revenue free lands 42 I C 585

—Ss. 51 and 72.—Civil Court has no power to amend or alter an entry by Collector in pursuance of its order as to possession. 4 P L T 718=1 P L R 370=74 I C 474=A I R 1924 Pat 134

—Ss. 52 and 42.—Claims to possession of a gift by two rival persons should be decided by Collector and not referred to Civil Court. A I R 1922 P 315=1 Pat 68=3 P L T 406=65 I C 135

—S. 55.—Where question of possession is not satisfactorily proved, Collector can decide it summarily or refer parties to Civil Court. A I R 1922 Pat 315=1 Pat 68=3 P L T 406=65 I C 135

—Ss. 60 and 78.—Only registered owner and not unregistered owner can claim rent from the tenant. 85 I C 865= A I R 1925 C 1173

—S. 62.—Neither appeal nor revision lies from order of Civil Court. A I R 1924 Pat 134=4 P L T 718=1 P L R 370 Civ=74 I C 474

—S. 68.—Where a tenure has been transferred even though the transferee's name is not registered a person who deposits arrears of Revenue accruing after the date of transfer cannot recover the same under s. 9 of the Act XI of 1859 or under s. 69, Contract Act, from the transferor but only from the transferee. A transferee becomes liable for the discharge of any duties and obligations of the proprietors of the estate from the date on which he should have applied for registration. 35 C W N 1136

—S. 70.—Objection to separate account must be made before collector. A I R 1929 Pat 22=9 P L T 661=8 Pat 95=Ind Rul (1929) Pat 193=115 I C 225

S 70.—Question of title is not raised by the question as to separate account. A I

## BENGAL LAND REGISTRATION ACT

( VII OF 1876 ) (Contd.)

R 1929 Pat 22=9 P L T 661=8 Pat 95=Ind Rul (1929) Pat 193=115 I C 225

S 70.—Proprietors' liability for entire Govt. revenue for whole mahal is not affected by opening of separate account. A I R 1929 Pat 22=9 P L T 661=8 Pat 95=Ind Rul (1929) Pat 193=115 I C 225

S 62.—Proprietor's failure to appear on notice under S. 70 is not governed by S 72. A I R 1929 Pat 22=9 P L T 661=8 Pat 95=Ind Rul (1929) Pat 193=115 I C 225

Ss 72 and 74.—(A) When shares do not correspond with character and extent of interest in estate than alone Ss. 72 and 74 (A) are applicable. A I R 1929 Pat 22=9 P L T 661=8 Pat 95=Ind Rul (1929) Pat 193=115 I C 225

—S. 74.—No reference to Civil Court can be made unless objection to application under s. 70 for separate account is raised. A I R 1929 Pat 22=9 P L T 661=8 Pat 95=Ind Rul (1929) Pat 193=115 I C 225

—S. 78.—Person whose name not registered under Act—Rent suit by that person for—Decree conditional upon having his name registered prior to his executing the decree—Right of.

Such a person is not entitled to a decree conditional upon having his name registered under the Land Registration Act, 1876, prior to his executing the decree.

Per Wort, J.—Non-registration of the person's name is a bar to his cause of action.

Per Jwala Prasad, J.—Such a person is entitled to bring a suit but no decree for rent can be passed without registration of his name. 11 P 30=12 P L T 693=134 I C 624=A I R 1931 P 417=A L R 1932 P 157

—S. 78.—Where the plaintiff's name has not been registered no decree for rent can be passed. A decree on condition of plaintiff getting his name registered before execution cannot be passed. A I R 1931 Pat 417=12 P L T 693=Ind Rul (1931) Pat 480=134 I C 624

—S. 78.—The tenure of Sukuls in Khas mahal is not a Revenue free or a Revenue paying land and s. 78 of the Act cannot apply to the case. 35 C W N 648

—S. 78.—Although landlord's name is not recorded in Collector's record a rent-decree in his favour against his tenant can be passed. A I R 1929 Pat 357=8 Pat 375=Ind Rul (1929) Pat 557=118 I C 733

—S. 78.—A proprietor's or mortgagee's title as such, is not lost by his inability to obtain a rent-decree by reason of his name not having been entered in Collector's register. A I R 1929 Pat 357=8 Pat 375=Ind Rul (1929) Pat 557=118 I C 733

—S. 78.—Where unregistered mortgagee whose rent suit is dismissed under



## BENGAL LAND REGISTRATION ACT

(VII OF 1876) (Contd.)

s. 78, gets his name registered during the Pendency of second appeal, he can obtain a decree even as to rent barred at the date of registration but not at date of the suit. 110 I C 469-9 P L T 357-A I R 1928 Pat 410-7 Pat 690

—S. 78—Where a co-sharer whose interest in respect of one estate partially registered in the Collectorate, realises rent proportionate to his entire estate for more than 30 years without any objection, he is entitled to recover the same as correct rent as between him and the payer Land in possession of tenants comprised in a number of estates is not governed by s. 78. A I R 1928 C 115-46 C L J 584-107 I C 91

—S. 78—Assignee of rent from un-registered owner is entitled to sue. A I R 1925 C 1175-42 C L J 134-90 I C 561

—S. 78—An unregistered owner cannot obtain rent from the tenant. Ss. 78 and 60 are complementary. A I R 1925 Cal 1173 -86 I C 865

—S. 78—Assignee from unregistered proprietors is not governed by s. 78. A I R 1924 Cal 124-27 C W N 888-78 I C 7

—S. 78—Applies only to revenue free estates already entered in general Register. A I R 1925 Pat 564-6 P L T 780-86 I C 559

—S. 78—Does not make it necessary for assignee from registered proprietor to get his name registered. A I R 1921 Pat 46-6 P L J 109-2 P L T 370-60 I C 390

—S. 78 and 81—Ijardar from one co-sharer is entitled to entire rent. A I R 1921 Cal 145-48 C 1078-64 I C 58

—S. 78—The bar prescribed under s. 78 that the registration is of primary importance before bringing a suit for rent, is applicable even when there is amicable payment of rent by the tenant previously to the suit or that the tenant was brought on land by the plff. 26 C L J 90-41 I C 477

—S. 78—There is no provision in the Act for registration of a mortgagee of a revenue free property. Hence sec. 78 does not operate as a bar to a rent decree being obtained by the mortgagee. 42 I C 535

—S. 78—Provisions of s. 78 of the Act are framed for protection of the tenant who are free to waive the benefits. If once he waives the benefit he cannot resile from the position he has taken by his own choice. But the section has no application with regard to assignee of a registered proprietor; but he ought to get his name registered during the trial. 30 C L J 48-53 I C 49

—S. 78—Where a suit was dismissed on the ground of non-production of a succession certificate, it was held that a

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## BENGAL LAND REGISTRATION ACT

(VII OF 1876) (Contd.)

certificate may be filed in the appellate Court by paying costs of previous proceeding. The term 'Zurpeshgidars' is a vagone one, where no interest is chargeable on the base at its inception but a certain premium is required, it is termed a lease with premium & not a usufructuary mortgage. 28 I C 383

—S. 78, 81—Non registration of plff's name in the Collectorates under Bengal Registration Act does not override a written Kabuliyat the favour of the plff. and hence the suit can be maintained if the contract be submission at the time. 18 I C 593

—S. 78, 81—Non-registration of a proprietor's name under s. 78 does not prevent his recovering rent if there is a contract under sec. 81 between the parties or their representatives. 24 I C 866

—S. 78 & 81—A transferee of usufructuary mortgage from a proprietor who had granted previously a 'patni lease' to the Deft. tenant can claim rent in excess of the share for which he had registered his name under sec. 78 & 81 as there were no written agreements between him & the tenants. 27 C L J 474-43 I C 726

—S 78—Non-registration is not a disqualification which would deprive him of a cause of action. It is merely an impediment against his right to recover rent by a decree until the provisions of s. 78 are complied with. 52 I C 267 (Pat)

—S. 81—Ijardar is a mere lessee and not a proprietor and as such he is not governed by S. 81. A I R 1924 Cal 124-27 C W N 888-78 I C 7

—S. 81—When one of the plaintiffs is a vendee of one of the parties to the contract S. 81 applies. A I R 1921 Cal 308 -34 C L J 119-65 I C 839

—S. 81—Lessee from one co sharer can sue for rent. A I R 1921 Cal. 145-48 C. 1078-64 I C 58.

—S. 81—Contract refers to contract between proprietor claiming rent and person bound to pay him rent. 27 C L J 474 -43 I C 726.

## BENGAL LAND REVENUE ASSESSMENT

REGULATION 1 OF 1801

See Regulations--(2) Bengal Regulations-Reg. 1 of 1801

## BENGAL LAND REVENUE ASSESSMENT

REGULATION 2 OF 1819

—See Regulation--(2) Bengal Regulations--Reg. 2 of 1819

## BENGAL LAND REVENUE ASSESSMENT

REGULATION 3 OF 1828

—See Regulations--(2) Bengal Regulations-Reg. 3 of 1828

**BENGAL LAND REVENUE RESUMPTION ACT.**

(VII OF 1862)

(S 1, Rep Act XII of 1873; ss 3, 4, rep Act XVI of 1874 Rep (in Assam, except the Lushai Hills), Reg I of 1886; Declared in force in the Sonthal Parganas, Reg III of 1872, s. 3, as amended by Reg III of 1899 s. 3.)

**BENGAL LAND REVENUE SALES ACT**

(XII OF 1841)

—Ss 3 to 35, Rep. Act I of 1845; S. 1, Rep Act XIV of 1870; s 2, Rep in pt, Act XVI of 1874; Rep (in Agra, except certain areas), Act IX of 1873; (in Central Provinces and the Sambalpur District), Act XVIII of 1881; (in Assam, except the Lushai Hills), Reg I of 1886; s 2, Declared in force-throughout Bengal (except the Sambalpur District) and Eastern Bengal, except as regards the Scheduled Districts, Act XV of 1874, s 6; in the Sonthal Parganas, Reg III of 1872, s 3, as amended by Reg III of 1899, s 3.

**BENGAL LAND REVENUE SALES ACT (XI OF 1859)**

Bengal Tenancy Act of 1885--Not in parimateria.

The differences between the two Acts are considerable. (Sir George Lowndes) Turner Morrison & Co. Ltd. v Monmohan Chowdhury (1931) 59 C 728 (734)=62 M L J 86=35 C W N 29=A I R 1931 P C 314=58 I A 440=135 I C 765=54 C L J 462=I R 1932 P C 45 (P C)

--Sale under--Irregular--Illegal or--Idol--Estate belonging to--Sale of--Shed-baits described in papers as proprietors in case of--Irregularity merely is (Mukerji and Guha, JJ) Sree Sree Radhagobinda Deb Thakur v Girijaprasanna Mukherji, (1931) 59 C 186 (195)=35 C W N 912=136 I C 129=I R 1932 C 177=A I R 1932 C 153=A L R 1932 C 531.

—Sale under—Malguzari and thanadari lands—Single sale in respect of both—Validity of.

Where it appeared that, although in the collectorate ledgers separate accounts were kept of the revenue for malguzari lands, and for demands for thanadari lands, the thanadari lands, had been amalgamated with the malguzari lands of the mahal and they together formed one estate as defined in S. 1 of Act VII of 1863 and that the demands on the two heads had been amalgamated to form a total demand for the estate, held that one sale for arrears due on account of revenue for malguzari lands, and on account of demands for thanadari lands, was not invalid. (Mukerji and Guha JJ) Sree Sree Radhagobinda Deb Thakur V. Girijaprasanna Mukherji (1931). 59 C 186 (194)=35 C W N 912=136 I C 129=A I R 1932 C 153=I R 1932 C 177=A L R 1932 C 531.

**LAND REVENUE SALES ACT**

(XI OF 1859 ; (Contd.)

A talukdar who wanted to deposit revenue and prevent sale can subsequently purchase the property from the purchaser at the revenue sale. A I R 1930 Cal 69=33 C W N 930=51 C L J 320=57 C 434=Ind Rul (1930) Cal 407=124 I C 167.

Civil Court alone can entertain suit raising question of title. Civil Court can determine rights of parties where proceedings before Collector are without jurisdiction. A I R 1929 Pat 22=8 Pat 95=9 P L T 661=Ind Rul (1929) Pat 193=115 I C 225.

If the Act is silent on the point of payment of land revenue, general law of appropriation will apply. A I R 1928 Cal 68=55 C 624=47 C L J 12=32 C W N 359=105 I C 15.

Misdescription of estate in Registered kept by Collector does not render the sale void if notification describing it correctly was issued. A I R 1926 Pat 549=7 P L T 747=(1926) Pat 362=96 I C 807.

Exact Compliance with the requirements of the Act is not needed as it is a stringent enactment to realise arrears of revenue. A I R 1926 Cal 886=53 C 886=43 C L J 468=30 C W N 618=95 I C 353.

Notification need not mention the name of all the proprietors. A I R 1926 Pat 549=7 P L T 747=(1926) Pat 362=96 I C 807.

Auction purchaser at Revenue sale can recover mesne profits from tenants 91 I C 474 (c)

Act XI of 1859 does not deal with small holdings. A I R 1926 Cal 97=52 C 862=90 I O 901.

Rent paid under prevailing practice a year later than the date shown in kabalijat as due date for payment of rent is considered to be duly paid. A I R 1927 Cal 1148=42 C L J 69=90 I C 40.

In the sale under the Act Crown's interest is sold and as such possession must be surrendered to the purchaser by the person in adverse possession. A I R 1923 C 82=36 C L J 472=77 I C 564.

Govt. on resumption of Howra from hawladar cannot sell the karsha for arrears of rent. A I R 1923 Cal 714=27 C W N 723=77 I C 29.

If the arrears are for the current or next preceeding year, notice to the proprietors need not be served. 741 C 881

Only the interest of the Crown subject to the payment of Govt. assessment is sold at a sale under the Act. A I R 1921 Cal 687=34 C L J 141=65 I C 866.

**BENG. LAND REV. SALES ACT (XI OF 1859)**

—Appropriation of payment to particular Kist and acceptance and acknow.

## LAND REVENUE SALES ACT

( XI OF 1859 ) (Contd.)

ledgment of Treasury officer—Subsequent appropriation by Treasury Officer to earlier Kist—Sale—Suit to set aside—Contract Act Ss. 59, 60 Appropriation. 38 C 537=15 C W N 443=9 M L T 446=8 A L J 480=13 C L J 525=13 Bom L R 413=(1911) 1 M W N 429=10 I C 272=21 M L J 1148=38 I A 80 (P C)

—A Collector has not an innate power to sell. It is restricted to a sale of revenue unit in its entirety. He is not empowered to dismember that unit from entire estate for purposes of realisation of arrears. A mere misdescription does not affect a sale although it may be a valid ground for irregularity. 16 C L J 524=17 C W N 844=16 I C 41.

—S. 2—Arrear of revenue within meaning of—Evidence as to—Collectorate books—Entries in—Correctness of—Presumption as to under. S. 114 Ills (e) and (f) of Evidence Act—Value of entries.

The books of the collectorate showed the estate in arrears and the relevant entries therein may be presumed to be correct under S. 114 Ills (e) & (f) of the Evidence Act and such books must be examined in order to arrive at a finding as to whether there were arrears or not (Mukerji and Guha JJ) Sree Sree Radhagobinda Deb Thakur v. Girjaprasanna Mukherji. (1931) 59 C 186=35 C W N 912=136 I C 129=I R 1932 C 177=A I R 1932 C 153=A L R 1932 C 531

--S 2--Share of estate in respect of which separate account opened--Revenue due in respect of--Arrear if, after appropriation by Collector to its satisfaction money deposited with him in terms of S. 15 of Act.

Quaere—Whether in a question with the Collector, revenue due in respect of a share of an estate for which a separate account had been opened could be said to remain unpaid after the Collector had appropriated in satisfaction of it part of the moneys deposited with him in terms of S. 15 of the Act ( Lord Thankerton ) Krishnachandra Bhounik v. Pabna Dhana-bhendar Co. Ltd ( 1931 ) 59 I A 68=59 C 1034=62 M L J 421=55 C L J 62=36 C W N 277=I R 1932 P C 106=136 I C 410=35 L W 842=A I R 1932 P C 61=A L R 1932 P C 175 (P C)

--S 2--Act VII of 1868--No change of the contract of parties and statutory provision applicable thereto is possible by reason of general regard or administrative rules which have no sanction of Indian statute The clauses of Act XI 1859 and provisions of Sec. 2 of Bengal Act VII 1968 are framed upon an understanding that they are to be applicable to

## BENGAL LAND REV. SALES ACT

( XI OF 1859 ) (Contd.)

the sale of estates which are in arrear of dues. 23 M L J 206=12 M L T 385=(1912) M W N 1005=14 Bom L R 1063=10 A L J 452=16 C L J 620=16 C W N 842=39 C 981=16 I C 821=39 I A 177 (P C)

—S. 2—It is at the will of purchaser at a Revenue sale to avoid incumbrances and under tenures. It is not necessary for the purpose of avoiding to give notice. Suffice if a suit is brought by him during limitation period. When such a suit is instituted, the encumbrance or tenure must be regarded as annulled from its very date. The possession prior to such a suit is not wrongful and the purchaser is not entitled to claim by way of damages for use any sum in excess of what actually represents the rent payable by the tenure-holder. 17 C W N 984=19 I C 974.

—S. 2—An injunction to deft for withholding a certificate of sale affected through fraud can not be granted by the Court under S. 28 of Revenue sale Act as no such case has been agitated under s. 33 of Sale Law. 19 I C 575,

—S. 2—An error in description and number of taluka in revenue money order does not render it liable to sale. If it has taken place, it can be set aside 42 I C 509

—S. 2—A Revenue Sale procured by fraud is but a private alienation and the purchaser with notice should be made to reconvey that property to rightful owners. Allegation of fraud must be clearly proved. On failure to prove one kind of and another cannot be set up. 24 Cal W N 662=55 I C 689=30 C L J 475

—S. 2—On the failure of an owner to pay the Govt. assessment his estate or interest in the land is forfeited and the purchaser at the sale purchases not the interest of defaulting owner but of the crown subject to Govt assessment and against a person who claims title by adverse possession, the time limited under Limitation Act commences to run from the date of sale.

Where certain lands were settled along with a person other than the Zamindar under Reg. II of 1819 by the Govt, the onus of proving that land within the ambit of Zamindari against the Zamindar did not lie on the person who claim it as such in the sense that on the failure to discharge it the land must be taken to remain and be vested in the Zamindar. 16 M L T 290=18 C W N 1281=27 M L J 365=1 L W 807=(1914) M W N 757=16 Bom L R 925=20 C L J 563=25 I C 309 (P C)

—S. 2, 3, 6, 7, 33, and 58—The question whether an instalment of payment remaining unpaid constitutes an arrear of revenue within the meaning of S. 2 of the Act is a question of law and can not be

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decided by the statement of a witness that it was an arrear of revenue within the meaning of the Act. The purchase of the estate made by Collector is in contraventions of the provisions of s. 58 of the Act and cannot confer a legal title on the Govt. under the purchase. Hence a proprietor can recover the rent by the civil suit even though in the ground of appeal much an objection to the sale was not specified. Whether non service of notice under s. 7 is not a material irregularity in the conduct of the sale so as to invalidate the sale is a question open to solution. A notice signed by the Deputy Collector for the collector is presumed to be a proper notice under s. 6, 7, of the Act 41 I C 458

—Ss. 2 and 3—suit for setting aside revenue sale—jurisdiction of Collector to sell—'kistbandi' dates are different from the 'latest dates of payment'—use of word 'kist' in the Act and in the Tausi Manual—default of payment of latest date—Collector has jurisdiction to sell after that date. A L R 1933 P 239

—S. 2 and 3—Revenue—Arrear of—Payment of—Last date for—Last date fixed by Board of Revenue under S. 3 if—"Poush talab".

It is contented that, as the sale was for recovery of revenue due up to the Poush (i. e. December-January) talab (demand the amount, though unpaid, was not an arrear of revenue within the meaning of S. 2 of Act XI of 1859 until the 1st February and for payment of such arrears the last date fixed by the Board of Revenue under S. 3 of the Act was the 28th March and consequently there were no arrears on 27th March, the date fixed for the sale. The papers of the collectorate distinctly show the 12th January, as the last day for the payment of the revenue, which can be nothing else than the last date contemplated by S. 3 of the Act and is not the date of the instalments, according to the settlement and kistbandi of the mahal, as contemplated in S. 2 of the Act. The expression "Poush talab" is no doubt used in the documents. It should, however, be borne in mind that, since the proprietor is quite safe, so long as he pays the revenue by the last date for payment fixed under S. 3 of the Act, the earlier date, on which it was payable under the settlement and kistbandi of the mahal, lost in course of time all its importance and was lost sight of in practice and the last date fixed for payment under S. 3 became all important. The expression "Poushtalab," used in the documents, is not the instalment for Poush according to the settlement and kistbandi of the mahal but the instalment for which the last date

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of payment, as fixed under S. 3 of the Act falls in Poush, and is loosely used to mean the instalment payable by the 12th January as so fixed. (Mukerji and Guha, JJ) Sree Radhagobinda Deb Thakur v. Girijaprasanna Mukherji (1931). 59 C 186 = 35 C W N 912 = 136 I C 129 = I R 1932 C 177 = A I R 1932 C 153 = A L R 1932 C 531

—Ss. 2, 3—Arrears—Where arrears were payable on 12th January and estate was sold on 28th March the next day for payment of arrears; Held sale was not invalid. 35 C W N 912

—Ss. 2, 3—Revenue Sale—Date fixed for payment of arrears—Sale before date—Validity—A sale for arrears of Revenue before the date fixed for payment of arrears is invalid *Saraswati Bahuria v. Surajnarayan Chaudhuri*. A I R 1931 P C 57 = 35 C W N 444 = 60 M L J 350 = (1931) M W N 339 = Ind Rul (1931) P C 84 = 53 C L J 307 = 12 P L T 357 = 10 Pat 496 = 130 I C 676 (P. C.)

—As kist of 28 th March becomes arrears on 1st April, sale for arrears cannot be held before 7th June. A I R 1931 P C 57 = 60 M L J 350 = 35 C W N 444 = 53 C L J 307 = Ind Rul (1931) P C 84 = 130 I C 676

—No sale for arrears can be held until the period fixed for payment of arrears has expired. A I R 1925 Pat 750 = 6 P L T 738 = 3 P L R 237 = 88 I C 485

—Three dates determine liability of estate to sale. A I R 1926 Pat 549 = 7 P L T 747 = (1926) Pat 362 = 96 I C 807

—In absence of original Kistbandi, Kist dates are those that are fixed under S. 3. A I R 1926 Pat 549 = 7 P L T 747 = (1926) Pat 362 = 96 I C 807

—Sale is not rendered void for want of jurisdiction by misdescription of the estate. Dates of revenue kists according to original settlement and kistbandi must be given by the party impugning the revenue sale. A I R 1924 Pat, 537 = 5 P L T 473 = (1924) Pat. 142 = 77 I C 851

—The contract of parties determines the due date for paying Revenue; sale before that date is *ultra vires*. 26 C W N 140 = A I R 1921 C 449 = 68 I C 491

—S. 2, 3, 25, 26—Under S. 25 When there is a mistake in procedure the commissioner can only act. The power goes beyond proper procedure. A revenue sale can be set aside when there are no arrears on the estate on the date of the kist. In considering the total arrears, arrears on separate portions are to be taken on account. 5 Pat L J 66 = (1920) Pat H C I = 52 I C 990

—S. 3—Sale under Act—Liability for—Conditions.

Before an estate becomes liable to sale under the Act there must be (1) the

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whole or a portion of a kist or instalment unpaid, (2) the conversion of such unpaid amount into an arrear on the first of the following month and (3) the passing of the latest date of payment of such arrears, as fixed under S. 3 and the official notice of the Board of Revenue (Lord Thankerton) Krishnachandra Bhoumik v. Pabna Dhanabhandar Co. Ltd. (1931) 59 I A 68 =59 C 1034 (1038)=62 M L J 421=55 C L J 62=33 C W N 277=136 I C 410=35 L W 842 =I R 1932 P C 106=A I R 1932 P C 61 =A L R 1932 P C 175 (P C).

—S. 3—'Arrears'—(i) Question whether arrears exist is not one of form but of substance, a legal position to be inferred from all the circumstances not a fact to be determined on the Collector's register alone. (ii) Liability to be sold arises not on the estate being in arrears but on arrears remaining unpaid on the latest date fixed. 12 P L T 401=10 Pat 757=Ind Rul (1931) Pat 437=134 I C 149

—Ss. 3, 5—Sale after payment of arrears—Legality—Where 7th June kist was paid two days late but kist payable on 28th September was paid in due time and the Collector issued a notice under s. 5 showing 28th September as the date for payment and sold the estate in January for arrears. Held that as the Collector had fixed the 28th September under s. 5 and as there were no arrears on that date the sale was *ultra vires*. 10 P L T 401=10 Pat 757=Ind Rul (1931) Pat 437; 134 I C 149

—Tenant taking over existing tenancy by executing kabulyiat afterwards, should pay revenue on the date fixed by tenancy. A I R 1922 P C 405=32 M L T 115=50 C 243=27 C W N 749=37 C L J 561 =50 L A 247=44 M L J 388 (P C)=74 I C 609

—S. 3—Act VII of 1868—Effect of Board's Notification of 6th October 1871 issued under section 3 of Act XI of 1859 is that no holding can be sold till after the 28th June next after the first day of the month in which the revenue or rent should have been paid. Premature sale is invalid. A I R 1921 Cal 449=26 C W N 140=68 I C 491

—S. 5—Construction—Sections 3 and 5 must be read together. Section 5 is an exception to s. 3 and has the effect of fixing another date than that fixed under s. 3. 12 P L T 401=10 Pat 757=Ind Rul (1931) Pat 437=134 I C 149

—When mortgage has been found to be a good one by judicial decision notice under s. 5 is expedient. A I R 1928 Cal 722=Ind Rul (1929) Cal 536=117 I C 552

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—Notice should not be issued combined under s. 5 and 6. A I R 1926 Cal 866=53 C 886=43 C L J 468=30 C W N 618 =95 I C 353

—S. 5, 6, 8, 11, 13, 14, 33—A defect in specification of property to be sold is a material circumstance which renders the sale invalid.

In the interpretate of a Civil Court sale the dominant consideration is the nature of the suit. In interpreting a statutory sale the dominant consideration is the nature of statutory proceedings. 2 P L J 402=2 P L W 229=40 I C 13

—S. 5, 6, 13—The provisions of sec. 5, 6 of Act XI 1859 which declare notification of sales specifying their properties and due publication in accordance with the law, are strongest enactments and serve as safeguards for protection of interest of defaulters. The object of the law as well as Board's Rules requiring specification of properties to be sold is to enable likely purchasers among the public to know exactly what was going to be sold and to insure thereby reasonable competition. The publication of the notice in Govt. Gazette is prescribed with the object of inviting purchasers from all quarters and not confining the bidding so speculation money lenders and muktyar of the neighbourhood. 42 Cal 897=28 M L J 583=19 C W N 481= (1915) M W N 559=2 L W 355=21 C L J 412=17 Bom L R 442=13 A L J 501=17. M L T 321=28 I C 699=42 I A 79 (P C)

—S 5, 9, 13, 14, 37. & 53—The words estate sold under the Act for recovery of arrears due on account of the same in Sec 37 have been used in contradistinction to a sale of an estate for arrears due on account of estates other than that to be sold referred to Ss 5 and 53 of the Act.

The benefit of exception 4 to Sec. 37 must be limited only to such portions of land only as are covered by buildings, tanks etc. and cannot be extended to portions on which there are no permanent works constructed. 23 C W N 315=50 I C 406=45 C 730.

—S 5, 18, 33—The estate was advertised for sale for revenue arrears. There were 'pulbandi charges' for which sale was to be advertised also. The Plff. paid revenue arrears without pulbandi charges being paid. There was no notice issued for pulbandi charges under Sec. 5. The Plff. had not obtained any exemption order from the Collector for revenue payment. The Collector had no authority to proceed for sale for pulbandi charges although no exemption order was obtained. The exemption charges order to be levied



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under certificate Act are taken out of the purview unless and until fresh notices are issued under s 5 and they cannot be treated as land revenue. 42 Cal 765=1914 P C 30; 28 M L J=480=19 C W N 507=2 L W 422=29 I C 290=42 I A 58 (P C) (on appeal from. 7 I C 43.)

—Fraudulent sale should be declared as not binding on the defrauded party. A I R 1930 Cal 621=34 C W N 809=Ind Rul (1931) Cal 177=129 I C 401.

—Notice need not mention arrears. A I R 1925 Pat 750=3 P L R 237=6 P L T 738=88 I C 485.

—Omission of certain particulars in the notice does not render the sale void. Particulars of notice vary with facts of each case. A I R 1926 Cal 1195=30 C W N 1004=97 I C 885.

—Ss 6 and 7— 41 I C 458.

—S 6, 7—A mere fact that notices under Sec. 6, 7 of the Act were signed neither by the collector nor by any officer authorised to hold sale but by a Deputy Collector does not vitiate the sale. 22 C W N 769=28 C L J 51=43 I C 447.

—S 33, 6—Omission to notify in Vernacular Gazette of a sale of an estate revenue exceeding Rs. 500 does not vitiate the sale under Sec. 33. It is only an irregularity due to failure to advertise in vernacular gazette. 46 Cal 255=35 M L J 644=16 A L J 915=25 M L T 80=29. C L J 198=23 C W N 169=21 Bom L R 544=47 I C 995=45 I A 205 (P C)=1918 P C 217 On appeal from 20 I C 423

—S. 6, 33—It is not essential that the sale notification should be published in Vernacular Govt gazette when the revenue exceeds Rs. 500. It is enough if it be in Govt. Gazette and unless a substantial loss due to omission in publication be proved the sale does not become ipso facto null and void. It is only an irregularity & not illegality. 41 Cal 276=20 I C 423=17 C W N 1135

—S 6, 33—The fact that the proclamation of sale was affixed in less than 30 days before the date of sale does not render it null and void but it is simply an irregularity which can be remedied. 16 C W N 227=40 C 281=13 I C 493

—S. 7—Notice under—Non-service of Price fetched at sale—Non-service of notice has no bearing on question of and cannot affect. (Mukerji and Guha J J) Sree Sree Radhagobinda Deb Thakur v. Girijaprasanna Mukherji (1931). 59 C 186 (196-7)=35 C W N 912=136 I C 129=A I R 1932 C 153=I R 1932 C 177=A L R 1932 C 531.

—Notice under S. 7 is only expedient and not necessary A I R 1928 Cal 722=

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Ind Rul (1929) Cal 536=117 I C 552.

—Notice under S. 7 need not mention day of payment according to settlement A I R 1925 Pat 750=6 P L T 738=3 P L R 237=88 I C 485.

—Sale for arrears is rendered invalid by non-compliance with rules of notice. Remitter of revenue is not bound to be on the look out for the return of the acknowledgment. A I R 1928 Cal 68=55 Cal 624=47 C L J 12=32 C W N 359=103 I C 15.

—S. 9—Mortgaged property—Revenue arrears in respect of falling due after passing of final decree on foot of mortgage and before sale of property in execution—Mortgagee decree-holder depositing under S. 9—Right acquired by.

S. 9—Gives the mortgagee-depositor a lien in addition to the personal remedy given by the section and enables him to add the amount of the deposit to his original lien, thereby giving him in respect of the amount deposited, priority over mortgages subsequent to his own mortgage.

The interest of the mortgagee decree-holder in the security directed to be sold is pending sale at least as great as that of a mortgagee before decree, and the fact of his having obtained a mortgage decree before his claim to a lien arose is no sufficient reason for depriving him of such lien in respect of what are really subsequent salvage payments in the absence of a statutory provision to that effect. The only effect of the preliminary decree was to make the mortgaged property security for the judgment-debt pending realisation by sale as provided in the decree and pending such realisation the plaintiff as a secured decree-holder was just as much interested in the preservation of the security as he had been under his mortgage while it subsisted and there is no reason why he should not be entitled to a first charge in respect of the payments of revenue made after the passing of the final decree, which were really in the nature of salvage payments on behalf of all persons interested (Sir John Wallis) Manohar Das Mohanta v. Hazarimull (1931). 59 C 463 (469-70)=1931 A L J 800=33 B L R 1345=35 C W N 1040=54 C L J 125=61 M L J 343=A I R 1931 P C 226=58 I A 341=8 O W N 893=34 L W 472=1931. M W N 1173=134 I C 645 (PC).

—S. 9—Transfer of tenure—Name of transferee not registered—Person paying arrears whether entitled to recover from transferor. See Bengal Land Regulation Act S. 68 supra. 35 C W N 1136.

—S. 9—Payment of revenue by

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mortgagee after final decree—Right to prior charge.

See Transfer of Property Act 1882 S. 72 Monohar Das v. Hazarimull. A I R 1931 P C 226; 8 O W N 893; 35 C W N 1040; 54 C L J 125; (1931) A L J 800; 33 Bom L R 1345; 61 M L J 343; 34 L W 472; Ind Rul (1931) Bom 293; (1931) M W N 1163; 134 I C 645 (P C)

—Remedies of mortgagee making deposit under S 9 and under T P Act, S. 72 are similar A I R 1930 Cal 151=Ind Rul (1930) Cal 669=33 C W N 1163=57 C 298=126 I C 125.

S. 9 (3) and (4) entitles a mortgagee to make deposit. A I R 1930 Cal 151=33 C W N 1163=57 C 298=Ind Rul (1930) Cal 669=126 I C 125.

No separate suit by mortgagee for deposits maintainable as he must tack the amount to the mortgage debt. A I R 1930 Cal 151=33 C W N 1163=57 C 298=Ind Rul (1930) Cal 669=126 I C 125

—S. 9—Both under S. 9 Bengal Revenue Sale Act as well as under Contract Act, a suit brought by the plaintiff, who is a mortgagee to recover the amount paid by him on account of defaulting mortgagors is maintainable. In the case of a person who is not a proprietor there are three courses open for him (1) placing him in temporary possession if a suit be pending for possession (2) personal decree against defaulting for amount paid (3) He is entitled to a lien on the estate. 16 C L J 148=17 I C 45.

—Question whether a share is pokhta or kham is determined by the proportion between total jama sadr and jama sadr assigned to the share in application for separate accounts. A I R 1925 Pat 681=4 Pat 1=3 P L R 66=6 P L T 713=88 I C 465.

—Where separate account is opened apportionment of arrears of revenue should not be made but Collector's jurisdiction to sell share in arrears is not affected by such apportionment. A I R 1925 Pat 681=4 Pat 1=3 P L R 66=6 P L T 713=88 I C 465.

—S. 10, 11 and 53—A proprietor who is not a recorded sharer within the meaning of S. 10; nor a recorded sharer of specific portion of land within the meaning of S. 11 but who is a proprietor of undivided interest held in common tenancy can not claim the benefit of the exception to S. 53 which relates to sharers with whom the Collector has opened separate accounts under secs. 10 and 11. A Collector when he opens accounts separately performs a statutory duty. His act is strictly in conformity of provisions on the subject. Where the Collector acts in contravention of statutory provi-

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sion his act is without jurisdiction and cannot confer any privileges days created by s. 53 of the act. 39 Cal 353=14 C L J 552=16 C W N 817=13 I C 353

A party can object on the ground of existence of arrears even if he has once failed to do so previously. A I R 1925 Pat 681=4 Pat 1=3 P L R 66=6 P L T 713=88 I C 465

—S. 12—A purchaser of a Noabad taluka at a sale held under provisions of Act XI of 1859 acquires it in the state in which it was at the time of last settlement and not in the state at its first creation 20 C W N 636=32 I C 752

—S. 13—Share of estate—Sale of, for revenue arrear according to separate account Validity of—Conditions.

To justify the sale of a share of an estate on the ground that, according to the separate accounts, an arrear of revenue is due from it, it is necessary, under S. 13 of the Bengal Revenue Sales Act XI of 1859, that (1) the estate must have become liable to sale for arrears of revenue, and (2) an arrear of revenue must be due from the share according to the separate account. (Lord Thankerton) Krishachandra Bhowmik v. Pabna Dhanabhandar Co., Ltd., (1931). 59 I A 68=59 C 1034 (1037)=62 M L J 421=55 C L J 62=36 C W N 277=136 I C 410=35 L W 842=A I R 1932 P C 61=A I R 1932 P C 106=A L R 1932 P C 175 (P C)

—S. 13—Sale of an estate for which no arrears for kist are due is invalid. A I R 1928 Cal 722=Ind Rul (1929) Cal 536=117 I C 552

—S. 13 Requires the sale only of the particular separate share in arrear at the kist in question. A I R 1928 C 722=Ind Rul (1929) Cal 536=117 I C 552

—S. 13 After the opening of separate accounts residuary share cannot be sold unless it is shown that at the date of opening of separate accounts entire estate also was liable A I R 1925 P 681=4 Pat 1=3 P L R 66=6 P L T 713=88 I C 465

No share from which separate accounts do not show any arrears as due can be sold by Collector. Extent of residuary share liable to be sold is determined by the date when the estate is in general arrear A I R 1925 P 681=4 P 1=3 P L R 66=6 P L T 713=88 I C 465

—S. 13—In a suit contesting sale of residuary share, plaintiff should show continued existence of the old accounts produced by him. A I R 1925 Pat 681=4 Pat 1=3 P L R 66=6 P L T 713=88 I C 465

—S. 13, 54—Where a share owned was wrongly entered in the Collector's book as a large share with larger revenues instead of it being right one, it was held that at

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—S 13 Under Sec. 13 the notification of sale for arrears of revenue must be in full & sufficiently accurate so that the impending purchaser may know what is in fact the property offered for sale. A mere mistake of a figure will not be material & would not make a sale notification an irregularity or illegality 18 C L J 97=21 I C 354

—S 13 The term 'estate' means the entire estate out of which a separate share shall have been carved out. If the entire estate has become liable for sale. The collector can sell only that much of it from which revenue may be due. If the entire state has not become liable for sale no share can be sold by the collector & the sale would be inoperative. 18 C L J 505  
=18 C W N 490=21 I C 933

—Sale of the share for which no arrears of kist in question is due is void. Before ordering sale of the entire estate all the separate accounts ought to be closed 31 I C 743 (Cal)

—S 14 Separated sharars not in arrears were shown in Collector's books as it in arrears; and consequently a sale of entire effected on that understanding by the collector is void; both as to sale of separated account as well as to the entire estate. The sale was set aside by the High Court on the ground that on the date fixed for closure of accounts, there were no arrears standing in the name; 1915 P C 177=19 C W N 764=34 I C 283 (P. C.)=31 I C 743  
S. 14—5 C L J 425=34 C 381; 21 C 844; 7 C L J 1

—S. 14, 33. It is not proper for a court to extend the period of limitation allowed by law to the prejudice of debtors, by giving Plff. time to deposit deficit Court fees when there is no question of any mistake merely to suit his convenience. Direct evidence to prove a benami transaction cannot be expected since the whole object of such a transaction is to suppress evidence of real facts, the true facts can be proved by circumstantial evidence.

When the first payer has been declared by the Collector as purchaser under s. 33 of Act XI, 1859, a cosharer who has paid up arrears subsequently cannot have the sale set aside by suit in Civil Court except upon proof of circumstances specified in s. 33 such a sale can be attacked as nullity and as such not requiring proof in those circumstances. 41 Cal 1092=18 C W N 1071=24 I C 276

—S. 18—Exemption of estate from sale for arrears of revenue—Order of—Conditional order only—Order when is—Payment of all arrears and penalty—Condition in order as to—Sale held on non-payment of arrears in meantime—Valid.

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An order of the Collector exempting an estate from sale for arrears of revenue "on payment of all arrears and penalty Rs. 150 as a special case" is not an absolute order and does not fall within S. 18 of the Act. In such a case a sale held when the arrears had not been paid in the meantime, is valid (Mukerji and Guha, JJ.) Sree Sree Radhagobinda Deb Thakur v. Girijaprasanna Mukherji. 59 C 186=35 C W N 912=136 I C 129=I R 1932 C 177=A I R 1932 C 153=A L R 1932 C 531

—S. 20—"Any other cause" in former part of—Means a cause ejusdem generis. (Mukerji and Guha, JJ.) Sree Sree Radhagobinda Deb Thakur v. Girijaprasanna Mukherji. (1931). 59 C 186 (196)=35 C W N 912=136 I C 129=I R 1932 C 177=A I R 1932 C 153=A L R 1932 C 531

—S. 20—"Any cause" in latter part of—Not a cause ejusdem generis. (Mukerji and Guha, JJ.) Sree Sree Radhagobinda Deb Thakur v. Girijaprasanna Mukherji. (1931). 59 C 186 (196)=35 C W N 912=136 I C 129=I R 1932 C 177=A I R 1932 C 153=A L R 1932 C 531

—S. 20—Adjournment of sale—Legality—Several estates—Sale of, fixed for a particular date—Sale commenced on that date and some of the estates sold—Adjournment of sale to next date in case of, because it was already 5 p. m. and all the bidders had left and the sale could not therefore be completed—Adjournment not in contravention of S. 20 in such a case. (Mukerji and Guha, JJ.) Sree Sree Radhagobinda Deb Thakur v. Girijaprasanna Mukherji. 59 C 186=35 C W N 912=136 I C 129=I R 1932 C 177=A I R 1932 C 153=A L R 1932 C 531

—S. 20—Adjournment of sale—Order for—Validity of—Signing order by Collector at the club and not at the Collector's office does not affect.

The signature of the Collector at the place mentioned did not affect the jurisdiction of the Collector, nor did it in any way affect the sale that ultimately took place. (Mukerji and Guha, JJ.) Sree Sree Radhagobinda Deb Thakur v. Girijaprasanna Mukherji. 59 C 186=35 C W N 912=136 I C 129=I R 1932 C 177=A I R 1932 C 153=A L R 1932 C 531

—S. 20—Sale in—Means sale proceedings of all the estates that are to be sold on the particular day. (Mukerji and Guha, JJ.) Sree Sree Radhagobinda Deb Thakur v. Girijaprasanna Mukherji. 59 C 186=35 C W N 912=136 I C 129=I R 1932 C 177=A I R 1932 C 153=A L R 1932 C 531

—S. 20—Adjournment—Collector can adjourn sale if he cannot complete it before 5 P. M. and before bidders leave. 35 C W N 912

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—S. 25, 26—Under s. 25 of land Revenue sales Act, a commissioner has jurisdiction to annul a sale which may appear to him not to have been conducted in accordance with the Act.

A sale of estate for revenue arrears which are not existent is null and void. (1920) Pat 1-52 I C 990

—S. 27—Defaulter continuing after sale—Mesne profits liability for—On sale becoming final the right of the defaulter is extinguished and the possession of the defaulter after that date is unlawful and becomes liable for mesne profits from that date. 35 C W N 395

—S. 28 and Sch. (A)—Purchaser's title—Relation back of, to date default—Scope of.

Under S. 28 and Sch. (A) of the Revenue Sale Law (Act XI of 1859) the title of the purchaser is to be deemed to have vested in him on the date of the default. But as observed by their Lordships of the Judicial Committee in the case of Shyam Kumari v. Rameswar Singh. I L R 32 Cal 27 at page 29, "When the Act is considered as a whole it seems clear that when a sale or purchase is spoken of in connection with time, the time meant is that at which the sale takes place in fact, not that to which its operation is carried back by relation." (Guha and Bartley, J.J.) Krishna Charan Nandi Chaudhury v. Nagendra Bala Deby. 37 C W N 14

—Ss. 28 and 31 and Sch. (A) Revenue sale purchaser of Tauzis—Land appertaining to—Tauzis—Acquisition of under Land Acquisition Act—Compensation in respect of proprietary and gantidari interest in the lands—Right to, of the original proprietor—Gantidar and of the revenue sale purchaser—Acquisition under Land Acquisition Act before and after revenue sale—Distinction. See Land Acquisition Act Ss. 11, 16 & 30 37 C W N 14

—S. 28—Title of purchaser, accrual of—Certificate, whether necessary—It cannot be said that no title accrues until issue of sale certificate. The sale certificate is only evidence of title; it does not create title. 35 C W N 395

—S. 29—The words any person etc in sec 29 refer to former proprietors or persons claiming proprietary rights through them and don't refer to under tenure holders and the purchaser must bring a suit to remove him if he refuses to vacate. Upon a notice to mokararidar to give possession to the purchaser, the latter is not entitled to any mesne profits accruing prior to date of sale. He is entitled only to damages for use and occupation. 17 C W N 984-19 I C 974

—S. 29—See Landlord and Tenants—Miscellaneous 7 C L J 460

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## BENGAL LAND REVENUE SALES ACT

(XI OF 1859) (Contd.)

—S. 31—An assignee of a recorded proprietor is not his representative and a Collector is justified in refusing to pay to such assignee any surplus which may have remained after deducting revenue sum from sale proceeds. If article 20 of Limitation was held to be applicable for Plff (assignee) time should run against him from the date when the right to sue accrued. The right to sue did not accrue till the right to obtain relief by way of declaration had been denied. 47 Cal 331-31 C L J 372-24 C W N 294-55 I C 639

—S. 31 and 53—As the sale by the Govt. conveys a title free from encumbrances to the purchaser the mortgagees are entitled to claim the same as creditors under sec. 31 and the Court will direct that such claims should be satisfied out of the sums in order of priority. In a case where the property is sold under sec 53, the property is acquired subject to all the encumbrances existing at the time of sale. 34 M L J 361-23 M L T 147-7 L W 315-27 C L J 303-22 C W N 505-(1918) M W N 295-4 Pat L W 249-16 A L J 271-20 Bom L R 553-A I R 1917 P C 111-44 I C 304 (P C)

—S. 33—Civil Suit—A sale where there are no arrears is void and a suit to set it aside in the Civil Court is not barred. 12 P L T 401; 10 Pat 757; Ind Rul (1931) Pat 437, 134 I C 149.

—S. 33—Omission to take objection before Commissioner—No amount of irregularity or illegality can vitiate sale unless the grounds are specifically taken in appeal before Commissioner under s. 33. 12 P L T 401, 10 Pat 757, Ind Rul (1931) Pat 437, 134 I C 149.

—Ss. 33 and 34—sale held when no arrear due—nature of the sale—it is not one under Revenue Sales Act—application for execution—whether the Act is applicable—limitation. A L R 1933 C 494

—Illegal Sales are governed by s. 33 also. Rights of proprietor are not affected by unauthorized Sale by Collector. Property not in arrear is not governed by this principle. 31 I C 965-22 C L J 525.

—Suit by defaulting purchasers are governed by s. 33. A I R 1930 Cal 621-34 C W N 809-1nd Rul (1931) Cal 177-129 I C 401.

—Objection on the ground that the sale was held under inaccurate description having been not raised in appeal to Commissioner, no separate suit to set aside the sale is maintainable. A I R 1926 P C 126-6 Pat 200-44 C L J 515-31 C W N 107-38 M L T 5-8 P L T 1-53 I A 246-26 L W 837-51 M L J 815 (P C)-98 I C 930.

—Difference between the amount of arrears claimed and the amount due does

## BENGAL LAND REVENUE SALES ACT

(XI OF-1859) (Contd.)

not vitiate the sale. No cesses can be recovered under the Act. A I R 1926 Cal 866=53 C 886=43 C L J 468=30 C W N 618 =95 I C 353.

—Sale cannot be set aside for non-compliance with provisions of the Act unless substantial injury is proved. A I R 1926 Cal 866=53 C 886=43 C L J 468=30 C W N 618=95 I C 353.

—Null and void sale need not be set aside, and is not governed by s 33 and Art 12 of Lim. Act. A I R 1925 Cal 1148 =42 C L J 69=90 I C 40.

—S 33—does not apply to a sale made in spite of the payment of revenue by money order on the date on which the treasury voucher is filled. 51 C 776=A I R 1924 Cal 839=78 I C 661.

—S 33—Applicability to sale under s 14. 41 Cal 1092=18 C W N 1071=24 I C 276.

—S 33—Omission to publish notification in the Vernacular Govt. Gazette—Validity of sale. 41 Cal 276=17 C W N 1135=20 I C 423.

—S 33—In a suit to set aside a revenue sale the Plff cannot put forth any ground which he did not take in his appeal to the Commissioner under Sec 2 of Bengal Sales Act. 47 I C 422.

—S 33—Scope of Reason for the ground need not be stated, when objection is taken to a revenue sale before the Commissioner. 41 I C 458

—S 33—Scope of section extends not only where the sale has been irregular but also where it is illegal—i. e. held in contravention of express provision for exemption. But this principle applies where the property sold is not in arrear. 22 C L J 525 =31 I C 965.

—S 33 and 34—Sec 34 refers to cases brought under s 33 and the rule of limitation laid down in s 34 requiring 6 month's time for execution applies to suits brought under s 33. Sec 34 did not apply to a case which is not a suit under Sec 33 to annul a sale the contention of Plff's being that there was no subsisting sale to be annulled. 19 C W N 464=28 I C 876.

—Only sales annulled under s 33, and not sales held to be void for want of arrears, are governed by s 34. A I R 1924 Pat 504=5 P L T 368=(1924) Pat 25=78 I C 303.

—S 34—The provisions of Sec. 34 are applicable merely to the case of an owner who has committed default in payment of revenue. It does not apply to a suit instituted by a third party against an auction purchaser at a revenue sale. 52 I C 692.

—S. 36—Must be construed strictly. Persons claiming through certified purcha-

## BENGAL LAND REVENUE SALES ACT

(XI OF 1859) (Contd.)

ser are not governed by the section.

62 I C 662 (Cal)

—S. 36—The provisions of the section are penal and should be construed with utmost strictness. It does not exclude a suit against a person claiming through a certified purchaser and must be confined to suits against a certified purchaser himself to oust him. 11 I C 434

—S 36—A previous agreement to convey purchased property can be specifically enforced by bringing a suit against a certified purchaser and sec. 36 is in no way a bar to its maintenance. 17 C W N 75=18 I C 100

—S. 36—The object of the section is to prevent the true owner from disputing the title of his benamidar or certified purchaser. It does not preclude a third party from enforcing his claim against the true owner in respect of benami property. 37 I C 790

—S. 36, 37—Under s. 36, a suit to oust a certified purchaser is prohibited merely on the pretext that the purchase was benami and does not bar a suit by the owner to oust a third person found in possession of property. A real purchaser is a purchaser within the meaning of s. 37 and his prayer to have his purchase free from encumbrances must be granted. The benefit of exception 4 to sec. 37 must be restricted only to such portions as are covered by buildings and other permanent works. 23 I C 917

—Ss. 36, 53—See Sale—Sale for arrears of revenue and cess—Purchasers, Rights and Liabilities of. 11 W R 265

—S. 37—Bengal Rent Act (VIII of 1859)—S. 66—Difference between.

S. 66 of Act VIII of 1869 says nothing about avoiding or annulling subordinate tenures. It merely provides that on a rent sale the purchaser shall acquire the tenure "sold, free from encumbrances" (Sir George Lowndes). Turner Morrison & Co., Ltd. v. Mannohan Chowdhury (1931). 59 C 728=62 M L J 86=36 C W N 29=A I R 1931 P C 314=58 I A 44=135 I C 765=54 C L J 462=1 R 1932 P C 45 (P C)

—S. 37—Maikana is not an Encumbrance but is a part of the revenue assessed upon it, (Suhrawardy and Graham JJ.) Mahendranarayan Ray Chaudhuri v. Abdul Gafur Chaudhuri (1931). 59 C 746=35 C W N 1233=135 I C 785=A I R 1932 C 49=1 R 1932 C 145

—S. 37—Encumbrance—Under-tenure—Distinction—Intermediate tenure—Encumbrance or under-tenure.

Under the Bengal Tenancy Act an intermediate tenure would be an "encum-



## BENGAL LAND REVENUE SALES ACT

(XI OF 1859) (Contd.)

brance"; see S. 159 and S. 161, where incumbrance is defined. But it is not so under S. 37 of the Revenue Sales Act of 1859. This section draws a clear distinction between "incumbrances" and "under-tenures." What is intended by the expressions "under-tenures" and "under tenants" is shown by the exceptions that follow. The third exception refers to "talukdari and other similar tenures." The taluk in the present case which is an intermediate tenure is, therefore, an under-tenure within the meaning of the section and is clearly something different from an encumbrance whatever that term may be intended to include. (Sir George Lowndes) Turner Morrison & Co., Ltd. v. Monmohan Chaudhury. (1931). 59 C 728-62 M L J 86 =36 C W N 29-A I R 1931 P C 314-58 I A 440-135 I C 765-54 C L J 462-I R 1932 P C 45 (P C)

—S. 37—Encumbrance—Under-tenure—Effect of revenue sale on—Annulment by purchaser—Necessity—Distinction.

Under S. 37 encumbrances are wiped out by the sale. In the case of under-tenures the purchaser is only entitled to avoid and annul them, and on doing so, that is upon exercising his option to annul, he can eject all under-tenants. Talukdari and other similar tenures can be annulled by the purchaser unless they fall within the provisions of the exception. The purchaser's right in respect of an under-tenure is only a right to annul. Unless and until an under-tenure is annulled it continues; the talukdar becomes the under-tenant of the purchaser and the tenants holding under him are not affected by the change of proprietorship. (Sir George Lowndes) Turner Morrison & Co., Ltd. v. Monmohan Chaudhury. (1931). 59 C 728-62 M L J 86-36 C W N 29-A I R 1931 P C 314-58 I A 440-135 I C 765-55 C L J 462-I R 1932 P C 45 (P C).

—S. 37—Under-tenure—Annulment of—Election by purchaser as to—Suit by him for possession of the holding joining both the talukdar and the talukdar's tenants—Institution of, would be an effective election to annul the taluk. (Sir George Lowndes) Turner Morrison and Co. Ltd. v. Monmohan Chaudhury (1931) 59 C 728-62 M L J 86-36 C W N 29-A I R 1931 P C 314-58 I A 440-135 I C 765-54 C L J 462-I R 1932 P C 45 (P C).

—S. 37—Under-tenure—Annulment of—Notice of Finding as to—Evidence justifying.

In a suit brought by the purchaser at a revenue sale to eject persons who claimed to hold the suit lands as tenants of a subordinate talukdar, the purchasers denied the existence of any taluk or any

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talukdari rights in the alleged subordinate talukdar. The latter was not made a party to the suit but was examined as a witness for the defendants. He deposed that after the sale an employee of the purchaser asked him to pay nazar and take a fresh settlement, which he refused to do. The High Court thought that that was "a sufficient expression of the intention on the part of the auction-purchaser to avoid the taluk."

Held that, in the circumstances of the case, the finding of the High Court was not justified. (Sir George Lowndes). Turner Morrison & Co. Ltd. v. Monmohan choudhury (1931) 59 C 728-62 M L J 86-36 C W N 29-A I R 1931 P C 314-58 I A 440-135 I C 765-54 C L J 462-I R 1932 P C 45 (P C).

—S. 37—Under-tenure—Annulment of—Notice of—Finding as to—Propriety of—Tenure-holder not before Court.

A finding to the effect that notice of the annulment of an under-tenure was given by the purchaser at a revenue sale ought not to be come to when the tenure-holder is not before the Court. (Sir George Lowndes) Turner Morrison & Co., Ltd. v. Monmohan Choudhury (1931) 59 C 728-62 M L J 86-36 C W N 29-A I R 1931 P C 314-58 I A 440-135 I C 765-54 C L J 462-I R 1932 P C 45 (P C).

—S. 37—Under-tenure—Annulment of—Notice of Necessity.

Notice of annulment in some form or other must be given by the purchaser. (Sir George Lowndes). Turner Morrison & Co. Ltd. v. Monmohan Choudhury. 59 C 728-62 M L J 86-36 C W N 29-A I R 1931 P C 314-58 I A 440-135 I C 765-54 C L J 462-I R 1932 P C 45 (P C).

—S. 37—Under-tenure—Annulment of—Revenue sale does not ipso facto have effect of annulling the under-tenure. (Sir George Lowndes). Turner Morrison & Co., Ltd. v. Monmohan Choudhury. 59 C 728-62 M L J 86-36 C W N 29-A I R 1931 P C 314-58 I A 440-135 I C 765-54 C L J 463-I R 1932 P C 45 (P C).

—S. 37—Under-tenure—Annulment of—Tenants of talukdar or under-tenure holder—Ejectment suit against by purchaser prior to annulment of under-tenure—Maintainability.

The purchaser has no cause of action against the tenants of the talukdar or under-tenure holder as long as the taluk subsists. Their contract is with him and their liability is to him and not with or to his superior landlord. The suit is therefore not maintainable. (Sir George Lowndes). Turner Morrison & Co. Ltd. v. Monmohan Choudhury. 59 C 728-62 M

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L J 86-36 C W N 29-A I R 1931 P C  
314-58 I A 440-135 I C 765-54 C L J 462-  
I R 1932 P C 45 (P C).

—S. 37—Under-tenure—Annulment of  
—Tenants of talukdar or under-tenure  
holder—Relation between purchaser and,  
prior to annulment of undertenure.

Unless and until a taluk or under-  
tenure is annulled it continues: the talukdar  
becomes the under-tenant of the purchaser  
and the tenants holding under him are  
not affected by the change of proprietorship.  
There is no privity of contract between  
them and the purchaser and the latter  
cannot either claim rent from them or  
eject them so long as he allows the taluk  
to continue. The purchaser could no doubt  
sue for possession of the holdings joining  
both the talukdar and the talukdar's  
tenants. (Sir George Lowndes) Turner  
Morrison & Co. Ltd. v. Monmohan Chou-  
dhury, 59 C 728-62 M L J 86-36 C W N  
29-A I R 1931 P C 314-58 I A 440-135 I  
C 765-54 C L J 462-1 R 1932 P C 45 (P C).

—S. 37—Proviso—"Raiyat" in—Means  
a cultivator and does not include the  
successor-in-interest of raiyats. (Sir George  
Lowndes) Turner Morrison & Co. Ltd. v.  
Monmohan Choudhury (1931) 59 C 728-62  
M L J 86-36 C W N 29-A I R 1931 P C  
314-58 I A 440-135 I C 765-54 C L J 462-  
I R 1932 P C 45 (P C).

—Purchaser at an auction sale is not  
bound to do give notice to encumbrancer  
to avoid encumbrance which he can do by  
expressing his intention to do so by deed  
or word. A I R 1930 Cal 69-57 C 434-33  
C W N 930-51 C L J 320-Ind Rul (1930)  
Cal 407-124 I C 167.

"Buildings" do not include masonry  
rivetments.

—S. 37 (4)—Masonry rivetments are  
not buildings. A I R 1930 Cal 69-33 C W  
N 930-51 C L J 320-57 C 434-Ind Rul  
(1930) Cal 407-124 I C 167.

—Person cultivating land or acquiring  
it for cultivation is a 'Raiyat'. A I R  
1930 Cal 69-57 C 434-33 C W N 930-51 C  
L J 320-Ind Rul (1930) Cal 407-124 I C 167.

—S. 37—Makes a portion of estate  
not separately assessed liable and saleable  
for the whole revenue. A I R 1929 Cal  
50-56 C 813-56 I A 74-33 C W N 289-49  
C L J 112-113 I C 465.

—In a suit for recovery of land  
sold for arrears against the purchaser who  
claimed it as lakhiraj plaintiff must show  
that the land was entered as mal and  
included in the estate as such at Permanent  
Settlement. A I R 1926 P 416-5 P 726-96  
I C 575-1926 P H C C 228.

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Lease meant by exception need not  
be one for excavating a tank thereon. A I  
R 1926 P 416-5 Pat 726-1926 P H C C  
228-96 I C 575.

Encumbrance is not annulment  
by revenue sale until the purchaser takes  
steps to annul it. Tenant does not forfeit  
his tenancy by denying purchaser's title  
before annulment of encumbrance. A I  
R 1926 P 416-5 Pat 726-1926 P H C C  
228-96 I C 575.

Encumbrances do not include structures  
or buildings. A I R 1926 Cal 97-52 C 862-  
90 I C 901.

Auction-purchaser creating Patni can-  
not be said to have exercised the option to  
annul under-tenure A I R 1923 Cal 195-  
68 I C 449

Contract with Govt. is "Settlement"  
A I R 1921 Cal 192-34 C L J 485-65 I C 911

Purchaser of entire estate at a revenue  
sale under Act XI of 1859 can eject all  
under-tenants except occupancy raiyats. Oc-  
cupancy rights in S. 37 provided can be  
acquired under any law promulgated since  
1859. 35 C L J 212

—S. 37—The section protects a portion  
of taluk existing before the permanent  
settlement but later on transferred and  
held under a different name but traceable  
to original. 15 C W N 515-10 I C 287

—S. 37—Where plaintiff sued for khas  
possession of lands alleged to have been  
purchased at a revenue sale free of encum-  
brances, it was found that the Deft. held  
some rent-free tenures which existed even  
before the permanent settlement. Held the  
burden of proving that the suit lands formed  
part of the mal lands of the estate lay  
on plff. 14 I C 90-16 C W N 980

—S. 37—It is not necessary that a  
Purchaser at a revenue sale must sue to  
avoid incumbrances, he may elect to effect it  
by any means. Judicial process is not neces-  
sary. 39 I C 273

—S. 37—In a suit for possession of  
lands purchased by the plaintiff at revenue  
sale, where it was found that the protected  
and unprotected interests were mixed up  
the form of the decree should be a joint  
decree with the Defts, to the extent to  
which the plaintiff succeeds. 22 I C 247-  
18 C L J 332

—S. 37—Interests of occupancy raiyat  
are protected from annulment by purchaser  
at revenue sale—Transferee in possession  
for more than 12 years prior to the suit  
can resist the suit for ejectment may  
acquire claim to stay on land. 49 I C 437

—S. 37—Where a suit for getting posses-  
sion by a purchaser of an undivided share

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(XI OF 1859) (Contd.)

was opposed by the Deft. on the ground that the land was included in their howla which was a protected interest, the onus lay on the Deft to prove the allegation 16 C W N 693=15 I C 701

—S. 37—The owner of a registered 'patni' purchasing the parent estate at a sale for arrears is not entitled to annul the tenures subordinate to the patni 18 C W N 672=25 I C 497

—S. 37—A suit for annulment of encumbrance in part is not maintainable unless all the lands of Deft's tenure are not included therein. A cadastral survey 'khatian' must be taken to be correct unless proved to be otherwise. Road Cess returns by a landlord are no evidence against the tenant 55 I C 645

—S. 37—When a portion of a taluka existing before Permanent Settlement is transferred and held under a different name but its origin is traceable, the portion also is protected under this sec. 19 C W N 79=27 I C 114

—37—The word settlement means permanent settlement of the estate in question & not the year 1793 in which greater portion of Bengal was permanently settled. This case is dissented from in 54 I C 658 (see next case) 19 I C 872

—S. 37 The words time of permanent settlement in exception I to this section refers to 1793 & not the year of mahal settlement. Permanent tenure-holders at fixed rates are entitled to protection under-tenure created by Government can be annulled under s. 37. A settlement under cl. 2 s. 10 regulation VII of 1822 does not create an under-tenure-holder but a muhfassal settlement holder. (1919) Pat. 449=5 P. L. J. 7=54 I C 658

—S. 37—A 'Lakheraj' tenure is not an encumbrance and entry in Thak map of such Lakheraj tenure before Permanent Settlement is admissible in evidence. A tenure holder of insignificant area is not liable to be ejected but his tenure is liable to be assessed with rent. And a suit for assessment of rent is maintainable in Civil Court. 21 C L J 637=39 I C 53

—S. 37—A tank existing prior to deft's lease is not a 'protected interest' within the meaning of exception to sec. 37. 41 I C 1

—S. 37—Except 4—Prov. Sm. C Courts Sch. II, Act VIII—Suit for rent of lands—Revenue sale—Adverse possession delivery of symbolical possession—Effect of—Garden land if protected. 42 Cal 638=20 C L J 494=27 I C 258=19 C W N 1030

—S. 37—The mere fact that a garden was made on a piece of land many years before the rev. sale would not make it a land

## BENGAL LAND REVENUE SALES ACT

(XI OF 1859) (Contd.)

falling within except. 4 to the sec and would be liable to be annulled though a sale for arrears does not ipso facto avoid incumbrances no formal notice is necessary, no particular method of expressing an intention to annul is necessary in suits for rent though the value does not exceed Rs 500 a second appeal lies to H. C. 42 Cal. 638=19 C W N 1030=20 C L J 494=27 I C 258

—S. 37—Except. 4 The transferee of auction purchaser has the same right as those of the latter and in order to get the encumbrance annulled no written notice by either is necessary but an act showing an intent to annul is sufficient 36 I C 184=20 C W N 1028

—S. 37—except. 4 Sale of estate lands covered by permanent work how far protected see s 5 supra 23 C W N 315

—S. 37—In a suit under sec 37 no prayer for fair and equitable rent can be entertained. 42 Cal 745=20 C W N 185=22 C L J 223=31 I C 19.

—S. 37—An occupancy tenant at fixed rent cannot be ejected 44 I C 543=27 C L J 284

See also 31 I C 19=20 C W N 185=22 C L J 223=42 C 745

—S. 37—A settled raiyat holding land sold for arrears in the same village as the village of which he is a settled raiyat under a term of permanent lease at fixed rent has a protected interest within the proviso to sec. 37 of revenue sale land 27 C L J 293=45 I C 25

—S. 37—Raiyat holding at fixed rates have protected interest within the meaning of proviso to the section 46 I C 254

—53—All incumbrances are binding on the defaulting proprietor - purchaser Right created by chowkidar comes to an end on resumption 1922 C 193=35 C L J 185=69 I C 7

—53—Benamidar purchaser for a defaulting proprietor is bound by the encumbrance created by the latter 96 I C 494

—S. 53—Encumbrances created by defaulting proprietor is binding on non-defaulting proprietor purchaser at a revenue sale. 121 I C 456=A I R 1929 Pat 209=8 Pat 569=Ind Rul (1930) Pat 162

—S. 52—In resumed khas mahal there was nimosat taluk under which existed. howla. Sale of nimosat taluk for revenue arrears did not affect howla which existed before settlement of taluk. 45 I C 892.

—Ss. 40, 41—Transfer of Property Act, 1882, s. 73 14 C W N 186=5 I C 70

—S. 53—Defaulting benamidar proprietor on purchase takes the estate subject to all incumbrances. Adverse possession is encumbrance. 43 I C 461.

See also

44 I C 304 (P. C.).

## BENGAL LAND REVENUE SALES ACT

(XI OF 1859) (Contd.)

—S 54—A purchaser under s. 54 purchases the share and not the right, title and interest of the defaulter. He is not a person claiming through the defaulter.

Hence in a suit for possession after his purchase, the Deft must show that he had acquired adverse possession. 15 C L J 436-16 C W N 587-14 I C 219.

—Incumbrance includes lease of right to collect rent. A I R 1922 Pat 389=3 P L T 816-63 I C 183-1 Pat. 38.

—S 54—A mortgagee brought a suit on his mortgage and obtained a decree in execution of which he purchased the property on a certain date. After that revenue on it fell in arrears and property was sold on that account. It was held on question of conflict of titles between a mortgagee purchaser and a revenue purchaser that the former can use his mortgage as a shield against the latter; (2) that the mortgagee purchaser took the property subject to all liabilities; (3) that the revenue purchaser was entitled to possession as against a mortgagee purchaser and (4) that the mortgage was not an incumbrance within the meaning of s. 54 after the Court Sale (5) obiter. If there had been accretions between the date of court sale and confirmation, they would have become property of mortgagee purchaser. 23 M L J 311-16 C W N 985-40 Cal 89-39 I A 228-16 C W N 985-12 M L T 352-14 Bom. L R 1046-16 I C 210, (P C).

—S 54—In a suit by purchaser for khas possession, he must prove assessment 1924 C 328-28 C W N 143.

—S 54—Sale under s. 54 does not raise the question of notice. 91 I C 411 =A I R 1926 C 552.

—S 54—Govt. Sale of separate share of estate subject to mortgage passes to the purchaser only equity of redemption. A I R 1929 Pat 209-121 I C 466-I R 1930 Pat 162 =8 Pat. 569

—S 54—Encumbrance within s. 54 includes allowance. Allowance granted for number of years raises presumption of grant. A I R 1926 C 552-91 I C 411.

—S. 54 See sec. 13 Supra. 19 C W N 782.

—S. 58—All incumbrances on property sold for arrears of revenue are binding on defaulting proprietor-purchaser. A I R 1922 Cal 193-35 C L J 185-69 I C 7.

—S. 6, 7, 58—Where a bid fell short of revenue arrears, a collector can in such a case purchase the property for the highest amount bid under second part of S. 58. 22 C W N 769-28 C L J 51-46 I C 447.

—S. 58 See Ss. 2, 3 supra. 41 I C 458.

## BENGAL LAND REVENUE SALES ACT

(VII OF 1868)

—S. 11—Am Ben. Act II of 1871; s. 29 and sch E Rep Act XII of 1873; ss. 1, 2, 6 Rep. In Pt ss. 15 to 28 Rep. Ben. Act VII of 1880 Supplemented, Ben. Act I of 1895; ss. 3, 4 Rep. In Pt. s. 9 schs. A B C D Rep. Act I of 1903; Rep. (in Assam, Except the Lushai Hills). Reg. I of 1886; Declared in force in the Southal Parganas Reg. III of 1872, s. 3 as amended by Reg. III of 1899, s. 3.

—S 1—Amalgamation of Maiguzari and Thanadari land—Single sale for arrears of revenue and Thanadari dues is valid in such cases. 35 C W N 912

—S 2—Act VII of 1868—A Commissioners order of setting aside a sale for arrears which is final according to Sec. 2 is not open to review by him 17 C W N 485-13 M L T 487-18 I C 956-17 C L J 583-15 Bom L R 500-40 C 552-1913 M W N 553-40 I A 54 (P C)

—Ss 6, 7, 8—Non-service of notice under s. 7—Has no bearing on the question of price and is no ground for setting aside revenue sale. 35 C W N 912

—S 8—Omission to post a proclamation in due time is an irregularity and a sale effected through such irregularity can can not be set aside without proof of injury. There is no presumption as a matter of law that inadequacy of price is due to irregularity 13 I C 403-16 C W N 227

—S. 12 (3)—“Protected interest” within meaning of—Etmam if a—Revenue sale-purchaser of Nobad taluk—Annulment of such incumbrance—Right of.

Where the entry in the settlement record was “The etman is not binding as against the Government”, held that the etman was not a protected interest and that the revenue sale purchaser of a Nobad taluk was entitled to call for the cancellation of such an incumbrance. 52 C L J 4-137 I C 311-I R 1932 C 293-A I R 1932 C 514-A L R 1932 C 1257

—S. 12 (3)—“Recognition” in—Refers to question of recognition as against the Government. 56 C L J 4-137 I C 311-I R 1932 C 293-A I R 1932 C 514-A L R 1932 C 1257

—S. 12, cl (3)—“Recognition” implies something more than a mere record of fact found to exist. It involves the notion of either acquiescence or sanction of a fact found to exist. 20 C L J 40-24 I C 253

—S. 12 (3) & (4)—Clause (3) of sec 12 affords protection to a tenant from ejectment in the case of those improvements only which are made by a tenant himself cl (3) of that section protects a tenant from ejectment whose interest has been recognised in the settlement proceedings at the

**BENGAL LAND REVENUE SALES ACT**

(VII OF 1868) (Contd.)

last temporary settlement & the rent has been fixed for the period of that settlement.

58 I C 287

—S. 12 (4) It is not necessary to establish that the tanks were made by tenure holders or by their predecessors in interest from being annulled by a purchaser held under that Act.

58 I C 543

**BENGAL LAND REVENUE SALES REGULATION**

—See Regulations—(2) Bengal Regulations—Reg. 5 of 1812

**BENGAL LAND REVENUE SETTLEMENT REGULATION**

See Regulations—(2) Bengal Regulations—Reg 7 of 1822

**BENGAL LICENSED WAREHOUSE AND FIRE BRIGADE ACT I OF 1893**

—S. 7—Failure to dispose of an application for license within 30 days from the date of the receipt by chairman exempts the applicant from liability until final refusal. 25 C W N 960=34 C L J 203=66 I C 428=A I R 1921 C 469

**BENGAL LOCAL SELF-GOVERNMENT ACT (III OF 1885)**

An election can be set aside by Civil Court A I R 1928 Cal 750=56 C 52=Ind Rul (1929) Cal 468=116 I C 372

—A District Board can acquire rights over Zamindari lands adjacent to its roads under Act III of 1885 and in absence of evidence of such acquisition, an encroachment is not an offence under the by laws of Dis Board. 19 C L J 635=23 I C 475=15 Cr L J 267

Ss. 78, 139 and 140 empower District Board to frame bye-laws penalising encroachment on roads. A I R 1922 P 545=3 P L T 464=1 Pat 251=23 Cr L J 139=65 I C 571

—S. 138 (d) rule 93 & 98—Rule 98 together with 93 is to be construed mandatory and not directory. So no immoveable property vested in Dist Board should be validly sold without previous approval of Local Govt & an instrument under common seal signed by Chairman & two members. Title to land can not pass by a mere admission if the statute requires a deed. A power to regulate involves the assumption of the thing which is to be made the subject of Regulation. 20 C W N 370=23 C L J 26=35 I C 305=43 Cal 790

Ss. 78, 139 and 140 empower District Court to frame bye-laws penalising encroachment on roads. A I R 1922 Pat 545=1 Pat 251=3 P L T 464=23 Cr L J 139=65 I C 571

—S. 139 An encroachment is an unlawful gaining upon the right of another. A

**BENGAL LOCAL SELF-GOVERNMENT ACT**

(III OF 1885) (Contd.)

hanging verandah would be an encroachment if it amounted to an unlawful gaining upon the right of user by the public. The public have a right of user not merely on the road way but also on the side lands attached to the road. 18 C W N 1120=22 I C 763=15 Cr L J 187

—S. 146, 363 The negligence of Dist Board and Municipality to remove an obstructions which had been placed was covered by the phrase any thing done under the Act. In such a case Plf is entitled to damages not only for injury actually visible at the time of suit but for such consequential injury that may be reasonably expected to arise in future. But a future suit for subsequent loss of injured limb was not maintainable as it did not give rise to a fresh cause of action without any further wrong on Deft's part. 5 P L J 359=1 P L T 269=(1920) Pat 193=58 I C 749

—S. 146—In order to give rise to a fresh cause of action new injury (and not the development of an old one) is sufficient. The negligence of public bodies, such as the District Board and Municipality in the discharge of their duties imposed by the Statute falls under s. 146. (1920) Pat 193=1 P L T 269=5 P L J 359=58 I C 749

Bengal Rent Recovery Act contemplates the sale of whole tenure 18 C W N 170=23 I C 105

**BENGAL MEDICAL ACT 1914**

—S. 27—Where the Returning Officer, through oversight did not consider the application of a licentiate in Medicine and Surgery of Calcutta University entitled to be registered as a voter and consequently his name was not enrolled as a voter, it was held that the High Court had no jurisdiction to consider an application for mandamus under S. 45 of Sp. Rel. Act For inclusion of the name.

Under R. 16 of the Rules under the Act, the decision of the local Government as to any question about the rules is final and S 27 of the Act, takes away the right of a person, to institute a suit in respect of any act done in exercise of any power conferred by the Act on the Government, Council or Registrar. 19 C W N 129=31 I C 618.

—Ss. 27 & 33—The returning officer cannot be compelled to publish the applicant's name in the final election roll. The act referred in S. 27 is one done under powers conferred in local Govt. Even if the rules under S 33 are ultra vires an application for mandamus cannot be sustained. 19 C W N 129=31 I C 618.



**BENGAL MOTOR CAR AND CYCLES ACT (111 B C OF 1908) BYE-LAW NO. 4 RULE 20.**

—The owner of a motor Car is responsible for the acts of his servant whom he permits to use his motor car. The master is liable if the servant drives the car recklessly or negligently. But the master should not be held liable in every case of improper use by the servant. If once, the permission—express or implied is given to use the car, the master will be held responsible for every misuse of the car while that permission lasts. A general injunction to the chauffeur never to drive the car beyond the regulation speed cannot absolve the owner from responsibility. 9 I C 480-15 C W N 390-12 C L J 89-13 C L J 335-38 C 415.

**BENGAL MUNICIPAL ACT (III OF 1884)**

—Candidate's presence at the actual voting is illegal. A I R 1924 Cal 1070-28 C W N 892-82 I C 345.

—When the sanction is for one offence conviction for another does not hold good. A I R 1924 Pat 377-1 P L R Cr 45-24 Cr L J 478-72 I C 894.

—S. 6 (3) Occupation & not ownership determines polling. A I R 1927 C 592-101 I C 755.

—S. 6 (3) One owner's two adjoining plots are not surrounded by one set of boundaries, though on the North & south there are open spaces. A I R 1927 Cal 592-101 I C 755.

—Ss. 6 (3) & 85—A—When a same person acquires adjacent plots differently they form one holding not to be separately assessed. A I R 1926 Pat 181-7 P L T 35-90 I C 74.

S. 6 cl (3)—The term "holding" means land occupied by a person under one title or agreement and surrounded by one set of boundaries. 17 C W N 812-17 C L J 131-15 I C 548.

—Ss. 6 (3) 29 and 108—The chairman of the Municipality, is the person in whose name only the Municipality can properly be sued.

The Bengal Municipal Act does not allow, for purposes of separate valuation and assessment, the splitting of a holding held under one title and surrounded by one set of boundaries into two separate holdings. 46 Cal 784-23 C W N 611-51 I C 993.

—Ss. 6 (3), 101, 103 and 110—Municipality's right to assessment is not taken away merely because the lands form part of a revenue, paying estate. 17 C L J 131-17 C W N 812-15 I C 548.

—S. 6 (4)—"Building" meaning of. 26 I C 651.

—Ss. 6 (4), 204 and 218—Unless it is shown that the patit land adjoining the house was enjoyed as part of the house,

**BENGAL MUNICIPAL ACT III OF 1884 (Contd.)**

obstruction placed in front of patit land cannot be regarded as an obstruction placed against or in front of the house within the meaning of s. 204. 22 C W N 376-46 I C 208-19 C R I J 714.

—Ss. 6, (11), 15, 103, 195—A person does not become qualified as a voter merely because he pays income tax or municipal rates unless he is also the person legally liable to pay.

—Where property was acquired by the father with contributions from his son and the son used to pay the rates. Held, that the son can be treated either as an 'occupier' or joint owner with the father. 15 C W N 586-13 C L J 471.

—S. 6 cl. (13), S. 30—The words "not being private property and not being maintained by Government or at the public expense" in s. 30, refer only to bridges tanks etc. and not to the words "all roads including the soil." People used to pass over a certain land by the implied permission of the shebaitis to pay pranam to the idol and for a definite period in each year the way over the land used to be closed to traffic and the shebaitis used to collect tolls from shop-keepers, for sheds erected on the land. Held, that the open land is not a road as defined by s. 6, (13) and is not vested in the Municipality under s. 30. 9 I C 562.

—S. 7—Sanction of Local Government—Increase of rate of same kind of tax—Sanction not necessary for. A I R 1933 C 78-36 C W N 906.

—Ss. 14 and 15—Entry in the Register is to be regarded not so much as in itself a qualification but as the evidence upon which the polling officer must proceed. If a duly qualified person finds his name omitted from the register, he can apply for inspection or for rectification of accidental omissions and if the chairman refuses to rectify the omission of a person's name in the register, that person is entitled to bring a suit. 24 C W N 969-57 I C 950.

—S. 15—Election as Commissioner of Municipality set aside by District Magistrate purporting to do so under rule 40 of Bengal Municipal Election Rules (1930)—Validity of—Declaration of—Suit for—Maintainable. 37 C W N 122.

—S. 15—The power of disposing of election disputes may be given to Dt. Magis. A I R 1931 Cal 288-34 C W N 972-58 C 180-53 C L J 236.

—S. 15 provi. & r. 16—Civil Court's jurisdiction for declaring the invalidity of an election is not removed. A I R 1931 Cal 36-58 C 87-34 C W N 741-I R (1931) Cal 108-129 I C 422.

—Ss. 15 & 69, r. 15 (1)—The rule is

**BENGAL MUNICIPAL ACT III OF 1884 (Contd)**

imperative & the election would be affected by its infringement. A I R 1931 Cal 36 =58 C 87=34 C W N 741=I R (1931) Cal 198=129 I C 422

—S. 15—The whole election becomes vitiated if in joint election one person's election is declared invalid. A I R 1931 Cal 36=58 C 87=34 C W N 741=I R (1931) Cal 198=129 I C 422

—S. 15—The sec. refers not to taxation but to electoral franchise. A I R 1928 Cal 832=55 C 1266=32 C W N 940=I R (1929) Cal 314=115 I C 90

—S. 15—One must be on voters list for voting or being elected. A I R 1926 Cal 1070=53 C 570=44 C L J 31=30 C W N 977=96 I C 620

—S. 15 (3) A son cannot vote if lives with the father but not as owner. A I R 1921 Cal 782=70 I C 154

—S. 15 (3) A son may vote only by contract or paying rent for exclusive use to parents. 26 C W N 412=70 I C 154

—S. 15 (2) Members of a jt. Hindu family can vote individually. A I R 1921 Cal 782=26 C W N 412=70 I C 154

—S. 15 In persons members of a jt. Hindu family are included. A I R 1921 Cal 473=36 C L J 189=64 I C 168

—S. 15 A person not legally liable to pay, cannot acquire the statutory qualification under s. 15 by mere payment of income-tax under cl. (1) of the proviso to S. 15 the payments of municipal rates, to serve as a qualification to vote must be made by a person legally liable to satisfy the municipal demand. 38 Cal 501=13 C L J 471=15 C W N 586=10 I C 43

—S. 15 rules under—Merely because person is enlisted as a voter under r. 8 as representing a corporation instead of in his own capacity he is not disqualified for election as a Commissioner if he is otherwise duly qualified according to r. 2 of the rules framed under s. 15 and duly registered as a voter as provided by rules 4 to 12. 16 C W N 710=16 C L J 212=14 I C 166

—Ss. 15 and 69—Rule 17 framed under Ss. 15 and 69 is not mandatory but the party supporting the validity of the election must show that the infringement of rule 17 has not affected the result of the election. A provision as to the time of opening and closing the poles is merely directory. 47 Cal 524=24 C W N 189=30 C L J 270=53 I C 741

—S. 29—A suit by Municipality must be brought in the name of the Chairman. It is not enough if he only signs the plaint brought in the name of the Municipality. 35 C W N 373

—Ss. 29, 34, 37—To have effect the signature must be for the execution of the

**BENGAL MUNICIPAL ACT III OF 1884 (Contd)**

deed. A I R 1923 Cal 35=50 C 180=36 C L J 109=70 I C 794

—S. 29—A suit for arrears of tax in respect of two non-contiguous, distinct and separate holdings is not maintainable. 35 C W N 373

—S. 29—Where no damages against officers of a municipality personally for wrong done by them and the relief is sought against the Municipality itself the only proper deft. is the Chairman, and the joinder of vice-chairman and officers is not proper. 23 C W N 611=51 I C 993=45 C 784

—Ss. 30 and 34—Commissioners can dispose of only the roads. A I R 1929 Cal 33=32 C W N 1055=56 C 280=I R (1929) Cal 371=115 I C 515

—Ss. 30, 234 and 235—Municipality in absence of contract cannot levy rents etc on those exposing good for sale on the roads. 76 I C 178=A I R 1922 Pat 286=3 P L T 339=25 Cr L J 114

—S. 30—applicability. 9 I C 562

—S. 30—Burning Ghat, 10 C W N 1044=4 C L J 343=33 C 1290

—Ss. 30, 34—It is within the powers of the Municipal Commissioners to abandon an old road for a new one, to straighten a crooked road under ss. 30 and 34 and to exchange a piece of land for a public purpose under s. 34. 11 I C 28

—Ss. 30 and 31—A private pathway does not vest in the Municipality under s. 30 of the Beng Municipal Act even after the amendment. But the Municipality can exercise some control over such a path-way under s. 31, is the public have a right of way over it. If a road vests in a Municipality, it becomes responsible for lighting etc. 43 Cal 130=20 C W N 613=33 I C 271

—Ss. 34, 37—Lease of Municipal land which does not comply with s. 37 is unenforceable against the Municipality—Such leases come within s. 37 and provisions of s. 37 are mandatory. 51 C 930=Ind Rul (1931) Cal 613=133 I C 179

—S. 34—For municipal improvement Commissioners may transfer land. A I R 1929 Cal 33=56 C 280=32 C W N 1055=15 I C 515

—S. 34—A major part of the road became useless for public purpose and the Municipality sold the remaining part no longer required and which was useful to the plff. A I R 1929 Cal 33=56 C 280=115 I C 515

—S. 34—It is not necessary to limit the meaning of "land" by excluding roads only. A I R 1929 Cal 33=56 C 280=115 I C 515

—Ss. 34, 43 and 44—In absence of sanction by resolution lease of Municipal

**BENGAL MUNICIPAL ACT III OF 1884 (Contd.)**

property is void. A I R 1923 Cal 675=37  
C L J 589=75 I C 506

—S. 44—There is no power under the Act for the Chairman of the Municipality to act on behalf of the Municipal Commissioners. 59 C 234=137 I C 812=I R 1932 C 384=36 C W N 134=A I R 1932 C 462=1032 Cr C 452=33 Cr L J 521=A L R 1932 C 594

—Ss. 37 and 44—Lease by only the Chairman is *ultra vires* and acceptance of rent does not validate it. A I R 1927 Cal 675=37 C L J 589=75 I C 506

—S. 37—Contract by Chairman and Vice-Chairman suffices if according to T. P. Act and Regis. Act. A I R 1923 Cal 35=50 C 180=36 C L J 109=70 I C 794

—S. 44—Acts done by "the Commissioners" differ from those done by "them at a meeting". A I R 1926 Cal 1073=95 I C 726

—S. 44—A Municipal Chairman has no power to sanction prosecution for food adulteration. A I R 1923 Cal 561=25 Cr L J 170=76 I C 394

—S. 44—Order for prosecution under the Act—Power of Chairman to pass such order on behalf of Commissioners. 20 C W N 824

—S. 45—Chairman can delegate his powers both under the Act and the Rules under it. A I R 1927 Cal 704=31 C W N 926=103 I C 890

—Ss 45 & 204—An application & also a notice under S. 204 are included in prosecution. A I R 1926 Cal 1073=95 I C 726

—S 45—See S. 353 infra 20 C W N 824

—S 45, 241, 273: (1) and 353 More fact that the officer delegating has ceased to hold office cannot terminate the delegation of powers by a chairman to a vice-chairman under S. 45. It continues: until withdrawn 18 Cr. L J 273=38 I C 305

—S. 45 Vice chairman cannot be delegated the powers under the Licensed warehouse & Fire Brigade Act. A I R 1921 Cal 469=25 C W N 960=66 I C 428

—S. 46 Proviso. The appointment of a Health officer is an appointment falling within the proviso to S. 46 of the Bengal Municipal Act that is to say an appointment to a post the salary of which is Rs. 50 per mensem or upwards. 59 C 234=36 C W N 134=137 I C 812=A I R 1932 C 462=1932 Cr C 452=33 Cr L J 521=I R 1932 C 384=A L R 1932 C 594

—S 53—Eligibility of a candidate depends upon his position a circumstance on the nomination day. A I R 1931 Cal 288=58 Cal 180=34 C W N 972.

—S. 57—A contract cannot stand as a candidate when he performs his part of the contract but he or any one interested in

**BENGAL MUNICIPAL ACT III OF 1884 (Contd.)**

the contract is unpaid. A I R 1931 Cal 280=34 C W N 972=58 C 180

—S. 57—A person disqualified under s. 57 is ineligible for election as a Municipal Commissioner.

A teacher, as he holds an office of profit under the Municipality is disqualified from being elected as a Commissioner. 47 I C 169

—S. 60—An appeal against the conviction of a municipal servant uninterested in it can be heard by a Dt. Magis. 22 Cr L J 587=3 U P L R (Pat) 54=61 I C 515

—S. 85—The scope of the section is widened by the word "circumstances." A I R 1929 Cal 452=49 C L J 383=33 C W N 684=118 I C 864

—S. 85 (a)—Deposits in all Savings Banks within municipal limits is "property within Municipality." A I R 1929 Cal 452=49 C L J 383=33 C W N 684=118 I C 864

—S. 85—Validity of the imposition of the personal tax under s. 85 cannot be questioned for the first time in second appeal. A I R 1929 Cal 452=56 C 462=I R (1929) Pat 688=118 I C 864

—S. 85 (a)—Servant's occupation must be ancillary to his duties. Assessment depends upon the mode of user. A I R 1928 Cal 832=55 C 1266=32 C W N 940=I R (1929) Cal 314=115 I C 90

—S. 85 (a) "Holding" does not mean a part of it. A I R 1928 Cal 832=55 C 1266=32 C W N 940=I R (1929) Cal 314=115 I C 90

—S. 85—For parts of one holding occupied separately there cannot be different assessments. A I R 1928 Cal 832=55 C 1266=32 C W N 940=I R (1929) Cal 314=115 I C 90

—S. 85 (a)—Haddars are the actual occupants when the debts holding Hara of a market place gave licenses to others for selling goods. A I R 1928 Cal 591=32 C W N 1170=114 I C 94

—S. 85 (a)—There must be separate assessment though holdings are held jointly. A I R 1928 Cal 591=32 C W N 1170=I R (1929) Cal 190=114 I C 94

—Ss. 85 (a) & 87 (b)—The Head Offices of tea Companies was within the Municipal limits but the income was derived from gardens outside it. The assessment can be on that income. It is not *ultra vires* when separate though the holding be jointly held. Defect in the assessment list under S. 87 (b) does not affect the assessment. A I R 1922 Cal 46=24 C L J 283=26 C W N 311=64 I C 649

—Ss. 85 & 87—Income is assessable if spent within municipal area though earned outside. A I R 1921 Cal 485=48 C 443=25 C W N 47=61 I C 511.

## BENGAL MUNICIPAL ACT III OF 1884 (Contd.)

—Ss. 85, 86 & 103—Rateable occupation is fixed by beneficial enjoyment and use. 25 C W N 282=60 I C 498.

—S 85—(a) Assessment is based on the earning and not spending in the municipal area. A I R 1921 Cal 567=25 C W N 45  
=60 I C 284.

—S. 87—Not mentioning the earning on the list does not invalidate assessment. 34 C L J 283=64 I C 649.

—585—Nature of personal tax under —not attaching to any particular holding. A I R 1933 C 437=36 C W N 906=142 I C 66=A I R 1933 C 78

—Ss 85 and 89—scope of—personal tax—imposed under Bengal Act 6 of 1838—legality—imposition of personal tax as well as a rate on the annual value of the holdings in one and the same ward—propriety. A I R 1933 C 437=36 C W N 906

—S. 85—Personal tax—Imposition of Sanction of Local Government not necessary for. A I R 1933 C 78=36 W N 906

—S. 85 Personal tax imposed under—Not attached to any particular holding.

The tax does not attach itself to any particular holding but it is a tax imposed upon a person occupying a holding within the Municipality according to "circumstance and property." It is therefore no objection to the tax that the assessee had changed his residence from one place to another and that no particular holding was taxed.

A I R 1933 C 78=36 C W N 906

—Ss. 85 & 89—Personal tax and tax on annual value of Government buildings in same ward—Levy of—Legality.

A I R 1933 C 78=36 C W N 906

—Ss 85 (b) & 101. It is an ultra vires valuation if based on supposition though accepted by commissioner. A I R 1930 Cal 38=57 C 162=34 C W N 155=124 I C 483

—Ss. 85 (b) & 101. The rate depends upon gross annual rent reasonably expected. A I R 1930 Cal 38=57 C 162=50 C L J 537=34 C W N 155=124 I C 483

—Ss 85 and 87—Income earned by resident taxpayers from outside the Municipal limits to be spent and enjoyed within the Municipality is liable to assessment under s. 85. The words "Circumstances" in s. 85 must be interpreted to be in substance the equivalent of "means". 25 C W N 47

—S. 85—Income from zamindari outside the Municipality is not assessable under s. 85. 1 Pat L T 591=56 I C 821

—Ss. 85 and 116—Civil Court cannot assess the value of the circumstances and property for the purpose of s. 85 as that must be done by the machinery prescribed by the Act. If the Municipality fails to disclose facts justifying the plaintiff's

## BENGAL MUNICIPAL ACT III OF 1884 (Contd.)

assessment, a prima facie case, as to the assessment being illegal is made out. 41 Cal 168=19 C L J 205=20 I C 264=17 C W N 1230

—Ss. 85, 113, 114, and 116—In matters regarding the amount of assessment, it is only when a Municipality acts ultra vires that the Civil Court can interfere and such interference cannot be questioned by the Municipality under s. 116. 23 C W N 475  
=19 C L J 379=50 I C 394

—S. 85 (a)—The test to be applied in determining the "circumstances" and property or means and property within the Municipality is not what is spent but what is earned within the Municipality. 25 C W N 42=32 C L J 210

—S. 85—Where a Naib of a zamindar occupied a house in zamindar's premises, where he carried on business on behalf of his master and for which he did not use to pay rent. Held, that zamindar and not the Naib who is liable, as the occupier of holding under s. 85, for payment of the Municipal tax. 15 C L J 689=15 I C 999

—S. 93 contains a provision which empowers the Municipality to enhance an assessment upon the ground that it appears to them to be inadequate and to have been so made owing to mistake and fraud. The power is curtailed by the limitation that not only the present assessment should appear to the Municipality to be inadequate but it must also be shown to have been so made owing to mistake and fraud. A I R 1933 C 78=36 C W N 906 (908).

—S. 86—The phrase "circumstances and property within the Municipality" does not include income derived from property outside Municipal Limits and therefore such income is not liable to assessment. 4 P L J 673=(1920) Pat 120=54 I C 227.

—Ss. 97-97 A, 102, 108—Area of holding increased owing to extension of Municipal limits—Tax fixed as for area formerly within Municipal limits, cannot be increased owing to enhanced area during quinquennium. Added area may be assessed as new holding. 46 C 784=23 C W N 611=51 I C 993.

—S. 101—Rateable value is the reasonable expected rent; & interest on costs or on capital value show the tenant's capacity to pay rents. A I R 1930 Cal 38=57 C 162=50 C L J 537=34 C W N 155=124 I C 483.

—S. 101 provi. (3) Raised reservoir must be assessed as it is not a machinery. A I R 1922 P C 27=15 L W 253=26 C W N 761=49 C 190=67 I C 926.

—S. 101—Proviso 3—Over-head steel tank for the supply of filtered water to Calcutta, not being machinery within the

## BENGAL MUNICIPAL ACT III OF 1884 (Contd.)

meaning of S. 101, is assessable. 46 Cal 910=23 C W N 727=54 I C 337.

—S. 102—Old percentage is in force till another is fixed. A I R 1929 P C 272=50 C L J 149=33 C W N 1039=I R (1929) P C 326=119 I C 622.

—S. 102 & 103—Revaluation of holding is not ultra vires without fixing a new percentage. A I R 1926 Cal 607=53 C 450=30 C W N 405=94 I C 231.

—S. 103—See ss. 2, 29 etc *supra*.

—S. 106—Future Rates or taxes cannot be remitted by the Commissioner. A I R 1931 Cal 129 (1)=34 C W N 1013=130 I C 141.

—Ss. 413 & 114. Disposal of objection to assessment as also the subsequent actions are ultra vires if not referred to Commissioner. A I R 1926 Pat 547=7 P L T 804=96 I C 444.

—S. 114—Both the circumstances and the property must be within the municipality. Three commissioners appointed to act as appeal committee form a competent tribunal. 12 I C 32=39 C 141.

—S. 155—The words "within a distance of two miles above or below the ferry" in S. 155 are interpreted as "within a distance of two miles above or below the ferry along the banks of the river or stream" and not within a radius of two miles of the Municipal ferry. 35 I C 782=21 C W N 601=25 C L J 639.

—Ss. 175, 178, 179 and 202—By virtue of S. 175, the preliminary procedure to be followed when an owner is required to do a certain thing by the Municipal authority applies to a case under S. 202. 21 C W N 470=23 C L J 598=34 I C 985.

—Ss. 190, 224, 226, 229 and 270 cl. (2). The Municipal Commissioners are not authorized under the Bengal Municipal Act to order the removal of a drain in the building not being a branch drain or a drain leading to a public sewer.

Merely because the plaintiff consented to an ultra vires order by the Municipality, he cannot be estopped subsequently from challenging the order unless it is shown that the Municipality had acted on the Consent to its prejudice. 20 C L J 138=20 I C 358.

—S. 202—Calcutta Municipal Act of 1899-S. 342 of Extension of, to a Municipality—No repeal of S. 202 of Bengal Municipal Act in that Municipality by reason of S. 342 of Calcutta Municipal Act not a provision "corresponding" to S. 202 of Bengal Municipal Act within meaning of S. 342 of Calcutta Municipal Act. 59 C 511=1932 Cr C 71=36 C W N 51=I R 1932 C 255=33 Cr L J 371=136 I C 903=A I R 1932 C 65=A L R 1932 C 221.

—S. 202—The only requirement of s

## BENGAL MUNICIPAL ACT III OF 1884 (Contd.)

202 is that the Commissioners shall issue a notice which shall show to the opposite party, in a way in which he can understand, what the obstruction or the encroachment is that he is required to remove. The fact that they describe it as road-side land and not a road has no importance at all. 58 C 1135=Ind Rul (1931) Cal 865=32 Cr L J 1244=35 C W N 659=134 I C 753.

—S. 202—When a Magistrate makes orders without hearance they must be set aside. A I R 1925 Cal 934=52 C 670=41 C L J 611=29 C W N 817=88 I C 862.

—S. 202 C P C—May be followed in absence of any other procedure. A I R 1925 Cal 934=52 C 670=41 C L J 611=29 C W N 817=88 I C 862.

—S. 202, 204, 218 & 353—When the period of compliance expires limitation runs. 22 Cr L J 427=2 P L T 330=61 I C 715.

—S. 202—Magistrate's order can be revised by the High Court. A I R 1925 Cal 934=52 C 670=41 C L J 611=88 I C 862.

—S. 202—A civil court must decide a dispute about title. 22 Cr L J 25=59 I C 137.

—Ss 202, 204 and 233—Encroachment by a person on a Municipal street, though not objected to, cannot Confer on him any right to raise the structure to any height he likes. 47 I C 306.

S. 209—Municipality must fence a land received in gift on that condition A I R 1924 Cal 101=24 Cr L J 680=73 I C 776.

—S. 217—The Municipality made a road over the petitioner's land to a trenching ground which was subsequently given up with the closing of the trenching ground. The road was named by the Municipality. The petitioner was convicted under S. 217 of encroaching on a public road. Held that on the evidence it cannot be said that the road was a public one. 22 C W N 539=46 I C 518.

—S. 222—No presumption arises under S. 114, III (e) of the Evidence Act that an order applying Part 6 of the Bengal Municipal Act to the Municipality was promulgated under the provisions of S. 222 of the Bengal Municipal Act 36 C W N 823=139 I C 134=A I R 1932 C 833=1932 Cr C 860=I R 1932 C 558.

—S. 224—Cisterns merely for collection of rain water and rice water do not amount to cess-pools and therefore cannot be ordered to be removed or closed under s. 224 of the Bengal Municipal Act. A pit can be called a cess-pool, if offensive matter is discharged into it. 1 Pat L W 774=40 I C 552.

—S. 234—A road cannot be leased by a Municipality. A I R 1922 Pat 286=3 P L T 339=25 Cr L J 114=76 I C 178.



## BENGAL MUNICIPAL ACT III OF 1884 (Contd.)

—S 237—Unless *ultra vires* restrictions imposed by sanction should be followed. A I R 1922 Pat 118=(1921) Pat 347=3 P L T 226=1 P 216=63 I C 355.

—Ss. 237, 240 & 241—Alleging material alteration a boundary wall cannot be prevented from being erected. A I R 1921 Pat 349=63 I C 290.

—S 238—Time is reckoned from the beginning to build. A I R 1922 Pat 484=1 Pat 42=3 P L T 779=69 I C 183.

—Ss. 238 and 240—Enlarging a house by new and additional masonry wall amounts to 'erection' under Ss. 238 and 240. 25 I C 651.

—S 240—Where a person, in the course of repairing the upper story of his house, had to renew certain parts of the walls and also to pull down and put up again the Calcony: held that there was neither erection or re-erection, nor, material alteration within the meaning of s. 240. 2 Pat L W 190=3 Pat L J 33=(1927) Pat 338=41 I C 713

—Ss. 240, 241, 242—Construction of platform on open space between the external wall of a house and the drain. Constitutes an 'erection' under s. 240 and an order by the Municipality not to construct between the house and the drain is perfectly legal.

A person aggrieved by an order s. 241 cannot claim relief from the Civil Court unless he has first availed of the remedy under s. 242 A. 3 Pat L W 252=37 I C 854.

—Ss. 240, 273 (1) and 353—The construction of portions of a house which had been totally destroyed amounts to re-erection under s. 240 of the Bengal Municipal Act.

A Municipality can order the removal of the portion constructed and at the same time, even though the objections to the notice for removal are pending, prosecute the owner of the house for "erecting" or "re-erecting" without its sanction. 38 I C 305.

—Ss. 241 & 237—A bye-law which prohibits erection of a compound wall unconnected with the building is invalid. A I R 1922 Pat 56=3 P L T 143=1 Pat 44=(1921) Pat 349=63 I C 290.

—S 245—Municipality can deal with huts in addition to pucca building in a bustee. A I R 1925 Cal 676=86 I C 618=29 C W N 445.

—S 250—S 250 of the Bengal Municipal Act does not empower the magistrate to seize ghee which is not for sale as fit for human consumption.

When the bailee parts with the possession of ghee with owner's consent the owner cannot claim it back. 4 Pat L W 62=43 I C 796=19 Cr L J 220.

## BENGAL MUNICIPAL ACT III OF 1884 (Contd.)

—S 261—Kiln shows a permanent structure. A I R 1922 Cal 194=49 C 1014=26 C W N 926=72 I C 356.

—S 261—The Sec. applies to a business which is not *per se* offensive but from which filthy smell may come out. 65 I C 518=A I R 1922 Cal 99=26 C W N 994.

—S 261—Timber is included in "wood" 63 I C 327=A I R 1921 Pat 178=6 P L J 363=22 C L J 631.

—S 261—License-fee levied under—Legality of—Suit contesting—Jurisdiction of Civil Court to entertain—Principle or basis of assessment—Amount of assessment—Suits questioning—Distinction. 58 C 1356=A I R 1932 C 177=136 I C 542=1 R 1932 C 222.

—Ss. 271 & 178—When objection to notice is not well deal with prosecution under s. 271 cannot be upheld. A I R 1922 Pat 183=3 P L T 301=23 Cr L J 273=66 I C 417.

—Ss 279 & 310—When there are more tenants the owner is liable for Municipal rates in respect of the holding. 64 I C 351.

—Ss 279 (3), 322 (1), 85 (d) & (f), 103 & 85 (b)—There should be beneficial use and enjoyment for rateable occupation. A I R 1921 Cal 161=25 A W N 282=40 C L J 295=60 I C 498.

—S 282—Application under s. 113 and not a Civil suit is the proper remedy for the aggrieved owner. A I R 1926 Cal 607=53 Cal 453=30 C W N 405=44 C L J 275=94 I C 231.

—Ss. 290 to 293, 295 & 297—Rules under s 290 are valid. 47 C 436=59 I C 340.

—Ss 290, 291, 292, 293, 295, and 297—Rules 4, 9 and 24 (e) framed by the local Government for the Chittagong Municipality under s. 290 of the Bengal Municipal Act are neither *ultra vires* nor in consistent with Ss 295 and 297 of the same Act. It is open to the Municipality, either to compel the occupier or owner of a house to pay for costs of water meter or to cut off water communication for non-payment of the same. 47 Cal 426=59 I C 340.

—S. 321—A municipal holding including Thakurbari does not become a dwelling house nor can it be said to contain a dwelling house, merely because pilgrims are allowed, as a matter of charity to lodge there for short periods during festivals. Hence such a holding is not assessable under s. 321. 49 I C 16.

—Ss 321 and 322—Fixing of a scale for the levy of latrin fees by the Commissioners at a meeting as provided by s 321 is a condition precedent to the validity of assessment and levy of latrin tax. Proviso to s. 322 exempts a shop-keeper living else where and paying latrine

**BENGAL MUNICIPAL ACT III OF 1884 (Contd.)**

tax for his house from paying again for his shop unless the shop contains a privy or cess-pool. Such exemption is not extended to the owner of a shop who is not its occupier. 15 C W N 519=13 C L J 674=9 I C 218.

—Ss 321 and 322 (4)—To “dwell” is “to live and occupy for all purposes of life”. “Dwelling house” does not cease to be so because a person absents himself occasionally while on duty.

Where a holding was used as a place of business but the owner used to reside there only when of unsound mind.

Held, that it was not his “dwelling house.” 19 C W N 1027=31 I C 10.

—Ss. 321, 322—The assessment and levy of the latrin tax is illegal if the Commissioners at the meeting do not fix any scale for the levy of latrin fees as provided by s. 321.

The case of a shop-keeper living else where and paying latrin tax far his house is covered by the proviso to s. 322 of the act which exempts the shop-keeper from paying again for his shop unless the shop contains a privy or cess-pool. According to s. 321, the annual value of holdings containing dwelling-houses or privies and not of dwelling-houses only which must be considered while levying the fees. 9 Ind. Cas 218=15 C W N 519=13 C L J 674.

—S 321—A Thakurbari without privies is not a dwelling house within the Sec. where pilgrims stay for 3 days at a time. 25 C W N 827=69 I C 16.

—S 321—A holding with a cow-shed and cook-shed is not a dwelling house when plff. occupied it when of unsound mind. 31 I C 10=19 C W N 1027.

—S. 339 & chap X license may be applied for by a co-proprietor. 85 I C 533 =A I R 1926 Cal 261.

—S 340—Owner is any one with a right to rent A I R 1926 Cal 261=85 I C 533

—S 350—Tabla is not an instrument with a high sound. A I R 1924 Pat 377=72 I C 894

—S 356—Distress warrant is sufficient for one from whom the tax is to be collected. A I R 1922 Pat 532=1 Pat 423=3 P L T 559=75 I C 719

—S. 356—Distress is not illegal merely because the return-date of such warrant is not shown. A I R 1922 Pat 532=1 Pat 423=3 P L T 559=75 I C 719

—S 358—Action on alternative resolutions is valid. A I R 1929 P C 272=50 C L J 149=33 C W N 1039=119 I C 622.

—S 361—Their being no special provision in the Beng Mun Act the

**BENGAL MUNICIPAL ACT III OF 1884 (Contd.)**

purchaser of a holding sold under S. 361 of the Act takes it subject to encumbrances. 21 C W N 425=39 I C 387

—S. 362—An act is to be regarded as “done under” a statute, if the donor had a reasonable and bonafide belief that he was so acting and the notice required by s. 363 is necessary if a person aggrieved by such an act desires to bring a suit. 24 C W N 891

—S. 363—Under the sec. damages for officer's wrongful act could be claimed. A

I R 1927 Cal 592=101 I C 755

—S. 363—Limitation does not affect payment of assessment under protest. A I R 1926 Pat 547=7 P L T 801=96 I C 444

—S. 363—The sec. does not govern a suit by a Municipal servant for money due under a contract with it as it is one for breach of contract. 65 I C 105

—S. 363—A damage suit arises out of illegal distress warrant. A I R 1921 Cal 91=48 C 45=59 I C 572

—S. 363—Before a suit is filed, municipality should be given a notice. A I R 1921 Cal 91=48 C 45=24 C W N 891=59 I C 572

—S. 391—While assessing a building as “dwelling house” with latrin tax, the period for which the house is occupied during the year and whether natural functions are performed there by the residents and the municipal action for conservancy purposes, must be taken into account. 38 I C 789

**BENGAL MUNICIPAL ELECTION RULES 1930**

—Before poll is closed a candidate can withdraw. A I R 1926 Cal 1016=30 C W N 670=91 I C 722

—R. 4 to 11—A new compliance is not required when election is postponed to allow time under r. 5. A I R 1927 Cal 704=31 C W N 926=103 I C 890

—Rr. 7, 10, 29—A name removed from voters list may be replaced by Dt. Magistrate. A I R 1921 Cal 808=20 C W N 147

—R. 6, 7 and 10—Election will not be set aside where there was sufficient time to apply under r. 10 was unavailable and application was not wrongly rejected. A I R 1927 Cal 704=31 C W N 926=103 I C 890

—R. 15—The rule is mandatory. A I R 1931 Cal 35=58 C 87=129 I C 422

—R. 15 and 16—It appears that the Magistrate should summarily and finally settle some election dispute but it is doubtful under provi. to r. 15. A I R 1931 Cal 36=58 C 87=34 C W N 741=129 I C 422

—R. 16—A Civil Court may question

## BENGAL MUNICIPAL ELECTION

## RULES 1930 (Contd.)

Magistrate's order saying that the nomination paper was within time. A I R 1931 Cal 36=58 C 87=34 C W N 741=129 I C 422

—R. 29, 10 and 6—Whether a name should be on voter's list can be decided by a magistrate. A I R 1921 Cal 808=26 C W N 147

—R. 32—When new polling officers are appointed and the election is postponed the rule is in applicable. 103 I C 890= A I R 1927 Cal 704=31 C W N 926

—R. 32—Meeting Rules. The rule is inapplicable when new polling officers are appointed on post-ponement of the election. 103 I C 890= A I R 1927 Cal 704

—R. 40—jurisdiction of District Magistrate to declare an election void on ground of corrupt practice—material irregularity—Bengal Municipal Act, S. 15. A L R 1933 C 440=60 C 437

—R. 40—Election petition—Corrupt practice—Declaration of invalidity of election on ground of—Jurisdiction of Civil Court to enquire into alleged corrupt practice and to grant relief—Not taken away by R. 40. 37 C W N 122

—R. 40—"Material irregularity" in Bribery and corrupt practice generally not covered by—Jurisdiction of District Magistrate to enquire into—Note added to to R. 40—Object and effect of. 37 C W N 122

## BENGAL N. W. PROVINCES AGRA AND ASSAM CIVIL COURTS ACT (XII OF 1887)

(S. 23 (c) Rep., Act VII of 1889; s. 23 (b) Rep., Act VIII of 1890; s. 2 Rep. in pt Act XII of 1891; s. 1 (2) Rep. in pt (in Agra), act XX of 1890; s. 9 (1); Declared in force in the Sonthal Parganas, with modifications, and as regards certain suits only, Reg. V of 1893, Ch. III; Ext. Sambalpur District, and s. 36 (1) (a) Am Ben act IV of 1906, s. 2]

—Court may amended or deft. may question plff's valuation of suit but cannot be questioned for the first time in second appeal. A I R 1923 Cal 405=71 I C 1014

—S. 8—Suit filed under s. 92 C P C—Transfer to Additional Judge not empowered to entertain such suits—Jurisdiction. 41 Cal 866

—Ss. 8, 20—Where an applicant for insolvency was sentenced to one month's simple imprisonment by the additional Judge under s. 43 Provincial insolvency Act, held, that an appeal lay to the High Court. 9 A L J 371=34 A 382=14 I C 462.

—S. 8 (2)—In suits under s. 92 C P C under s. 8 (2) Additional Dt. Magis. has the

## BENGAL N. W. PROVINCES AGRA AND

## ASSAM CIVIL COURT ACT

## XII OF 1887 (Contd.)

same powers as a Dt. Magis. A I R 1921 Cal 210=48 C 53=62 I C 115

—S. 8 (2)—A Dt. judge is authorized by subs (2) of s. 8 of the Beng. Civil courts Act to transfer a particular case to an additional Judge. 19 C W N 791=21 C

L J 437=42 C 842=29 I C 935 (F B)

—S. 8 (2)—empowers the Additional Judge to discharge any of the functions assigned to him by Dist. Judge. 9 A L J 95=13 I C 584=34 A 205

—S. 8 (2)—A reference under the land Acquisition Act, made over by the Dt. Judge under the provisions of s. 8 cl. (2) to the Additional judge for disposal can be disposed of by the later. 50 I C 690

—S. 10—An absence of Dt. Judge, the acting judge can here appeal to Dt. Judge. A I R 1927 Cal 598=31 C W N 814=105 I C 348

—S. 13 (2)—Allotment of Sub-Division does not limit jurisdiction. A I R 1930 Pat 230=10 P L T 848=120 I C 783

—S. 13 (1) & (2)—Sub-Judge's jurisdiction under s. 13 (1) cannot be taken away by Dt. Judge under s. 13 (2). A I R 1927 Cal 312=54 C 374=31 C W N 332=101 I C 133

—S. 13 (2)—Court passing a decree can attach immoveable property within another Court's jurisdiction when the former Court is specially given jurisdiction by the Local Government. A I R 1925 Cal 679=41 C L J 160=86 I C 775

—S. 13 (2)—It is not a transfer of business when situated within limits of one Court is assigned to another by Dt. Judge. A I R 1922 Cal 41=26 C W N 216 =70 I C 210

—S. 13 (2)—Sub-judge's territorial jurisdiction is not disturbed by the re-distribution of civil work by the Dt. Judge. A I R 1921 Pat 152=2 P L T 374=6 P L J 304=62 I C 437

—S. 13—The Government of India by Notification No 2598 fixed the limits and consequently the jurisdiction of the Civil Courts of the Ballia and Shahabad districts.

The notification of the local Government transferring a village from Ballia to Shahabad and vice versa cannot affect the Jurisdiction of the Civil Courts of either districts. 5 Pat L J 451=1 Pat L T 288=57 I C 204

—S. 17—On abolition of a Court passing the decree, it can be executed by the Court to which its work is transferred. A I R 1929 All 677=118 I C 670

—Ss. 18, 20—Appeal from Deputy Commissioner not to lie to Commissioner—

**BENGAL N. W. PROVINCES AGRA AND  
ASSAM CIVIL COURT ACT  
XII OF 1887 (Contd.)**

Where appeal is decided by Commissioner  
no second appeal to High Court. 14 I C 160

—S. 18—Jurisdiction of Munsif. 43  
C 650

—S. 18—Principal Court of original  
Jurisdiction—Deputy Commissioners—C P  
Land Rev. Act s. 136 (9). 1 Pat L J 290

—Ss. 18 and 21—Even though the suit  
is valued at less than Rs. 5000, the District  
Judge in appeal, can pass a decree for  
more than Rs. 5000. 4 Pat L J 447=(1920)  
Pat 17-52 I C 452

—S. 19—Application for final decree  
is not a plaint & cannot be returned for  
want of Jurisdiction. When mesue profits  
under O XX r. 12 (2) C P C exceeds  
Jurisdiction, it does not oust the Court's  
jurisdiction. A I R 1925 Cal 1076=42 C L  
J 49=29 C W N 869=89 I C 726

—S. 19—Proceedings for fixing mesue  
profits pendente lite do not come within  
the Sec—Decree beyond pecuniary jurisdic-  
tion is allowed by O XX r. 12 (1) (c) C P  
C. A I R 1921 Pat 118=2 P L T 143=6 P  
L J 54=60 I C 346

—S. 19 (1)—The value of the subject-  
matter in Controversy i. e. the value of the  
interest claimed by the plaintiff must be  
regarded as the value of a suit for purposes  
of Jurisdiction. 23 I C 964

—S. 20—The sec. deals with the forum  
of appeal. It does not authorize appeal  
from every order to the High Court. A I  
R 1925 Pat 138=3 Pat 1018=7 Pat L T 424  
=92 I C 133

—S. 21—Jurisdiction—Sonthal Parganas  
Civil Courts Statutory Rules para 29—  
Executing Court—Regulation II of 1886  
s. 26—Power of Superior Court to enlarge  
order passed by executing Court. 41 Cal 915

—S. 21—Appeal against order of  
Court returning plaint for presentation to  
proper Court on plff's valuation being  
found incorrect—Amendment and presenta-  
tion of plaint to another Court under  
protest if bars appeal. 23 C W N 942

—S. 21—Dt. Judge can dispose of an  
appeal even though he finds the value of  
the suit at more than Rs. 5,000. 20 C W  
N 1099=24 C L J 140=32 I C 893

—Ss. 21, 22—The Sub-judge of M was  
empowered, under a Notification of the  
High Court issued under s. 21 (4), to  
hear appeals from the decrees of the  
Munsif of M. An appeal was presented  
to the Subjudge.

Held, that the District Judge has no  
power under s. 22 to transfer such an  
appeal as an appeal pending in his Court.  
37 All 76=13 A L J 41=26 I C 783

**BENGAL N. W. PROVINCES AGRA AND  
ASSAM CIVIL COURT ACT  
XII OF 1887 (Contd.)**

—S. 21—If in a suit the aggregate  
value of reliefs claimed exceed Rs. 5000  
and appeal lies to the High Court and not  
to the District Judge. 8 A L J 236=9 Ind  
Cas 571

—S. 21—A suit was instituted to reco-  
ver Rs. 7500. Subsequently the plaint was  
amended and the relief claimed was reduc-  
ed to Rs. 2500 but the valuation of the  
suit for the purposes of Jurisdiction and  
payment of Court fee laid at Rs. 7500 in  
the plaint was not altered. Held, that the  
subject matter of the suit at the hearing  
in the lower Court was only Rs. 2500 and  
the appeal lay to the District Judge. 18 A  
L J 741=57 I C 134.

—S. 21—Suit for sale on mortgage—  
Suit valued at less than Rs. 5000—Per-  
sonal decree against mortgagor—Sale pro-  
ceeds proving insufficient—Appeal against  
personal decree lay to the Dist. Judge. 17 A  
L J 266=49 I C 687=41 A 384.

—S. 21 (a)—Dist Judge—Appeal in  
a case of valuation of over Rs. 5000—Decree  
in—Validity. 4 Pat L W 45.

—S. 21 (1) (a)—Appeal—Private arbi-  
tration—Subject—matter of award 18 C W  
N 867.

—S. 21 (A)—Act I of 1887. s. 3 cl.  
(13), 13 A 320=A W N 1891. 107.

—S. 22 (1)—Application to Dist. Judge  
to revoke sanction to prosecute granted by  
Munsif cannot be transferred to Sub-Judge.  
16 C W N 903.

—S. 21 (3)—A Dist. Judge acting  
under s. 21 (3) can assign appeals and other  
cases coming from a particular district to  
the Additional Judge. 9 A L J 95=13 I C  
384=34 A 205.

—S. 21 (2)—Second appeal lies agai-  
nst decreed mesue profits when land was  
below Rs. 5,000 but with mesne profits  
above it. A I R 1929 Cal 719=33 C W N  
614=122 I C 220.

—S. 21—Sub-Judge decreed a suit  
for accounts valued at Rs. 1500 for court  
fees. Deft. cannot change the forum of  
appeal by putting any valuation and the  
appeal lies to the Dt. Judge. A I R 1928  
Pat 535=9 P L T 726=109 I C 895.

—S. 21—A declaratory suit that some  
property worth more than Rs. 5000 was  
not attachable and the valuation was less  
than the suit Appeal lies to the High  
court from its dismissal. A I R 1927 Pat  
289=6 Pat 420=103 I C 819.

—S. 21—Though the case is trans-  
ferred from Small cause court to Munsif,  
appeal lies to sub Judge from Hon-Munsif  
appointed under s 9 U P Hon-Munsifs  
Act. A I R 1924 All 761=22 A L J 880=L  
R 5 A 725=82 I C 292.

## BENGAL N. W. PROVINCES AGRA AND

## ASSAM CIVIL COURT ACT

## XII OF 1887 (Contd.)

—S. 21—Suit valuation for appeal purposes is one in the plaint as amended by original court's order if any. A I R 1923 Cal 405=71 I C 1014

—S. 21—Order in execution is appealable to the High court only when the decree exceeds Rs. 5000. A I R 1922 Cal 247=35 C L T 106=68 I C 575.

—S. 21—Valuation of the suit determines the forum of appeal. So to choose his own forum plff should not grossly exaggerate the value. 62 I C 35.

—S. 21 (2)—Appeal lies to the Dt. Judge when a Munsiff decrees mesne profits exceeding its jurisdiction. A I R 1921 Pat 69=2 Pat L J 143=60 I C 346.

—S. 21 (1)—No appeal lies to Dt. Judge from a mortgage suit exceeding Rs. 5000. 4 P L W 445=4 P L J 202=45 I C 920.

—S. 21—If the original suit is for less than Rs. 5,000 appeal to Dt. Judge is not prevented by decree exceeding that sum. 41 A 384=17 A L J 266=49 I C 687.

—S. 22 cl (3)—S 22 (3)—Where under S. 22 cl (1) of Act No XII of 1887 an appeal is transferred by a Dt. Judge to a Subordinate Judge, the latter can, if the section so provides exercise the powers vested in an Appellate court by S. 197 of the Agra Tenancy Act (1804). 37 All 232=29 I C 633.

—S. 22—An appeal against an order under S. 476 can be transferred to a Sub-Judge. A I R 1929 All 774=51 A 344=L R 10 A 121 Cr=111 I C 595.

—S. 21 (4)—Appeal from the Court of Munsiff ordinarily lie to the Additional Sessions and Subordinate Judge of Jaunpur; and that Judge is competent to entertain application for sanction for which he can admit additional evidence. 42 I C 915=15 A L J 844=40 A 21.

—S. 33—The High Court has no jurisdiction under s. 107 of the Govt of India Act 1915 to revise an order passed by a District Judge under s. 33. 42 I C 619=27 C L J 477

—S. 37—Neither Hindus nor Muhammadans should be subjected to any law other than their own. S. 37 does not apply to a dispute between Muhammadans themselves and a man is at liberty to adopt for himself any special Custom which he pleases. 33 I C 114

—S. 37—The Sec is not repugnant to Beng. Reg III of 1872, s. 6. A I R 1930 Pat 442=10 Pat 63=128 I C 133

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## BENGAL N. W. PROVINCES AGRA AND

## ASSAM CIVIL COURT ACT

## XII OF 1887 (Contd.)

—S 37-T P Act s. 123 is inapplicable when a Muhomedan makes a gift to a Hindu under the Muhomedan law which is valid. A I R 1929 Pat 417-I R (1930) Pat 321=123 I C 401

—S. 37—A rule of equity does not override positive law. A I R 1928 All 699=26 A L J 944=117 I C 351

—S. 37—To determining Muhomedan child's legitimacy s. 112 Evi. Act applies. A I R 1926 All 589=48 A 625=24 A L J 723=96 I C 582.

—S. 37 (2)—To high way cases English principles should be applied. A I R 1924 All 599=46 A 470=22 A L J 729=85 I C 304.

—S. 37 (2)—Equity prevails when there is no specific contract between landlord and tenant. A I R 1921 All 28=19 A L J 681=64 I C 153.

—S. 37—Separate suits for partition of lands in different villages—Maintainability. 23 I C 442

—S 37—"Succession"—Presumption as to death not a rule of Evidence but a rule of succession. 11 A L J 355.

—S. 38—So long as no decree or order is passed by him in the Munsiff's capacity, additional Sub-Judge may hear appeal under s. 38. A I R 1928 All 96=25 A L J 1024=108 I C 704.

## BENGAL PATNI REGULATION

See Regulation — (2) Bengal Regulation — Reg 8 of 1819

## BENGAL PERMANENT SETTLEMENT REGULATION

See Regulations — (2) Bengal Regulation — Reg 1 of 1793

—S. 17—Powers of revision of the Commissioner and the Board of Revenue—Certificate-sale, setting aside—Certificate issued under the Cess Act 1886—Limitation—Deciding case in a party's absence—Proper remedy for the purchaser is to apply to the Commissioner for a re-hearing 10 C W N 969=4 C L J 177=16 M L J 365=8 Bom L R 719=3 A L J 869=1 M L T 308=33 I A 134=33 C 1178 P C.

## BENGAL PUBLIC DEMANDS RECOVERY ACT

(1 OF 1895)

—Plff. was a party to a sale under Ben. Public Demands Recovery Act 1 of 1895 & Limi. Act art 95 governs a suit to avoid it by the plff. as shabaitis & executors. A I R 1931 Cal 69=I R (1931) Cal 311=129 I C 871.

—Unless rent has been settled by agreement of parties or by a competent Court, no sum can be levied for occupation of Government land by the certificate procedure under the Public Demands Recovery Act. 10 Ind Cas 335=15 C L J 217.



## BENGAL PUBLIC DEMANDS RECOVERY

ACT (1 OF 1895) (Contd.)

—Sale under—Sale by purchase to third party—Subsequent cancellation of sale under—No effect on innocent stranger purchaser. 20 C W N 819=35 I C 339.

—What the purchaser at a sale under the Public Demands Recovery Act acquires is only the right, title and interest of the person named as the judgment-debtor in the certificate. If the Secretary of state intends to enforce a security, the only course is to institute a regular suit as the Act is silent on the point. 11 I C 465-16 C W N 351=14 C L J 292.

—A sale of a property held under the Act for arrears of Road Cess by issuing certificates against persons having no interest in the property is not binding on the real owner of the property. 41 I C 252.

—S 6 (2)—The original owner and not the transferee unless his name is substituted in the place of the original owner in the "engagement" who is liable to satisfy an engagement entered into by him with the secretary of state for India in Council under s. 38 of the Bengal Drainage Act. 18 C W N 944=19 C L J 610=23 I C 782.

—S 7—Claim for damages, if within the section. 22 I C 626.

—Ss 9 (2), 9 (3) and 10 (1)—That the requisition under s 9 cl. (2) was not duly signed and verified is not sufficient to vitiate the sale. But the sale is invalid if it is shown that the certificate did not comply with the forms under the Act and that the officer signed the certificate without using his discretion under s. 9 (3).

Merely entry in the order sheet that notice had been served is no proof that service was effected. 19 C W N 1159=31 I C 664.

S. 10—Sale is void if notice under s. 10 is not served and the real owner can sue for possession, Art 142 Limitation Act governing the suit. A I R 1923 Cal 13=36 C L J 208=72 I C 698.

—S 10—Service by affixture suffices when the person is absent and no adult is present. Sale to the extent of a co-share's share is void when he is not served. A I R 1922 Pat 546=1 Pat 273=1 P L R 196=69 I C 700.

—S. 10—Entry in order-sheet about service of notice is no sufficient proof. 19 C W N 1159=31 I C 664.

—S. 13—What the purchaser at a sale acquires is the right title and interest of the persons named as judgment-debtors in the certificate. If a person suffers his right to be barred by the law of limitation the result is the extinction of his title in favour of the party in possession. If not s. 28 of the Limitation Act, at least its

## BENGAL PUBLIC DEMANDS RECOVERY

ACT (1 OF 1895) (Contd.)

principle applies to cases governed by art 3 of sch III of the Bengal Tenancy Act. Where the mortgagor has been dispossessed after the grant of the mortgage, the adverse possession may operate against the mortgagee. 14 C L J 292=16 C W N 351=11 I C 465.

—S. 10—If notice under s. 10 is not served on the judgment debtors, the sale is invalid and the original owners are entitled, when dispossessed, to recover possession of the property within 12 years from the date. S. 310 A of the C P C is not applicable to a sale held under s. 10. 18 C W N 766=18 C L J 628=22 I C 95.

—S. 10—Notice, service of, onus. 11 I C 472.

—Ss. 10 and 31—To effect proper service of notice under s. 10 the provisions of that section must be strictly complied with, 45 Cal 496=46 I C 741.

—S. 10—Want of service of notice under s. 10 invalidates the sale. A sale against a person who had ceased to hold title to the estate or who was not the holder of the estate is invalid. 11 I C 472.

—S. 10—Sale without service of notice is nullity—Sale against a person who was not the holder of the estate is bad, 1 Pat L W 319=38 I C 483.

—S. 15—An execution Court is incompetent to try the validity of a certificate under the Public Demands Recovery Act, by the Revenue authority, as being made without jurisdiction. The special period of Limitation under s. 15 does not apply to a suit for a declaration that the certificate has not been duly made against the plaintiff. 14 C L J 83=10 I C 532.

—Ss. 15 and 32—Unless a certificate has become final, it cannot be executed and unless it is set aside, the Judgment debtor cannot get back the money realized from him in execution of the certificate. A Judgment-debtor, who merely prefers an appeal against an order passed in execution is not entitled to a fresh start of six months for a suit under S. 15. 52 I C 832.

—S. 19 Sub S (2)—S. 317 of the C P C of 1882 applies and therefore the plaintiff cannot bring a suit for a declaration that the defendant's purchase of certain lands in execution of a certificate issued under the Public Demands Recovery Act was benami on behalf of the plaintiff. 16 C W N 973=16 C L J 412=15 I C 291.

—S. 31—The Sec. refers to notice by fixture in some conspicuous place not in judgment debtor's house but in the certificate officer's office. A I R 1922 Pat 546=1 Pat 273=1 P L R 196=69 I C 700.

## BENGAL PUBLIC DEMANDS RECOVERY

## ACT I OF 1895. (Contd.)

—Only the judgment-debtor's interest passes. A I R 1931 Pat 64=11 P L T 900=10 Pat 234=130 I C 257.

—Agreement is inferred by long additional payment. Such demand exceeding revenue depends upon contract or a statute. A I R 1923 Cal 609=50 C 208=79 I C 218.

—Peskosh from permanent holders can be recovered on statutory or contractual liability. A I R 1923 Cal 609=50 C 208=79 I C 218.

—S. 3 (1)—It is controlled by S. 36 Act III of 1913. A I R 1923 Cal 13=36 C L J 28=72 I C 698.

—S. 4—Manager is not liable for a public demand. A I R 1929 Cal 679=34 C W N 131=I R (1930) Cal 537=125 I C 313.

—Ss. 4, 6—If the tabular form is rightly made omission of names and figures in the blanks does not invalidate the certificate. A I R 1927 Cal 315=45 C L J 73=31 C W N 299=100 I C 997.

But see 82 I C 1013.

—S. 4—Entries in the certificate portion must be proper. A I R 1925 Cal 383=82 I C 1013.

—S. 4—For a single demand more than one certificate cannot be given. A I R 1922 Cal 101=49 C 1026=35 C L J 304=67 I C 375.

—S. 4—When demand is conditioned on use and enjoyment and payable to the Collector it is included in 'Public demand.' A I R 1922 Cal 101=49 C 1026=35 C L J 304=67 I C 375.

—S. 6—For Art 95 Limt. Act certificate is not a decree. A I R 1931 Cal 69=34 C W N 801=I R (1931) Cal 311

—S. 7-Form 3—Lithograph signature suffices. A I R 1927 Cal 315=45 C L J 73=31 C W N 299=100 I C 997

—S. 9—Proper persons must be served with a certificate. A I R 1929 Cal 679=34 C W N 131=I R (1930) Cal 537=125 I C 313

—S. 10—The Act does not affect causes of action accrued prior to it as it is not retrospective. A I R 1923 Cal 13=36 C L J 208=72 I C 698

—S. 20—Patni taluk was sold under Reg. 7 of 1917 but was unconfirmed. Under this Act another sale order was made. The former remains good. A I R 1930 Cal 599=I R (1931) Cal 44=128 I C 188

—S. 20—For passing good title certificate must be against proper person. A I R 1929 Cal 679=34 C W N 131=I R (1930) Cal 537=125 I C 313

—S. 23—Though some what irregular sale under certificate should not impair purchaser's security. A I R 1929 Cal 409=33

## BENGAL PUBLIC DEMANDS RECOVERY

## ACT I OF 1895 (Contd.)

C W N 305=56 C 902=I R (1929) Cal 7=120 I C 151

—S. 23—Misdescription in pro-clamation does not lose identity of property. A I R 1929 Cal 409=33 C W N 305=56 C 902=I R (1929) Cal 7=120 I C 151

—S. 27—In a certificate sale only the interest of the judgment-debtor passes. A certificate obtained against a benamidar has no effect as against the real owner. A I R 1931 Pat 64=11 P L T 898=Ind Rul (1931) 16=10 Pat 234=130 I C 257

—Minor co-sharer—Sale in Manager's name after attainment of majority—Where a minor's mother's name was entered as Manager in the D Register though she was not appointed as Manager by the Collector or any Court and her name was retained after the minor attained majority and the certificate of sale was in her name. Held that the sale was null and void. 53 C L J 524=Ind Rul (1931) Cal 630=133 I C 102

—A Suit for recovery of possession in the case of a void sale is governed by Art 142 Limitation Act. 53 C L J 524=Ind Rul (1931) Cal 630=133 I C 102.

—The Collector is not a necessary party to a suit for possession in the case of a void sale. 53 C L J 524=Ind Rul 1931 Cal 630=133 I C 102

—S. 34—Sale cannot be questioned by a certificate debtor as defence in a suit for possession. A I R 1929 Cal 409=56 C 902=33 C W N 305=I R (1929) Cal 7=120 I C 151

—S. 35—37. Civil Court's jurisdiction is limited to cases where no arrears were due or non-service of notice or fraud vitating the proceedings. A I R 1929 Cal 409=56 C 902=33 C W N 305=I R (1929) Cal 7=120 I C 151

S. 36—Sale for baseless arrears is void. Before suing for cancellation one may not necessarily proceed under Revenue Law. A I R 1923 Cal 428=27 C W N 386=70 I C 869

—S. 37—A valid certificate is presupposed by the Sec. A I R 1929 Cal 679=34 C W N 131=I R (1930) Cal 537=125 I C 313

—S. 37—The certificate is ultra vires when there is no public demand due. A I R 1928 Cal 808=55 C 1355=33 C W N 385=I R (1929) Cal 301=115 I C 45

—S. 37—Certificate debtor's mortgagee represents him. A I R 1927 Cal 315=45 C L J 73=31 C W N 299=100 I C 997

—S. 37—Sale can be set aside on the ground of fraud as also on material irregularity with substantial injury. A I R 1927 Cal 315=45 C L J 73=31 C W N 299=100 I C 997

—S. 37—The sec. applies to questions

**BENGAL PUBLIC DEMANDS RECOVERY****ACT I OF 1893 (Contd.)**

between certificate holder & such debtors. To obtain a decree when to set aside sale some ground under s. 37 must be proved when one of fraud fails. A I R 1926 Cal 107=30 C W N 36=91 I C 796

-S 37 Sale can be declared null by a suit. 60 I C 759

-Ss 37 & 35 Suit for declaration or injunction or other relief is not prevented by ultra vires issue of certificate. A I R 1922 Cal 101=49 C 1026=35 C L J 304=67 I C 375

-S 41-Minors are not bound by decree against minor's representative when the same is not shown in Collector's register. A I R 1929 Cal 679=34 C W N 131-I R (1930) Cal 537=125 I C 313

-S 57-Certificate decision is not res judicata on any question raised by a Civil Court. A I R 1929 Cal 130=112 I C 71

-S 66-The section says nothing about avoiding or annulling subordinate tenures; it merely provides that on a rent sale the purchaser shall acquire the tenure sold free from encumbrances. 59 C 440=62 M L J 86=36 C W N 29=A I R 1931 P C 314=135 I C 765=58 I A 440=1 R 1932 P C 45 (P C)

-R 46 (4) Objection may be raised by omission of statement under purchaser only. A I R 1927 Cal 315=45 C

L J 73= 31 C W N 299= 100 I C 997

-R 46 (2) Omitting to serve notice is not fatal. A I R 1927 Cal 315=45 C L J 73=31 C W N 299=100 I C 997

-R 47 (3) Omission to publish proclamation at Thana is not fatal. A I R 1927 Cal 315=45 Cal 315=45 C L J 73=31 C W N 299=100 I C 997

**BENGAL REGULATIONS**

See Regulations-(2) Bengal Regulations

**BENGAL RENT ACT 10 OF 1859.**

-A grantee form a trespasser as well as a grantee form a temporary intermediate holder can acquire occupancy rights. 18 C L J 23=21 I C 204.

-S. 310 A, Civil Pro. code applies to Rent sales under act X of 1859. The latter act is not a complete code in itself and upon a point on which it is silent the provisions of the former code must be followed. 38 C 832=11 I C 207=15 C W N 863=14 C L J 284.

-Act VIII of 1865 read with Act X of 1859-Tenancy Act, S. 74-Setting aside sale-Deposit of money. 16 C W N 311=14 C L J 163=11 I C 239

-A landlord of non-transferable occupancy holding can sale it for rent arrears. 25 C W N 554=66 I C 46

**BENGAL RENT ACT 10 OF 1859 (Contd.)**

-Thekadar cannot acquire occupancyright, when it is non-transferable A I R 1921 Pat 428=2 P L T 654=62 I C 59

-Beyond holder's lifetime transfer of occupancy right is void. 46 I C 657 (Nag)

-Yearly lease holder of sir land is not affected by the rule of occupancy acquisition. 1927 Pat 225=8 P L T 578=101 I C 119

-The effect of a transfer of putni holding with the consent of the landlord under Act X of 1859 can only be that the original tenant is considered to have relinquished the holding altogether and that a new tenancy is created in the transferee.

After the enactment of Act X of 1859 the original Khudkast rayats continued to hold the same rights as they held before but the Khudkast right ceased to exist as a right that can be acquired after the passing of the Act. 27 I C 928

-S 6-On construction of a lease it was held that no occupancy was created. A I R 1922 P C 241=30 M L T (P C) 279=48 I A 49=48 C 460=14 L W 265 (P C) =64 I C 231.

-S 6-Ryot occupying and cultivating land for more than 12 years under landlord without title-Acquisition of occupancy rights. 29 I C 834.

-S. 10-If a certain amount of cash rent and price of certain quantities of produce constitute one whole rent, the price of the produce is not an alwab but is liable to recovery as rent. 1917 Pat 287= 3 Pat L W 270=37 I C 980.

-S. 16-The presumption provided for by this section cannot be drawn in favour of a tenure coming into existence for the first time, long after the date of the Permanent settlement; and a suit for enhancement of rent will lie though it has been held at a fixed rent for 20 years period to the suit. 26 I C 908

-S. 16-A suit for alteration of rent can be instituted without the permission of the Govt. though the tenure is one which appertains to a public endowment, and the beneficiary of which is a Thakar. 26 I C 908

-S. 17-This section does not invalidate Contractual enhancement of rent.

S. 26 of Act VI of 1908 does not affect a contract for enhancement of rent made under Act X of 1859; but it applies to enhancements effected before it came into force in contravention of ss. 21 and 24 of Act 1 of 1879. Enhancements of rents by private agreements under the then existing laws are also unaffected by it. 17 C W N 430=16 C L J 422=16 I C 929

-S. 23, cl. (b)-Specific Relief Act, 1877, s. 9, 13 C L J 250=15 C W N 387

## BENGAL RENT ACT X OF 1859 (Contd.)

S. 81—Evidence—Decrees Judgments and Proceedings in Suits. 21 W R 33

—S. 82—This section gives to the decree-holder physical possession of the land in a case where the occupancy holding has ceased to be so because of the eviction of the raiyat for non-payment of rent. 1 Pat L J 543=2 Pat L W 435=20 C W N 1240=37 I C 658

—S. 82—In case of a sale of a holding of an occupancy raiyat the under-raiyat's interest is only voidable. 1 Pat L J 543=2 Pat L W 435=20 C W N 1240=37 I C 658

—S. 82—A distinction is drawn between proceeding with respect to a tenure-holder and a raiyat. 1 Pat L J 543=2 Pat L W 435=20 C W N 1240=37 I C 658

—S. 82—In a suit to declare an under-raiyat a trespasser it is not open to him to contest the validity of a decree against his lessor. 1 Pat L J 543=2 Pat L W 435=20 C W N 1240=37 I C 658

—S. 105—If Chapter XIV of the Bengal Tenancy Act has been extended to the district where the sale held under Act VIII of 1865 in execution of a rent decree took place, that sale is liable to be set aside under s 174 of the Bengal Tenancy Act by depositing the decretal amount etc. 14 C L J 168=16 C W N 311=11 I C 239

—S. 109—The sale becomes void if the procedure laid down in this section is not strictly followed. 15 C W N 863=14 C L J 284=11 I C 207=38 C 832

—S. 109—This section does not mention the case of a joint and several decree against a member of judgment debtors. So where the decree holder elects to proceed against some only of them, he will have first to proceed against their person and moveable properties before applying for their immoveables; in spite of the fact that the moveables are insufficient for the full satisfaction of the decree. But before applying for the immoveables, he is not bound to proceed against the persons and moveables of the other judgment debtors.

Once he has exhausted the moveables he is free to apply for immovable property in successive applications and is not bound to take notice of the moveables that might have come in the judgment-debtor's possession in the interval. 17 C W N 87=16 C L J 586=15 I C 735

—S. 109—Wrongful distraint, 6 W R B Act X Rul 67

—Ss. 109, 110, 151—The provisions of s. 310 A of the C P C of 1892 apply to sales under this Act.

The general rule is that the provisions of the Civil Procedure Code must be applied to the procedure of the Revenue

## BENGAL RENT ACT X OF 1859 (Concla

Courts when trying questions arising under this Act, except upon points expressly provided for by the Act. 38 Cal 832=14 C L J 284=15 C W N 863=11 I C 207

BENGAL RENT RECOVERY UNDER TENURES  
ACT VIII OF 1865.

—There is no reason why a decree should be executed against a tenure when it is more than a year old. A I R 1928 Pat 615=8 Pat 122=9 P L T 627=113 I C 681.

—S 15—Unless otherwise mentioned a grant to a person and his heirs is included in it. A I R 1922 Pat 411=1 Pat 201=69 I C 849.

—S 16—A purchaser gets free from incumbrances when the tenure is sold for cess arrears as proviso does not apply. A I R 1927 Pat 266=6 Pat 317=103 I C 454.

—Held under, read with s. 105 of Act X of 1859—Setting aside of sale—See Beng. Act VIII of 1865, ss. 2 (2), 174, 14 C L J 168.

—Sale for arrears of rent—Under-tenures and portions, sale of, 20 W R 59.

—A tenure was sold (after the Bengal Tenancy Act had come into operation) in execution of a decree passed before that Act was enforced. It was at that time erroneously held by Courts that the provisions of the Bengal Rent Act (VIII of 1869) and not those of the Bengal Tenancy Act governed such sales and the plaintiff had the under-terms in a manner sufficient under the old Rent Act though not by a formal notice as required by the Bengal Tenancy Act. In a suit by an under-tenure holder for declaration of the title and recovery of possession of his under-tenure Held—That (the provisions of the Bengal Tenancy Act would govern the annulment of under-tenures and that the under-tenure not having been annulled under the provisions of the Bengal Tenancy Act this annulment was inoperative though based on erroneous decision of Courts.) 17 C W N 619=15 I C 479.

—S 3—As s. 3 of Act VIII of 1865 does not affect clause 2, of s. 15 of the Patni Regulation, a purchaser of a Patni tenure, if resisted in obtaining delivery of possession should apply to the Dt. Judge and not to the Collector. 44 Cal 715=25 C L J 535=40 I C 368.

—S. 3—Effect of, Patni Regulation VIII of 1819, s. 15 (2). 40 I C 715=33 M L J 78.

—S. 6—An amendment, directed by consent of parties in a suit under s. 5 of the Bengal Rent Recovery Act, is not affected by the limitation contained in O. 6 r. 18 of C P Code. 19 C W N 200=22 I C 778.

—S. 6—The words "All costs of process" mentioned in this section include costs of execution.

## BENGAL RENT RECOVERY UNDER TENURES

## ACT VIII OF 1865 (Contd.)

An entry in a sale proclamation regarding some costs which were not in fact really due is not sufficient to render the sale, which followed in perfect good faith, invalid.

The title of a purchaser at a sale of a tenure for arrears of rent, is superior to that of an unregistered purchaser of the said tenure. 10 IC 899

(Reversed on appeal 20 IC 337)

—S. 6—Occupation of nij jote land by a tenant for 12 years, after the coming into operation in Orissa of s. 20 of the Bengal Tenancy Act, is sufficient to give that tenant the status of a settled raiyat. 17 C L J 585=20 IC 394

—S. 6—The term "Costs of process" in this section refers only to the costs for the issue of the writ of attachment and sale proclamation and not to the costs incurred in obtaining a copy of the decree. 16 C L J 388=20 IC 337

—S. 6—A sale effected after the satisfaction of the decree, confers no right even to a bonafide purchaser for value without notice. 19 C L J 388=20 IC 337

S. 6—It is open to an unregistered purchaser of an undertenure to stop a sale by deposit of a sufficient sum; he being a person interested within the meaning of s. 6. He can also institute a suit to declare that the execution sale is illegal.

The sufficiency or otherwise of a deposit is a question of fact as well as law. 19 C L J 388=20 IC 337

—S. 11—Sale certificate—Order directing issue of—Not appealable. Chota Nagpur Ten. Act Ss. 208 and 209. 55 IC 27=5 Pat L J 101=2 U P L R (Pat) 69=1 P L T 146

—S. 16—Where a tenure holder wilfully defaults to pay rent scheming thereby to extinguish the under tenure by the consequent sale under a rent decree and even fixes the purchase and the price beforehand, the sale under such circumstances, is no better than a private transfer and the purchaser's annulment of the under tenure is not to be given any effect the duty of the intermediate land lord is to protect his tenants. 18 C W N 782=19 C L J 300=23 IC 896.

—S. 16—There is nothing in Law to prevent tenant from acquiring and retaining an occupancy right where a mokurrari which he had obtained had been extinguished by operation of S. 16 of Act VII of 1865. 19 C W N 858=28 IC 374.

—S. 16—The proviso to this section applies only to a raiyat and not to a tenureholder. 38 IC 146.

## BENGAL RENT RECOVERY UNDER TENURES

## ACT VIII OF 1865 (Contd.)

—S. 23 cl. (1)—A suit to get kabuliati for a term of years against a tenure-holder lies under this section.

The presumption mentioned in s. 5 of the Bengal Tenancy Act does not apply to occupancy raiyats who acquired their right before the Act. 16 C L J 271=17 IC 237.

—S. 23, cl. (c)—A tenant, ousted from possession by a landlord, cannot bring a suit in a Civil Court under s. 9 of the specific Relief Act, as this section makes such a suit cognisable by the Collector alone. (Chatterjee J. dissenting). 17 C W N 1201=21 IC 224.

—S. 23 (G)—Tenant dispossessed by landlord—Possessory suit in Civil Court. Sp. Rf. Act. S. 1. 17 C W N 1201=21 IC 224.

—S. 105—Sales of Under Tenures Act Ss. 4, 6, 16—Sale in execution of a decree for rent of a jagir tenure, effect of. 16 C L J 197=17 IC 165.

## BENGAL REVENUE RECOVERY ACT I OF 1890.

—S. 5—Sale of estate not in arrears is without jurisdiction—Real owner's title is not affected. A I R 1922 Pat 445=70 IC 714.

## BENGAL REVENUE SALE LAW.

See Beg. Land Rev. Sales Act.

—Auction sale for road cess—Purchaser priority of Beng. Ten. Act. s. 65. 1 Pat L J 161=36 IC 498.

—S. 20—Only in case of a material alteration of holding a landlord can claim a higher rent than that mentioned in the Road- Cess Return.

S. 20 of the Road-Cess Act does not cease to apply because of a mere alteration in area due either to remeasurement or encroachment.

Neither an entry in a record of rights nor an entry in a jama wasi baghi can supercede the provisions of the Act. 1 Pat L J 521=1917 Pat 312=2 Pat L W 421=38 IC 109.

—S. 95—Evidence of a Road Cess Return furnished by widow is admissible in favour of the reversioner. 18 C L J 633=22 IC 594.

## BENG. SANITARY DRAINAGE ACT VIII OF 1895.

—S. 16—The sec. is applicable to lands within and without the municipal limits. A I R 1927 Cal 415=45 C L J 185=101 IC 349.

## BENGAL ( SONTHAL PARGANAS )

## ACT 37 OF 1855

Sch. am., Act X of 1857; s. 6, Rep., Act XIV of 1870; s. 1, Rep., in part, Act XII of 1891; s. 3, Rep. in pt. ss. 4, 5, Rep., Reg. V of 1893; supplemented, Reg. V of 1893; Rep., Act XIV of 1874 (when notified); ss. 1, 2 and 3, declared in force in the Sonthal Parganas, Reg. III of 1872, s. 3, as amended by Reg. III of 1899, s. 3.



**BENGAL (SONTHAL PARAGANAS) ACT**

37 OF 1355 (Concl'd.)

—S. 2.—In the Sonthal Paraganas the Code of Civil Procedure is in force as regards suits exceeding Rs. 1000, subject to a condition that they are tried by a Court established under the Civil Courts Act.

A suit before an officer invested with Civil Court's powers will be governed by Civil Pro. Code. 18 C 133.

**BENGAL SURVEY ACT (V OF 1875).**

—S. 41.—Section 62 does not apply to those persons who are not parties to the previous boundary proceedings under s. 41.

35 C W N 620.

—S. 40-(1) A possessory order under s. 40 has the force of a Civil Court's order and analogous to decision under s. 34 Beng. Regu. 7 of 1822. A I R 1921 Cal 277 =34 C L J 465=66 I C 923.

—S. 41.—The fact of possession is not determined when the survey officer being unable to decide it from the evidence before him ordered the boundary to be as in the survey map. A I R 1928 Cal 576=112 I C 823.

—Ss. 41 and 62.—A Civil Court can determine title though order under s. 41 is made. A I R 1925 Cal 1052=85 I C 1012.

—S. 41.—An order under s. 41 is like a Civil Court's order until reversed or modified. Art 46 Limi. Act does not bar a suit filed after 3 years from the date of order. A I R 1921 Cal 277=34 C L J 465 =66 I C 923.

—S. 41.—A revenue officer may delegate his power to an assistant settlement officer and his decision is like a Civil decree. A I R 1923 Pat 96=(1922) Pat 114=3 P L T 617 =66 I C 471.

—S. 41.—Adverse possession under the Sec. is dispossession within Art. 142 Limi. Act. A I R 1921 Pat 277=2 P L T 133=61 I C 78.

—S. 41.—Limitation of Art. 142 runs from the date of Collector's order for a suit to modify or reverse it. A I R 1921 Pat 31=6 P L J 51=2 P L T 118=61 I C 46.

—S. 41.—Only because boundary pillars were not put up an order under the sec is not void. The presumption is that they are duly set up & the onus to prove the contrary lies on the one alleging it. 59 I C 840 (Pat).

—Ss. 41 & 63.—Civil Courts are not bound by a decision on partition map made behind the party on a question of title. 19 C W N 1038=31 I C 41.

—Ss. 62 & 41.—Survey officers decisions in boundary disputes are no evidence of title. A I R 1928 Pat 399=I R (1929) Pat 185=115 I C 217.

—S. 41.—A Collector's order under this section amounts to a decree of a Civil Court, and as such is unchallengeable by a

**BENGAL SURVEY ACT (V OF 1875) (Cont'd.)**

Magistrate under s. 145 of the Cr. Pro. Code. 18 Cr L J 301=38 I C 333.

—Ss. 41 and 63.—Order under if binds civil court upon question of title and precludes it from finding possession during period anterior to order. Evidence Act, Ss. 13, 45 and 83. 19 C W N 1038.

—Ss. 45, 4, 5 & 6.—Demarcation under S. 4.—Absence of proclamation—Resistance to Amin charged with demarcation—Offence under S. 353, I P C Penal Code Ss. 353, 147 and 49. 2 Pat L J 18=38 I C 744.

—S. 62.—Where the defendants plead that the plaintiff's suit is not maintainable because of a previous boundary decision under the Act, the burden is on the defendants to prove what the proceedings were and who were parties to it. 35 C W N 620.

—S. 62.—Section 62 does not apply to persons who are shown not to have been parties to the previous boundary proceedings under s. 41. 35 C W N 620.

—S. 62.—If there has been dispossession of plaintiff since the order of the Asst. superintendent, a suit for declaration and confirmation of possession is in effect for declaration and recovery of possession and the section does not apply. But the section applies and proves as a bar to such a suit if the plaintiff was kept in possession all along and has never been dispossessed and the proceedings of the Asst. Collector of survey were regular. 41 I C 86.

—S. 62.—A plaintiff dispossessed of his land by reason of survey proceedings, is not barred by this section from bringing a suit for recovery of possession, as owner of that land. 40 I C 588.

**BENGAL STEAM-BOILERS AND PRIME-MOVERS ACT III OF 1879**

[Title, preamble, ss. 1, 12 rep. in pt. Act I of 1903; Declared in force in the Sonthal Parganas, Reg. III of 1872, s. 3, as amended by Reg. III of 1899, s. 3]

**BENGAL TENANCY ACT VIII OF 1885.**

Scope of—applies when rent payable quarter—court to fix rate of rent—interest—not allowed. A L R 1933 C 343.

—Auction purchaser at a rent sale—status of his rights are determined by the terms of the sale certificate—construction of the right, title and interest of the judgment debtor in the sale certificate—auction purchaser is not estopped from questioning the validity of a transfer by the judgment-debtor. A L R 1933 C 489.

—Covenant in a mourashi mokarari lease for the payment of mutation fee of one-fourth the price of land on transfer, is not invalid as a covenant in restraint of alienation or as offending the rule of perpetuity—such a covenant runs with the land. A L R 1933 C 489.

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—Growing and reaping of thatching grass on Sankhola land, an agricultural purpose; B T Act applies. 11 I C 942.

Leases of agricultural land not for agricultural purposes, not within the Act. 29 I C 797.

Where an issue was raised as to quantity of produce and its price during the years in suit, but the courts below having refused to take their evidence, owing to their admission of average price in a Road Cess Return.

Held, that an opportunity ought to have been given to them to rebut the presumption arising from their admission in the Cess Return. 2 Pat L W 60-40

—Declaratory suit not governed by the Bengal Tenancy Act. See Declaratory suit Record of Rights, 1 Pat L J 67.

—Effect. See Res Judicata. 3 Pat L J 426.

Mere denial of the relationship of landlord and tenant does not involve any forfeiture unless the denial has been given effect to by a decree of the Court. Where the landlord after the dismissal of his suit for rent appealed and pending the appeal withdrew the suit and then brought an action to eject the tenant on the ground of such denial by the tenant. Held owing to the withdrawal of the suit the denial of the relationship would not work any forfeiture as it was not given effect to by a decree of the Court. 16 C W N 730-14

—Raiyat, ejectment of only under the provision of. See B T Act S. 182. 22 C L J 219.

—Some village co-proprietors released their share to S also a co-proprietor for a term of years & some lands in another village were also leased by it providing that lessee to cultivate & suffer expenses of thana & police. Held that (1) the lease conferred lessor's right on some share on the lessee & (2) a right to cultivate lands in another village was also given. He was therefore a tenure holder for the shares & a lessee to cultivate the specific lands. He being a tenure holder cannot acquire occupancy right on the lands included in the ijara. The suit being mainly for partition the claim that S had got no occupancy or other right was only secondary. As S had acquired no such right B T Act Sch III Art 1 (a) does not bar the suit. 4 Pat L W 428-45 I C 705.

—Considering the restrictions put by B T Act on enhancement of rent, it is the duty of court to prevent landlords from inducing improvident tenants to take land at low rents with a stipulation for future enhancement. 22 C L J 95-25

I C 880.

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

The Act is not complete it does not incorporate the general principles of the law of landlord and tenant. It does not affect the doctrines of equity jurisprudence applicable to disputes between landlord and tenant, 44 C 771-20 C W N 1340-24 C L J 541-35 I C 754.

The Act governs the relations of landlord and tenant only the rights of the tenant against a third person remain unaffected. 20 C W N 872-35 I C 365.

Occupancy raiyat enjoys under the B T Act substantial rights in the land and not merely "personal right or personal privilege".

Exhaustive enumeration of all the incidents of occupancy right under B T Act given. 58 I C 353-31 C L J 510 (F B.)

—Scope of Relationship between landlord and tenant necessary. See B T Act S. 106. 18 C W N 9-8.

Where in a Kabulyiat for a term a certain rent was settled out of which a portion was agreed to be suspended and it was further stipulated that if after expiry of the term the raiyat remained in occupation without making a fresh agreement he would be liable to pay rent at the full rate. The Kabulyiat was held not to contravene the provision relating to non occupancy raiyats and was not invalid 41 C 493; 16 C W N 496, foll. Held further that Rent paid and accepted at lower rate can be proved to show that the kabulyiat was not intended to be acted upon or that there had been a waiver of the terms of the lease. 20 C W N 347-32 I C 251.

Where on payment of the nazar the purchaser was usually recognized by the landlord. It was not evidence of any custom or usage that the landlord was compelled to recognise the purchaser. 16 C W N 955-17 I C 15.

—Transfer not contrary to local usage of entire holding does not constitute forfeiture-Surrender of portion of holding entitles Landlord to re-enter that portion despite any encumbrance created prior to surrender. 17 C W N 698-18 I C 996.

—Rearing fish and stacking grass for cattle are agriculture purposes within B T Act. A I R 1931 Cal 135-34 C W N 1063-130 I C 219.

—The Act does not take away bar of s. 109 of the old Act. A I R 1931 Cal 253-57 C 796; Ind Rul (1929) Cal 163-129 I C 355.

Where a tenant holds over after expiry of the lease no tenancy is necessarily created each case depends upon facts and intention of parties. English Law not wholly applicable to cases under B T Act. A I R 1930 Cal 262-33 C W N 1207; Ind Rul (1929) Cal 574-125 I C 654.

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—Legal Rights of tenants can be claimed by suit as well by defence. A I R 1930 Pat 105=11 P L T 470=Ind Rul (1930) Pat 407=124 I C 87

—Jote is a general term for holding it does not necessarily mean raiyati jote. A I R 1928 Cal 880=56 C 73=48 C L J 97=32 C W N 587=Ind Rul (1929) Cal 305=115 I C 81

—80 or 85 years old tenancy does not come within T P Act or this Act. A I R 1929 Cal 330=113 I C 568

—A dar-chukanigar can establish himself as occupancy tenant under Notification 964 of 5th Nov, 1898. A I R 1928 Cal 322=55 C 428=111 I C 276

—On purchase of raiyati holding by fractional proprietor, holding does not merge in larger interest—Interest acquired passes to purchaser. A I R 1927 Pat 172=8 P L T 69=102 I C 386

—Lease of homestead within Municipal area not governed by Act or T P Act A I R 1927 Cal 279=31 C W N 282=47 C L J 27=100 I C 614

—Homestead land and village service tenure are not governed by B T Act or T P Act and are not transferable on surrender by tenant, on abandonment by former tenant landlord can take direct possession. A I R 1927 Cal 373=100 I C 167

—Ordinarily, a landlord can realise rent after one year—Zamindar's right under Patni Regulation does not compel him to realise it every six months. 5 Pat 415=98 I C 893=A I R 1926 Pat 465; 8 P L T 313

—Occupancy right under the Act is statutory right, not a gift. A I R 1923 P C 79=5 Pat 634=53 I A 164=7 P L T 553=31 C W N 74=51 M L J 587=44 C L J 86 (P C)=95 I C 1025

—Lease for residential purposes only although coupled with right to fruit trees is not governed by Act. A I R 1926 Cal 312=42 C L J 520=92 I C 411

—Act being for the protection of tenants, mere refusal by a tenant to pay higher rent than necessary under the Act, does not disentitle him from obtaining a renewal of tenancy. A I R 1926 Cal 162=90 I C 893

—Even where a trespasser gets into possession and asli at Permanent Settlement cannot on re-emergence be resumed and assessed with revenue. A I R 1925 Cal 273=29 C W N 119=85 I C 211

—The nature of the original tenancy, and not that of the parcels included in sub-tenancy, must be looked to in applying B T or T P Act. A I R 1925 Cal 202=40 C L J 307=84 I C 743

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—Homestead portion is on the same footing as cultivated area in absence of local custom. A I R 1925 Cal 202=40 C L J 307=84 I C 743

—Older theories of acquisition of occupancy right do not continue alongside Act. A I R 1925 Cal 336=40 C L J 167=84 I C 735

—Landlord can claim consideration for recognising the purchaser of non-transferable occupancy holding. 82 I C 970= A I R 1925 Cal 389

—Abatement of rent can be claimed. A I R 1925 Cal 356=51 C 1022=29 C W N 124=82 I C 315

—Under-raiyat's interest is inheritable and non-transferable Not several tenants but only rent receivers may co-exist. A I R 1924 Cal 850=40 C L J 90=28 C W N 865=82 I C 386

—Mere fact that a certain rate is mentioned regarding excess land in tenant's possession does not make it a mokarari holding. A I R 1925 Cal 245=80 I C 987

—Subsequent lessee cannot sue to collect dues by previous lessee there being no privity of contract or estate between them. A I R 1923 Cal 368=37 C L J 263=76 I C 252

—Rent decree—Landlord need not sue legal representatives whose names are not registered. A I R 1924 Pat 339=(1923) Pat 374=75 I C 321

—Transferee of a non-transferable holding cannot be ejected if rent were received from him after the transfer. A I R 1923 Cal 520

—Rights of occupancy acquired previous to the Act remain unaffected. A I R 1923 Cal 375

—“Chaukani” is a particular tenancy governed by custom. A I R 1923 Cal 375

—Where a tenant sold the homestead for non-agricultural purposes, and the landlord recognised the sale on receipt of salami and fourfold rent, the settlement was held to be fresh one. S. 111 (L) T P Act applied. A I R 1922 Cal 201=26 C W N 389=70 I C 166

—Only one recorded tenant's representation on behalf of all is explained. A I R 1923 Pat 206=(1923) Pat 57=1 Pat L R 47=69 I C 565

—T. P. Act does not govern jama of under-tenure including agricultural land and homestead also. A I R 1923 Cal 294=67 I C 66

—Property of the raiyat in the holding is distinct from the parent estate. A I R 1922 Pat 619=3 P L T 653=65 I C 882

—Sale of the non-transferable holding in execution of money-decree against the holder is valid. A I R 1922 Pat 114=1 Pat 317=3 P L T 205=65 I C 335

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

--In Bengal under-raiyat's is inheritable. A I R 1922 Cal 85

--Occupancy right would vanish but Raiyat holdings bought after amendment Act continue as such. 26 C W N 100-63 I C 892

--A patni purchaser, suing to eject defendant as trespasser, must show (a) Zamindar's possession before the purchase and (b) want of adverse possession on part of defendant. 61 I C 463-25 C W N 105

--Rights of under-raiyat cannot be sublet or transferred. 61 I C 200 (Cal)

--S. 1 as amended by s. 3 of B. T. Amend. Act 1907--s. 3 of 1907 Act makes "Town of Calcutta" co-extensive in area with the present Municipal limits of Calcutta. But is does not retrospectively affect the tenant's rights held by him within the limits of Calcutta as defined in sch. I of Calcutta Municipal Act 1899. 20 C W N 258-33 I C 54

--S. 1 Sub-s (2)--Distinction between the passing and commencement of Act. See B. T. Act, S. 170 (3) etc. 24 I C 9.

--Ss. 2 (2) 174--A judgment-debtor can under S. 174 have a sale reversed when held under the Bengal Rent Recovery (Under-tenures) Act, 1855, read with S. 105 of the Rent Recovery Act in respect of property situate in Orissa Division. 16 C W N 311-14 C L J 168-11 I C 239.

--S. 2 (2)--After being extended to Orissa, Cha. 14 of the B. Act repeals inconsistent parts of Acts including Act 8 of 1865. A I R 1921 P. C. 34-48 I A 123-25 C W N 1009-40 M L J 546-14 L W 358- (1921) M W N 399-3 U P L R (P. C.) 25-2 P L T 453-30 M L T 32-48 C 811 (P. C.) 61 I C 1

--Ss. 3 (1) and 103--Lands within a Municipality come under the B. T. Act, unless excluded by a notification of Local Government. 50 I C 778

--S. 3 (3)--To determine the status of a tenant, the document creating the tenancy must first be looked to. If it is not clear then subsequent conduct or dealings may be considered. 32 I C 717

--S. 3 (5)--Money payable under Bengal Drainage Act S. 42 is "rent" within S. 3 (5) B. T. Act and the decree for such money is a rent decree within Ch. XIV of the B. T. Act. (a) Drainage charges included in rent-Decree holder expressing intention to buy tenure at rent-Sale at a given price and buying at said price-Effect.

Where a decree for rent included certain drainage charges it was a rent decree within the meaning of Ch. XIV of the B. T. Act drainage charges payable under S. 42 (a) of the Bengal Drainage Act being money recoverable as rent as defined in S. 3 Cl. (5) of the B. T. Act.

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

--Where before the sale of the holding in execution of a rent decree the judgment-debtor being anxious to procure a good price for the holding approached the decree-holder and the latter expressed his intention to bid up to a certain amount and at the sale the property was knocked down to the decree holder for that amount.

Held that in the absence of fraud, the circumstance would not deprive the purchaser of the benefit attaching to sale under the B. T. Act or render it a private sale. 23 C W N 201-50 I C 222

--S. 3 (5)--Where before the sale in execution of a rent decree the judgment-debtor requested the decree-holder to bid up to a certain amount and the latter so acted. Held that in the absence of fraud the circumstance would not deprive the purchaser of the benefit attaching to sale under B. T. Act or render it a private sale. 23 C W N 201-50 I C 222

--Ss. 3 cl (8) and 11--Nimhowla tenures of Backerganj--Transferable and heritable--Permanent tenure--Notification of transfer--Landlord not entitled to rent from original tenants.

Nimhowla tenures of Backerganj are permanent tenures within S. 3 cl. (8) of the B. T. Act and are transferable and heritable under S. 11. Where the transfer of such a tenure has been duly notified to the landlord he cannot claim the rent from the original tenants after the notification. 25 I C 373

--Ss. 3 (9) and 30--Holding does not include undivided share and a suit for enhancement of rent under Sec. 30 cannot or lie in respect of such undivided share. 24 C W N 1022-59 I C 209

--Ss. 3 (9), 188--"Holding"--Under raiyat--Separate tenancy--Undivided share of land--Joint possession--Separate kabuli-yat--Co-sharers joint owners, not joint landlords--Suit for ejectment by one of them, whether lies. 14 I C 738.

--Ss. 3 (9) and 30--An undivided share of a howla does not come within the definition of the term 'holding' in s. 3 cl. (9) and therefore, does not fall within s. 30. 40 Cal 29-16 C L J 9-16 C W N 877-15 I C 453.

--Ss. 3 cl. (9) 167--Holding does not include under raiyati. An under-raiyati cannot be sold for arrears of rent under Chap. XIV; so a purchaser of such interest has no right to annul incumbrances under S. 167 which applies only in cases under Chap. XIV. 16 C W N 831-16 C L J 539-14 I C 349.

--Ss. 3 (10) & 20--Settled raiyat--Holding land in village, meaning of.

To become a settled raiyat it is necessary that one must hold land in a

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

"village" continuously for 12 years. If an area were at some time declared to be a "village" the declaration cannot have retrospective effect. 55 I C 330.

--S. 3--The Act does not cease to operate merely because the tenancy is of tank. A I R 1930 Cal 270=51 C L J 25=

Ind Rul (1930) Cal 699=126 I C 203.

--S. 3--If a landlord leased an agricultural holding to two ryots one after the other, the second has no right to collect rent payable by the first. A I R 1923 Cal 368=37 C L J 268=76 I C 252.

--Ss. 3 and 50--Homestead land is presumed to be non-transferable if created before T P Act. 72 I C 662 (Pat.)

--S. 3 (3) and (9)--No tenancy is formed by first khata alone when some rent was payable for one entire khata and for a share in another. A I R 1929 Pat 237=

I R (1929) Pat 604=119 I C 556.

--S. 3 (3)--Proprietorship is not necessarily denoted by non-payment of rent. A I R 1926 Cal 337=87 I C 798

--S. 3 (3)--For creating tenancy of waste land immediate payment of rent is not required. A I R 1923 Pat 176=67 I C 859.

--Ss. 3 (3) & 4. No rights are created by these Secs. & Lessee of zerait is a tenant only during the continuance of the lease. A I R 1922 P C 142=43 M L J 55=26 C W N 833=35 C L J 506=(1922) M W N 410=1 Pat 340=31 M L T 231 (P C)=3 P L T 197=49 I A 81 (P C)=66 I C 337.

--S. 3 (5)--Jungle lands of tenure--Wood to be supplied on account of, in addition to cash rent--Rent even in restricted sense of S. 3 (5) is.

Obviously it is something deliverable in kind by the tenant to his landlord on account of the use or occupation of the land held by the tenant. 59 C 513 (515)= A L R 1932 C 864.

--S. 3 (5)--Rent-Cess if included in Suspension of rent if involves suspension of cess also--Bengal Cess Act--S 41--Effect. 36 C W N 72 (75, 78)=137 I C 696=I R 1932 C 385=54 C L J 479=A I R 1932 C 385.

--S. 3 (5) Within the Sec. Chur & Gur are agricultural produce & rent. A I R 1931 Pat 25=11 P L T 695=Ind Rul (1931) Pat 137=130 I C 41.

--S. 3 (5) Actual rent is not defined by mal. A I R 1929 Pat 307=8 Pat 655=10 P L T 329= Ind Rul (1929) Pat 561=119 I C 65.

--S. 3 (5)--Suit for damages for use and occupation is not a suit for rent. Decree passed in such a suit is executable only under the C P Code. A I R 1923 Pat 397=2 Pat 183=4 P L T 689=74 I C 454.

--S. 3 (8) Mourasi tenure is included in "permanent tenure" A I R 1929 Cal 454=56 C 180=I R (1929) Cal 518=117 I C 534.

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

--S. 3 (9) "Holding" defined as amended by Act 4 of 1928 has no retrospective effect. A I R 1930 Cal 238=3 C W N 1156=I R (1930) Cal 676=126 I C 132.

--S. 3 (9) Undivided share is not holding. A I R 1930 Cal 238=3 C W N 1156=Ind Rul (1930) Cal 676=126 I C 132.

--S. 3 (9) Whether belagan homestead land is or is not included in raiyat's holding is a question of fact. A I R 1930 Pat 201 (F B)=11 P L T 141=I R (1930) Pat 323=123 I C 403.

--S. 3 (9) Belagan homestead land is not only a part of but is inseparable from the holding. A I R 1930 Pat 201 (F B)=11 P L T 141=I R (1930) Pat 323=123 I C 403.

--S. 3 (9) A transferee of belagan homestead from the tenant cannot resist ejectment by landlord. A I R 1930 Pat 201 (F B)=11 P L T 141=I R (1930) Pat 323=123 I C 403.

--S. 3 (9) "Parcel" does not mean undivided share. A I R 1929 Pat 237=I R (1929) Pat 604=119 I C 556.

--S. 3 (9) Plot of land including joint share is not holding. A I R 1929 Cal 201=I R (1929) Cal 493=116 I C 637.

--S. 3 (9) Undivided share of land is not holding. 30 C W N 613=94 I C 338.

--Ss. 3 (9), 30 & 182--"Holding" does not include undivided share. 24 C W N 1022=59 I C 209.

--S. 3 (17) The Sec. is not retrospective as amended in 1928. A I R 1931 Cal 91=I R (1931) Cal 299=34 C W N 815=129 I C 859.

--S. 4 Under-ryot is not included in "ryot" A I R 1926 Cal 1160=96 I C 588.

--S. 4--Whether tenant is tenure holder or raiyat is a question of fact. A I R 1926 Pat 9=(1925) Pat 281=6 P L T 787=90 I C 895.

--S. 4--Zerait land does not come under the Act A I R 1925 Pat 241=4 Pat 89=6 P L T 240=(1924) Pat 337=84 I C 305.

--S. 4--A lessee of zerait land does not come under S. 4. A I R (1925) Pat 241=4 Pat 89=(1924) Pat 337=6 P L T 240=84 I C 305.

--Ss. 4 and 5--Where a kabuliyaat did not show that it was in renewal of a previous lease, nor was there any evidence of tenancy before the kabuliyaat. Held, that the tenant was an occupancy ryot and not a ryot at fixed rate. 2 P L T 605.

--S. 4--Tenant holding under raiyat at fixed rate of rent--Whether under raiyat. See Landlord and Tenant--Under-Raiyat. 58 I C 413=32 C L J 130.

--S. 4--Notice to quit essentials of non-agricultural land--B T Act if applicable. See Landlord and Tenant--Notice to quit. 32 C L J 6=58 I C 835.



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—S. 4—Not exhaustive—See B T Acts Sec. 116. (1917) Pat 318-3 Pat L W 105-42 I C 177.

—S. 4—Tenants not mentioned in S. 4 do not come under the Act. 40 I C 504.

—S. 4—Raiyat at fixed rate of rent if occupancy, raiyat-Distinction. See Landlord and Tenant Ejectment. 29 I C 461-19 C W N 1129-27 C L J 579.

—S. 4—The distinction between a raiyat and an under raiyat was recognised before the B T Act (VIII of 1885).

In a case governed by Act VIII of 1869 an under-tenant acquires a right of occupancy. 24 C W N 685-58 I C 662.

—S. 4 (2)—Where a person was let into possession of land subject to future agreement as to rent but no such agreement was actually concluded. Held that he was not a raiyat within the B T Act At the highest his position was that of a tenant-at-will or tenant by sufferance. 23 C W N 773.

—S. 4 (3) (a)—See B T Act S. 50 (2) 38 I C 94-27 C L J 281.

—S. 4 (3) (b)—Occupancy raiyat. See B T Act Scope of. 31 C L J 510-24 C W N 818-58 I C 353 (F B).

—Ss. 4, 105—'Tenant' and 'landlord' in S 105 mean a tenant and a landlord as defined in S. 4.

S. 105 of the B T Act does not apply to non-agricultural lands in municipal limits. 46 Cal 441-52 I C 412.

—S. 5 (5)—Record of Rights—Entry in—Presumption arising from—Consideration of—Court's duty.

Held that the Subordinate Judge erred in law is not at all taking into consideration the presumption arising in favour of the plaintiff from the entry in the Record of Rights which recorded plaintiff's niskar in Karsa Khatian No. 34 and that of the defendants in kolekarsa khatian. 55 C L J 569-139 I C 832-1 R 1932 C 662-A I R 1932 C 870

—Ss. 5 (5), 45, 115—The lands being found not to be the proprietor's private lands, the tenants can acquire occupancy right in the case of a zurpeshi lease. Presumption raised by S. 5 (5) can be rebutted.

With regard to another plot, the Court of first instance had held it to be the proprietor's private land, dealing with the matter on the footing of an admission made at the trial by the tenant's defendants.

Court cannot go behind tenant's admission and re-open the question as to whether it was the private land of the proprietor. 15 C W N 345 (P C)-9 M L T 364-8 A L J 441-13 C L J 512-13 Bom L R 396-9 I C 913

Ss. 5 (5), 104-H, 111—A-Suit regarding Erroneous entry in Settlement Rent

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Roll as to tenant's status is not a suit under S. 104-H, but falls within the category of suits referred to in the proviso to s. 111-A and may be brought within six years. 15 C W N 896

—S. 5—The presumption under s. 5 is weakened by the fact that almost the whole of the land was at the time of the settlement under water and that the excess of the area over the statutory limit was not so great as to preclude the possibility of pliffs being raiyats. 29 Cal 707 dist. And it is rebutted by the entry in the finally published record of rights showing that the pliffs. were occupancy raiyats and from a decision also of a Civil Court to the same effect.

If the original purpose was to cultivate the lands then subsequent conduct would not alter their status.

The pattah is the repository of the intentions of both parties and less they were "ad idm" obviously there could not have been any contract at all. (1917) Pat 379-5 Pat L W 311-43 I C 941

—S. 5—Where one of two brothers executed a kabuliati, the question whether the other brother became a tenant depends on the intention and conduct of the parties. If the landlord knew at the time of kabuliati that the brothers had agreed to share the tenancy, such agreement would bind the landlord, but not otherwise. Subsequent knowledge of landlord would not amount to a novation. The presumption under S 5 is not retrospective, yet when the question is whether a tenant was or was not a raiyat the area of the land held should be taken into consideration. 1 W R 68 ref. to 16 C L J 271-17 I C 227

—S 5—A lease was granted on condition that if a tenant settled on any portion of the land leased out, the lessee would surrender to the lessor that portion would get in exchange for the same lands of similar description. The lessee was also restricted from cutting any tree transferring any portion etc. Held, that the interest created was that of a raiyat.

A question regarding acquisition of occupancy right by an under-raiyat or the rights of a tenant holding over, cannot be raised in Second appeal for the first time. 53 I C 12

—S 5—A transferee of a non-transferable occupancy holding, obtaining a recognition from some of the co-sharer landlords acquires a good title with regard to shares of those landlords and gets the right to joint possession of the holding. 32 I C 255.

—S: 5—Evidence is admissible to rebut the presumption under s. 5 55 I C 249

—S. 5—The mere fact that a tenant has sub-let his land, does not by itself conclusively decide whether he is a tenure

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holder or a raiyat. The test to be applied is the intention of the parties.

In cases where the origin of the tenancy is unknown, the mode of user of the land may be considered and where the terms of the grant are ambiguous, evidence of subsequent conduct of the parties may also be admissible. 14 C L J 38 and 15 C W N 896 ref.

The presumption in S. 5. (5) is not applicable when the terms of the original grant are known. 46 Cal 160-27 C L J 334-45 I C 43

—S. 5—Person taking settlement from joint co-sharer without consent of other co-sharer, is not a raiyat. 19 I C 393

—S. 5—A sublessee who was no party to the contract of lease, can show that the real purpose for which the land was acquired by the lessee was other than what was stated in the lease. 11 I C 262-15 C W N 896 dist.

The terms of a lease and the papers of the landlord showing that the tenancy was a raiyati one, is not conclusive against the sub-lessees.

The word "Jote" does not necessarily mean the interest of a cultivator.

An option to the tenants of renewal on the expiry of a lease is not enforceable, if the terms are undefined and depending upon the will of the lessors. 21 C W N 188-34 I C 92

—S. 5—In deciding the character of a holding, the origin of the tenancy as well as the subsequent conduct of the parties should be considered. [But see 15 C W N 902 infra—E—Ed.] Where the original area of the lands taken was considerably more than what could be cultivated by the tenant himself, or by the members of his family, or by hired servants or with the aid of partners, and the tenant himself was not a member of the cultivating class, and where subsequent settlements were also of large areas. Held:—That these circumstances led to the conclusion that these lands were taken for the purpose of settling tenants on them and the lease was a tenure. 15 C W N 218-6 I C 362

—S. 5—Jotedar meaning of. See Land Lord and Tenant Jotedar. 34 I C 185

—S. 5—Tenure-holder. See Santhal Parganas. 58 I C 43

—S. 5 (1)—Where the debts were recorded as Kaima Madheya Satyadhi kari or intermediate tenure holders, the record can be rebutted by evidence of events before the record. 42 Cal 745-20 C W N 185-22 C L J 223-31 I C 19

—S. 5, Cls. 1 and 5—Where a lease of over 100 Bighas provided that the grantee might cultivate the land after

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making them fit for cultivation at his own expense. Held that the grantee was a tenure-holder within S. 5 cl 1 although part of the land is cultivated by himself. 20 C L J 140-27 I C 432

—Ss. 5 (1), (2) & (5) & 19—s. 5 (5) is applicable to tenancies created prior to Act.

A prajagari settlement was made of land exceeding that usually held by a raiyat. Held that 'praja' means a tenant and it is presumed that lease was a tenure. Held also that language being consistent only with the interest granted subsequent conduct is inadmissible. Evidence may be given for explanation and not contradicting doubtful documents. But when the meaning is clear, the subsequent acts cannot be admitted.

Per Tennon J:—B T Act regulates relations among the agricultural community and was intended to apply to agricultural tenancies created before or after the Act.

Tenants recorded as tenure holders sued to be recorded as raiyats under S. 104. The settled rent cannot be disturbed unless the plff. shows that the entry in the record of Rights was wrong. S. 19 refers only to raiyats within S. 5 had acquired occupancy right prior to the Act. 21 C W N 505-39 I C 934

—S. 5 (1) and (2)—Tenant taking land for cultivation to let out the land to another should be regarded as a tenure-holder and not as a raiyat.

To determine the status of a tenant the nature of the holding in its inception should be considered. 50 I C 468

—Ss. 5 (1) (4) and 103 B—Where land of more than 250 acres was leased to a non-resident permanently at a fixed rent with a view to its reclamation at the lessee's expense and by his own efforts "by cultivating it or having it cultivated." held that it could not be said that the demised land purported to be cultivated by his personal agency.

In the circumstances the presumption under S. 103 B. from an entry in the record of rights that the tenant was a raiyat was rightly held to have been rebutted. 45 Cal 805-35 M L J 214-23 M L T 384- (1918) M W N 379-20 Bom L R 743-22 C W N 674-5 Pat L W 1-16 A L J 522-27 C L J 543-45 I C 411-45 I A 67 (P C).

—S. 5 Sub-Sec. 2—In order to bring a lease for the purposes of grazing within the meaning of sub-section 2 of S. 5 it is necessary to prove that the grazing was in relation to cultivation which is the primary purpose for which a raiyat acquires the right to hold land. The term 'horticulture' means the cultivation of a garden

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managing a garden including growing flowers, fruits and vegetation.

If a lease is for gathering fruits from the trees on the land, the lease is not for horticultural purposes. 17 C L J 411=20  
I C 332

—S. 5 (2)—Members of a firm can acquire rights of occupancy in land and pass such rights to the successors. 25 W R 117, 4 Cal 957; and 11 Cal 501 Ref. 4 Pat L J 533=53 I C 106

—S. 5 (5)—Cl. 5 of S. 5 is not restricted to suits or proceedings between landlords and tenants under the Act. Neither is it limited to cases of tenancy of more than 100 bighas at the date of the suit.

The clause is a provision of adjective law; so it applies to tenancy which existed before the Act

The clause is applied to determine the character of the tenancy of 126 bighas, although that tenancy has been sub-divided into two tenancies before the B T Act came into operation. 17 C L J 435;

The fact that some tenants of the land themselves carried on cultivation and did not collect rent from under-tenants, is not decisive as to the character of the tenancy. The real test is the purpose of the original grant. 20 C L J 140, ref.

The mere forbearance on the part of the landlord to claim enhancement of rent from an occupancy raiyat for 40 years does not mean that the rent is fixed permanently. 24 C L J 363=44 Cal 555=22 C W N 89=36 I C 884

—S. 5 Sub S. (5)—Where the terms of the original grant are ambiguous or the terms upon which the tenancy was created cannot be proved by direct evidence the subsequent conduct of the parties may be considered with a view to determine the nature of the tenancy. Where the rent was on one occasion enhanced and the tenants submitted to such enhancement. Held it negatived the inference as to the fixity of rent 16 C L J 322=16 I C 376

—S. 5 (5)—Where the terms of the original lease are not ambiguous the question whether the tenant is a tenure-holder or a raiyat must be determined from those terms and without reference to the subsequent conduct of the parties (But See 15 C W N 218 Supra-Ed) The nature of the tenancy cannot be altered by the subsequent conduct of the parties to the detriment of under tenants. 15 C W N 902=14 C L J 38=10 I C 431.

—Ss. 5 (5), 104-H. 111-A.—Where no question as to entry of a rent settled or an omission to settle rent is concerned, a suit by a tenant for a declaration that an entry in the record of rights is erroneous and for

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a declaration that he is an occupancy raiyat is not a suit under S 104 H but falls within S. 111 A and may be brought within 6 years. Once the original grant is clearly shown to be raiyati by a lease unambiguous in its terms, or by other evidence where there is no written lease, the mere fact that the tenants subsequently sublet the land would not amount to alteration of the original nature of the tenancy by agreement, or there may possibly be cases where subsequent conduct may be set up as evidence of such agreement. But where no such agreement is set up and it is clearly proved that the land was originally acquired by the tenant for cultivating it himself or by hired servants or members of his family the character of the tenancy is not affected by the mere fact that the land was subsequently let out to tenants. 15 C W N 218  
Explained 15 C W N 896=11 I C 262.

—S. 5 (5) Sch. III, Art 3—In a suit for possession by tenant, where no information is available as to the character of the tenancy it is for the landlord to prove whether general or special limitation applies.

Clause (5) does not presume that where the area held is less than 100 bighas tenant is a raiyat. 14 C L J 598=11 I C 164.

—S 5 Sub-S. 5—Where a considerable portion of the land of a tenancy has been brought under cultivation, not by the raiyat, but by the tenants settled by him on the land, an inference may be drawn that the raiyat has treated himself as a tenure-holder. 9 C L R 449 and 11 C 501 refd to. where it was proved that in one instance the rent was enhanced and the enhanced rent had been paid without protest.

Held, that the rent of the tenancy had not been fixed in perpetuity and was liable to enhancement. (Mookerjee and Beachcroft, JJ) Banapada Roy v. Midnapore Zemindari Co. 16 C L J 322=16 I C 376.

—S. 5 (5)—Area exceeding 100 bighas is no conclusive evidence of tenure. 15 C W N 218=6 I C 362.

Ss. 5, 3 and 4—Usufructuary mortgagee of share, whether landlord—Co-sharer landlord, meaning of. See B T Act S 148 A. 18 C W N 1016

—Ss. 5 and 19—Grantee of Chur Lands for reclamation had let the lands at a priot to cultivators. Held the Grantee not a raiyat, but a tenure-holder and that S. 19 which saves occupancy rights accrued to raiyats prior to the Act, did not apply 45 I A 190=46 Cal 90=23 C W N 649=51 I C 226 (P C)

—Ss. 5 and 195—Reclamation lease is not necessarily a raiyati lease. Original terms, conduct of the parties, and other

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evidence may show that it is a tenure and not raiyati holding.

The word "raiyyat" is sometimes used in official documents to mean tenants in general. A "korfa tenant" is not necessarily an under-tenant of raiyyat. He is a sub-lessee whether of a talukdar or of a raiyyat.

The reservation by the Chakdars of certain portions of the land for their own cultivation did not militate against the conclusion that they were tenure-holders.

The definition of "tenure-holder" in S. 5 (1) merely formulates the pre-existing law and the insertion of the words "bringing it (the land) under cultivation by establishing tenants in it" introduced no change in the law. 9 C L R 449 diss. 1 W R 71-15 C W N 218-15 C W N 896 ref.

The section subject to S 195 applies to tenancies created before as well as after the B T Act.

In a suit to establish the status of the plffs as raiyyat, the under tenants are proper but not necessary parties. 21 C W N 452-39 I C 409.

S. 5 Sub S 5 Scope of Sec B T Act Ss. 116, 120. 38 Cal 432 (P C.)

—S. 5 (2)—Whether a lease is for agriculture is determined by primary object. Lease for one holding included a tank and adjoining land for fishing, storing grass and grazing agricultural cattle. Payment of cess and more rent for additional land was provided for. The lease is agricultural. A I R 1931 Cal 135-34 C W N 1063-130 I C 219.

S. 5 (5)—Area held exceeded 100 Bighas—Presumption under s. 5 (5) can be rebutted by showing that all the 100 bighas were not one tenancy. A I R 1930 Cal 161-Ind Rul (1930) Cal 691-126 I C 195.

—S. 5—Facts did not show that the tenant wanted to cultivate the land himself the area being less than 100 bighas and the land was promptly let out. The tenant is not a raiyyat but a tenure holder. A I R 1929 Pat 372-10 P L T 369-I R 1930 Pat 145-121 I C 449

—Ss. 5, 18 and 48—Tenant holding land for cultivation is under-raiyyat if landlord is a raiyyat. Consideration whether rent is fixed is generally immaterial. A I R 1929 Pat 372-Ind Rul (1930) Pat 145-10 P L T 369-121 I C 449.

—S. 5 (5)—For rebuttal of presumption under the Sec. it is perhaps material to inquire whether tenant holds other lands from the same landlord. A I R 1930 Cal 253-56 C 1164-33 C W N 564-I R (1930) Cal 37-120 I C 453.

—S. 5—'Area held by a tenant' means controverted holding or letting. A I R 1930 Cal 253-56 C 1164-33 C W N 564-Ind Rul (1930) Cal 37-120 I C 453.

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—Ss. 5 & 103 B—A tenancy exceeded 100 bighas and was recorded as tenure but Kabuliyyat clearly stated it as raiyyat with all its incidents. Tenancy was held only raiyyat and the Kabuliyyat was held to rebut presumption under the Secs A I R 1929 Cal 514-33 C W N 356-I R (1929) Cal 816-119 I C 816.

—S. 5 (2)—Those personally cultivating are raiyyats. 32 C W N 1221-1 R (1929) Cal 646-118 I C 358.

—S. 5 (5)—When the land measures less than 100 bighas no presumption arises in favour of raiyyat land. A I R 1928 Pat 267-7 Pat 212-9 P L T 696-109 I C 526

—S. 5 (2)—Tenant given the right to bring land under cultivation is a raiyyat. A I R 1928 Pat 316-7 Pat 275-9 P L T 589-109 I C 461

—S. 5—Even persistent subletting of his holding by a raiyyat does not by itself make him a tenureholder. A I R 1928 Pat 603-7 Pat 566-109 I C 287

—S. 5—Rearing flower-garden is an agricultural purpose. A I R 1927 Cal 748-31 C W N 1007-103 I C 674

—S. 5—When the lease is equivocal other facts should be considered as for rebuttal of presumption real purpose of the tenancy is the test. A I R 1927 Cal 413-100 I C 466

—S. 5 (5)—In Bengal reclamation and cultivation by tenant himself is inconsistent with his being a tenureholder. A I R 1926 Pat 9-6 P L T 787-(1925) Pat 281-90 I C 895

—S. 5 (5)—Purpose and extent of tenancy determines whether a tenant is raiyyat or tenureholder. When the first is proved the second does not arise and when not proved the second is conclusive. A I R 1926 Pat 9-6 P L T 787-(1925) Pat 281-90 I C 895

—S. 5—The possession should be given up after the lease is over when bagat land is given for a fixed period and there was no indication about its being for agricultural or horticultural purpose. A I R 1926 Cal 354-90 I C 114

—S. 5 (5)—The grant was clear and known. If the terms are equivocal subsequent conduct is admissible. Intention may also be considered. A I R 1925 Cal 1238-85 I C 757

—Ss. 5 (3) & 48—It does not matter whether zarpeshgi & the kabuliyyat form one transaction. A raiyyat does not hold under a raiyyat within s. 5 (3) by giving a kabuliyyat in zaripeshgidar's favour. A I R 1925 Pat 118-3 Pat 266-(1924) Pat 4-78 I C 913

—S. 5 (5)—One occupying alluvial accretion without govt. settlement but paid rent was a tenant. Malikan settlement

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may be made with a third person by a revenue officer. A I R 1923 Cal 25=35 C L J 493=77 I C 261

—S. 5 (5)—Grant was ambiguous & not directly proved. Mode of user should be considered. Original tenant's transferee was recorded as tenure holder. Original tenants were presumed to be such. A I R 1923 Cal 25=35 C L J 493=77 I C 261

—S. 5—Where a sale of Non-transferable holding for residential purposes is recognised by landlord on payment of enhanced rent the purchaser takes under new settlement from landlord and the case is governed by T P Act A I R 1922 Cal 201=26 C W N 389=70 I C 166

—Ss. 6 and 7—Part of tenure created before Permanent Settlement held by assignee and at proportional rent, landlord confirming. Held the confirmation did not create a new tenure, and the rent payable was not liable to enhancement except in the circumstances specified in Cls. (a) and (b) to S. 6 of the B T Act. Continuity of transferable tenure is not affected by sub-division or by consolidation 36. C 287 com. 20 C W N 1002 =24 C L J 277=31 I C 707

—Ss. 6, 60 and 105—A tenure was created by a howla puttah in 1233 B S expressly making the tenure hereditary but with no clause about fixity of rent. Held that though the plaintiff had been realizing the same rent for a great many years, that did not by itself show that the rent was fixed and that, therefore the rent could be reassessed. A heritable tenure is not necessarily a mokurrari tenure. 52 I C 702

—S. 6. (a)—Tenures existed prior to Permanent Settlement and the fresh assessments were twice made. Held they may be due to increased area and the zamindar had not proved conditions justifying the increase. A I R 1930 P C 221=I R (1930) P C 329=34 C W N 793=126 I C 425

—S. 6—The Sec. is applicable to tenures held prior to the Permanent Settlement. A I R 1924 Cal 1015=39 C L J 605=84 I C 86

—S. 6 (a)—In absence of proof of local custom the Court should determine the conditions under which a tenure is held and whether it is held since Permanent Settlement. A I R 1924 Cal 133=38 C L J 121 =72 I C 979

—S. 7—There is nothing inherently wrong in referring to the principles embodied in S. 7 Bengal Tenancy Act, in trying to arrive at the correct conclusion, so far as the assessment of fair and equitable rent was concerned, in cases which do not come within the purview of the Act. 54 C L J 74=A I R 1932 C 41 (43)=133 I C 693

—S. 7—Tenure recorded in Record of Rights as non-mokurrari tenure—Enhancement of rent under S. 7 in respect of land-

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lord entitled to, unless tenure-holder establishes that tenure was in existence from date of permanent settlement. 55 C L J 91 =A I R 1932 C 632=A L R 1932 C 665

—S. 7 (3)—Rent within meaning of Hat-Income of-Not rent. 13 P L T 618 =A I R 1933 P 36

—S. 7—In a suit for assessment of fair rent under the general law there is nothing wrong in applying the principles of s. 7. 54 C L J 74=Ind Rul (1931) Cal 741=133 I C 693

—S. 7—To entitle the landlord to claim enhancement under s. 7 he must first prove that there is a customary rate prevailing in the vicinity. On succeeding in doing so, he can apply to the Court to allow enhancement as it thinks fair and equitable. A I R 1931 Cal 565=35 C W N 212=Ind Rul (1931) Cal 689=133 I C 561

—S. 7—If there is a customary rate of the *taraf* it means that that rate prevails throughout the estate including the tenures in it. A I R 1931 Cal 565=Ind Rul (1931) Cal 689=35 C W N 212=133 I C 561

—S. 7—Though (i) there is no presumption that a permanent lease should at the same time be mokarrari the express mention of the words mokarrari is not necessary to create a permanent lease at a fixed rent. Held (ii) that upon the true construction of the patta and kabuliya the tenure was held at a fixed rent and the landlord was not entitled to sue for enhancement of rent under s. 7 Bengal Tenancy Act. 58 C 1046=134 I C 1130— (following) 38 C L J 350

—Ss. 7 and 10—There is no basis for a sale under s. 7 until a certificate has been made by the Collector strictly in manner prescribed thereby. Such certificate has, after service of notice thereof under s. 10 the effect of a decree so far as regards the remedies for enforcing it. 23 C 775=23 I A 45 P. C.

—S. 7—Enhancement of rent—Sought under Chap. X whereupon the deft. asserted fixity of rent since the Permanent Settlement. Thereupon the plff. withdrew his application with liberty to sue afresh. More than twelve years thereafter the plff brought a suit under S. 7 on a contract embodied in some old kabuliya. Held the suit was not time-barred. 22 C W N 856=43 I C 59

—S. 7—Rent not settled by Rev. authorities. See Land Settlement Act S. 2. 19 C L J 614

—S. 7, 9—Reclamation—Applicability of—Enhancement of such cases—Provision for future enhancement. See Landlord and tenant. 37 M L J 578 (P. C.)

—Ss. 7, 30, 191 and 192—The landlord brought one suit for enhancement in respect



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of two etmans—Held that the plffs. and the defts, being the landlords and tenants of the etmans and having the same interest in each, the misjoinder in bringing one suit was merely technical and did not affect the merits of the case.

A temporary settlement holder is not by virtue of Ss. 191 and 192 precluded from exercising the ordinary powers of a landlord under S. 7 or S. 30.

Etmans are tenures and therefore S. 7 applied to the enhancement.

The rent of a tenure is always liable to enhancement unless the landlord has precluded himself by contract or is estopped by law and the mere fact that the parties have agreed that resort may be had to the putui regulation to recover arrears of rent cannot mean that the rent was permanently fixed. 23 C W N 945=30 C L J 140=54 I C 850

—S. 7—Absolutely accurate rate is impossible. A I R 1928 Cal 218=Ind Rul. (1929) Cal. 566=117 I C 678

—S. 7—Etmam tenure in Chittagong not being from the time of Permanent Settlement, rent can be enhanced. A I R 1928 Cal. 186=47 C L J 112=32 C W N 1233=107 I C 730

—S. 7 (1) and (2)—Jurisdiction to settle rent is not given by plff's failure to prove customary rate. A I R 1926 Cal 85=89 I C 190

See A I R 1926 Cal 432=88 I C 512

See A I R 1925 Cal 454=40 C L J, 585=85 I C 97.

—S. 7—Liability for increased rent exists when it is agreed that the holder should pay rent for lands besides those in the kabuliya which may be under him or which may be found in excess. 38 C L J 369=77 I C 954

—Ss. 7, 52, 105—Enhancement of rent cannot be decreed in addition when only excess rent for such area is claimed. A I R 1923 Cal 111=67 I C 1001

—S. 7—Question of customary rate not investigated in trial Court cannot be raised in appeal. A I R 1922 Cal 152=49 C 866=36 C L J 96=67 I C 775.

—Ss. 8 and 9—provisos 1, 2 and 3 and S. 30 (c)—Enhancement of rent—Improvement by landlord. See Landlord and tenant Rent Enhancement. 23 C L J 209

—S. 9—On dismissal of a previous enhancement suit for default, S. 9 or O IX C P C does not bar a second suit. A I R 1927 Pat 375=7 Pat 28=8 P L T 789=103 I C 615

—S. 11—Agricultural lease—covered by S. 11 is transferable 52 I C 19.

—S. 11, 12 and 17—Transfer of a

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portion of putui See B T Act S 195 (c) and Ss. 11, 12 and 17. 18 C W N 338.

—Ss. 11, 18 and 85—S. 85 which restricts the power of raiyats to grant under-leases must be read along with Ss. 11 and 18 and therefore it does not apply to the case of a raiyat holding at a fixed rate of rent. 54 I C 647.

—S. 18, 11 and 85—The transfers contemplated in Ss. 11 and 18 are transfers out and out and not partial transfers by way of sub lease. S. 85 does not apply to a Subraiayat granting an under-lease. There is no express provision for the grant of sub-leases by tenure holders and under-raiyats, but such sub-leases are recognised by the Act in the definitions of a tenure holder and a "under-raiyat" The T. P. Act has no application to a tenancy under the B T Act. 19 C W N 1110=28 I C 267.

—Ss. 11, 18, 85 and 167—A sub-lease by a raiyat holding at fixed rates is not governed by S. 85 of the B T Act. If the sub lease be perpetual, it is an encumbrance which could be avoided by execution purchaser even if he be the superior landlord before khas possession is taken. The interest of the lessee is a voidable and not a void interest. A sub-lease granted by a raiyat does not necessarily terminate on the death of the lessee. If, under the terms of the lease, the interest is continued after the raiyats death and if the lease is a valid lease under the law, that interest can be inherited. 57 I C 580.

—Ss. 11, 18 and 85, 170—Raiyat under permanent lease can grant a valid sub-lease such sub-lease is transfer within Ss. 11 and 18. A sub-lessee is entitled to deposit money under S. 170 to avoid sale of holding. S. 85 is subject to the provisions of S. 18 and does not apply where s. 18 applies 23 I C 925.

See also: 32 I C 503=19 C W N 1127.

—Ss. 11, 18, 85 and 170 (3)—The term "transfer" as used in S. 11 or S. 18 of the B T Act includes a lease. 19 C W N 1127=32 I C 503.

See also. 23 I C 925

—S. 11—A lease restricted transfer to lessor or his heirs by the lessee. It was held not absolutely against alienation & when the sale was held by the lessees right of re-entry was held to extend to lessor's representatives. A I R 1926 Cal 950=95 I C 252.

—S. 11—The Sec is consistent with. S. 10 T P Act. A I R 1926 Cal 451=42 C L J 490=29 C W N 1020=90 I C 451.

—Ss. 11 & 18, The Secs are in applicable when the holding is not proved to be with a fixed rate. A I R 1925 Cal 761=85 I C 636.

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—S. 12—The transfer of a portion of a tenure was complete upon registration although the land lord's fee was not paid and no notice of the transfer was given to him 16 C 642; 19 C 17; 12 C W N 478; 16 C W N 64 ref.

But where the transferee allowed his vendor to represent him to the landlord paying rent in the latter's name the landlord could frame his suit for rent without impleading the purchase and the sale in execution of the decree obtained therein passed the entire tenure. 20 C W N 355 =34 I C 251.

--S. 12—Where the provisions of S. 12 are complied with the transferor of a permanent tenure ceases to be liable for subsequent rent and any property which he has mortgaged as security for the rent is freed from the charge. 29 C L J 476=51 I C 909.

—S 12—Does not apply to a case of transfer by partition. 17 C W N 313=18 I C 479.

—S. 12—A transfer of a permanent tenure is complete as soon as the document is registered after which the transferor is discharged from liability to pay rent 16 C 642, 33 C 580 foll 16 C W N 64 ref 19 I C W N 112=28 I C 683.

—Ss. 12, 17 and 195 (c)—Transfer of a portion of patni—Landlord, if bound to recognise—Applicability. See Patni Regulations S. 5. 18 C W N 629.

—Ss. 12 and 63, Sch. II. Upon the transfer of a permanent tenure under S. 12 the transferee becomes by operation of law the tenant of the tenure, and the transferor ceases to be the tenant, though he is not thereby necessarily absolved from liability under the terms of the contract between him and the landlord. Such a transferee when he tenders rent as tenant is entitled under S. 63, to claim a receipt with his name thereon as tenant.

Where the landlord refused to grant such a receipt, Held, that there was a valid tender wrongly refused by the landlord. 19 C W N 112=28 I C 683

—Ss. 12 and 13 Landlord cannot rely upon decrees against original tenants ignoring the transferee. A I R 1930 P C 193=Ind Rul (1930) P C 326=126 I C 422

—S. 12—Transferee of permanent tenure having the alienation registered gave notice under s. 12 The transfer is incomplete. Subsequently it was sold under Public Demands Recovery Act under a certificate in which the transferee was not shown. The latter sale is void. A I R 1929 Cal 454=I R (1929) Cal 518=56 C 180=117 I C 534

—S. 12—Whether release is a transfer. A I R 1929 Cal 253=I R (1929) Cal 453=49

## BENGAL TENANCY ACT 8 OF 1885 (Contd.)

C L J 132=33 C W N 629=116 I C 165

—S. 12—The suit is proper when after transfer landlord knowing of other person's interest in tenure sued transferee for rent and the landlord is not bound to sue interested person as tenant. A I R 1929 Cal 258=I R (1929) Cal 453=49 C L J 132=33 C W N 629=116 I C 165

—S. 12—A lessee undertook all obligations under the lease and hypothecated the property as security. The lease was transferred. Though liability for rent passes, the lessee's liability to stand as security continues. A I R 1926 Cal 451=42 C L J 490=29 C W N 1020=90 I C 451

—S. 12—As soon as the deed is registered, a transfer of permanent tenure under s. 12 is complete. A I R 1923 P C 88=45 M L J 219=50 C 680=50 I A 155=39 C L J 26=28 C W N 517=18 L W 681=33 M L T 314=4 L R P C 159=73 I C 193

—S. 13—Under the Bengal Tenancy Amendment Act, I of 1903, mere non-payment of the landlord's fee does not invalidate a sale. The landlord, the evidence shows, was perfectly well aware of the transfer at the mortgage sale, and by bringing the suit against the former tenants only he was only claiming money which was not really rent, as arrears of rent fell due after the transfer of the holding and was not rent. After the transfer of the tenure the original tenureholder would no longer be liable for the rent and an effective decree, therefore, could only be obtained against the transferee. 36 C W N 922

—S. 13—An auction purchase of saramoiyan holding described as occupancy cannot recover dispossession when dispossessed by subsequent execution purchaser at a rent sale. A I R 1928 Pat 367=7 Pat 167=I R (1929) Pat 458=117 I C 650

—S. 13—Sale does not become void by failing to serve notice and pay landlord's fee. A I R 1926 Cal 844=94 I C 147

—S. 15—The mere failure of the heirs of a recorded tenure holder to cause their names to be registered in the landlord's sherista does not entitle the landlord to affect their interest by sale in execution issued in a suit against a person who to the knowledge of the landlord had no interest in the property but was simply registered in the sherista. The sale must be one which in justice and equity should operate as a sale of the tenure. 10 Cal 996, 32 Cal 177=59 I C 49

—Ss. 15, 16—Deposit of landlord's fee subsequent to institution of suit, sufficient 15 I C 542

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—Ss. 15, 16—Where the person becoming entitled to a permanent tenure by succession is the same person as the holder of a superior interest then it is not necessary for that person to serve on himself a notice of his succession to the inferior tenure or pay to the Collector a fee which he himself would have afterwards had to withdraw. The service of the notice mentioned in Ss. 15 and 16 is not in such a case a condition precedent to the institution of rent suits.

18 I C 254

Ss. 15 and 17—Notice of Succession, given to landlord, after decision of first court, but before hearing of appeal. Held, good 23 Cal 87 appl. 2 Pat L J 701=42 I C 838=2 Pat L W 181

—Ss. 15 and 16—For the bar under s. 16, two conditions must co-exist the plaintiff must have succeeded to the tenure and the rent sued for must be payable to him as the holder of the tenure. A I R 1928 Cal 220

—S. 15—When landlord has no notice of succession of heirs, decree in rent suit against some is not a rent decree. A I R 1927 Cal 825=103 I C 707

—Ss. 15 and 16—No notice of succession to a tenure—The successor cannot recover rent from sub-tenants, but his interest is not otherwise affected—Landlord must either proceed against the recorded tenants or real tenants in occupation of the tenure. A I R 1927 Cal 81=97 I C 489

—Ss. 15 & 16—One co-sharer may sue for his share when due to Ss. 15 & 16 some co-sharers are unable to recover rents. A I R 1925 Cal 297=40 C L J 504=85 I C 127

—Ss. 15 & 16—Only one tenant was recorded in the landlord's sherista. Others failing to do so either knowingly or negligently are presumed to allow the former to represent them except where the recording is not obligatory. A I R 1923 Pat 206=(1923) Pat 57=1 Pat L R 47=69 I C 565

—S. 15—The landlord cannot execute a decree against one heir, against others when the representation was not established. A I R 1921 Cal 434=26 C W N 138=63 I C 706

—S. 15—On abandonment of the tenure by two heirs, the rest were recorded. Decree against recorded tenant is a rent decree as the tenure is fully represented.

60 I C 510

—S. 15—Tenure-holders were not registered in the sherista. Sale under a decree against person with no interest to the landlord's knowledge does not affect them. 32 C L J 77=59 I C 49

—S. 16—S. 16 Bengal Tenancy Act applies where a person seeks to recover rent qua tenure-holder and not where the claim is based on a different or an additional right outside the section. Suits which are founded upon a kabuliya executed by

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the defendants after the plaintiffs had succeeded to the tenure are not hit by the said section. 35 C W N 1260

—S. 16—Khudkaht tenants i. e. resident and hereditary cultivators were protected from eviction while the paikhashts i. e. temporary non-resident cultivators were treated as tenants at will. In sales under Act VIII of 1865 the purchaser acquires property free from encumbrance but he is not entitled to eject khudkasht raiyats. S. 16 of the Act 4 C L R 165, 16 W R 207, 3 C W N 13 Dist 1920 Pat 181=1 Pat L T 258=56 I C 678.

—S. 16—Patni interest got by succession must be registered with landlord. Sale under Patni Reg. cannot be questioned by defaulter. A I R 1923 Cal 527=37 C L J 222=73 I C 482.

—S. 16—The Sec. is penal & applies to one claim rent not as purchaser but as tenure-holder. A I R 1921 Cal 305=34 C L J 119=65 I C 839.

—Ss. 17 and 18, 88—See Landlord and Tenant—Transfer of Tenant's interest. 21 C 433.

—S. 17—Patni taluk's purchaser at a rent sale takes it subject to the original conditions. A I R 1922 P C 48=15 L W 180=49 C 27=26 C W N 465=48 I A 499=41 M L J 638 (P C)=66 I C 674.

—Ss. 18, 73, 88—Where a raiyat at fixed rates under s. 18 sells portions of his holding to several purchasers, the landlord in suing for rent is bound, if he is aware of the purchases, to implead the purchasers as parties to the suit. (11 C W N 217, Fol). If a landlord omits to join a purchaser of whose purchase he is aware, the purchaser will not be bound by the rent decree, and will be entitled to bring a suit for a declaration that the decree is inoperative as against him. 9 Ind Cas 666.

—S. 18—'Transfer,' if sub lease is. See B T Act Ss. 11, 18, 85 and 170, 23 I C 925.

S. 18—'Transfer,' includes sub-lease. See B T Act Ss. 11, 18, 85 and 170 (3). 19 C W N 1127=32 I C 503.

Ss. 18 and 20—The grant of sub-lease by a raiyat holding at fixed rent is a transfer within the meaning of S. 18.

A person holding under a raiyat at fixed rent can acquire a right of occupancy. 54 I C 750.

—Ss. 18 and 85—The term 'transfer' as used in clause (a) of S. 18 includes a lease. S. 85 being subject to S. 18 a raiyat at a fixed rate can grant a permanent lease. 49 I C 515 foll 19 C W N 1110 dis.

—S. 18—refers to a particular class of tenancies, where, as S. 85 lays down the general rule; consequently the particular

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provisions must be taken to qualify the general provision. 19 C W N 1127 ref. 25 C W N 9.

—S. 18 and 85 (2)—S. 85 does not apply to a sub-lease creating a permanent tenancy created by a right holding at fixed rates. S. 18 Applies. In the case of a sub-lease created by an ordinary occupancy raiyat if the kabuliyat creating the tenancy be not admissible in evidence the tenancy may be established by proof of possession or payment of rent or otherwise. 10 I C 469 and 17 C W N 468 rel. 49 I C 515.

—S 18 A—Nothing contained in an instrument to which exception is taken, can be used as evidence as against the landlord of the permanence of the tenure mentioned in such instrument. It may be used for an entirely different purpose. 29 C L J 577=52 I C 825.

—Ss. 18 and 48—Tenant holding whole or part of settled land to cultivate is under-riyat. A I R 1929 Pat 372=10 P L T 369=Ind Rul (1930) Pat 145=121 I C 449

—S. 18—S 48 is subject s. 18 A I R 1927 Cal 878=104 I C 150.

—Ss. 18 and 48—Ss. 48 and 85 are subject to s. 18—Transfer, includes lease. A I R 1927 Cal 878=104 I C 150.

See also A I R 1921 Cal 603=25 C W N 9=61 I C 529.

—S. 18-B—Acceptance of fee by landlord is not admission of permanency of the tenancy of the transferee but amounts to a recognition of the transferee as a tenant. A I R 1925 Cal 761=85 I C 636.

—S. 18-B—Recitals in a gift-deed where landlord is not a party and relating to tenure cannot be admitted in evidence against landlord. A I R 1922 Cal 185=35 C L J 182=68 I C 1003.

—S. 19—Amendment does not affect tenant's non-occupancy. A I R 1927 Cal 748=31 C W N 1007=103 I C 674

The rights acquired before the B T Act are saved by S. 19. 18 C W N 358=18 C L J 536=18 I C 377.

—S. 19—Under S. 19 under raiyat can be ejected on the ground of the expiration of a written lease, or by notice to quit if he holds under a lease for an indefinite time. A raiyat lessor cannot eject arbitrarily except for non-payment of the rent. He cannot eject the under-raiyat by giving him notice under S 49 (b) 6 C W N 377 followed. 18 I C 82.

—Ss. 19 and 20—Any person holding in good faith as a cultivating ryot under a temporary manager, proprietor or even lease holder would acquire occupancy rights therein after twelve year's cultivation

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unless he is evicted by legal process before 12 years.

Therefore occupancy rights acquired when the estate was in the lands of a Hindu widow cannot be questioned by the reversioners after her death. 37 I C 350.

—Ss. 19 and 181—Ghatwali land—Occupancy right, acquisition of in-B T Act S 181—Effect of not to take away such rights See B T Act S 181. 27 C L J 556=22 C W N 763=46 I C 483.

—S. 19—Occupancy rights got before 1885 are protected. A I R 1927 Cal 463=44 C L J 271=98 I C 852.

—Ss. 19, 20 to 21—Occupancy right are inherent and cannot be got by contract or grant. A I R 1923 Pat 276=4 P L T 135=(1923) Pat 65=1 P L R 111=1 Pat 414=71 I C 902.

—S. 20 (1)—S 20 (1) (a) is not retrospective in effect so as to apply to pending proceedings. A I R 1931 Cal 321=52 C L J 597=35 C W N 125=58 C 817=131 I C 398.

—S. 20—In the province of Behar and Orissa the word kaimi denotes a settled raiyat and not a raiyat at fixed rent. 5 P L J 387=1 Pat L T 690.

—Ss. 20 and 21—Lessee of 6 lands expressly stipulating to have the lands to the khas possession of the plff. Occupancy rights acquisition of in such case. See Orissa Tenancy Act. Ss. 154 and 232.

3 Pat L J 475.

—S. 20 and 21—See Bengal Rent Recovery Act, s. 6. 20 I C 394=17 C L J 585.

—Ss. 20, 21 and 116—Lease by guardian for 5 years without sanction of court is voidable by minor.

Where a lessee holds over after the expiry of the term and remains in occupation he acquires the status of a non-occupancy raiyat. This status cannot be retrospectively affected by the subsequent extension of S. 116. 1 C L J 310=17 C L J 585, foll 21 C L J 644=30 I C 58.

—S. 20 (1)—Trespasser bonafide believing himself to be owner and settling land with a raiyat—Raiyat holding more than 12 years is protected from ejectment against purchaser of the mohal. 52 I C 699.

—S 20 (2)—The interest possessed by a non-occupancy raiyat in his holding is heritable; 24 C. 207 overruled.

A non-occupancy raiyat does not incur a forfeiture by his parting with the possession of a part of his holding.

S. 26 of the Bengal Tenancy Act deals with the right of occupancy and not of a holding. 41 C 1108=18 C W N 828=19 C L J 505=25 I C 562.

—S. 20 (7)—Possession under a lease as a thekdar and not as a cultivating tenant

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does not confer occupancy rights under the Act. 35 I C 622.

—S. 20 (7)—Possession for eleven years before enchancement of rent.

There is a presumption of possession for 11 years under Cl. 7 of S. 20. 28 I C 380.

—S. 20—Occupancy right. See Landlord and Tenant. 1 Pat L T 184=57 I C 323.

—S. 20 (1-A)—Sub-section is not retrospective. A I R 1931 Cal 321=35 C W N 125=52 C L J 597=131 I C 398.

—Ss. 20 (5), 44 (c) & 182—Occupancy holding was sold for rent arrears and raiyat had only homestead. After one year the land was settled with the same for limited period under S. 182 he can be ejected after the expiry of period even from homestead. A I R 1930 Pat 224=11 P L T 107=1 R (1930) Pat 45=120 I C 477.

—S. 20 (1-A)—Possession for a long period would be considered as continuous for 12 years, although it is declared to be a village after 12 years period began. I R (1929) Cal 214=48 C L J 386=114 I C 150.

—S. 20—Land must be held in a village to acquire occupancy rights. A I R 1925 Cal 336=40 C L J 167=84 I C 735.

—S. 20—Lessee of zemai land inducted as a tenant on the land. His possession of 12 years completes occupancy right. A I R 1924 Pat 207=2 Pat 913=(1924) Pat 191=5 P L T 653=81 I C 321.

—S. 20—Settled raiyat must hold raiyati land continuously though as homestead for 12 years. It is not necessary to be the same. A I R 1924 Cal 367=72 I C 640.

—S. 20—Kaimi raiyat is not one at fixed rent but a settled ryot. (1921) Pat 358=5 P L J 387=1 P L T 690.

—Ss. 21, 44, 45, 182—The land was let for three years. Upon the expiry he was allowed to hold over and ten years later the landlord served him with notice to quit and a suit for ejectment was filed the suit was barred under Ss. 44 and 45.

**Obiter dictum**—The B T Act applies to the homestead of a raiyat although he is not a resident raiyat and is not a raiyat of the same landlord as the landlord of the homestead land. 4 C L J 332; 10 C W N 944 rel on. 11 Ind Cas 139.

—Ss. 21 and 182—If a settled raiyat acquires other land though of another landlord to create a homestead thereon then under the joint operation of Ss. 21 and 182 he acquires occupancy rights in such lands. (1919) Pat 235=50 I C 8.

—S. 21—Settled Raiyat See B T Act Sec. 37 45 I C 25.

—S. 22—See B T Act Raiyat Meaning of. 4 Pat L W 428=45 I C 705.

—S. 22—See Landlord and Tenant Occupancy Right 19 C W N 246=18 C L J 262=20 I C 698.

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—S. 22 (1)—Landlord purchasing raiyat holding. See B T Act S 85 Subletting. 19 I C 652=17 C W N 860.

—S. 22—A co-sharer proprietor may let a third person if he was inducted on the land as a tenant and not as a proprietor. 4 Pat L J 540=53 I C 110.

—S. 22—If a co-sharer landlord purchases the occupancy holding on behalf of the other sharers the whole tenancy is merged. In the case, however, of a purchase by a co-sharer landlord individually the non-occupancy right can be kept alive by the purchaser. 34 I C 75.

—S. 22—A raiyat holding land under a tenure-holder and acquiring a lease of the tenure, is no raiyat, and so he must restore its possession after expiry of the lease. 20 C W N 890=36 I C 178.

—S. 22—Purchase by co-sharer landlord of non-transferable occupancy right, effect is that such right ceases to exist and other co-sharers have right to joint possession with the purchaser.

The case in 27 C 473, has not been overruled by any subsequent decision of a Full Bench. 15 I C 524 See also 12 I C 67.

—S. 22—Purchase of occupancy holding by co-sharer landlord—Sub lease to the deft, before the B T Amend. Act. Held that the deft. was an under raiyat and liable to be ejected on the expiry of the lease. 32 C 386 foll 38 I C 534.

—Ss. 22 and 49—In order that a sub-lease by a raiyat may be binding upon his superior landlord there must be either a registered lease for a term not exceeding nine years or the consent of the landlord. The mere issue of a notice under S. 49 of the B T Act does not mean a recognition by the landlord of the under-tenant as his immediate tenant. 50 I C 37.

—Ss. 22, 49, 85, 161 A and 167—A sub-tenant is not entitled to notice under S. 167 under S. 85, if he be treated as an under raiyat. The purchaser of a Taluk does not step into the shoes of the occupancy raiyat nor is there a merger within S. 22. His right to eject an under-raiyat arises on the cessation of the interest of the occupancy raiyat and a notice under S. 49 is necessary. sub tenancy in S. 161 A means a tenancy directly under the tenancy which has been purchased. 25 I C 741.

—S. 22—Though the raiyat's right merges into that of the superior landlord by the sale the right of an under-raiyat remains alive till he is evicted by law according to the proviso of S. 22. 29 I C 437.

—S. 22 Expln—Explained. See Mad Est. Land Act, Ss. 8 Cls. (1), (2) and 6 (b). 31 M L J 354.

—S. 22 (2) | The Plff. an occupancy



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raiyyat, purchased the superior tenure. Thereafter A, who was an under-raiyyat transferred his interest to B. The Plff. sued to eject B. Held that the occupancy right ceased to exist but not the holding itself and A continued to be an under-raiyyat under the purchaser. An under-raiyyat may, under certain circumstances, acquire an occupancy right, but that right is not transferable except by custom or local usage.

19 C W N 246=18 C L J 262=20 I C 698.

—S. 22 (2)—Where a co-sharer land lord purchases a non-transferable occupancy jote, his co-sharer is entitled to khas possession of the jote jointly with the purchaser co-sharer, on the ground that the jote must be treated as having been abandoned.

13 I C 336.

The decision confirmed on appeal, 25 I C 546.

—S. 22 (2)—Purchase of non-transferable occupancy holding by co-sharer landlord—No right to exclusive possession—S. 22 (2) applies only to a case of transferable occupancy holding 27 Cal 473 appl. 43 I C 467.

—S. 22 (2)—Purchase of occupancy by landlord at rent sale—No merger. See B T Act, Ss. 49, 85 and 167. 43 Cal 164.

—S. 22 (2)—Purchase of occupancy holding by co-proprietor—He does not give it up on partition and allotment of the holding to another co-proprietor—He can continue possession on payment of rent. A I R 1921 Pat 341=2 P L T 163=58 I C 955.

See also A I R 1929 Cal 253=33 C W N 161=117 I C 536

(He holds as tenure-holder and not as raiyyat).

See A I R 1923 Cal 210=36 C L J 89=70 I C 68 (purchase after partition.)

See A I R 1922 Pat 193=3 P L T 13=65 I C 586.

See A I R 1922 Pat 62=(1922) Pat 55=3 P L T 2=65 I C 281.

See also 2 P L T 163=58 I C 95.

But See 59 I C 87 (Pat) (Purchaser not entitled to possession it is allotted on partition to another co-sharer.)

—Ss. 22 (2) and 42—The Eastern Bengal and Assam Act I of 1908. S. 10, cl. b which amends S. 22 cl. 2 of the B T Act, has no retrospective operation. 15 I C 705.

—Ss. 22 (2) and 85—A landlord purchasing raiyyati interest in execution of a money decree cannot treat the under-raiyyat as a mere trespasser.

As regards clause (2) of S. 22 of the B T Act the change made by the Amending Act of 1907 has not altered the law as previously understood. 44 I C 922.

—S. 22 (3)—Thiccadar agreed in the

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lease of 1905 to give up possession of occupancy holdings purchased at an auction-sale. On obtaining purchase money from malik and upon expiry of the lease, the Zemindar sued the thiccadar for ejectment. Held that prior to Amendment of 1907, s. 22 (3) does not bar the purchase of occupancy right by a thiccadar and so he acquired such rights in the lands bought before the lease. The amendment act does not take away vested occupancy rights. Under s. 178 B T Act agreement to give up vested occupancy rights in the lease of 1905 is void. Under s. 22 (3) the thiccadar could not get occupancy rights during the lease contrary to the lease. Occupancy right does not merge under s. 22 (3). The ejectment claim as bad as plff. did not offer to pay purchase money. The debts were occupancy raiyyats of lands purchased after the lease was over at rent-sale accruing due during the lease. 5 Pat L J 302=(1920) Pat 168=1 Pat L T 310=56 I C 366

—S. 22, (3)—When an ijaradar purchases an occupancy holding, the occupancy right comes to an end but the holding itself does not cease to exist. Therefore, the purchaser of a holding from an ijaradar, becomes a raiyyat. 13 I C 636

See also 15 C L J 647 infra

—S. 22 (3)—An Ijaradar could purchase an occupancy right from a raiyyat during the ijarah prior to the Amend. Act (1907), he himself being competent to consent to the transfer. (1920) Pat 11=1 Pat L T 533=55 I C 59

—Ss. 22 (3), 49—An ijaradar who has purchased an occupancy holding acquires it as a non-occupancy holding under S. 22 (3) and if he settles the same with another he settles it in the character of a raiyyat and not as an ijaradar. The person settled with is an under raiyyat and is liable to be ejected after his tenancy has been terminated by a notice to quit under S. 49. 15 C L J 647=13 I C 598

See also 13 I C 636 supra

See also 11 I C 389

—Ss. 22 (3) and 180 (1)—Chur land held continuously for over twelve years, but during part thereof as ijaradar also—Held, that the plaintiff acquired occupancy right in the land under S. 180 sub S. (1) of the Act. The effect of the holding of the ijarah during part of the period discussed 8 B L R App 95; 25 W R 503; 18 C 45; 18 C 121, 123 referread to 17 C W N 881=19 I C 635

—S. 22 (1) and (2)—Both merge when a person buys proprietary interest and also lessee's inferior rights. A I R 1928 Pat 273=107 I C 819

See A I R 1926 Cal 158=90 I C 816

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—S. 22 (2)—It is applicable only to transferable holdings. A I R 1929 Pat 185 = (1929) Pat 481=19 P L T 204=8 Pat 650= 118 I C 129

—S. 22 (2)—Amendment Act has no retrospective effect. There is no merger when a co-sharer landlord bought raiyati holding prior to that Act. A I R 1930 Cal 109=Ind Rul (1930) Cal 419=33 C W N 1081=124 I C 323

See 65 Ind Cas 584 (Cal) [Case of tenure-holder buying raiyati interest.]

—S. 22 (2)—Defts. must prove that they are raiyats and not under-raiyats when they allege it, specially when they admit that it was under-raiyati originally. A I R 1930 Cal 111=I R (1930) Cal 631= 84 C W N 51=51 C L J 193=125 I C 855

—S. 22 (2)—Not the tenancy-holding but merely the occupancy ceases when the occupancy is transferred to a co-proprietor or permanent tenure holder. A I R 1930 Cal 111=Ind Rul (1930) Cal 631=34 C W N 51=51 C L J 193=125 I C 855

See A I R 1930 Cal 109=33 C W N 1081=124 I C 323 (Purchaser a patnidar).

See A I R 1921 Cal 429=26 C W N 100=63 I C 892

—S. 22 (2)—The sec. applies to all sub-leases effected after the amendment Act whether occupancy right was obtained before or after 1908 or 1885. A I R 1927 Pat 172=8 P L T 69=102 I C 386

—S. 22 (2)—Co-sharer purchased and sold raiyati jote and he was allowed to be in possession by the agreement which within S. 22 (2) is a sub-lease. A I R 1927 Pat 172=8 P L T 69=102 I C 386

—S. 22 (2)—The sec. is applicable to land in which the occupancy right was transferred to a proprietor after he became a co-proprietor or permanent tenure holder. A I R 1927 Pat 32=10 P L T 91= 97 I C 708

—S. 22 (2)—Status of a co-sharer does not change when he gets a part of the proprietary right on partition and he purchases the whole holding at rent sale. A I R 1926 Pat 580=8 P L T 20=97 I C 68

—S. 22 (2)—After a co-sharer purchased a raiyati there was a partition and bakasht land was allowed to another co-sharer's takhta. Purchasing co-sharer's privileges are not taken away by the partition. A I R 1926 Pat 263=5 Pat 281= 7 P L T 170=93 I C 1001

—S. 22 (2)—A co-sharer bought occupancy holding and then ceased to be a co-sharer. The possession passing to one acquiring his interest. A I R 1925 Pat 547=7 P L T 87=3 P L R 138 (Oiv.)=89 I C 232

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—S. 22—Purchaser does not become a raiyat by purchasing a portion of another's raiyati. A I R 1924 Pat 780= (1924) Pat 268=5 P L T 616=84 I C 130

—S. 22—It is no merger when occupancy raiyat takes permanent lease. A I R 1923 Cal 373=76 I C 382

—S. 22 (2)—A co-sharer landlord does not get any title by purchasing non-transferable occupancy holding. His lessee is raiyati and cannot be ejected under S. 49. A I R 1923 Cal 701=50 C 749=27 C W N 759=75 I C 447

—Ss. 22, 86 & 87—'Acquire' in s. 22 implies accrual by statute. It is sale when occupancy right is transferred to izardar in lieu of takkavi loan. A I R 1924 Pat 392=72 I C 705

—S. 22—Collectorate partition was made of Bakasht lands. Except where some other interest exists co-sharer's existing possession should not be questioned. A I R 1922 Pat 354=1 Pat 600=3 P L T 419 =67 I C 530

—S. 22 (2)—The words 'Kasht' or 'bakasht' are used to understand the possession by the proprietors and the tenants. A I R 1922 Pat 193=3 P L T 13=65 I C 586

—S. 22 (2)—Though one co-sharer purchases a part of the holding, a co-sharer's right to sue for the whole rent continues. 62 I C 47 (P)

—Ss. 22 (3) & 49—Izardar was authorised to buy the holding at rent sale & to sub-let which was done to the old tenant himself. After his death his heirs were inducted upon the land. They held as landlord's under-raiyats and cannot be ejected without notice under s. 49 (b) after the ijara period is over. A I R 1921 Cal 327 =33 C L J 575=60 I C 449

—S. 22—A co-sharer landlord is a raiyat when he purchases raiyati holding before the amendment Act. 59 I C 337 (Cal)

—S. 22—When there is merger, third person's rights remain unaffected. A I R 1921 Pat 373=(1921) Pat 357=2 P L T 525

—S. 22 (1)—S. 22 gives a pre-existing doctrine of merger. There is a merger when an occupancy tenant who is also a co-landlord gets on partition the interest of a sole landlord in the whole or part of the occupancy holding. A I R 1921 Pat 373=2 P L T 525=(1921) Pat 357

—S. 23—The purchaser of a portion of a non-transferable holding cannot successfully resist an eviction suit brought by a co-share-landlord. A I R 1931 Cal 576=Ind Rul (1931) Cal 590=35 C W N 109=132 I C 638

—S. 23—Chapter IX—Effect of—No repeal of the Bengal Embankment Act—Beng. Embankment Act Ss 6 and 76 (b). 29 C L J 328 =46 C 825=23 C W N 572=50 I C 469

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—S. 23—A raiyat holding at a fixed rate of rent has the right to cut and appropriate even such timber as were growing on the holding at the time of his lease. 21 C W N 636=38 I C 49

—S. 23—Right of the tenants to cut trees under s. 23 does not include the right to take timber of the trees unless there is a local custom to that effect (1920) Pat 129=1 Pat L T 143=56 I C 126

See also 41 I C 679

See also 41 I C 769

—S. 23—Held, that the onus of proving the custom as set up by the tenant regarding cutting and appropriating trees rested upon him, both in a civil and criminal case. 1 Pat L T 318=57 I C 273=21 Cr L J 609

—S. 23—S. 23 applies to cases where the land is made permanently as well as temporarily unfit for the purposes of tenancy. An occupancy holding is made unfit for tenancy if a portion is used for establishing a market. 24 C L J 85=37 I C 249

—Ss. 23, 25 cl (a), 76—The plaintiffs instituted a suit for ejectment under cl. (a) of S. 25. A suit for rent was subsequently commenced in respect of a period subsequent to the alleged forfeiture:—

Held, that there was no waiver 10 C L J 187 *referred to*.

To succeed in an action under S. 25 cl. (a) of the B T Act, what has to be considered is the effect of the act upon the entire land comprised in the tenancy.

Therefore, where a holding comprises 66 bighas and the tenants sub-let 4 bighas to an under-lessee who excavated a tank on 2 bighas, and it was found that the tank had not rendered the land of the tenancy unfit for the purposes thereof, but was a practical necessity.

Held, that the raiyat could not be ejected under cl (2) of S. 25. 15 I C 497.

—S. 23—A Sisum tree does not bear any fruit and it is grown only with a view to its being cut when ready for use and no mischief can be committed by cutting such a tree or its branch unless it can be shown that the tree or branch cut was not fit for the use for which it was cut. 21 W R 38 (Cr.) 4 P L W 291 *fol.*

Where a tree is cut down by the tenant under S. 23 motive is immaterial 5. Pat L W 114=46 I C 409=19 Cr. L J 729.

—S. 23—Tenure-holder—Right to cut the trees on the land. Penal Code S. 426 44 I C 451=4 Pat L W 291

—S. 23—Ejectment See. 15 I C 497

—Ss. 23, 25 and 155—The construction of a public cremation ghat with accessory plinths and sheds on an occupancy holding is a misuse and a suit for ejectment with

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an alternative prayer for an injunction will lie. 57 I C 758

—Ss. 23 and 76 (f)—An occupancy raiyat can build a pucca dwelling house on a small portion of his holding used for gardening 31 C 1941 *fol.* 37 I C 999

—S. 23—A co-sharer to whom a portion of a non-transferable occupancy holding is allotted on partition can eject the purchaser of the same. 35 C W N 109

—S. 23—Tenant is entitled to growing timber on the land during his occupancy, and his consent must be obtained by the landlord desiring to cut the trees. A I R 1930 Cal 240=33 C W N 839=57 C 344=*ind* Rul (1930) Cal 316=123 I C 316

—S. 23—s. 23 permits excavations not injuriously affecting landlords' right to receive agreed rent. A I R 1924 Cal 56=50 Cal 694=75 I C 53

—Ss. 23 and 178 (3), (b)—Agreement by occupancy raiyat to give up his right to cut down trees is illegal. A I R 1927 Cal 268=31 C W N 192=100 I C 7

—S. 23—Occupancy holding is generally non-transferable. A I R 1929 Pat 222=10 P L T 129=8 Pat 439=*ind* Rul (1929) Pat 294=116 I C 518

—Ss. 23 and 178—Tenant cannot contract to grow a particular crop like indigo on a portion of the holding for landlord's benefit if such obligation was not fastened to the tenancy before 1885. A I R 1922 Pat 171=3 P L (1922) Pat (Sup.) 177=67 I C 49

—S. 23—In absence of a contract to the contrary, raiyat has right to appropriate water and fish on the leased land. A I R 1922 Pat 9=3 P L T 53=(1922) Pat (Sup.) 195=64 I C 346

—Ss. 23, 86 and 87—Where several tenants hold separate portions of a holding, no separate holdings are formed. Landlord is not entitled to re-enter on a transfer of a portion of a non-transferable occupancy holding. 25 C W N 717=64 I C 330

—S. 24—Non-transferable holding—Transferee of entire—Representative of tenant if. Quere. 11 P 798=13 P L T 567=A I R 1932 P 330 (331)=I R 1932 P 286=140 I C 3=A I R 1933 P 26 (F B).

—S. 24—Although an occupancy tenant could surrender the holding with the consent of the landlord, he could not force the landlord to re-enter upon the land and escape his obligation to pay rent merely by transferring the land to a third party. 11 P 798=13 P L T 567=A I R 1932 P 330 (332)=I R 1932 P 286=140 I C 3=A I R 1933 P 26 (F B).

—Ss. 24 and 158 (b)—Non-transferable holding—Transfer of entire—Rent of

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holding after—Decree obtained by landlord against original tenant for—Rent decree and not money decree—Sale of holding in execution—Purchase by landlord at—Right acquired by—Eviction of transferee by him—Right of. 11 P 798-13 P L T 567- A I R 1932 P 330-I R 1932 P 286-140 I C 3=A L R 1933 P 26 (F B.)

—Ss. 24 and 158 (b)—Non-transferable holding—Transfer of entire—Rent of holding after—Liability of original tenant for. 11 P 798-I R 1932 P 286-140 I C 1-13 P L T 567-A I R 1932 P 330- A L R 1933 P 26 (F B.)

—S. 24—Plaintiffs claiming in a suit to recover rent at rates agreed upon by all utbandi tenants, are debarred in appeal from claiming fair and equitable rent. A I R 1929 Cal 614-50 C L J 299-34 C W N 127-Ind Rul (1930) Cal 509-125 I C 285

—Ss. 24 and 27—Where plaintiff fails to prove his rate of rent, he can only be given rent at a rate admitted by defendant. A I R 1930 Pat 485-Ind Rul (1930) Pat 343-123 I C 615

—S. 24—When a fair and equitable rent of kabil lagau lands is assessed, back rents can be decreed as damages for use. A I R 1929 Pat 347-10 P L T 281-Ind Rul (1929) Pat 414-117 I C 206

—S. 25—Where a tenant unauthorisedly mortgaged the holding and puts the mortgagee in possession, that by itself cannot work a forfeiture. There must be something in the nature of surrender or abandonment on the part of the tenant. 20 C 590, 33 C 1219, 43 C 1091 refer. The landlord is not bound by the transfer and may demand rent from the tenant. 40 Cal 870-22 I C 416

S. 25—Express denial of landlord's title made before the ejectment suit only entails forfeiture. 37 I C 935 (Pat)

—Ss. 25 and 136 A—Landlord and tenant—Forfeiture by denial of title, what amounts to. T P Act S 111 (g) 37 I C 935

—S. 25 (a)—Ejectment. B T A S 23 15 I C 497

—S. 25 (f) (2)—Transferee of occupancy holding cannot erect building on the property, even if he has paid his purchase money into Court. A I R 1930 Cal 547-Ind Rul (1930) Cal 751-126 I C 559

—Ss. 25, 86 and 87—Ss. 25, 86 and 87 provide three ways to landlord for obtaining possession of occupancy holding. 97 I C 302 (Pat)

—S. 25—The Patni Regulation (1819) protects occupancy tenants. A I R 1925 Cal 1169-87 I C 32

—S. 25—Provides for execution of a decree for ejectment. A I R 1921 Cal 492-25 C W N 658-63 I C 236

—Ss. 25 and 155—Ejectment in execution of a decree under S. 25 does not follow unless the Compensation is not

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paid or the misuse is not remedied. 25 C W N 658-63 I C 236

—S. 26-D—A purchaser of a tenancy purporting to be an occupancy holding cannot raise the question that what he purchased was a mokurari tenancy and not an occupancy holding. A I R (1931) Cal 483 (1)-53 C L J 414-Ind Rul (1931) Cal 504-35 C W N 114-131 I C 856.

—S. 26-F—In a case in which an application for preemption under S. 26-F was made by one of three co-sharer landlords, it was stated that the other two persons were co-sharer landlords and their shares and interest were also specified. But the said co-shares were not made parties defendants to the proceedings that were to follow, nor was the application framed in such a way as to give them an opportunity to join in the application as co-applicants. Held, that such an application was not competent and was not fit to be entertained at all in view of S. 188. 37 C W N 89.

—S. 26-F—Homestead within scope of—S. 182 not effective to bring—Order allowing landlord's right of pre-emption in case of—Bad for want of jurisdiction and revisable under S. 115 C P C 36 C W N 788-A I R 1932 C 857-139 I C 765- I R 1932 C 649

—S. 26-F—Landlord's rights of purchase under—Exercise of—Condition precedent to—Payment of balance of landlord's transfer-fee and compensation allowed is not. 59 C 554-35 C W N 1078-136 I C 900-A I R 1932 C 226-I R 1932 C 252-A L R 1932 C 937

—S. 26-F—Co-sharer landlords not named in notices served through the Collector have pre-emption right in respect of the occupancy holding sold under s. 26 (c) or s. 26 (e). Limitation for exercise of right by them is a reasonable time after their knowledge of the sale—Two months period fixed by S. 26-F inapplicable to them. 59 C 15-35 C W N 688-53 C L J 578-136 I C 871-A I R 1932 C 289-I R 1932 C 278-A L R 1932 C 342

—S. 26-F—Period of limitation—In applicable to cases in which the landlord makes an application for pre-emption but notices are not issued under S. 26—C or 26-E. 59 C 554-35 C W N 1078-136 I C 900-A I R 1932 C 226-I R 1932 C 252- A L R 1932 C 937

—S. 26 F & C—Notice issued on landlord under S. 26-C—Landlord seeking to exercise right of pre-emption on—Court cannot in such a case go into the further question as to what happened between the parties after the issue of the notice under S. 26 (c). 36 C W N 486-139 I C 403-I R 1932 C 622-A I R 1932 C 625

—Ss. 26-F & 26 J—Applications at same time under—Allowable. 59 C 554-35 C W N 1078-136 I C 900-A I R 1932 C 226-I R 1932 C 252-A L R 1932 C 937

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—S. 26-F (6) Dispossession by land lord put into possession under—Application under O 21, r. 100 C P C in case of—Maintainable. 36 C W N 790

—Ss. 26-F & 182—S. 182 makes the position of the raiyat or the under-raiyat with regard to the homestead dependent not upon his position with regard to his holding, but upon the status of the landlord of the homestead. 36 C W N 788=A I R 1932 C 857-139 I C 765-I R 1932 C 649.

—S. 26-F—Slight discrepancies in description of property in an application for pre-emption as compared with notice under s. 26-C, cannot defeat the application. 54 C L J 231-35 C W N 656.

—S. 26-F-(4) (a)—Purchaser of share pending pre-emption proceedings is entitled to join as co-applicant for preemption if purchase is within period specified in s. 26-F (4) (a)—Ordinarily co-sharer landlords are entitled to pre-empt in equal shares, in any case according to their interest—Unequal decision justifies interference in revision. 35 C W N 1058.

—Ss. 26-F, 26-J Application under s. 26-J must be made first in order to make S. 26-F applicable but landlord is not bound to wait until payment of transfer-fee for exercising right to pre-empt. 35 C W N 1078.

—S. 26 (J)—Scope of—recovery of landlord's fee and compensation—application for under S. 26-J—whether maintainable. A L R 1933 C 249-60 C 289-36 C W N 924-141 I C 842=A I R 1933 C 283.

—Ss. 26-J (2), 26-C and 26-E—application for recovery of balance of transfer fee no suit to establish occupancy holding of tenant necessary—remedy of tenant. A I R 1933 C 448.

—S. 26-J—Application under—Condition precedent to provisions of 26-F being applicable to case to which provisions of S. 26-J (1) applies to. 59 C 554-35 C W N 1078-136 I C 900=A I R 1932 C 226-I R 1932 C 252=A L R 1932 C 937.

—S. 26-J—For the purposes of S. 26-J the landlord has only got to show in a summary proceeding that the holding is a raiyati holding in order to be able to recover the balance of the transfer-fee to which he is entitled under S. 26-C or S. 26 E This, of course, will not debar any subsequent suit by the tenant to establish that the tenure is a permanent tenure or rent-free tenure, and if he establishes that fact in a subsequent suit he will be entitled to recover the balance of the landlord's transfer fee which he has paid under S. 26-J of the Act. 36 C W N 847.

—S. 26-J—Application for recovery of landlord's fee and compensation as provided by—Competent—Suit for purpose not necessary. 36 C W N 924.

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—S. 26-J (3)—Two months period provided in Merely a provision fixing the time within which the landlord may apply to pre-empt. 59 C 554-35 C W N 1078-136 I C 900=A I R 1932 C 226-I R 1932 C 252=A L R 1932 C 937

—S. 26—Applicability to nonoccupancy See B T Act, S. 20 cl. (3) 18 C W N 828-41 Cal 1108-19 C L J 505-25 I C 562 (F B)

—S. 26—Occupancy holding if may be disposed of by will. 27 I C 352-18 C W N 1294.

—S. 26 and 178 Cl. 3 (d) Ss. 26 and 78, cl. (2) do not warrant the view that a non-transferable holding can be devised. 42 Cal 254-21 C L J 187-18 C W N 1290-27 I C 235.

—S. 26—On failure of heirs of last male holder, tenure reverts to the landlord A I R 1930 Pat 407-10 P L T 823-9 Pat 515=Ind Rul (1929) Pat 438-117 I C 639.

—S. 26—Where occupancy raiyat leaves an heir, suit for khas possession under S. 26 mast fail. A I R 1927 Cal 86-44 C L J 282-98 I C 835.

—S. 26—Where occupancy holding reverts to the landlord for want of heirs, a usufructuary mortgagee under a mortgage by widow of the last male holder, is not entitled to retain possession as against the landlord unless the holding was transferable and the transfer was for legal necessity. A I R 1930 Pat 407-10 P L T 823-9 Pat 515=Ind Rul (1929) Pat 438-117 I C 630.

—S. 26—Disposal of occupancy raiyat by will is valid unless avoided by the landlord. A I R 1931 Cal 244-34 C W N 1146-131 I C 25

—S. 26—Occupancy right of under-raiyat is not heritable by statute but may be by custom. A I R 1925 Cal 956-29 C W N 733-90 I C 844.

—S. 26—On heirless occupancy raiyat dying intestate, holding reverts to landlord subject to encumbrances created by tenant A I R 1925 Pat 597-(1925) Pat 206-4 Pat 774-7 P L T 75-89 I C 170.

—S. 26—Occupancy right of under raiyat is inheritable. A I R 1922 Cal 85.

—S. 26—Rights of under-raiyat are not transferable. 61 I C 200 (Cal).

—S. 26 (d)—Landlord's right of repurchase can not be allowed to be defeated at the instance of the purchaser of occupancy holding denying nature of tenure 35 C W N 114=Ind Rul (1931) Cal 504-131 I C 856.

—S. 27—Rent for time being payable fair and equitable—Effect of section as to Onus of proof not to be thrown on landlord 13 P L T 237-138 I C 312 (2)=I R 1932 P 175=A I R 1932 P 203=A L R 1932 P 333.

—S. 27—Dispossession by some of the co-sharers and not by the whole body



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of landlords Section not applicable. 32  
1 C 757.

--Ss. 27 and 37—Suit for enhancement lies against auction purchaser of estate—Rent assessed between proprietor and tenant is presumed to be fair and equitable even against purchaser. 49 1 C 959.

--Ss. 27, 29 and 30 to 35—Under S. 27 the burden of proof is on the landlord to show that the rent claimed was fair and equitable.

The provisions in Ss. 30 to 35 are not conclusive tests for the purpose of ascertaining whether the rent of a raiyat is fair and equitable.

--S. 29—Is not a bar to the enhancement of two annas in the rupee where the increase has been agreed upon in order to settle a bona fide dispute between the landlord and the tenant as to the area of his tenancy. 57 1 C 850.

--S. 28—Purchase by co-sharer landlord of a non-transferable occupancy holding --whether there is 'merger' or 'abandonment'--right of co-sharers to take khas possession--indication of intention to keep separate the two interests. A L R 1933 C 483.

--Ss. 29 and 147-A—Compromise decree a bona fide dispute--does not offend against S. 29--non-compliance with the provisions of S. 147-A-decree not a nullity. A L R 1933 P 57=12 P 170=13 P L T 737=142 1 C 113=A I R 1933 P 104.

--S. 29—Enhancement of rent--Compromise effecting, embodied in decree--Operates as estoppel by judgment, even if enhancement in contravention of S. 29. 59 C 512=A L R 1932 C 864.

--S. 29—S. 29 applies only to cases where there is a contract pure and simple for enhancement, which cannot be the case where there is a bona fide dispute as to rate or area. 25 1 C 829=21 C L J 325=19 C W N 321.

--S. 29—Amalgamation of two occupancy holdings with enhanced rates creates no change in the old tenancy. Enhancement cannot be enforced unless it is proved that a new tenancy has been created or the parties intended to create a new tenancy. 37 1 C 862.

--S. 29—Where by a Kabulyiat executed after the Act, the original rent which had been fixed before the Act, was enhanced by more than two annas in the rupee: Kabuliya was void. 50 1 C 370.

--S 29—If an ijardar gives a settlement of a holding to any one, that person becomes a raiyat on the land, and he does not cease to be a raiyat when the ijara comes to an end (10 C L J 65) foll. 16 1 C 419.

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--S. 29--In a kabulyiat, the rent was stated to be Rs. 23 odd, but that for three years the tenant would pay Rs. 8 the rest being kept in abeyance. At the end of that time if he did not do make a fresh Kabuliya he was to be liable for rent at the rate of Rs. 23.

Held, that the stipulations in the kabulyiat were a mere device to defeat the provisions of S 29 and that the landlord was entitled to a decree for rent at Rs. 8 only. 15 1 C 878.

--S. 29-S 29 applies only where the holding remains constant. 22 C L J 88=30 1 C 329.

--S. 29--A stipulation to pay an enhanced rent after enjoying remission of portion thereof is repugnant to s 29. 39 1 C 497.

--S. 29--Kabulyiat to pay instead of money rent, grain rent and in default enhanced money rent is unenforceable. 33 C 200; 18 C L J 74; 37 C 610; 10 C L J 144; 15 C W N 249, ref. 23 C L J 635=34 1 C 97.

--S 29--The tenants held under the plff and a certain lady. A Kabulyiat to pay rent only to the plff. at enhanced rate. Held, that as no new tenancy was created, the Kabulyiat contravened the provisions of S 29 of the B T Act. 22 C L J 86=30 1 C 891.

--S. 29--Where separate tenancies were amalgamated and later partitioned, it was held that if the total rent remained unaltered, its distribution, by agreement of parties, over different parcels of land, did not constitute enhancement within the meaning of the B T Act. 20 C L J 331=27 1 C 49.

--S. 29--An enhancement in excess of that allowed by S 29 agreed to by means of a compromise is illegal. 4 Pat L W 247=44 1 C 638.

--S. 29--Agreement to pay at enhanced rate violates s 29 and cannot be enforced. 28 C L J 142=48 1 C 35.

--S. 29--Kabulyiat allowing reduction of rent for a term, at the end of which full rent was payable. Suit for full rent at the end of the term. Held that in the absence of any case that the document was never intended to be acted upon or any conduct the suit was not for enhancement and that s. 29 was no bar to recovery by the landlord at the rate claimed 19 C W N 867=29 1 C 807.

--S. 29--Landlord's right to realise the full nominal rent is inadmissible where it is only a threat that the rent at the full rate would be levied in case the tenant would not execute a kabulyiat within a year after the expiry of the term. 44 1 C 574.

--S. 29--Lease, expiry of, before the Act--Agreement by occupancy raiyat to pay full rent stipulated for in Kabulyiat.

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on expiry of its terms during which a large portion of rent was to be kept in Hajat effect of. 20 C W N 680=32 I C 185.

-S. 29-In order to bring the case within S. 29 it is necessary to show that there was an enhancement and for that purpose it is necessary to plead and prove what the rent was prior to the contract. 11 I C 940.

-S. 29-Where the rent is assessed for excess land as also for new lands taken by the tenant, and one consolidated rent is assessed for all the lands, there is in essence a new holding created and no question arises as to the enhancement of rent payable by the tenant. 22 C L J 81=30 I C 283.

-S. 29-The land in suit being non-transferable there was no rent payable which was enhanced within the meaning of S. 29. 16 C L J 71=39 C 663=14 I C 701.

-S. 29-Enhancement by more than 2 annas in the Rupee is invalid unless it comes within any of the exceptions in S. 29 (1918) Pat 26=5 Pat L W 213=36 I C 537.

-S. 29-Rent-Husks, value of-Abwab. 19 C L J 402.

-S. 29-Where the true rent is liable to be increased on certain conditions, the agreement for increase is inoperative as being merely a device to evade S. 29. 40 I C 113.

-S. 29-Where an occupancy raiyat agrees to pay a consolidated rent for original holding and the encroached lands of which he took possession without the consent of the landlord S. 29 is not applicable as a new holding is constituted. 22 C L J 81 foll. 32 Cal L J 134=57 I C 998.

-S. 29-Abwab-Illegal cess, 19 C L J 402=25 I C 547.

-S. 29-S. 29 applies only to the case of a money rent of an occupancy raiyat and not that of a tenant at fixed rate.

The status of the tenant may be raised from an occupancy raiyat to that of a tenant at a fixed rate, and as consideration the rent may be enhanced more than 2 annas in the rupee. 37 I C 797.

-Ss. 29, 31 and 111 A-It is not necessary to sue for a declaration that an entry in the Record of Rights that the debts are raiyats at fixed rates, is wrong before suit for enhancement 2 Pat L J 124=1 Pat

L W 431 (1917) Pat 108=39 I C 85.

-Ss. 29, 33 and 179-An agreement contained in a Pata and Kabulyat, recited about the fixity of rate but contained no provisions as to the heritability or transferability of the holding.

Held, that even if the kabulyat had been executed under undue influence, subsequent conduct of the tenant implied ratification of kabulyat. Held, further, that the kabulyat created a permanent muka-

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rari interest within the meaning of S. 179 and that therefore, S. 29 of that act did not apply. In order to make out a claim for enhancement under S. 21 it is necessary to comply strictly with the provisions of S. 33. 1 Pat L J 76=35 I C 437.

-Ss. 29 and 42-Where in a kabulyat two different sums are mentioned as rates of rent only the true is recoverable. If the bigger sum is meant to evade S. 29 it is not recoverable. 39 I C 1.

-Ss. 29, 43-Where it was agreed that if the tenant should continue in occupation after the expiry of the term he would pay rent in kind. Held, that the agreement could be enforced 17 C L J 580 ref. to 217 668 dist. 18 C L J 74=21 I C 351.

-Ss. 29, 74, 147 A and 147 B-S. 29 applies only to rents paid in money and not where the rent is received in kind. Where in a suit for rent the landlord claimed as rent more than half the produce of the land, and parties filed a compromise where by the tenants prayed that a decree might be passed accordingly alleging that they have been paying rent at that rate; Held, that neither S. 147 A nor 147 B. prohibits the court from giving effect to the compromise. The presumption as to the accuracy of a record of rights is rebuttable. 19

C L J 333=25 I C 42.

-Ss. 29 and 113-Kabulyat at enhanced rate on promise to grant puttah of all lands-Whole not included-promised land in tenant's possession-Suit for possession or in the alternative for enhanced rent-Held, the Suit was not maintainable. 23 I C 579.

-Ss. 29, 147 A-A decree for rent passed in accordance with a compromise, without recording evidence to show what the amount of rent was before the dispute arose, is made without jurisdiction and the tenant is not bound. As the tenant cannot waive the irregularity, it amounts according to the test laid down in Holmes v. Russel. 9 Dowl 487 to a nullity. 17 C W N 496=18 I C 809.

Ss. 29 and 147 A-S. 29 does not apply where a compromise changes the status of a tenant.

A settlement of disputes forming the subject matter of a suit can be regarded as consideration of a contract relating to matters extraneous to the suit. 4 Pat L J 667=(1920) Pat 114=52 I C 20.

-S. 29 1 (b)-Agreement given by tenant for settlement of bona fide dispute as to rent-Recitals in agreement are not conclusive-Burden of proof on landlord-Strict proof that case is taken out of statute-proof by independent evidence. 12 I C 589.

-S. 29 (6) proviso (1)-Proviso (1) to S. 29 does not control clause (6) of the

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section and a continuous realisation of rent at an illegal enhanced rate will not entitle the landlord to realise at that rate.

A contract providing for an enhancement exceeding as 2 in the rupee in contravention of S. 29 is wholly void and not merely to the extent of the excess.

A mere division of a tenancy in pursuance of a contract has not the effect of creating new tenancies, unless that was the intention of the parties. 23 C L J 580-34 I C 45.

—S. 29 cl. (b)—A kabuliyat showed the rent payable on the land as Rs 57-4-0 but for some unexplained reason, a sum of Rs. 17-2 was remitted and the rent payable was Rs. 40-2-0 for the remaining period of the kabuliyat. The kabuliyat provided that at the end of the period the tenant should take a settlement at the sum of Rs. 57-4-0 and in default, the landlord should be entitled to recover the same by the suit. Held, that the rent payable was only Rs. 40-2-0, that the stipulation for an increase later was one for an enhancement of rent and was against S. 29, cl. (b) 18 C W N 738-18 C L J 502-21 I C 948.

—S. 29, cl. (b)—Where it appeared that in consideration of the landlord recognising a division of the holding and his foregoing the Nazarnama for additional lands included in the divided holding, a tenant agreed to pay an enhanced rent, more than 2 as. in the rupee. Held, following 13 C W N 181, the onus of proving that a kabuliyat contravenes S. 29, cl. (b) lies on the tenant, that under the circumstances of the case S. 29, had no application. Held also that the new kabuliyat was either wholly good or wholly bad. 22 I C 854

—S. 29—Even slight enhancement over two annas cannot be allowed—Principle “Deminimis non curatlex” does not apply. A I R 1929 Cal 658-Ind Rul (1930) Cal 656-125 I C 48

see also A I R Cal 531-123 I C 743

—S. 29—A compromise decree though in contravention of s. 29 is binding until vacated. A I R 1928 Cal 606-113 I C 570

See also A I R 1929 Pat 568-10 P L T 717-118 I C 723-Ind Rul (1929 Pat 547

See 57 I C 850 (Cal); (Settlement of dispute as to area.)

See 4 P L J 667-52 I C 20  
Contra see 4 P L W 247-44 I C 638

—S. 29—Landlord passing additional Consideration, can enhance the original rent. A I R 1927 Cal 911-104 I C 763

See also A I R 1925 Cal 389-82 I C 970

See 60 I C 412

See 32 C L J 134-57 I C 998; (But see 84 I C 361)

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See 37 I C 797 (Pat) Raising tenant's status from occupancy to fixed rate.)

—S. 29—In order to come under s. 29, tenant must prove himself to be occupancy raiyat. A I R 1926 Pat 156-7 P L T 145  
(=1926) Pat 29-90 I C 929

—S. 29—S. 29 does not save contracts for enhancements as it is imperative. A I R 1925 Cal 1262-87 I C 565

—Ss. 29 and 105—S. 29 does not apply to proceedings under s. 105. A I R 1926 Cal 353-89 I C 951

—S. 29—No new holding is created by consolidating distinct holdings with definite rentals. Enhancement of rent beyond the limits of s. 29 is illegal A I R 1925 Pat 185-3 Pat 825-6 P L T 537-84 I C 361

—S. 29—An order is not presumed to have been passed immediately after rejection of any particular objection. A I R 1924 Pat 209-4 P L T 629-(1924) Pat 21  
=75 I C 1036

—S. 29—Rent cannot be permanently enhanced without registered writing. Mere payment at enhanced rent for over 3 yrs. is insufficient. A I R 1923 Cal 600-37 C L J 489-72 I C 136

—S. 29—Only cases where rent has been actually paid for 3 years are governed by s. 29. 37 C L J 489-72 I C 136- A I R 1923 C 600.

See also A I R 1924 Pat 820-75 I C 22

—S. 29—S. 29 does not apply where there is no evidence to prove the original jama. A I R 1924 Cal 370-71 I C 300

—S. 29—To prove rate of rent, rent collection papers not proved by persons preparing them, are not sufficient. 71 I C 300 (Cal)

—S. 29 proviso (3)—S. 29 proviso (3) requires proof of specially low rate of rent. A I R 1921 Pat 412-2 P L T 605

—S. 29—Plaintiff failing to raise a defence under s. 29 in a prior suit for rent is not precluded from raising it in a subsequent suit. 65 I C 581 (Cal)

—S. 29 (1)—The words “continuous period of not less than three years immediately preceding the period for which the rent is claimed” in s. 29 (1) mean the period in respect of which the rent is payable as a separate cause of action. 64 I C 188 (Cal)

—29—“Rent” for a previous period which was due but not paid may be “rent” in s. 29. 62 I C 619 (Cal)

—Ss. 29 and 147 (a)—Suits not between landlord and tenants as such, but between landlord and trespasser are not governed by s. 29 and 147 (a). A I R 1922 Pat 654-(1922) Pat (Sup) 319-4 P L T 301-

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71 I C 143

--S. 29--Enhancement of rent beyond Statutory limit must be justified by landlord. A I R 1922 Cal 575=26 C W N 758=49 C

875=67 I C 813

See also A I R 1924 Cal 544=69 I C 414 (case of purchaser of occupancy holding)

--S. 29--Landlord can claim enhancement on proving that the raiyat held the land a low rate of rent in consideration of cultivating of a particular crop for his benefit, that he is released from such existing obligation and that he must have deemed that the rent was fair. A I R 1922 Pat 171=(1922) Pat (Sup) 177=3 P L T 386

=67 I C 49

--S. 30--Suit for enhancement of rent--excess area and rise in prices--landlord to prove excess in area--presumption as to measurement--equity between landlord and tenant. A L R 1933 C 432=60 C 434

--S. 30 (a)--The basis of s. 30 (a) is the division of the lands of a village into classes to each of which is attached a rate of rent. If a holding is held at a lump rental it must be the aggregate of the rents of the different plots computed in accordance with the rate appropriate to the class of each lot. 11 P 557=13 P L T 244 =139 I C 537=I R 1932 P 235=A I R 1932 P 179=A L R 1932 P 251

--S. 30--For settlement of rent under s. 30, the Revenue Officer has to apply the provisions of those sections to the holdings to which they apply, that is the entire holding. A I R 1931 Cal 565=35 C W N 212=Ind Rul (1931) Cal 689=133 I C 561

--S. 30 (a)--Lump rental--Existence of Holding not taken out of operation of S. 30 (a) by reason of. 11 P 557=13 P L T 244 =139 I C 537=I R 1932 P 235=A I R 1932 P 179=A L R 1932 P 251

--S. 30 (a)--Lump rental--Holding consisting of lands with higher and lower rates of rent held at a--Enhancement exceeding the lower of the two rates--Permissible when is and is not. 11 P 557=13 P L T 244=139 I C 537=I R 1932 P 235=A I R 1932 P 179=A L R 1932 P 251

--S. 30 (a)--The expression means a definite customary rate per bigha current in the village at which a particular class of land is held, and does not mean an average rate per bigha for that class and still less for all lands. 11 P 557=13 P L T 244=139 I C 537=I R 1932 P 235=A I R 1932 P 179=A L R 1932 P 251

--S. 30 (a)--"Prevailing rate paid in neighbouring villages"--Means prevailing rate in the neighbourhood generally for land of similar description and with similar advantages and not merely in one neighbouring village or area of such

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village. 11 P 557=13 P L T 244=139 I C 537=I R 1932 P 235=A I R 1932 P 179=A L R 1932 P 251

--S. 30 (a)--Rate of rent low in comparison with prevailing rate for lands held on cash rental which is the result of commutation of produce rent--Tenant's right to hold at low rate in absence of the other evidence. 11 P 557=13 P L T 244 =139 I C 537=I R 1932 P 235=A I R 1932 P 179=A L R 1932 P 251

--S. 30 (b)--Bemiadi lease--Rent payable under--Enhancement of--Liability for. 36 C W N 341

--S. 30 (b) & 35--Enhancement of rent--Refusal to grant--Rent payable already unduly high--Refusal of enhancement on ground of--Power of Court. 13 P L T 237 =138 I C 312 (2)=I R 1932 P 175=A I R 1932 P 203=A L R 1932 P 333

--S. 30 (b)--Where the lease provides that tenant shall pay without notice additional rent for land found to be in excess by measurement, it indicates that the rent was a fixed one. A I R 1922 Cal 18, followed. A I R 1931 Cal 265 (2)=52 C L J 583=Ind Rul (1931) Cal 472=131 I C 584

--S. 30, 32 & 35--Enhancement of rent--Suit for--Matters for consideration in--Economic depression if one of--Onus on raiyat in regard to "Unfair and inequitable" in S. 35--Meaning of. 11 P 654=13 P L T 377=I R 1932 P 219=139 I C 191=A I R 1932 P 225=A L R 1932 P 611 (F B)

--Ss. 30, 52--Rent of an undivided share of a holding cannot be enhanced in proceedings under s. 105--Powers of Revenue Officer in applying ss. 30 and 52 pointed out. A I R 1931 Cal 565=Ind Rul (1931) Cal 689=35 C W N 212=133 I C 561

--S. 30, 31--A--If it is found that the majority of the tenants holding similar lands do not pay one uniform rate, the lowest rate may be adopted as the prevailing rate, and the rent may be enhanced up to that limit. 1 C W N 310 Foll. 9 Ind Cas 5--a sum in addition to the interest payable on the capital spent and the enhancement agreed to by the tenant may be taken as fair rent unless the tenant proves it to be wrong. 23 C L J 209=34 I C 783

--S. 30--Enhancement of rent--Restriction on Court's duty. 25 I C 880

--Ss. 30 and 188--Raiyat under separated shares of tenure--Purchase of one share by piff--Suit for enhancement of rent by him alone not maintainable without joining the owner of the other share as a piff, 25 C 917 relied upon. Such purchaser is not the landlord of a holding within the meaning of S. 30. 15 I C 847.

--S. 30--S. 30 does not apply where rent is paid partly in cash and partly in kind. 24 C L J 373=35 I C 618...

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—S. 30—An undivided share is not a holding within S. 30. 40 C 29=16 C W N 877=16 C L J 9=15 I C 453.

—S. 30—Though the Kabuliya of an occupancy tenant provides for an enhancement only in the case of a survey being made, the landlord can apply to have the rent enhanced under S. 30 on his making out a proper case for enhancement. 55 I C 85.

—Ss. 30 and 52—Suit for enhancement under, for one holding as well as for an undivided share in another holding not maintainable. 2 Pat L J 553=1 Pat L W 798=40 I C 535.

—S. 30, 101 and 111—The expression 'suit for alteration of rent' in S. 111 includes not merely a suit under S. 52 but also under S. 30.

The term, 'local area' in S. 101 is comprehensive enough to include an entire district. 22 C L J 489=29 I C 885.

—S. 30—Enhancement of rent See B T Act, Ss. 52. 28 I C 498.

Ss. 30, 105 & 109 A—A decision so far as it determines the amount of enhancement is "a decision settling the rent" within the meaning of S 109 A and therefore no appeal lies against it. Batwara papers are not evidence against the tenants. In settling the rate of enhancement under S. 30 (b) of the Act, the Court must have regard to the nature of the land. 1 Pat L J 409 =35 I C 678

—Ss. 30, 113 and Ch X—A settlement of rent with reference to the prevailing rate is not illegal if it involves an enhancement of more than 2 annas in the rupee.

An entry of a certain sum as rent at a settlement made under Ch. X of the B. T. Act as merely an entry of the existing rate does not come within S. 113. 32 I C 749

—Ss. 30 and 188—Suit for enhancement of rent—Joint landlord—Shebait—Suit by one alone—Maintainability. 24 I C 266=19 C W N 250

—Ss. 30 (1) 87, 105, 107, 109—An application under S. 105 is not a suit; and a withdrawal of that application without leave will not bar a suit. under S. 30 (b) 40 C 428=17 C W N 467=18 I C 130

Ss. 30 (1) and 31 (a)—The average rate of rent for neighbouring villages is not the prevailing rate within the meaning of subsection (a) of S. 30 and where no one prevailing rate is found, the landlord is not entitled to get an enhancement under the sub-section. 21 C L J 483=29 I C 880

—Ss. 30 (a) and (b) 52 and 103 A (3)

—No second appeal lies from an order under S. 30 (b) enhancing the rent by

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reason of a raise in the price of a staple food crops, even though such order was passed on an application under S. 52. 17 C W N 1201. 23 C L J 21; 1 P L W 429. ref 2 Pat L J 574=4 Pat L W 60=42 I C 342

—Ss. 30 sub-sec. (b)—Suit for enhancement of rent on ground of rise of price of staple food crops—Landlord need not prove price of crops at the creation of tenancy. 40 I C 682

—Ss. 30 (b), 52 and 105—Settlement Officer can decide as to claim for enhancement on the ground of rise in the average local price of staple food crops during the currency of the existing rent. 29 C L J 253=51 I C 34

—S. 30—Permanent mokarari lease is created if and intention to create such lease is shown. A I R 1931 Cal 265=52 C L J 583=Ind Rul (1931) Cal 472=131 I C 584

—S. 30 (b)—While assessing fair and equitable rent, provisions of S. 30 (b) cannot be applied by Settlement Officer to the lands not constituting a 'holding'. A I R 1931 Cal 303=34 C W N 991=58 C 159=131 I C 657

—S. 30 (b)—Where holding is converted into orchard without objection by landlord, enhancement of rent on the ground of rise in the price of staple food crops can be claimed by landlord. A I R 1930 Pat 559=11 P L T 557=9 Pat 583=Ind Rul (1930) Pat 752=127 I C 848

—S. 30 (a)—In S. 30 (a) there is no intention to raise or depress rents to a common average level, but a proper standard is laid down. A I R 1930 Pat 332=11 P L T 335=Ind Rul (1930) Pat 601=126 I C 297

—Ss. 30 and 174—Dak and neg cesses cannot be recovered from tenants. Rent can be enhancement under S. 30 even if such cesses are paid. A I R 1930 Pat 76=10 P L T 700=Ind Rul (1930) Pat 426=124 I C 394

—S. 30 (b)—Corresponding rise in the prices of necessities cannot be made the ground for refusing maximum enhancement. A I R 1930 Pat 76=16 P L T 700=Ind Rul (1930) Pat 426=124 I C 394

S. 30 (a)—S. 30 (a) applies inspite of existence of lump rentals. S. 31 (f) is applicable even where different classes of land in village are assessed at lump rent. A I R 1929 Pat 702=10 P L T 693=Ind Rul (1930) Pat 422=124 I C 390

—S. 30 (b)—No proof of rise in prices of agricultural produce is necessary for enhancement. A I R 1930 Pat 162=10 P L T 869=Ind Rul (1933) Pat 271=122 I C 815

—S. 30 (b)—Goodness or badness of the land has no concern with enhance-



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ment. A I R 1929 Pat 348=10 P L T 388=Ind Rul (1930) Pat 172=121 I C 476

—S. 30 (b)—Where land is used in such a way with the acquiescence of the landlord that food crops cannot be raised thereon, enhancement cannot be claimed on the ground of rise in the price of staple food crops. Where there is a house on a portion of the land, enhancement should be claimed for the land only. 8 P L T 495=106 I C 422

—S. 30—A aptta stipulating payment of additional rent in case of discovery of additional area, is not conclusive evidence of perpetuity of rent. A I R 1927 Cal 406=31 C W N 450=102 I C 323

—S. 30 (b)—Enhancement of rent of a holding consisting both of Nagdi and bhaoli lands is illegal. A I R 1927 Pat 207=8 P L T 564=101 I C 511

—S. 30—S. 30 is not applicable where portions for which bhaoli and nagdi rents are paid, are indistinguishable and form one holding. Bhaoli and nagdi lands shown in separate khatahs, must be proved by defendant to form one holding only. A I R 1927 Pat 108=8 P L T 224=98 I C 995

—S. 30—In a rent-suit court can treat excess area in tenant's possession as separate holding. A I R 1926 Cal 541=91 I C 846

—Ss. 30 and 39—For enhancement price lists prepared under S. 39 must be referred to by Court. A I R 1926 Cal 601=91 I C 734

—Ss. 30—S. 30 is applicable where a kabuliya executed before Bengal Tenancy Act contains a covenant for charging excess rent in case of discovery of excess area at next survey. A I R 1925 Cal 1209=88 I C 377

—S. 30 (a)—Where in a suit for enhancement of rent the report of Revenue Officer is found in sufficient by Court, further enquiry should be ordered. A I R 1925 Cal 898=86 I C 533

—Ss. 30 and 36—Court can order enhancement of rent favourable to tenant. A I R (1924) Pat 761=(1924) Pat 217=83 I C 124

—S. 30—Where a suit is prolonged, Court should not order enhancement from its commencement. A I R 1924 Pat 761=(1924) Pat 217=83 I C 124

—Ss. 30 and 76—No suspension of rent can be claimed by tenant on ground of landlord's failure to supply irrigating facilities. A I R 1924 Pat 605=(1924) Pat 173=5 P L T 629=79 I C 858

—Ss. 30 (a)—Where in a suit for enhancement, plaintiff proves that the holdings were non-existent in previous years,

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it is upto tenant to prove that they formed part of other fields taxed uniformly. A I R 1924 Pat 245=(1923) Pat 339=78 I C 593

—S. 30 (b)—Enhancement of rent for land yielding no crop, homestead or patit is not illegal. A I R 1925 Cal 399=79 I C 567

See also A I R 1923 Cal 370=76 I C 492

See A I R 1922 Cal 510=27 C W N 962=36 C L J 305=70 I C 535

—Ss. 30, cls. (a), (b) and 31-B—Court while determining prevailing rate should follow method in 2 P L J 124 (Mullick, J) and should refer to table of rates prepared by Revenue Officer under Part III, Chap X. A I R 1924 Pat 326=3 Pat 49=5 P L T 77=(1923) Pat 345=2 P L R 113=75 I C 411

—S. 30—S. 30 bars a suit for determination of fair and equitable rent in respect of past years for which rent has been paid already. 2 P L T 642=68 I C 433

—Ss. 30, 105 and 188—In a suit for enhancement of rent, receiver for one co-sharer's property is not a necessary party. A I R 1923 Pat 86=3 P L T 316=65 I C 349

—Ss. 30 and 50—Where in a suit for enhancement of rent out of 2 grounds ground of excess area is not proved, Court should allow the suit to be withdrawn with liberty to bring fresh suit. A I R 1921 Cal 611=35 C L J 161=62 I C 699

—Ss. 30, 3 (9) and 182—Where the tenancy of a raiyat is an undivided share of land S. 30 is in applicable. 24 C W N 1022=59 I C 209

—S. 31 (a)—Principle of—Area in respect of which the provision has not been notified—Application of principle of section to—Not permissible. 11 P 557=13 P L T 244=139 I C 537=I R 1932 P 235= A I R 1932 P 179=A L R 1932 P 251

—S. 31 (b)—Commission under—Issue of—Discretionary. 11 P 557=13 P L T 244=139 I C 537=I R 1932 P 235=A I R 1932 P 179=A L R 1932 P 251

—Ss. 31 (A), 50 (2), 113 and 115—Settlement of rent in proceedings under Chap. XI by Settlement Officer such rent cannot be enhanced under S. 113 for fifteen years even on the ground of the prevailing rate.

Where the tenants have been recorded is occupancy raiyats in the Record of Rights the tenant is not entitled to the benefit of the presumption arising under S. 50 (2). 37 C 30 foll. 12 C W N 904, not foll. 45 Cal 930=22 I C 604

—S. 31—Enhancement of rent cannot be refused on the ground that occupancy

## BENGAL TENANCY ACT 8 OF 1885 (Contd.)

raiyat has sublet part of his holding. 64  
I C 182 (Cal)

—S. 31—A—If s. 31-A is made applicable to area in question, the provision is applicable. A I R 1930 Pat 599-11 P L T 623=Ind Rul (1931) Pat 61=128 I C 797

—S. 31-A—Rate definitely known and paid by majority of tenants in village and recognised as such is a "prevailing rate" A I R 1930 Pat 599-11 P L T 623=Ind Rul (1931) Pat 61=128 I C 797

—S. 31-A—Average rate is not a 'prevailing rate'. There is no prevailing rate where different tenants pay different rates. A I R 1930 Pat 599=Ind Rul (1931) Pat 61=128 I C 797

—S. 31-A (1)—Even in districts where s. 31 is made applicable application of method of averaging set forth in s. 31-A (1) is not obligatory. A I R 1930 Pat 332=11 P L T 335=Ind Rul (1930) Pat 601=126 I C 297

—S. 31-A—Where s. 31 is not made applicable principal of that section cannot be applied. A I R 1930 Pat 332=11 P L T 335=Ind Rul (1930) Pat 601=126 I C 297

—Ss. 32 and 52—Suit for enhancement of rent-excess area-increase in prices. A L R 1933 C 145=60 C 138=56 C L J 279 =A I R 1933 C 175

—Ss. 32 and 35—It may be that the law enunciated by the Judge was wrong with regard to the discretion vested in him. It may be that the evidence adduced was inadmissible and that it was misunderstood. But these are not errors involving any question of jurisdiction, 22 C W N 50 ref. (1918) Pat 347

—Ss. 32 (b) and 35—The provisions of s. 32 (b) relating to an enhancement on a rise in the price of staple food crops are imperative unless it be unfair and inequitable under s. 35 to allow enhancement. 57 I C 115

—S. 32-B—Landlord can claim periodical revision of rent under s. 30 (b) except where raiyats hold at fixed rates. He can also claim certain share of produce. A I R 1929 Pat 702=10 P L T 693=Ind Rul (1930) Pat 422=124 I C 390

—S. 32—Period immediately before suit can be compared with any other period during tenancy. A I R 1928 Cal 841=33 C W N 498=Ind Rul (1929) Cal 410=115 I C 568

—Ss. 32 and 35—Under s. 35 Court is invested with discretion as to the extent to which the enhancement can be allowed. Ss. 32 and 35 must be read together. A I R 1928 Cal 570=109 I C 305

—S. 35—"Circumstances of the case" refers to the circumstances of the particular case. A I R 1930 Pat 76=10 P L T 700 =Ind Rul (1930) Pat 426=124 I C 394

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## BENGAL TENANCY ACT 8 OF 1885 (Contd.)

—S. 35—Enhancement-discretion of lower appellate Court-not to be interfered within second appeal. A L R 1933 C 145

—S. 35—The facts and circumstances in each case have to be taken into consideration in determining the limit of enhancement so that it may not be unfair or inequitable to the parties concerned. 56 C L J 279=A I R 1933 C 56=A L R 1933 C 145(148)

—S. 35—The discretion given by s. 35 is very wide and where it is applied on right principals that is to say, for the purpose of maintaining the proportions of the produce allotted to the landlord and the tenant respectively it should not be a matter of interference in revision. Where, however, it is wrongly applied, where, for example a tribunal has considered the words "fair and equitable" as giving it a right to alter these proportions in accordance with its own economic or political ideas of justice the High Court should, and will correct the error. 11 P 654=13 P L T 377=139 I C 191 =I R 1932 P 219=A I R 1932 P 225=A L R 1932 P 611 (F B)

—S. 35—Discretion of lower appellate Court under-Interference in second appeal with-Not permissible where the discretion of that Court is based upon a consideration of all the facts and circumstances of the case. 56 C L J 279=A I R 1933 C 56=A L R 1933 C 145 (148)

—S. 35—"Unfair and inequitable" in -Meaning of. See Under this Act-Ss. 30, 32 and 35. 11 P 654=13 P L T 377=139 I C 191=I R 1932 P 219=A I R 1932 P 225 =A L R 1932 P 611 (F B)

—Ss. 35 & 30 (b)—Enhancement of rent-Refusal to grant-Rent payable already unduly high-Refusal on ground of-Power of Court as to. See Under this Act-Ss. 30 (b) and 35. 13 P L T 237

—S. 35—Court should grant enhancement of rent within limits of S. 35. If the rent is already unduly high and the soil is unproductive enhancement should not be allowed. A I R 1929 Pat 702=10 P L T 693=Ind Rul (1930) Pat 422=124 I C 390

—S. 35—In action for arrears of rent reduction on the ground of deterioration can be pleaded. A I R 1930 Pat 105=11 P L T 470=Ind Rul (1930) Pat 407=124 I C 87

—S. 35—S. 35 does not give unrestricted discretion to Courts to deprive landlord of his dues. A I R 1929 Pat 348=10 P L T 388=Ind Rul (1930) Pat 172=121 I C 476

—S. 35—S. 35 gives discretion to Court to enhance rent. A I R 1928 Cal 841=33 C W N 498=Ind Rul (1929) Cal 410=115 I C 586

Ss. 35 & 27—Enhancement of rent should correspond with rise in the prices. Enhancement of cash rent would not be refused for landlord's neglecting Gilandazi. A I R 1927 Pat 144=8 Pat 117=100 I C 754

## BENGAL TENANCY ACT. 8 OF 1885 (Contd.)

—S. 35—Court's order refusing enhancement on facts found will not be interfered with by High Court in second appeal.  
7 P L T 768=98 I C 1049

—S. 35—Enhancement must be allowed only if it is found fair and equitable after taking into account all the facts and all the relevant rules. A I R 1921 Cal 209=25 C W N 897=65 I C 636

—S. 35—Where different tenants pay different rates, there can be no prevailing rate. A I R 1930 Pat 599=11 P L T 623  
=Ind Rul (1931) Pat 61=128 I C 797

—S. 35—Where enhancement is decided on Court can pass order favourable to tenants. A I R 1924 Pat. 761=(1924) Pat 217  
=33 I C 124

—S. 36—S. 36 relates to the amount of assessment and not to the ground upon which a Court has to determine whether enhancement should be allowed or not.  
23 C W N 1041=30 C L J 9=52 I C 79

—S. 37—Agreement for enhancement of rent—Suit by proprietor within fifteen years of agreement for enhancement—not maintainable. 4 Pat L J 106=(1918) Pat 162=4 Pat L W 210=44 I C 292

—S. 37—Purchaser at revenue sale—Right of to enhance rent—Purchaser subject to limitation imposed by S. 37 See B T Act Ss. 27 and 37. 51 I C 403.

—S. 37—Where suit for enhancement of rent is withdrawn with permission to bring fresh suit subject to condition—Dismissal on default does not amount to dismissal on merits. A I R 1930 Pat 406=Ind Rul (1930) Pat 542=125 I C 574.

—S. 37—If Jama paid before Record of Rights is same as that paid after and consisting of ground rent and Abwab which was latterly disallowed, there is no change in legal rent payable and consolidation of legal rent with Abwab does not bar suit for enhancement A I R 1929 Pat 661=10 P L T 696=Ind Rul (1930) Pat 424=124 I C 392.

—S. 37—The bar of suit mentioned in the section does not apply to dismissal of a prior suit for default in payment of costs. A I R 1930 Pat 406 (1)=Ind Rul (1930) Pat 542=10 Pat 105=125 I C 574.

—Ss. 38, 105, cl. (4)—In a proceeding under S. 105 there is no second appeal.

Where it was found that no rents had been paid in respect of the lands for over a generation. Held, that there was no 'existing rent' so as to attract the presumption under cl. (4) of S. 105 and that there had been no increase or reduction of rent, but merely the fixing of a fair and equitable rent. 9 Ind Cas 493.

—S. 38—The word "permanent" in S. 38 must be construed with reference to existing conditions; when a piece of land

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gets covered with sand the deterioration is permanent with reference to existing conditions. 20 C W N 1157=22 C L J 42=29 I C 236.

—S. 38—"Permanent deterioration" must be construed with reference to existing condition and not by possibilities of improvement by application of capital and skill. A I R 1930 Pat 105=11 P L T 470=Ind Rul (1930) Pat 407=124 I C 87.

—S. 38 (1)—Occupancy tenants are not only entitled to claim abatement 2 P L T 569=63 I C 219.

—Ss. 39 (a) and 31 A—There is no "prevailing rate of rent" within S. 30 (a) in a village situate in a district to which S. 31 A has not been extended. 33 I C 85.

—S. 40—Commutation of rent—Compromise by some of the landlords is not binding on others who are not parties. 55 I C 538.

—S. 40—The exercise of jurisdiction by a Revenue Court under S. 40 presupposes that the raiyat is an occupancy raiyat and that the rent is payable in kind. Civil Courts can consider the competence of the Revenue Court in commutation proceedings 19 C W N 825=21 C L J 590=30 I C 412.

—S. 40—Where the tenant is not an occupancy raiyat, an order made by the Revenue Court for commutation is without jurisdiction. 29 I C 896 rel. 23 C W N 614=50 I C 285.

—Ss. 40 and 153—A second appeal lies under S. 153. 9 C W N 122 ref. 19 C W N 823=21 C L J 487=29 I C 896.  
See also 50 I C 285.

—S. 40 Sub-S. (3)—An application to have the rent commuted should be entertained and determined on the merits by the "Officer" mentioned in sub. S. 3 of S. 40 Consequently the Sub-Divisional Officer cannot transfer such application to a Settlement Officer. 45 Cal 769=27 C L J 569=46 I C 455.

—Ss. 40 (5) and 188—Though an application for commutation must be made by all the landlords together or their agent by operation of S. 188 the rule does not apply to appeal in which the procedure followed is that which is laid down in O. 41 R. 4 C P C. 1 Pat L W 578=41 I C 787.

—S. 40—No objection to the manner in which the application to hear and determine commutation came to be heard by the Assistant Settlement Officer can be raised by the applicants. A I R 1931 Cal 327=34 C W N 999=131 I C 396.

—S. 40—In commutation proceedings landlord's presence is necessary. A I R 1930 Pat 325=Ind Rul (1930) Pat 653=124 I C 861.

—S. 40—In commutation proceedings landlords presence is necessary and as such

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rent fixed in proceedings in which he is absent is not binding him. A I R 1930 Pat 325=Ind Rul (1930) Pat 653=126 I C 861.

—S. 40 (5)—A retrospective order of commutation can be passed by Commutation Officer A I R 1929 Pat 177=10 P L T 107=Ind Rul (1929) Pat 163=115 I C 195.

—S. 40—Proceedings under S. 40 are miscellaneous proceedings not governed by C P C O XXXII r. 3—Civil Court can interfere with Revenue Officer for illegality only. A I R 1927 Cal 374=100 I C 146.

—S. 40—"Public document" in Evidence Act includes a Crop cutting report of Deputy Collector. It is admissible as such A I R 1926 Pat 436=7 P L T 671=95 I C 966.

—S. 40—No order under S. 40 can be passed without notice to the parties concerned. A I R 1923 Cal 364=37 C L J 473=72 I C 37.

—S. 40—s. 40 does not apply to a case of tenant's failure to pay rent commuted by contract as payable annually. A I R 1921 Cal 530=25 C W N 714=67 I C 946.

—S. 40—Where the rent is in reality payable in kind either wholly or partially and the tenant is occupancy raiyat, commutation can be allowed. 25 C W N 714=67 I C 946.

—S. 41—Order under S. 41 operates as a Civil Court decree, and a suit to upset it must be brought within 12 years from its date. 59 I C 840 (Pat).

—Ss. 44 and 47—Tenant holding over—Where second lease executed, continuing occupation after a break of about 11 months, tenant is not liable to ejectment under s. 44. A I R 1925 Cal 181=79 I C 648.

—S. 44—Non-occupancy raiyat in possession of formerly homestead land let for cultivation cannot be ejected except under the section. A I R 1923 Pat 94=3 P L T 621.

—Ss. 44 and 47—Registered putta and kabulyat for fixed term between landholder and tenant—suit for possession by landholder after the expiry of period—applicability of S 44 principles of S 47—finding as to commencement of occupation necessary when S 47 is applied. A L R 1933 P 225.

—Ss. 44 & 47—Kabulyat creating relationship of landlord and tenure-holder and not of landlord and raiyat—Sections inapplicable to case of. 13 P L T 599=

A I R 1932 P 363.

—Ss. 44 (c) and 47—It must be remembered first that the general object of the Act is the protection of raiyats and it may well be that a person who has been a raiyat may be inveigled by his landlord

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into executing a lease imposing upon him no harder terms than he has hitherto borne but stating that the lease is to come to an end after a certain fixed period of time. The object of these two sections is to defeat this manoeuvre on the part of the landlord and for the purpose of counting the period of occupancy, the real period of occupation as a raiyat is to be taken into account and not the period of occupation which may happen to be stated in the lease. If therefore a defendant who is sued by his landlord in ejectment on the ground that his lease has come to an end is able to show that in fact before the date of the lease he was a raiyat and in occupation of that same land in that capacity he is entitled to count the period of his occupation from the period when in fact he came into occupation as a raiyat. 13 P L T 599=

A I R 1932 P 363.

—S. 44—Under the Act no raiyat holds from year to year. If tenant is non-occupancy raiyat, holding under lease for a term he cannot be ejected. 20 C W N 258=33 I C 54.

—Ss. 44 (c), 45, 196—The plaintiffs, who at the date of their suit had a right limited by law in a particular way, cannot take advantage of subsequent legislation removing that limitation; their right must be determined by law as it stood at the date when the suit was instituted. 9 I C 805.

—Ss. 45, 116, 120 and Sch III Art (1) (a)—The new Sub-sec 2 (a), to S 120 confirms the view in 7 C W N 400 that a statement made in a Kabulyat executed after the 2nd March 1883 that the land is Zerait was not admissible. 17 C 466=13 C W N 661; 13 C W N 994; 1 C L J 456, ref.

A suit to eject a raiyat of zerait land brought more than 6 months after the expiry of the term of his lease is barred by Art. (1) (a) of Sch III of the B T Act S 45 of the Act which was not applicable to zerait lands coming under S 116 having been replaced by the said article which is applicable. 20 C W N 14=33 I C 978.

—Ss. 44 and 45—See Under S 21.

16 C W N 536=14 C L J 170=10 I C 139.

—S. 46—The word agreement mentioned in S 46 means an agreement proposed and tendered by the landlord to be executed by the tenant.

Where a landlord sent a draft of the proposed agreement duly stamped to the Court and the Court served on the tenant a copy identical with the draft but without a stamp on it.

Held, that there was a valid tender of the agreement as required by S 46 of the B T Act.

Held, further that it is not obligatory in S 45 that a notice should be served

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along with the copy of the agreement.

22 C W N 558-28 C L J 87-45 I C 234.

—Ss. 46 and 158—Suit for fair rent or enhancement is maintainable if tenant holding over, after expiry of the period, for 3 years is non-occupancy raiyat but not maintainable if tenant had become occupancy tenant. 5 Pat L J 406-57 I C 558.

—S. 46 cl 7—Non-occupancy tenant is liable to pay enhanced payment from the date of his agreement. A I R 1929 Cal 334-50 C L J 8-Ind Rul (1930) Cal 236-122 I C 300.

—S. 46—No decree for ejectment should be passed if the tenant agrees to pay fair and equitable rent to be determined first by the Court. A I R 1928 Cal 533-55 C 659-111 I C 222.

—S. 46—s. 46 is meant for assessing fair and equitable rent. Agreement in sub s. 7 is an agreement between landlord and tenant after courts fixing rent. A I R 1926 Cal 693-43 C L J 45-92 I C 37.

—Ss. 46 and 111—S. 111 is applicable to a suit under S. 46 as it includes determination of status of tenant. A I R 1925 Cal 1211-88 I C 670

—S. 46—Non-occupancy ryot can be ejected for refusing to agree to enhancement if the agreement for enhancement is tendered to him. 26 C W N 359-35 C L J 203-68 I C 991

—S. 46, Sub-s. 7—Liability to pay enhanced rent begins from the time of agreement. A I R 1926 Pat 42-5 Pat 46-7 P L T 355-(1925) Pat 298-90 I C 871

—S. 47—Lease term of which has expired—Ejectment of tenant a raiyat under terms of—Landholder's suit for—Occupation by tenant prior to date of lease—Advantage of—Tenant's right to take—Condition of—Proof of such prior occupation being as a raiyat necessary—Proof of prior occupation being in any capacity not enough—Onus of proof on tenant. 13 P L T 599-A I R 1932 P 363.

—S. 47—Lease term of which has expired—Raiyat under terms of—Occupation prior to date of lease by—As a raiyat or as a tenure-holder—Evidence. 13 P L T 599-A I R 1932 P 363

—S. 48—Where an under-raiyat undertook to deliver a paddy as rent and on default, Rs. 20 as its price.

Held, it was not a money-rent but a produce rent S. 48 had no application. 29 C L J 234-41 I C 373

—S. 48—The words "holding at a money rent" in S. 48 govern the word "under raiyat" just preceding them and not landlord. An under-raiyat paying rent in kind is not protected by the section. 3 Pat L J 576-4 Pat L W 109-43 I C 965

**BENGAL TENANCY ACT 8 OF 1885 (Contd.)**

—S. 48—Raiyat letting out a portion of holding to under raiyat—Provisions of S. 48 as regards 25 per cent. limit do not apply. 39 Cal 839-15 I C 256-16 C W N 857

—S. 48—A ryot who has sub-let a portion of his holding under a registered lease, cannot recover from the under ryot rent exceeding 50 percent the amount which he himself pays for the whole of the holding. It cannot be said that S. 48 of the B T Act applies only where the whole of a ryot's holding is sub-let, 39 C 839 expl. 42 I C 243

—S. 48—Where an under-raiyat agrees to deliver paddy and in case of default, the money value. Held it is on the tenant to prove that the amount claimed is in excess of the rent payable by him.

S. 48 applies only to cases in which the land held by a raiyat is co-extensive with the land held by the under raiyat and not where it is a fraction of the holding of his raiyat landlord. 24 I C 677

—Ss. 48, and 49 (a)—Where, on the death of the original tenant of a raiyati holding under a written lease for a term of years, before the expiry of the term, his son succeeded him as an under-raiyat, and went on cultivating the land after the expiry of the lease.

Held, that he was liable to be ejected without a notice to quit. 20 C L J 328-27 I C 45

—S. 48—Whether land sub-let is or is not co-extensive, raiyat cannot realise more than 50 or 25 percent of the rent he pays to landlord. A I R 1930 Pat 596-9 Pat 627-11 P L T 784-Ind Rul (1930) Pat 743-127 I C 839

—S. 48—S. 48 governs tenancies co-extensive under settlement and kabulyat. A I R 1929 Pat 372-10 P L T 369-Ind Rul (1930) Pat 145-121 I C 449

—S. 48—Where under-raiyat of a part of holding agrees to pay to raiyat higher than 150 percent of the rent of the whole holding. S. 48 applies even if the holding is not co-extensive. A I R 1928 Cal 885-32 C W N 1050-Ind Rul (1929) Cal 507-56 C 217-116 I C 731

—S. 48—S. 18 controls S. 48. A I R 1927 Cal 878-104 I C 150

—S. 48—Only under raiyats are protected by S. 48. A I R 1926 Cal 986-43 C L J 242-93 I C 1015

—S. 48—Mortgagee-lessor can recover rent from mortgagor-lessee only as under S. 48. A I R 1923 Pat 402-71 I C 470

—S. 48—Rent recoverable from a raiyat executing zarfeshgi lease and then taking land from zarfeshgidar is governed by S. 48. A I R 1923 Pat 402-71 I C 470

—S. 48—Where under-raiyat agrees to pay rent in kind S. 48 (a) does not



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apply. In a rent-suit plea of eviction by title paramount can be raised. A I R (1922) Cal 273=35 C L J 159=63 I C 502

—S. 48 (a)—S. 48-(a) is not applicable to a case of rent in kind and on default money-value. A I R 1922 Cal 273 =35 C L J 159=63 I C 502

—S. 48—S. 48 applies to the case of an under-raiyat without reference to the status of the landlord. 36 C W N 89

—S. 48—S. 48 applies where the option of paying either kind of rent is given to the tenant, it does not where the alternative money rent is recoverable at the option of the landlord. 36 C W N 89

—S. 48—Where the relevant portion of the kabuliyat was in these words "If we do not deliver paddy (as aforesaid) then we will pay to you within the said month as value of the said paddy Rs. 400 according to the present market rate. If we do not, then you will be entitled to realize the same amicably or by suit with interest thereon", Held that the rent was payable in kind or in money and that the kabuliyat gave the tenant the option of paying either kind of rent. 36 C W N 89

—S. 43 (c) (as amended)—Not-retrospective. 55 C L J 170=139 I C 544=I R 1932 C 643=A I R 1932 C 568=A L R 1932 C 609

--48 (G) (3)--No change in law by introduction of. 36 C W N 400=56 C L J 176=A I R 1932 C 571=A L R 1932 C 577

--S. 48 (G) (3)--Not retrospective in operation. 36 C W N 400=56 C L J 176 =A I R 1932 C 571=A L R 1932 C 577

--S. 48-H--Where an under-raiyat gives an under-raiyati lease for more than 12 years describing himself as a raiyat and gets it registered without paying landlord's fees, the lease will have no effect against the landlord but the landlord cannot sue for his fees. 35 C W N 974

—S. 49—Jote—Means a raiyati, under-raiyati, or any sort of holding for the purpose of cultivation and not necessarily an occupancy holding. 139 I C 544=55 C L J 170=I R 1932 C 643=A I R 1932 C 568 =A L R 1932 C 609

—S. 49—The fact that one of the co-sharer landlords accepted rent did not in any way affect the other landlords who did not join him in accepting to rent. After the determination of the tenancy on expiry of the term of the notice the position of the under-tenants, namely, the defendants, became that of trespassers. The appellants as co-sharer landlords could institute a suit for possession in respect of their share of the land either jointly with the tenants as representing the co-sharer who received rent or separately. As there has been no

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separation of the land, the only claim that the appellants can make is to obtain possession in respect of their share jointly with the defendants as representing the interest of the co sharer who received rent. 13 P L T 432=I R 1932 P 289=A I R 1932 P 259=140 I C 14.

—S. 49—Proper Court-fee for suit for ejectment of under-raiyat after notice is on one year's rental under s. 7 (ii), Court Fees Act. 54 C L J 68=Ind Rul (1931) Cal 737=133 I C 689

—Ss 49, 167—The purchaser of raiyati holding (other than the landlord) sold for arrears of rent, can eject the under-raiyat after giving notice under s 49 without annulling the encumbrance under s. 167. 30 C L J 201, followed; 19 C W N 1077, distinguished. A I R 1931 Pat 20=14 P L T 777=Ind Rul (1931) Pat 80=129 I C 96

—S. 49—Suit for ejectment—onus of proof—where plaintiff's title established onus is on the defendants to prove the existence of a right of occupancy or a permanent right. A L R 1933 C 245=57 C L J 37

—S. 49—S. 49 does not apply to the case of an under-raiyat who has relinquished his holding. 20 C L J 548=42 Cal 751=19 C W N 43=27 I C 271

—S. 49--Application of, to suits in ejectment on transfer of under-raiyati holding. 19 C W N 43

—S. 49--Ejectment—Termination of the interest of occupancy raiyat—Notice under S. 49, not necessary. 25 I C 741

—S. 49--Landlord and Tenant—Tenancy--Nature of--Evidence--Conduct. 42 I C 280

—S. 49--Under raiyat--Notice to quit by one of several landlords, is valid even where there is no evidence that it was signed by the landlord on behalf of himself and the other landlord. 23 C W N 76=46 I C 254

--S. 49--S. 49 prescribes no form or length of notice. 19 I C 557=17 C W N 932

--S. 49--A notice to quit under S. 49 should be served in the manner prescribed in the C P Code for the service of a summons. 56 I C 127

--S. 49--Notice to quit by several joint landlords--Notice signed by one is valid. 44 I C 49

--S. 49--Where in a suit for ejectment the defence is that the defts. are not under-raiyats but occupancy raiyats, the question for determination is whether the plffs. are raiyats or tenure holders. (1917) Pat 379=5 Pat L W 311=43 I C 941

—S. 49--Suit for rent by raiyat against under-raiyat dismissed. Sub-

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sequent suit for ejectment is not res judicata on the question of the title of the plaintiff, but the debt as under-riyat could not be ejected without notice under S. 49.

27 I C 273

--Ss. 49 and 85--An under-riyati lease which was described as Karsana patta i. e. yearly lease was held to be terminable by notice under S. 49. 22 C W N 179-28 C L J 91-44 I C 254

--S. 49 and 85--A lessor describing himself as a Kayamiriyot does not necessarily imply that he was a ryot at a fixed rent.

Where the lessor did not represent himself as a ryot at a fixed rent and the lessee was not induced to take the lease by such representation and that in fact he was in occupancy ryoti. Held, that the lease which was for a term of more than nine years was invalid. 22 C W N 179 (1917) followed.

The interest of an under ryot is not heritable. 24 C W N 93-54 I C 906

--Ss. 49 and 85--Where sub-lease by the raiyat of a non-transferable occupancy holding is not valid against his landlord under S. 85 the landlord can eject the under raiyat without any notice under S. 49 on the raiyat transferring the holding to the under-riyat. 2 C L J 570; 4 C W N 667, ref. 13 C W N 913; 31 C 932; 34 C 104; 19 C W N 68, dist. 44 Cal 272-21 C W N 363-34 I C 912.

Confirming on appeal. 29 I C 466.

Ss. 49, 85-A permanent sub-lease granted by a raiyat is inadmissible in evidence, even though some money or some rent has been paid by way of part performance. Therefore the right of the parties cannot be adjudicated on with reference to it. 17 C W N 59 foll.

A raiyat may by custom create a permanent sub-lease and such sub-lease is not inadmissible in evidence, but the party who wants to prove it must establish the custom before it is admitted in evidence.

Obiter: A raiyat holding at a fixed rate of rent is competent to create a permanent underlease. 42 I C 534.

--Ss. 49 and 85--Apart from custom or express enactment, a lease for a term devolves on the heirs of the original lessee. On expiry of the term the heirs may be ejected without notice under S. 49 (b) 41 C 1108; 31 C 757; 11 C W N 519 ref. 20 C W N 756-31 I C 26-22 C L J 232.

--Ss. 49, 85 and 167--Mortgagee of raiyati land sublet. Purchase and resale of the raiyati land by landlord the purchaser from landlord sued to eject the under-riyat after notice. Held the purchase by landlord did not involve merger the under raiyat continued to be under-riyat and

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could be ejected after notice. 43 Cal 164-29 I C 686.

--Ss. 49 and 85 (2)--In a suit to eject after a notice under S. 49 the debt set up a permanent sub-lease granted by the plffs vendor and pleaded estoppel.

Held, that the lease being invalid under cl. (2) of S. 85 the tenancy could be ended by a notice under S. 49 and the debt, not having a subsisting tenancy could not rely upon his previous possession. 23 C W N 435 foll. 13 C L J 649 and 24 C L J 539 dist.

Held, that the principle of estoppel cannot be invoked to defeat the plain provisions of a statute. 23 C W N 437-51 I C 403.

--Ss. 49 and 87--Where a superior landlord is claiming to re-enter because the occupancy-raiyat has forfeited his holding by having transferred it without the consent of the landlord no notice under S. 49 or S. 87 is necessary. 29 I C 466.

See on appeal. 44 Cal 272-21 C W N 363-34 I C 912.

--Ss. 49, 113 and 183--An under-raiyat can acquire a right of occupancy by custom or usage and in such a case he is not liable to be ejected under S. 49. 19 C W N 246 ref. 46 Cal 43-22 C W N 618-28 C L J 84-45 I C 545.

--Ss. 49 and 167--A purchaser of an occupancy holding can eject, without annulling the incumbrance under S. 167 and without notice under S. 49 an under-raiyat, whose holding was created without a registered lease and without the consent of the landlord. 28 Cal 205; 17 C W N 860; 31 Cal 932 and 13 C W N 913 dist.

S. 167 and S. 49 Apply only to cases where there is a subsisting tenancy. 46 Cal 766-30 C L J 201-53 I C 334.

--Ss. 49, 182--Sub-lease of homestead by raiyat--Permanent under-raiyati lease valid and binding as between parties. 16 C W N 618-15 C L J 672-13 I C 364.

--S. 49 cl. (6)--The landlord of a non-transferable under raiyati holding who knowingly continues to receive rent from the transferees in the name of the original under-raiyat cannot eject them without notice under Cl. (6) of s. 49. 32 I C 614.

--S. 49 (b)--An under-raiyat holding under a potta executed before the Act and not expressly providing for the period of its duration comes within cl. (b) of S. 49. 39 C 273-14 C L J 407-16 C W N 6-12 I C 161 (F B)

--S. 49 (b)--Under-raiyat holding under an occupancy raiyat cannot be ejected without notice.

The term "landlord" includes a person who on the extinction of other

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rights comes into direct relationship with the tenant or under tenant as the case may be. 17 C W N 781-18 I C 249.

Ss. 49 (b) and 85 (2)-Sub-lease by under-riyat both exceedings nine years-Sub-lease registered by mistake-Not admissible under S. 91 of the Evidence Act to prove tenancy-Ejection after notice to quit. See B T Act Ss. 85 (2) and 49. 23 C W N 435-42 I C 621-29 C L J 388.

-Ss. 49 (b) and 85 sub s. (2) and (3)-Under-riyat lease for more than nine years prior to the Act not invalid after expiry of nine years from passing of the Act. The ryot cannot therefore before the term of the sublease has expired eject the under ryot under S. 49 (b). 29 C L J 391.

-S. 49, Cl. (b) and 182-Where a riyat sublet homestead portion. Held that having regard to the nature of the original tenancy, the incidents of the sublease would be governed by the B T Act and not by the T P Act. 8 C W N 453, 15 C L J 672, foll. 19 C W N 914-21 C L J 475-28 I C 839.

-Ss. 49 (b) and 85-Solenam creates a new lease, and as such it is not binding unless it is registered even if it is embodied in a decree. A I R 1929 Cal 462-56 C 427-Ind Rul (1929) Cal 703-118 I C 895.

-S. 49-Plaintiff seeking ejectment must prove himself to be a riyat and defendant an under-riyat, and that notice under S. 49 was given 113 I C 575 (Cal).

-S. 49-Plaintiff seeking ejectment must prove that defendant is under-riyat A I R 1927 Cal 963-32 C W N 160-105 I C 857.

-S. 49-S. 49 does not prescribe any special form for notice, it must be clear in terms. A I R 1927 Pat 376-103 I C 471.

-S. 49-Bargadar-tenant is governed by S. 49. A I R 1926 Cal 1118-96 I C 667.

-S. 49-In a suit for ejectment heirs of tenant of non-heritable holding not recognised by landlord need not be joined as parties. A I R 1926 Cal 1206-96 I C 360

-S. 49-Under riyat cannot be ejected for denying landlord's title except under S. 49. A I R 1926 Cal 540-91 I C 652

-S. 49-On the expiry of the registered lease under-riyat can be ejected by landlord though he may be a settled riyat under another landlord. A I R 1926 Cal 662-43 C L J 132-94 I C 920.

-S. 49-A tenant holding under a lease for an indefinite period can be ejected by landlord serving notice under S. 49. 92 I C 961,

-S. 49-Sub-leases by permanent heritable tenant of homestead land are not governed by S. 49. A I R 1926 Cal 215-42 C L J 78-90 I C 104.

-S. 49-S. 49 requires only a reasonable notice, and not six months' notice. A I R 1926 Cal 466-89 I C 113.

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-S. 49-Notice under S. 49 must strictly comply with O V R 17, A I R 1925 Pat 441-4 Pat 135-7 P L T 175-(1925) Pat 106-91 I C 184.

-S. 49-S. 49 does not apply to a case of consent-decree embodying the lease A I R 1925 Cal 199-28 C W N 984-84 I C 730

-S. 49-Where two tenants are in, possession under an agreement of lease notice in ejectment to one of them alone cannot be given A I R 1924 Cal 483-28 C W N 157-76 I C 365

-S. 49-S. 49 requires substantial notice A I R 1924 Cal 520-37 C L J 548 =70 I C 999

-S. 49-Riyat's right in homestead is acquired by its settled riyat 65 I C 504 (Cal)

-S. 49 (b)-Permanent-lease by riyat without tenure-holder's consent, lessee remaining in possession for more than 12 years not liable to be ejected 64 I C 756 (Cal)

-S. 49 (b)-An under-riyat in possession under a permanent sub-lease by a riyat not holding at fixed rate can be ejected 25 C W N 4-32 C L J 296 (F B) =61 I C 466

S. 49 and 167-Under riyat can be ejected by a stranger purchasing a riyati holding sold for arrears for rent, serving notice under S. 49 A I R 1931 Pat 20-11 P L T 777-129 I C 96

-Ss 49 and 182-No settled riyat of the village can be ejected from the homestead land of which he is an under-riyat A I R 1930 Pat 411-123 I C 628

-Ss. 49 and 85-Entry in Record of Rights showing under-riyats to have acquired occupancy rights based on kabuliya containing no clause entitling the plaintiff to eject defendants under-riyats but the term that it was year to year tenancy is void A I R 1929 Cal 450-49 C L J 352-122 I C 550

-Ss. 49 (b) and 85-In absence of a custom or express enactment to the contrary a lease for a term devolves on the heirs of the original lessee who can be ejected on the expiry of the term without notice under S. 49 (b). 22 C L J 232-20 C W N 756-311 I C 26

-S. 49-E, Sub-s. 2-Mortgage by aboriginal tenant is valid if it is within s 49 -E, Sub-s. 2 A I R 1923 Cal 313-68 I C 301

-S. 49-K-S. 49 K renders the sale of aboriginal's tenure void. A I R 1924 Cal 638-51 C 224-28 C W N 556-82 I C 848

-S. 50-In respect of a tenure recorded in the Record of Rights as a non-mukarrari tenure, the landlord sued for enhancement of rent under S. 7 of the Act. The tenure holder contended that for nearly half a century or more he had been paying

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rent at the rate of Rs. 66-7-3 and that consequently he was entitled to the benefit of the presumption under s 50.

Held that the answer to this contention is that the Record of Rights has been published duly under Ch. X, Bengal Tenancy Act, and having regard to the provisions of S. 115 of that Act, it is clear that the defendant is not entitled to the benefit of that presumption. 55 C L J 91=A I R 1932 C 632=A L R 1932 C 665

—S. 50—Presumption under-Tenureholder not entitled to benefit of, by reason of S. 115 of Act, cannot fall back on any presumption outside the Act 55 C L J 91 =A I R 1932 C 632=A L R 1932 C 665

—S. 50—Where the rent receipts stated all items in detail but after some years the details were omitted though the total amount was the same.

Held, it cannot be assumed merely from the from of the receipts that the tenant must necessarily have consented to pay the whole sum as the consolidated rent of her land; and that therefore the tenant is entitled to the presumption under s. 50. 1 Ind Cas 21

S. 50—From the mere fact that a tenancy has been held for about 25 years before the date of transfer at a uniform rate of rent, it cannot be inferred that the rent was fixed in perpetuity.

Though the misconstruction of a document is a ground for second appeal, a second appeal does not lie, because the Judge in the Court of appeal below has misunderstood the effect of documentary evidence.

In order to prove a custom or usage of transferability, it is necessary to prove that transfers have been made to the knowledge and without the consent of the landlord, and that they have been recognised by him without the payment of nazar or upon payment nazar also fixed by contract. It is not necessary to prove that the landlord has actually made an objection to a transfer and has been unsuccessful.

The usage or custom must be obligatory; a usage of transferability, after it has grown up, affects not merely tenancies created thereafter but also existing tenancies. 13 C L J 418=15 C W N 752=10 I C 325.

—Ss. 50 cl. (2), 85, 86, cl. (b)—Even where the defendant set up a false pattah, he could be entitled to the benefit of presumption, if he has proved other facts which would give rise to such an inference. Where a raiyat surrenders his holding, the landlord can reenter by ejecting the under-raiyat without a notice to quit, if not protected by S. 85 or S. 86 cl. (b). 10 Ind Cas 164,

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—S 50—Applicability of—Case where variations of rent not small. Ben Ten Act S 105. (1917) Pat 261=41 I C 499.

—S. 50 Where the evidence, if accepted gives rise to a presumption under S 50 (2) that the entire area is a fixed rate holding but it is conceded that a portion of the holding is not held at fixed rate, the presumption is affected and the holding cannot be held to be a fixed rate holding. 51 I C 302.

—S. 50—Presumption applicability to suits not under the Act Landlord and Tenant, Uniform Rent 22 I C 367

—S 50—Where a tenure holder in a suit brought more than 20 years before the present suit asserted that his rent was a certain fixed sum and in the present suit also the same rent was claimed there was no evidence of any alteration of rents Held that the fact that the same rent was claimed in the present suit was on admission of fixity of rent and (2) that the debts were entitled to the presumption under s. 50. 23 I C 773

—S 50—Presumption—Lease—Construction 45 I C 221

—S 50—Presumption Landlord and Tenant—Termination of Tenancy 20 I C 263

—S 50—A slight variation in the rents unless explained on any ground other than that of the enhancement is sufficient to rebut the presumption under s. 50. 40 I C 553

—S 50—A raiyat in order to bring himself within s. 50 has only to show that the land in question has been held at an unchanged rent since the permanent settlement and it is not important that land should throughout that period have remained a separate holding. If there has been a confusion of boundaries by reason of his own act or conduct, before he can rely upon the presumption, he is bound to satisfy the court and identify the particular lands in respect of which he claims the benefit of the statutory provisions (1874) 11 W R 267 Expl. 17 C L J 435=21 I C 385

—Ss 50 and 105—The mere fact that the rent was enhanceable under a kabuliyat executed after the inception of the tenancy is not sufficient to rebut the presumption under s. 50 clause (2) if in fact it was not altered 51 I C 904

—S 50 & 105—In a proceedings under s. 105 Jama wasil baki papers of more than 70 years were held admissible to rebut the presumption arising under s. 50 and their genuineness could be presumed under s. 90 of the Evidence Act.

Held, rather that the liability to enhancement was imposed not by the Jama Wasil baki papers but by the law in the absence of a presumption under s. 50 or upon rebuttal of that presumption. 16 C L J 24 foll. 32 I C 794

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—Ss. 50 and 105—Question of enhanceability of rent is not a question under s. 105. 18 C W N 949=25 I C 228

—Ss. 50 & 105—On application under s. 105, for settlement of rent after the final publication of the Record of Rights the tenant is entitled to the benefit of the presumption under s. 50. 33 I C 415

—S. 50 & 115—The presumption under s. 50 does not apply to a tenant who has been recorded in a Record of Rights prepared under Chapter X of the Act. 22 I C 943

—S. 50 & 115—After the publication of the Record of Rights under Chapter X the tenants are debarred by s. 115 from relying on the presumption in s. 50 51 I C 552

—Ss. 50 & 115—After the publication of a Record of Rights raiyat, is precluded from relying upon the presumption raised in s. 50 for that section is controlled by s. 115. 56 I C 818

—Ss. 50 & 116—Tenant being recorded in the Record of Rights as occupancy raiyat under s. 102 (b) and not as raiyat at fixed rent. Held, presumption under s. 50 did not apply. 23 C W N 1041=30 C L J 9 =52 I C 79

—Ss. 50 & 158—The principle underlying s. 158 is that there should be an admitted tenancy. In dealing with an application under s. 158 it is not necessary to find whether presumption under s. 50 arises that section being applicable when the landlord seeks an enhancement of rent. 55 I C 709

—Ss. 50 (1) (3) & 105—New kabuliyat not varying the rent but stating it to be variable does not rebut presumption. Purchaser of a non-transferable occupancy holding cannot claim recognition by the landlord as of right but if he obtains recognition then in the absence of special circumstances he is admitted into the original tenancy with all its incidents. 22 C W N 904=29 C L J 371=47 I C 359

—S. 52 (2)—Where rent was being paid and accepted for 37 years landlord's right to khas possession was held to be barred. But on production of kabuliyat executed by the predecessor-in-interested of the defendant stipulating enhanceability of rent. Held the rent could be enhanced. 31 Cal L J 178 =55 I C 790

—S. 50 (2)—Holding at uniform rent is enough to raise presumption under s. 50 (2)—Proof of payment is not necessary. 27 C L J 281=38 I C 94

—S. 50 (2)—A kabuliyat which expressly stipulated to pay enhanced rate rebutted the presumption. 22 C W N 322=44 I C 593

—S. 50 cl (2)—Presumption of permanency—Suit not under Bengal Tenancy Act Presumption—Payment of Rent. 21 I C 544=18 C L J 183

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—S. 50 (2)—Presumption See B T Act s. 31 A. 45 Cal 930=22 I C 604

—S. 50 (2)—Amalgamation of several tenures and stipulation to pay enhanced rent by tenant—New tenancy Presumption rebutted. 22 C W N 321=44 I C 595

—S. 50 (2)—Presumption is applicable where abatement has been allowed for lands gone out of cultivation, if the abatement bears to the whole rent the same proportion that the land given up does to the whole area. 41 I C 259

—S. 50 (2)—The presumption under s. 50 (2) may arise even though there has been an alteration in the area of the holding. In such a case the rent cannot be increased except for the excess area unless the presumption is rebutted. Where the records filed by the landlord himself prove that the tenant was holding the land at the same rent for more than twenty years before the suit, it is not necessary for the tenant to produce his rent receipts to prove the same to avoid himself of s. 50 (2). 22 C W N 999=41 I C 767

—S. 50 (2)—Where rents had been paid by the former tenants at a uniform rate and that for many years after the purchaser and before suit no rent had been paid the presumption under s. 50 (2) arises. 11 W R 432 foll. A raiyat, who under s. 50 (2) is deemed to have held at a rent which has not been changed, comes within the definition of a raiyat holding at a fixed rate within the meaning of s. 4, sub s. (3) (a). 27 C L J 281=38 I C 94

—S. 50 (2)—Mere statement in rent receipt that a holding is sarasari does not rebut the presumption arising under s. 50 (2) from the fact that the rent has been unchanged for more than 50 years. 47 I C 780

—S. 50 (2)—A mere sub-division of an old tenure or amalgamation does not necessarily mean the creation of a new tenure so as to destroy the presumption under s. 50 (2) unless the tenant had executed fresh kabuliyat rebutting the presumption. 46 I C 433

—S. 50 (2)—Defendants proved payment of rent at the same rate for 20 years before the suit. Plaintiff produced a Kabuliyat showing that the tenants had agreed to pay enhanced rent and amalgamation of original tenures.

Held, that the plaintiff was entitled to enhancement as he rebutted the presumption. 18 C W N 949 dist. 31 C L J 12

—S. 50 (2)—Fixity of rent presumed from uniform payment of rent for 20 years, unless contrary shown. 31 C L J 11

—S. 50 (2)—If a landlord abstains from enforcing enhancement for twenty years or more, this in itself confers no right upon the tenant, but merely gives



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rise to a presumption under S. 50 (2). 22 C W N 856=43 I C 59

—S. 50 (2)—Slight variations in the rent paid with corresponding variations in area—Presumption of permanency. 1 W R 230 (1842) 4 W R Act X Rulings, p. 33, (1865), relied on. 7 W R 44 (1867); 5 W R Act X. Rulings, p. 83 (1866) ref. 20 I C 53=18 C L J 76=19 C W N 117

—S. 50 (2)—Tenants producing rent receipts showing payment of uniform rate of rent for 20 years—Presumption that tenancy commenced from permanent settlement—Onus on the landlord to show that the former owners of the land were not predecessors. 22 C W N 126=43 I C 856

—Ss. 50 (2), 102 (b) and 115—Once the status of a tenant is entered as qaimi under S. 102 (b) of the Act no presumption can thereafter arise under section 50. The section does not, however bar proof of the tenancy from the time of the permanent settlement at a fixed rate of rent by any other means. 58 I C 25

—Ss. 50 (2) 105—Tenant recorded as occupancy raiyat can claim fixity of rent by proof of uniform payment

S. 105 is not restricted to cases where no rent has been previously agreed upon. 17 C W N 774=16 C L J 328=17 I C 266

—Ss. 50, 115—Application of suit for declaration. Declaratory Suit—Record of Rights. 35 I C 427=1 Pat L J 67

—Ss. 50 (2) & 115—An occupancy raiyat is precluded from relying upon the presumption under s. 50 (2) after the publication of the Record of Rights. 1 Pat L T 27 =54 I C 672

—S. 50—Presumption under s. 50 is rebutted where a tenant after Permanent Settlement executes Kabuliyats agreeing to pay higher rent and landlord agreeing to keep excess rent has at. A I R 1931 Cal 303=34 C W N 991=58 C 159=131 I C 657

—S 50—No presumption under s. 50 arises unless the suit is brought under that Act. In ejectment suit it is discretionary for the Court to raise presumption. A I R 1930 Cal 734=34 C W N 675=Ind Rul (1931) Cal 34=128 I C 178

See also A I R 1927 Cal 174=94 I C 740=43 C L J 104

S. 50—If at the time of Permanent Settlement rent is not fixed in perpetuity presumption under s. 50 (2) does not arise even though same rent was paid for a number of years. A I R 1930 Pat 379=11 P L T 240=Ind Rul (1930) Pat 273=125 I C 121

—Ss 50& 160—A raiyat holding at a fixed rent can claim benefit of s. 50 on proving particular facts in s. 50. A I R 1928 Cal 880=48 C L J 97=32 C W N 587=56 C 173=Ind Rul (1929) Cal 305=115 I C 81

—S. 50 (1)—Kabuliyat showing the

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tenants in possession attorning to the plaintiff on his purchase of the zamindari, and not the creation of any new tenancy, is insufficient to prove a change in rent since the date of Permanent Settlement.

109 I C 376 (Cal)

—S. 50—Words "at the time of the Permanent Settlement" mean the date of the Permanent Settlement of 1793. A I R 1928

Pat 429=9 P L T 679=109 I C 136

—S. 50—Transfer of part of holding by tenant and recognition of the transferee by landlord create new tenancy. A I R 1928 Cal 163=106 I C 136

—S. 50—Where landlord purchases holding in rent sale and resettles with the same tenant the continuity is broken. A I R 1928 Cal 169=106 I C 136.

—S. 50 and 109—In proceedings under S. 105, Appellate Court's order holding that presumption under S. 50 was rebutted and remanding the case for settling fair rent, is appealable. A I R 1927 Cal 686=31 C W N 936=104 I C 823

—S. 50—If no proceedings in Revenue Court or under B. T. Act, are taken, a suit by raiyats for correcting wrong entry in Record of Rights as to their status, is only an ordinary Civil suit. A I R 1927 Cal 458=31 C W N 499=102 I C 113

—S 50 (3)—Presumption is affected by addition or subtraction of land. A I R 1927 Cal 493=101 I C 347

—Ss. 50 and 102 (b)—Addition of "Caimi" to "Settled raiyats" does not vitiate the entry. A I R 1927 Cal 546=101 I C 45

—S 50 (2)—Absence of the tenancies in the old wasil baki papers does not affect the presumption if uniform rate is shown for 20 yrs. A I R 1927 Cal 493=101 I C 347

—S. 50—S. 50 does not contemplate enhancement of rent to a substantial amount. A I R 1926 Cal 1214=44 C L J 103=97 I C 1007

—S. 50—Kabuliyat to pay higher rent if the tenant is found to be in possession of excess area, does not alter the rate of rent. A I R 1927 Cal 75=97 I C 546

—S. 50 (2)—Presumption under sub-s. (2) is not rebutted simply by an agreement to pay enhanced rent at future time. A I R 1926 Cal 1207=30 C W N 1038=97 I C 753

—S. 50—If Record of Rights shows fixity of rent, fixity need not be proved by tenant till landlord rebuts the entry. A I R 1926 Cal 1222=96 I C 884

—S. 50—S. 50 applies whether there is one or series of tenancies or the land is held under one or different landlords. A I R 1927 Cal 75=97 I C 546

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—S. 50 (1)—Irrespective of any contract between parties, sub-s. (1) applies where rent has actually not been charged. A I R 1926 Cal 1177-95 I C 565

—S. 50 (4)—Temporary kabuliyat rebuts the presumption. A I R 1926 Cal 858-94 I C 26

—S. 50 (2)—Where presumption is inapplicable, fixity of rent may be determined by referring to other evidence. A I R 1926 Cal 887-94 I C 310

See also A I R 1927 Cal 546-101 I C 45

—S. 50—Addition of additional land with additional rent to the old tenancy neither destroys presumption as to old tenancy, nor raises presumption with regard to added area. A I R 1926 Cal 710-92 I C 107

—S. 50 (2)—Presumption under the section may arise irrespective of its provisions. 91 I C 878

—S. 50—Burden to prove that rent is liable to be enhanced lies upon the landlord, unless he shifts it by proving origin of tenancy or any other mode. A I R 1926 Cal 113-90 I C 557

—S. 50—(1)—Kabuliyat to pay enhanced rent, if excess land be found does not rebut the presumption under s 50 (1). A I R 1925 Cal 1133-88 I C 584

—S. 50—Apart from presumption of permanency, contract against enhancement of rent may be proved. A I R 1925 Cal 954-29 C W N 723-88 I C 433

—S. 50—(2)—To rebut the presumption under S. 50 (2), quinquennial Register of 1895 kept under Bengal Reg. XLVIII of 1793 is admissible in evidence. A I R 1925 Cal 1037-86 I C 538

—S. 50 (2)—Substantial valuation in rent is not necessary to rebut presumption under S. 50 (2). A I R 1925 Cal 1025-86 I C 587

—S. 50—Slight variation in rent does not affect the presumption. A I R 1925 Cal 632-29 C W N 500-41 C L J 135-86 I C 316

—S. 50 (2)—Whether uniform rent for 20 yrs. is proved or not is a question of fact. A I R 1925 Cal 632-41 C L J 135-29 C W N 500-86 I C 316

—S. 50 (2)—Fixity of rent or permanency of tenancy is not proved by the fact that the rent had been uniform for 55 years and that the tenancy was held by defendants for several generations. A I R 1925 Cal 761-85 I C 636

—S. 50 (2)—To invoke the aid of s. 50 (2) defendant must be proved to be a tenant. A I R 1925 Cal 761-85 I C 636

—Ss. 50 and 115—Non-compliance of entries in the Record of Rights with s 102, raises presumption under s. 50. A I R 1925 Cal 208-29 C W N 209-40 C L J 248-84 I C 989

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—S. 50 (2)—If rent, tenant, land are same in 1299, 1311, 1323, presumption under s 50 (2) arises in favour of purchaser from the tenant. A I R 1924 Cal 875-39 C L J 437-83 I C 568

—S. 50—Presumption under s 50 is applicable to occupancy raiyats. A I R 1924 Cal 143-27 C W N 740-80 I C 577

—S. 50 (1)—Unless the area of the holding is altered, rent is not liable to be increased if uniformity of the rent from the time of the Permanent Settlement is proved. A I R 1924 Cal 143-27 C W N 740-80 I C 577

—S. 50 (2)—Tenancies which are wholly or partially Haja Badi are not governed by s 50 (2). A I R 1924 Cal 648-51 C 314-28 C W N 529-81 I C 564

—S. 50—Presumption under, is not raised merely by production of receipts for 33 years. A I R 1923 Pat 324-2 Pat 92-79 I C 199

—S. 50 (3)—Presumption under s 50 (2) is not rebutted because the tenure is sub-divided. A I R 1925 Cal 498-78 I C 744

—S. 50 (2)—Presumption is not rebutted merely by production of a certified copy of a paper in Collectorate not strictly fulfilling the test of s. 35, Evidence Act. A I R 1924 Cal 654-39 C L J 389-28 C W N 679-78 I C 719

—Ss. 50 and 30 (a)—On landlord proving that holdings as recorded in Record of Rights were not in the same condition as recorded in previous years, tenants have to prove uniformity of rent of their present holdings. A I R 1924 Pat 245-(1923) Pat 339-78 I C 593

—S. 50 (2)—Kabuliyat proceeding on the basis that there were pre-existing rights, does not rebut the presumption. A I R 1923 P C 86-28 C W N 752-18 M L W 147-33 M L T 432-1923 M W N 718-45 M L J 779 (P C)-75 I C 556

—S. 50 (2)—Tenure held over 20 years at the same rent and name is not a permanent tenure. A I R 1923 Cal 261-36 C L J 389-74 I C 383

—S. 50 (3)—Sub-division or amalgamation of tenures does not affect the presumption to be drawn under cls (1) and (2). A I R 1923 Cal 66-36 C L J 382-73 I C 312

—S. 50 (2)—Holding at uniform rent raises presumption under s 50 (2)—Payment need not be proved. A I R 1923 Cal 665-37 C L J 598-73 I C 77

See also 38 I C 94-27 C L J 281.

See also A I R 1926 Cal 1169-95 I C 525-30 C W N 520

See also 97 I C 513-A I R 1927 Cal 48

See also A I R 1922 Cal 141-67 I C 381-35 C L J 309-49 C 661

—Ss. 50 (1) and 50 (2)—Cases of rent partly payable in cash and partly in kind

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are governed by the s. 50 (1) (2). A I R 1923 Cal 74=27 C W N 115=36 C L J 220=72 I C 663

—Ss. 50 and 29—S. 29 contemplates a case of actual payment of rent for three years, while s. 50 applies to a case of tenancy held at a certain rate. A I R 1923 Cal 600=37 C L J 489=72 I C 136

—S. 50 (2)—Where Record of Rights is against a tenant, no presumption under s. 50 in his favour can arise. A I R 1924 Pat 373=1 P L R 32=71 I C 15

—Ss. 50 and 115—A suit for enhancement of rent not being a suit under chapter X of the B T Act, does not entitle the tenant to the benefit of the presumption under s. 50. A I R 1922 Cal 146=49 C 919=26 C W N 947=36 C L J 291=70 I C 537

—S. 50—Landlord as per special contract between him and tenant, can at the expiry of the lease, claim rent at the rate stipulated in the contract. A I R 1923 Cal 141=36 C L J 333=70 I C 437

—S. 50—In a suit for enhancement of rent, the nature of the tenure and the conditions under which it is held should first be determined. A I R 1922 Cal 461=36 C L J 196 (2)=27 C W N 328=70 I C 273

—S. 50 (2)—Apart from applicability of s. 50, proof of uniform rate of rent for 20 years immediately preceding, does not raise presumption that same rent was paid since Permanent Settlement. A I R 1921 Pat 435=2 P L T 642=68 I C 433

—Ss. 50 (2) and 103 (b)—Ss. 103 (b) prevails in competition with s. 50 (2). A I R 1921 Pat 435=2 P L T 642=68 I C 433

—S. 50 (1) and (2)—Words "Permanent Settlement in s. 50 (1) mean the Permanent Settlement of 1793. Proof of permanent settlement of rent even later than 1793 raises presumption under s. 50 (2). A I R 1923 Cal 298=50 C 135=27 C W N 647=67 I C 294

—Ss. 50, 105 and 105-A—Where a tenant under a lease agrees to take a fresh settlement on proper rent on the determination of the lease a new Tenancy on old terms excepting duration is presumed to be created on landlord's failure to exercise his rights of possession or renewal and tenant holding over. 65 I C 589 (Cal)

—S. 50—No presumption of fixity of rent, apart from that under s. 50, is raised on showing payment of rent at uniform rate. 65 I C 527 (Cal)

—S. 50 (2)—Landlord can claim enhancement in absence of proof of uniform rate since Permanent Settlement; and to prevent presumption under s. 50 (2) arising can refuse old rates in any case. Until a change has actually been effected, same rate of rent continues. A I R 1922 Cal 141=35 C L J 309=49 C 651

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—Ss. 50 and 104 (h)—Proof of origin of tenancy affects the presumption under s. 50. Revision of rent under s. 104 (h) cl. 4 of the B T Act, cannot be claimed by a person not really affected by an entry of rent in the Record of Rights. A I R 1924 Cal 464=40 C L J 235=70 I C 207 (Cal)

—Ss. 50 and 115—Tenant cannot rely on presumption under S. 50, after the Publication of Record of Rights under Chap X. 26 C W N 945=64 I C 445.

See also A I R 1930 Pat 599=11 P L T 623=128 I C 797=Ind Rul (1931) Pat 61.

See also A I R 1925 Pat 181=6 P L T 221=80 I C 926.

See also A I R 1930 Pat 332=9 Pat 809=11 P L T 251=125 I C 795=Ind Rul (1930) Pat 571.

See also A I R 1926 Cal 256=86 I C 753.

(Circumstances apart from presumption should be considered).

See also 56 I C 818.

See also A I R 1924 Cal 669=51 C 454=83 I C 169 (Even if correction of record entries is not time barred)

See also A I R 1923 Pat 324=2 Pat 92=79 I C 199

See also 1 P L T 27=54 I C 672.

See also 51 I C 552 (Cal)

See also 91 I C 878.

See also A I R 1924 Pat 373=1 Pat L R 32=71 I C 15.

—S. 50—Proof of payment of additional sum as rent with tenant's consent, may rebut the presumption of fixity of rent. 63 I C 317 (Cal)

—S. 50 (2)—Proof of holding at a uniform rate of rent for 20 years immediately before the suit or proceeding raises presumption in tenant's favour. 62 I C 677 (Cal)

—S. 50 (2)—Tenant is entitled to presumption under S. 50 (2) on proving payment of same rate of rent for more than 20 years. 60 I C 402 (Cal).

—S. 51—Res Judicata. 6 C W N 589.

—Sec. 51—Resjudicata presumption. Landlord Tenant-Rent Suit. 16 C L J 124=17 I C 111.

—S. 51—The presumption under S. 51 applies not only in respect of a particular year on proof of the rate of rent for the preceding year, but also to each successive year, unless the tenants prove that the conditions of the tenancy have altered in the meantime. 25 I C 552.

—S. 51—On remission for patit lands, the lessee can claim hajat remission. A I R 1929 Cal 397=33 C W N 311=Ind Rul (1930) Cal 1=120 I C 145 (2)

—S. 51—Lessee granted remission of rent under certain circumstances is liable

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to pay full rent if the circumstances change. A I R 1929 Cal 398=33 C W N 309-Ind Rul (1930) Cal 2=120 I C 145. (1)

—S. 51-Decree in a rent-Suit for a particular period raises a presumption as to the same rate for subsequent years. A I R 1922 Pat 213=77 I C 334.

See also. 1 P L R 109=72 I C 138.

—S. 52-Enhancement of rent-Excess area-Additional rent for-Claim to-Onus of proof on landlord. 58 C L J 279=A I R 1933 C 56=A L R 1933 C 145.

—Ss. 52 and 55-The Deputy Collector has under S. 52 to decide the question of possession in fact, and when possession is claimed by virtue of a succession or transfer, to decide whether the transfer or the succession did in fact take place. Where he is unable to arrive at a decision on these matters, he is entitled to refer the matter to the Civil Court under S. 55. 13 P L T 728.

—Ss. 52, 105, 106—Enhancement of rent for increase of area within specified boundaries—Increase of area, proof of—Second appeal, if lies. 15 C W N 921

—S. 52—Does not apply to a permanent lease except when on measurement it is found to be over 1000 bighas. 40 I C 494

—S. 52—A second appeal lies for settlement of fair and equitable rent under s. 52. To entitle the landlord to apply under that section it is not necessary to prove that there was an actual measurement or that there has been a practice of measurement. The question for determination under the section is whether the tenant holds at consolidated jama or at a certain rate per bigha. 2 Pat L J 276=1 Pat L W 402=39 I C 611

—S. 52—In a suit for enhancement of rent on the ground of any increase in area the landlord must prove the area for which rent has been previously paid as well as the area now held by the tenant and that such area is in excess of the original area. On such proof, unless it is established that the rent payable was a consolidated rent for lands within specified boundaries irrespective of the precise quantity, the landlord becomes entitled to claim additional rent. 30 C 579, 6 C W N 318 explained and distinguished 24 C 251, 5 C L J 38 referred to. 15 C W N 921=14 C L J 146=11 I C 212

—S. 52—In settling additional rent for increased area it is open to the settlement officer in consideration of possible errors in the original measurement to allow the enhancement at somewhat reduced rate. 11 I C 212

—S. 52—Apportionment of rent cannot be given when the landlord himself evicts a tenant from part of a holding. 4 P L W 86=(1917) Pat 346=36 I C 528

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—S. 52—If for no fault of the tenant all the lands of his jote are washed away, he cannot be held liable for rent unless he is precluded by the terms of his kabuliyat. This rule also applies to tenants who hold over even if they did not surrender the jote or avoid the tenancy when the lands were washed away. 24 C L J 162=34 I C 464

—S. 52—In a suit for enhancement of rent on the ground of excess area, the landlord need not prove the particular land as being the land in excess except where a consolidated jama is paid for a particular holding. 58 I C 959

—S. 52—S. 52 applies both to tenure-holders and to raiyats. But a tenure holder is at liberty to contract himself out of his right to apply for a reduction of rent. 44 I C 222

—S. 52—Suit for additional rent for increased area—Excess of land found in tenant's possession—Standard of measurement same—decree to plaintiff for rent for the excess area. 23 I C 794

—S. 52—Not applicable to diarra lands—Occupancy right in diarra lands not acquired before 12 years' occupation—No reduction of rent claimable for deficiency in area in respect of diarra lands. 18 C W N 598

—S. 52—Rent abatement—Kabuliyat. 22 I C 822=18 C W N 598

—S. 52—Where rent is fixed for the area within the boundaries specified in a pattah, the landlord is not entitled to additional rent on account of excess area merely because the area within the boundaries is more than the area stated in the pattah. He may however claim additional rent for excess lands outside the boundaries. 44 I C 24

—S. 52—The expression "area" in S. 52 means the area with reference to which the rent previously paid has been assessed or adjusted. 55 I C 430

—S. 52—The burden of proving an increase in the area for which rent has been previously paid is on the landlord. He may do this in two ways:—

—(1) By proving that the tenant is in possession of excess land outside the original boundaries.

—(2) By proving that rent is not being paid according to the agreement between him and the tenant. It is in connection with this second method that question may arise under clause (2) of S. 52 as to the conditions of the tenancy and whether the rent originally fixed was or was not a consolidated rent or the whole area. When however, it is proved that the tenant is holding land outside and beyond original boundaries, the question

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as to the rent being a consolidated rent does not arise except for land gained by alluvion. 22 C W N 826=27 C L J 563=45

1 C 660

—S. 52—Suit for rent—Co-sharer tenants—Claim for abatement—Appeal by tenants—Death of one—Abatement of appeal C P Code, O 21, Rr. 2 and 3. 30 C L J 203

—S. 52—Where it was found that the land in suit was not part of the original holding of the deft. but was subsequently acquired the lower court refused to give possession but decreed assessment of rent. Held, that the suit was not maintainable as not, being framed under S 52, though the facts found were such as would have been necessary to find if the suit had been framed as one under S. 52. 20 C L J 296

=27 I C 19

—Ss. 52, 105, 106—A court of appeal cannot under R. 12 of O. 41 of the C P C restrict the grounds upon which the appeal admitted under the rule is to be heard finally. In a case within S. 52 (1) (a) the landlord must establish the present area held by the tenant; he can then claim additional rent for the excess area. When it is specifically known that the area was ascertained by scientific method the landlord is entitled to the additional rent for excess lands ascertained on re-measurement. A landlord is entitled to costs for applications made under S. 105 of the B T Act and in serving them upon the tenants. 14 C L J 146=11 I C 212=15 C W N 921

—Ss. 52, 109 Sub-Sec. (3)—Where the question is whether the excess land is at all liable to rent a second appeal is not barred under S. 109. Sub-S. (3). 19

1 C 924

—Ss. 52, 109 A—An appeal lies from a decision fixing the area but no appeal lies from that part of the decision which relates to the rent that ought to be assessed upon the land. If the landlord originally intended to let and the tenant intended to take (a) such and such a piece of land, or (b) so many bighas the fact that the area proves to be larger than what was originally stated would not entitle the landlord to additional rent in case (a) but it would in case (b). 16 C L J 182=15 I C 332

—Ss. 52, 179, and 188—S. 188 of the B T Act does not apply to a joint tenant and a suit by a co-sharer for abatement of rent is maintainable. 27 C 417 Rel.

There can be a permanent tenure in the Sunderbans 21 C L J 315=19 C W N 546=28 I C 510

—Ss. 52, 188—A co-sharer landlord sued for the whole rent including the rent due on the additional area as agreed upon a Kabuliya making the co-sharers parties to the suit. Held. (1) that so far as the

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claim for increased rent was concerned, it was barred by section 188 that the suit must be brought by the whole body of landlords and it was not sufficient that the co-sharers who were unwilling to join as plaintiffs were joined as defendants. 11 C 695; 25 C 917; 2 C W N 44; 8 I C 842; 13 C L J 51; 15 C W N 74; 38 C 270; 9 M L T 1; 8 A L J 1; 13 Bom L R 1; 21 M L J 92; (1911) 2 M W N 19 followed; (2) that although there was a separate kabuli at between the parties. the suit was one under the B T Act. 7 C W N 670; 3 C W N 225 distinguished. 25 C 917 relied upon. S. 52 applies to cases in which new land has been taken by the tenant. 20 I C 659

=18 C W N 942

—Ss. 52 and 188—A suit by a co-sharer landlord to which the other co-sharers are made parties, for rent and additional rent for his share of the excess area, under S. 52 on the basis of a kabuliya dated prior to the Act, which clearly gives the different co-sharer's right to bring such suits is maintainable. 33 I C 211

—Ss. 52, 188—A suit for rent for excess land by some of the members of a joint Mitakshara family cannot be considered as instituted by them as agents for other members, within the meaning of S. 188

Quære :—Whether the head of the family, can be said to be such agent. 16 C

L J 427=18 I C 197

—Ss. 52 and 188—Suit for rent for arrears, which are already brought into cultivation, is permissible at the instance of one co-sharer by making other co-sharers proforma parties (18 C W N 942 dist). 21 C W N 371=22 C L J 469=37 I C 847

—Ss. 52 and 195—Patnidar has a right to apply for abatement of rent. 45 I C 190

—Ss. 52 (3), and 30—Where in a kabuliya it was found, that the area was assumed to be 15 bighas without actual measurement; that the rent was assessed at lump sum on that area and that the landlord reserved his right to have the lands measured and the rent assessed at the prevailing rent. Held, the landlord could claim additional rent for excess land as also enhancement of rent.

Where the plff, had not framed his suit as one for enhancement of rent, but claimed arrears of rent at enhanced rate. Held, that he was not entitled to a decree, till rent was enhanced in a suit appropriately framed for the purpose. That he was entitled only to additional rent. 21 C L J 309=28 I C 498

—Ss. 52 (5) and 105—S. 52 (5) Does not preclude the Court from adopting other methods of calculation. 46 I C 544

—S 52 (6)—If the court draws the presumption under S. 52 Sub-Sec. 6 it



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follows that the rent was not a consolidated one. 19 C L J 451=25 I C 532

—S. 51—On addition to the tenure, additional rent can be claimed. S. 52 is not applicable where tenancy is composed of some definite plots and undivided share in another plot. A I R 1930 Cal 595=51 C L J 485=Ind Rul (1931) Cal 23=128 I C 177

See also 10 P L T 696=A I R 1929 Pat 661=Ind Rul (1930) Pat 424=124 Ind Cas 392

See also A I R 1924 Cal 374=50 Cal 957=28 C W N 264=79 I C 852; (Sufficiency of evidence to prove additional area discussed).

See also 74 I C 961 (Pat)  
See also A I R 1923 Cal 278=67 I C 998

See also A I R 1922 Pat 215=1 Pat 459=3 P L T 807=66 I C 82

See also A I R 1921 Cal 611=35 C L J 161=62 I C 699

—S. 52 (3) and (4)—Assessment of rent on additional area is not governed by sub-s. 4, but by sub-s. 3. A I R 1930 Cal 205=56 C 919=Ind Rul (1930) Cal 212=122 I C 212

—S. 52—Tenant is entitled to abatement of rent on proving deficiency in area, in absence of express stipulation or other circumstances justifying its refusal. A I R 1929 Cal 413=49 C L J 270=Ind Rul (1930) Cal 46=120 I C 462

See also 24 C L J 162=34 I C 464 (Deficiency by dilution).

—Ss. 52 (1) (b) and 179—No abatement even in case of dilution can be claimed by tenant if he has agreed to pay fixed rent under any circumstances. A I R 1929 Cal 303=33 C W N 245=Ind Rul (1929) Cal 779=119 I C 299

Contra See A I R 1924 Cal 880=39 C L J 431=83 I C 336

—S. 52—Landlord can claim back rent for additional area. A I R 1929 Pat 347=10 P L J 281=Ind Rul 1929 Pat 414=117 I C 205

—S. 52—Tenant not given possession of entire agreed area, can claim from landlord suspension of rent. A I R 1928 Cal 479=55 C 464=32 C W N 472=Ind Rul (1929) Cal 471=116 I C 375

See also (1) A I R 1921 Cal 305=36 C L J 121=70 I C 177 (Tenant can ask for an enquiry to be made by Court).

—S. 52—Tenants jointly entitled to claim abatement, must claim it jointly. A I R 1928 Cal 548=55 C 676=111 I C 111

—S. 52—Measurement at partition under Estates Partition Act, cannot be the basis for rent assessment. A I R 1928 Cal 553=55 C 680=111 I C 107

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—S. 52 (1) (a)—“The area” means area with reference to which rent was assessed or adjusted. A I R 1928 Cal 553=55 C 680=111 I C 107

See also A I R 1924 Cal 374=50 C 957=28 C W N 264=79 I C 852

See also 55 I C 430 (Cal)

—S. 52—Measurement on the basis of which rent was assessed originally must be the basis for the claim for additional rent. A I R 1928 Cal 553=55 C 680=111 I C 107

—S. 52—Agreement by tenant not to claim reduction of rent on reduction of area under s. 52 is valid. A I R 1928 Cal 406=47 C L J 464=110 I C 340

See also A I R 1924 Cal 880=39 C L J 431=83 I C 336

—S. 52—Kabuliyat containing a stipulation as to measurement of land, and as to rate of rent according to class of land, does not mean that the rent is fixed but that it should be assessed as per its terms. A I R 1926 Cal 848=30 C N W 643=95 I C 1055

See also 30 C W N 640=95 I C 984

—S. 52—Measurements by the Settlement Officers, and not by landlord, are presumed to be scientific and correct unless found to be inaccurate, in which case, deductions giving accurate and approximate result will be made by the Court. A I R 1926 Cal 616=91 I C 763

—S. 52—If the landlord shows that the present area is greater than the one for which rent was paid, the tenant must show that the excess area previously belonged to the holding but was lost by alluvion or some other cause. A I R 1926 Pat 197=5 Pat 197=7 P L T 375=(1926) Pat 19=90 I C 862

—S. 52—Additional rent for accretions cannot be claimed until proceedings under s. 50 or under Chap. X are taken. A I R 1925 Cal 758=29 C W N 505=87 I C 442

See also A I R 1923 Cal 207=27 C W N 121=36 C L J 192=70 I C 119 [No enhancement can be made under Regulation VII of 1822.]

—S. 52 (1) (b)—No abatement of rent can be claimed unless proportionate reduction in area is proved. A I R 1925 Cal 1208=85 I C 692

See also A I R 1924 Cal 1044=40 C L J 62=84 I C 403

See A I R 1925 Cal 426=79 I C 978

See A I R 1924 Pat 511=5 P L T 98=(1924) Pat 18=75 I C 679

—S. 52—The section applies to cases of alteration of area and miscalculation of area. A I R 1924 Cal 374=50 C 957=28 C W N 264=79 I C 852

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—S. 52 (1) (b)—In a rent-suit by one co-sharer alone, abatement of rent can be claimed. A I R 1923 Pat 397=2 Pat 183=4 P L T 689=74 I C 454

—Ss. 52 and 105—Where landlord after claiming excess rent for excess area and also enhancement, gives up the latter claim, decree for the former claim only can be granted. A I R 1923 Cal 111=67 I C 1001

—S. 52 (1) (b) and S. 38—In a suit for recovery of rent tenant can claim abatement, for which he need not himself institute a suit washing away of the whole of land exempts the tenant from payment of the whole of rent. A I R 1922 Pat 169=(1922) Pat (Sup.) 132=6 P L J 665=2 P L T 567=63 I C 219

—S. 52 (6)—The expression "at the time of measurement etc." in S. 52 (6) means the measurement on which the area in excess or defect is found out before the institution of the suit. A I R 1921 Cal 397=48 C 556=25 C W N 230=32 C L J 302=61 I C 82

Overruling 47 C 266=31 C L J 68=56 I C 38

—Ss. 52 (1) (b) and 179—Tenants under a lease of lands not within a permanently settled area, can claim the benefit of S. 52 (b) even if the lease contains a stipulation that they are not entitled to claim reduction of rent on account of flood or diluvion. A I R 1921 P C 33=48 C 473=33 C L J 214=25 C W N 361=48 I A 39=14 L W 248=40 M L J 232=30 M L T 196 (P C)=60 I C 1

—S. 53—Under S. 53 the rent for the quarter of the agricultural year becomes due on the 1st of Assin so a suit instituted during the currency of the quarter is premature.

A tender of rent must include the interest due at the date of the tender despite the landlord having demanded damages and not interest. 1 Pat L T 455=58 I C 878.

—Ss. 53, 65 and 158 (b)—The contention that holdings held on produce rent or partly on produce rent and partly on money rent cannot be sold in execution of a decree for arrears is without authority (1920) Pat 257=58 I C 497.

—Ss. 53, 67, 178, Sub S. (3) cl. (h) Where there was a contract to pay rent in monthly kists and also interest on each kist from the time it fell due and the interest so calculated exceeded 12½ per cent per annum held, the landlord was entitled to monthly kists. But having regard to S. 178 Sub-S. (3) cl. (h) he was entitled only to the interest secured to him by S. 67 B T Act the Interest Act not being applicable. 22 C 214 distinguished 17 C W N 820=18 C L

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J 175=19 I C 625

—S. 53—In a contract referring to a specific block specifiable only by an area the area is the essence. A I R 1926 Pat 197=5 Pat 157=7 P L T 375=(1956) Pat 19=90 I C 862

—S. 53—Contract to pay annual rent in monthly instalments with interest on default is binding. A I R 1923 Cal 527=37 C L J 222=73 I C 482.

—Ss. 54, 61, 62, 67—Held, by a majority of the Full Bench (Rampini C J and Mitra J. dissenting)—that if a valid tender has been made and improperly refused, it is not obligatory upon the tenant to follow up the tender by a deposit in Court under section 61 of the Bengal Tenancy Act; if the tender is kept good, it is sufficient to stop interest from the date of the tender. 6 C L J 273=11 C W N 983=35 Cal 34 (F B).

—S. 54—Tender of rent to manager—not at the village office but at his house—not valid. 18 C W N 84=18 I C 442.

—S. 54—Tender—Requisites. 13 I C 442.

—Ss. 54, 67 and 169 (c)—When rent falls due and is not paid, it becomes an arrear under S. 54 of the B T Act and carries interest under S. 67, 53 I C 996=29 C L J 371.

—Ss. 54 (3) 65 and 158 (b)—A holding which is held on produce rent or partly on produce rent and partly on money rent is liable to be sold in execution of a decree for arrears. 5 Pat L J 641=1920 Pat 257=58 I C 497.

—55 Clause (3) S. 66—Ejection for arrears. See S. 66. 11 I C 974.

—S. 55—Reference to Civil Court under S. 55—Not competent unless Deputy Collector finds that he cannot decide question of possession or decides the question in formal terms. 13 P L T 728.

—S. 55—Reference to Civil Court under—Scope of enquiry in—Not wider than that before the Deputy Collector. 13 P L T 728.

—S. 55—Section contemplates appropriation and not tender—Rent includes interest thereon. A I R 1923 Cal 527=37 C L J 222=73 I C 482.

—S. 56 (3)—A tender is not vitiated by a demand of receipt for rent. 19 C W N 112=28 I C 683.

—S. 58 (3)—A collector can transfer inquiry to a sub-divisional officer. Consequently the latter can, in that inquiry, record a proceeding under S. 476 of Cr. Pro. Code 40 C 465=17 C W N 571=14 Cr L J 139=18 I C 891.

—S. 58 (3) and (5)—Inquiry under S. 58 (3) is a prosecution within the meaning of the penal code—Discharge of landlord under S. 58 (5) will not bar suit for com-

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pensation. 34 I C 149-1 P L J 149-3 P L W 415.

—Ss. 58 (3) and 56—The existence of a decree against a tenant for rent, in respect of which receipts are claimed under S. 56 operates as res judicata in proceedings held under S. 58 (3)—34 I C 149-1 P L J 149-3 P L W 415.

—S. 60—Deed—Construction. 2 Pat L J 40-38 I C 808.

—S. 60—Landlord's name registered in respect of certain share—Collection of rent by him for larger share—suit for larger share maintainable. 13 I C 451.

—S. 60—Landlord registered as 16 anna proprietor—Tenant cannot plead that part of rent is due to a third person as co-sharer of the plff. 41 I C 769.

—S. 60—Suit by registered proprietor—Tenant cannot plead that rent is due to third person. 52 I C 523.

—S. 60—Object of S. 60 is force proprietors to register their names under the Land Regis. Act. 3 Pat L W 351-41 I C 97.

—S. 60—A registered co-sharer can maintain a separate suit for his share of rent. 41 I C 859.

—Ss. 60 and 72—Suit for rent by ijardar. Tenant cannot plead payment to auction—Purchaser under rent decree. 3 Pat. L. W. 245-43 I. C. 182.

Ss. 60 and 153—Suit by lessee for rent—Title questioned by tenant by claiming that rent is due to the lessor—Appeal and second appeal lie. Obiter—If the lessee is registered proprietor tenant cannot question title. 24 I. C. 118

—S. 60—Applies whether plff. claims rent as proprietor or on the basis of a contract. 38 C 512-13 C L J 693-10 I C 467

—S. 60—Where a registered cosharer, by amicable arrangement among the co-sharers, gets entitled to collect the whole rent, S. 78 of Land Regis Act does not operate as bar to the recovery of such rent. 13 C L J 693-10 I C 467-38 C 512

—S. 60—Principle of estoppel does not override provisions of Act of Legislature e. g. 50 B T. Act or 5. 78 Land Regis. Act. 13 C L J 693-10 I C 467-38 C 512

—S. 60 See Bengal Land Registration Act S. 78.

—S. 60 The disability imposed by s. 60 does not apply to the tenure held by Sukuls in a khas mahal which is revenue free or revenue-paying and not separately entered in the General Register. A I R 1931 Cal 111-34 C W N 905-58 C 84-Ind Rul (1931) Cal 338-133 I C 274

—S. 60—Objection under S. 60 if not raised in written statement, will not

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be considered A I R 1929 Cal 431-49 C L J 372-Ind. Rul (1930) Cal 223-122 I C 223

—S. 60—Proprietor or manager or mortgagee not recorded in Collectors register does not lose his title or right but he cannot obtain rent decree. A landlord however though not recorded can get a rent decree. A I R 1929 Pat 357-8 Pat 375-Ind Rul (1929) Pat 557-118 I C 733.

—S. 60—Tenant cannot plead payment to unregistered thekadar as against the registered one. 96 I C 495-A I R 1926 Pat 532.

—S. 60—Tenant cannot plead payment to proprietor of adjoining mahal as against a registered proprietor. A I R. 1925 Pat 473-6 P L T 214-87 I C 439

—S. 60—Ijardars and part proprietors are governed by S. 60. Tenants of a part proprietor cannot claim discharge by paying to the other proprietor unless his case falls within the section. A I R 1924 Cal 124-27 C W N 888-78 I C 7

—S. 60—Suit by Ijardar for entire rent of a lease by one co-sharer is maintainable. A I R 1921 Cal 145-48 C 1078-64 I C 58

—S. 60 and 149—In a rent-Suit by registered proprietor plea by a tenant that the rent is due to third person cannot be allowed. A I R 1921 Pat 363-2 P L T 337-(1921) Pat 201-6 P L J 658-61 I C 386 See also A I R 1922 Pat 60-3 P L T 756-1 P L R 24

See also 68 I C 288. Third person an unregistered transferee and kabuliyats were in his name

See also 52 I C 523 (Pat)

See also 3 P L W 245-43 I C 182 Suit by ijardar Plea of payment to auction-purchaser under rent decree.

—S. 61—Deposit in court of a part of the rent due is not a good deposit under S. 61. 11 C W N 84-18 I C 442

—S. 61—Withdrawal, by landlord's authorised agent, of the rent deposited by tenants under S. 61, amount to recognition by landlord. (1917) Pat 83-2 Pat L W 158-41 I C 885-42 I C 826.

S. 61—Under-Lessee of a tenant can deposit rent. 41 I C 431

—S. 61 Validates a deposit by tenant of less than the amount due under a bonafide dispute as to amount. A I R 1927 Cal 914-105 I C 52

See also A I R 1926 Pat 42-(1925) Pat 298-7 P L T 355-5 Pat 46-90 I C 871

—Ss. 61 and 62—Deposit for three tenancies where only one tenancy was actually held. Such deposit is invalid despite court having accepted it. 34 C L J 501-64 I C 696-A I R 1921 Cal 143

—Ss. 61 and 62—Although receipt is

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given by court, the deposit is not valid unless tenant is entitled to deposit. 48 I C 445.

—Ss. 61, 62 and Sch III art 2—No deposit of rent in kind. But where rent is payable partly in cash and partly in Kind and lieu of latter a fixed sum, the entire rent may be deposited. 19 C W N 1143=20 C L J 153=25 I C 171

—Ss. 61 and 64 (3)—deposit of rent in Court—right to tenant to withdraw after three years. A L R 1933 P 226

—Ss. 61, 62 and Sch III art. 2—Limitation, prescribed in art 2, applies to suit for rent, when rent has been deposited under S. 61, even though the sum deposited were less than amount due, 19 C W N 1143=20 C L J 153=25 I C 171

—Ss. 61 and 66—Application for withdrawal of portion of claim not allowed in second appeal.

Deposit of rent without interest due thereon is not a sufficient deposit. 23 I C 777

—Ss. 61 and 195 (c)—Putnidar can deposit rent in Court in case of bonafide doubt as to person entitled to receive it. 41 C 1000=18 C W N 916=24 I C 71

—S. 61 (b)—Tenant need not file along with his application for deposit a copy of the notice to be served upon landlord. Rule 10 (1) of Rules and Orders of High Court does not apply in this case. 14 C L J 116=11 I C 723.

—S. 62—Tenant granted receipt is presumed to be entitled to make deposit. A I R 1925 Pat 387=4 Pat 285=6 P L T 562 = (1925) Pat 41=86 I C 543.

—S. 63—Tender of rent by transferee coupled with demand of statutory receipt, if a valid tender—Landlord if may insist on giving receipt in another form. 19 C W N 112=28 I C 683.

—S. 65—Landlord leasing his proprietary right in a holding to another—Latter purchasing the holding execution of a rent decree—Held there was no interest of the tenant left in the holding for the lessor landlord to proceed against, to recover rent due from the tenant prior to the lease. 34 I C 905.

—S. 65—Sale of holding by tenant—Landlord obtaining rent decree against tenant for period before the sale and against purchaser for period after the sale—Purchaser paid in the amount decreed—Held the holding could not be sold in execution of decree against the tenant as it did not constitute first charge on the holding under s. 65. 18 I C 328.

—S. 65—The principle is that only the landlord can bring the holding to sale and this involves that a sale held after his charge has ceased does not pass the holding as distinct from the tenant's right,

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title and interest therein. It is immaterial for this purpose whether the landlord's charge ceases prior to the date of the suit for rent, or after he has obtained a decree for the rent, or after he has applied for execution, or even after the issue of the writ of attachment and proclamation of sale. 36 C W N 518=137 I C 359=55 C L J 240 =A I R 1932 C 321=A L R 1932 C 631=59 C 1202 F B

—S 65—Rent decree against Hindu widow is executable against estate in the hands of reversioners. 34 I C 581=43 P R 1916

—S. 65—When two persons have charges of equal priority on the same property, the first who takes out execution is entitled to satisfy his decree by sale of the property, and the other person loses his right to proceed against the property. 16 C W N 701=14 I C 568.

—Ss. 65, 161, 167—Priority. 13 C W N 412=9 C L J 234=1 Ind Cas 35.

—Ss. 65 and 167—Rent sale—Holding—Sold after mortgage decree but before Mortgage sale—Rent—Sale purchaser—Priority. 24 C W N 961=59 I C 868.

—Ss. 65, 162, 163—Application by decree-holder under s. 162 and obtaining an order under s. 163 implies an assertion by him that the property in question is at least an occupancy holding. He is bound by his own representation as against a purchaser. 16 I C 632=17 C L J 652.

—Ss. 65, 66, 147, 148 and 195—Special lien and rights given by Putni regulation to a darpatnidar are not affected by proceedings taken in respect of the putni under the B T Act. 27 M L J 4=15 M L T 380=18 C W N 747=12 A L J 553=(1914) M W N 397=23 I C 632=41 Cal 926=25 C L J 494=1 L W 1059=41 I A 91 (P C)=1914 P C 111.

—Ss. 65, 66—Assignee of a decree from Zamindar cannot seek to bring the tenure to sale under the Act, owing to the absence of the relationship of landlord & tenant. 23 I C 632=41 C 926 P C.

—Ss. 65, 165, 195 (c)—Putni tenure—Successive rent decrees—Sale in execution of last decree—Zamindar has a charge on surplus sale proceeds for amounts of previous decrees. 43 I C 996=22 C W N 131.

—Ss. 65, 195—Applicability of to Putni tenure. 20 C L J 1=19 C W N 1001=26 I C 197.

—S. 65—Tenant's mortgagee attaching surplus sale proceeds under his decree obtained after landlord's decree is not his representative within. S 47 C P C. A I R 1931 C 202=34 C W N 702.

—Ss. 65 and 212 (2)—Landlord cannot be forced upon by a transferee of non-transferable occupancy holding to take him up as a tenant. 1928 Pat 234=7 Pat 155=9 P L T 241=107 I C 310.

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—S. 65—If the person obtaining the decree is landlord, and the person executing it has landlord's interest vested in him, rights under S. 65 are acquired. A I R 1927 Pat 108-8 P L T 224-98 I C 995.

—S. 65—In a suit to recover rent from tenant's transferee, tenant is not a necessary party. A I R 1926 Cal 737-91 I C 657.

—S. 65—Where under a rent decree a holding is sold for less price owing to a statement in the sale proclamation imposing upon the auction—purchaser liability for arrears for rent the sale can be set aside. A I R 1921 Pat 479-2 P L T 248-80 I C 223.

—S. 65—Where a landlord purchasing portion of holding in execution of rent-decree, evicts the tenant, the latter cannot claim suspension of rent. A I R 1923 Cal 333-37 C L J 314-72 I C 1013.

—S. 65—No priority over rent can be claimed by a purchaser at a rent-sale, A I R 1922 Cal 32-35 C L J 1-69 I C 841.

—S. 65—Tenant is personally liable for the arrears of rent accrued due prior to the institution of the rent-suit, or between the date of the suit and date of auction-sale. Therefore no liability attaches to auction-purchaser. 2 P L R 248-1921 Pat 479-80 I C 223.

—S. 66—Applicability of—who can claim the special right. 27 M L J 4 (P C) = 1924 P C 111-41 C 926-18 C W N 747.

—S. 66—Even if the time originally fixed had expired, court can grant extension. 44 I C 473

—S. 66—Landlord may sue for ejectment at the time of the year mentioned in S. 66. Instead, if he claims subsequent rent he treats the tenancy as existing and cannot ask for ejectment in respect of subsequent arrears. 16 C W N 104-11 I C 974.

—S. 66—Suit for more than one year's rent-decree for ejectment on default of payment is bad. 47 I C 1006.

—S. 66 (2)—Decree for ejectment, if executed pending appeal against it, is not liable to be set aside on payment within 15 days of confirmation by appellate Court.

The term "date of decree" in S. 66 (2) does not mean the appellate decree when the decree appealed against has been executed. 46 C 1032-23 C W N 974-54 I C 659.

—S. 65—Relationship of landlord and tenant is necessary for a sale under S. 65. 27 I C 601.

—S. 65—"Rent," includes "road-cess" Purchaser at sale in execution of decree for road-cess has priority over mortgagee of the same property although the decree was obtained subsequent to the mortgage. 1 Pat L J 161-36 I C 498.

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—S. 65—Decree for rent, in favour of person who had ceased to be zamindar, cannot be enforced as rent-decree. It is good for other purposes. 46 Cal 870-29 C L J 465-51 I C 922.

—S. 65—Rent decree—Produce. 58 I C 457-2 U P L R (A) 128.

—S. 66 (2)—In a suit for arrears for 4 years the Judgment directed that a decree for ejectment should be made, in terms of S. 96, in default of the payment of the decretal money within 15 days. Piff. executed the decree on default. Deft later asked for amendment. Held "Decretal money" meant not the entire amount but that specified in S. 66 (2). And that Court could amend a decree even after it had been executed. 13 I C 671.

—S. 66 (2)—Payment under S 66 (2) must be made by or for the judgment-debtor, court cannot, therefore, accept tender by under-raiyat in order to prevent non-occupancy right. 27 C L J 478-44 I C 977.

—S. 66 Cl. (3)—Extension of time. See under Bengal Landlord and Tenant Procedure Act (VIII of 1869) S. 52, 21 C W N 749-38 I C 467.

—S. 66—Under-raiyat—Decree for ejectment of, on his failure to pay rent decree within a certain time—Presumption arising from entry in Record of Rights as to acquisition by under-raiyat of occupancy right by custom—Rebuttal of—Decree not sufficient for, where under-raiyat did pay the rent and he was never ejected. 54 C L J 68-A I R 1932 C 6-133 I C 689.

—S 66—S. 66 is not made inapplicable to under-raiyats with a right of occupancy. The Legislature certainly had in view the distinction between an occupancy raiyat and an under-raiyat with a right of occupancy. An examination of S. 113 of the Act is sufficient to show that the Bengal Tenancy Act does recognize this distinction and if it was the intention of the legislature that S. 66 could not apply to an under-raiyat with a right of occupancy there was nothing to prevent it from saying so. 54 C L J 68-A I R 1932 C 6 (8) = 133 I C 689.

—S 66—Section 66 is applicable to under-raiyats and decree under s. 66 does not rebut presumption of correctness of an entry of acquisition of occupancy right by under-raiyat. 54 C L J 68-Ind Rul (1931) Cal 737-133 I C 689.

—S. 66—Decree in suit against under-raiyat with permanent rights does not operate as a bar in subsequent ejectment suit as regards status of under-raiyat. A I R 1931 Cal 87-34 C W N 887-Ind Rul (1931) Cal 295-129 I C 855

—S. 66 (3)—Order extending time



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specified in a decree for making payment amounts to variation in the decree and is not appealable but revisible. A I R 1929 Cal 140=112 I C 124

—S. 66—Act is applicable to a sub-lease of agricultural land. A I R 1928 Pat 89=8 P L T 829=105 I C 172

—S. 66 (2)—Deposit by a transferee of a non-transferable occupancy holding is not valid. A I R 1927 Cal 752=31 C W N 1016=104 I C 180

—S. 63—S 117, T P Act should be liberally interpreted. A I R 1925 Pat 421=4 Pat 404=6 P L T 331=(1925) Pat 89=86 I C 597

—S. 67—Interest—Arrears of money due under jalkar lease. 19 C W N 514=27 I C 614

—S. 67—Suit for arrears of rent and damages—no interest claimed on arrears of rent—interest can only be awarded on arrears of rent, at the rate finally determined. A L R 1933 C 285=60 C 254=A I R 1933 C 254=37 C W N 535

—S. 67—Award of interest on arrears of rent under a kabuliya executed before the Act, at a rate stipulated in kabuliya is not discretionary with Court. The conduct of the tenant does not affect it. A I R 1931 Cal 111=34 C W N 905=58 C 84=Ind Rul (1931) Cal 338=130 I C 274

Ss. 67, 178 and 179—Interest—stipulation in kabuliya creating a permanent mokarari lease in permanently settled estate, for a higher rate of interest than the one allowed by—s. 67—amendment of Ss. 178 and 179 proviso effect of the stipulation in the kabuliya—interest accrued prior to amending Act also affected by the amendment if it had not been recovered—recovered—meaning of A L R 1933 C 487

—S. 67—In a kabuliya, executed before the Act, rate of interest was mentioned. In a subsequent solehnama other things were stipulated, but not interest. Held the solehnama did not create new contract but merely varied the terms of the old, and the interest was to be as in the kabuliya and not under s. 67. 32 I C 710

—S. 67—See cases under s. 54 & s. 55

—S. 67—Interest on rent accrues not from the expiration of the date of instalment, but from the expiration of the quarters of the agricultural in which the instalment fall due. 45 I C 532

—Ss. 67 and 68—s. 67 does not apply to mokurari leases, unless contrary is stipulated. 23 I C 108

—Ss. 67 and 68—Bhowli rent not being payable quarterly s. 67 does not apply. Interest can, however, be claimed on arrears of Bhowli rent, apart from s. 67 unless Court refuses. 4 Pat L J 282=(1919) Pat 242=50 I C 506

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—Ss. 67 and 68—It is mandatory on Court either to award interest or damages on arrears of rent under ss. 67 and 68. 36 I C 955

—S. 67—Withdrawal of a portion 23 I C 777

—Ss. 67 and 178 (3) H—A mortgage bond executed as security for arrears of rent and providing higher interest than allowed by s. 67 is not void. But a suit on such a bond is not a suit for rent within s. 67. 2 Pat L J 367=3 Pat L W 337=39 I C 736

—Ss. 67 and 179—S. 67 does not apply to a permanent mokurari tenancy situated within a permanent settled area. 55 I C 507

—Ss. 67 and 179—Despite general rule of non-interference in cases outside ss. 67 and 179, Civil Courts may on grounds of equity, interfere in cases of unconscionable bargains. 21 C W N 112=35 I C 721

—Ss. 67 and 178—Arrears of rent under kabuliya executed before B T Act, can be decreed with interest. A I R 1931 Cal 111=58 C 84=34 C W N 905=Ind Rul (1931) Cal 338=130 I C 274

—S. 67—Where under a Kabuliya executed after the Act, rent is partly payable in cash and partly in kind, cash value of the produce has to be paid by the tenant. A I R 1930 Cal 823=52 C L J 179=Ind Rul (1931) Cal 120=129 I C 104

—S. 67—S. 67 applies only to rent paid in cash. A I R 1930 Pat 157=11 P L T 228=Ind Rul (1929) Pat 686=120 I C 45

—S. 67—Landlord is entitled to interest at 12½ per cent, even if he fails to prove the contractual rate of interest. 10 P L T 805=Ind Rul (1929) Pat 388=117 I C 180

—S. 67—In absence of evidence as to rent for Bhaoli holdings being payable quarterly, no interest can be charged. A I R 1925 Pat 795=6 P L T 801=3 P L R 109=88 I C 395

—S. 67—Lease granted in 1874 without any fixed term is not transferable by tenant, nor attachable under a decree after B T Act, it becomes one from year to year. A I R 1925 Cal 722=41 C L J 453=87 I C 178

—S. 67—Stipulation for an exorbitant rate of interest at 75 per cent is not an incident of tenancy attachable to it even after the sale for arrears of rent. A I R 1923 Cal 559=27 C W N 502=37 C L J 333=72 I C 719

—Ss. 67 and 78—Under a kabuliya before Act, rent is payable in money and also in kind. Interest on arrears in excess of 12½ per cent cannot be recovered. Holding over creates a new contract. A I R 1922 Cal 77=68 I C 109

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See also A I R 1921 Cal 300=34 C L  
J 369=64 I C 118

—S. 68—If defendant has made a proper tender of rent court will refuse to decree interest. 40 I C 614

—S. 69—Revenue Court is competent to decide dispute between landlord and tenant as to proper share of the produce due to each. (1918) Pat 461=5 P L J 76  
=53 I C 37

—Ss. 69 and 70—It is not within the powers of a sub-divisional officer to pass an order for costs in a proceeding under ss. 69 and 70. 1 Pat L W 694=42 I C 482

—Ss. 69 and 70—Sub-divisional Officer is competent to decide a dispute as to whether the crops grown on a holding are to be appraised or divided. The decision that a holding is batai is final and the action of the Court on the basis of that decision is not without jurisdiction. 2 Pat L J 183=39 I C 645

—S. 69 (1)—Civil Court cannot question report of the officer not questioned before Collector. A I R 1928 Pat 627=7 Pat 667=9 P L T 753=110 I C 514

—Ss. 69 and 70—Where final order is not made, landlord cannot sue for rent, but should apply to Collector for such order. A I R 1928 Pat 627=7 Pat 667=9 P L T 753=110 I C 514

—S. 69—Where both parties admit that bhaoli rent is payable, Collector's jurisdiction is not excluded due to dispute about the existence of batai or danabandi system. A I R 1925 Pat 505=6 P L T 419=85 I C 566

See also 2 P L J 183=39 I C 645.

—S. 69 (3)—Where Collector's order under S. 69 (3) is disobeyed, he can proceed under S. 95, or S. 476, of Cri P C. A I R 1921 Cal 260=48 C 1086=23 C L J 231=25 C W N 617=66 I C 71

—S. 69—On application for appraisal being made, a responsible officer should be deputed, who must make the division on the spot at the time when crops are ripe for harvest. 1 Pat L R 128 (c)

—S. 69—Landlords are entitled to an enquiry into the allegation that the raiyats had deliberately grown a poor crop and misappropriated the same. 1 P L R 128

—S. 70—Order for appraisement by Court of competent jurisdiction is not *ultra vires* for minor irregularities in procedure. Order under S 70 (5) is final and cannot be questioned in Civil Court. 49 I C 845

—S. 70—A Commissioner can exercise supervision and control over revenue officers in respect of their orders under S. 70. 2 Pat L W 98

—S. 70—Order without notice to par-

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ties under S. 70 (4) is *ultra vires*, and is no bar to a subsequent rent suit. 57 I C 572

—S. 70 (5)—Order under s. 70 (5) made by an officer who had full jurisdiction is final, even though the officer may have erred in his findings of fact. 2 Pat L J 24=38 I C 85

—S. 70 (5)—An order merely directing the deposit of the sale proceeds of crops in the treasury without direction to pay them to any one is not a final order and is not enforceable as a decree within the meaning of S. 70 (5). 4 Pat L J 325= (1919) Pat H C C 400=51 I C 763

—S. 70 (2), (5)—Omission to give the landlord notice under S. 70 (2) vitiates the whole proceeding.

An amin appointed to appraise or divide the Crops is not entitled to sell them without order. (1919) Pat H C C 400 =51 I C 763=4 Pat L J 325

—S. 70 (4)—No fresh notice besides that given under sub-s. (2) need be given under sub-s. (4). A I R 1928 Pat 627=7 Pat 667=9 P L T 753=110 I C 514

—S. 70 (4)—Cl. 4 does not require any fresh notice to be served. A I R 1926 Pat 495=8 P L T 221=(1926) Pat 258=98 I C 991

—S. 70 (2)—Where notice is served by Amin, absence of it must be proved by the person alleging it. A I R 1926 Pat 495=8 P L T 221=(1926) Pat 258=98 I C 991

—S. 70 (5)—S. 70 (5) lays down details of procedure of Collector's action in appraisement of crops. No separate decree apart from order need be passed. A I R 1925 Pat 505=6 P L T 419=85 I C 566

—S. 70—Civil Court has no powers to question order by Revenue Court under S. 70. A I R 1924 Pat 604=(1924) Pat 211 =78 I C 465

—S. 70 (5)—Commissioner can supervise an order under S. 70 if it is without jurisdiction. 1 Pat L R 128 (Cr.)

—S. 71—Effect—Tenants on bhaoli danabandhi system—Removal of crops without giving reasonable opportunity to landlord to appraise—Conviction under s. 424 Penal Code—Legality. 1 Pat L W 691=40 I C 335

—S. 71 (4)—Removal of crops by tenants before appraisement—Presumption arises—Landlord is entitled to claim rent on the basis of best crops in the neighbourhood. 52 I C 267

—S. 71 (4)—Wrongful removal of batai crops by tenants. He is liable to be convicted under s. 424 of the Penal Code. 1 Pat L J 353=(1917) Pat 71=3 Pat L W 43 =17 Cr. L J 315=35 I C 491

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—S. 71 (4)—S. 71 lays down procedure for Collector's action. Where a portion of crops appraised by him is removed by tenant. A I R 1928 Pat 282=7 Pat 281=9 P L T 106=110 I C 93

—S. 71 (4).—Collector's report of crop-cutting for the succeeding years in suit for neighbouring lands is a valuable evidence. A I R 1927 Pat 167=8 P L T 74=102 I C 391

—S. 71—Where tenants have removed crop before appraisement or have absented at appraisement landlord can claim rent on the basis of best crops in the neighbourhood. A I R 1926 Pat 43=7 P L T 671=95 I C 966

See also 52 I C 267 (Pat.)

—S. 71 (4)—Where rent based on produce is claimed, tenant cannot prevent landlord from estimating the crops. A I R 1925 Pat 505=6 P L T 419=85 I C 566

S. 72—Question of service of notice under s. 72 is immaterial if tenant had in fact notice of transfer. Tenant is liable to transferee of landlord's interest for rent if he had actual notice of the transfer. 23

C W N 355=49 I C 993

—S. 72—Landlord and Tenant—Transfer of landlord's interest. 25 C 445=2 C W N 108

—S. 72, sub-s. (2)—Where a landlord transfers his interest to another person, and the tenant gets notice of the transfer from the landlord himself and not from the transferee, such notice is not inoperative. 7 C W N 454

—S. 72—S. 72 protects only that tenant who has paid rent to transferer landlord without notice of transfer. A I R 1926 Cal 515=91 I C 726

See also 29 C L J 204=40 I C 655 (Payment need not be in good faith within s. 50 T P Act.)

—S. 72—Tenant paying rent to the transferee is protected, if he has been given notice of transfer by the latter. A I R 1922 Pat 607=3 P L T 756=68 I C 288

—S. 73—Principle of s. 73 does not apply to non-transferable occupancy holding. Where the transferee of a non-transferable occupancy holding has acquired the title of tenant by adverse possession of the limited interest, the landlord cannot claim rent from the transferor. 52 I C 289=42 A 48=17 A L J 945

—S. 73—Both the tenant and his transferee are jointly liable for rent. 37 I C 842

—S. 74—Peishkush being not abwab the origin of payment can be inferred from antiquity and purpose of payment; and right to levy it may thus be found. 45

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Cal. 866=22 C W N 824=28 C L J 285=44 I C 497

—S. 74—Where Katihari is entered in the record of rights as payable by tenant, it may be presumed to be legal Katihari payable on looms worked by tenant in his house is not an illegal cess. 37 I C 813

—S. 74—Claim for abatement for land on which tenant had to build embankment to protect other land. Tenant prima facie entitled to abatement for all the years. Stipulation in the nature of imposition in addition to actual rent is void under S. 74 16 C L J 225=17 I C 173.

—S. 74—Abwab. 40 Cal 806=16 C L J 296=17 I C 177.

—S. 74—On construction of a Kabuli-yat it was held that items in addition to rent were not in the nature of imposition within s. 74, and hence not void. They together with the rent, formed the total consideration for the use and occupation of the land. 52 I C 119.

—S. 74—Words—Malguzari—or Malguzari Bakaya—mean that the landlord was crediting the payment to whatever was due to him. A I R 1930 Pat 301=9 Pat 747=Ind Rul (1930) Pat 603=126 I C 299

—S. 74—Agreement by tenant to deliver straw etc. along with nakdi rent instead of batai system, is illegal if it was independent of commuted cash rent. A I R 1930 Pat 414=Ind Rul (1930) Pat 548=125 I C 772.

—S. 74—Realisation of Neg and Dakcess from tenant is illegal and not recoverable. A I R 1930 Pat 76=10 P L T 700=Ind Rul (1930) Pat 426=124 I C 394.

—S. 74—Question whether stipulation in lease amount to part of rent or abwab is a question of fact. A I R 1930 Cal 205=56 C 919=Ind Rul (1930) Cal 212=122 I C 212

—S. 74—Contracts of service in lieu of rent are governed by T P Act. and by B T Act. A I R 1929 Cal 224=49 C L J 189=58 C 862=Ind Rul (1929) Cal 290=115 I C 34.

—S. 74—Rent under s. 74 in the case of permanent tenure before the Act, is that recoverable under cl. 3 of Reg. V of 1812. A I R 1929 Pat 307=10 P L T 329=8 Pat 655=Ind Rul (1929) Pat 561=119 I C 65.

—S. 74—Lessee must pay annual rent agreed to be paid in kabuliya, whether he is paid by raiyats or not. A I R 1927 P C 250=54 I A 432=26 A L J 19=32 C W N 260=47 C L J 90=54 M L J 293=8 P L T 813=106 I C 571.

—S. 74—Malguzari means revenue only. A I R 1927 P C 250=54 I A 432=26 A L J 19=8 P L T 813=32 C W N 260=47 C L J 90=54 M L J 293=106 I C 571.

Reversing A I R 1925 Pat 421=86 I C 597

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—S. 74—"Actual rent" in s. 74 means neither a fair and equitable rent, nor rent at customary or pargana rates. A I R 1927 P C 250-54 I A 432-26 A L J 19-8 P L T 813-32 C W N 260-47 C L J 90-54 M L J 293-106 I C 571.

Reversing A I R 1925 Pat 421-86 I C 597.

—S. 74—All questions of illegal cesses are decided by the meaning of actual rent in s. 74. A I R 1927 Cal 857-54 C 799-46 C L J 297-32 C W N 81-105 I C 279.

—S. 74—S. 74 renders all impositions upon the tenants such as Abwab, Mathat etc. in addition to the actual rent, illegal Raiyat and intermediate tenant are equal in this respect. A I R 1925 Pat 421-4 Pat 404-6 P L T 331-(1925) Pat 89-86 I C 597.

Reversed in A I R 1927 P C 250-106 I C 571 P C.

—S. 74—Abwabs do not mean Dak and Bhet expenses. A I R 1924 Cal 877-51 C 643-79 I C 346.

—S. 75—Bengal Patni Regulation s. 14 17 I C 504-17 C W N 374.

—S. 75—Purchaser of landlord's title with arrears of rent is entitled to sue for the arrears. A I R 1927 Pat 2-8 P L T 201-97 I C 373.

—S. 72—Tenant, paying rent to landlord after the transfer, is protected by s. 72 if he had no notice of the transfer. The payment need not be in good faith within s. 50 T P Act. 29 C L J 204-40 I C 655.

—S. 74—An agreement to supply straw and husk in addition to rent is valid and enforceable and the mere fact that it is imposed by a separate clause does not make it an abwab or illegal exaction. 32 C W N 81 followed; 16 C L J 7 296; 19 C L J 402, not followed; 54 M L J 293 P C referred to; 45 C 259, commented upon. A I R 1931 Pat 161-12 P L T 3-Ind Rul (1931) Pat 257-132 I C 97.

—Ss. 76 and 155—Tenant can effect any improvement which would add to the value of the holding. Mere fact of having a house on adjacent mouza does not prevent tenant from building one on the occupancy holding. 2 Pat L J 634-45 I C 332.

—Ss. 76 and 188—A tank excavated when there was already one existing. Held the tenant must prove, in order to make s. 76 applicable, that the excavation was entirely for the purpose of agriculture. A suit by cosharer to compel tenant to fill up the tank, or in alternative for damages does not come within s. 188. 16 C L J 127-17 I C 115.

—S. 76 (f)—Occupancy raiyat—Holding used for gardening purposes—Erection of pucca building, on a small portion of the holding, not improper. 37 I C 999.

—Ss. 76, 30—Remission in the rent cannot be claimed on the ground that

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irrigation facilities were not given to the tenant A I R 1924 Pat 605-(1924) Pat 173 -5 P L T 629-79 I C 858.

—Ss. 76, 182—A pacca building by occupancy tenant on land not forming part of the holding is not prohibited.

64 I C 716 (Cal)

—S. 84—does not apply to a contract in Kabuliyat for a surrender of land if a market were established there. If such a custom be proved, the landlord is not bound to adopt the procedure in s. 84; and tenant cannot insist on the landlord taking only a specific portion and no more. 55 I C 268

—S. 80—Person alleging himself as raiyat granting permanent lease—Lease registered—Lease is inoperative as a permanent lease but liable to be terminated as provided by s. 49 (b)—Registration thereof is void. A I R 1921 Cal 451-48 C 783-25 C W N 4-61 I C 466.

—S. 85—Creation of a permanent under-tenancy by a widow having a kayami mourashi right-rights of the tenant recorded as of a korfa tenant, with right of occupancy by custom in record of rights—document registered—suit by reversioner after death of widow—no legal necessity—transaction bonafide acquisition of right of occupancy by custom—though document inadmissible matter could be proved by other means. A L R 1933 C 461.

—S. 85—Under-raiyat—Eviction of—Suit for by superior landlord auction-purchaser of raiyat or person claiming title from him—Defence in, of under-raiyat having acquired a right of occupancy by custom and of his interest being protected by S. 160 (d) of Act—Invalidity of under-raiyati under S. 85—Onus of proof of, on plaintiff. 36 C W N 400-55 C L J 176-A I R 1832 C 571-A L R 1932 C 577.

—S. 85—(Before amendment)—Lease by raiyat in contravention of s. 25 (old) could not confer occupancy right on under-raiyat as against the landlord. 35 C W N 1001.

—S. 85—B T Act, Ss. 11, 18, 19 C W N 1127-23 I C 925.

—S. 85—B T Act Ss. 49, 85. 44 C 272 -34 I C 912-21 C W N 363.

—S. 85—B T Act Ss. 49, 85 and 167 43 Cal 164.

—S. 85—Lease to an under-raiyat for 9 years—Stipulation to give a fresh lease on expiry of the term is valid; and in such a case he cannot be ejected without an offer of fresh lease. 16 C L J 122-13 I C 912-16 C W N 620 Note.

—S. 85—A sub-lessee having subsisting tenancy can recover his possession, if dispossessed, despite his lease exceeding nine years. 22 C W N 61-43 I C 854.

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—S. 85—A sub-lease by a raiyat exceeding nine years, whether registered or not, is void and can be questioned by the grantor or person claiming through him. If a raiyat misrepresents as to his status, and a lease is entered into, he cannot afterwards deny it. 22 C W N 179=28 C L J 91=44 I C 254

—S. 85—An occupancy raiyat granted a lease to A and subsequently an intermediate tenancy to B both in contravention of S. 85. Held A could not contest B's claim for rent, as the raiyat had agreed that rent was payable to B, despite the fact that tenancy itself was void. 55 I C 615.

—S. 85—Permanent lease to an under-raiyat—Purchase of raiyat's holding by landlord under rent decree—Held the under-raiyati lease was invalid and the landlord could eject the under-raiyat without annulling the same under S. 167 or notice under S. 49 or without fear of S. 22 (1). 17 C W N 860=19 I C 652.

—S. 85—Notwithstanding S. 85, a stipulation, in a sub-lease for 9 years, for renewal after expiry of 9 years is valid 20 C W N 948=33 I C 448.

—S. 85—A sub-lease exceeding nine years is inadmissible in evidence, even though registered. If it is followed by possession the sub-lessee can recover the possession if dispossessed. 24 C L J 539=38 I C 489.

—S. 85—B T Act ss. 11, 85, 28 I C 267.

—S. 85—B T Act s. 49 & 85. 20 C W N 756=22 C L J 232=31 I C 26.

—S. 85—An under-raiyat, who takes a lease exceeding 9 years, cannot sue the landlord for possession. 50 I C 514.

—S. 85—Madras Irrigation Cess Act. S. 11. 28 M L J 297=24 I C 741.

—S. 85, sub-ss. (1) and (2)—The question of invalidity of a sub-lease granted in contravention of s. 85 can be raised only by the landlord of the raiyat. (6 C W N 916 R; 6 C W N 919, Doubted). An under raiyat, who holds under a permanent lease can successfully maintain a suit for possession or defend his possession against the raiyat. *Quaere*—Whether a plaintiff is entitled to a decree for recovery of possession on account of previous possession, in an action in ejectment not under s. 9 of the Specific Relief Act. 13 C L J 649=10 I C 469.

—S. 85 (3)—The representative in interest of the raiyat, who granted a lease to under-raiyats, cannot as between themselves and the under-raiyats, question the grant. The tenancy of an under-raiyat who holds over after the termination of nine years from the commencement of the Act is to be terminated in accordance with the provisions of the law, he cannot be forcibly ejected. 13 C L J 656=10 I C 562.

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—Ss. 85 (1), (2) and 167—Purchaser under rent decree can question the validity of a sub-lease. Such purchaser can annul the sub-lease under S. 167.

Where at the time of the grant of permanent sub-lease the deft. was in occupation the sub-lease did not create any new tenancy. 22 C L J 99=19 C W N 1077=43 Cal 178=30 I C 898.

—S. 85 (2)—A permanent under-raiyati lease cannot be questioned by the raiyat. 15 I C 255.

—S. 85 (2)—Lease granted in contravention of s. 85 is operative as between parties to it. 44 Cal 771=20 C W N 13.0=24 C L J 541=35 I C 754.

—S. 85 (2) B T Act ss. 18 and 85 (2). 49 I C 515.

—S. 85 (2)—Lease of a permanent character cannot be granted by raiyat who does not hold at fixed rate. Registration of such lease is void. If such lease be created verbally it can be terminated under s. 49; but until it is so terminated the under-raiyat cannot be treated as trespasser.

Raiyat granting lease by representing him-self to be tenure-holder or raiyat at fixed rate will be estopped as against the under-raiyat. 25 C W N 4=32 C L J 296 (F B).

—S. 85 (2)—Permanent sub-lease by raiyat does not confer any title, even though registered. Registered sub-lease like this not admissible in evidence. 17 C W N 468=18 I C 791.

—S. 85—Landlord and tenant -Relationship. 51 I C 928=29 C L J 379.

—S. 85 (2)—Sub-lease by raiyat for more than 9 years is void, and the sub-lessee cannot sue even a trespasser for possession. 24 C L J 538=38 I C 487.

—S. 85 (2)—Consent of landlord cannot validate the registration of a sub-lease which contravenes S. 85 (2). 54 I C 625.

—S. 85 (2)—Lease by raiyat to hold from generation to generation is a nullity, and payment of rent does not amount to ratification. 21 C L J 478=29 I C 879.

—S. 85. (2)—Does not apply to permanent lease by under-raiyat. 18 C W N 882=24 I C 287.

—S. 85 (2)—A permanent under-raiyati lease registered in contravention of S. 85 (2) does not operate even as against the grantor. A lease described as year to year lease and which stipulated that if the under-raiyat even tried to reduce the rent he would be liable to eviction without notice was held void under S. 85 (2) 47 I C 416.

—S. 85 and 49 (6)—After due service of notice under S. 49 (6) to an under-raiyat for over nine years, after the B T Act the under-raiyat cannot resist plaintiff's claim for ejectment. 23 C W N 435=29 C L J 388=42 I C 621.



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—Ss. 85 (2), 160, 161 (c) and 167—Superior landlord purchasing the holding of the raiyat cannot be called upon to annul a permanent under-raiyati lease created without his consent, nor is such interest protected by s. 161 (c) so far as the superior landlord is concerned. 19 C W N 412=21 I C 104=18 C L J 252

—S. 85 (3)—Sub-lease granted before the Act is valid up to 9 years after the Act. Although the title of the tenant may continue to subsist by reason of possession and payment of rent, the sub-lessee is always to be ejected. 50 I C 713

—S. 85 (2)—A sub-lease registered in contravention of s. 85 (2) is inadmissible in evidence. 16 C L J 144=17 C W N 59=15 I C 476

—Ss. 85, 86, cl. (6)—Landlord and Tenant—abandonment of tenure etc. 4 C W N 667

—S. 85—Compromise decree between raiyat and under-raiyat conferring on under-raiyat a permanent right is valid and cannot be challenged in subsequent ejectment suit. A I R 1931 Cal. 87=34 C W N 887=Ind Rul (1931) Cal 295=129 I C 855

—S. 85—Under raiyat holding over amounts to subletting without a registered document and therefore invalid against landlord purchasing occupancy holding under execution sale unless he consents. A I R 1930 Cal 262=33 C W N 1207=Ind Rul (1930) Cal 574=125 I C 654

—S. 85—Occupancy right cannot be created by a kabuliati. A I R 1930 Cal 315=33 C W N 1193=Ind Rul (1930) Cal 298=123 I C 266

—S. 85 (2)—A lease registered against the provisions of s. 85 (2) by reason of the misunderstanding if the registering officer is not operative after 9 years. A I R 1926 Pat 9=6 P L T 787=(1925) Pat 281=90 I C 895

—S. 85—A permanent & heritable tenure can be given to an under raiyat by a fixed rate raiyat. 71 I C 319=1924 C 350 (A I R)

—S. 85—An agreement by raiyat to an under raiyat to renew the lease is valid and the successors of the lessee can comply with the agreement. A I R 1925 Cal 516=41 C L J 604=79 I C 317

—S. 85 (1)—Landlord cannot be said to have impliedly consented to a lease granted to an under raiyat merely because the latter was made a party deft. in a rent suit. 91 I C 668=A I R 1926 C 734

—S. 85—The section is not applicable to homestead lands. A I R 1928 Cal 156=105 I C 290

—S. 85—Where a tenant who was put into possession by virtue of a kabuliati, is dispossessed by subsequent lessees, the

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former can recover possession from the latter. A I R 1928 Cal 376=Ind Rul (1929) Cal 443=116 I C 155

—Ss. 85, 49—An entry in the Record of rights to the effect that the under raiyats had acquired occupancy right was held to be incorrect as it was based on a kabuliati from year to year which is inconsistent with such rights and also because such kabuliati cannot be treated as giving permanent right of occupancy as such a kabuliati is bad under s. 85. A I R 1929 Cal 450=49 C L J 352=Ind Rul (1930) Cal 246=122 I C 550

—S. 85—An agreement by the raiyat with an under raiyat that the former will not evict the latter except under certain contingencies is invalid under this section. A I R 1928 Cal 478=Ind Rul (1929) Cal 179=114 I C 83

—Ss. 85 & 18 cl. (a)—“Transfer in s. 18 cl. (a) includes a lease—s. 18 controls s. 85. A I R 1921 Cal 603=25 C W N 9=61 I C 529

—S. 85—It is not contrary to the provisions of s. 85 to change the under raiyat tenancy into an heritable one. A I R 1929 Cal 519=25 C W N 715=60 I C 457

—S. 85 (2)—Registered sub-lease for period exceeding nine years is inadmissible in evidence—Sub-lessee having subsisting tenancy can recover his possession if dispossessed. 59 I C 748

See also 22 C W N 61=43 I C 864

See also 24 C L J 539=38 I C 489

—S. 85 (2)—So too a lease in perpetuity by raiyat to under raiyat is inadmissible. 60 I C 507

—S. 85—The section does not apply to a case of a grant of permanent lease by occupancy raiyat. To such a case s. 18 applies. 79 I C 515

See also 18 I C 996=17 C W N 698

—S. 86—A raiyat having sold a part of his occupancy holding cannot surrender that part to his landlord, so as to entitle the latter to eject the purchaser. 40 I C 544=25 C L J 480

—S. 86—Taking a new settlement of the remainder after expressly surrendering a part implies surrender of the remaining portion. s. 85 (7) Provides for a valid surrender of a part of a holding.

S. 86 (5) Is no bar to landlord making fresh settlement after surrender.

25 C L J 480=40 I C 544

—S. 86—Sale of a portion of a non-transferable occupancy holding is not an incumbrance within s. 86 (6). (17 C W N 1101 foll. 19 C W N 268 Dist) 25 C L J 480=40 I C 544

—S. 86—Sale of a portion of non-transferable holding—Subsequent surrender of the same to landlord—The landlord can-

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not evict the transferee—Per Richardson J  
Contra. 22 C W N 972=501 C 567

—S. 86—Purchaser of a portion of a holding is not bound by the subsequent surrender of that portion by the tenant case of the surrender of the entire holding is different. 24 C W N 573=571 C 574

—S. 86—The rights of a mortgagee are not affected by a surrender. 63 I C 500  
See the same effect:—67 I C 91=1922 C 56

—S. 86—Surrender by registered tenant—Fraud and collusion with Landlord.

15 I C 264

—S. 86—Ryot holding by virtue of surrender by Hindu widow—nature & extent of interest passed by. (1919) Pat 245=50 I C 872

—S. 86—An occupancy raiyat who has transferred part of his non-transferable holding is not competent to surrender either the portion so transferred or the whole holding inclusive of such portion. 25 C W N 29=32 C L J 286

—S. 86—Surrender by a joint tenant of his interest may operate as a valid transfer, if not a valid surrender, where the deed of surrender is stamped as a conveyance and is registered. 32 I C 232

—S. 86—Sale of portion of holding by tenant—subsequent surrender of that portion—Landlord cannot evict the vendee. 24 C W N 571=501 C 378

—S. 86 (1)—A raiyat, not holding for fixed period, can surrender under s. 86 (1) when such surrender is accepted by the landlord who enters into possession the tenant cannot sue to recover the holding from persons to whom the landlord has let it after the surrender. 54 I C 752=47 C 129

—S. 86 (1)—Surrender need not be by instrument even though the tenant held under a registered lease, 54 I C 752=47 C 129

—S. 86 (6)—Surrender may be with or without consideration, 63 I C 500 (Pat)

—S. 86—Occupancy raiyat who has transferred portion of non-transferable holding cannot surrender either such portion or whole holding. A I R 1921 Cal 444=48 C 605=25 C W N 29=61 I C 443

—S. 86 (1)—Registered lease—oral surrender, validity of—Evidence Act s. 92 (1).

47 Cal 129

—S. 86 (6)—Landlord's right cannot be affected by an incumbrance created by tenant, which is not legally binding upon him. Landlord taking tenant's right by surrender is bound by previous transaction of the tenant. 21 C L J 185=27 I C 1003.

—S. 86 (6)—Quære:—whether the purchaser of a portion of a holding is not protected under s. 86 (6). 18 C W N 1194=19 C L J 313=24 I C 387

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—S. 86 (6) & (7)—Surrender of non-transferable holding by an occupancy raiyat, the raiyat having already transferred a portion of the holding to another entitles the landlord to enter upon the whole holding. A I R 1924 Pat 1=3 Pat 1=4 P L T 581=1 P L R 402=(1923) Pat 305=75 I C 794

—S. 86 (6)—Sale of portion of non-transferable holding—subsequent surrender of that portion and taking of new settlement of the remainder—Held this operated as a surrender of the whole holding, and there being no fraud, the landlord was entitled to evict the purchaser from the portion sold. 22 C W N 967=46 I C 862

—S. 86 (6)—The validity of the "incumbrance" in s. 86 (6) must be limited to the tenant and the encumbrancer. Surrender by tenant without the consent of his transferee is not valid and has not the effect of entitling the landlord to khas possession.

30 I C 252

—S. 86 (6)—Surrender, by tenant, of a portion of his holding, which he had already sold, is not valid and does not entitle the landlord to evict the purchaser. 22 C W N 965=49 I C 979

—S. 86 (6)—Invalidates surrenders which aim at defeating encumbrances by tenant to landlord. 38 I C 523

—S. 86 (6)—Transfer of holding by tenant—Surrender—Landlord, if can eject assignee. 18 C L J 257=18 C W N 601=21 I C 58

—S. 86 (6) (7)—Surrender operates against transferee of portion of non-transferable occupancy if tenant continues in possession of the remainder and pays rent. Unless the case falls under cl. 6 the landlord is bound to accept surrender. A sale creates no incumbrance. A I R 1924 Pat 1=3 Pat 1=4 P L T 581=1 P L R 402=(1923) Pat 305=75 I C 794

—Ss. 86 (6) & 88—Surrender of holding without consent of mortgagee of a portion of the holding, does not entitle the landlord to eject the mortgagee; and where the landlord after such surrender himself settled the rest of the land with another, subdivision of the holding was effected by the landlord and so did not offend against s. 88. 19 C W N 268=27 I C 564

—S. 87—Occupancy holding—transfer by gift by tenant—suit for ejectment by landlord—no inference of abandonment can be drawn from such transfer. A L R 1933 C 280=60 C 219

—S. 87—Original tenant transferring holding by way of gift—ejectment of the transferees—right of landlord—must show that he has a right of re-entry as against the original tenant before he can eject the transferee. A L R 1933 C 280=60 C 219

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—S. 87—Tenant executing usufructuary mortgage over an occupancy holding—also defaulting in payment of rent—sale of holding and purchase by landlord—Constitutes abandonment on the part of the tenant. A L R 1933 C 429=36 C W N 844=142 I C 33=A I R 1933 C 49

—S. 87—Non-transferable occupancy holding—Abandonment of—Transfer by tenant if amounts to—Retention by tenant of his interest in homestead, all agricultural land going to transferee—Transfer if amounts to abandonment of holding in case of, depends upon whether such retention of interest is as a mere matter of kindly permission of the transferee or by virtue of a definite settlement giving tenant a right to continue to remain on the homestead. 36 C W N 478=56 C L J 256=A I R 1932 C 584 (585)=139 I C 227=I R 1932 C 572

—S. 87—Non-transferable occupancy holding—Abandonment of—Transfer by tenant of holding if amounts to—Under-lease of agricultural land and homestead to be given to transferor—Transfer made on footing of—Abandonment of holding does not amount to. The transaction in such a case must be treated not as a transfer of the whole interest in the holding but as being no more than a transfer of a part. 36 C W N 478=56 C L J 256=A I R 1932 C 584=139 I C 227=I R 1932 C 572

—S. 87—Non-transferable occupancy holding—Abandonment of—Usufructuary mortgage by tenant of whole of holding—Rent left in arrear after—Decree of rent obtained by landlord and holding purchased by him at sale held in execution thereof—Mortgagee put in possession of holding subsequent to rent sale in a proceeding by him under O. 21. r. 101, C. P. C.

Held, that, on the above facts, the tenant must be deemed to have completely abandoned the holding. 36 C W N 844

—S. 87—Statement by tenant in witness-box that transferee from him was his malik as regards homestead does not amount to, in the absence of any answer elicited from him that he did not recognise any liability as between him and the landlord or that he had taken a sub-lease through his transferee. 36 C W N 478=56 C L J 256=A I R 1932 C 584 (586)=139 I C 227=I R 1932 C 572

—S. 87—Non-transferable occupancy holding—Transferee of—Suit by, for recovery of possession of holding from landlord who had forcibly re-entered—Abandonment of holding by transferor justifying re-entry by landlord—Plea by landlord of—Onus of proof in case of—Tenant stipulating for lease of homestead at time of transfer. Held, that even in such a case the onus of proof of abandonment of the hol-

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ding was on the landlord. Where there was no evidence at all to show that the rent of the tenancy had not up to the time of re-entry been paid and in whose name it was paid and there was evidence to show that the homestead land remained settled with the tenant throughout, held further that there was no abandonment so as to entitle the landlord to re-enter. 36 C W N 478=56 C L J 256=A I R 1932 C 584=139 I C 227=I R 1932 C 572

—S. 87—If the transaction of transfer was a transfer of the whole so as to amount to an abandonment of the land, then no doubt the landlord would be entitled to re-enter against the transferee. If it was not, and the landlord by force re-entered against the transferee, the transferee is entitled to bring a suit to recover the land independently altogether of s. 9, Specific Relief Act. The fact that the plaintiff is the transferee does not make any difference in principle.

Hiralal Ghose v. Sheikh Imanuddi (1931). 36 C W N 478=56 C L J 256=A I R 1932 C 584=139 I C 227=I R 1932 C 572

—S. 87 & 89—Non-transferable occupancy holding—Purchaser of portion of—Ejectment decree obtained by landlord against recorded tenant—Fraudulent nature of—Declaration of—Suit by purchaser for—Suit held maintainable where the purchaser (plaintiff) was found to be in possession and it was also found that there had been no abandonment by the original tenant. 59 C 1155=36 C W N 535=I R 1932 C 459=138 I C 463=A I R 1932 C 479=A L R 1932 C 1150

—S. 87—Whether there has been abandonment or not, is in each case a question of fact; though the inference from facts found as to whether there has been abandonment or not, is a question of law. (Vide 17 C W N 802=(32. C W N 1111) A I R 1931 Pat 236=10 Pat 264=12 P L T 570=Ind Rul (1931) Pat 306=133 I C 34

—S. 87—To constitute abandonment within the section, there must be a finding that the tenant had left the village in which the holding is without making arrangements for payment of rent. A I R 1931 Pat 236=10 Pat 264=12 P L T 570=Ind Rul (1931) Pat 306=133 I C 34

—S. 87—The landlord's right to recover possession of a tenancy relinquished by his tenant does not solely depend upon s. 87. He has right to re-enter for breach of the terms of which the tenancy was created. A I R 1931 Cal 657=35 C W N 217=58 C 869=Ind Rul (1931) Cal 610=132 I C 898

—S. 87—Although a tenant sells his holding, yet if he still continues in possession of a portion of it there is no abandonment and landlord has no right of re-entry.

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

A I R 1928 Cal 748=48 C L J 546=Ind Rul (1929) Cal 607=117 I C 847

—S. 87—The sections not exhaustive and there can be abandonment in other ways also. Complete cessation of interest constitutes an abandonment. A I R 1924 pat 440=3 Pat 126=5 P L T 407=75 I C 841

See to the same effect:—123 I C 649=A I R 1930 C 190=I R 1930 C 345=33 C W N 1023

—S. 87—Where abandonment took place 12 years before the landlord's suit for re-entry, the bar of limitation can be overcome only by establishing a case within s. 83 of Lmt. Act. 56 I C 811

—S. 87—Where a co-sharer landlord purchases a holding sold in execution of a decree under s. 87 the other co-sharers would only be entitled to fair rent. If the decree were other than one under s. 87 they would be entitled to joint possession. 54 I C 787

—S. 87—Part of holding was sold in 1908 partition took place in 1919 between co-sharers of taluk, plaintiff sued in 1922 to eject purchaser—Purchaser was not trespasser and the suit is barred as adverse possession began in 1908 and not at the date of partition. A I R 1928 Cal 876=48 C L J 347=Indian Rul. (1929) Cal 584=32 C W N 1077=117 I C 696

—S. 87—A usufructuary mortgagee of a non-transferable holding can maintain his possession against the landlord, unless there has been an abandonment. 47 I C 332

—S. 87—Mere execution of a usufructuary mortgage, with possession, by tenant who continues to reside in the village does not entail forfeiture or abandonment. 37 I C 915

—S. 87—The section does not prescribe any particular mode of abandonment. 37 I C 942

—S. 87—Discontinuance of residence in the village amounts to abandonment of the homestead land. Purchaser of a non-transferable homestead is a mere trespasser and can be ejected. 1 Pat L J 502=36 I C 653

—S. 87—Abandonment may terminate a tenancy under B T Act. But it is by itself not sufficient to extinguish the tenancy rights of a transferee of a lessee under T P Act. 33 I C 98

—S. 87—Where it is sought to eject a mortgagee in possession by foreclosure the burden lies on him to shew that there was no abandonment. A I R 1928 Cal 848=32 C W N 1027=Ind Rul (1929) Cal 345=115 I C 265

—S. 87—A landlord is not entitled to recover possession if there is no abandonment in case of a transfer of a part only or not by way of sale. A I R 1928 Cal 848=32 C W N 1027=Ind Rul (1929) Cal 345=115 I C 265.

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S. 87—Abandonment of non-transferable holding by sale—The lessee of the landlord is entitled to an ejectment decree, even though the purchaser executes a deed of release and puts the raiyat in possession. 32 I C 355.

—S. 87—Principles of abandonment govern both raiyats and under-raiyats. A I R 1929 Cal 120=48 C L J 390=Ind Rul (1929) Cal 217=114 I C 153.

—S. 87—Abandonment is a question of fact. A I R 1929 Cal 120=48 C L J 390=Ind Rul (1929) Cal 217=114 I C 153.

See to the same effect. 71 I C 304.

—S. 87—Finding of a Lower App. Court as to abandonment, arrived at on the evidence on record, is unassailable in second appeal. 32 I C 355.

—S. 87—Mere execution of a usufructuary mortgage is not sufficient to establish abandonment. Abandonment is a question of fact. 17 C W N 802=20 I C 198.

—S. 87—In order to entitle a landlord to eject a transferee of the whole of a non-transferable raiyati holding, disclaimer by original tenant not be proved, nor is latter a necessary party. 17 C W N 1105=17 I C 603.

—S. 87—Where a mortgagee of a non-transferable holding obtains possession by foreclosure. Held, that this constitutes abandonment. A I R 1928 Cal 848=32 C W N 1027=Ind Rul (1929) Cal 345=115 I C 265.

—S. 87—Held that there was no abandonment where the period was too short for raising an inference of abandonment and the transaction did not amount to a transfer. A I R 1928 Cal 891=32 C W N 1111=Ind Rul (1929) Cal 242=114 I C 482.

—S. 87—Non-Cultivation and non-payment of rent are quite sufficient to constitute abandonment leaving the village is not necessary. A I R 1929 Cal 120=48 C L J 390=Ind Rul (1929) Cal 217=114 I C 153.

See to the same effect:—59 I C 908=1921 Pat H C C 151=2 P L T 219=A I R 1921 Pat 142.

—S. 87—A mere sale does not constitute abandonment. 97 I C 302 (Pat)

—S. 87—Tenant pleading right of transfer is repudiation of tenancy and landlord is entitled to re-enter. A I R 1926 Cal 1160=96 I C 588.

—S. 87—To eject a transferee of the whole of a non-transferable holding the landlord must prove that the raiyat has left the holding and disclaims any interest in it, unless the tenant has sold the entire holding. 54 I C 548.

—S. 87—Where a holding was sold in execution but the tenant becomes tenant of purchaser and continues to reside on the homestead lands and cultivates a portion of

**BENGAL TENANCY ACT VIII OF 1885 (Contd.)**

the holding—Held that landlord is not entitled to sue for khas possession either against the tenant or the transferee. A I R 1924 Cal 900=28 C W N 602=39 C L J 356 =78 I C 497.

—S. 87—Non transferable holding held by several tenants—Transfer of his share by one alone is not abandonment. A I R 1921 Cal 523=25 C W N 717=64 I C 330.

—S. 87—Where a tenancy is not split up and one of several tenants remains and others drop away there is no abandonment. 30 I C 583.

—S. 87—Where a tenant transfers his holding by a usufructuary mortgage but continues to reside in the village. Held, there was no abandonment. A I R 1926 Pat 71=7 P L T 1=39 I C 802.

—S. 87—Transferee of non-transferable holding is trespasser only as against landlord. A I R 1925 Cal 417=82 I C 958.

—S. 87—Land partly horticultural and partly homestead, does not strictly come within s. 87. When the tenant of a non-transferable holding executes a usufructuary mortgage of it, places the mortgagee in possession, abandons the holding and leaves the village, the landlord is entitled to treat the mortgagee as trespasser and to ask for ejectment, although the case does not come within the purview of s. 87 of the Bengal Tenancy Act. 9 Ind Cas 20.

—S. 87—Mortgagee of a non-transferable holding, the mortgagor abandoning the holding and leaving the village, can be treated as trespasser by the landlord and sued for ejectment although the case does not come within s. 87. 9 I C 20.

—S. 87—Abandonment by tenant—Landlord's right of suit—Section not exhaustive. 21 C L J 261=19 C W N 1319 =28 I C 343.

—S. 87—Legal necessity must be proved to justify a surrender by a Hindu widow. 63 I C 211.

—S. 87—Landlord and Tenant—Occupancy holding—Transferability of part or whole. 42 C 172=20 C L J 52=18 C W N 971=27 I C 61.

—S. 87—Abandonment of holding—Notice. 1 C W N 198; 3 C W N 45.

—S. 87—Landlord's right of entry on abandonment of holding. 47 I C 147.

—S. 87 (1)—Sale of a portion of non-transferable holding without the landlord's consent. Upon subsequent surrender of that portion by the original raiyat, the landlord can sue to eject the transferee as trespasser. Latter's remedy is only against his vendor. 17 C W N 1101=17 I C 682.

—S. 87 (2), (3)—Notice under cl. (2) is not imperative; it is only important for a suit under cl. (3). 15 I C 639

**BENGAL TENANCY ACT 8 OF 1885 (Contd.)**

—S. 87 (7)—Transfer of portion of a non-transferable holding—Surrender to landlord—If landlord can eject. 17 C W N 1101=17 I C 682

—S. 88—A fresh agreement between the parties is a test for deciding whether a tenure is subdivided mere receipt of rent separately is not sufficient. A I R 1929 P C 171=56 I A 238=33 C W N 822=57 M L J 132=30 L W 310=10 P L T 829 (P. C.) =Ind Rul (1929) P C 322=119 I C 618

—S. 88—All co-tenants are necessary parties in a suit by landlord. A I R 1928 Pat 218=7 Pat 129=9 P L T 735=109 I C 519

—S. 88—Landlord is not bound by every statement in receipt of rent by his agent. A I R 1928 Cal 315=55 C 355=32 C W N 184=107 I C 81

—S. 88—Entry in thikadar's papers regarding area and rent amounts to express consent by thikadar and binds the zamindar, in the absence of collision between thikadar and tenants. 2 P L J 151=1 Pat L W 229=38 I C 706

—S. 88—Road-cess return rejected by Collector, receipt by patwari, and statement in plaint by previous landlord are not admissible in evidence to prove division of holding. 51 I C 996

—S. 88—"Rent roll" mentioned in S. 88 is a jamabandi and not jama wasil baki. 41 I C 501=22 C W N 693

—S. 88—Suit by landlord for ejectment of purchasers of an occupancy holding—S. 88 does not warrant a decree for ejectment on failure of debts, to attain within a fixed time. 47 I C 575

—Ss. 88 and 161—Failure to pay landlord's fee does not invalidate a sale of the whole of a raiyati holding at fixed rate—it does a sale of portion. Title acquired by adverse possession against a tenant is an incumbrance within S. 161. 47 I C 334

—S. 88—Dakhila by landlord's agent showing division of durputni is binding on the landlord 13 I C 449

—Ss. 88 and 188—Rent receipt clearly showing that the rent was paid in respect of a particular portion only is sufficient acknowledgment to bind the landlord. Division not binding the whole body of landlords does not come within S. 88. 1918 Pat 210=4 Pat L W 316=45 I C 294

—S. 88—Mere separate realisation of rent does not imply sub-division. A I R 1929 Cal 356=49 C L J 289=Ind Rul (1929) Cal 5=120 I C 149

—S. 88—Non-transferable holding—subdivision of holding. see. 36 I C 777



**BENGAL TENANCY ACT VIII OF 1885 (Contd.)**

—S. 88—Appellate Court can decide whether the facts constitute sub-division as whether division is recognized under s. 88 is question of law. A I R 1929 Cal 366=49 C L J 289=Ind Rul (1929) Cal 5=120 I C 149

—S. 89—If after the transfer of the non-transferable holding plffs. ratified it by giving dakhilas as Ijardars and as landlords by purchase of the proprietary right, and the act of the agent of plaintiffs in receiving the rent from the transferee was not repudiated. Held, that the transferee could not be ejected. A I R 1923 Cal 520

—Ss. 90, 91—Court has no power to deal with the question as to the standard of measurement. 17 C L J 50=18 I C 621

—Ss. 90 (1), (3); 91 and 158—Local inquiry under s. 158 is not a "measurement". Notwithstanding the determination of incidents of tenancy two years before the application for measurement, such application is maintainable. 19 I C 906

—S. 92—Applicability of s. 92 depends on the nature of the contract. Where a tenure within specific boundaries was intended to be leased the lessor cannot claim additional rent merely because area proved to be larger than what was mentioned in the deed. A I R 1931 Cal 596=58 C 686=Ind Rul (1931) Cal 744=133 I C 696.

—S. 92—Thikadar can be ejected after expiry of his lease, though he was a cultivating riyat with respect to the lands of which he took the thika prior to it. 20 C W N 800=36 I C 178.

—S. 93—Common manager not to be appointed a receiver in a suit for partition which is necessary to avoid proceedings under. A I R 1925 Cal 686=52 C 231=86 I C 610.

—S. 93—A dispute to warrant the appointment of a common Manager need not be one between all co-owners, nor need it be as to the management of all and every part of the estate. Cosharer is a co-owner within S. 93 even if he opens a separate account. 21 C W N 240=36 I C 448.

—S. 93—A common manager should be appointed on an application of small sharers after consideration of the objection of the owner of the separate estate. A I R 1925 Cal 686=52 C 231=86 I C 610.

—S. 93—Such manager cannot be appointed for only a part of estate. 80 I C 654=A I R 1924 C 214=27 C W N 1040.

—S. 93—Previous appointment does not validate a later one. A I R 1924 Cal 214=27 C W N 1040=80 I C 654.

—Ss. 93, 95 and 98—If common manager resigns, dies or is removed new ones can be appointed by Dist. Judges 35 C L J 75=64 I C 819.

**BENGAL TENANCY ACT VIII OF 1885 (Contd.)**

—Ss. 93, 94, 95, & 99—Common manager, appointment of for part of an estate—Legality of permanent lease by manager. 26 I C 498.

—Ss. 93, 94, 99—Appointment of common manager for part of an estate is not valid (6 C L J 219 rel.) 24 I C 498.

—Ss. 93, 95—Non-Compliance with the formalities for appointment of common manager makes the appointment illegal. 26 I C 498.

—S. 93—A permanent lease granted by the common manager without obtaining the sanction of the Judge is invalid. 26 I C 498.

—Ss. 93, 94, 95—Court may appoint interim receiver pending the final appointment of a common manager. 43 Cal 986=20 C W N 1009=36 I C 177. also 34 I C 83.

—Ss. 93, 100—Appointment of receiver pending application for appointment of common manager. 17 C W N 581=13 I C 398.

—S. 93 (6)—"Injury to private rights" includes loss of income to the cosharers resulting from a dispute between themselves. A I R 1925 Cal 686=52 C 231=86 I C 610.

—S. 95—Common manager—Appointment of, where under advancing circumstances two different common managers should have been appointed is not Ultra vires of the statute. 59 C 961=55 C L J 8=138 I C 4=I R 1932 C 401=A I R 1932 C 275=A L R 1932 C 1037.

—S. 95—The protection afforded to a receiver in the shape of a requirement as to permission has been extended to common managers in suits for accounts when they are to be instituted against them. Such permission is not, however, necessary in all cases. Held that a suit against a common manager on foot of a mortgage bond executed by his predecessor was maintainable without such permission. 59 C 961=55 C L J 8=138 I C 4=I R 1932 C 401=A I R 1932 C 275=A L R 1932 C 1037.

—S. 95, as it was under the Act of 1885, did not debar the appointment of a common manager in respect of an estate or share of an estate together with the tenure or tenures subordinate thereto, but in making an appointment in such a case the Judge had to call upon the parties to divide themselves into as many groups as there were properties held by them in common. The amendment of the section in 1928 will make it possible, which it was not possible to do before, to appoint a common manager for only those portions of the estate or tenure, which are affected by the dispute. But even under the law, as it stood before the amendment, it was possible to appoint a common manager not

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

only in respect of an estate or of a tenure but also in respect of the joint lands of the estate or of its subordinate tenures. 59 C 961-55 C L J 8-138 I C 4-I R 1932 C 401=A I R 1932 C 275=A L R 1932 C 1037

—S. 95—Zamindari estate—Common manager of—Mortgage in respect of its putni—Execution of—Power of—Common manager has. 59 C 961-55 C L J 8-138 I C 4-I R 1932 C 401=A I R 1932 C 275=A L R 1932 C 1037

—S. 95—Appointment of common manager for portion of estate not permissible. 30 C L J 261=53 I C 672

—S. 95—A suit for accounts against a common manager does not lie without the sanction of the Court which appointed him, and is not maintainable without notice under s. 80 of C P C. The position of a common manager is analogous to that of a receiver under C P C. 24 C W N 138=30 C L J 279=53 I C 747

—Ss. 95, 98, 100—Suit by common manager against ex-common manager for papers and accounts is maintainable as such a suit is for the purpose of management of the estate under s. 98 (3). Per Gosh J (Geidt. J. contra):—Such a suit shall be brought with the sanction of the Dist. Judge under r. 4 of the rules framed by the High Court in accordance with s. 100 of B T Act. 53 I C 737=30 C L J 263

S. 95—Permission to sue common manager, granted to some of the cosharers, enures for the benefit of all. 44 Cal. 800 =42 I C 461.

S. 95—Appointment of Common Manager. 10 C W N 437=7 C L J 109

S. 95—Sale—Common manager—T P Act S. 82. 50 I C 790=23 C W N 308=29 C L J 297

S. 95—Common Manager Probate—Will. 16 I C 48=17 C W N 445

—S. 95—Receiver Common manager if legal. 9 I C 1027=13 C L J 487=15 C W N 672

—S. 95—Receiver if may be appointed common manager of property in hand. 15 C W N 672=13 C L J 487

—S. 95 (e)—Deposit of rent by Patnidar, effect of B T Act s. 61. 41 Cal 1090

Ss. 95 & 98—A common manager appointed under s. 95 is, like a Receiver, officer of the court, created by statute. No suit will lie against without sanction of the court except for acts of misconduct and acts outside his authority under the Act. 40 C 150=17 C W N 846=16 I C 193

—Ss. 95, 98—Common manager can defend a suit for possession and it is immaterial whether the heirs of some of the co-owners were brought on the record too late for a suit against them. 14 C L J 61=16 C W N 96=11 I C 397

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—Ss. 95, 97—B. Court of wards Act s. 60—All cosharers are not wards of the court under this section so as to prevent them from incurring debts or selling their interest, or their creditors from selling property in execution. 33 C W N 847=Ind Rul (1930) Cal 320=123 I C 320=A I R 1929 C. 790

—S. 95—Sale of six annas share under a mortgage decree. The estate was under a common manager. Held, his authority as common manager still existed and the purchaser has no power to collect rents separately so long as the common manager continued to be the common manager. A I R 1927 Pat 334=8 P L T 611=104 I C 672.

—Ss. 95, 98 and 100—District Judge's sanction is unnecessary for suit against common manager. A I R 1925 Cal 334=82 I C 327.

—Ss. 95 (a) and 97—Manager of Court of Wards can sue. 34 C L J 205=66 I C 287.

—Ss. 95 (a), 97—Where estate is brought under Court of Wards through B T Act Court has same powers as in the case of other estates. A I R 1926 Cal 651 =34 C L J 205=66 I C 287.

—S. 95 (a)—Estate to be managed includes accretions and reformatations. A I R 1921 Cal 661=34 C L J 205=66 I C 287.

—S. 98—See cases under Ss. 93 and 95.

—S. 98—Dist. Judge can fix and direct payment of the remuneration of the common manager. No question of limitation arises in a suit for arrears of remuneration. 46 I C 686.

—S. 98—Suit by common manager against former manager for papers and Account if maintainable. 30 C L J 263.

—S. 98 (4)—Where the title of a co-owner is disputed the Dist. Judge can direct the common manager to retain the disputed share of the rent till the title disputed is adjudicated upon. 17 C W N 445=16 I C 48.

—Ss. 98, 100—High Court, having made rules under s. 100 B T Act, can under s. 15 of Charter Act superintend and revise the orders of Dist. Judge under ch. X. 29 I C 177.

—Ss. 98 (3), (7) and 103—Application under s. 103 by common manager is not excluded by s. 98 (7). 27 I C 307.

—S. 98—District Judge's sanction is necessary for taking proceedings in execution against common manager. A I R 1925 Pat 374=(1925) Pat 109=6 P L T 127=86 I C 787.

—S. 99—In an application to District Judge, for restoration of management to co owners, the common manager cannot be a party. 24 C W N 927=59 I C 191.

—S. 99—Where dispute between co-owners has been effectively settled—Restoration must be ordered. A I R 1925 Cal 1168=44 C L J 569=87 I C 815.

BENGAL TENANCY ACT VIII OF 1885 (*Contd.*)

-Ss. 100, 120-Declaratory suit to rectify wrong entry in Record of rights-Limitation, 6 years from the challenge of the right. 2 Pat L J 493-41 I C 11

-S. 101-Local area includes the whole District. B T Act ss. 30, 101 and 111 21 C L J 489

-S. 101, 102, 103-Local custom cannot be recorded under s. 101. If so recorded, there can be no presumption under s. 103 as to its correctness. 57 I C 126

-Ch. X-(ss. 101-115 (A))-Situation of land in Municipal area is not sufficient to make Chap X inapplicable. A I R 1927 Cal 126-98 I C 137

-Ch. X-Chap. X is not limited to suits between landlord and tenant only. A I R 1926 Cal 862-30 C W N 689

-96 I C 959

-Ch X-Entry in Record of Rights as to amount of rent is corroborative evidence in suit for recovery of rent. A I R 1925 Cal 404-78 I C 169

-Ss. 101 & 111-Entertaining within s. 111 means considering and it applies to suits before as well as after declaration under s. 101 is made. A I R 1925 Cal 1211 -88 I C 670

-Ss. 101, (2) (d), 104, sub-s. (2), 107-By a contract made previously to the record of rights, the rent was agreed upon. The Revenue Officer fixed the fair rent in preparing the record-of-rights: Held, that, under s. 104 the record-of rights prevailed. 9 Ind Cas 360

-S. 101 cl 2 (a)-The "large portion of landlords" in s. 101 cl 2 is not the numerical proportion but the proportion in interest. 40 C 123 at 133-18 I C 939-17 C W N 1151

-S. 101 cl 2 & 3-The discretion rests with the Local Government to determine whether the application was in due form under s. 101 cl (2) and after the local government has decided the point and issued notification the jurisdiction of the Civil Court to interfere with the order is barred by cl. 3 of s. 101- 40 C 123 at 137-18 I C 939-17 C W N 1151

-Ss. 101 (2) (D), 104 & 192-Under B T Act as it stood in 1898 Collector could settle fair and equitable rent of his own accord. Nowabad land forms part of Govt. estate and rents due to Govt. from such estate is Land Revenue within ss. 101 and 104. 24 I C 820

-S. 101 (2)-Entry in Record of Right that under tenure is not binding-L and R sales Act s. 12 (3). 24 I C 253-20 C L J 40

-S. 102-Contract to sub-let at a rate higher than that fixed by settlement cannot be enforced. A I R 1928 Cal 763-49 C L J 65-33 C W N 362-Ind Rul (1929) Cal 556 -117 I C 604

BENGAL TENANCY ACT VIII OF 1885. (*Contd.*)

-S. 102-The presumption under s. 50 does not arise by reason of an entry of a person as a settled Ryot in Record of Rights under s. 102 (b). A I R 1925 Cal 208-29 C W N 209-40 C L J 248-84 I C 989

-S. 102 (b)-S. 102 (b) is wide enough to cover an entry of acquisition of occupancy right by custom by under-riyat and such entries must be presumed correct. A decree under s. 66 does not rebut such presumption. (57 I C 126, 89 I C 1020, not followed, 46 C 43, 33 C W N 1193, followed) 54 C L J 68-Ind Rul (1931) Cal 737-133 I C 689

-Ss. 102 (b), 50-The operation of s. 51 is not barred by reason of the addition of the word "koimi" to "settled riyat" the entry not being on that score bad. A I R 1927 Cal 546-101 I C 45

-S. 102 (h)-Settlement Officer is bound to record grounds of remission of rent. 97 I C 590

-S. 102 (c)-Revenue Officer is to determine existing rent and not settle a fair rent. A I R 1925 Cal 799-29 C W N 517-87 I C 1014

-Ss. 102 (dd), 106-In a suit under S. 106 between two neighbouring proprietors, coming within s. 102 (dd), the only question that can be gone into is which of them was in possession at the date of the final publication of the Record. 45 I C 781

-Ss. 102, 104 H, 158-Suit under s. 104 H does not lie on the ground that enhancement of rent should not have been made. 23 C W N 383-51 I C 144

-S. 102-Revenue Court can, on an application for settlement of fair rent, go into questions as to liability of the land to pay rent and relationship between parties. 52 I C 403

-S. 102 (h)-Cl. (h), S. 102 is sufficiently wide to empower a settlement officer to record the incidents of an under-riyati by which the under-riyat is said to have acquired the right of occupancy by custom.

Ordinarily an under-riyat cannot acquire a right of occupancy under the statute and this is certainly a special condition and incident of the tenancy of an under-riyat if he acquired the right of occupancy by custom. This does not cease to be a special condition or incident of the tenancy merely because this question has to be established by evidence of a general character. With regard to the particular tenancy it is a special condition although the evidence by which the special incident is established may be of a wide and general character. 54 C L J 68-A I R 1932 C 6 (7)=133 I C 689

-S. 102 (h)-An entry in the Record of Rights of trees as exclusive property of tenants is in entry of a special incident

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of tenancy, authorised by s. 102 (h). The presumption of correctness is applicable to the entry. A I R 1931 Pat 209=10 Pat 311=12 P L T 150 at p 154=Ind Rul (1931) Pat 289=132 I C 865

—Ss. 102 (h), 103—An entry in the Record of Rights of the tenant's exclusive right to trees (kul haq raiyat) comes within s. 102 (h) and must be presumed to be correct under s. 103. A I R 1931 Pat 209=10 Pat 311=12 P L T 150=Ind Rul (1931) Pat 289=132 I C 865

—S. 103—Record of Rights—Entry in—Presumption arising from—Consideration of—Court's duty. See under this Act—S. 5 (5). 55 C L J 569

—S. 103—Record of Rights—Under-raiyat—Acquisition by, of right of occupancy by custom—Entry as to—Presumption from—Rebuttal of—Decree inter partes under S. 66 of Act for ejectment of under-raiyat on his failure to pay rent decree within a certain time when is not. See under this Act—S. 66. 54 C L J 68=133 I C 689=A I R 1932 C 6

—S. 103—Where a Record of Right contains an entry that the defendant, an under-raiyat, has a right of occupancy onus is on plaintiff to prove the contrary. 53 C L J 616=Ind Rul (1931) Cal 668=133 I C 220

—S. 103—Entry in Record of Rights that tenant is exclusively entitled to the trees (kul haq raiyat) falls within s. 102 (h) and must be presumed to be correct. A I R 1931 Pat 209=10 Pat 311=12 P L T 150=Ind Rul (1931) Pat 289=132 I C 865

—Ss. 103, 116—Where land was recorded as raiyati or as in the possession of tenants or no evidence is available as to how it was recorded it cannot be presumed to be zeraf. A I R 1931 P C 231=8 O W N 973=Ind Rul (1931) P C 257=61 M L J 415=34 L W 439=35 C W N 1217=133 I C 721 P C

—S. 103—Dispute as to boundaries of neighbouring estates cannot be determined by an Executive Officer. A I R 1925 Cal 1253=86 I C 767

—S. 103-A—Entry as to area—An entry as to area in the Record-of-Rights must be presumed to be correct until it is proved incorrect. A I R 1931 P C 221=Ind Rul (1931) P C 270=54 C L J 280=35 C W N 921=133 I C 734 P C

—S. 103-B—Entry in Record of Rights of land within ambit of zamindari as debottar land—Zamindar impeaching correctness of—Onus of proof in case of, is on him. 11 Pat 701

—S. 103-B—The value of the presumption which arises under s. 103-B, as to the correctness of the entry in the revisional survey khatian is not lessened merely by the fact that the plaintiffs not

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knowing what the entry meant proceeded to attack it on the ground that it had wrongly omitted to describe them as possessing occupancy rights. It would be unreasonable to presume that the survey authorities did not know the law or the provisions of s. 183 and had recorded persons as having occupancy right even though no custom had been proved before them. A I R 1931 Pat 361.

—S. 103-B—Record-of-Rights—whether conclusive evidence as to nature of the lands—debottar property. A L R 1933 P 65=11 P 701=141 I C 157=A I R 1933 P 6.

—S. 103-B—The presumption under s. 103-B is rebuttable. Ind R 1930 Pat 510=123 I C 390=A I R 1930 Pat 568.

—S. 103—The presumption cannot be rebutted by entry in quinquennial register—Nor by Road cess returns under Regulation 48 of 1793. 75 I C 201=A I R 1923 C 611=27 C W N 548.

—S. 103—The mere fact of conflicting entries does not rebut presumption as to the last entry. A I R 1929 Pat 460=10 P L T 569=Ind Rul (1929) Pat 508=118 I C 316.

—So also the fact that both parties object does not affect the presumption. 100 I C 701=1927 P 164=8 P L T 121=6 Pat 342.

—S. 103—Entry in Record-of-Rights as to occupancy rights of a tenant creates a presumption in favour of the tenant. Onus is on the landlord to establish contrary. 34 I C 506.

—S. 103-A—No presumption arises from Khasra papers under this section. A I R 1923 Cal 194=67 I C 871.

—S. 103—It is until the Record-of-Rights is finally published that presumption (rebuttable) of correctness arises. 34 I C 857.

—S. 103—Entry in Record-of-Rights presumed to be correct until contrary is proved. 35 I C 424.

—S. 103—The presumption refers only as to the entry and not the whole Record of Rights. A I R 1929 Cal 606=49 C L J 540=Ind Rul (1930) Cal 116=121 I C 404.

—So also no presumption as to the entry of tenant's right to trees being correct. 89 I C 1020=A I R 1926 Pat 68.

—S. 103-B—Proceedings before Revenue authorities can be referred to as evidence of rebuttal of the presumption. under this section. A I R 1929 Cal 255=33 C W N 196=Ind Rul (1929) 523=117 I C 539.

—So also any external evidence can be admitted. 87 I C 1014=A I R 1925 C 799=29 C W N 517.

—S. 103—A Record-of-Rights is evidence not only between landlord and tenant, but in all cases where the subject matter of the entry is in dispute. 35 I C 424.

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—Ss. 103 and 105—Difference between s. 103 and s. 105 is that former contemplates a record of existing facts, while the latter an alteration of existing facts. In a proceeding under s. 105 mere challenging of an entry, by landlord, in the Record of Rights, does not take the proceeding away from s. 105. 21 C L J 305-28 I C 508.

—S 103—The facts stated in the entry of record of rights may be presumed to be correct to some extent. A I R 1928

Pat 36-8 P L T 817-104 I C 514.

—See to the same effect:—61 I C 420.

—So also:—A I R 1929 Pat 748-123 I C 386-Ind Rul 1930 Pat 306.

—Ss. 103-A & B—The presumption mentioned in s. 103 B is to be made only after the Record of rights is finally published. However the order under s. 103-A directing the name of a particular person to be entered is good evidence as to possession of such person. A I R 1928 Cal 298-47 C L J 347-109 I C 241.

—See also;—Order by the Assistant settlement officer no presumption attaches under s. 103 A. 78 I C 605-A I R 1924

Pat 443-1924 P H C C 1-3 Pat. 120

—S. 103—Proof of contrary user rebuts presumption as to correctness of entry under this section. A I R 1925 Cal 635-29 C W N 333-86 I C 835.

—Ss. 103 and 105—In an application under s. 105, non-joinder by one or some of the cosharer does not dissolve the relationship of joint landlords. 21 C L J 305-28 I C 508.

—S. 103—Common Manager, powers of—Application under s. 103, whether excluded. 27 I C 307.

—S. 103—Tr. of Property Act (IV of 1882) S. 43—Transfer by person having no title—Subsequent acquisition of title effect of—Municipality land situated within whether within scope of Act—Record of Rights, publication of—Certificate of Revenue officer, effect of. 50 I C 778.

—Ss. 103, 102—The customary rights of possession of occupancy rights of an under raiyat must be recorded as an incident of tenancy under s. 102 and presumption under s. 103-B does apply to such an entry. A I R 1927 Pat 376-103 I C 471.

—S. 103—Resjudicata—Suit, for possession on one cause of action dismissed—Suit, subsequent, for different property or different causes of action, whether barred—possession, suit for—Right of third person, defendant whether can plead. 43 I C 395.

—S. 103—Record of Rights, entry in—presumption—Entry not proved to be wrong effect of—Burden of proof—Eject-

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ment, suit for—Occupancy raiyat. 50 I C 319.

—S. 103—Chota Nagpur Tenancy Act (B C VI of 1908)s. 11—Suit to recover rent—Rent not recoverable for period prior to registration in office of landlord. 27 I C 605.

—S. 103—Record of Rights, entry in—Presumption—Entry not proved to be wrong, effect of—Burden of Proof—Ejectment, suit for—Occupancy raiyat. 50 I C 319.

—S. 103 (A)—Entries in a draft record of rights are not admissible in evidence in rent suits. 18 C W N 896-27 I C 229.

—S. 103 (A), (B)—Draft record of rights is not admissible in evidence. If admitted, the appellate court should remand the case. I P L T 224.

—Ss. 103, 104—A tenant can plead that the rent should be suspended as he was dispossessed from a portion of the land. 80 I C 1034-A I R 1924 C 341-27 C W N 982.

—Ss. 103-A, 105, 108—Despite final publication of Record or Rights and the settlement of rent being up-held by special Judge, s. 108 empowers a Settlement Officer to correct the Record on a bonafide mistake. 17 C W N 625-16 C L J 339-17 I C 279.

—Ss. 103 A, 105, 109—S. 103 does not preclude inquiry as to correctness of entry, it only precludes the Court from going into the question whether the procedure under the chapter has been followed. 19 C W N 35-27 I C 446.

—Ss. 103-A and 106—Entry in record of rights is presumed to be correct. Onus is on plaintiff to prove that the entry is incorrect, if he so alleges. 1 Pat L T 221-1920 Pat 177-56 I C 417.

—S. 103 B, Ss. 50 (2)—Where there is a conflict between these two sections the former shall prevail. 2 P L T 642-68 I C 433.

—S. 103-B—applies to some extent to non-agricultural land also. A I R 1924 Cal 667-28 C W N 516-80 I C 805

—S. 103-B—Reduction of rent in case of inundation recorded presumed to be correct. A I R 1925 Cal 564-78 I C 836.

—S. 103 B—A fard rewaj bhaoli is admissible in evidence under S. 35 of Evd. Act but no presumption as to correctness attaches to it under S. 103 B T Act as it does appear to be published under ch. X 2 Pat L J 187-1 Pat L W 238-38 I C 176.

—S. 103. B—It is open to a court to consider the history of the proceedings which have resulted in the particular entry in question. 37 I C 353.

—S. 103 B—An entry to the effect that rent assessable but not paid cannot be held to incorrect by the niege fact that period of tenants' possession is indefinite, even when no rent has been paid. A I R 1927 Cal 1-31 C W N 32-99 I C 189.



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—S. 103 B—The burden of Proving that the land is rent free is on the claimant in resumption Proceedings by proving a contract to that effect or a grant recognised by Government. A I R 1922 P C 272=(1923) M W N 361=27 C W N 925=45 M L J 460 =3 P L T 605=36 C L J 499=32 M L T 1=71 I C 984=49 I A 399=2 Pat 38.

—S. 103 B—Presumption applies to a suit instituted before the publication of the record of rights in which the entry is contained. 19 C L J 348=17 C W N 1159=20 I C 171.

—S. 103 B—The fact that entry is contrary to the principles of general law, does not rebut the Presumption of correctness. A I R 1922 Pat 497=1 Pat 368=3 P L T 818=64 I C 866.

—S. 103 B—Rebuttal of presumption is a question of fact and the Appellate Court cannot interfere with the finding. 45 I C 65=22 C W N 449.

—S. 103 B (3)—Until it is rebutted the Record of Rights is to be presumed as Correct. A I R 1921 Cal 577=34 C L J 133=67 I C 170.

—But no such presumption arises where the entry refers to land to which B T Act does not apply and as to which revenue officer could not hold enquiry. 65 I C 4=A I R 1921 C 236=34 C L J 504=26 C W N 483.

—S. 103 B—Court's finding on one-sided evidence is not legal. 63 I C 194. (Pat)

—S. 103 B—Where land is recorded as occupancy holding the burden to prove that it is malik zerait is on zamindar. A I R 1926 Pat 485=5 Pat 393=7 P L T 784=96 I C 937.

—See to the same effect:—71 I C 1022=11 P L T 444=1923 Pat (A I R) 340.

—S. 103 B—Evidence of a date prior to that of the publication of the Record is admissible to rebut presumption as to correctness of entry. 56 I C 40.

—Ss. 103-B (3), 106—In a record-of rights, mal lands may be recorded as malik in the sense that lands which are part of the revenue-paying lands of an estate are held rent free. Where a suit is instituted under s. 106 the plaintiff has not only to start a prima facie case, but to prove by evidence that the entries in the record-of rights are incorrect. When a fixed period is given to do a certain act, and the person bound to perform it is, from no act of his own but from some act or order of the Court prevented from carrying it out he gets the advantage of the next open day. 9 Ind Cas 181.

—S. 103 (b) (3)—Evidence of facts subsequent to the publication of record of rights may be admissible to rebut presump-

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

tion as to correctness of entry. 22 C L J 140=30 I C 937.

—Ss. 103 (B) (5), 104 (J)—Presumption under s. 104 (j) refers only to the rate and the amount payable. Mere payment of rent at certain rate by father does not raise presumption of son being also tenant.

Entry as under-raiyats in the settlement record raises presumption of relationship of landlord and tenant, which may be rebutted. 23 I C 244.

—Ss. 103 (B), 105, 107—In proceedings under s. 105, tenant cannot question the correctness of entries in the record of rights and the decision of the Revenue officer, though he may do so by a suit under s. 106 or one for declaration.

Presumption under s. 103 does not become conclusive merely because the defendant omits to rebut it. 19 C W N 638=23 I C 615.

—Ss. 103-B, 105, 106, 108—No suit lies for the alteration or correction of entries made in the record of rights published under Ch. X. Persons aggrieved by the entries should have recourse to the special remedy provided in that chapter. 12 C W N 1032=8 C L J 322=35 C 1013.

—Ss. 103 B, 161, 167—Where certain lands in a putni were recorded rent-free, and there being no evidence rebutting it the deft's interest could be deemed to be an encumbrance so as to entitle the plff. to eject deft, unless it was shown that the zamindar was in possession of those lands at the time when the putni was created. 23 C W N 182=47 I C 765.

—S. 103 B (3)—Party can prove an entry in the record-of-rights to be incorrect by showing that it was based upon materials not admissible in evidence. 27 C L J 107=41 I C 804.

—Ss. 103 B, 104, 104 J, 105, 112, 113—Enhancement of rent—s, 113, scope and operation of.

The provision of s. 113 are not applicable to a mere entry of an existing rent in the Record of Rights. 21 C W N 546. =34 I C 32.

—Ss. 103 B, 148 B (1), 153—Second Appeal—Decision of amount of Rent annually payable—Rent suit below Rs. 100—Decree according to defendant's admission of Rent—Presumption—Publication of Record of rights—Admission of plaint in rent suit without statement of rental of tenancy according to Record of Rights—Duty of Court to require Collector to supply copy of statement. 23 I C 416.

—S. 103 B—Bengal Cess Act (IX B-C of 1880) s. 41 (3)—Cess assessment of method of—Fard rawaj bhaoli, admissibility of, in evidence Act (1 of 1872), s 35. 1 Pat L W 677=39 I C 503

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—Ss. 103 B, 104 H—Raiyats—"Tenure holders"—Test for determining, whether a person is "raiyyat" or tenure holder—Record of Rights, entry in—Presumption as to correctness of entry, rebuttal of—Burden of proof. 46 Cal 90=51 I C 226 (P C).

—Ss. 103 B, 147 B, 74—Record of Rights, presumption as to correctness of entries in—Katipari, whether legal charge—Illegal cess. 37 I C 813

—Ss. 103 & 5 (5)—Area exceeding hundred Bighas—Tenure-holder—Presumption—Attendant circumstances. Entry in Record of Rights as raiyat—Presumption. 22 C W N 674 (P C)=45 Cal 804

—S. 103 (b) Lim. Act 1908 Art. 130—Suit to assess rent on land entered in record of rights. Presumption as to correctness—Onus. 22 C W N 685

—Ss. 103-B, 111-A—Presumption under—Ryot, status of conditions of—Occupancy right, acquisition of—Limitation 19 C W N 1017=30 I C 255.

—S. 103—Record of Rights Boundary Fence. 2 Pat L W 27=40 I C 987.

—S. 103 (b)—Record of Rights—Suit for correction or alteration of—Maintainability. 13 C W N 111=9 C L J 83=1 Ind Cas 689

—S. 103—Accretion to permanently settled estate—Government Notification under S. 3. When ultra vires.—In correctness of decision of Revenue Courts, whether can be questioned by Civil Court—Bengal Regulation IX of 1825. 50 I C 94

—Ss. 103 and 106—Limitation Act Art 120—Entry in record of rights—suit to declare it incorrect. 23 C W N 883=53 I C 968

Chapter X Part II—Suit for rent—amount settled by Revenue Officer—Tenant if can dispute. 51 I C 981

—S. 104—See cases under Ss. 5, S. 22, Sub-S 1; 52; 101; 102 and 103.

—S. 104—A suit under S. 104 E without notice under S. 80 of C P C is not maintainable. 18 C L J 566=22 I C 36

—Ss. 104 and 106—Settlement Officer's decision embodied in record of rights does not operate as res judicata in a Civil Court. 20 C W N 275=22 C L J 155=30 I C 953=43 Cal 547

—S. 104—A Settlement Officer can award fair rent based on tenant's status who holds over. A I R 1927 Cal 413=100 I C 466

—S. 104—No presumption arises as to the entries in Record of Rights made by a Settlement Officer having no jurisdiction to do it. A I R 1922 Cal 274=36 C L J 124=70 I C 822

—S. 104—Suit under—Extension of period under S. 15 Limitation Act. 27 C L J 374

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S. 104—Settlement of rent by Rev. Officer can only be altered by a suit under S. 104 H. (17 C W N 153 appl) Therefore, additional rent for excess cannot be recovered by a suit until the rent settled were first altered by a suit under S. 104 H.

38 I C 341

—Ss. 104 and 30 (6)—A suit is not barred after the decision of a Settlement Officer wherein he had not dealt with question about undivided portion of land for recovery of rent with claim for enhancement under s. 30 (b). A I R 1930 Cal 238=33 C W N 1156=Ind Rul (1930) Cal 676=126 I C 132

—Ss. 104, 106 J and 192—Tenants are bound to pay the rent fixed by Revenue authorities for accretion lands newly created if no proceedings are taken to get the order reversed. 60 I C 391

—S. 104—Applicability of, to a lease created before the Act—Construction of lease, Tenure holder or labourer. 21 C W N 505

—S. 104 (1)—Lease for reclamation, whether constitutes raiyati lease—Tenant status of, materials for determination of—korfa, meaning of 'Raiyat'—meaning of—interpretation of s. 5 (1) whether introduced change in land—Parties, proper, in suit for declaration of plaintiff's status as tenant. 39 I C 409

—S. 104—Entry in Record of Rights is conclusive. A I R 1922 Cal 101=35 C L J 304=67 I C 375

—S. 104 (2)—Settlement Officer can review his decision on the ground that it was erroneous.

Where alteration of record is made on joint application by landlord and tenant, the tenant cannot afterwards contend that the order was made without jurisdiction. 30 C L J 1=53 I C 39

—S. 104 A to J—The Record of Rights become final if no suit under s. 104 (h) is instituted. 38 I C 341

—S. 104 (c) (f) and (h)—Civil P. C. (Act V of 1908) S. 80—Suit against Secretary of State—Notice—Suit under section 104 H.—Objection under section 104 E, whether constitutes notice of cause of action. 22 I C 36

—S. 104 (E)—Revenue Officer's order, if a judicial order. 3 C L J 133=15 C W N 896

—S. 104 G—Where a record of rights was finally published before Act III of 1898 came into force, no proceedings could be taken under S. 104 G for the alteration of such record. 29 C L J 237=51 I C 127.

—S. 104 H (4)—Tenant a necessary party in proceedings under, 16 C L J 38; =17 I C 919.

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—S. 104—H—Tenants co-sharers—Suit by, for correction of entry in Record of Rights—Dismissal of—Appeal against—Death of some of them pending and abatement of appeal as regards them—Entire appeal does not abate by reason of. 58

C 1341

—Ss. 104 H, 111 A—Even if a claim is barred under s. 104 (H) it is not barred under s. 111 A. 65 I C 669.

—S. 104 H, F, J—Entry in Record of rights settling rent is conclusive, unless altered by a suit under S. 104. Suit for enhancement of rent not maintainable, until the entry is altered by a suit. S. 113 does not apply. 17 C W N 153=15 I C 327

Sec. 104 (H)—Record of rights is final as to rent. 60 I C 501

—S. 104—H The only relief which a plff. in a suit under S. 104 H can claim is the alteration of an entry of the rent settled or the insertion of an entry as to amount of rent to be settled. Such a suit should have as defendant only the person benefited by the rent-entry or by the omission to make a rent-entry, as the case may be. 17 C W N 835=16 C L J 385=17 I C 921.

—S. 104 H (2)—Rent settled by Record of Rights cannot be altered six months after its publication. 67 I C 375=A I R 1922 C 101=35 C L J 304=49 C 1026

—S. 104 (H) 4—Where fair rent is not settled a suit for its settlement will lie under s. 104 H (3) cls. (d) & (e). A I R 1921 Cal. 429=26 C W N 100=63 I C 892

—S. 104 H (4)—In settling fair rent under S. 104 H (4) what the Court has to consider is the rent of other holdings of the same class comprised in the same settlement rent roll. 54 I C 718

—S 104 H—In a suit under s. 104 H it is not sufficient to hold an entry erroneous. Court must determine the exact conditions and incidents of the tenancy and also rent. 46 Cal 160=27 C L J 334

=45 I C 43

—S. 104 (H)—In order to come under this section a person must be aggrieved of an entry of rent A I R 1924 Cal 464=40 C L J 235=70 I C 207

—S. 104 H—The two months of notice under s. 80 of C P C cannot be excluded in reckoning the limitation for a suit under S. 104 H. 46 I C 899

—Ss. 104 H, 111 (a)—Arrears after re-settlement or new contract is a new cause of action.

Court cannot go behind the record of rights to ascertain what, in fact, is the true nature of the tenancy. 29 I C 437

—S. 104 H, 111 A—Where reliefs claimed are outside s. 104 H but within s. 111 A, the limitation applicable is that provided in art. 20 of the Lmt. Act 45 Cal 645=47 I C 820

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S. 104 H—Statements in record of rights as to rent are not admissible in evidence to rebut correctness of entry under s. 104 A and J. 23 C W N 860

—S. 104 H—Scope—Tenant whether tenure holder or ryot—Test to determine—Suit for declaration of occupancy right after final publication of record of rights—Limitation. 3 C L J 133=15 C W N 896.

—S. 104 (h)—Notice to Secretary of of State—Limitation 22 C W N 802=47 I C 502

—S. 104 (H)—Status of tenant, materials for determination of—Lease by prajagiri patta. Whether creates tenure Praja-  
'Bhagehasis,' meaning of—Lease created before Act, whether governed by Act—Suit to vary rent—Construction of documents. 39

I C 934

—S. 104 J—Entry being without jurisdiction, there is no presumption. A I R 1922 Cal 274=36 C L J 124=70 I C 822

—S. 104 J—Nature of presumption regarding entry of area in Record of Rights pointed out. A I R 1924 Cal 341

=27 C W N 982=80 I C 1034

—Ss 104 J & 103 B—A tenant can prove the area in defence to suit for ejectment. Under S. 103 B entry as to area in Record of Rights is presumed to be correct but is not conclusive under s. 104 J. A I R 1927 Cal. 214=98 I C 498

—Ss. 104 J and 111 A—Entry as regards tenant is presumed to be correct but entry as to rent is conclusive. A I R 1928 Cal. 808=33 C W N 385=55 C 1355=Ind Rul (1929) Cal 301=115 I C 45

—S. 104 J—The words "shall be deemed to have been correctly settled" create an irrebuttable presumption as to the correctness of the rent settled. 46

I C 287

See also 23 C W N 516

—S. 105—Applies not only when no rent has been fixed but also when the rent has been fixed by agreement of parties. 16 C L J 328=17 I C 266=17 C W N 774

—S. 105—Application under S. 105 is valid even though there is a flaw in the signature or one of the proprietors is not mentioned therein. It is doubtful whether proceedings under the section are suits. 79 I C 5=3 Pat 67=(1924) Pat 104=A I R 1923 Pat 273.

—S. 105—Enhancement of rent—Appellate Court cannot very decree allowing additional rent for additional area where no appeal or cross-objection has been preferred. A I R 1931 Cal 565=35 C W N 212

=Ind Rul (1931) Cal 689=133 I C 551

—S. 105—Enhancement of rent—Appellate Court—Can order re-trial where

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the lower Courts have proceeded on the wrong basis that certain tenancies were not entire holdings but only undivided shares. A I R 1931 Cal 565=35 C W N 212=Ind Rul (1931) Cal 689=133 I C 561

—S. 105—Enhancement of rent—Rent of undivided share of holding cannot be enhanced. [34 C W N 991, explained] A I R 1931 Cal 565=35 C W N 212=Ind Rul (1931) Cal 689=133 I C 561

—Ss. 105, 105 A—Order under—see B T Act, s. 108

—S. 105—S 105 applies to a lease of tank for agriculture A I R 1926 Cal 239=88 I C 534

—S. 105—Suit, after the dismissal of application for more rent for additional area for non-prosecution, may be treated as a suit for rent at original rate and not as a suit for additional rent. 91 I C 178

—S. 105—S. 29 of the Act is not applicable to proceeding under s. 105. A I R 1926 Cal 353=89 I C 951.

—S. 105—A zemindar cannot enhance rent after the grant of patta fixing perpetual rent, which is implied in 'mokarari' but not in forbearance. 77 I C 1015=38 C L J 372=A I R 1924 Cal 513.

—S. 105—Court after having decided under s. 105, can try question as to non-service of notice in rent suit in the case of fraud only. 92 I C 714=A I R 1926 Cal 582.

—S. 105—Decree of Revenue Court has the force of Civil Court decree. A I R 1924 Cal 907=40 C L J 34=82 I C 396.

—S. 105—A previous finding on rent rebuts presumption as to entry in Record of Rights and is conclusive. A I R 1923 Cal 282=68 I C 298.

—S. 105—Even if an application is made by the landlord under s. 105, the rate of rent is not final if tenants agree to pay a higher rent. Unless there is an application to correct an entry under s. 105, Revenue Court cannot correct it. 108 I C 255=A I R 1928 Cal 399.

—S. 105—The rent that the landlord is to receive under the contract with the tenant, is the existing rent. 115 I C 525=A I R 1929 Cal 47=Ind Rul (1929) Cal, 381=32 C W N 999.

—S. 105—Settlement of fair and equitable rent requires all facts to be considered. A I R 1929 Cal 47=32 C W N 999=Ind Rul (1929) Cal 381=115 I C 525

—S. 105—A suit with regard to seven jotes being dismissed does not operate as res-judicata with regard to another suit on one jote. 72 I C 1013=A I R 1923 Cal 333=37 C L J 314.

—S. 105—Rules framed under the Act must be followed by the Settlement Officer in the assessment of fair rent. Held that

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the Assistant Settlement Officer cannot enhance rent on the basis of s. 30 (b). A I R 1931 Cal 303= 58 C 159=34 C W N 991=131 I C 657.

—Ss. 105, 105-A—Once rent is fixed, no application to vary it is allowed. A I R 1922 Cal 461=27 C W N 328=36 C L J 196=70 I C 273.

—S. 105—Application for assessment of fair and equitable rent—Finding of status not applied against before special Judge—Held, the question of status cannot be raised in second appeal, and no second appeal lay against the assessment. 1917 Pat 261=41 I C 499.

—S. 105—When once rent is settled by consent under s. 105, court cannot legally decide another rate afterwards. 65 I C 474=(1922) Pat 68=3 P L T 130=6 P L J 588=A I R 1923 Pat 101.

—S. 105—A decision under this section is binding on a purchaser at rent sale even if it is after the sale. A I R 1923 C 438=83 I C 556.

—Ss. 105 and 105 A—Second appeal against special judge's decision on a question of principle lies to High Court. 85 I C 693=A I R 1925 Cal 656=29 C W N 353.

—S. 105—If parties to suits under s. 105 were sued in same capacities, a decree as to one plot is res judicata in other where both were held under same landlord. A I R 1930 Cal 533=34 C W N 730=Ind Rul (1930) Cal 752=126 I C 560.

—S. 105—Application made under s. 105, but withdrawn is to be treated as one never made. Hence subsequent application lies. Non-payment of rent for a period does not bar landlord's right to have rent assessed and recovered. Art 50 of Lmt. Act applies after the tenure is found to be rent-free. 28 C L J 254=47 I C 420.

—S. 105—Enhancement proceedings pending at the time of the sale of a tenure—Enhancement after sale—Held, purchaser can set aside all the sale, but he cannot refuse to pay enhanced rent. 46 I C 136.

—S. 105—Share of tenant in holding is included in the word land on which proceedings under s. 105 can be taken. A I R 1929 Cal 156=48 C L J 590=Ind Rul (1929) Cal 349=115 I C 269.

—S. 105—Record of Rights being in putnidar's favour and unchallenged, a landlord's suit for increase in rent for additional area under putnidar's possession must fail. 30 C W N 906=98 I C 663.

—S. 105—Second appeal lies in a case under s. 105 for enhancement of rent in which the decision depends on the status of the tenant. 19 C W N 1328=32 I C 164.

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S. 105—Decision under s. 105 fixing rent for ten plots by Revenue Officer was held to be not res judicata when a tenant in a suit to recover rent, contended that jama consisted of three plots and not of ten plots as alleged and when the Revenue Officer did not decide the question. 114 I C 670=Ind Rul (1929) Cal 270=A I R 1928 Cal 472.

—S. 105—An inquiry as regards existing rent can be made by Revenue Officer. 115 I C 525=A I R 1929 Cal 47=Ind Rul (1929) Cal 381=32 C W N 999.

—S. 105—Different co-sharer tenants should not be directed by "decree" to hold at different rates. A I R 1930 Cal 533=34 C W N 730=Ind Rul (1930) Cal 752=126 I C 560.

—S. 105—One co-plaintiff cannot withdraw without others' consent. 86 I C 1035=52 C 139=A I R 1925 Cal 637.

—S. 105—Entry in Record of Rights, found to be correct, cannot be attacked in a subsequent civil suit. 1 Pat L J 479=3 Pat L W 59=37 I C 641.

—S. 105—Where increase or abatement is demanded and entry as to rent in Record of Rights was accepted the decision is one of settling the rent. 115 I C 525=A I R 1929 Cal 47=Ind Rul (1929) Cal 381=32 C W N 999.

—S. 105—Question of correct rent is not barred by decision on rate of increase only. A I R 1929 Cal 685=Ind Rul (1929) Cal 231=114 I C 407.

—S. 105—In a suit for settlement of fair and equitable rent, the landlord must prove what the standard of measurement was in the contemplation of the parties at the time of demise. 57 I C 502.

—S. 105—Permanent tenancy is obtained by a lease from generation to generation. A I R 1922 Cal 123=35 C L J 90=64 I C 774.

—S. 105—Where a pattah, without specifically limiting a period, provided that from a certain year onwards the rent shall be so much. Held it was a permanent tenure at fixed rate and no application under s. 105 lay. 24 I C 58.

—S. 105—In a suit for ejectment a question as to status will not entitle the defendant to stay of proceedings under S. 111. A I R 1928 Cal 388=32 C W N 132=106 I C 875.

—S. 105—A landlord has no remedy under s. 105 on the dismissal of his application made against only one of the joint tenants. A I R 1928 Cal 146=46 C L J 555=106 I C 836.

—S. 105—A settlement Officer, and a special Judge on appeal, have Jurisdiction to settle fair rents, and the special Judge on appeal has jurisdiction to direct settlement of fair rent on excess lands. 20 I C 841=18 C W N 165.

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S. 105—Question of liability as to rent is not res judicata in proceedings based on presumption that lands are rent paying if the question was left undecided. A I R 1927 Cal 603=101 I C 800.

—S. 105—An order settling a fair rent cannot be applied retrospectively. 67 I C 813=49 C 875=26 C W N 758=A I R (1922) Cal 575.

—S. 105—A second appeal does not lie against a decision as to fair rent. 65 I C 349=3 P L T 316=A I R 1923 Pat 86.

—S. 105—It is not necessary to stick to rate stated in kabuliyat. A I R 1925 Cal 656=29 C W N 353=85 I C 693.

—S. 105 (before amendment by Act 1908)—Tenants settled by trespassers entered as raiyat—Recovery of land by owner—Owner can apply for settlement of rent. 17 C W N 348=17 C L J 431=17 I C 587.

—S. 105—Where, in a proceeding under s. 105, questions are raised and decided which properly fall within s. 106, second appeal lies. 15 C W N 921=11 I C 212.

—S. 105—A civil suit except under s. 113 does not lie on a settlement of rent under s. 105. A I R 1924 Pat 193=72 I C 781.

—S. 105—The area of holding may be decided constructively by Settlement Officer. A I R 1924 Pat 511=5 P L T 98=1924 Pat 18=75 I C 670.

—S. 105—Tenant's eviction is not wrongful if landlord in execution of rent decree purchases jote. A I R 1923 Cal 333=37 C L J 314=72 I C 1013.

—Ss. 105 and 106—In relation to preparation of Record of Rights, proceedings under ss. 105 or 106 are continuous. A I R 1929 Cal 110=55 C 1216=49 C L J 70=Ind Rul (1929) Cal 245=114 I C 485.

—Ss. 105 and 106—Decision under s. 106 on tenant's application binds the landlord who assented to stay his own application under s. 105 pending former application, even though the landlord's application was decided before the final decision under s. 106 which was first dismissed for default but later on restored. A I R 1925 Cal 465=82 I C 953.

—Ss. 105 and 109—There is no bar to suit regarding matters that are neither raised nor decided previously. A I R (1923) Pat 174=67 I C 710.

—S. 105—Presumption under s. 50 B T Act if rebuttable—Application to settlement of fair rent. 22 C W N 204.

—S. 105—Appellate Court, power of to allow deduction on measurement calculation of excess area, method of Costs—Appeal High Court, interference by with discretion of lower Court. 46 I C 544.



## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—Ss. 105—Settlement officer—Decision as to enhancibility of rent—second appeal Tenure-Kabuliyat construction. If mere recognition of prior tenure. Tenant paying same rent Effect Presumption under s. 50 If may be drawn. 18 C W N 949.

—Ss. 105—Landlord & tenant—Rent, assessment of, suit for—Tenant, denial of liability by—Limitation, whether can vary terms of tenancy. 25 C L J 467=38 I C 469.

—Ss. 105 & 105-A—Applications under—Court fee payable on—Notification No. 6954 L R of 21 st July 1922 published in Calcutta Gazette—Meaning and effect of. 59 C 997=55 C L J 303=A I R 1932 C 674=A L R 1932 C 646.

—Ss. 105 & 105-A (f) & 106—Tenancies or holdings grouped in accordance with Rule 60 (4) of Rules framed by Bengal Government—Application by landlord ostensibly for settlement of fair and equitable rent S. 105 or 105-A (f) or 106 applicable to. 59 C 997=55 C L J 303=A I R 1932 C 674=A L R 1932 C 646.

—Ss. 105, 107—Settlement officer deciding a case under s. 105 without following the procedure laid down in s. 107, his order cannot have the force and effect of a decree. 57 I C 989.

—Ss. 105, 107 and 109-A suit for ejectment is barred if there was a previous decision in proceeding between the same parties under s. 106. A I R 1923 Cal 433=50 C 79=71 I C 307.

—Ss. 105 and 109 A (3)—An appeal lies to the High Court from judgment of the Special Judge proceeding under s. 105 because it is not merely a decision settling rent within s. 109. 62 I C 677 (Cal).

—Ss. 105, 109—Although an order under sec. 105 cannot be declared inoperative tenants can file a declaration suit against landlord for being deceased as Lakherajdars even though the land was recorded as rent paying in Record of Rights by an exparte decision in landlord's application. 95 I C 334=A I R 1926 Cal, 822=43 C L J 327=30 C W N 826.

—Ss. 105 and 109 A—On the increase in rent after the road cess return, landlord can claim rent at a higher rate than that marked in it in spite of s. 20 of the Cess Act. A I R 1922 Pat 55=6 P L J 622=(1922) P 57=4 U P L R Pat 23=3 P L T 141=65 I C 3.

—Ss. 105 (a) and 109—The subject matter of a civil suit must be proved to be the same as in the previous—application under s. 105, in order to apply s. 109. 72 I C 781.

—Ss. 105 & 110—A landlord proceeding under s. 105 cannot claim past rent for additional area A I R 1926 Cal 172=52 C 910=91 I C 1016.

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—Ss. 105 & 50—Where kabuliyat was substantially altered, it was held to be void for a claim for amount on account of submerged land, and presumption under s. 50 applied. 50 C L J 173=A I R 1929 Cal 789.

—Ss. 105 & 52—If tenancy is joint enhancement or settlement of fair rent cannot be made. A I R 1930 Cal 595=51 C L J 485=Ind Rul (1931) Cal 33=128 I C 177.

—S. 105 r 63 (1)—Rule 63 (1) not being properly framed cannot override S. 105. A I R 1926 Cal 1037=43 C L J 591=97 I C 142.

—Ss. 105, 105 A—In proceedings under s. 105 status of tenant can be inquired into even if under-tenants are not impleaded. Terms of other leases can be considered in settling fair rent. 21 C W N 427=36 I C 795.

—Ss. 105, 106—A proprietor of an estate purchased within that estate a tenure within which a holding of the opposite party was situated. Held, mere non-registration of proprietor's name as owner of the tenure does not disentitle him to apply under s. 105. 21 I C 37.

—Ss. 105, 106—Correctness of record of rights can be impugned by unrecorded landlord by application under s. 105, (A). 18 C W N 268=21 I C 37.

—Ss. 105 106 107—Although no formal issue framed, it is obligatory upon the settlement officer to try and decide the question of the status of the tenant. 52 I C 969.

—Ss. 105, 105 A, 107, 109—Proceedings under S. 105—Issue raised by tenant as to whether land is mal or lakhiraj—Rent settled on tenant's failure to adduce evidence—Decision is a bar to a suit by tenant for declaration of title. 24 C W N 223=54 I C 952.

—Ss. 105, 109—To attract the operation of S. 109 it is essential to establish that the Civil Court has for its subject a matter which has already formed the subject of an application under S. 105. 35 I C 695=44 Cal. 783=25 C L J 556=21 C W N 1004.

—Ss. 105, 109—Point which might and should have been raised in a proceeding under S. 105, but neither raise nor decided does not operate as resjudicata under S. 109. 35 I C 695=44 C 783=25 C L J 556=21 C W N 1004.

Ss. 105, 109—After assessment under S. 105, a subsequent declaratory suit by tenants, that they are maurasi mokurari raiyats and not tenure-holders and that the lands held constitute not one tenure but distinct raiyati holdings is not barred by S. 109, but a declaratory suit that the landlord is not entitled to the rent assessed is barred. 35 I C 695=44 C. 783=25 C L J 556=21 C W N 1004.

—Ss. 105, 109—Court can try a suit for rent although the matter has already been the subject of an application under s. 105, provided the party has not invoked the operation of S. 109. 57 I C 48.

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—Ss. 105, 109—Decision in a previous rent suit as to the amount of rent payable does not operate as res-judicata in a suit for rent for subsequent years. But the decision as to whether there is a formal agreement as to the amount of rent payable does so operate. 57 I C 48

—Ss. 105, 109—An application made, whether it is withdrawn or dismissed is nevertheless an application within s. 109. 24 C W N 1020

—Ss. 105, 109—An ex parte decree in a rent suit cannot operate as res-judicata unless the defendant appeared and filed a written statement upon which an issue was or could have been raised between the parties. 57 I C 48

—Ss. 105, 109, 106—Settlement of fair rent under s. 105 does not preclude subsequent suit to declare land lakhiraj or held at fixed rent, despite the fact that the tenant did not institute suit under s. 106. 19 C W N 636-29 I C 122

—Ss. 105, 109—A suit concerning a matter which was the subject of an application under s. 105 was not maintainable under s. 109. 16 C L J 67-16 I C 935

—Ss 105, 106, 109, 158—Lands recorded as rent-free—Entry contested by a proceeding under S. 106—Decree by Revenue Officer that lands were not rent-free. Being too late to apply under s. 105, the landlord brought a civil suit to have a fair rent settled. Held such suit maintainable (19 C. 182 Dist). Held further that the cause of action arose after the decree and limitation ran from the decree. Decree was final and could not be contested. 18 C W N 466-20 I C 910

—Ss. 105, 106, 109 (before amendment)—Suit to declare entry in record-of-rights erroneous, after decision under s. 105, lies—Suit under s. 106, not exclusive remedy—Question of correctness of entries should not be raised under s. 105. 14 C W N 897-7 Ind Cas 102-12 C L J 195

—Ss. 105, 109 A—Where a settlement Officer directed a schedule to be prepared, Held that limitation for filing appeal against the decision began to run from the date on which the schedule was signed. 44 I C 152

—Ss. 105 A, 109—Decision under s. 105 A that certain persons are tenure-holders is no bar to a suit by latter against certain other persons not parties to the proceedings under s. 105 A for ejectment. 56 I C 993

—S. 105—Expression "Settling rent" in S. 105 (4) includes enhancement. Hence decision of Settlement Officer which results in enhancement is not subject to second appeal. 32 I C 982

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S. 105 (4)—Settlement of fair rent—S. 30 does not lay down any particular rule Clause 4 of s. 105 does not imply that the Revenue Officer has to follow provisions of s. 30. A I R 1931 Cal 565-35 C W N 212-Ind Rul (1931) Cal 689-133 I C 561.

—Ss. 105 (4), 109 A—High Court cannot interfere under s. 115 C P C on the ground that the question of limitation was wrongly decided by the lower Court. 32 I C 982

—Ss. 105 (4), 109 A—Decree of the Special Judge on appeal, altering the rent in favour of the landlord is without jurisdiction and liable to be set aside in revision under s. 115 of C P C. 32 I C 982

—Ss. 105 and 188—All landlords must apply under s. 105. 86 I C 1035-52 C 139  
=A I R 1925 Cal 637

—Ss. 105 and 187—A landlord can be represented by a duly authorized mukhtear under s. 105. A I R 1925 Cal 637-52 C 139-86 I C 1035

—Ss. 105 and 188—Son born after final publication of Record of Rights must be made a party within two months in application for rent settlement. A I R 1921 Cal 591-25 C W N 38-61 I C 549

—Ss. 105 and 188—Procedure is still valid even though one of the plaintiffs withdraws from the suit. A I R 1925 Cal 637-52 C 139-86 I C 1035

—Ss. 105, 188—Joint landlords—Revenue paying estates—Land falling under more than one estate—One estate sold for arrears of revenue—Purchaser is not joint landlord with proprietors of other estates, and can, therefore bring a suit, s. 188 being no bar to such suit. 24 I C 281

—Ss. 105 and 188—In an application under s. 105, the sons of sole plaintiff being Karta and sole recorded proprietor of the family, are not to be co-plaintiffs. A I R 1926 Pat 461-7 P L T 540-(1926)  
Pat 256-97 I C 436

—S. 105 (1)—A landlord can apply within two months without making tenants parties the limitation is for application and not for making parties. A I R 1926 Cal 1037-43 C L J 591-97 I C 142

—S. 105 (1)—It is valid to apply for substitution even after two months from the time when Record of Rights was published. A I R 1928 Cal 146-46 C L J 555-106 I C 836

—S. 105 A—Even as a defence, a decision under S. 105 A operates as rejudicata. 97 I C 708-A I R 1927 Pat 32

—Ss. 105 (3) and 105 A—Held that the Government notification incorporating by reference only to Art I, Sec I, Court Fees Act, is not ultra vires. 117 I C 701  
=A I R 1929 Cal 141-Ind Rul (1929) Cal 589-32 C W N 1136

**BENGAL TENANCY ACT, VIII OF 1885 (Contd.)**

—S. 105 (3)—Court-fee is to be charged on each tenancy in appeal from order under s. 105 (3). A I R 1924 Cal 345=50 C 903  
=28 C W N 116=79 I C 312

—S. 105 (3)—Eight annas stamp is enough for an application regarding tenancy held by more than one tenant. A I R 1924 Cal. 345=50 C 903=28 C W N 116=79  
I C 312

—Ss. 105, 188—S. 188 is no bar to an application by a cosharer landlord to whom the tenant has given a kabuliyat in respect of his share for settlement of fair rent under s. 105. Where tenant, executing ikabuliat in favour of cosharer landlord enters into a separate agreement for the purpose of a tenancy such cosharer is not joint landlord but separate. 21 C L J 592  
30 I C 414

—Ss. 105, 188—Application under S. 105—Dismissal by lower appellate Court as against a party for non-prosecution. Joint decree. All necessary parties not before the Court—see. 28 C L J 201

—Ss. 105, 188—An amendment, in a record of rights, which would have the effect of extending the statutory period of two months from the date of final publication could not be allowed and the proceedings under S. 105 must therefore fail, 25 C W N 38

—Ss. 105, 188—An application under S. 105 is not maintainable at the instance only of the managing members of a joint Hindu family. 25 C W N 38

—Ss. 105, 195—Putni tenure—Resident hereditary cultivator—Enhancement of rent if permissible—Lease fixing rent in perpetuity—Acceptance of, effect of bona fide engagement with putnidar, effect of—Entry as occupancy tenant in record of rights, effect of. 53 I C 271

—Ss. 105, 107—Withdrawal of application without leave to sue again does not bar subsequent suit for enhancement of rent. (23 C 723 fol)

On withdrawal of application there is no order passed amounting to dismissal of suit or having force and effect of a decree. 17 C W N 467=18 I C 130=40  
Cal 428

—S. 105 A—Where a cosharer granted lease for reclaiming jungle and waste lands, and the lessee remained in possession for ten years without objection; Held, he became raiyat of all the cosharers. 19 C L J 113=22 I C 666=19 C W N 407

—Ss. 105 A, 107, 109—Decision of revenue Court that relationship of landlord and tenant does not exist operates as res judicata in a subsequent suit for ejectment. 3 Pat L J 379=46 I C 125

**BENGAL TENANCY ACT VIII OF 1885 (Contd.)**

—Ss. 105 A and 109—Decision of Settlement Officer as to status of the tenant—Civil Courts are barred from questioning the decision. 27 C L J 210=44 I C 562

—S. 106—Suit instituted before the Settlement Officer—Transfer to competent Civil Court—Appeal would lie to Subordinate Judge but not to special Judge. 27 C L J 281=38 I C 94

—S. 106—Where proceedings have been taken before a Settlement Officer, in respect of any matter under s. 106 a Civil Court cannot entertain a suit concerning such matter. 9 Ind Cas 651

—S. 106—Where land revenue is not yet settled, a suit disputing entry in record of rights is maintainable. 21 I C 538  
=18 C L J 187

—S. 106—Plff. and deft were recorded as joint landlord. It was found that there had been a partition between them long before the Record and plff. was in sole possession. Held, deft. failing to show that plff's possession was as a cosharer on his behalf, the plff. should be recorded as sole landlord. 47 I C 5

—S. 106—does not bar a Civil suit to correct entry (35 C 1013 not foll). 25 C W N 13

—S. 106—Settlement Officer can, under s. 106, decide only the question of possession and not of title between rival proprietors. 18 C W N 938=19 C L J 197  
=20 I C 298

—S. 106—Mere fact of a tenure being hereditary does not imply fixed rent

The use of expression "Patni taluk" in a contract does not necessarily create a taluk subject to the summary procedure for realisation of rent. 32 C L J 19=58  
I C 867

—S. 106—Order of Settlement Officer under s. 106 is a decree within s. 9 of Act III of 1898, and operates as res judicata on the points raised and decided, unless that point be whether the land was rent-free or not. 22 C L J 148=30  
I C 944

—S. 106—In a suit under s. 106 for correction of entry onus is on plff. to show that entry is wrong. 53 I C 625

—S. 106—S. 106 indicates the points that can be decided by the revenue officer with power to pass a decree for possession. Mere transfer of such suit to a Civil Court would not widen the permissible scope of these particular suits. 17 C W N 750=20 I C 151

—S 106—Under s. 106, the Court cannot determine the question of title between rival proprietors. The only question it can determine is that of present possession. (12 C W N 8 foll). 20 I C 298=19 C L J 197=18 C W N 938

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S. 106—Long possession without payment of rent raises a presumption of lakhiraj rights. 45 Cal 574=22 C W N 396  
=47 I C 49

—S. 106—Land tenure—Patwari service, liability of—Grant of assessment. 19 C L J 241

S. 106—Suit under—Fresh suit in regular Civil Court—Civ. Pro. Code, 1908, O. XXIII, R. 1. 9 Ind Cas 4

—Ss. 106, 109, Scope of—Withdrawal of suit under s. 106, when bars Civil suit—Civil Procedure Code, (Act V of 1908) O, XXIII r. 1 (3) 37 I C 253

—S. 106—and 111 (A)—Suit for alteration in Record of Rights, 3 Pat L J 361

—S. 106—Where the plff. sought for correction of entry and recovery of possession. Held these reliefs could not properly be secured by a suit under s. 106. 15 C W N 974=11 I C 184

—S. 106—Transfer of suit under s. 106 to Civil Court. Competency of the latter would be ascertained under C. P. C. Appeal from the decision of a Munsiff would lie to subordinate Judge and not to the special Judge, 27 C L J 281=38 I C 94

—S. 106—Plff. must specifically prove in what respects the entry is incorrect and how it should be amended. 21 C W N 492=25 C L J 53=39 I C 209

—S. 106—Question of title between two rival proprietors may legitimately arise and be decided in proceeding under s. 106. Court will not go behind any statement in the judgment of another court. 13 I C 311.

—S. 106—Where plff. has a title and his claim is not barred by limitation, he is entitled to possession, but he cannot get all reliefs in a suit under s. 106, a suit in civil court will give complete remedy. 19 C W N 911=27 I C 883.

—S. 106—Question of title between rival proprietors not to be gone into under s. 106. As regards other parties' claim, however, the Court is not limited to the question of possession. 41 I C 698.

—S. 106—Reasonability of custom is a question of law. It is wrong to hold that a custom is unreasonable in so far as it permits the appropriation of timber by tenant. 19 C W N 1188=29 I C 312

—Ss. 106, 107—Order of dismissal for default is not a decree and not appealable. The fact of a formal decree having been drawn up does not alter the nature of the order, 18 C L J 128=18 C W N 604=20 I C 1

—Ss. 106, 107, 108—Single suit for correction of entry against all tenants of the village not maintainable—separate suit is necessary against each class of tenants and separate court-fee should be paid for

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

each suit. Revenue Court can order payment of additional Court-fee. 22 C L J 57=30 I C 862

—Ss. 106, 109—Order of dismissal for default does not operate as res judicata. 43 I C 973

—Ss. 106, 109—The bar under s. 109 is a bar only regarding matters which are legally the subject matters of investigation under ch. X. 24 C L J 79=37 I C 253.

—Ss. 106, 109 A (3)—Suit under s. 106. Tenants found to be in occupation of excess lands. Held, the special Judge could amend the entry and add a note to the effect that tenants were in occupation of excess land. But such a decision is not one with in s. 109 and is, therefore, appealable. 24 I C 283.

—Ss. 106, 107—Decision as to area for which bhaoli rent is payable, in a rent suit, in variance with an earlier decision under s. 106, Bengal Tenancy Act, cannot operate as res judicata as to rent for subsequent years. A I R 1931 Pat 215=10 Pat 337=12 P L T 717

—S. 106—A second suit for possession and declaration that tank is his own property and not defendant's niskar as recorded, does not lie after the dismissal of his first suit to correct the entry. A I R 1929 Cal 385=49 C L J 285=33 C W N 623.  
=Ind Rul (1930) Cal 3=120 I C 147

—S. 106—Revenue Officer cannot decide title of neighbouring estates but has the power to decide possession and title of landlord and tenant. A I R 1923 Pat 213=4 P L T 68=1 P L R 157=73 I C 5.

—S. 106—Question of title is also within the scope of a suit under s. 106. A I R 1929 Cal 308=49 C L J 294=34 C W N 47=Ind Rul (1930) Cal 11=120 I C 155.

—S. 106—Only in the case of actual possession, a suit to change entry lies. A I R 1929 Pat 590=Ind Rul (1929) Pat 452=117 I C 644

—S. 106—Proprietors of neighbouring estates are affected by an entry in the same way as landlord and tenant or tenant and tenant. A I R 1921 Pat 268=2 P L T 81=59 I C 298

—S. 106—Held that according to the terms of the Kabulyat, rent could be enhanced. 67 I C 241

—S. 106—A suit under S. 106 is like an ordinary civil suit. 61 I C 420

—S. 106—S. 106 applies when there is a question as to possession whether exclusive or joint. A I R 1921 Cal 813=35 C L J 195

—S. 106—Correction of entry in Record of Rights can be made by a civil suit. A I R 1921 Cal 741=25 C W N 13.  
=48 C 359=61 I C 503

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S. 106—Only the question of possession is within the scope of a Revenue Officer under S. 106. 63 I C 602

—S. 106—Court should look into evidence justifying entry if it is challenged. 62 I C 417

—S. 106—The remedy of—possession cannot be claimed in suit under S. 106. A I R 1929 Cal 308=49 C L J 294=34 C W N 47=Ind Rul (1930) Cal 11=120 I C 155

—Ss. 106 and 109—A civil suit cannot be instituted after dismissal of a suit for correcting Record. 64 I C 889(Cal)

Ss. 106 and 109—A second suit can be instituted if the first one was withdrawn with liberty to bring fresh one. 25 C W N 1022=35 C L J 19=63 I C 954

—Ss. 106 and 109—Only plaintiff is disabled from filing a subsequent suit under s. 109, and the defendant even though he was an applicant under s. 106 is not affected. A I R 1928 Pat 579=7 Pat. 786=9 P L T 609=Ind. Rul. (1924) Pat 221=115 I C 557

—Ss. 111, 111 B,—Suit instituted within prohibited period, how to be dealt with—Dismissal of suit—Rejection or return of plaint 35 I C 76

—S. 107 (1)—A Court trying a rent suit has no jurisdiction to decide an issue between parties which has been finally decided under s. 106, 6 P L T 588 followed. A I R 1931 Pat 215=10 Pat 337=12 P L T 717

—Ss. 107, 109—Appeal from Rev. Officer's decision to Special Judge. The latter gave judgment for the appellant, and of his own motion passed an order for costs at a date subsequent to the judgment. Second appeal held barred as limitation ran from the date of judgment not from the date of order for costs. 1 Pat L T 403=5 Pat L J 472=57 I C 236

—Ss. 107, 113—Holding, partly cultivated and partly waste—Stipulation for assessment at settlement rate of rent on waste lands becoming cultivated. Held increase in rental will accrue on any portion of waste lands becoming cultivated although the Settlement Officer fixes a consolidated rental on the holding. 21 C W N 534=25 C L J 128=38 I C 595

—S. 107—Though *ex parte* a decree under s. 105 is binding when it fixes the area and the rent. A I R 1928 Cal 479=55 Cal 464=32 C W N 472=Ind Rul (1929) Cal 471=116 I C 375

See A I R 1924 Cal 907=40 C L J 34=82 I C 396

—S. 107—Under s 105 a Settlement Officer can try an enhancement suit in case of homestead lands and the decision is binding on the parties, 107 I C 743

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S. 108—Whether an appeal lies or not from an order under s. 108, the High Court can set aside the order in revision. A I R 1931 Cal 553=58 C 1013=35 C W N 336=Ind Rul (1931) Cal 889=134 I C 889

—S. 108—Valid proceedings under s. 108 within twelve months of order passed under ss. 105 and 105-A. Proceedings as against a dead man are invalid. A I R 1931 Cal 553=58 C 1013=35 C W N 336=Ind Rul (1931) Cal 889=134 I C 889

—S. 108—A Specially empowered Rev. Officer can direct a fresh investigation upon the merits. 18 C L J 125=20 I C 301

—S. 108—B. T. Act Ss. 106, 107 and 108. 30 I C 862=22 C L J 57

—Ss. 108 (a), 109 (a)—Interpretation in record not bona fide mistake—Correction not to be made under s. 108 (A)—Inherent power of Court to amend—Order purporting to be passed under s. 108 (A)—Though s. 108 (A) inapplicable appeal lies under s. 109 A and second appeal also lies. 19 C L J 251

—S. 108 A—S. 108 applies only to Rev. Officers specially empowered by Local Govt. It, in substance, authorises Settlement Officers to reconsider the matter on merits. 16 C L J 339=17 C W N 625=17 I C 279

—Ss. 108 A, 109 A—Entry having not been made owing to bona fide mistake within s. 108 A no appeal or second appeal lay. Held, further, that if it be held that as the Settlement Officer purported to act under s. 108 A, an appeal lay to the Special Judge, then he having purported to act under s. 109 A a second appeal lay. 19 I C 916=19 C L J 251

—S. 108—Not to an order in revision but to making of application, limitation of 12 months applies. A I R 1926 Cal 849=30 C W N 638=95 I C 971

—S. 109—Suit by landlords under S. 106—withdrawal with permission to bring a fresh suit—compromise decree in subsequent suit—bar created by S. 109 not pleaded—decree, whether void for want of inherent jurisdiction—question of jurisdiction if can be raised—collaterally. A L R 1933 P 57=12 P 170=13 P L T 737=142 I C 113=A I R 1933 P 104

—S. 109—S. 109, does not relate to a mere matter of procedure but confers a substantive right and the amended section is not applicable to suits instituted before the amendment came into force. 35 C W N 1147.

—S. 109—No *res judicata* on a point which has neither been raised nor decided in an application under s. 105.

S. 109 is no bar to a suit for a declaration that the proceedings under Ch. X were vitiated by fraud. 44 Cal 783=21 C W N 1004=25 C L J 556=35 I C 695.



## BENGAL TENANCY ACT 8 OF 1885 (Contd.)

—S. 109—Scope of jurisdiction of Civil Court—Point not raised or decided in proceeding under s. 105—No bar to trial—B T Act Ss. 105, 150 A, 109 & 111 A.

35 I C 995.

—S. 109—Second appeal, Assessment of fair and equitable rent—B T Act s. 105.

1917 P 261.

—S. 109—Record of rights—Entry in—Possession suit for. 22 C L J 144=30 I C 939.

—S. 109—Decision as regards amount of Enhancement "Decision settling rent" within s. 109 of the B T Act—B T Act Ss. 30, 105 & 100 A. 1 Pat L J 409=

35 C W N 678.

—S. 109 A—Decision of special Judge, on appeal from proceeding under s. 105, allowing enhanced rent on basis of excess area, was held open to second appeal because the finding of fact was based on erroneous interpretation of contract. 23 C L J 281=33 I C 148=43 Cal 603=20 C W N

428 (F B).

—S. 109 A (2)—Dismissal for default appeal to special judge—Dismissal of application to rehear appeal if lies—C P C O 43, R 1 (1) 41 (1).

45 C 638=41 I C 751=27

C L J 155.

—S. 109 A, Sub cl (3)—Application for enhancement of rent for excess area—Order granting enhancement on ground of rise of prices of staple food—Crops—Second appeal. 2 Pat L J 574=4 Pat L W 60=42 I C 342.

—S. 109 A (3)—The right of second appeal is subject to s. 584 of the C P C 1882. High Court has, therefore, no jurisdiction to disturb a question of fact. 45 I A 185=46 Cal 189=51 I C 760=23 C W N 345=

9 L W 552 (P C)

—S. 109 A (3)—Second appeal—Question raised—Landlord and tenant. 43 C 932

=21 C W N 106=38 I C 30.

—S. 109 A—Is no bar to an appeal in a case of settlement of rate in which a question of jurisdiction is definitely raised. 19 C W N 35=27 I C 446.

—S. 109 A (3)—No second appeal lies from a decision settling rent. 38 I C 32.

—S. 109 (b)—Contemplates enquiry by Rev. Officer into agreements adjusting disputes about enhancement and does not apply to a case where the agreement was made 15 years before the settlement proceedings. 25 I C 829=19 C W N 321=

21 C L J 325.

—S. 109 (c)—Agreement between mortgagor in possession and tenants not binding on mortgagee. 1 P L T 392=56 I C 895.

—S. 109—To proceedings under s. 105, provisions about the verification of a plaint do not apply. A I R 1924 Pat 104=3 Pat 67=(1923) Pat 273=2 P L R 169=5 P

L T 591=79 I C 5.

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—S. 109—The application under s. 105 differed from subsequent suit under s. 7 in the subject-matter, the suit is not barred though nature of the defence is same. A I R 1930 Pat 161=I R (1930) Pat 714=127 I C 570.

See A I R 1922 Cal 575=49 C 875=26 C W N 758=67 I C 813.

—S. 109—A joint landlord made an application under s. 105 and then withdrew it. Then on partition the whole holding was allotted to him. Then the co-sharer landlord sued under s. 105 held that s. 109 did not bar the suit and the subject-matter was different. A I R 1930 Cal 32=56 C 584

=I R (1930) Pat 25=120 I C 249.

—S. 109—An application under s. 106 was withdrawn without leave to make a new one. Then the applicant was sued for possession. S. 109 does not bar the suit. A I R 1928 Pat 579=7 Pat 786=9 P L T

609=I R (1929) Cal 541=117 I C 557.

—S. 109—Application under s. 105 for enhancing rent under s. 30 (b) was withdrawn. Then there was a suit for enhancement s. 109 is no bar as the subject-matter differs. A I R 1928 Cal 841=33 C

W N 498=I R (1929) Cal 410=115 I C 586

—S. 109—An application under s. 105 was made and presumption under s. 50 was made by Revenue Court. The appeal court holding that it was rebutted remanded the case to settle fair rent. This order is a decision within s. 109 and is appealable. Appellate Court's order is final and not interlocutory. A I R 1927 Cal 686=31 C W

N 936=104 I C 828.

—S. 109—Pending the landlord's application for settling fair rent under s. 105 he filed a rent suit concerning that holding, s. 109 does not bar it. A I R 1927 Cal

711=46 C L J 46=104 I C 349.

—Ss. 109 & 105—It was assumed that lands were rent-paying without discussing the liability for paying rent. S. 105 does not bar such question A I R 1927 Cal 603=

101 I C 800.

—Ss. 109 and 105—Landlord applied under s. 105 for enhancement in respect of lands recorded as one jama and area was taken into consideration while fixing rent. A declaratory suit that entry in the Record of Rights is erroneous can be filed. A I R

1926 Cal 1058=95 I C 788.

—Ss. 106, 105 & 109—A rent suit is not barred by an application under s. 105 or 106 though nature of defence be the same. A I R 1926 Cal 980=53 C 475=

95 I C 87.

—Ss. 109, 106 & 105—An order dismissing an application under s. 105 or 106 for default without any decision on merits is not a decision under s. 105. A I R 1926

Cal 980=53 C 475=95 I C 87.

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—S. 109—An application under s. 105 was withdrawn. This bars a civil suit for that relief though withdrawal was with liberty to file a suit. The fact of the making of the application is to be considered and not the mode of its disposal. A I R 1925 Cal 845=41 C L J 456=29 C W N 755=52 C 894=88 I C 637.

—S. 109. Subsequent suit is barred by a decision under s. 105 constructively relating to reduction of area. A I R 1924 Pat 511=5 P L T 98=(1924) Pat P H C C 18=75 I C 670.

See also A I R 1925 Cal 478=83 I C 876.

See also A I R 1923 Cal 624=50 C 626=29 C W N 987=74 I C 1001.

See also A I R 1930 Pat 69.

See also A I R 1924 Cal 854=25 C W N 703=83 I C 873.

See also A I R 1929 P C 134=57 M L J 43=30 L W 279=10 P L T 871=57 C 118=56 I A 179=33 C W N 705=116 I C 396 (P C)

See also A I R 1921 Cal 455=48 C 157=33 C L J 304=59 I C 760=24 C W N 1020.

Contra A I R 1922 Cal 251=35 C L J 19=25 C W N 1022=63 I C 954.

—Ss. 109, 106—In a landlord's proceeding under s. 109, decision under s. 106 that deft. is not a trespasser but a tenant is res judicata. A I R 1923 Cal 433=50 C 79=71 I C 307.

—S. 109—Second appeal lies against Special Judge's decision. A I R 1923 Cal 141=36 C L J 333=70 I C 437.

—S. 109 & 105—To proceedings under Ss. 105 & 109 the doctrine of constructive res judicata is inapplicable. A I R 1923 Pat 174=67 I C 710.

—S. 109 A—The Sec. does not bar an appeal against a decree rejecting additional rent for such area. A I R 1930 Cal 577 (1) =51 C L J 569=I R (1931) Cal 43=128 I C 187.

—Ss. 109 A & 105 A—In an application under s. 105 A—the custom of suspension of rent was not proved & no appeal was made from the decision. It is res judicata. A I R 1928 Cal 706=I R (1929) Cal 626=118 I C 338.

—S. 109—A (3) The Special judge found out the original rent payable & then settled a fair rent under s. 105 with s. 30 The decision is appealable as it is not a settlement of rent only. A I R 1929 Cal 47=32 C W N 999=I R (1929) Cal 381=115 I C 525.

—S. 109—A—No second appeal lies from a decision of a special Judge settling a fair & equitable rent. A I R 1928 Cal 496=55 C 619=111 I C 79.

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—S. 109 A—Second appeal lies when the application includes matter other than that of settling the rent. A I R 1928 Cal 146=46 C L J 555=106 I C 836.

—S. 109 A—Appeal lies when the jurisdiction of the Court to settle rent is questioned though a decision fixing rent is unappealable. A I R 1926 Cal 85=89 I C 190.

—Ss. 109 A & 188—All landlords may not be parties to an appeal under the Secs. A I R 1925 Cal 637=52 C 139=86 I C 1035.

—S. 109 A—Special Judge's order refusing to set aside abatement of appeal is appealable. A I R 1923 Cal 431=37 C L J 139=74 I C 925.

—S. 109 A—Special Judge's decision deciding tenant's status is appealable to the High Court. A I R 1923 Cal 141=36 C L J 333=70 I C 437.

—S. 109 A—Decision about the area & liability to enhancement is not only about rent-settlement. A I R 1922 Cal 152=36 C L J 96=49 C 866=67 I C 775.

—S. 109 A—questions under S. 105 A were discussed in a proceeding under s. 105. A second appeal lies against the decision. A I R 1922 Cal 152=36 C L J 96=49 C 866=67 I C 775.

—S. 109 C—Fair rent cannot be based on a contract against the Sec. A I R 1923 Cal 435=37 C L J 118=70 I C 895.

—S. 111—Prior suit by landlord for khas possession—Plea of tenancy at fixed rent—Held in a subsequent for settlement of fair and equitable rent that the judgment and the assertion by the tenant in the prior suit were admissible in evidence, and that the present suit was one for alteration of rent within S. 111. Held also that the suit should not be dismissed but remanded, as the suit was brought within three months of final publication of record of rights. 19 C W N 1141=21 I C 958.

—S. 111—Agreement to abide by Court's decision not binding if the suit is one not maintainable under the law 19 C W N 1141=21 I C 958.

—S. 111—Suit for alteration of rent includes suits for enhancement B T Act Ss. 30, 101 & 111. 21 C L J 489=29 I C 885.

—S. 111—A suit for alteration of rent instituted within three months of the final publication of the record of rights should not be dismissed altogether but stayed until the expiry of this period. 19 C W N 1141=21 I C 958.

—Ss. 111, 111 B—Suit instituted within prohibited period should not be dismissed but may be treated, subject to questions arising under s. 109, as one

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instituted on the day following the expiry of the prohibited period. But the plaint in such a suit should be at once returned or rejected under o. 7 rr. 10, 11 of C P C. 21 C W N 209=35 I C 76=29 C L J 17.

—S. 111 A—Limitation for declaratory suit is 6 years from the publication of Record of Rights. 1 Pat L J 73=35 I C 433.

—S. 111 A—Scope of. 40 C 123=17 C W N 1151=18 I C 939

—S. 111 A—Suit for declaration in respect of wrong entry in record of rights is maintainable under S. 111 A, B T Act or s. 42 of specific Relief Act. (1918) Pat H C C 225=3 Pat L J 361=4 Pat L W 303=45 I C 432.

—S. 111 A—Proviso—Entry in record of rights presumed correct only when the record framed under S. 101 (2) (d). 35 I C 695=44 Cal 783=25 C L J 556=21 C W N 1004.

—S. 111 A—Proviso—A suit under the proviso lies for a declaration of right, but not for a declaration that an entry in record of rights is a nullity. Court fee for the latter is as under s. 7 (4) (e) of Court Fees Act not art 17 (3) Where plff-paid a deficient court-fee and omitted to make up the deficiency, the plaint was rejected and no appeal lay. 44 C 352=21 C W N 834=40 I C 96 (2).

—S. 111 (a), 104 (h) 103 (b)—Suit for declaration of occupancy right brought more than 6 months after the final publication of record of rights—plff. recorded as raiyat Held, holding for over 12 years rebutted the presumption under S. 103 (b); and that the suit came within the proviso to S. 111 and not under S. 104 (h), and was not time-barred. 19 C W N 1017=30 I C 255.

—Ss. 111, 111-A—Holding over—Acquiescence—Suit for khas possession—Landlord and tenant—holding over. 3 Ind. Cas 100.

—S. 111 B—Suit for possession, on ground of deft. being trespasser, lies in Civil Court—within 3 months of final publication of record of rights. 17 C L J 634=20 I C 506

—S. 111-Proviso—applies only to a case where a settlement of land revenue is being or about to be made, but not to a case where the Record of Rights was prepared at the instance of the landlord under S. 101 (2) cl. 4. 35 I C 695=44 C 783=25 C L J 556=21 C W N 1004

—S. 111—"Shall not entertain" means a suit should be adjourned till the final publication of the Record of Rights. A I R 1924 Cal 704=51 C 20=28 C W N 631=40 C L J 177=81 I C 993

—S. 111-A—Right for rearing fish in

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another's tank cannot be recognised. A I R 1924 Cal. 667=38 C W N 516=80 I C 805

—S. 111 A—Limitation runs from the final publication of Record of Rights to a declaratory suit for raiyati & under-raiyati right. A I R 1923 Cal 307=68 I C 489

—Ss. 111-A & 104-H—The provi. to Sec. includes a declaratory suit that entry in the record of rights as tenure holder is erroneous & to declare the plff. as raiyat, Art 120 Limi. Act governs the suit. A I R 1929 P C 286=30 L W 600=56 I A 388=51 C L J 1=34 C W N 1=57 M L J 849=32 Bom. L R 114=I R (1929) P C 352=120 I C 56

—S. 111-A—When a claim under S. 104-H is barred, a suit under S. 111-A could be maintained. 65 I C 669

—S. 111-B—Limitation runs not from the certificate-date but from the final publication of the Record of Rights in a suit under the sec. A I R 1930 Cal 767=I R (1931) Cal. 353=130 I C 225

—S. 111 B. In a suit under S. 111 B limitation runs from the final publication of the Record of Rights. A I R 1929 Cal. 481=56 C 407=I R (1929) Cal 729=119 I C 121  
See 22 C W N 685=46 I C 428

—S. 113—Wood—Supply by tenant of, in addition to rent reserved—Compromise between landlord and tenant for—Status of tenancy also raised by—Compromise not in contravention of S. 113 59 C 513  
=A L R 1932 C 864

—S. 113—Entry of rent not a result of settlement bar of 15 years if applicable B T Act s. 30 32 I C 749

—S. 113—Stipulation that on waste-lands, included in the holding for reclamation, becoming cultivated, they should be assessed at settlement rate, increase in the rental would accrue automatically on any portion of waste land becoming cultivated. 25 C L J 128=21 C W N 534=38 I C 595

—S. 113—Applies to rent finally settled under Ss. 104, 105 or 112 but not to rents settled otherwise. It does not apply to a mere entry of an existing rent. Ss. 103 and 113 are not inconsistent. 21 C W N 546  
=34 I C 32

—S. 113—Suit for enhancement within 15 years—B T Act Ss. 31 A, 50 (2) & c. 22 I C 604=45 Cal 930

—Ss. 113, 183—Acquisition of occupancy right by custom or usage—Under raiyat continues to be such and cannot be ejected. 22 C W N 618

S. 113—On reduction in area, rent settled under Ch. X cannot be diminished. A I R 1926 Cal 1240=97 I C 470

—S. 113—Apportionment is decided by

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Local Govt. Assessment is not upon land but upon persons A I R 1921 Cal 520=33 C L J 349=62 I C 925.

—Ss. 115 and 50—Presumption under S. 50—Benefit of—Tenure-holder's right to—S. 115 when a bare to. See under this Act—S. 50— 56 C L J 91.

—Ss. 115 and 50—Tenure recorded in Record of Rights as non-mokrari—Enhancement of rent under S. 7 in respect of—Landlord's right to See under this Act—S. 7. 56 C L J 91.

—S. 115—Recorded of rights reference to ascertain rent of contiguous land—B T Act S. 105 18 C W N 466 20 I C 910

S. 115—Record of rights—Presumption under s. 50, if arises—B T Act ss. 50 & 115. 22 I C 943.

S. 11—See cases under Ss. 5, 30, 50 and 105.

—S. 115—To an occupancy holding presumption under s. 50 (2) is inapplicable. A I R 1930 Pat 599=11 P L T 623=I R (1931) Pat 61=128 I C 797.

—Ss. 50 & 115—Tenant cannot claim presumption under s. 50 after the final publication of the Record of Rights. To decide enhancement, other circumstances may be looked to. A I R 1926 Cal 256=86 I C 753.

See A I R 1925 Pat 181=6 P L T 221=80 I C 926.

See A I R 1924 Pat 443=3 Pat 120=(1924) Pat 1=78 I C 605.

See A I R 1922 Cal 146=36 C L J 291=49 Cal 919=26 C W N 947=70 I C 537.

—S. 115—When all proceedings under cha. X become exhausted the sec. is applicable. There is no change in the interval in the inference when tenant produces discontinuous rent receipts. A I R 1924 Cal 143=27 C W N 740=80 I C 577.

See A I R 1926 Cal 256=86 I C 753.

—Ss. 115 & 50—Entry in the Record of Rights based on uniform payment can be rebutted. A tenant may show uniform payment from the time of Permanent Settlement. A I R 1923 Cal 365=27 C W N 936=76 I C 401.

—Ss. 115 & 50—Presumption under s. 50 is in applicable when enhancement suit does not fall within cha. X. A I R 1922 Cal 146=49 C 919=26 C W N 947=36 C L J 291=70 I C 537.

See A I R 1921 Pat 435=2 P L T 642=68 I C 433.

—S. 115—Presumption under s. 50 becomes irrebuttable after the final publication of the Record. 64 I C 445 (Cal).

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—S. 115-C—On a decision not merely settling rent, but deciding a fundamental question of tenancy such as extent of area with reference to which rent has been fixed, a second appeal is competent. A I R 1931 Cal 550=35 C W N 19=Ind Rul.(1931) Cal 569=132 I C 249.

—S. 115 C—S. 180 A must be taken with this sec. second appeal lies from a decision involving a fundamental question like the extent of the area. 35 C W N 19.

—S. 116—Lease by guardian of minor for 5 years without sanction of Court—Lessee holding over—Status of tenant—See 21 C L J 644=30 I C 58.

—S. 116—Acquisition of occupancy right—Deed construction. 2 Pat L J 353=2 Pat L W 118=49 I C 500.

—S. 116 and Sch. III cl 1. (a)—Khas Khamar tenant does not come within the term "non-occupancy raiyat" and the suit against him: for Khas possession is not barred, though brought more than 6 months after expiration of lease. 44 Cal 267=20 C W N 1097=39 I C 64.

—S. 116—Khudkhash does not necessarily mean zerait within s. 116. 45 I C 418.

—S. 116—Suit for Khas possession against a non-occupancy raiyat more than 6 months after the expiry of the lease is barred by art 1 (a) of sch. II. (1917) Pat 318=42 I C 177 (F B)=3 Pat L J 1=44 I C 94

—S. 116, Sch. III art 1—Occupancy or non-occupancy rights cannot be acquired in zerait land, suit to eject tenant from such land not barred by art 1 of Sch. III. 39 I C 389.

—Ss. 116, 120—No evidence as to zerait land being ever in Khas possession—occupancy right can be acquired on such land.

Admission by tenant that the lands are zerait—Court cannot go behind the admission. 38 Cal 432=38 I A 65=9 I C 913=15 C W N 345=9 M L T 364=8 A L J 441=13 C L J 512=13 Bom. L R 396=1911 (2) M W N 182 (P C).

—S. 116—Zerait land—Tenant's admission in kabuliyat executed after 2nd March if admissible—B T Act Ss. 45, 112. 20 C W N 14=33 I C 978.

—S. 116—Non-occupancy rights in zerait land may be acquired when it is not held under a yearly lease or a lease for a fixed period. A I R 1929 Pat 392=8 Pat 471=10 P L T 565=I R (1929) Pat 501=118 I C 309.

Contra 39 I C 389 (Pat.)  
—S. 116—Tenant not absolutely barred from acquiring occupancy right in zerait lands. A I R 1929 Pat 460=10 P L T 569=I R (1929) Pat 508=118 I C 316.

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—S. 116—Lessees cannot acquire occupancy rights when their possession is from year to year and they held it from person holding for a term of years on the expiry of the lessors tenancy they are liable to be ejected as trespassers. A I R 1925 Pat 771 =88 I C 874.

—S. 116—No occupancy or other rights in zerait lands arise even apart from a registered lease whether yearly or for a term of years. A I R 1925 Pat 241=4 Pat 88=6 P L T 240=(1924) Pat 337=84 I C 305. Overruled in 118 I C 316.

—S. 116 & Ch. V—One does not become an occupancy raiyat by holding landlord's khamir lands under a lease for a fixed period. A I R 1921 Cal. 530=25 C W N 714=67 I C 946

—S. 120—Limitation—Declaratory suit to correct in record of rights. 2 Pat L J 493=41 I C 11

—S. 120 (2)—Zerait land—Tenant's admission in Kabuliya, executed after 2nd March 1883, if admissible—B T Act ss. 45, 116. 20 C W N 14=33 I C 978

—S. 120 (2)—Only those lands can be treated as zerait which were originally set up by the Zamindar as such. Admission by tenant in previous deposition is admissible in evidence. Assertions of witnesses as to the land are also admissible. 13 I C 1

—S. 120 (2)—Documents executed between landlord and tenant containing admissions as to proprietor's Kamat rights are inadmissible. 5 Pat L J 87=(1920) Pat 131=1 P L T 13=54 I C 652

—S. 120—No evidence as to cultivation by landlord or recognition by usage—Presumption that land is not zerait; but it can be rebutted. A I R 1929 Pat 41=7 Pat 187=11 P L T 12=Ind Rul (1929) Pat 149=114 I C 469

—S. 120—Recitals in deeds executed subsequent to the 1st March 1883 are admissible. A I R 1928 Pat 267=7 Pat 212 =9 P L T 696=109 I C 526

—S. 120—The word 'Baksht Malik' or ticcadar means in cultivating possession of the malik or ticcadar & applies to land directly held & not to zerait land within s. 120. A I R 1928 Pat 316=7 Pat 275=9 P L T 589=109 I C 461

—S. 120—'Baksht' means khudkashat. It may include lands temporarily in landlord's possession & cultivation. A I R 1926 P C 60=5 Pat 735=53 I A 176=7 P L T 483=31 C W N 341 (P C)=97 I C 217

—S. 120 (2-A)—'Agreement or compromise' relates to character of land. Such admission in kabuliya is relevant. A I R 1926 P C 79=5 Pat 634=53 I A 164=7 P L T 553=31 C W N 74=44 C L J 86=51 M L J 587=95 I C 1025

See A I R 1930 Pat 297

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—S. 120—There is nothing in s. 120 itself to cut down the generality of the expression "any other evidence". The agreement or compromise which the Revenue Officer is not to regard is an agreement or compromise made before the Revenue Officer in a proceeding connected with the Record of Rights. A I R 1923 Pat 276=2 Pat 414=(1923) Pat 65=4 P L T 135=1 P L R 111=71 I C 902

—S. 120—Mentioning the land as zerait in a lease does not mean that it is really so. S. 120 (2) allows the evidence of the land being specifically let as proprietor's private land before 2-3-83. Presumption from the Record of Rights is rebuttable. A I R 1922 Pat 425

—Ss. 121 and 54 (3)—Rent was payable on 1st December. Attachment on 4th December is legal under a distraint order of 2nd December. A I R 1921 Cal. 361=33 C L J 24=25 C W N 209=22 Cr. L. J 491=62 I C 187

—S. 128 (2) (d)—Occupancy raiyat's interest in a non-transferable holding can be bequeathed as it is an interest in immovable property. A I R 1929 Cal 127=49 C L J 122=56 C 630=Ind. Rul. (1929) Cal 364 =115 I C 364

—S. 140—S. 140 does not afford the only remedy against distraint. Court which passes an ex parte order has always the power to review it. 27 I C 812

—S. 143—Suit for katiari dues is a suit for money, not rent, and is cognizable by Small Cause Court. 19 C W N 359=19 C L J 310=23 I C 12

—Ss. 143, 153—Where in a suit for rent for less than Rs. 100 decree was passed on appeal and application to rehear the appeal dismissed. Held no second appeal lay.

Term "suit" includes appellate stage. 19 C L J 310=18 C W N 359=23 I C 12

—Ss. 144 (1), 193—The Act applies to suits for rent in respect of forest land. Suit for "rent" within the meaning of sch. II, art. 8 of Pro. Sm. C. Court was not cognisable by the Small Cause Court. 20 C L J 227=19 C W N 415=26 I C 380

—S. 147—On Judgment-debtor depositing the amount, the Court must set aside the sale, notwithstanding previous sale by the Judgment-debtor. If he withdraws the deposit he should be directed to re-deposit, and in default the order may be executed as decree. 18 C W N 175=22 I C 885

—S. 147 A—Compromise contravening s. 29 is not a lawful contract, and Court cannot deliver decree on such a compromise. 18 I C 809=17 C W N 496

—S. 147 A—A compromise decree in contravention of s. 147 A is a nullity. 35 I C 445



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—S. 147 A (2)—Court can give effect to a lawful compromise and pass decree, even if the parties subsequently retract from it. 46 I C 228

—S. 147 A—Landlord & tenant—Compromise relating to tenancy—Consideration for compromise consisting of matters extraneous to suit—Power of Court to record compromise—B. T. Act ss. 29 and 147 A. 4 P L J 667=52 I C 20

—S. 147-A (3)—Compromise does not become null by non-compliance with the Sec. A I R 1929 Pat 287=8 Pat 372=10 P L T 189=Ind Rul (1929) Pat 546=118 I C 722

Holding A I R 1924 Pat 204 and 17 C W N 496 As wrongly Decided.

—S. 147—Raiyat at fixed rate cannot contract himself out of that right, nor can a compromise decree not passed in accordance with S. 147 A have that effect. 54 I C 750

—S. 147 A.—A decree under the section is not a consent decree & its procedure & principles in setting aside do not apply A I R 1929 Pat. 568 (F. B.)=10 P L T 717=Ind Rul (1929) Pat. 547=118 I C 723 Contra A J R 1925 Cal 199 28 C W N 984=84 I C 730

—S. 147-A The sec. is inapplicable to a suit for trespass when alternative relief under s. 157 is claimed as it is not a suit between landlord & tenant A I R 1929 Pat 568 (F B)=Ind Rul (1929) Pat 547=10 P L T 717=118 I C 723

—S. 147-A.—In compromise of a rent suit, the rate agreed to was surely higher than the khatian rate. It is binding if bona fide disputes are settled. A I R 1929 Pat 287=8 Pat 372=10 P L T 189=Ind Rul (1929) Pat 546=118 I C 722

See also A I R 1924 Pat 374=1 P L R 43=69 I C 616

See A I R 1929 Pat. 568=10 P L T 717=118 I C 723 (F B).

—S. 147 A—Decree is not without jurisdiction but can be questioned as erroneous in proper proceedings when there is no compliance with the Sec. A I R 1926 Cal 1101=30 C W N 940=45 C L J 24=97 I C 770

—S. 147 A—Compromise decree is null when the Sec. is not complied with. Held that decision in 118 I C 722 is wrong. A I R 1924 Pat 204=72 I C 40

See 72 I C 40 (Pat.)  
See 35 I C 445 (Pat.)

—S. 147 A—The Sec. is inapplicable to a suit between landlord and trespasser. A I R 1922 Pat 319=4 P L T 301=(1922) Pat 654=71 I C 143

—S. 147 A—The Sec. prevents landlord from deceiving the provisions of the Act to the detriment of the illiterate tenant. 65 I C 581 (Cal.)

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—S. 147 A—Non-compliance with the Sec. of a compromise decree cannot be objected to in execution. 24 C W N 1070  
=60 I C 204

—S. 147 B—"Shall have regard" does not mean that correctness of entries will not be presumed. A I R 1926 Cal 862=30 C W N 689=96 I C 959

—S. 148—Plaint under—Particulars required by section to be set forth in—Absence of, or error as to—Dismissal of suit on ground of—Not proper—Amendment of plaint by filling up particulars—Opportunity for—Court ought to allow, if necessary, on payment of costs. 11 P 624= A I R 1932 P 355=140 I C 570

—S. 148—Rent suit—Co-sharer landlords—Suit by one of—Other co-sharers impleaded as proforma defendants in—Transposition as plaintiffs of—Limitation Act, S. 22 (1) applies to, and no question of a bar by limitation can arise in such a case. 13 P L T 392=139 I C 535=A I R 1932 P 304=I R 1932 P 243=A L R 1932 P 663

—S. 148—One of the plots comprised in the holding was left out of the schedule attached to the plaint. The result therefore is that the suit was instituted in respect of a part of the holding and not in respect of the whole holding. The consequence of such a suit would be to treat it not as a rent suit but as an ordinary money suit and that the decree that may be passed in a suit of this nature will only be treated as a money decree and not as a rent decree. The effect of not including the plot would not be to make the suit not maintainable at all. 13 P L T 392=139 I C 535=A I R 1932 P 304=I R 1932 P 243=A L R 1932 P 663

—S. 148—Rent suit—Plot numbers appertaining to plots comprised in suit—Khatoo—Mistake in plaint as to—Dismissal of suit on ground of—Not permissible—Amendment of plaint to be allowed in case of, if necessary, on terms. 11 P 624=A I R 1932 P 355=140 I C 570

—S. 148—"Landlord's interest" in S. 148 (h) is the interest of the person entitled to receive rent at the date of the application for the execution of the decree. 17 C W N 276=17 C L J 227=40 C 462= 18 I C 689 (F. B.)

—S. 148-A—Suit for rent by co-sharer landlords—other co-sharer impleaded as defendant—question of title raised—court can go into and decide the question of title—finding that the karsha belonged to both parties is one of facts—it cannot be attacked in second appeal. A L R 1932 P 476

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—S. 148-A—The suit must be for whole rent due. A L R 1933 C 2=59 C 1250

—S. 148-A—Where in a rent suit, a co-sharer landlord was impleaded but did not take part in the proceedings, there is no room for the doctrine of equitable estoppel of standing by A I R 1931 Cal 485 (2)=58 Cal 358=Ind Rul (1931) Cal 855=134 I C 567

—S. 148-A—The co-sharer landlord is made a party in a plaint framed under s. 148-A so that certain adjudications may be made in his presence and he may be given an opportunity of taking benefit of such adjudications. It is open to him to appear in the suit or not. A I R 1931 Cal 486 (2)=58 Cal 358=Ind Rul (1931) Cal 855=134 I C 567

• —S. 148-A—Co-sharer landlord—Rent suit by—Co-sharer landlord impleaded as defendant in—Plea by, of prior purchase of holding by him in execution of previous rent decree in a similar rent suit and of his liability for rent after his purchase—Validity of such purchase—Jurisdiction to adjudicate upon—Court has, where plaintiff insists upon getting a decree for whole rent against original tenant. 59 C 1250=A I R 1932 C 894=A L R 1933 C 2

—S. 148-A—Co-sharer landlords—Suit by one of, for his share of rent—Decree in, for his share of rent—Rent decree in accordance with S. 148, if and when is—Object of S. 148, and essential principles underlying it. 11 P 498 (502-3)=A I R 1932 P 284=139 I C 836 (2)=I R 1932 P 255=A L R 1932 P 646

—S. 148-A—Suit framed under is a suit for entire rent notionally at all events.

If the plaintiff does not know what rent has been paid to his co-sharers, he, by impleading them, gives them a chance to raise any case they may have on that point. The intention is that the suit for the period covered is to deal with the whole of the rent, so that the tenant is not subjected to a multiplicity of suits in respect of the same matter. 59 C 1250=A I R 1932 C 894=A L R 1933 C 2

—S. 148 A—Where a cosharer, who used to collect his share of the rent separately, sues for his share only, and obtains decree, such decree will be a money-decree. But if the decree is properly framed under S. 148 A. it will operate as rent-decree. 27 C L J 101=45 I C 767

—S. 148 A—Usufructuary mortgagee is a "landlord" and can sue for rent. Usufructuary mortgagee from one of the

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cosharers is a cosharer landlord within S. 158 B (1) (e). If a suit comes within S. 141 A. the decree may be executed under S. 158 B (1) (e) and not under O 34 r. 14 of the C. P. C. 18 C W N 1016=23 I C 981

—S. 148 A—Cosheibait, being not a cosharer, cannot maintain suit under S. 148 A. 27 C L J 605=41 I C 837

—S. 148 A—Decree under—Sale of occupancy-holding—Execution—Purchaser's right to apply under O. 21 rr. 100 and 101. 2 P L J 478=1 Pat L W 685=42 I C 526

—S. 148. (b)—Rent Suit—Specification of property in arrears is necessary. 27 I C 313

—S. 148 (b)—Assignee of a rent-decree cannot execute it even as money decree, unless the landlord's interest in the land has become vested in him. 41 I C 542.

—S. 148 (b) (1) Proviso—Plaint without statement of rate of rent—Practice—B T Act S. 153. 23 I C 416.

—S. 148 (b) (2)—Court has no jurisdiction to dismiss a suit, on ground of plaint being defective under s. 148 b (2), without first asking plff. to amend the plaint within a particular time. 1 Pat L T 188=55 I C 445=2 U P L R (Pat) 29.

—S. 148 (h)—Rent—Decree satisfied when payment made to and accepted by assignee of decree—Contribution, suit for 20 C W N 458=20 C L J 200=27 I C 56 (2).

—S. 148 (h)—An assignee of a decree for arrears of rent is prohibited from executing the decree by reason of s. 148 (h) A I R 1931 Cal 485=35 C W N 51=Ind Rul (1931) Cal 493=58 C 798=131 I C 701.

—Ss. 148 A, 158 B, sub-s. (2), 170—Suit by co-sharer-landlord for his share of rent, making co-sharer party and offering to raise valuation if anything found due to co-sharer—Decree for arrears due on account of holding—Claim not allowable in such case. 8 Ind Cas 50=15 C W N 820.

—S. 148 A. S 158 B, Sch III art 6—Decree by cosharer landlord for his share is a money decree and special limitation does not apply. 16 C W N 1006=16 C L J 379=17 I C 207.

—S. 148 A—Co-sharer—Rent. 48 I C 726.

—Ss. 148 A, 158 B—Sale in execution of decree without serving notice under s. 158 B upon co-sharer landlords. Such sale is not void but has the effect of a sale under money decree. 55 I C 402.

—Ss. 148 A, 158 B, 188—Suit under s. 148 A should in form be for the whole rent, and in substance for separate share, and

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that the whole body of landlords should be impleaded 4 Pat L J 500=53 I C 91.

—S. 148—When particulars in s. 148 are not stated in the plaint, the deft should ask for them but when the cause of action is mentioned, suit should not be dismissed but the amendment of the plaint should be allowed A I R 1931 Pat 135=11 P L T 617=I R (1931) Pat 49=128 I C 785.

—S. 148—The decree will be a money decree if in a rent suit the whole holding is not represented. A I R 1228 Pat 459=7 Pat 733=9 P L T 484=I R 1929 Pat 164=115 I C 196.

—S. 148—Rent suit confined to lands actually under lease should not be dismissed as accretion extends the tenure. A I R 1925 Cal 758=29 C W N 505=87 I C 442.

—S. 148—In a rent suit & alternatively for money had & received of title may be gone into & the procedure is not special but summary. A I R 1923 Cal 699=27 C W N 716=50 C 807=77 I C 10.

—S. 148—A—Decision of rent in a prior suit between co-sharer landlord & tenant is not binding on another such landlord made a co-deft A I R 1930 Cal 169=33 C W N 1221=57 C 480=I R (1930) Cal 526=125 I C 302.

—S. 148 A.—A co-sharer landlord can sell the holding though he is unable to get his co-sharers with him. A I R 1930 Cal 169=33 C W N 1221=57 C 480=I R (1930) Cal 526=125 I C 302.

—Ss. 148 A & 159 (b)—A recorded full proprietor was only a co-sharer. He may obtain a rent decree but unless Ss. 148 (a) & 159 (b) are complied with it will not be such a decree & he cannot get the holding itself in execution sale A I R 1929 Pat 357=8 Pat 375=I R (1929) Pat 557=118 I C 733.

—S. 148 A.—A rent suit primarily claiming plff's share is not one within s. 148 A though it includes prayer for others' shares A I R 1928 Cal 347=103 I C 41.

—Ss. 148 A & 163—If otherwise good a decree is rendered any theless one for rent by mere Court's failure to simultaneously issue the attachment order & the proclamation A I R 1928 Pat 318=7 Pat 260=107 I C 821.

—S. 148 A—Not substantial but strict compliance with the terms is necessary. A I R 1927 Cal 945=103 I C 827.

—See A I R 1925 Cal 106=40 C L J 512=51 C 935=84 I C 145.

—S. 148 A—Though the plff should sue for the whole rent due, but when dues to other co-sharers are unknown, he can sue for his share only. A I R 1927 Cal 945=103 I C 857.

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—S. 148, A—Transfer was recognised by some co-sharers only when a non-transferable holding was sold. Others filed a rent suit making the consenting landlords and original owner defts. but purchaser was not made a party. The decree is not money decree but a rent decree. A I R 1926 Cal 733=30 C W N 494=96 I C 689.

—S. 148 A.—A co-sharer filed a rent-suit. It was not stated that he had a right to sue for his share. The suit is maintainable as the contrary is not proved. A I R 1926 Cal 963=95 I C 42.

—S. 148 A—Whole rent should be sued for or the plff. must be unable to fix whether or not the whole is due. A I R 1926 Cal 356=90 I C 955.

—S. 148 A—When a rent decree is obtained against some tenants only it is not a rent decree. A I R 1925 Pat 783=88 I C 830.

—S. 148 A—In a suit under the Sec. co-sharer landlords were defts. & they did not deny plff's share. Tenant cannot dispute plff's share when they had not alleged excess payment to any co-sharer A I R 1925 Pat 564=6 P L T 780=86 I C 559.

—S. 148 A—Decree is a rent decree when a co-sharer's suit complies with S. 148 A. A I R 1925 Cal 82=28 C W N 757=85 I C 214.

—S. 148 A (1)—Plff sued for his share only but prayed that under some conditions the whole amount due to all co-sharers may be decreed is not according to S. 148 A (1). A I R 1925 Cal 106=51 C 935=40 C L J 512=84 I C 145.

—S. 148 A—A co-sharer can sue for his share of rent & the decree is valid. Plff alternatively claimed the whole rent & the co-sharers were made parties. In absence of proof of a contract for separate connection, plff's claim may be decreed. A I R 1923 Pat 41=4 P L T 39=(1922) Pat 355. See 9 P L T 809=114 I C 193.

—S. 148 A—In form the suit was for whole rent but in substance for a share only. All the landlords must be made parties and the plff must allege his inability to fix the shares A I R 1922 Pat 560=3 P L T 439=68 I C 625.

See 4 P L T 500=53 I C 91.

—S. 148 A—all the arrears due must be sued for & not the rent payable under contract. A I R 1921 Cal 289=34 C L J 462=65 I C 1.

—Ss. 148 A, 158 b & 169—Some co-sharers sold a part of the holding in execution of a rent-decree. Subsequently the whole was sold in execution of decree for whole rent. The latter purchaser has a preference to khas possession. A I R 1922

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Cal 243-26 C W N 639-35 C L J 30-64  
I C 591.

—S. 148 H—An assignee of an arrears decree who is not an assignee of the landlord's interest cannot execute it. 35 C W N 51-131 I C 701.

See also 41 I C 542 (Cal).

—S. 148 L—Assignee—Legal heir in possession of general estate of testator—Rent suit, before executor under will obtains probate of will—Probate obtained by executor before decree in suit—Decree in suit nevertheless passed in favour of legal heir—Decree a rent decree within meaning of Tenancy Act is.

The decree-holder cannot be held to have parted with or assigned over his interest as landlord in any way, so as to be an ex-landlord and not an existing landlord. 59 C 911.

—S. 149—If the tenant hands in the amount claimed in the Court, the Court will serve notice on the third party and unless the latter brings his suit within 3 months, the plff in the first suit will be entitled to the money.

The suit instituted by the third party, under S. 149 (33), is not rendered infructuous by the fact that plff in the original rent suit gets a decree against the deft. 47 I C 1003.

—S. 149—Was introduced for the protection of tenant against harassment or litigation. 15 C L J 501-16 C W N 558-14 I C 230.

—S. 149 (3)—“Money” is the entire sum deposited and no question of apportionment can be raised or decided in a suit under s. 149, 21 C L J 485-29 I C 883.

—Ss 149, 153—Dismissal of suit for rent on basis of decision in suit upon title by third person under S. 149 (3)—No second appeal lies. 50 I C 276.

—S. 149—Under O 21 r. 90 C P C. 23 C W N 619-50 I C 329.

—S. 149 (3)—Decision under the Sec. does not finally decide substantial rights. Incidental decision on title is not res judicata. A I R 1927 Cal 431-100 I C 427.

—S. 153—S. 153 is applicable to a suit by the assignee of landlord's entire interest. The tenant pleaded that he paid rent to the middle tenure-holder—Held that there was no second appeal as the suit-value was less than Rs. 100 & though decision was about interest in land, it was not one between parties having hostile claims as the alleged tenure-holder was not a party. Whether the Court is right or wrong but has decided within jurisdiction the High Court could not interfere in revision. 1 Pat L W 548-39 I C 748.

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—S. 153—The plff. purchased landlord's right at execution-sale & in a rent-suit his successors were added as defts. who pleaded that plff. had not got possession of landlord's right. Held that second appeal lay as plff's title was questioned by the successors & there were conflicting claims. 32 I C 695.

—S. 153—Specially empowered judicial officer's decision is unappealable when no special questions show in S. 153 are decided by him. In a suit for rent of less than Rs. 50, defence plea was that plff. was his benamidar & the specially empowered munsiff dismissed the suit without deciding the question of title. The appellate court decreed the suit on merits, holding the appeal as competent. Held that second appeal lies though first appeal would not lie. Per Sanderson. C J As the Dt. Judge decided a question of conflicting title within S. 153, a second appeal was competent.

Per Mookerjee. J. A second appeal lies on the principle that when jurisdiction is usurped by a Court in making an order which is appealable.

If it was within jurisdiction, an appeal against is not defeated because the order was made without jurisdiction.

As the first appeal was incompetent the case was remanded to the Dt. Judge to be dealt with under the proviso to S. 153, 20 C W N 967-24 C L J 235-35 I C 348.

—S. 153—“Order” in S. 153 includes final as well as interlocutory orders. So in a rent suit below Rs. 100, lower appellate Court's remand order for retrial without deciding special questions is unappealable. 34 I C 301.

Overruling on review. 23 C L J 235-31 I C 812.

—S. 153—In a rent suit below Rs. 100, on plff's failure to prove the alleged rate, decree at the rate admitted by deft. was granted held that there could be second appeal as there was a question of rent rate within S. 153. Unless expressly denied, the Record of Rights must be presumed to be finally published under S. 103 (B). Under S. 141 B (1), a certified copy of the Record of Rights should be supplied by the Collector when a plaint is admitted without the rental of a tenancy. 23 I C 416.

—S. 153—When the only question decided is about the existence of relationship of landlord & tenant, no special appeal lies to the High Court in a rent-suit below Rs. 100. 47 I C 105.

—S. 153—In a rent suit below Rs. 100, alleging that deft. was plff's under raiyat but he denied it held that second appeal would lie to a rent decree passed for the plff. 20 C W N 1352-39 I C 233.

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—S. 153—Deft. no. 1 was the tenant & deft. no. 2, an intermediate tenure holder which title was alleged by the plff. to be annulled under Patni Regu. Ss 11 & 15. It was dismissed because the tenure was not annulled by a previous suit. Held that a second appeal lies because the question came under S. 153 B T Act. 11 I C 85

—S. 153—For a right of second appeal under S. 153, it is only required that the decree decides the annual rent either directly or incidentally, though there may not be any contest upon it. The defence must be put in at the proper time. A tenant cannot plead eviction by title paramount for the first time in second appeal. 18 I C 87=18 C W N 552

—S. 153—There is no rigid rule that a question of title may not be raised in a rent suit. In the case of a suit valued at much less than Rs. 100, wherein no question of title had been decided, a second appeal is barred by S. 153. A I R 1931 Cal 673 =53 C L J 415=Ind Rul (1931) Cal 801 =134 I C 305

—S. 153—Case coming under—Sale—Fraudulent suppression of process of—Application to set aside sale on ground of—Order on—Appeal from—Not competent, because fraud alleged is not something different from irregularity of proceedings in publishing and conducting the sale. 36 C W N 330=I R 1932 C 482=138 I C 647 =A I R 1932 C 490

—S. 153—Suit by landlord for recovery of rent—Order passed in—Ex parte decree in suit—Application under O. 9, r. 13, C P C to set aside—Order dismissing is an Order passed in suit within meaning of S. 153, and is not appealable. 36 C W N 540=56 C L J 145=A I R 1932 C 687=I R 1932 C 681=139 I C 502=A L R 1932 C 1281

—Ss. 153 and 3 (5)—Rent—includes cesses—suit for recovery of—plaintiff's name registered under Bengal Land Registration Act—can sue alone—Second appeal. A L R 1933 C 329=57 C L J 120=60 C 587.

—S. 153—The deft. had no other title than that of tenant under pro forma deft. in a rent suit below Rs. 50, there is no second appeal from the decree because there is no decision of a question of title to or interest in land between parties with conflicting claims. 55 I C 92

—S. 153—Second appeal lies against a decree deciding rent to be Bhawli or Nagdi. 21 C L J 487

—S. 153—S. 153 B T Act does not bar second appeal when the question is about deft's liability to nagdi or bhawli rent. No such appeal lies under the above

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

sec. when there are conflicting titles of one of the parties & a stranger. 4 Pat L W 72=43 I C 777

—S. 153—It is a question of annual rent payable by tenants within S. 153 when a jeth raiyati mafi is claimed not as personal right but as incidental to holding which the tenants have a right to deduct from the rent to be paid & for which there is no separate cause of action. (1929) Pat 241

—S. 153—A suit was brought for Rs. 82-8 as rent-arrears & Rs. 50 as damages held that S. 153 bars second appeal for rent & S. 102 C P C for damages Joinder of a money claim with that for rent does not evade the bar mentioned in S. 153, the word 'rent' may perhaps include all that is recoverable as rent under B T Act as also amounts ancillary to it, viz. interest or arrears or statutory damages for non-payment. 23 C L J 557=34 I C 697

—S. 153—When no question of title is decided & the claim in the rent-suit is below Rs. 100, there is no second appeal. 53 I C 64.

—S. 153—A co-sharer landlord sued his tenant & co-sharer for arrears. The first court gave the decree against the deft. co-sharer & the Lower Appellate Court dismissed the suit holding that 2nd deft. had an ijara interest which was a shield between plff. & tenants held that the onus to prove that ijara was valid & operative was on the contesting defts & that as the decree decides a question of title between ijardars & the plff. who had conflicting claims, a second appeal is competent. 42 I C 414

—S. 153—Decree at the rate admitted by deft. was given as plff. failed to prove the rate claimed, held no second appeal lies under S. 153. 49 I C 255

—S. 153—Plff. under a title from proprietors' zurpeshgi lease field a rent-suit. The defence was that after the lease, the property was divided under the Estates Partition Act & the rent was paid to A as he was entitled to the land occupied by him. So A was made a deft. & he admitted the receipt of rent. The first appeal Court made A liable to plff. held (1) under S. 153 a second appeal lies (2) that on the finding that A was in directly a party to the lease, he cannot contend that plff. had not right to ask for the rent from the tenant but that he was entitled to rent decree against him & not against A for the money, A received was to the use of tenant & not to that of plff. 20 I C 70.

—S. 153—The claim in a rent suit was less than Rs. 100 & the defence plea was that plff. was entitled to only a half held that second appeal was proper as there was a dispute about the amount of rent annually payable. 51 I C 397



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—S. 153—The deft. claimed Rs. 3-5 as mafi because he was a Jeth raiyat in a rent-suit no exceeding Rs. 100 and the landlord preferred a second appeal. Held that under S. 153 no such appeal lies. Mafi is not rent as it is a sum payable by the landlord to the tenant, where as rent is payable by the tenant, mafi is a set-off against the rent. 1 Pat L J 504-20 C W N 1207-3 P L W 92-37 I C 670

—S. 153—A finding is inoperative when it is on a question not in issue. In a rent suit a finding as to adverse possession which does not arise at all is not a decision as to title & so under S. 153, is not appealable. 53 I C 576

—S. 153—There is no second appeal in a rent-suit below Rs. 100 when Dt. Judge without any matter on merits holds that appeal to him is incompetent. 57 I C 759

—S. 153—An appeal lay to the Dt. Judge, when the original Court in a suit for rent below Rs 50, held that there was no relationship of landlord & tenant & that debts inter se were so related & so dismissed the suit. 55 I C 212

—S. 153—The 3rd deft. lessee the plff. sued the other defts for rent & the validity of the lease was questioned on the allegation that they were his tenants. held that the decision as to the validity of the lease decides the question of title under S. 153 & a second appeal lies. In a previous suit an exparte decree for rent was obtained held that it established the relation of landlord & tenant & unless proved its non-existence, under S. 109 Evi. Act, its continuance will be presumed. 18 C W N 33-22 I C 383

—S. 153—A—application to set aside an ex parte decree—Court accepting a surety bond in lieu of deposit—order erroneous—jurisdiction. A L R 1933 C 195 =56 C L J 575=A I R 1933 C 343

—S. 153 (a)—Whether the rent is in money or kind & whether the plff. is a co-sharer & other co-sharers are as proforma-defts, s. 153 (a) B T bars second appeal in a rent suit below Rs 100. 54 I C 662

—S. 153—S. 153 B T Act does not bar an appeal against a decision in a rent-suit when after considering whether the tenants are entitled to part abatement of rent or not full rent was decreed, as it decides the amount of annual rent. 20 Bom. L R 161-42 Bom. 277-34 I C 851.

—S. 153—Not controversy but decision on a question of title between conflicting claimants is necessitated by s. 153. So no appeal lies under the above sec. when in a rent-suit the question of title was raised but not decided by the Court. 44 I C 558.

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—S. 153—Under s. 153 B T Act no appeal lies against an order dismissing tenant's objection to the sale of his holding in execution of landlord's money decree against him as it decides title. 49 I C 465.

—S. 153—The deft's plea in a rent-suit valued at less than Rs. 50 was that he is not plff's tenant but is entitled to it under a settlement from superior landlord and holding it proper the suit was dismissed. Under s. 153 a second appeal lies. 39 I C 721.

—S. 153—There is no second appeal from a Dt. Judge's order in execution of a decree in a landlord's rent suit where the claim was below Rs. 1008 nothing mentioned in s. 153 was decided. 24 C L J 331-37 I C 425 (F B).

—Ss. 153, 174—A specially empowered munsiff decreed a rent-suit below Rs. 50 but the decree was modified in appeal heard without jurisdiction. Decree-holder become the purchaser in execution. Under s. 174 an application to set aside the sale was made but was refused because the poundage fee was not deposited. In appeal the Dt. Judge overruled the objection about the competency of appeal. On hearing it was held that the judgement debtor was not bound to deposit the poundage fee because on reversal of the sale the decree-holder would be entitled to the deposit. The sale was set aside held that (1) under s. 174 the order is appealable, (2) an order setting aside sale or refusing it relates to title, (3) the new explanation to s. 153 does not supersede 32 C 967 F B although it considerably restricts its effect. (4) when the question is whether s. 174 is fully complied with by judgment debtor, the case does not come under the explanation but the rule in the above decision applies. (5) first appeal was competent. 15 I C 436-16 C L J 542-17 C W N 84.

—Ss. 153, 153 A—Specially empowered officer under s. 153 passed a rent-decree held that an appeal from an order in execution by an officer not so empowered is not barred. Whether an appeal lies or not depends upon the qualification of the officer making the order. Though s. 153 A does not state how to apply the deposit by the person at whose instance the exparte decree is set aside, the landlord in whose favour a decree is made on trial should apply the deposit to his credit towards satisfaction of the decree and execute it for the balance. 10 I C 539-15 C W N 760.

—Ss. 153, 143 and 143 (2)—A suit for rent-arrears under Rs. 100 was dismissed on merits. The appeal was decided exparte. The respondent under O. 43 r. 21 C. P. O. applied to rehear but was re-

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fused and he appealed held that no appeal lies under S. 153. S. 143 (2) making O. 43 r. 21 C. P. C. applicable to suits between landlord and tenant, does so subject to S. 153 and the absence of restriction in an appealable case from cl. (t) does give the right to appeal. 19 C W N 359-19 C L J 310-23 I C 12

—S. 153. Expl.—In a rent-suit under Rs. 50, a decree was passed and 30 days after the execution sale, an application for setting it aside because of fraud, irregularity and Collusion was made and was refused on the ground that there was no such fraudulent concealment as to bring it within S. 18 Lim. Act. held per curiam that under 32 C. 957 F. B. an appeal lies as this was not a finding on a question of irregularity of sale within the explanation to S. 153. Per. N. R. Chatterjee J. The expla.-does not cover a question of fraud in publishing or conducting a sale. Per. Mullick. J. Fraud may or may not accompany the irregularity. Irregularity tainted by fraud is not excluded by the explanation. 19 C W N 953-22 C L J 245-29 I C 308

—S. 153. Expl.—Controls general right of appeal given by S. 174 (5) of amended Bengal Tenancy Act. 36 C W N 330-1 R 1932 C 482-138 I C 647-A I R 1932 C 490

—S. 153—The onus is on deft. to show that plff should have registered her name under Land Registration Act before plff. was entitled to file a rent-suit. The Dt. Judge's jurisdiction is revisional and not appellate under S. 153. But when Dt. Judge instead of considering whether primary court acted without jurisdiction or illegally or with material irregularity treated the matter as an appeal, he has acted illegally and with irregularity and the High Court is justified in its interference. 23 I C 844

—S. 153 (b)—A munsiff with powers under S. 153(b) decreed two rent suits under Rs. 50. "The defts. decreed appealed. The sub-judge decreed the appeals in one judgment. High Court granted rule on a single petition held that (1) no appeal lies to the sub-judge and though not raised in court below the objection may be taken in High Court as it concerns jurisdiction. (2) High Court can grant a rule on a single petition affecting two decrees, the subject of a single appeal. 15 I C 669

—S. 153 (1) (b)—Only revision and not appeal is allowed against a decree or order of the specially empowered officer under S. 153 (1) (b). 55 I C 653

—S. 153 (b)—There is no appeal from Dt. Munsiff's dismissal of a rent suit of

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less than Rs. 50 when he holds that relationship of landlord and tenant is not proved, 47 I C 922

—Ss. 153 A, 193—s. 193 makes s. 153 A applicable to rent suit of a jolkar. An exparte decree was passed in such a suit but deft applied to set it aside, held that applicant should deposit the amount which he admits to be due. 15 C L J 52-11 I C 123

—S. 153 (a) The admission that rent is due for the holding for which the suit is filed is contemplated by s. 13 (a) when the deft alleged that land mentioned in the plaint was in fact a part of the holding with an annual jama of Rs. 7-12 held that it was not an admission of the liability for rent for the suit holding but for a different one & s. 153 (a) was in applicable. 19 C W N 970-22 C L J 589-29 I C 476

—S. 153 A, An application to set aside an exparte decree cannot be entertained unless it shows the injury sustained by the applicant caused by it. 41 I C 800

—Ss. 153, 153 A—A especially empowered officer under s. 153 decreed a rent-suit, held that the Sec. does not bar an appeal from an order in execution made by an officer not so empowered. Whether appeal lies or not is to be determined with reference to the qualification of the officer making an order which is to be appealed from. Though no mode of applying the deposit, is given by s. 153 A, by the person at whose instance exparte decree is set aside the Legislature intended that the landlord for whom decree is made on retrial should apply it towards satisfaction of the decree & execute it for the balance, if any. 15 C W N 760

—Ss. 153, 186 A. The first Court decreed a rent-suit for Rs. 99 & awarded Rs. 25 as damages under s. 186 A. Held in second appeal by deft, that it was questionable whether second appeal lies. A High Court could sue motion interfere with Sub. Court's order under s. 115 C P C when an illegality or irregularity is clear on the face of the judgment. In a rent-suit deft denied plff's title as being his daughter's benamidar. No issue was raised as to deft's estoppel from denying plff's title the first appeal court held that he was so estopped. Held that to hold so was an irregularity when there was no finding about the question whether deft was induced by the plff or if so, into what land or whether there was an attornment to the plff. & as to the question of benami as bearing upon that of estoppel held also that it was a material irregularity to come to a finding under a serious misapprehension of facts. An admission without being aware of circumstances is not binding, Deft's previous deposition, who

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made no appearance in subsequent suit was admitted without any proof that it was his deposition held that it was an irregularity within s. 115. Before damages are awarded under s. 186 A its reasonable or probable cause should be found out. 9 I C 806.

—Ss. 153—There is no right of appeal as the case does not come under the exception when the decision holds that owing to irregularity the sale is to be set aside or that the sale is good not with standing the allegations of irregularity. A I R 1930 Cal 490=34 C W N 331-I R (1931) Cal 9=128 I C 89.

—S. 153 Expl: An appeal does lie when execution sale is set aside because of fraud A I R 1930 Pat 371=11 P L T 312=I R (1930) Pat 478=125 I C 126.

—S. 153 Question of title arises when in a rent suit below Rs. 50 defts disclaim liability by pleading transfers. A I R 1929 Cal 645=I R (1930) Cal 485=125 I C 101.

—S. 153—Custom to remit rent for failure of crop is not one of rent payable annually. A I R 1930 Cal 251=I R (1930) Cal 482=125 I C 98.

—S. 153—Decision of the rate of rent or liability for its payment in utbandi tenancy is appealable. A I R 1929 Cal 206=I R (1929) Cal 689=118 I C 881.

—S. 153—The claim not only includes statutory interest & damages but 75 p. c. interest if agreed to. A I R 1928 Cal 777=56 C 723=48 C L J 327=33 C W N 126=I R (1929) Cal 417=115 I C 593.

—S. 153 Expl. The provision is applicable whether irregularity is due to negligence or fraud. A I R 1928 Cal 859=48 C L J 581=I R (1929) Cal 378=115 I C 522.

—S. 153—Annual rent payable is not determined when the decree is passed on deft's admission. A I R 1928 Cal 512=109 I C 25.

See. A I R 1923 Pat 41=(1922) Pat 355=4 P L T 39

—S. 153—Appeal lies when the amount of rent is not declared in the decree but the question is actually decided. A I R 1928 Cal 254=107 I C 470.

—Ss. 109 & 153—Dt. Judge may interfere when a Munsif wrongly holds that s. 109 bars a suit. A I R 1927 Cal 711=46 C L J 46=104 I C 349.

—S. 153 Expl—Fraud is also included in irregular publication or sale. A I R 1927 Cal 633=45 C L J 566=32 C W N 57=104 I C 199.

See also 107 I C 471

—S. 153—No second appeal can be maintained when the alleged fraud is not proved. A I R 1927 Cal 845=54 C 1050=103 I C 705.

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See 107 I C 471.

—S. 153—Appeal lies to a Sub-Judge when a rent-decree is passed by a Munsif not specially empowered & until question of title is involved the Sub-Judge's order is unappealable. A I R 1927 Pat 300=102 I C 603.

—S. 153—Exception to the Sec. is inapplicable to a decision that set up jama is part of a bigger jama. A I R 1927 Cal 939=31 C W N 436=102 I C 337.

—S. 153—Amount of rent was dependent on the existence of other co-sharers. No question of rent-amount is decided when the finding is in the negative. A I R 1926 Cal 1113=30 C W N 850=44 C L J 414=97 I C 1038.

See 97 I C 138.

—S. 153—In a rent-suit the defence was that as there was another co-sharer, plff. was not entitled to whole and the whole claim was decreed. It decides the rent payable. A I R 1926 Cal 1229=97 I C 138.

But See 97 I C 1038.

—S. 153—An execution sale was set aside under C P C & O 21 r. 90 of which is not exempt from s. 158. A I R 1926 Cal 790=30 C W N 586=96 I C 669.

—S. 153—A rent-suit is not made necessarily one for assessment by a prayer for enhancement. A I R 1926 Cal 1182=44 C L J 296=96 I C 570.

—S. 153—A suit is not a rent suit when assessment is prayed for with a prayer for recovery of rent. A I R 1925 Cal 936=52 C 689=90 I C 71.

—S. 153—Special Judge's order on an application to set aside a sale for a sum below Rs. 50 because of fraud is unappealable. A I R 1925 Cal 1064=88 I C 667.

—S. 153 (b)—There is no appeal when a specially empowered Munsif tries a rent suit below Rs. 50. A I R 1925 Cal 1237=85 I C 760.

—S. 153—The decree is unappealable when in a rent-suit non-joinder of necessary parties is objected to & there is an absence of separate collection. A I R 1925 Cal 1032=30 C W N 63=85 I C 576.

—S. 153—No second appeal lies when a rent-suit is valued below Rs. 100 & no question of amount of rent is decided. A I R 1925 Cal 395=82 I C 829.

—S. 153—Second appeal is not barred when there is dispute about the amount of rent. A I R 1924 Cal 838=39 C L J 334=81 I C 567.

—S. 153—Second appeal does lie when a question of the rent payable is involved. A I R 1925 Pat 294=78 I C 463.

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—S. 152—"Has decided a question of title" refers both to decree & order. Order in execution must itself decide title. A I R 1925 Cal 299=78 I C 236

—S. 153—An appeal does lie when both fraud & irregularity are proved. A I R 1922 Cal 163=77 I C 520

—S. 153—When plff. has not published the notice there is no appeal against a decision about the deft's liability to pay cess. A I R 1923 Cal 673=37 C L J 521

—S. 153 provi.—An addi-judge is competent to hear an application transferred to him by the Dt-Judge. A I R 1923 Cal 469=27 C W N 315=72 I C 794

—S. 153—Whether plff. has a right to whole or 2/5 of the rent is a decision on the amount of rent payable annually. A I R 1922 Cal 417=49 C 538=26 C W N 96=34 C L J 579=64 I C 733 (Reversing. 61 I C 194

—S. 153—Interest is not included in "rent". 63 I C 529 (Cal)

—S. 153—A question as to payment of money in default of one in kind is a question of the amount of rent payable annually. 62 I C 639 (Cal)

—S. 153—An application under O. 9 r. 13 or O 57 r. 1 is barred unless it mentions the injuries suffered by applicant & the deposits the rent admitted to be due. 2 P L T 372=(1921) Pat 301=62 I C 80

—S. 153—There is no appeal when in a rent suit only the relationship of landlord & tenant was decided. 26 C W N 96=34 C L J 579=64 I C 733

See 61 I C 194 reversed

—S. 153—When no relationship of landlord or tenant is found, no appeal lies in a rent suit below Rs. 50. 23 C L J 235 =31 I C 812

—S. 153 A—Court should fix the amount of deposit & record the reasons for it. A I R 1927 Cal 821=47 C L J 66 =103 I C 853

—S. 153 A—If decree is made by mistake, before setting aside such an exparte decree, the court may excuse the deposit of the amount admitted by deft. 7 P L T 441=(1926) Pat 42=93 I C 289.

—S. 153 A (a) & (b)—Application to set aside an exparte decree without a deposit should not be admitted unless the Court thinks it unnecessary. 62 I C 444 (Cal).

—S. 150—Plea of tender, to be effective must be accompanied with deposit. A I R 1928 Cal 874=32 C W N 1082=Ind Rul (1929) Cal 575=117 I C 687.

—S. 150—Does not apply where the rate of rent is in issue. A I R 1926 Cal 191=90 I C 431.

## BENGAL TENANCY ACT VIII OF 1885. (Contd.)

—S. 150—Admission by tenant as to part of rent claimed, but no deposit—Trial Court going on with trial—Deposit made in Appellate Court can be accepted. A I R 1930 Pat 414=Ind Rul (1930) Pat 548=125 I C 772.

—S. 150—Applies where the tenant pleads that he has cultivated lesser area than that for which rent is claimed. Such plea must be accompanied by deposit. A I R 1925 Pat 489=6 P L T 757=86 I C 41=4 Pat 304.

—Ss. 151, 181—Service—tenure. 3 C L J 27=32 C 1104.

—S. 153—Measure of damages for breach of covenant not to assign is such a sum as will place the landlord in the same position as if the covenant had not been broken. 20 C L J 332=24 I C 538.

—S. 153—Does not apply to a suit for rent with alternative prayer for assessment of fair and equitable rent. 53 I C 19.

—S. 153— 2 Pat L J 634.

—S. 153—"Amount claimed in a suit" does not include costs and interest. 16 I C 422.

—S. 153— 18 C W N 1266.

—S. 153 A—No deposit is required when deft. admits nothing to be due. A I R 1921 Pat 284=(1921) Pat 301=2 P L T 372=62 I C 80.

—Ss. 154 & 30. It is quite unfair to order enhancement of past rents S. 154 prescribes the ordinary mode. A I R 1924 Pat 761=(1924) Pat 217=83 I C 124.

—S. 155—A tenant judgment-debtor may apply for granting time to pay the decretal amount to the landlord under S. 155, even if the execution is applied for and possession is obtained by the decree holder. 23 C W N 569=34 I C 537.

—S. 155—Notice under S. 155 gives the tenant an opportunity to remedy the breach & so to avoid ejectment after remedying it & paying a compensation. A notice to support an ejectment suit is not valid if it requires the tenant to remedy the breach to compensate & to surrender the land. 23 C W N 569=34 I C 537.

—S. 155 (1)—A notice that within a month the tenants should remedy the breach & on their failure, a suit for ejectment & for Rs. 200 as damages would be filed does not satisfy S. 155 (1) as no compensation is claimed either additionally or alternatively. 29 C L J 430=51 I C 385.

—S. 155—If in a notice under S. 155 the misuse complained of is irremediable the notice is sufficient though tenant is not asked to remedy it & suit based on it does not fail for want of proper notice. 43 I C 801.

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—S. 155—Not art. 143 but art 32 of the Lim. Act applies to a landlords ejectment suit under S. 155 against a tenant who allows strangers encroachment & exchanged a portion of the tenancy contravening the kabuliyat, 20 C W N 661-33 I C 923.

—S. 155—A tenancy continues till tenant's failure to comply with the decree under S. 155 within prescribed time. The Sec. gives the tenant a relief which when granted forbids forfeiture. The Court can hear an application for granting time after the given period is over & even though execution is applied for butan order for such extension depends upon circumstances 24 C L J 523-44 Cal 954-21 C W N 776-38 I C 493.

—S. 155-Ejectment. Suit for, 80 C 1063

—Ss. 155, 181-Service Tenure, e C L J 403

—Ss. 155, 188-Per Curiam. s. 145 only applies to an ejectment suit where the tenant forfeits the tenancy by breach of covenant does not help the execution-purchaser of a permanent tenure forfeited under a lease. An ejectment suit against such purchaser is governed by art. 142 Lim Act & not by art. 1 Sch. 3 of B T Act. He is a trespasser & a co-sharer landlord can eject & s. 188 does not apply.

21 C W N 117-24 C L J 40-34 I C 833

—Ss. 155 (b), 178 & 179—In an ejectment-suit if the breach is capable of remedy, the tenant must make it alright, but whether it can be remedied or not, the court must be specify reasonable compensation & on tenant's failure to deposit it within a fixed period, ejectment-decree should be passed against him. s. 155 also applies where such a suit is brought on breach of contract prior to B T Act & even though it contains a provision for reentry. The compensation-deposit may be by any person impleaded as the defendant. 29 C L J 40-34 I C 497

—S. 155—Terms of notice to quit must be proved. A I R 1930 Pat 624-11 P L T 668-I R (1931) Pat 54-128 I C 790

—S. 155—Plff. is entitled only to ejectment & not in addition to compensation when there is a failure to compensate & to remedy misuse. A I R 1930 Cal 300-33 C W N 1224-I R (1930) Cal 525-125 I C 301

—Ss. 155—A decree, under, s. 155 is alternative. A I R 1930 Cal 300-33 C W N 1224-I R (1930) Cal 525-125 I C 301

—S. 155—A landlord suing under the Sec. for breach of any term must give notice when a Miras karsha lease contains an agreement to re-entry on breach of a condition. A I R 1928 Cal 193-47 C L J 21-107 I C 735

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—S. 155 (b)—A tenant was prevented from transferring the land & if any transfer was made the landlord would have a right to re-enter. Landlord or his representative can eject even without notice under s. 155 (b) the tenant's transferee. A I R 1928 Cal 113-105 I C 786

—S. 155—A notice is invalid when only compensation was asked but the tenant was not required to remedy the misuse. A I R 1923 Cal 149-27 C W N 144-77 I C 1047

—S. 155—Ejectment, as well as compensation under s. 155 cannot be decreed at the same time. A I R 1921 Cal 492-25 C W N 658-63 I C 236

—S. 155—Date of ejectment should also be fixed by decree of the appeal court. A I R 1921 Cal 492-25 C W N 658-62 I C 236

—S. 155—In a suit for ejectment and compensation if the former claim is time-barred, the latter can be maintain of within limitation under Art 32 Limi. Act. 25 C W N 930-62 I C 779

—S. 157—Damages for use and occupation see 18 I C 751

—S. 157—When the suit is for trespass alone the mere fact that an alternative claim for rent exists does not make it the less a suit on trespass, as that claim is based on s. 157. 22 C L J 154-30 I C 949

—Ss 157, 188—Relationship of Landlord and Tenant, 25 C 324

—S. 158—Applications under jurisdiction of Civil Court see under ss. 105, 106 and 158; 18 C W N 466

—158—S. 158 B is imperative in requiring a notice to the co-sharers before execution-sale to satisfy one co-sharer's rent-decree and the sale is invalid on Court's failure to serve it. 43 I C 3-31 C L J 73

—S. 158—An application to determine the incidents under s. 158 cannot be made by or against a fractional landlord. When a tenant holds under separate leases from joint landlords, the collection of rent may be separate but tenancy is only one. So the tenant must bring one application against all co-sharers. 20 I C 820-18 C W N 168

—S. 158 In an order to the collector for local inquiry to determine matters

—S. 158, A—Court of Wards in possession of entire estate—subsequent release of a four anna share of the estate, by the Court of Wards in favour of one co-sharer—application for certificate procedure for the released share—who should make the application—no necessity for formal application by the twelve annas owners—jurisdiction—order on four annas owners application not ultra vires—procedure applicable to the Court of Wards—exercise of proper discretion—question of fact—cannot be raised in second appeal. A I R 1933 C 469



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—S. 158 B.—S. 158 B applies when the rent decree-holder is the sole landlord at the time of decree, although he may be a co-sharer landlord for a part of the period for which the rent is decreed. 2 Pat L J 194=39 I C 672=3 Pat L W 420

—S. 158 (b)—Decree for rent by mortgagee from co-sharer landlord—Execution. 18 C W N 1016.

—S. 158 B. A decree for rent-arrears for a period in the latter of which plff. comprised the whole body of landlords, which he did not formerly, is a rent-decree within s. 158 B. Under the Sec. only at the time of decree all the landlords must be on record. 1 Pat L W 342=39 I C 219

—S. 158 B (2)—Notice of sale required by—Failure of effect—Irregularity merely is, and not illegality rendering the sale absolutely void—Objection based on such failure—Party entitled to take—Co-sharer effected the only party—Third party cannot take advantage of that objection and allege that the sale is wholly invalid. 11 P 498 (503-4)=I R 1932 P 255=139 I C 836 (2)=A I R 1932 P 284=A L R 1932 P 646

S. 158—B.—Notice—Non-appearance, effect of—Cosharer landlord—The notice under s. 158 B is given to a co-sharer, landlord for his benefit. If he takes the benefit he is bound by the proceedings. If he does not appear and contest the sale, it is difficult to hold that he forfeits such rights as he has under the law against the tenant or in respect of the tenure or holding. A I R 1931 Cal 485 (2)=58 C 358=Ind Rul (1931) Cal 855=131 I C 567

—S. 158 B (2)—Mandatory provisions of S. 158 B (2) must be complied with when a co-sharer landlord wants to sale a tenure & the sale becomes in valid if the Court fails to serve notice. 23 C W N 931=53 I C 515

—S. 158 B, 163 & 167—When in a sale of a holding under s 158 B omitting to mention in the proclamation that it is sold free from incumbrance does not remove purchaser's right to annual incumbrances under S. 165. It may be an irregularity, setting aside the sale under O 21 R 90, if substantial injury results. The incumbrances may be annulled if it was a holding & s. 158 B is complied with. 2 Pat L J 176=1 Pat L W 351=(1917) Pat 143=39 I C 230.

—Ss. 158 & 154—A co-sharer landlord cannot file an enhancement suit. There is no severance of the tenancy, by mere tenant's agreeing to pay rent to one of them separately. But separate kabuliyat to one co-sharer landlord evidences separate tenancy. A I R 1922 Cal 284=65 I C 469

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S. 158 (d)—A landlord may ask for a decree for back rents at a fair & equitable rate. A I R 1928 Cal 43=105 I C 133

—S. 158 (d)—A Revenue officer can ascertain the rate of rent & to determine a fair & equitable rent in absence of one. A I R 1928 Cal 43=105 I C 133

—S. 158—If the only object is inquiry under S. 158, it is not necessary to remand the case. A I R 1928 Cal 43=105 I C 133

—S. 158—Court is competent to determine relationship of landlord & tenant in an application under s 158 A I R 1927 Cal 51=97 I C 604

—S. 158 (3)—An order under S. 158 (3) is appealable as a decree. A I R 1926 Cal 688=43 C L J 106=30 C W N 479=95 I C 245

—Ss. 158 & 188—Suit for settling a fair rent by some co-sharers is competent as jurisdiction under s. 9 C P C is not ousted by s. 158. A I R 1925 Pat 517=6 P L T 849=(1925) Pat 153=88 I C 959

—S. 158—The Sec. applies when the rate is not determined in the application for settling a fair rent. A I R 1925 Pat 517=6 P L T 849=(1925) Pat 153=88 I C 959

—S. 158—Within the meaning of C P C o 9 r 9 an application under s. 158 is not a suit. A I R 1923 Pat 381=2 Pat 192 =4 P L T 705=74 I C 464

—S. 158—Subsequent suit for compensation is not barred by the dismissal for default of an application for assessment of rent. A I R 1923 Pat 381=2 Pat 192 =4 P L T 705=74 I C 464

—S. 158 (b)—Art 20 Limi. Act governs a sale contrary to a declaratory suit for invalidity 3 U P L R (Pat) 27=60 I C 529

—S. 158 (b)—A landlord purchasing in execution sale for a decree against some co-tenants only gets judgment—debtor's interest alone unless the whole estate is represented. A I R 1929 Cal 452=56 C 462=I R (1929) Cal 688=118 I C 864

—Ss. 158 B, 177, Ch. 14—A rent-decree holder sold the tenure in execution. He must show that he was a landlord when he applied for it. Only tenant's right & not tenancy itself is sold in a subsequent execution-sale for a rent-decree. A I R 1928 Cal. 768=32 C W N 1060=I R (1929) Cal 574=117 I C 686

—158 B—A co-sharer landlord may waive his right to have a notice under the Sec. A I R 1928 Pat 234=7 Pat 155=9 P L T 241=107 I C 310

—S. 158 B—A rent-sale is not totally invalidated by non-service of notice according to the Sec. upon the co-sharers but becomes one in execution of a money decree. A I R 1927 Cal 873=104 I C 196

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—S. 158 B. 177 (Ch. 14)—Subsequent plea cannot be raised when a judgment-debtor fails to objection to execution proceedings under the Chap. that decree is not a rent decree. A I R 1927 Cal 825=103 I C 707

—S. 158 B (2)—Sale without notice is a mere irregularity & its effect is like a sale in execution of a money decree. A I R 1926 Pat 503=6 Pat 80=7 P L T 871=96 I C 569

—S. 158 B—After actual sale only under, the decree, the tenure passes to the purchaser. A I R 1926 Pat 213=3 P L R 341=7 P L T 717=93 I C 303

S. 158-B—Service of notice to some co-sharers is not one to all. A I R 1926 Cal 351=42 C L J 477=90 I C 333

S. 158 B—Person being party to sale as pro forma defendant is not estopped from asserting title subsequently—Evidence Act, s. 115 for not giving notice to purchasers that no title under s. 158-B would be conferred upon them. A I R 1926 Cal 420=85 I C 747

—S. 158 B—Absent co-sharer's ijarard being a party as another co-sharer does not represent the former. A I R 1926 Cal 420=85 I C 747

—S. 158 B (2)—It cannot be held that non-service of notice under s. 158 (B) on a co-sharer landlord either nullifies the sale or alters it one in execution of a money decree. A I R 1924 Cal 408=37 C L J 447=27 C W N 765=82 I C 507

—S. 158 B—Whole interest does not pass when at an auction sale a part of the holdings is purchased. A I R 1924 Pat 342=1 P L R 467=80 I C 570

—Ss. 158 B, 117 (Ch. 14)—A tenant can object to execution of rent decree as being barred specially under Chap. 14. But it can be taken if the execution is under C P C as a money decree. 65 I C 810 (Cal)

—Ss. 158 B & 159—The Secs. determine the purchaser's rights in a rent decree. Limi. Act, Art 130 applies only where he acquires judgment-debtor's right, title & interest. "Incumbrance" in Ss. 156 & 161 includes a trespasser's statutory title by adversely possessing a defaulting tenant's land. A I R 1922 Cal 544=26 C W N 985

—S. 158 B-Limi. Act Art. 120 governs a suit for declaring the invalidity of a sale which is contrary to the Sec. 3 U P L R (Pat) 27=60 I C 529 (2)

—S. 159—For annulling encumbrances under s. 159, the tenure must have been sold in execution of a rent-decree. On Govt's resumption of ghatwali tenure & settlement with the Zemindar, he agreed

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to pay the quit-rent & leased the lands to A who agreed to pay consolidated rent. held, Zemindar's rent-suit was for arrears due & not by a co-sharer landlord. 19 C L J 324=19 I C 776

—S. 159—Though a landlord, under S. 43 Contract Act may sue one of several ryots for the whole rent, all the tenants must generally be made parties so as to pass the entire holding by execution-sale. When one tenant represents all he may be regarded as the sole tenant for "suit for rent-arrears within Ch. XIV B T Act. 17 C W N 833=19 I C 989

—Ss. 159, 160, 161, 167—A part of a tenure was duly recognised as a separated one. Its purchaser at a sale for arrears acquires the right of a purchaser of the whole tenancy within s. 159. The onus is on the purchaser to show that the interest to be annulled is an incumbrance within s. 161 (a) & then the deft. should prove his protected interest within s. 160. 16 C W N 777=7 I C 919

See also

16 C W N 779

—Ss. 159, 160, 161, 167—The onus is on the plff. that interest to be annulled is an "incumbrance, when he, the purchaser at execution of a rent-decree sues to annul an alleged incumbrance & then the incumbrancer has to show that it is a protected interest. 16 C W N 779=15 I C 30 also 16 C W N 777

—Ss. 159, 160, 161 (a), 183—Under s. 160 any occupancy right is a protected interest not to be annulled by an execution-purchaser. So ejectment-decree against an under-raiyat with occupancy right cannot be passed at the instance of such purchaser. A tenant's mortgage is an incumbrance under S. 161 (a) & can be annulled under S. 159 but usufructuary mortgage not by the tenant by his under tenant is not an incumbrance & the mortgagee cannot be touched as long as the under-tenant's interests exist. 20 I C 55

—Ss. 159 & 160 (c)—Even though there be no permanent lease a tenant's interest in a betel plantation is a protected one within s. 160. S. 159 controls the rights of a purchaser at execution of rent-decree concerning betel-plantation by a tenant who originally held under a lease for term of years but subsequently held over on payment of rent. 53 I C 188

—Ss. 159, 161—For determining what passes to the execution-purchaser, sale-certificate should be examined & if necessary the nature & scope of execution proceedings. In a part of the sale-certificate, judgment-debtor's right title & interest was shown as transferred while in another the property was expressly mentioned as one of which the rent was in arrear held

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that what was sold was the defaulting tenure described as judgment-debtor's property. 'Encumbrance' in Ss. 159 & 161 includes a statutory title & interest of a trespasser by adverse possession & it cannot be got rid of except as shown by s. 167.

—Ss. 159, 161, & 167—A purchaser at execution of a rent-decree sued, for possession, the defts who were in possession before the patni was created held that though decree-holder's interest is an incumbrance under art. 121 of Lim. Act, such adverse possession should have commenced after patni is created. This rule is limited to encumbrances on the tenure by the defaulting proprietor's act & the adverse possessor's interest gets possession by proprietor's act 19 C W N 18-21  
C L J 265-26 I C 436

—S. 159—See cases under Ss. 22 and 65  
—S. 159 Proviso cl. (b) & 179—S. 179 Provi. cl. (b) is controlled by s. 179—The putnidar & the darpatnidar may contract permanent tenancy subject to extinguishment of patnidar's subordinate interests on a sale of the under tenure for rent-arrears. This restriction goes with the land operates also between the representat. ves.  
27 C L J 511-45 C 940-46 I C 129

—Ss. 159 to 177—Though suit can be filed for separate holdings, consequent must be so moulded as to apply to separate holdings distributively. A I R 1929 P C 171-33 C W N 822-56 I A 238-57 M L J 132-30 M L W 310-10 P L T 829-Ind Rul (1929) P C 322-119 I C 618

—S. 159. to 177—The Act is defeated when several tenures are included in one sale-order & sub-tenure-holder is made to pay arrears on tenures not connected with him. A I R 1929 P C 171-56 I A 238-33 C W N 822-57 M L J 132-30 M L W 310-10 P L T 829-Ind Rul (1929) P C 322 (P C)-119 I C 618

—S. 159—Not the incumbrancer but the landlord is to take advantage of the Sec. A I R 1926 Cal 1062-95 I C 853

—S. 159—Purchaser of a part of a non-transferable holding cannot apply under C P C O 21 rr. 100 & 101 when evicted by landlord in execution of a rent decree against the recorded tenant. A I R 1926 Cal 956-95 I C 146

—S. 159—The purchaser at a rent sale takes the tenure subject to protected interest with a right to annul incumbrances in a prescribed manner. A I R 1922 Cal 87-35 C L J 292-49 C 948-69 I C 126

—Ss. 159 & 161—Incumbrances includes trespasser's statutory title. A I R 1922 Cal 331-35 C L J 36-26 C W N 703-68 I C 219

—Ss. 159 & 161—Prescriptive title falls within encumbrance. A I R 1922 Cal 544-26 C W N 985

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—S. 160—'Lease of land' in s. 160 refers to a valid and binding lease on the landlord and not one avoidable by him.

50 I C 37.  
—S. 160—Protected interest within Section—Onus of proof on party setting up such interest, tenure-holder—Estoppel—Possession  
21 C L J 65.

—S. 160 (c)—'Plantations' in s. 160 (c) is very wide and includes an assemblage of plants of any kind and so a betel leaf plantation. It is largely if not exclusively a question of fact whether a particular assemblage of plants comes within the meaning of "plantation". 16 C L J 170-21  
I C 419-18 C W N 349.

—S. 160 (g)—A general permission in a patta to the darpatnidar to create sepatni protects one who lets a sepatni from his sepatni being cancelled as a protected interest under s. 160 (g). Only proprietor's written and express permission is necessary.  
23 I C 899.

—S. 160 (g)—Sub-lease by reason of permission granted in lease is a protected interest.  
39 C 138-14 I C 991.

—Ss. 160 (c), 101 (a), 85 (1) & (2)—B an occupancy holder under plffs' granted permanent sub-lease to deft and registered it. The land devolved on D on whose default to pay rents, the plffs. became purchasers at execution-sale for satisfying the rent-decree. Not getting the possession, they sued for ejectment. Held that (1) the sublease contravening s. 85 (2) was invalid against the plffs. (2) that deft's possession being prior to it he was an under raiyat but if he was so inducted on land without plffs' consent, then under s. 85 (1) there was no sub-lease in his favour and so there was no sub-tenancy constituting an incumbrance under s. 61 (a) which the plffs should annul, also it can be held that he had a lease as a protected interest under s. 160 (c) when the lease was invalid against the plffs. Plff's claim should be decreed. 18 C L J 252-21 I C 104-19 C W N 412.

—Ss. 160 & 167—Being not a protected tenure within s. 160 extinction of a sepatni follows that of a dar-patni necessarily. On extinction of dar-patni, rents must be paid to the patnidar purchaser. A sepatnidar unejected under s. 167 cannot collect rents when the darpatni is extinguished under the sec. by purchase of the patni in execution sale.  
18 I C 372-17 C W N 1064.

—Ss. 160 (c) & 167—"Plantation" in s. 163 (c) is very wide as including an assemblage of growing plants of any kind. Whether a particular assemblage falls within it is largely if not exclusively a question of fact. Per chatterjee J. A lease of land with betel-leaf plantation is

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

a "protected interest". "Date of Sale" in s. 167 means the date of its confirmation. 18 C W N 349=18 C L J 170=9 I C 528.

—S. 160 (g)—It is not necessary for the tenant to ask for express authority each time to create any intended specific interest under s. 160 (g). Such a permission in the landlord's lease is sufficient. A darpatni deed provided for sale and gift as well as granting sepatni held that creation of sub-tenancy was authorised within s. 160 (g). 24 C L J 180=21 C W N 829=36 I C 669.

—Ss. 160 (g) & 185—Provision for making alienations and creating encumbrances was made in a patni kabuliyat and patnidar mortgaged the land to plff. held that only the ordinary incidents of a putni grant were recited in it and there was no express authority to create mortgage and so that to the plff. was not a protected interest under s. 160 (d). Patnidar's mortgage-rights are subject to s. 11 Putni Regu. s. 160 (g) is subject to saving provision of s. 195 (e). 16 C W N 561=14 I C 145.

—S. 160 (d)—Under-raiyat who, by custom has acquired a right of occupancy—Interest of—Protected interest by virtue of S. 160 (d) as it stood before amendment of 1928

No doubt the right of occupancy of an under-raiyat is created not by the Act but by custom which is merely saved by S. 183. It is not however possible to narrow Cl. (d) by restricting it to such rights as are created by the Bengal Tenancy Act itself. 36 C W N 400=55 C L J 176=A I R 1932 C 571 (573)=A L R 1932 C 577.

—S. 160 (d)—Valid interest under—Claim to—Under-raiyat whose under-raiyati interest shown to be invalid as against landlord under S. 85 has no, by virtue of mere acquisition of right of occupancy by him semble. 36 C W N 400=55 C L J 176=A I R 1932 C 571 (574)=A L R 1932 C 577.

—S. 160 (d)—"Protected interest"—Occupancy right acquired by under-raiyat is a protected interest within s. (d) but an under-raiyat could not acquire such right against landlord where the lease by the raiyat was in contravention of s. 85 as it stood before 1928. 35 C W N 1001.

—Ss. 160 (c), 167—"Plantations" of s. 160 (c) is not governed by the word permanent and though implying permanency in the work, it does not necessarily mean that in the plant. Land with a betel leaf plantation is a protected interest under s. 160 "date of sale" in s. 167 means the date of its confirmation. 9 I C 528.

—S. 160—Bengal Law Revenue sale Law S. 37. 42 Cal 745.

—Ss. 160 & 50—Benefit of S. 50 should be given to a raiyat holding at a fixed

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

rent. A I R 1928 Cal 880=56 C 173=48 C L J 97=32 C W N 587=I R (1929) Cal 305=115 I C 81.

—S. 160—Occupancy raiyat's right subsequently getting fixed rate grant is a protected interest A I R 1927 Cal 846=104 I C 744.

—S. 160 (b)—A sub-tenure holder can apply to avoid sale when it is sold for rent-arrears. A I R 1925 Pat 737=7 P L T 478=(1925) Pat 236=93 I C 994.

—S. 160 (g)—A mortgage of a patni is a protected interest, when created with zemindar's consent. A I R 1926 Cal 356=90 I C 355.

—S. 160. The portion is a protected one when a person holding it is recognised as a tenant by the landlord. A I R 1925 Pat 556=86 I C 575.

—Ss. 160, 159 & 158 B—There was a sale for rent-arrears under B T Act. A holder of protected interest cannot apply under O 21 r. 90 C P C. Under Ss. 158 B & 159 a protected interest is not affected. A I R 1925 Pat 556=86 I C 575.

—S. 160 B—After a rent sale, incumbrances were annulled before publication of Record of Rights. A fixed-rate tenancy in not negated by provision for enhancement under circumstances over which a landlord has no control. A I R 1922 Cal 222=77 I C 1044.

—S. 160—The Sec. protects a settled raiyat in possession for 12 years & obtaining occupancy rights. A I R 1922 Cal 287=49 C 280=34 C L J 233=26 C W N 15=63 I C 986.

—S. 160—The protection under S. 37 Act XI of 1859 applies to all provisions of occupancy rights in B T Act. 42 C 745=22 C L J 223=20 C W N 185=31 I C 19.

—S. 161. An exchange is not a sale for all purposes. A transfer of a part of non-transferable occupancy is not an encumbrance within S. 161. 46 Cal 891=30 C L J 4=51 I C 285.

—S. 161—Incumbrance—Acquisition of title by adverse possession against tenant holding at fixed rate—B T Act Ss. 83 & 161. 47 I C 334.

—S. 161—"Incumbrance" in—Includes any interest in the tenure—mokarrari or otherwise—which the tenure-holder has the right to create 59 C 26 (27)=35 C W N 806=53 C L J 512=133 I C 99=A I R 1932 C 165=A L R 1932 C 367.

—S. 161—"Incumbrance" in Makarrari Osat taluk created by holder of a permanent tenure is an. 59 C 26 (27)=35 C W N 806=53 C L J 512=133 I C 99=A I R 1932 C 165=A L R 1932 C 367.

—S. 161—"Incumbrance"—Term "incumbrance" is wide enough to include any interest in the tenure which the

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

tenure-holder has right to create. A makurrari under-tenure created by a permanent tenure-holder is an incumbrance. 53 C L J 512-35 C W N 806-Ind Rul (1931) Cal 627-133 I C 99.

—Ss. 161 and 179-Permanent mokarrari lease-Grant of—Right of—Permanent non-mokarrari tenure-holder has so as to make it binding upon the landlord. 59 C 26 (27-28)=35 C W N 806-53 C L J 512-133 I C 99=A I R 1932 C 165=A L R 1932 C 367.

—Ss. 161, 167—An assignment of a portion not of tenure but of rent to the mirasdar for the miras is an incumbrance within S. 161 which the auction purchase should get annulled by a notice under S. 167. 41 I C 687

—S. 161—A landlord purchaser in execution of rent decree may not annul the interest of a part purchaser of a non-transferable holding. An incumbrance implies a limitation & not extinction of a tenant's rights. 28 C L J 266-43 I C 300

—S. 161—1 Pat L W 504-1917 Pat 169

—S. 161—A tenant's mortgage being a lien on the holding is an incumbrance within S. 161—A mortgage security does not extinguish till sold in execution of such decree & proceeds paid to the mortgagee. The purchaser at sale for rent-arrears may annul the incumbrance of a mortgagee decree holder. 16 C L J 156-13 I C 144

—S. 161—1 Pat L J 403-38 I C 337

—S. 161—An exchange is not a sale for all purposes. Selling a part of a non-transferable holding is not an incumbrance within S. 161. 30 C L J 4-46 C 891-48 I C 285

—S. 161 A—25 I C 741

—S. 161 (c)—19 C W N 412

—Ss. 161, 163 (2) and 167—A mortgage of a part of a non-transferable holding is an incumbrance within S. 161 & a purchaser at a rent sale under S. 163 (2) (b) takes it subject to mortgage unless annulled under S. 167 by him. In the mortgagee's suit against tenants and the purchaser, the landlord is not a necessary party. 22 C W N 662-46 I C 176

—Ss. 161, 166 & 167—A lien by the tenant is an incumbrance within S. 161. So the purchaser at a rent sale must annul any mortgage by the tenant under S. 167, which the sale does not ipso facto annul. If not so done within a fixed period, the incumbrance remains in force. A landlord purchaser is in the same position as other purchaser. Until the proper service of notice under S. 167 the incumbrance stands. The proceedings before the collector are summary & not binding on the Civil Court. In a suit for possession, the plff, must succeed on the title as on the date of the suit. 9 I C 248

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—Ss. 161 & 167—The interest of an usufructuary mortgagee or that by way of conditional sale of a part of a non-transferable holding is not binding on the landlord or execution purchaser and is not incumbrance within S. 161. It binds the tenants who mortgages on the ground of estoppel but not against anybody who is not a party to it. 39 I C 460

—Ss. 161 and 167—Per Jenkins C. J. The interest of an unregistered part of a patni is not incumbrance within S. 161 & need not be annulled under S. 167 by the purchaser at execution sale for a rent decree against a registered tenant. Per Mullick J. A purchaser from a registered tenant is a like a rent free sub-tenant & is an incumbrancer within S. 161. 43 Cal. 558-19 C W N 1217-22 C L J 356-31 I C 554

—Ss. 161 and 167—The mortgagee—purchaser of apart of tenure at a rent-sale is an incumbrancer within S. 161 and he cannot be ejected by the purchaser, in execution-sale for a rent-decree until the incumbrance is annulled under S. 167. 47 I C 847

—Ss. 161 and 167—A raiyat's permanent subleasee on payment of rent become at least an under-raiyat if his possession dates prior to the lease. Under-raiyat's interests is an incumbrance within S. 161 which a stranger purchaser at a rent-sale must annul under S. 167 otherwise the under raiyat cannot be ejected. 43 Cal 178-19 C W N 1077-22 C L J 99-30 I C 898

—S. 161 and 167—A purchaser at a rent sale must annul the mortgage of a non-transferable holding as he steps in the shoes of the tenant and one not doing so cannot avoid the mortgage but can only redeem it. A I R 1927 Pat 53-6 Pat 235-8 P L T 464-97 I C 309

—Ss. 161 and 167—The provisions are applicable to all holdings. A I R 1927 Pat 53-6 Pat 235-8 P L T 464-97 I C 309

—Ss. 161 and 86 (6)—Purchaser of a part of the holding is not an incumbrancer. A I R 1924 Pat 1 (F B)-4 P L T 581-1 P L 402-(1923) Pat 305-3 Pat 1-75 I C 794

—S. 161—A trespasser's prescriptive title comes within incumbrance. A I R 1922 Cal 331-26 C W N 703-35 C L J 36-68 I C 219

—S. 161—Estate growing up by suffe-  
rance was held to be an incumbrance. A  
I R 1922 P C 48-15 L W 180-49 C 27-30  
M L T (P. C.) 138-26 C W N 465-48 I A  
499-41 M L T 638 (P. C.)-66 I C 674



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—Ss. 161 and 167—Encumbrances not created by patnidar but by inferior tenure-holder need not be annulled by purchaser of the patni at a rent-sale but may be avoided by a suit. A I R 1921 Cal 754=25 C W N 106=61 I C 469

—Ss. 162 and 163—If a rent-decree holder rightly executes it under the B. T. Act, Court's failure to order attachment and proclamation simultaneously does not make it any the less a rent-decree. But it will not have that effect if the decree-holder is shown not to have taken some steps as in execution of a rent decree 57 I C 492

—S. 162—Inadequacy of price is hardly a consideration which comes in when the question is what is the legal consequence that should have followed from the sale. The use of forms of proclamations under S. 162 (b) instead of those under S. 162 (a) and the occurrence of the words "sale will be subject to incumbrance" in one copy of the proclamation and of the words "sale will be free from incumbrance" in another copy cannot affect the statutory consequences of the sale that was held. These irregularities and errors cannot affect the statutory consequences. 59 C 911 (917).

—Ss. 162, 163—When a decree-holder applies under S. 162 and gets an order under S. 163, there is an assertion that the property to be sold is at least an occupancy holding. If one purchases on faith of it, the decree holder cannot then turn round and say that what is sold is the interest of an under-raiyat. He is bound by his representation and cannot be allowed to act to the purchaser's disadvantage. 17 C L J 652=16 I C 632

—Ss. 162, 163—The appellants were entitled to malikhana sum under such grant from Mahomemdan Emperor but on Govt. resumed and permanently settled the jagirs, held no additional sum as malikhana for jagirs was to be paid. 15 C W N 1029=10 M L T 285=38 I A 189=12 I C 114 (P. C.)

—S. 163—Rent decree—Sale proclamation—In execution of rent decrees sale proclamation should ordinarily issue at the time the property is attached. Notice under O. XXI, r. 66 (2) is not necessary. A I R 1931 Pat 267=10 Pat 138=12 P L T 736=Ind Rul (1931) Pat 398=133 I C 686

—S. 163—Scope—Notwithstanding the provisions of the C. P. Code, the Court shall issue simultaneously the order of attachment and the sale proclamation. In execution of rent decree no notice under r. 66 (2) is required. A I R 1931 Pat 267=10 P 138=12 Pat L T 736=Ind Rul (1931) Pat 398=133 I C 686

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—Ss. 163, 164 (1), 165 and 167—If the sale money is insufficient to satisfy decree and costs under S. 164 (1) and the sale is concluded, the purchaser can annul all other encumbrances provided S. 167 is followed. It does not matter that the decree-holder gives away the remedy under S. 165. 43 Cal 263=20 C W N 156=21 C L J 659=30 I C 68

—S. 161—Under the Sec. interest of an unregistered patni-purchaser is not an encumbrance. 43 C 558=19 C W N 1217=22 C L J 356=31 I C 554

—S. 163 (2) (a)—To find out purchaser's right, true meaning of the decree should be considered when through oversight a wrong proclamation form is used. A I R 1926 Cal 1062=95 I C 853

—Ss. 164, 165—Under S. 164 the purchaser fell short of the decreed sum and tenure was sold but without second proclamation under S. 165. The sale does carry with it the incidents of a rent sale but only those of an ordinary court sale. 38 C 923=16 C W N 259=13 I C 785

Ss. 164, 165, 167—The mortgagee is not worse by first proceeding to sale than the landlord for rent -arrears as he would be otherwise entitled to annul it under s. 167 & so the mortgagee-purchaser may protect himself under his mortgage against the subsequent landlord purchaser. 38 C 923=16 C W N 259=13 I C 785

—S. 167—Date of the service of the notice—whether terminus adquem of mortgage. A L R 1933 C 429=36 C W N 844=142 I C 33=A I R 1933 C 49

—S. 167—Notice under—Issue of Application for—Dismissed application—Revival of—Collector's function in matter of—Ministerial Officer's function only. 59 C 911 (918)

—S. 167—Notice under—Issue of Application for—Dismissal of—Subsequent application—Revival of case on, and order for issue of notice—Jurisdiction as to—Collector has— 59 C 911 (917-8)

—S. 167—Notice under—Service of—Presumption—Onus of proof—Collector's order-sheet—Certificate in, that notice has been properly served—Prima facie evidence, but not conclusive that such a notice has been served—Presumption of service arises from such certificate and onus of establishing non-service is on party who alleges it. 11 P I (7 & 8)=136 I C 442=A I R 1932 P 123=I R 1932 P 106=A L R 1923 P 138

—S. 167—S. 167 speaks of "notice" and not "knowledge" and so requires some intimation of definite character as regards the nature and the particulars of the encumbrance to serve as a basis on which the starting point contemplated by the section may rest. No form of notice

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is prescribed by the statute, and knowledge or intimation may sometimes be sufficient to impute notice, if the circumstances are such as may reasonably require the person who has such knowledge or intimation, to enquire about the particulars. Notice cannot be so imputed in a case in which there is no such duty. 59 C 911 (919-20)

—S. 167—Under-tenure created by permanent tenure-holder—Purchaser cannot adopt, in part and decline to be bound by entire rights created by permanent tenure-holder. 59 C 26 (29)=35 C W N 806=53 C L J 512=133 I C 99=A I R 1932 C 165=A L R 1922 C 367

—S. 167—Annulment of incumbrance—A mokurrari under-tenure created by a permanent tenure-holder is an incumbrance and will be binding on the purchaser if not annulled within one year. 63 C L J 512=35 C W N 806=Ind Rul (1931) Cal 627=133 I C 99

—S. 167—Whether a patni-purchaser must annul incumbrances created by the darpatnidar. Whether a person having adverse possession for a statutory period against the patnidar is not in the same position as patnidar's unrecorded co-sharer and whether that right does not pass at rent-sale without annulment under s. 167. 23 C W N 201=50 I C 222

—S. 167—Application for annulment should be made to the collector. When there is such an application it does not matter that notice is issued by Tenancy Act Dy. collector. All acts done under S. 167 are presumed to be according to law & procedure. 1 Pat L W 440=39 I C 943.

—S. 167—One claiming incumbrances and disputing purchaser's rights in a previous litigation and thus denying his right to issue annulment notices and causing delay cannot in equity be allowed to say that purchaser's title to issue notices was perfected not on confirmation but on the date of actual sale. 9 I C 503.

—S. 167—Annulment of incumbrances is a very severe measure and can be only allowed if proper procedure is followed by the party. An entry in the order sheet that notice is served is not sufficient proof of notice. A taluk was divided into many taluks and a sale of the whole taluk in execution a single rent decree in respect of the whole taluk is not a sale for rent arrears under B. T. Act. 22 C W N 788=47 I C 97.

—S. 167—Suit to annul encumbrances—Service of notice, decision as to "Final decree" 12 C W N 545=35 C 618=8 C L J 168.

—S. 167—Annulment, necessity for—Suit to eject under raiyats by purchaser from landlord who purchased at rent-sale see. 43 Cal 164.

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—S. 167—Proper service of notice must be proved before annulling an interest under s. 167. 54 I C 797.

—S. 167—S. 167 does not apply where the superior landlord is the auction purchaser of the holding, so that notice to eject the sub-tenant is not necessary. 50 I C 37.

—S. 167—"Date of sale" in s. 167 means not the date of confirmation but of actual sale. It is sufficient notice under the sec. if the purchaser had knowledge or intimation of the incumbrance. The lower appeal court rightly held that the purchaser had notice when he had intimation at the time of purchasing an occupancy holding that persons other than judgment-debtor were cultivating the land. 17 C W N 440=16 C L J 131=15 I C 430.

—S. 167—The legal effect of a transaction cannot be always determined with reference to the law at the time of transaction. A rent-decree was obtained before but execution sale took after B T Act came in force. Held that the rights must be determined under B T Act & not under Bengal Rent Act. A Zemindar purchased a tenure but did not annul an under-tenure held that he had no valid title against under-tenure holder. 17 C W N 619=15 I C 479.

—S. 167—A person getting title to a part of sub-tenancy by adverse possession against a sub-tenant, has an interest in the sub-tenancy so that the purchaser of the superior tenancy at a rent-sale seeking to annul the sub-tenancy must give notice under s. 167 to him. 45 C 756=21 C W N 155=23 C L J 485=33 I C 957

—S. 167—A person claiming incumbrances & disputing purchaser's rights in a prior litigation & thus denying his right to issue annulment notices & causing delay cannot in equity be allowed to say that purchaser's title to issue notices was perfected not on confirmation but on the date of actual sale. 9 I C 503.

—S. 167—Plffs. purchased some patni lands free from encumbrances at a rent sale and issued notices of annulment under S. 167 to defts. which were served like summons on a debt under C P C 1882. Plffs sued for possession. Held that either such a service or by proclamation and beat of drum and by posting them in the presence of at least 2 persons on some conspicuous place would be sufficient. The High Court remanded the case for the darpatnidar being made a party deft. Held that the suit was not bad for non-joinder by originally omitting him to make a party also the order of remand was not bad in law so far as original defts were concerned. 26 M L J 86=18 C W N 259=21 I C 928 (P C)

—S. 167—"Date of sale" means not

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the date of actual sale but that of its confirmation especially when the sale is under C P C 1882. 22 C W N 86=26 C L J 328=40 I C 996=45 Cal 151

—S. 167—As far as possible a notice annulling an incumbrance should be served personally. Lower appeal Court's finding of proper service of notice is not one of fact & may be questioned in appeal. 53 I C 570

—S. 167—Patni tenure—purchase at sale for arrear's of rent—Notice to darpatnidar annulling darpatni—Darpatnidar a Hindu lady—Her refusal to give up Darpatni—Suit by purchaser for possession and mesne profits—Lady's death during litigation—Substitution of her sons as defendants—Mesne profits—Son's liability to what extent limited to assets received from lady up to lady's death—Personal liability for subsequent mesne profits 18 C W N 542=16 I C 205

—S. 167—A putni was purchased at a rent-sale by the plffs & the incumbrance was duly annulled. Within 12 years of the purchase they sued for khas possession of two jamas originally held by R & purchased by deft. 7 years after the darpatni was created. Held plffs. should prove that Zemindar had the possession before the patni & that possession of the putni was not adverse. 20 C W N 1311 (P C) is not contrary to 19 C W N 18. Tenant's possession however long is not adverse to landlord. Whether deft's adverse possession of some lands subsequent to patni constitutes incumbrance held it would be incumbrance only when for statutory period but here deft's adverse possession had not become incumbrance when darpatni came in existence. It was an incumbrance not on the putni but on the darpatni & so no separate notice was necessary. What is to be annulled under s. 167 is only the subtenancy & the purchaser has not to find out the chain of subordinate interests. 25 C W N 106

—S. 167—"Plantations" in s. 160 (O) is not governed by the word "permanent" nor does it necessarily mean permanency in the plantation. Land with a betal leaf plantation is a protected interest within s. 160. "Date of sale" in s. 167 means the date of confirmation of sale. 9 I C 528=18 C L J 170=18 C W N 349

—S. 167—A prior purchaser under a rent-decree cannot be ousted by a latter purchaser under a mortgage decree even though there be no notice under S. 167. The latter occupies a position of a second mortgagee with a right to redeem. 4 Pat L J 362=46 I C 921

—S. 167—Sale certificate in name of benamidar—Benamidar, proper person to give notice under S. 167. 21 C L J 65

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—S. 167—Purchaser at a rent-sale sued for ejectment and knew of deft's incumbrance only by his written statement. Decree for possession was passed subject to incumbrance remaining good if not annulled within a year, 24 Cal W N 657=58 I C 674

—Ss. 167 and 173—Plff. purchased benami a mokurari tenure at a rent-sale for one of the judgment-debtors. On Collector's refusal to issue notice under S. 167 he sued for a declaration that he had power to annul the incumbrance and Collector was bound to issue the notice held that the suit was rightly dismissed as no equitable relief could not be granted in such a case. Even assuming that Collector should have issued notices, the Court should consider whether it is equitable to require him to do the specific act, seeing that there by the law prohibiting purchase by judgment-debtor would be defeated. 21 C W N 342=39 I C 189

—S. 167 and Ch. XIV.—The decree-holder continued as sole landlord when applying for execution and took proper steps to sale the under tenure the execution sale passes the under-tenure to the purchaser though decree-holder loses his interest as landlord before actual sale. The legal result of a sale depends upon the due proceedings in execution and not upon the position of the parties at the time of sale, also it would be a manifest abuse of judicial precedents if isolated dicta from P. C. judgment be applied to a case where the facts differ essentially. 45 Cal 294=21 C W N 847=25 C L J 629=41 I C 353

—S. 167—Rent decree-contest between purchaser in mortgage decree and rent-decree—priority. See. 51 I C 746

—S. 167—Protected interest-onus—Notice of annual rent. See 21 C L J 65=34 I C 215

—S. 167—Notice, effect of. See 17 C W N 627=16 I C 911

—S. 167—Notice—Land mortgaged sold in execution of rent-decree See 19 C L J 324=19 I C 776

—S. 167—Decree for assessment can be passed in absence of previous assessment when defts had neither mirash rights nor were the lands held as an unit. A I R 1930 Cal 693=130 I C 433

—S. 167—A stranger-purchaser of a non-occupancy holding at a rent auction sale should annul the incumbrance within a year. If not so annulled it will be valid against him though ineffectual against landlord. A I R 1930 Pat 451=11 P L T 500=I R (1930) Pat 599=126 I C 295

—S. 167—Limitation runs from con-

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

firmation and not from the date of actual sale. A I R 1929 Pat 236=10 P L T 396= I R (1930) Pat 147=122 I C 147

—S. 167—There must be separate service of notices. A I R 1929 Cal 218=33 C W N 117=I R (1929) Cal 731=119 I C 123

—S. 167—When plff. has knowledge of the encumbrance and fails in proper service, decree subject to annulment of encumbrance cannot be given by applying for new notice. A I R 1929 Cal 218=33 C W N 117=I R (1929) Cal 731=119 I C 123

—S. 167—Procedure in C P C must be followed for service of notice under S. 167, A I R 1929 Cal 218=33 C W N 117=I R (1929) Cal 731=119 I C 123.

—Ss. 167 & 171—When there is a rent-sale of the holding & also the tenants mortgagee purchases it in his decree, the landlord cannot be dispossessed nor redeemed by the latter. He can only make payment in court prior to rent-sale A I R 1929 Pat 222=10 P L T 129=8 Pat 439=I R (1929) Pat 294=116 I C 518.

—S. 167—Entries in order sheet are not prima facie evidence against the incumbrancer of the service of notice. A I R 1928 Pat 459=7 Pat 733=9 P L T 484=I R (1929) Pat 164=115 I C 196.

—S. 167 A—Civil Court is not bound by the Collector's opinion about service of notice. A I R 1928 Pat 459=7 Pat 733=9 P L T 484=I R (1929) Pat 164=115 I C 196.

—S. 167—Purchaser prove the date when he got notice of sale when he applies to annul incumbrance after one year from sale. A I R 1928 Cal 892=32 C W N 1079=I R (1929) Cal 241=114 I C 481.

—S. 167—Incumbrance is valid till the prescribed notice is served. A I R 1929 Cal 392=113 I C 904.

—S. 167—A real owner is not prevented from giving notice under the Sec. Purchaser includes certified purchasers assignees or transferees. A I R 1928 Cal 448=55 C 1070=32 C W N 759=108 I C 585.

—S. 167—The party questioning proper service of notice must prove it A I R 1928 Pat 318=7 Pat 260=107 I C 821.

—S. 167—Order-sheet is not sufficient proof of due service. All sub-Divisional officers can issue notices under Local govt's notification. Proper service must be proved. A I R 1925 Cal 1199=85 I C 790.

—S. 167—If the application is within a year of knowledge, an auction-purchaser can annul incumbrance even during the incumbrancer's mortgage—suit. A I R 1924 Pat 515=2 P L R 19 civ.=78 I C 476.

—S. 167—Notice for annulment of an incumbrance is necessary. A I R 1924 Cal 396=71 I C 284.

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S. 167—Validity of a mortgage can not be questioned after a year from the sale, by the purchaser at a rent-sale of that holding. A I R 1922 Cal 32=35 C L J 1=69 I C 841.

—S. 167—An encumbrance can only be annulled in accordance with the section. A I R 1922 Cal 331=35 C L J 36=26 C W N 703=68 I C 219.

—S. 167—To get benefit of the Sec. & to annul the claims of tenant incumbrancers, the plff. must prove an origin subsequent to the creation of patni taluk. A notice under S. 167 must served within a year of the sale or from the date of knowledge of incumbrance whichever is later. A I R 1922 P C 48=41 M L J 638=15 L W 180=30 M L T 138=26 C W N 465=49 C 27=4 U P L R P C 53=48 I A 490=66 I C 674.

—S. 167—A mortgagee in execution of his decree purchased a part & subsequently the whole holding was sold in execution of a rent decree held that after sale in mortgage decree there was no encumbrance to be annulled under the Sec. by the subsequent purchaser. A I R 1921 Cal 599=25 C W N 424=66 I C 103.

—S. 167—B T Act governs the rights of a purchaser in a rent decree. A I R 1922 Cal 544=26 C W N 985.

—S. 167—Possession as tenant is not an incumbrance. A I R 1921 Cal 754=25 C W N 106=61 I C 469.

—S. 167—The interest of an adverse possessor is encumbrance only when it is for statutory time. A I R 1921 Cal 754=25 C W N 106=61 I C 469.

—Ss. 167 & 161. Sub-tenancy created by the patnidar i. e. the darpadni & the subordinate claims in a patni is the thing to be annulled under S. 167. 25 C W N 106=61 I C 469.

—S. 167—When there is a rent decree & also a mortgage-decree the purchaser in execution of the former one must redeem the mortgage within the period provided by the Sec. 24 C W N 961=59 I C 868.

—S. 167—Unregistered purchasers interest requires no annulment. 43 C 558=19 C W N 1217=22 C L J 356=31 I C 554.

—S. 169—An application under s. 169 can be filed though it is more than 2 months after the sale is confirmed. Interest may be granted under s. 169 (e) as rent between the filing of the suit and the confirmation of the sale 12½ p.c. per annum. When a judgement-debtor questions the landlord's right to interest as part of rent and the court decides it, the decision will have the force of decree. 2 Pat L W 97=(1917) Pat 270=2 P L J 722=41 I C 734.

—S. 169—By s. 169 the purchaser gets the property free from all charges of rent-

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

arrears and the landlord decree-holder should satisfy his claim from surplus sale proceeds. 25 I C 974

—S. 169—Rent sale—Purchase by landlord—Rent between date of decree and of sale—Liability of tenant. See. 24 I C 52

—S. 169 (1) (c)—In a rent-sale, the landlord under s. 169 (1) (c) has a right out of the surplus sale-proceeds not only to rent-arrears accruing since the filing of the suit but also to interest upon it. 26 C L J 322-22 C W N 323=42 I C 881.

—S. 169 (c)—After sale of a tenure in execution of a rent-decree plff applied under s. 169 for rents due from the date of suit to that of sale confirmation. The sum being insufficient he now sued for the balance. Held that s. 65 C P C as changed makes the purchaser's title to begin from the date of sale, the judgment-debtor is not liable for rent after the date of sale and the liability of the surplus under s. 169 (c) is also limited. 18 C W N 136=23 I C 101.

—S. 169, Sub Ss. 1 (c) & (2) & Sch. III, Art 2—The decree-holder under s. 169 (1) (c) has a right to surplus sale-proceeds for rent-arrears from the date of suit to that of confirmation of sale though at the time of application, the suit for arrears is time-barred. 19 C W N 582=21 C L J 535=28 I C 133.

—S. 170—Rent decree—Claim by third party under O 21, r 58, C P C, against—Maintainability of—Claim based on ground that the tenure or holding in suit belonged to claimant and not to person against whom decree was obtained—S. 170 of Tenancy Act a bar to the claim in case of.

In this case, the claimant, while admitting that the holding was held under the decree-holder and that arrears of rent were due thereon, alleged that he was the recorded tenant and that the person against whom the rent decree was obtained was his (claimant's) under-tenant. 11 P 790 (795)=13 P L T 643.

—Ss. 170, 171—Darpatnidar paying dues is not bound to go on paying such dues if usufruct is insufficient. He can recover whatever he has paid as a mortgage—Suit to recover is governed by Art. 132, Limitation Act, not by arts. 61, 99 or 120. A I R 1931 Cal 493=35 C W N 678=Ind Rul (1931) Cal 1779=134 I C 75.

—S. 170—It is not a rent decree within S. 170 when it is not in respect of all the arrears of a holding. 36 I C 769

—S. 170—Sub-Ss. (1) and (3)—Purchaser of holding not recognised, by landlord if may make a deposit?—Interest voidable—no sale, meaning of. Judgment-debtor meaning of.

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

A purchaser of a holding who has not been recognised as a holding which is voidable on a sale held in execution of decree for rent against the registered tenant, within the meaning of cl (3) of S. 170 of the Bengal Tenancy Act. A person claiming to be a tenant for a period longer than 12 years to the knowledge of the landlord acquires an interest in the holding within the meaning of Sub-S. (3) of S. 170 of the Act. Such a person does not come within the description of "judgment debtor" in Sub-S. (1) of the section. A purchaser of a holding who has been recognised by the landlord as a tenant cannot make a deposit under the section. 17 C W N 163=16 C L J 548=16 I C 977.

—S. 170—Withdrawal of decretal amount. See. 34 I C 76.

—S. 170 (3)—A purchaser of a part of a non-transferable occupancy holding can make deposit under s. 170 (3) against landlord's wishes. 27 I C 424.

—S. 170 & 171—Plff. made a deposit under s. 171 when deft's holding was advertised for sale in execution of a rent-decree alleging himself to be interested as mortgagee. The defence plea was that mortgage was a forgery and plff had no voidable interest within s. 171. Payment however was accepted as plff. was plainly a mortgagee, other disputes being reserved for a separate suit. The plff. sued on mortgage but the suit was dismissed. In a suit to recover the deposit, held that plff. had no voidable interest within s. 171 and could not be allowed to deposit also the claim cannot be enforced either under s. 69 or s. 70 of Contract Act. 21 C W N 394=25 C L J 325=34 I C 341

—Ss. 170 & 171—Whether a declaratory suit is maintainable to the effect that landlord's rent-suit at high rent subsequent to deposit is collusive and not binding. 1 Pat L W 674=(1917) Pat 222=2 Pat L J 561=41 I C 237

—S. 170—It amounts to recognition of purchaser's tenancy when a landlord withdraws the deposit made by him. A I R 1930 Cal 745=I R (1931) Cal 283=129 I C 843

—S. 170—Under S. 170—attachment under C P C O 21 r. 58 cannot be objected to by one not denying plff's title and the arrears due to him. A I R 1929 Pat 195=10 P L T 118=I R (1929) Pat 411=117 I C 203

—S. 170—In execution a part of the holding cannot be sold. A I R 1928 Cal 94=54 C 1064=107 I C 357

—S. 170—By virtue of this section. O 21 r. 58 is inapplicable to rent-decree. A I R 1926 Pat 213=3 Pat L R 341=7 P L T 717=93 I C 393



## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S. 170—To execution of rent-decree C P C O 21 r. 58 is inapplicable because of S. 170. A I R 1926 Pat 210=3 Pat L R 339=7 P L T 625=95 I C 293

—S. 170—The Court can ascertain the true nature of property when its jurisdiction is to be ousted on the ground that the attached property is of a particular description. A I R 1923 Cal 715=27 C W N 817=80 I C 353

—S. 173 (1)—The Sec. does not bar transferee's substantive suit for title and restraining the landlord from selling it in execution of decrees not binding on him. A I R 1930 P C 193=34 C W N 821=I R (1930) P C 326=126 I C 422

—S. 170 (2)—Application under the Sec. may be oral and to the Nazir but it must be before the tenure is knocked down to the purchaser C P C O 21 r. 69 is in applicable. Bonafide are not required to be considered. A I R 1923 Pat 572=4 P L T 495=75 I C 676

—S. 170 (3)—A landlord took out execution of a rent-decree & a stranger applied to deposit decretal sum. The decree-holder as well as the judgment-debtor must be given notice; and if judgment debtor applies, decree-holder should be given notice even though s. 170 (3) makes no express provision for notice. 18 C L J 142=21 I C 409

—S. 170 (3)—Under s. 170 (3) deposit cannot be made by an unregistered transferee of the whole holding. 38 I C 832

—Ss. 170 (3) & 161—A transferee of a part of non-transferable holding has not an interest in it which is voidable on sale within s. 170 (3) & cannot make a deposit. Such interest is also not an incumbrance within s. 161. Per Mullick J. "Interest" in s. 170 has a wider-significance than 'incumbrance' & includes rights other than those in s. 161. 2 Pat L J 457=1 Pat L W 504=(1917) Pat 169=40 I C 257

—Ss. 170 (3) & 161—An usufructuary mortgagee can make a deposit under s. 170 (3) when he is in possession of a non-transferable holding, such interest being voidable on sale. 5 Pat L J 83=1 Pat L T 108=56 I C 490

—S. 170 (3)—Whether the applicant is entitled to make a deposit or not must be decided when an application under s. 170 is made for a deposit. A I R 1923 Pat 353=4 P L T 247=73 I C 12

—S. 170 (3)—Reversioner cannot deposit when a decree against a Hindu widow is to be executed. A I R 1922 Cal 95=26 C W N 167=70 I C 127

—S. 170 (3)—Transferee of a non-transferable holding cannot make a deposit. A I R 1924 Cal 1005=39 C L J 428=28 C W N 845

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

See 38 C L J 147=76 I C 358=A I R 1924 Cal 185

—S. 170 (3)—Purchaser of a non-transferable occupancy holder has no right to make a deposit when not recognised by landlord A I R 1926 Cal 934=54 C 15=43 C L J 554=30 C W N 729 (F B)=96 I C 363.

—S. 170 (3)—When occupancy holding is put for rent decree an under-raiyat with an unregistered lease can make deposit under the Sec. A I R 1930 Cal 163=66 C 1064=I R (1930) Cal 181=121 I C 744.

—S. 170 (3)—When a transferee is allowed to deposit without notice to landlord & he cannot question the transfer if he withdraws it. Non-service of notice is immaterial. A I R 1928 Cal 730=114 I C 657.

—S. 170 (3)—Interest of an under-raiyat contrary to S. 85 (2) is not an incumbrance & so he cannot make a deposit. A I R 1927 Cal 513=31 C W N 580=110 I C 130.

—Ss. 170 (3) & 178 (3) (d)—Transfer of a part of a non-transferable holding does not forfeit the tenancy. So a mortgagee of such a part has a voidable interest within S. 170 (3). An agreement between landlord & tenant after the passing of the Act but before it comes in force to forfeit even for attempt to transfer does not operate against S. 178 (3) (d) See also S. 1 (2). 24 I C 9.

—S. 170 (3)—A landlord withdrawing deposit made by transferee of a non-transferable holding for the raiyat, is not a recognition of the transfer even though the transferee describes himself as a purchaser in possession. 33 I C 718.

—S. 170 (3)—A usufructuary mortgagee can deposit under S. 170 (3) when a part of nontransferable occupancy holding is being sold in execution of a rent-decree. 1920 Pat 49.

—S. 170 (3)—Non-transferable occupancy holding may be transferred provided that when it is a sale of the entire holding the landlord is in absence of consent ordinarily entitled to enter. A private purchaser of such holding can make a deposit under S. 170 (3) to prevent the sale by the landlord, 20 C W N 39=22 C L J 106=27 I C 176

—S. 170 (3)—No deposit under S. 170 (3) can be made by an unregistered transferee of an occupancy holding. Voidable interests in S. 170 (3) are those which are incumbrances within S. 161. Under S. 161 unregistered purchaser's interest in the whole holding is not an incumbrance. 1 Pat L T 403=2 Pat L W 364=38 I C 337

—S. 170 (3)—A purchaser of a permanent tenure prior to the landlord's

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

suit for arrears cannot deposit under S. 170 (3). 16 C W N 94=13 I C 328

—S. 170 (3)—Judgment-debtor in S. 170 (3) does not include one who purchases the holding from recorded tenant before the rent suit one claiming possession as a tenant for more than 12 years to the knowledge of the landlord has an interest which is voidable on sale within S. 170 (3). A rent decree against a recorded tenant does not bind his purchaser who is not only in possession but is recognised by the superior landlord and his interest does not vanish by execution-sale of such a decree. 16 C L J 548=17 C W N 163=16 I C 977

—S. 170 (3)—A purchaser at a rent-sale who is not a party to subsequent rent-decree cannot under s. 170 (3) make a deposit for the latter decree, his interest not being voidable. If he is a benamidar of the original tenant he has no interest voidable or otherwise and so no right of deposit under s. 170 (3) 48 I C 965

—S. 170 (3)—Sale of holding—Application to deposit money to save sale—Summary rejection—Remedy. see 11 I C 125.

—S. 170 (3)—A non-transferable occupancy holding's transferee has no interest in it & cannot make deposit under s. 170 (3) to stop its sale in execution of a rent-decree. To allow him to deposit & so to prevent execution is an irregularity open to revision by High Court. 16 C W N 421=13 I C 487=15 C L J 383

—S. 170 cl. (3)—Transfer of portion of non-transferable occupancy holding—Effect on tenancy. See 23 I C 839

—Ss. 170 (4) & 171—The landlord sold the holding in execution of a rent-decree & the prior purchaser deposited the money & the landlord knowing who he was agreed to its being set aside held that landlord cannot question the purchase. S. 170 (4) does not relate to procedure; it is a rule of evidence & is not retrospective. 9 I C 619

—S. 171—In execution of a rent-decree, the decision regarding the rights of a usufructuary & a simple mortgagee, under their mortgages is unappealable as the questions are not related to execution, satisfaction or discharge of decree & not between parties to the suit or the representatives under s. 47 C P C Nor are they to be summarily decided under s. 171. 29 C L J 416=52 I C 980

—S. 171—Co-tenant's interest is not voidable but void on sale. So when a co-share tenant to save it paid up the decretal sum due from his co-tenants he gets no lien on their share. 15 C W N 782=11 I C 501

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S. 171—On an application under s. 171 it was ordered that applicant may make a deposit but there was no decision as to whether he had any interest voidable on sale. Held that there was material irregularity & under s. 115 C P C High Court could interfere also the order was unappealable as the original application was by a stranger & so not within s. 47 C P C. 17 C W N 602=16 I C 202

—S. 171—Money paid by a mortgagee to a vert a sale do not become part of the mortgage amount entitling him to include that sum as remaining due on his mortgage under s. 83 T P Act. When such payment is made the statutory mortgage has priority over his charge. Assuming his right to repudiate the statutory charge & that he can add the amount to the mortgage sum he is put to election as to his remedies. 21 C L J 429=29 I C 929

—S. 171—Deposit for saving property from sale—Deposit by alleged mortgagee—Mortgage found invalid—Voluntary payment—See Contract Act, 1872, ss. 69, 70. 9 Ind Cas 615

—S. 171—To prevent sale of the holding in execution of landlord's rent-decree an unrecognised transferee of a non-transferable holding has a right to deposit the decretal amount. 50 I C 596

—S. 171—A proprietor decree-holder withdrawing the deposit under protest does not thereby recognise the transferee as his tenant. 38 I C 366

—S. 171—The tenure is liable to be sold for the money paid by a se-putnidar to satisfy putnidar's decree against the dar-putni held that such money was a charge on the entire tenure could be split up. In appeal by one of the debts, the question was raised as to the proper form of the decree, the appeal court must set it in a right form. 14 C L J 134=11 I C 897

—S. 171—S. 171 cannot benefit an unregistered co-sharer against the holder of a rent-decree when he makes a deposit to prevent the sale of the holding 35 I C 584

—S. 171—When payment is made directly to plff under Court's orders it is equivalent to 'payment into Court'. A I R 1922 Pat 656=1922 Pat (Sup) 347=4 P L T 134=71 I C 473

—S. 171—A patnidar got a decree against darpatnidar & by making a deposit sepatnidar obtained an order under s. 171 (3). The purchaser is bound by the order as darpatnidar's interest was already sold under mortgage decree. A I R 1921 Cal 350=33 C L J 494=63 I C 1094

—S. 171, 166 & 167 "Interest voidable on the sale" in s. 171 mean such interests as can be avoided or annulled under Ss. 166

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

& 167 by the decree holder. A tenant's donee or reversioner has no right to make a deposit. 3 Pat L J 145=4 Pat L W 84=43 I C 23

—S. 171 (1) (b)—Rights of darpatnidar  
—Ben Reg VIII of 1819, s. 13 (4), 15 C W N 404=9 I C 489

—S. 171 (6)—Payment of first charge on the putni—Mortgagee's prior right to surplus sale proceeds. see 15 C W N 404=9 I C 489.

—S. 173—Quere—Whether a person claiming an occupancy right can have the execution sale for rent set aside. A I R 1931 Cal 425=35 C W N 31=Ind Rul (1931) Cal 449=131 I C 561

—S. 173—A stranger auction-purchaser may appeal from an order setting aside the sale on judgment-debtor's application under s. 173 19 C L J 81=20 I C 191

—S. 173—Application for setting aside rent sale—Limitation—Starting point. see 24 I C 366

—S. 173—Auction sale—Application to set aside sale on the ground of judgment debtor purchasing benami—Limitation. see 38 I C 209.

—S. 173—Execution sale—Order setting aside sale on the ground that auction purchaser was benamidar for one of the judgment debtors—No appeal. 46 I C 748

—S. 173—An auction-purchaser has no right to appeal against an order under s. 173 though judgment-debtor might have alleged fraud. 19 C L J 81=20 I C 191

—S. 173—It is not always than an order under s. 173 is unappealable. Whether appeal lies or not depends upon whether the question is about execution and whether it is between the parties or their representative bringing it within C P C s. 47. 15 C W N 512=13 C L J 257=7 I C 769

—S. 173—Unrecorded co-sharer if representative of recorded co-sharer—Order under s. 173 when appealable. 15 C W N 512

—S. 173—Sale in execution of non-transferable occupancy—Application to set aside a prior purchase. see 27 I C 431

—Ss. 173, 194—Operation of, controlled by s. 194 20 C L J 551=27 I C 397

—S. 173—Quere Whether a person claiming occupancy right can set aside the execution-sale I R (1931) Cal 449=131 I C 661

—S. 173—No appeal lies against an order setting aside the sale under both provision. When the application to set it aside under O 21 r 90 C P C and also under s. 173 is made. A I R 1927 Cal 833=46 C L J 172=104 I C 825

—S. 173—No appeal is competent against an order under s. 173 setting aside a sale. A I R 1926 Cal 213=87 I C 744

## BENGAL TENANCY ACT 8 OF 1885 (Contd.)

—S. 173—When the case comes within s. 47 C P C order under s. 173 is appealable but no appeal is competent by the auction-purchaser A I R 1925 Cal 1223=85 I C 750

—S. 173—An application under s. 173 is governed by art 166 Limi. Act A I R 1925 Cal 351=51 C 1014=82 I C 322

—S. 173—A sale was set aside under this sec. as well as under C P C, O 21 r 90. Right of appeal against an order under the former is not conferred by existence of such right under the latter. see A I R 1922 Cal 180=77 I C 522

—S. 173 (2)—An execution-sale to the judgment debtor himself is voidable under s. 173 (2) and is valid till duly not set aside. A I R 1924 Pat 318=5 P L T 13=74 I C 769

—S. 173 (3)—An auction-purchaser cannot appeal when a sale is set aside A I R 1928 Cal 202=32 C W N 98=105 I C 561

—S. 173 (3)—Court has discretion to decide whether under s. 173 (3) the sale is voidable or not and its decision is not open to revision unless serious prejudice results. A I R 1925 Cal 293=80 I C 708

—S. 173 (3)—Under O 21 r 89 C P C a co-sharer purchaser of a non-transferable holding cannot make a deposit of the rent decree. A I R 1924 Pat 513=2 Pat L R 12 Civ.=80 I C 823

—S. 173 (3)—The sec. applies only when judgment-debtor is the purchaser directly or indirectly in execution sale. 57 I C 404

—S. 173 (3)—When one of the grounds to set aside the sale was that the judgment-debtor was the purchaser through a benamidar does not bring the case within s. 173 (3) when there were other grounds also. In such cases the court is in duty bound not to proceed summarily under s. 173 but to try it under C P C and the decision would be open to both appeals. 33 I C 574

—S. 174—A suit for setting aside an order under S. 174 cannot be maintained. 62 I C 743.

—S. 174—Judgment debtor is not bound to pay cost of the copy of the decree of separate vakilatnama. In claiming relief misleading by court clerk is no excuse but if the mistake is due to courts neglect he has a right to the relief. A I R 1924 Pat 256=4 P L T 642=71 I C 925.

—S. 174—The sec-is applicable to a rent-sale under B Rent Recovery Act of property in Orissa. 38 C L J 229 (P C)=75 I C 278.

—S. 174—There is no appeal against an order refusing to set aside the sale. A I R 1924 Cal 791=39 C L J 522=86 I C 264.

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—S. 174—The sale is not to be set aside when there is a full deposit but made in slightly erroneous manner. A I R 1926 Pat 55=7 P L T 11=88 I C 989.

—S. 174—The order setting aside the sale is unappealable by the auction-purchaser. A I R 1926 Pat 55=7 P L T 11=88 I C 989.

—S. 174—There is no appeal on a question under the Sec. between the judgment-debtor & the auction purchaser. A I R 1925 Pat 525=4 Pat 718=6 P L T 795=(1925) Pat 183=91 I C 217.

—S. 174—Judgment-debtors holding was sold to a stranger in execution & 5 p. c. was paid within a month. Then the decree-holder & the Judgment-debtor both applied to have it set aside. It was held that the Sec. is not fully complied with. A I R 1925 Pat 525=4 Pat 718=6 P L T 795=(1925) Pat 183=91 I C 217.

—S. 174—There is no appeal against an order under S. 174, A I R 1926 Cal 1236=97 I C 306.

—S. 174—Judgment-debtor's application falls within S. 174 though the decree is satisfied out of Court. A I R 1926 Cal 1236=97 I C 306.

—S. 174—An order under S. 174 does not come within C P C s. 47. A I R 1930 Cal 302=50 C L J 532=34 C W N 250=I R (1930) Cal 433=124 I C 481.

—S. 174—An order setting aside a sale under the Sec. is unappealable. A I R 1930 Cal 302=50 C L J 532=34 C W N 250=I R (1930) Cal 433=124 I C 481.

—S. 174—The Sec. is sufficient by complied with by the judgment-debtor when due to Court officials mistake a short deposit was made which was made good when the mistake was known. A I R 1930 Cal 302=50 C L J 532=34 C W N 250=I R (1930) Cal 433=124 I C 481.

—S. 174 (as amended by Act IV of 1928) and S. 185—Application to set aside sale on grounds of fraud and irregularity in the sale proceedings and non-service of notice of sale proclamation on the defendant—knowledge of sale—Limitation Act S. 18 applicable—Limitation Act S. 29 (2). A L R 1933 C 457

—S. 174 (as amended by Act. IV of 1928)—Application to set aside sale—presumptive reversioner—is a "person whose interests are affected by the 'Interest' not restricted to proprietary or necessary interest. A L R 1933 C 182=37 C W N 329

—S. 174—An application to set aside a sale on deposit was made under S. 174 But the deposit fell a little short through mistake of the Court. But the applicants deposited the deficit as soon as they knew it. Purchaser's application to set aside the sale where the decree-holder was not a

**BENGAL TENANCY ACT VIII OF 1885 (Contd.)**

party was originally rejected but allowed by the first appeal Court held that no second appeal lies proceedings under S. 115. C P C Could not be revised by the High Court. 32 C L J 12=58 I C 816.

—S. 174—Time for depositing under S. 174 B T Act or O 21 r 89 C P C could not be extended. But if delay is due to Court action then the position is different as an act of Court prejudices none S. 174 is applicable to all purchasers whether strangers or decree holders. It is obligatory on judgment-debtors to deposit the decretal sum in the costs which are rightly incurred by the decree-holders subsequent to decree & in execution. An execution proceeding is essentially a continuation of the suit. A pleader engaged in a suit may appear on behalf of his client in execution proceeding without fresh authority. The poundage fee paid by decree-holders is not an integral part of the costs & it cannot be claimed from the judgment-debtors. On setting aside a sale of immoveable property the decree-holder has a right to refund of fee—but the poundage fee could not be recovered from the debtors. 15 C L J 89=16 C W N 736=13 I C 365.

—S. 174—An application under S. 174 could not be entertained unless the statutory conditions in the Sec. are complied with. High Court can set aside an order under S. 174 made without jurisdiction. A party can be relieved only when he is misled by an act of Court and not by wrong information of an officer of Court. Deposit of decretal sum with 5 p. c. of purchase of money under S. 174 must be made within 30 days of the sale. 3 Pat L. W 48=1 Pat L J 459=35 I C 779.

—S. 174—An application comes under O, 21 r. 89 C P C & not under 174 B. T. Act when it is made by a share holder in mokarari to deposit the purchase money for a part of it sold in execution. 36 I C 769.

—S. 174—Deposit by the judgment debtor under S. 174 is the sum recoverable under the decree with costs & not that in the proclamation under C P C O. 21 r. 89. 4 P L J 55=47 I C 654 (2).

—S. 174—Deposit of decree amount to set aside a rent sale—Amount insufficient. Mistake by officer of Court. 22 I C 842.

—S. 174—Only the judgment-debtor must deposit under S. 174. His transferee is not governed by the Sec. 43 Cal 100=29 I C 840.

—S. 174—An execution-sale under Act. VIII of 1865 taken with S. 105 Act X of 1859 can be set aside under S. 174 B. T. Act by making a deposit as Ch. XIV has been extended to districts where sale held. 14 C L J 168=16 C W N 311=11 I C 239.

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S. 174—No appeal lies from an order under S. 174. 36 I C 769

—S. 174—Because of S. 143, an order under S. 174 is appealable when the decree-holder is the execution-purchaser. 2 Pat L J 525=3 Pat L W 18=(1917) Pat 244=40 I C 662

—S. 174—A stranger to a rent-suit purchased the property at the execution sale. The judgment debtor making the deposit asked to set it aside. The Court confirmed it as depositor took no further steps. Then he sued for possession and to set aside the sale, held that the suit can be maintained but S. 151 C P C was inapplicable. Notices were not necessary under S. 174 and the Court should set aside the sale when the conditions of the Sec. are fulfilled. 52 I C 982

—S. 174—After the extension of the B. T. Act to Orissa, S. 174 is applicable to all suits filed under the old law in the Revenue Court. A I R 1921 P C 34=48 C 811=48 I A 123=38 C L J 229=25 C W N 1009=30 M L T (P C) 32=14 L W 358=(1921) M W N 399=2 P L T 453=61 I C 1=40 M L J 546=75 I C 278

—S. 174—No suit to set aside an order under S. 174 can be filed. A I R 1921 Pat 54=6 P L J 16=2 P L T 66=61 I C 126

—Ss. 174 and 170—C P C O. 21 r. 92 does not apply to judgment-debtor's proceeding for setting aside order under S. 174. A I R 1921 Pat 54=6 P L J 16=2 P L T 66=61 I C 126

—S. 174—For setting aside a sale a suit cannot be filed. A I R 1921 Pat 54=6 P L J 16=2 P L T 66=61 I C 126

—S. 174—Judgment debtor's application under S. 174 followed by a deposit is proper though in a note it was stated that the tenants had prior to sale transferred the tenure to a stranger and the purchaser had given the money. If then the judgment-debtor with decree-holder's consent withdraws the application, sale should be set aside on purchaser's application. On withdrawal judgment-debtors were asked to refund within 7 days failing which the order was directed to be executed against them as a money decree. 18 C W N 175=22 I C 885

—S. 174—A rent-sale was held and under S. 174 deposit was made by the judgment-debtor. Then he applied to withdraw the deposit and the Court refused to set aside the sale. Then the purchaser came forward saying that he had purchased it long ago and deposit was made with his money. His petition was dismissed as had no locus standi. Held that for the sake of justice the petition be allowed to use judgment debtor's name and to make a new deposit within 7 days. 10 I C 526

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S. 174—A rent sale was held on 9-3-14 and H purchased the property. A little before confirmation, B alleging that he was the execution-purchaser after the above sale, made a deposit and under s. 174 the sale was set at naught. H sued B for declaration that he had no right to deposit and he had got no title, held that such a suit could be maintained. (1919) Pat 399=3 Pat L W 264=3 P L J 122=44 I C 532

—Ss. 174, 184, 185—A Court is not authorised to lengthen the time to make deposit under S. 174. To a proceeding under S. 174, S. 18 Limitation Act is not by itself applicable. Judgment-debtor alleging fraud cannot be protected by S. 18 of Limit. Act. The order was held to be without jurisdiction when the original Court set aside the sale after 30 days because of judgment-debtor's poverty and execution creditor's fraud. 20 I C 760=18 C L J 533=18 C W N 31

—S. 174—Judgment-debtor only can apply under S. 174. So a person acting on another's behalf under S. 174 must establish his authority if challenged. 16 C L J 546=15 I C 561

—S. 174—A judgment-debtor's application under S. 174 was refused because pounage fee was not deposited, held that the order was appealable. 16 C L J 542=15 I C 436

—S. 174—Scope of, limited—Application raising question as to decree beyond scope of section. see. 52 I C 514

—S. 174—Proviso. After a rent sale on 19th Augu. 1910, on 23rd judgment-debtor applied to set aside the sale because of material irregularity and notice was issued to the decree-holder and the auction-purchaser. On application dated 17th Sept. under S. 174 of the judgment-debtor he was ordered to make the deposit which was duly made. On Sept. 24th the case under C P C O. 21 r. 9 was on hearing and the judgment-debtor applied to withdraw it. Held that under the proviso he could not apply under S. 174 and the application itself could not be regarded as a withdrawal from the proceedings, justifying the sale being set aside on acceptance of the deposit. 11 I C 757

—S. 174 (1)—"Judgment-debtor" in S. 174 means one against whom a decree is passed in execution of which the sale is held. So debt against whom no decree is passed is not a judgment debtor. 15 C L J 170=14 I C 453

—S. 174 (3)—Tenant's holding and not his interest is sold under the Sec. So an auction-purchaser cannot under C P C O. 21 r. 91 apply for setting it aside on the ground that there was no saleable interest. A I R 1926 Cal 738=43 C L J 279=94 I C 292



## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S 174 (5)—Proviso to the Sec. is not retrospective and does not affect an appeal from an order under C P C O 21 r. 90 when such order was passed prior to the amendment Act. A I R 1931 Cal 92 (2)=34 C W N 820=58 C 167=I R (1931) Cal 318=129 I C 878

—S 174 (5)—The Sec. has no retrospective effect. A I R 1931 Cal 100=54 C W N 1009=I R (1931) Cal 289=129 I C 849

—Ss 174 (5) and 153—Case coming under S. 153—Sale—Fraudulent suppression of processes of—Application to set aside sale on ground of—Order on—Appeal from—Not competent. 36 C W N 330=I R 1932 C 482=138 I C 647=A I R 1932 C 490

—S 174-A (2) Proviso—Order under S 174—Condition of—Notice of application to make deposit under that section being given to the auction purchaser is a—Absence of such notice is a good ground for reviewing the order. 137 I C 430=I R 1932 C 302=A I R 1932 C 265

—S 174-B—A landlord is not precluded from claiming pre-emption by reason of his agreeing to have the rent sale, at which he purchased the holding set aside. 51 C L J 231=35 C W N 656

—S. 178—Award of interest on arrears of rent under a kabuliyat executed before the Act, at rate stipulated therein, is not discretionary with Court. The tenant's conduct does not affect landlord's contractual right to interest. A I R 1931 Cal 111=34 C W N 905=58 C 84=Ind Rul (1931) Cal 338=130 I C 274

—S. 178—A lease of permanent settlement for agricultural use provided that if lessor took to cultivation subsequently i. e. after 12 years, the lessee should give it up, held that provision was not consistent with lessee's interest, was bad as remote & was opposed to S. 178. 15 I C 575

—S. 178, 179—The law as it now stands makes all stipulations as to payment of interest in excess of 12½ per cent unenforceable whether the contract was executed before or after the passing of the Bengal Tenancy Act or whether it related to a permanent mokarrari tenure or not. 54 C L J 215=Ind Rul (1931) Cal 883=134 I C 883

—S. 178—A plot of land with trees let out to a lessee who can enjoy the fruits & plant fresh trees is not a garden but is really an orchard to which T P Act & not B T Act applies. Whether a holding is horticultural is a question of fact depending on circumstances. 42 I C 580

—S. 178—A tenant's agreement to pay higher rent than recoverable under the Act

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

is not illegal & though unenforceable is still a condition precedent to renewal. A I R 1926 Cal 162=90 I C 893

—S. 178—Agreement is void when its effect is to prevent the deft. a settled raiyat from acquiring the occupancy right under S. 21 in suit-land. A I R 1925 Cal 1065=85 I C 793

—S. 178—The sec. is not contravened by executing a registered lease of zerait lands after occupation for a small period. A I R 1925 Pat 241=4 Pat 89=6 P L T 240=(1924) Pat 337=84 I C 305

—S. 178—The Sec. is not contravened by a compromise with regard to the very existence of occupancy right. A I R 1925 Pat 113=75 I C 992

—S. 178—Tenancy on fresh terms is acceptable when the tenants are raiyats at fixed rent in 1890. A I R 1923 Cal 141=36 C L J 333=70 I C 437

—S. 178—The Sec. is applicable when a compromise decree creates a tenancy. A I R 1921 Cal 565=34 C L J 157=66 I C 766

—S. 178 (1) The agreement is valid & the lease does not come under the Sec. when in a lease prior to the Act it was stipulated that landlord could assess rent at prevailing rate. A I R 1926 Cal 1177=96 I C 565

—S. 178 (1) A & C-A putni lease was created with a condition that putnidar should give up lands to the proprietor when required & with the same condition putnidar leased out the lands. Proprietor can claim back the necessary lands & the Sec. is not infringed. A L R 1927 Cal 41=44 C L J 220=98 I C 46

—S 178 (1)—Operation of, controlled by s. 194. 20 C L J 551=19 C W N 1197=27 I C 397

—178 (1) (a)—If holding is acquired by Govt. a share of compensation will not be claimed is a valid agreement. A I R 1922 Cal 187=35 C L J 133=62 I C 793

—S 178 (1) (c)—The landlord and the tenant cannot contract contrary to s. 49. A I R 1925 Cal 199=28 C W N 984=84 I C 730

—S 178 (3)—It is a void agreement to pay high rent in consideration of a non-existing obligation. A I R 1922 Pat 171=3 P L T 3=6=(1922) Pat 177=67 I C 49

—S 178 (3)—Applicability—contract after the passing of the Act, but before its commencement. 24 I C 9

—S 178 (3) (b)—The proviso to the Sub-Sec. gives the only distinction between orchard land and agricultural land and specially provides for contracts for temporary cultivation of orchard lands. A I R 1930 Pat 529=11 P L T 559=I R (1931) Pat 1=128 I C 113

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—Ss 178 (3) (b) & 23—To cut trees is within s. 23 user of land. An occupancy raiyat's agreement not to cut trees is not binding but in spite of contrary custom agreement not to appropriate trees is binding. A I R 1927 Cal 268=31 C W N 192=100 I C 7

Ss. 178 (3) (H) & 67—It was agreed to pay the rent arrears of two tenures for previous four years in 6 instalments and on default of 2 successive instalments, the plff was to realise the money due with interest at 2 p. c. from the date of the bond and as security debts mortgaged some land which they held as plff's raiyats held that relationship of landlord and tenant ceases but becomes that of mortgagor and mortgagee & so s. 178 (3) (h) and 67 did not apply to interest provisions. 2 Pat L J 367 =3 P L W 337=39 I C 736

—S 178 (c)—Right of occupancy—record of rights—entry in favour of an under-raiyat—lease executed subsequently by under-raiyat—whether can supersede right in existence. A L R 1933 C 512

—S 179—A permanent tenure-holder, even if he has no mokurrari interest can create a mokurrari under-tenure which will be binding on the purchaser unless annulled under s. 167. 53 C L J 512=35 C W N 806 =Ind Rul 1931 Cal 627=133 I C 99

—S 179—Kabulyat creating permanent mokurrari and providing for enhanced rent—validity. 1 Pat L J 76=35 I C 437

—S 179—A patni lease prior to B T Act provided that the patnidar should provide wood for some idol. On his failure zemindar sued for the price. Held that as the value of the wood was not an integral part of and not incorporated with rent nor of the patni, it was not recoverable, being an abwab. The debts, original patnidar's representatives were asked to execute a security bond in 1903 and they did so held that the security bond was not a new lease and the plff. was not assisted by s. 179. 15 C W N 568=9 I C 167.

—S. 179—Stipulation to pay high rate of interest whether a penalty. see. 21 C W N 112

—S. 179—Applicability—Abwabs. 9 Ind Cas 47

—S. 179—When a tenancy was created prior to the Act. Tenant has a right to exclude abwab & it cannot be made payable by s. 179. A I R 1929 Pat 307=10 P L T 329=8 Pat 655=I R (1929) Pat 561 =119 I C 65

—S. 179—Tenant & landlord are at liberty to make any contract they like in a Permanent Mokarrari. A I R 1925 Cal 1065=85 I C 793

—S. 179—Rent must be presumed to be fixed one when in a lease of the per-

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

manent Mokarrari tenure it was stipulated to pay excess rent for such area. A I R 1922 Cal 18=80 I C 315

—S. 180—"His holding", meaning of. see. 18 C W N 598

—S. 180—An unregistered lease of churland for a term of years, the rent being Rs. 2 per bigha for such land as was capable of being brought into cultivation is not one of an utbandi nature but is a non-occupancy holding to which ch. VI. applies. 42 I C 544

—S. 180—Some churlands were part of the holding for which rent was paid for was 12 years & the churlands were occasionally sub-merged, held that tenant's right to acquire occupancy rights is not destroyed by such submersion. 2 Pat L J 48=38 I C 679

—S. 180—Fluvial action forms churland & it refers not to site but to soil. A I R 1925 Cal 249=29 C W N 290=80 I C 702

—S 180—S. 180 A should be read with s. 115 C. Second appeal does lie against a decision involving fundamental question like the extent of area as it is not one merely settling rent. 35 C W N 19

—S 180 (a) & (b)—Till order under s. 180 (a) is made utbandi character of tenures continues & it is immaterial that occupancy right are obtained before the order. A I R 1929 Cal 296=I R (1929) Cal 689=118 I C 881

—S. 180 A—The whole area should be taken into account & calculation is to be on the average rent actually paid for cultivated part & rent 'payable' for the uncultivated. 35 C W N 19

—S. 180 A—In assessing uniform rent is premissible though two different procedures in s. 180 are followed. 35 C W N 19

—Ss. 180 A & 180 B—Tenant's liability to pay a fair & equitable rent for utbandi lands arise after occupancy right is acquired by him. A I R 1929 Cal 614=58 C L J 294=34 C W N 127=I R (1930) Cal 509=125 I C 285

—Ss. 180 A & 180 B—Custom or existing arrangement is not interfered with by introduction of the sections in 1923. A I R 1929 Cal 206=I R (1929) Cal 689=118 I C 881

—180 A—The entire area of the tenancy must be taken into account in fixing rent under s. 180 A—The average rent actually 'paid' for cultivated portion, and the rent 'payable' for uncultivated portion must be calculated. A I R 1931 Cal 550=35 C W N 19=Ind Rul (1931) Cal 569=32 I C 249

—S 180 A—Second appeal is maintainable from a decision involving a fundamental question as to tenancy such as extent of area with reference to which rent has to be assessed. A I R 1931 Cal 550=35 C W N 19=Ind Rul (1931) Cal 569=132 I C 249

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S 180 A—The following of two different procedures in s 180 A in assessing uniform rent, is permissible. A I R 1931 Cal 550=35 C W N 19=Ind Rul (1931) Cal 569=132 I C 249

—Ss. 180 (1) and 180 (2)—Acquisition of occupancy rights by utbandi raiyats—Chapter VI whether applicable. A I R 1933 C 477

—S 181—Acquisition of occupancy rights in Chaukidari Chakran lands—Rights of zamindar—Transfer of lands to Zamindar—Zarait land of Zamindar. see 52 I C 191

—S 181 The expression 'Jagir Khudkast land' does not necessarily mean service tenure within s. 181. 45 I C 418

—Ss. 181 & 19 Ghatwali land was subject to acquisition of occupancy right from 1859 to 1885 & s. 181 does not take away such rights enjoyed or acquired. 22 C W N 763=27 C L J 556=46 I C 485

—S 181—In service tenancies of a Police character occupancy right does not accrue in absence of custom or usage. A I R 1928 Pat 603=7 Pat 566=109 I C 287

—S 181—"Service tenure" truly means 'service tenancy' and a tenure in contra distinction to a holding is not implied. A I R 1928 Pat 603=7 Pat 566=109 I C 287

—S 181—Rights obtained under s. 6 Act X of 1853 are not affected by s. 181. A I R 1927 Cal 46=44 C L J 271=98 I C 862

—S 182—Utbandi raiyati holding—applicability of the section. A L R 1933 C 505

—S. 182—Suit for rent prior decree for entire amount of rent claimed—no plea of dispossession taken then—plea of dispossession in the present suit—Civil Procedure Code (Act V of 1908), S. 11 doctrine of constructive res judicata no bar 'might' and 'ought' difference. A L R 1933 C 492

—S. 182—Benamidar—mortgaged property—right of the mortgagor on the date of mortgage—whether can be denied by the mortgagee as benami—analogy of S. 65 Cl. (a) of the Transfer of Property Act. A L R 1933 M 697

—S. 182—Benamidar—person executing a mortgage benami for the real owner—or a transferee from his heirs—can maintain a suit for redemption benamidar a trustee for the real owner. A L R 1933 M 697

—S 182—Incidents of raiyati & under-raiyati holdings are considered. A settled raiyat having homestead as an under-raiyat cannot be ejected from the latter 123 I C 628

—S. 182—Homestead—ejectment. See 21 C L J 475

—S 182—In an ejectment suit under T P Act debts were found to be raiyats of the neighbouring lands & the disputed

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

land was taken to store the crops of the adjacent land, held that they were also raiyats for the suit land & could be ejected only under B T Act. S. 182 applies to all agricultural lands & is not restricted to lands actually cultivated "Homestead" in S. 182 means land used by a raiyat for residential purposes. To apply S. 182 it is not necessary that the homestead should be in the same village or under the same landlord as raiyats holding. 20 C W N 550=22 C L J 219=31 I C 16

—S 182 For application of S. 182 it is not essential that the raiyat as such should hold other land in the same village 49 I C 267

—S. 182—Whether ryot's homestead forms a part or not of the agricultural holding the B T Act applies to it either because of S 182 or the general provisions of the Act. 46 I C 489.

—S 182—B. T. Act applies to a tenancy for building a shop in market where he afterwards resides when the tenant has occupancy right in some jamas under the same landlord in another village from before acquiring the tenancy. 43 Cal 195=34 I C 152=25 C L J 357

—S 182—One must be a raiyat before he becomes a settled raiyat of the village. One does not become so by merely occupying a homestead in the village for more than 12 years. 47 I C 829

—S 182—A raiyat purchased two plots of land from the raiyats to whose homestead they belonged, since then rent was paid by him but subsequently the landlord brought an ejectment suit, held whatever they were the plots were now agricultural land held by raiyat and the Act applies. 13 I C 289

—S 182—A raiyat possessing an agricultural jote paid rents for 2 years and built a homestead and lived there, held that in absence of any usage or custom S. 182 applied and she is a raiyat regards homestead. 26 C L J 88=41 I C 472

—S 182 art. 3—A person possessed a house, some homestead land and a raiyat holding in a village. He sold the house and the land to the plff. Who was dispossessed by the landlord, held that art. 3 does not apply. As the plff's claim was not as an occupancy raiyat, he did not hold it as part of his jote and the original tenant's agricultural lands not being sold to him, he cannot be an occupancy raiyat with reference to homestead land 21 C L J 473=29 I C 859

—S 182—Part of agricultural holding—Incidents of tenancy. see 19 I C 78

—182 & 21—Settled raiyat—Acquisition of land for homestead—Right of occupancy see 50 I C 8

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—S. 182—The Contract Act and not s. 182 is applicable to a person who is not a raiyat but a resident in a village. A I R 1926 Pat 606=100 I C 584

—Ss 182 & 49—S. 182 is inapplicable and the landlord can eject by serving notice when under-riayats hold homestead along with other lands as part of their tenancy. A I R 1927 Cal 191=44 C L J 311=99 I C 216

—S. 182—Contractual rights about homestead are abrogated. A I R 1926 Cal 1199=44 C L J 302=96 I C 541

—S. 182—When homestead is not held as a part of the holding the Section is applicable. A I R 1926 Cal 1199=44 C L J 302=96 I C 541

—S. 182—The section is applicable to raiyat's lands. A I R 1926 Cal 662=43 C L J 132=94 I C 920

—S. 182—Raiyat cannot be evicted when his culturable lands form part of the homestead. A I R 1926 Cal 580=92 I C 843

—S. 182—Provisions about homestead of under-riyat as well as a raiyat are the same. A I R 1927 Cal 96=91 I C 183

—S. 182—Not the B T Act but the T P Act is applicable when land is let for shop & is used as such. A I R 1926 Cal 373=42 C L J 197=90 I C 805

—S. 182—The Act does not apply when a tenant holding a portion of land does not form a part of his any other holding A I R 1925 Pat 612=3 P L R 174=88 I C 553

—S. 182—The Act is applicable to land used for keeping agricultural cattle. A I R 1923 Cal 667=37 C L J 524=74 I C 552

—S. 182—The character of the land justifying its use as homestead is not enough. The section only applies when land is held as homestead. 72 I C 640

—S. 182—To homestead S. 30 is applicable but tenant can show that rent of such land is not liable to enhancement by custom or local usage. A I R 1922 Cal 510=36 C L J 305=27 C W N 962=70 I C 535

—S. 182—For application of the Sec. it is not necessary that the homestead be in the same village or under the same landlord as the raiyat's holding. 22 C L J 219=20 C W N 550=31 I C 16

—S. 183—Acquisition of occupancy right by custom or usage—Under raiyat continues as such and not liable to be ejected. 22 C W N 618

—S. 184, art. 3—A tenant dispossessed in 1903 by his landlord sued for declaration of title and possession in 1909. Held the suit is not time-barred under art. 3 and applicable to all raiyats under s. 61 (3) of B T Amendment Act of 1907; when this

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

act was passed the plff. had a vested right to sue and was not thereby deprived of it. The amendment might regulate the procedure to which the plff. could not comply but could not apply to suits when such compliance is impossible from the beginning P C decision in 35 All 227 does not affect 17 C W N 889. Unless expressed unequivocally a vested right is not taken away. 18 C W N 804=19 C L J 549=41 I C 1125=24 I C 37 (F B)

—Ss. 184 & art. 6—A rent-decree was passed without mentioning the relief given but was subsequently amended by the Court on an execution application made more than 3 years after the decree but within 3 years of the amendment. Held the decree before amendment was like one unsigned by the judge and so no question of limitation arises also art. 6 is in applicable here. 18 C W N 266=21 I C 615.

—Ss. 184, 193, Art 2—By a registered deed debt. was allowed to remove and sell all trees within a specified limit for 5 years also he could sub-let and if occasion arises to re-enter setting off the money so realised against that due from the lessee but if the trees were not cut or removed before the period was over the grantee was to have no rights or interest. Held that it was a grant of forest rights under B T Act and was governed by Ss. 184 and 193. Deft's Manager being authorised generally paid Rs. 15 through a Mohurrir and followed it by its entry in his account book with his own hand. Held that the payment being made by the Manager was by an authorised person for s. 20 Lim. Act. The Raja and the deft. sued under the grant, the former for rent and the latter for damages. It was found that Raja's claim was mainly time-barred and the latter's dues fell short of the barred arrears. Held that decree for damages was rightly refused as deft. had recouped himself. 23 C W N 336=50 I C 862.

—Ss. 184, 185—Extension of, to suits prescribed under s. 104. 45 Cal 934.

—Ss. 184, 185, sch III, art. 3—Applicability of s. 28, Limitation Act—See. 14 C L J 292.

—S. 184—Though plea of limitation be not raised the suit must be dismissed when it is filed after the period shown in the Schedule. A I R 1930 Pat 256=I R (1930) Pat 533=11 P L T 197=9 Pat 788=125 I C 565.

—S. 184—Application of s. 14 Limi. Act is not excluded by the section. A I R 1929 Cal 325=I R (1930) Cal 161=33 C W N 227=56 C 805=121 I C 673.

—184—Special limitation is inapplicable when landlord is not the dispossession. A I R 1927 Cal 831=105 I C 600.

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—S. 184—Jurisdiction remains unaffected though decision is wrong. Unless contrary be shown it is assumed that the plea of limitation is decided by the court. A I R 1927 Pat 261=8 P L T 494=101 I C 694.

—S. 184—When a question of limitation was put up in the written statement but not pressed in original court, it can be pressed in appeal. A I R 1925 Pat 549=3 P L R Civ. 132=7 P L T 253=89 I C 340.

—S. 184 & Art 6—In the execution of rent-decree to extend limitation s. 19 Limit. Act is applicable. A I R 1922 Cal 187=26 C W N 486=34 C L J 135=64 I C 993

—S. 185—Sch III of Act—Cases under, between 1922 and 1928—Applicability to, of Ss. 19 and 20 of Limitation Act—S. 29 of Limitation Act—Effect of. 36 C W N 833 (836)

—S. 185 (2) and art 3—"Dispossession" means coming in of one and driving out of another. The plffs. got lease of 12 cottals but possession was given of 7 cottals only and the defts agreed to vacate the remainder after sometime. But they failed and continued the occupation of 5 cottals, held that it is not such dispossession as to make art 3 applicable. By S. 185 (2), art 144 Limit. Act applies and the suit is within time if within 12 years from the deft's adverse possession. 32 C L J 9=58 I C 844.

—S. 185 (2)—There is no conflict between S. 185 (2) to and Limit. Act as amended by S. 29 (2) (b) of Act 10, 1922. A I R 1930 Pat 301=I R (1929) Pat 603=9 Pat 747=126 I C 299

—S. 185 & Art 3 Quære—Whether title to property is also extinguished on the expiry of the limitation under Art 3. A I R 1930 Pat 476=I R (1930) Pat 650=11 P L T 447=126 I C 858

—S. 186 (a)—Before damages under S. 186 (a) are awarded, it must be found out whether there exists a reasonable or probable cause & the court should give its reasons for arriving at that decision. 15 C L J 114=9 I C 805

—S. 186 (a)—S. 186 (a) is inapplicable to landlord's civil suit for possession when the tenant successfully denied his title in a suit for rent. 29 I C 472

—S. 186 (a)—Relationship of landlord and tenant denied—Forfeiture. See 16 C W N 730=14 I C 719

—S. 188, has no application to a suit for ejectment inasmuch as such a suit is not a thing which the landlords are required or authorized to do under the Act. All that the Act requires is that under S. 49 all the landlords should join in determining the tenancy. After the tenancy is once determined the action which the landlords take in ejecting the defendants and bringing a suit for the purpose is not

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

a thing which is required or authorized to be done by the Act. The suit therefore by some of the landlords cannot fail on the ground that one of them had accepted the tenants as his tenants. 13 P L T 432=A I R 1932 P 259 (261)=140 I C 14=I R 1932 P 289

—S. 188—In a suit by a co-sharer landlord as plaintiff for assessment of rent payable to such co-sharer landlord it is not necessary that the other co-sharers should join as plaintiffs where there is no dispute about the extent of the share of the co-sharer plaintiff, based on the principle that a suit to have fair and equitable rent assessed is consistent with and arises out of the general law, and was not one which the landlord was required or authorized to do under the Bengal Tenancy Act within the meaning of S. 188 of the Act. 54 C L J 74=A I R 1932 C 41 (42)=133 I C 693

—S. 188—An agreement by a tenant with some of several joint landlords to pay separately to them a fixed amount on account of their share of the rent does not constitute a separate tenancy and does not, in a suit for enhancement, relieve such co-sharer landlord from the bar imposed by S. 188. 13 P L T 309=137 I C 859=I R 1932 P 158=A I R 1932 P 221=A L R 1932 P 331

—S. 188—There is no doubt that in the cause title the suit has been loosely described as one under the rent law, but that did not necessarily bring into operation the provisions of the Bengal Tenancy Act, when it is apparent from the plaint that the main reliefs claimed by the plaintiff was under the general law. It is impossible therefore to give effect to the argument that the suits were under the provisions of the Bengal Tenancy Act. (Guba J) Gour Sundar v. Krishna Kamint (1931). 54 C L J 74=A I R 1932 C 41 (42)=133 I C 693

—Ss. 188 and 26-F—Co-sharer landlords Application under S. 26-F by one of—Competency of—Other co-sharer landlords not made parties defendants. 37 C W N 89

—S. 188—Back rent can be claimed and decreed in such suits by way of compensation for use and occupation. 54 C L J 74=Ind Rul (1931) Cal 741=133 I C 693

—S. 188—Non-payment of rent for several years is no bar to such a suit right subsists so long as relationship subsists. 54 C L J 74=Ind Rul (1931) Cal 741=133 I C 693

—S. 188—In a suit by a co-sharer landlord, other co-sharer landlords, need not be plaintiffs. It is enough if they are parties defendants. Such a suit is under the general law. 54 C L J 74=Ind Rul (1931) Cal 741=133 I C 693



## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S. 188—C—Held a tenure under A & B The joint landlords with interests in defined shares. A with out joining B cannot bring a declaratory suit that C is not a tenure-holder. A I R 1930 Cal 693=34 C W N 379=130 I C 433

—S. 188—When the kabulyat is in his favour a co-sharer landlord can sue for enhancement. A I R 1929 Cal 397=I R (1930) Cal 1=33 C W N 311=120 I C 145

—Ss. 188 & 105—When the plff. is the sole karta of the family & the sole recorded proprietor, he can apply under s. 105. It is not necessary to join his sons. A I R 1926 Pat 461=7 P L T 540=(1926) Pat 256=97 I C 436

—S. 188—Plff. fully represented the estate at the time of filing the suit & those subsequently interested in it were joined as plffs. The suit is not defective as originally filed. A I R 1926 Cal 737=91 I C 657

—S. 188—The Section is inapplicable when under separate agreements rent is claimed on separate holdings. A I R 1925 Pat 559=4 Pat 604=6 P L T 367=(1925) Pat 125=88 I C 687

—S. 188—Malguzars are the proprietors' agents and can file suits for them. A I R 1925 Cal 245=80 I C 987

—S. 188—In an enhancement suit all co-sharers must join as plaintiffs or defendants. A I R 1925 Cal 522=79 I C 369

—S. 188—After an application under S. 105 was made, some co-sharers repudiated it. If other joint landlords desire to proceed with it, it will not be defeated by S. 188. A I R 1924 Pat 104=3 Pat 67=(1923) Pat 273=2 P L R 169=5 P L T 591=79 I C 5

—S. 188—The section is inapplicable to a tenant. A I R 1923 Pat 397=2 Pat 183=4 P L T 689=74 I C 454

—S. 188—The Sec is inapplicable to arrears suit. Only because minor co-parceners are not joint plffs or proforma defts. A rent-suit, by the manager of joint Hindu family cannot fail. A I R 1922 Cal 468=27 C W N 372=36 C L J 234=72 I C 722

—S. 188—After the non-consenting co-sharers are made defts, one co-sharer can sue for the whole rent & if there is a contract he may title a suit for his own share. In absence of such a contract, s. 148 A states when his suit could be maintained & its procedure. A I R 1923 Pat 41=(1922) Pat 355=4 P L T 39

—S. 188—The Section is inapplicable to an ejectment suit against a trespasser. A I R 1924 Cal 445=69 I C 504

—S. 188, 52 & 154—Unless a separate kabulyat exists a separate agreement for paying rent to one co-sharer does not

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

create separate tenancy. For accretions to tenure some rent must be paid. Unless co-extensive there is not a necessary merger of the separate interests. A I R 1922 Cal 281=65 I C 459

—Ss. 188 & 105—Co-sharer landlords sued for rent & a receiver was appointed for collecting rent of a co-sharer's share who was not made a party; the suit does not fail, but when co-sharer's title is in dispute it would be otherwise. A I R 1922 Pat 86=3 P L T 316=65 I C 349

—S. 188—A suit for assessing rent is not one which the landlord is required or authorised to do under s. 188 but arises out of general law & revenue system of the country. So a joint landlord can file it. If s. 188 be applicable the court is not justified in justice & equity in entertaining a suit where plff. joined his co-sharers as defts. 22 C W N 685=46 I C 428

—S. 188—A co-sharer landlord sued for arrears & also for additional rent on the ground of a kabulyat & the other co-sharers were made parties. Held that suit for additional rent is untenable as not brought jointly under s. 188 also the kabulyat does not take it out of B T Act. 13 C W N 942=20 I C 659

—S. 188—To enhance rent a suit for the purpose & it is authorized in respect of tenure-holders as well as occupancy raiyats. B T Act prohibits an enhancement by some only of the co-sharer landlords unless all join the suit as co-plffs. making other joint landlords defts. is not enough. otherwise it would be a rent-suit. 38 Cal 270=13 C J 51=8 A L J 1=8 I C 842=13 Bom L R 1=21 M L J 92=15 C W N 74=9 M L T 1=1911 (2) M W N 149=38 I A I (P C)

—S. 188—Separate tenancy—Tenant executing kabulyat in favour of landlords in respect of his share-s. 188 does not bar an application for settlement of fair rent. 21 C L J 592=30 I C 414

—S. 188—The section does not apply to auction-purchaser of permanent tenure. 24 C L J 49

—S. 188—Joint landlords—Suit by one making others defts—Oral authority to agent. see. 24 I C 266

—S. 188—B. T. Act authorises suit for enhancing rent in the case of tenure-holders & also occupancy raiyats. But it prohibits a suit by one or some of the co-sharer landlords unless both or all are joined as co-plffs. So a suit for enhancement by one co-sharer landlord does not lie when other non-concurring co-sharers are made defts. 8 I C 842 P C=9 M L T 1=13 Bom L R 1=15 C W N 74=13 C L J 51=21 M L J 92=38 C 270

—S. 188—To a landlord's suit for damages against an occupancy raiyat s. 188

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is inapplicable. Though in a suit on contract all jointly interested should be parties, it is different in a suit for damages wrong apart from contract. When several persons have a right to sue for a wrong done to them jointly, it is not necessary that all should join as plff. Any one of them can sue so far as he suffers damage. 15 C L J 225 =14 I C 478

—S. 189—In appeals before the Special Judge, process fees for notices on respondents should be paid according to scale laid down in High Court Rules under s. 20 of the Court Fees Act, 1870; r. 65 of the rules framed under s. 189 is not applicable. A I R 1931 Cal 572=58 C 995=35 C W N 253=Ind Rul (1931) Cal 603=132 I C 683

—S. 189—Transfer of an application for commutation of rent to Asstt. Settlement Officer is authorised by Rule. 45. A I R 1931 Cal 327=34 C W N 999=131 I C 396

—Ss. 191 and 192—A permanent ganti lease at a fixed rent was granted but then Govt resumed its part chak khatali and settled with the proprietor at Rs. 850-2 for 20 years P. C. dismissed transferee's rent suit against the settlement holder. After 20 years a farming lease for 10 years of chak khatali was given by Govt. to plffs. and the Revenue Officer fixed Rs. 1967 under Ch. X Part II. The tenant never questioned this under S. 104 H. Held that plffs had a right to rent fixed by the officer and the P. C. decision was not res judicata as the plffs. did not represent proprietor who granted the ganti lease. 33 I C 420

—Ss. 191, 192—Temporary settlement holder—Right to exercise the ordinary powers of a landlord under Ss. 7 and 30. 23 C W N 945

—S. 192—Contract for paying higher rent is unenforceable. Government prohibits subletting at a higher rate than that fixed by settlement. A I R 1928 Cal 763=I R (1929) Cal 556=49 C L J 65=33 C W N 362=117 I C 604

—S. 192—The Section is inapplicable when the lease was prior to the Act. A I R 1922 Cal 248=35 C L J 14=65 I C 234

—S. 193—The Section does not apply when the land was let out for residential or other non-agricultural uses with rights of fishery. A I R 1929 Cal 545=I R (1930) Cal 228=50 C L J 19=56 C 1170=122 I C 292

—S. 193—Rent—Meaning of—Wider than definition in B. T. Act. 23 C W N 876

—S. 194—Controls operation of s. 178 20 C L J 551=27 I C 397.

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—S. 195—Patni taluks excluded from the operation of the Act. 18 C W N 747

—S. 195—Patnidar—Right to apply for abatement of rent. 45 I C 190

—S. 195 (a)—When the patni law is silent the Tenancy Act applies. Zemindar's right to proceed under the general law for recovering rent arrears is not taken away by the Patni Regu. an additional right by a summary process is conferred by it. A I R 1926 Pat 465=8 P L T 343=5 Pat 415=98 I C 893

See also A I R 1926 Cal 314=90 I C 405

—Ss. 195 (e) and 11, 12 and 17—S. 195 (e) provides that Reg. VIII of 1859 remains unaffected by the Act so far as sale of whole or part of the patni is concerned. So a Zamindar is not bound to recognise a sale not recorded in his sherista. Registration of a patni transfer under S. 12 confers no right on the transferee. 18 C W N 338=18 I C 712

—S. 195 (c)—Saves all putni enactments from the operation of B. T. Act—Ss. 12 and 17 of the Act do apply to partial transfer of patni right. 18 C W N 629

—S. 195 (e)—Putni tenure—Purchaser at putni sale—Eviction of raiyat with occupancy rights—Right of—Raiyat not a Khudkhast raiyat—Tenancy created after putni and not in existence in 1819 37 C W N 4 (8 & 9)

—S. 195 (a)—Whether excludes applicability of S. 65 to patnitenures, See 20 C L J 1

—S. 197—A rent-sale purchaser did not know of an incumbrance until it was set up in debt's written statement and so notice of annulment under S. 167 was given after the suit was filed. Held that yet the suit could not fail. 24 C W N 659 =58 I C 745

—Sch. III—To suit for possession, limitation in Sch. III applies when a tenant is dispossessed by another at the instance of the landlord. The special rule will also apply when the holding is purchased by another raiyat at execution-sale of a rent-decree. Obiter—Not the tenure but the right, title and interest of the tenant only can be sold by a ticcadar who gets a rent-decree after the expiry of his ticca. 9 I C 625

—Sch. III—Existence of relation of landlord and tenant is necessary. A I R 1927 Pat 313=8 P L T 673=102 I C 768

—Sch. III—Limitation laid down in Sch. III, of B. T. Act, applies to a suit under S. 64. A of Bengal Cess Act. 93 I C 843

—Sch III—The amendment made in S. 29 of the Limitation Act of 1922 merely

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means that such sections as Ss. 19 and 20 are not to apply by virtue of the Limitation Act and that, if they are to apply, the grounds for applying them are to be found in the special or local Act itself; but that section is not to be construed as intending to cut down whatever is provided by any special or local law either by express words or by clear intention. If S. 184 of B T Act stood by itself and no such provision as S. 185 had been added, then it would be quite right to apply S. 29 of the Limitation Act and say that the mere S. 184 was not under the Limitation Act to import such S. 19 and 20. But in the present case by the Bengal Tenancy Act S. 185 means that certain sections of the Limitation Act should not apply and certain other sections should apply. The proper effect and result of that is that by virtue of the Local Act Ss. 19 and 20 did apply to cases under Sch. III of Bengal Tenancy Act even between the years 1922 and 1928. 36 C W N 833

—Sch. III—Putni rent—Suit for—Sch. III applies to. 36 C W N 833 (835)

—Sch. III—Rent decree retains its character even if made payable by instalments. A I R 1927 Pat 313=8 P L T 673=102 I C 768

—Sch. III—Dispossession of a benami purchaser at an execution sale by the real purchaser for a period of 2 years extinguishes the former's title. 24 C W N 1024 (Cal)=59 I C 719

—Art. 1—Art. 32 Lim. Act governs a claim for ejectment for breach of condition and compensation. A I R 1921 Cal 62=25 C W N 930=62 I C 779

—Art. 1—Suit to eject a lessee from zeraiti land—Limitation. See 39 I C 389

—Art. 1—Auction-purchaser of permanent tenure—Tenancy forfeited—Suit for ejectment—Limitation—art 142 applies. 24 C L J 40=21 C W N 117=34 I C 833

—Art 1 (a)—Lessee of proprietors—zeraiti land under term-expired lease—Suit to eject—Limitation. (1917) Pat 318

—Art 1 (a)—Non-occupancy raiyat—Suit to eject Limitation. See 18 C L J 597=22 I C 67

—Art 1 (a)—Non-occupancy raiyat holding over after term—Suit to eject—Limitation. See 20 C W N 258

—Art 1 (a)—Suit to eject a Non-occupancy raiyat—Limitation See 22 I C 67

—Art 1 (a)—A lease to a firm or concern is one in favour of its members & in absence of anything to show that they have ceased to be members, there is nothing to prevent them from acquiring occupancy rights. A lease to a firm expired in 1905 but it continued in possession. On disregarding the notice to quit of 1-4-1915

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the suit was filed on 24-1-1916, held that (1) the firm had acquired occupancy right & (2) the suit was barred by Art 1 (a) as brought more than 6 months after the expiry of the lease. 4 P L T 533=53 I C 106

—Art 1 (a) A darputnidar or tenure-holder who is given possession under S. 13 '4) Reg VIII of 1819 on deposit of putni rent is a landlord for the time being. He can recover rents accrued due before his possession & his suit is governed by B T Act for limitation. 41 I C 711

—Art 1 (a)—Suit for possession of khas khamar land—Limitation See 20 C W N 1097=44 Cal 267=39 I C 64

—Art 1 (a)—Usufructuary mortgage—zamindar settling tenants on the land—Redemption—Suit by mortgagors to eject tenants—Limitation. See 52 I C 473

—Art 1 (a)—Zeriat land—Tenant's admission in kabuliyat executed after the Act—Whether admissible. See 20 C W N 14

—Art 1 (a) and S. 60—Proprietors of an estate—Suit by some against others for partition—Claim in suit for declaration that debt has not acquired occupancy or non-occupancy right under lease in hes favour by plffs. See 4 Pat L W 423

—Art 1 (a)—Non-occupancy raiyat—Expired case—Suit in ejectment—Limitation. (1917) Pat 318=42 I C 177  
See also 44 I C 94=3 Pat L J I.

—Art 1 (a)—'Lease' refers to a registered lease. A I R 1930 Pat 378=Ind Rul (1930) Pat 492=9 Pat 405=125 I C 140

—Sch III, Art 1 (a)—Art 1 (a) and S. 44 must be read together A I R 1930 Pat 378=Ind Rul (1930) Pat 492=9 Pat 405=125 I C 140

—Sch. III, Art (a)—Ejectment of a tenant who is not a non-occupancy raiyat is not governed by Art 1, but by Art 139, Lim. Act. Lessee of proprietor's private or zerait land is not a non-occupancy raiyat. A I R 1922 P C 142=43 M L J 55=35 C L J 506=3 P L T 197=(1922) M W N 410=26 C W N 833=1 Pat 340=49 I A 81=31 M L T 231 (P C)=66 I C 337.

—Sch. III, Art 1 (a)—This General Law of Limitation applies to ejectment of sub-lessee from non-occupancy tenant. 62 I C 392 (Pat).

—Art 2—Suit for recovery of rent by assignee of landlord—Limitation. see. 1 Pat L J 506=3 P L W 179=38 I C 102.

—Art 2—Suit for arrears—Limitation—See. 11 I C 496.

—Art. 2—Written statement must raise a limitation plea if under special law. A I R 1924 Cal 463=69 I C 194.

—Art. 2—The decision of 27 M 143 P C will not save the suit from limitation when the plffs. can ask to ascertain the

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

area in tenant's possession and for rent in respect thereof. 20 I C 205.

—Art. 2—Rents for 1313 B S under first kabuliyat and for 1313, 1318 B S under a second one was sued for. Deft's estate came under the Court of Wards on 11-11-1908 & a written acknowledgment for the above rent was given on 20th Sept. 1910 by the Collector.

Per Fletcher J: under the B T Act the suit for rent of 1313 was barred. The act is inapplicable to leases of agricultural land not used for that purpose.

Per Richardson J: A lease relating to agricultural land but not for that purpose is governed by s. 107 T P Act. There is no conflict between the T P Act and B. T. Act when a lease appears to be a temporary one relating to agricultural land. 20 C W N 485-23 C L J 111-29 I C 797.

—Art. 2—Provision for suits only and not applications. 19 C W N 580.

—Art. 2 (iii) (b)—The Zemindar himself purchased a patni taluq in execution of his rent-decree for 1264 M E and remained in possession till 1270 M E when the sale was set aside because of fraud. Also it was found that defts 1 and 2 owners of 2/3 colluded with the patni and so deft. 3 was given mesne profits. The plff. sued for rent alleging that as deft. 3 got mesne profits he was liable for it. Held that the suit fails because (1) it is not known how mesne profits are arrived at and (2) although possession was with the plff for 7 years; he had only accounted for 1/3 and perhaps he had got more as profits; also held that limitation barred the rent for first half year of 1264 M E. 19 I C 564.

—Art. 2 (b)—Art. 2 (b) governs a rent-suit of a fishery right. 33 I C 110.

—Art. 2 (b)—Whether a landlord's suit for rent-arrears is within art. 2 (b) is to be seen with reference to relations of parties when the right to sue accrued. The art. applied to suit for arrears by one who ceased to be landlord before the suit provided the arrears claimed fell due when he was the landlord. 16 C L J 360-17 I C 343.

—Art 2 (b) & S. 67—A right to soil is not necessarily implied in jalkar and a suit to recover rents for such and no right to land is governed by Art. 2 (b). Money reserved in such lease is not rent and interest for such arrears cannot be allowed under S. 67 at 12½ p. c. 19 C W N 514-27 I C 614.

—Art. 2 (b) and s. 184—Applicability—Suit by assignee of rent—Limitation—See.

2 Ind Cas 989.

—Art. 2 (b)—Suit by an assignee for arrears of rent is not governed by Art. 2, but by Art. 110, Lim. Act. 63 I C 424 (Pat).

See 3 P L W 179-1 P J 506-38 I C 102

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—Sch. III, Art 3—Special period of limitation under—suit to be brought within two years of dispossession—occupancy right extinguished, if barred by special limitation—Limitation Act, S. 28. A L R 1933 P 65-11 P 701-141 I C 157- A I R 1933 P 6.

—Sch. III, Art. 3—The dispossession of one person by another generally implies as a sequence possession by the latter adverse to the former. Dispossession merely means exclusion from possession without the consent of the person concerned. 11 P 701.

—Sch. III, Art. 3—Dispossession of raiyat within meaning of—Purchaser of landlords' interest—Possession taken of raiyati holding by—Dispossession of raiyat amounts to. 11 P 701.

—Sch. III Art. 3—Occupancy right barred under, must be treated as extinguished, even if S. 28 of Limitation Act be not directly applicable to suits under that article. 11 P 701.

—Sch. III, Art. 3—(i) 'Where the plea of special limitation under Bengal Tenancy Act has been on the record from a comparatively early stage and the matter has been investigated the Appellate Court should not set aside the question merely on the ground that it was not pleaded so early as it ought to have been. (ii) In a suit by the plaintiff for possession of land on the allegation that they are raiyats and that they had been dispossessed by the defendants landlords, the burden of making out the plea of special limitation is on the defendants. 35 C W N 1143.

Sch. III, Art 3—A suit, by tenant for possession of his holding where the landlord was found to have no land in dispossessing the plaintiff and he recognized the defendant as a tenant after he entered into the land, is governed by the rule of 12 years limitation and not by the Special limitation provided in Sch. III, Art. 3. A I R 1931 Pat 236-10 Pat 264-12 P L T 570.

—Ind Rul (1931) Pat 306-133 I C 34.

—Art 3—Suit for recovery of possession by a raiyat or under-raiyat dispossessed by landlord is governed by special rule of limitation of two years. A I R 1930 Cal 450-34 C W N 358-Ind Rul (1931) Cal 75-128 I C 251.

—Art 3—An under-raiyat dispossessed in July 1907 sued for possession in July 1909 held that amending Act of 1907 was inapplicable as cause of action was prior to the Act of 1907. Decision in 17 C W N 389 is not affected by 35 A 227 P C. Though the act in force regulates the procedure still without clear expression, intention to remove a vested right cannot be imputed. 13 the legislature. 41 Cal 1125-18 C W N 804-19 C L J 549-24 I C 37 (F B)

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—Art 3—Art 3 applies when the whole body of landlords getting a rent-decree, purchase the tenure in execution & dispossess the tenant. 10 I C 54

—Art 3—This art is in applicable where dis possession was by a tenant authorized by the landlord. 28 C L J 216=46 I C 787

—Art. 3—Art. 3 applies to an occupancy raiyat's suit for possession against his landlord and it also applies to dis-possession by a co-sharer landlord as well as to that by the sole landlord or the whole body of them. 28 C 127=4 C WN 801

—Sch. III, art. 3—Possession of landlord after purchase in execution of rent-decree—Period of Limitation for suit by tenant for recovery of possession—See 10 Ind Cas 54

—Art. 3—When a landlord is in any way concerned with an occupancy tenant's dispossession, a suit for possession is governed by Art. 3 whether landlord is a party or not. Also if he is made a party or not the Limitation Act applies when the landlord has not in any way caused the dispossession 58 I C 46

—Art 3—12 years rule of limitation was applicable to a kaimi raiyat's suit for possession when his landlord dispossessed him a little before the B T Amendment Act. 38 I C 643

—Art 3—"Dispossession" in art 3 means that by landlord as such & not when misled by the agent colluding with a purchaser. 41 Cal 52=18 C W N 353=18 C L J 89=21 I C 431

[ On appeal from 9 I C 625 ]

—Art 3—Art 3 governs a case of dis-possession by a landlord who is also the auction purchaser at the time. It need not be by the landlord as such. 21 C W N 976=35 I C 838

—Art 3—After the dispossession of a raiyat by some co-shares landlords his redemption right was recognised in a mortgage suit by another landlord, held that such recognition did not extend limitation mentioned in Art 3 for a suit to recover possession. 28 C L J 219=45 I C 937

—Art 3—Per Sharfuddin. J. When deff. is assisted by the landlord is dis-possessing a tenant art 3 of B T Act applies whether attestation of a deed implies assent to it is a question of fact. 21 I C 367

—Art 3—It must be clearly shown that a case comes within art 3 Sch III B T Act & the dispossession by the land-lord in fact accords with the article. 18 C L J 89=18 C W N 353=41 C 52=21 I C 431

**BENGAL TENANCY ACT VIII OF 1885 (Contd.)**

—Art 3—Landlord's simply favouring & not actual dispossession does not fall within the article. 18 C L J 86=20 I C 350=17 C W N 1149

—Art 3—Art 3 as amended by Act 1 of 1907 is inapplicable where dispo-session was prior to the amendment 18 C L J 274=20 I C 821

—Art 3—Art 3 Sch III applies to a suit by former tenant to recover the holding when a landlord of a raiyati holding after purchasing it in execution of rent-decree, settles it with others. 21 C W N 978=40 I C 419

—Art 3—Per Chamier C J—Art 3 is applicable only to a suit by a raiyat or under raiyat against landlord if that relationship is shown to exist in fact. Per Mullick J if in fact the relationship is found in fact art 3 applies though one party may or may not admit the other in that relation. A co-sharer landlord dis-possessed a raiyat alleging the land to be his zeraif & after 2 years tenant sued possession when the relationship was found to have existed, held art 3 barred the suit. 2 Pat L W 16=(1917) Pat 247=40 I C 907=2 P L J 567

—Art 3—There is no dispossession within art 3 when the sole landlord becomes the purchaser at an execution sale for his own rent-decree & takes possession. Dispossession due to the delivery of delivery of possession by the Court does not fall within art 3, 17 C W N 817=19 I C 545

—Art 3—Limitation under art 3 is not restricted to cases where the landlord is a deff. 38 I C 69

—Art 3—A plain dispossession within art 3 is required to deprive a tenant of his right to sue. To determine what art 3 means the purpose & scope of the B T Act must not be dis-regarded. 20 C W N 872=35 I C 365

—Art 3—Art 3 is inapplicable to raiyat's suit for possession against an auction-purchaser at a rent-sale. 46 I C 975

—Art 3—Title of purchaser. See 24 C W N 1024

—Art 3 (a)—Ejectment suit against a non-occupancy ryot on the expiry of the lease must be filed within 6 months from the expiry in spite of the custom that notwithstanding the expiry of the lease as a matter of grace, the occupation may be longer, 18 C L J 597=22 I C 67

—Art. 3—A landlord dispossessed a tenant relying on an entry in the Record of Rights describing the land as the landlord's khas possession. The tenant after 7 years from dispossession sued for possession. Held that art. 3 barred the suit. 2 Pat L W 45=40 I C 774



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—Art. 3—Plffs. sued for possession of land alleging that they were wrongly dispossessed & the landlord occupied the land & had settled with them. Held no person dispossessing is mentioned in Art 3 & as the Act amends & consolidates the law of landlord & tenant the art can be applied only where landlord has a hand in dispossession. Art. 3 was inapplicable here as it is not found that defts were authorised by landlord to dispossess. 25 C W N 102

—Art. 3—Art. 3 as amended in 1908 is inapplicable to a suit filed after amendment but for a cause of action prior to it. So an under-raiyat suit filed a few months after the amendment in 1908 for dispossession in 1898 is not barred by 2 years' limitation under s. 61 (3) of the Amendment Act. New laws affecting rights cannot be effected retrospectively unless such is the express or implied intention of the Legislature. 17 C W N 889=19 I C 793=17 C L J 316. also 24 M L J 54 & (1912) M W N 652

—Art. 3—Dispossession of tenant by landlord not in his capacity but by virtue of independent acquisition of joti interest —Suit by tenant for possession—Limit. Act art 142 applies and not Sch III of B T Act. 38 I C 777

—Art. 3—Several persons were made defts. but the plff. proceeded against one only, describing others as proforma defts. Held that in second appeal he cannot amend the plaint as to drop the deft. against whom he had proceeded & to claim relief against pro forma defts. In a tenant's suit for possession against tenants inducted by landlord, he is a necessary party & art. 3 is applicable to such a suit. 58 I C 581

—Art. 3—At a rent-sale a landlord made purchase in a former tenant's name & took forcible possession without delivery by the Court & so ousting the present tenant. Held that art. 3 was applicable. 24 I C 860

—Art. 3—Art 95 of the Limi. Act 8 Art. 3 of the B T Act applies to plff's suit for declaring his raiyat right to the suit land & for khas possession after settling aside an exparte decree, as the setting of this decree is most essential. 19 I C 980

—Art. 3—A licensor is dispossessed within art. 3 when tenant's licensees refuse to vacate on the expiry of the license, and the suit not brought within limitation under it, it is barred. 53 I C 959

—Art. 3—Art. 3 applies to a raiyat's suit for possession when landlord has dispossessed alleging that it is his kamat land. Per Chamier C. J. Art. 3 is not limited to cases where dispossession is by the

**BENGAL TENANCY ACT VIII OF 1885 (Contd.)**

landlord as such. It applies when it is shown that plff. is the tenant of the deft. who has dispossessed. Per Mullick J. of the relationship of landlord and tenant is in fact found to exist, art. 3 is applicable though one may or may not admit the other to be so. When special limitation under Rent Acts applies, other statutes of limitation are excluded. 2 P L W 16= (1917) Pat 247=2 Pat L J 567=40 I C 907

—Art. 3—Two year's rule of limitation does not apply to a suit for possession when dispossession is by the purchaser as it is not by or in collusion with the landlord though sale is at his instance. 21 C W N 373=39 I C 383

—Art. 3—An heir of the original tenant sued for joint possession, the defts who were co-share landlords who dispossessed the plff. after securing a kobala of the whole land from another heir, held that art. 3 applied. When a landlord purchases at a rent-sale, the Court delivers the possession to him as auction-purchaser and the relationship of landlord and tenant no longer exists. But in a private purchase such relation continues and a kobala from one of the heirs does not take the case out of the operation of art. 3. 24 C W N 382=31 C L J 199=58 I C 598

—Art. 3—It is not dispossession within art. 3 when a landlord in execution of a rent-decree purchases the property and obtains delivery through Court. 22 C W N 659=46 I C 221

—Sch. III, Art. 3—Art. 3 applies to a suit to recover possession of land by a raiyat or non-raiyat. A I R 1930 Pat 573=Ind Rul (1931) Pat 19=128 I C 131

—Art 3—Art. 141, Lim. Act is not controlled by Art. 3. A I R 1930 Pat 573=9 Pat 634=11 P L T 714=Ind Rul (1931) Pat 19=128 I C 131

—Art. 3—Dispossession means the dispossession of the plaintiff, or his successor in interest. A I R 1930 Pat 573=Ind Rul (1931) Pat 19=128 I C 131

—Art. 3—Whether Art. 3 applies to dispossession of a raiyat in execution of a writ for delivery of possession issued by the Civil Court to landlord auction-purchaser. A I R 1930 Pat 177=11 P L T 61=Ind Rul (1930) Pat 669=127 I C 449

—Art. 3—Suit for possession by a raiyat must be brought within two years, otherwise he cannot acquire raiyati status by subsequent occupation within 12 years. A I R 1930 Cal 225=33 C W N 1077=Ind Rul (1930) Cal 803=127 I C 51

—Art. 3—Entry in gair mazrui does not prove dispossession. A I R 1930 Pat 476=11 P L T 447=Ind Rul (1930) Pat 650=126 I C 858

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—Art. 3—Whether after the period of limitation prescribed by Art. 3, the title is also extinguished. A I R 1930 Pat 476=11 P L T 447=Ind Rul (1930) Pat 650=126 I C 858

—Art. 3—Art. 3 contemplates dispossession by landlord only and not mere discontinuance of possession. A I R 1930 Cal 247=51 C L J 36=Ind Rul (1930) Cal 604=125 I C 732

—Art. 3—Dispossession by landlord as auction—purchaser is not governed by Art. 3. 2 P L J 587=41 I C 533, overruled A I R 1930 Pat 256=9 Pat 788=11 P L T 197=Ind Rul (1930) Pat 533=125 I C 565  
Overruling 41 I C 533,  
See also A I R 1927 Cal 109=98 I C 140

—Art. 3—In a suit by a raiyat or an under-raiyat, the entire body of landlords need not be made parties. A I R 1930 Cal 311=33 C W N 1085=Ind Rul (1930) Cal 417=124 I C 321

—Art. 3—Dispossession within limitation period must be proved by the plaintiffs. Proof of title and enjoyment at earlier period is insufficient. A I R 1930 Pat 134=Ind Rul (1930) Pat 310=123 I C 612

—Art. 3—Where subsequent to the sale in execution of rent-decree and giving of formal possession of property, a suit is brought alleging that decree under which property was sold was a money decree, the suit is not governed by Art. 3. A I R 1930 C 479.

—Art. 3—Suit by a reversioner to recover possession of occupancy holding sold by a widow to landlord is not governed by Art. 3. A I R 1929 Cal 157=48 C L J 554=Ind Rul (1929) Mad 355=115 I C 355.

—Art. 3—Actual taking of possession by a person occupying position of landlord, is governed by Art. 3. A I R 1928 Cal 586=112 I C 618.

—Sch. III, Art. 3—Suit by a tenant to recover possession of his land sold in execution of a rent-decree is not governed by Art. 3. A I R 1928 Pat 218=7 Pat 129=9 P L T 735=109 I C 519.

—Art. 3—Art. 3 does not require that dispossession must be by landlord as such. A I R 1927 Cal 488=54 C 450=31 C W N 634=103 I C 124.

—Art. 3—Dispossession within Art. 3 does not include dispossession in execution of a Civil Court's writ for delivery of possession. A I R 1927 Pat 43=8 P L T 243=97 I C 629.

—Art. 3—Dispossession by purchaser from landlord is not governed by Art. 3. 92 I C 897 (Cal)

## BENGAL TENANCY ACT VIII OF 1885 (Contd)

—Art. 3—Suit for possession by tenant against a person recognized by landlord as tenant after his taking possession, is not governed by Art. 3. A I R 1926 Cal 751=91 I C 493.

—Art. 3—Actual dispossession and not constructive one, is necessary. A I R 1926 Cal 350=90 I C 793.

—Art. 3—Art. 3 requires that plaintiffs as raiyats must have been dispossessed by defendants. A I R 1924 Pat 780=(1924) Pat 268=5 P L T 616=84 I C 130.

—Art. 3—Dispossession by fractional landlord is governed by Art. 3, but not dispossession by trespasser. A I R 1921 Cal 775=39 C L J 581=84 I C 25.

—Art. 3—Suit for recovery of possession from landlord of land settled by tenant with others is governed by Art. 3. A I R 1924 Pat 557=3 Pat 540=(1924) Pat 269=6 P L T 321=82 I C 79.

—Art. 3—A plea of limitation can be raised and inquired into by persons claiming under the landlords in a suit to which the latter are not parties. A I R 1925 Cal 461=79 I C 569.

—Art. 3—Dispossession of a tenant by landlord purchasing the property in execution of a fraudulent and collusive decree against a person who was in fact not the tenant, is governed by Art. 3. A I R 1924 Cal 623=28 C W N 482=78 I C 514.

—Art. 3—Suit between two tenants is not governed by Art. 3. A I R 1922 Cal 176=36 C L J 140=27 C W N 259=79 I C 602.

—Art. 3—Art. 3 applies only if—plaintiff is dispossessed. A I R 1922 Cal 32=35 C L J 1=69 I C 841.

—Art. 3—Suit not between landlord and tenant is not governed by Art. 3. A I R 1923 Cal 327=68 I C 472.

—Art. 3—Art. 3 does not apply unless the decree is obtained in a suit between landlord and tenant and the provisions of the Act are applicable to them. A I R 1922 Pat 602=3 P L T 525=67 I C 882.

—Art. 3—Dispossession by tenants of co-sharer landlords with help of landlord's naib subsequent to the delivery of possession to landlord as auction-purchaser, is governed by Art. 3. A I R 1921 Cal 289=34 C L J 462=65 I C 1.

—Art. 3—Dispossession must be by landlord or somebody acting in concert with him. 64 I C 858 (Cal).

—Art. 3—Art. 3 applies if relationship of landlord and tenant is subsisting. 64 I C 192 (Cal).

—Art. 3—Dispossession even of a portion of the holding—Art. 3 applies. A I R 1921 Pat 362=2 P L T 615=63 I C 481.

—Art. 3—Art. 3 does not apply if plaintiff is dispossessed by person under landlord's authority. 62 I C 763 (Cal).

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

—Art. 3—Art. 3 applies where plaintiff is dispossessed by landlord as auction-purchaser or a lessee from him. 62 I C 704 (Cal).

—Art. 3—Dispossession by peons under a grant of settlement by landlord and at his instigation—Art. 3 applies. A I R 1921 Cal 522=27 C W N 86=62 I C 690.

—Art. 3—Dispossession by landlord's agent acting within his authority attracts applicability of Art. 3. A I R 1921 Cal 249=25 C W N 102=61 I C 899.

—Art. 3—Suit by tenant to recover possession of his holding from landlord holding over after the termination of the usufructuary mortgage is not governed by Art. 3. 59 I C 442 (Cal).

—Art. 6—Even though the cause of action be prior to amendment, a suit filed after it is governed by the art as amended. 21 I C 43.

—Art. 6—Three years rule of limitation of art. 6 applies to execution of a decree below Rs. 500 by a co-sharer landlord after the amendment. 43 I C 737.

—Art. 6 (3)—“Amendment” whether “review” within cl. (3). sec. 18 C W N 266.

—Art. 6. In—1903 a co-sharer landlord got a rent-decree execution of which was taken out in 1904 and again in 1907 before B. T. Act was passed, again in 1910 execution was taken out within 3 years of the previous application, held that art. 6 as amended by S. 61 of the Act of 1907 applied. Proceedings in execution are proceedings in a suit for certain purposes but when there is special law of limitation it must be applied to each successive application and if there is amendment prima facie that will be applicable to subsequent applications. 21 I C 113.

—Art 6—B. T. Act applies to a rent-suit against a co-sharer tenant as it is one between a landlord and tenant. So art. 6 applies to execution of such a decree 50 I C 33.

—Art. 6—To execution of a rent-decree below Rs. 500 got by a co-sharer landlord for his share without making other co-sharers parties, art 6 as amended applies. Art 6 applies when a decree is given in a suit between landlord and tenant to whom the Act is applicable though all the other provisions may not be so. 19 C W N 751=27 I C 729.

—Art 6—Execution of rent-decree dated 14-6-1911 was applied for on 6-3-1914 and sale was on 25-4-1914 but was set aside on 16-9-1914 and the execution proceedings were dismissed on 28-9-15. Decree-holder's appeal from this order was also dismissed on 2-1-16. A fresh application was made on 16-2-16, held that art 6

## BENGAL TENANCY ACT VIII OF 1885 (Contd.)

barred the application and the previous application ended on 6-9-14 and there was no continuity. 22 C W N 766=45 I C 712.

—Art 6—On 13-2-1907 execution of a rent-decree was applied for but the judgment debtors took time for satisfaction on 6-5-1907. Subsequently they sued for setting aside the decree because of fraud etc. and injunction dated 27-6-1907 was granted to stop execution but attachment subsisted. The injunction ended on 8-5-1908 and the decree holder on 7-10-1909 again applied for attachment and sale of moveables but application was rejected for default and want of further proceedings. On 4-7-1910 third application for the same original lands was made, held that Art 6 did not bar this application as this was in continuation of the first, though second one asked for sale of moveables only. 18 C W N 539=20 I C 244.

—Art. 6—To a decree in a suit between landlord and a tenant to whom and not to which the Act is applicable, art 6, applies, though all the provisions of the act may be inapplicable. A co-sharer landlord obtained decree for his share of the rents, in a suit where it was claimed for several holdings. Execution application was held to be governed by art 6. 11 C L J 81=20 I C 833.

—Art 6—B. T. Act is not confined to agricultural land except the definition of a raiyati. So the law about raiyats must necessarily deal only with agricultural land. An under raiyat is only a tenant holding a raiyat. So if an under tenant is given land for non-agricultural uses that does not remove it from the tenancy Act. An under raiyat is governed by the same law as it is an interest carved out of the raiyati. 21 I C 43.

—Art 6—The appeal court's order directing the respondent to pay partial costs of the appellant which were awarded against the latter in the lower court made in a rent-suit falls within art 6. 9 I C 246.

—Art 6—The article applies to an execution-application of a consent-decree in a rent-suit against a tenant wishing to pay by instalments. So limitation runs not from the last or any other instalment but from the date of the decree. The parties cannot contract themselves, out of the limitation law and extend the time prescribed. 17 C W N 518=18 I C 595.

—Art 6—To execution of a rent-decree got by the landlord after he has ceased to be so, the special limitation for execution under B. T. Act is inapplicable and only the ordinary limitation applies. 34 I C 145.

—Art 6—The period of limitation for execution of a rent decree obtained by a co-sharer landlord is one under art 6 of 3 years and not under C P C of 12 years. 19 C W N 1271=31 I C 700.

**BENGAL TENANCY ACT VIII OF 1885 (Concl'd.)**

—Sch III Pt. III Art 6—Execution of restitution order. 9 Ind Cas 246.

—Art 6—Art 6, is not applicable unless the decree cannot be obtained in a suit between landlord and tenant, and the provisions of B T Act are inapplicable to them, A I R 1922 Pat 602=3 P L T 525=67 I C 882.

—Art 6—Suit for declaration and possession is not governed by art 6 if plaintiff himself denies existence of tenancy. A I R 1926 Cal 545=91 I C 478.

—Art 6—Art 6 applies to a suit for rent with an unnecessary declaration of share in bhauli rent. A I R 1922 Pat 566=3 P L T 563=1 Pat 779=(1923) Pat 5=67 I C 869.

—Art 6—A fresh starting point for counting limitation under Art 6 is given to a decree holder by acknowledgment of liability under S 19. Limitation Act. A I R 1922 Cal 187=26 C W N 486=34 C L J 195=64 I C 993.

—Art 6—Art 6 is applicable where a co-sharer landlord obtains a rent decree without joining another co-sharer 19 C W N 1271=31 I C 700.

**BENGAL TENANCY (AMENDMENT) ACT**

(I OF 1907).

—Act is not declaratory. A I R 1927 Cal 748=103 I C 674.

—No retrospective effect is given to the Act. 65 I C 584.

—S. 54—Bengal General Clauses Act (I of 1899), s. 8, cl. (c)—Application to set aside rent-sale—Right accrued previous to Act I of 1907, but application after repeal—Effect—See. 12 C W N 434=35 C 543.

**BENGAL TENANCY AMENDMENT ACT**

(II OF 1918.)

—Ss. 49 (c) and (f)—S. 49 (c) (f) empower tenant to make only a complete usufructuary mortgage of his land. A I R 1923 Cal 313=68 I C 301.

**BENGAL TOWNS MANUAL RULES**

—RR. 102 and 115—Sale of estate for arrears in contravention of rules is invalid. A I R 1928 Cal 68=55 C 624=47 C L J 12=32 C W N 359=105 I C 15

**BENGAL VILLAGE CHAUKIDARI ACT**

(VI OF 1870)

See also cases under Chaukidari Chakran lands.

—Enquiry—Procedure—Absence of notice to party interested Proceedings of Commissioners void—Jurisdiction of Civil Court not barred. 32 I C 545=21 C W N 238

—It was provided in a patni lease that the patnidar was not to object to the payment of the stipulated jama if any land be excluded from the patni by any law or order by the Court, held that this provision would not apply to resumption by the Collector under the Chaukidari Act.

**BENGAL VILLAGE CHAUKIDARI ACT**

VI OF 1870 (Cont'd.)

A patnidar's cause of action against the Zemindar to recover patni land resumed & settled with the zemindar does not arise from resumption but only when the zemindar disputes his right. If the land is settled with the tenants by the zemindar they do not become ryots against the patnidar. s. 27 Spe Rel Act is inapplicable. 33 I C 593.

—Chaukidari Chakran land to which the Chowkidari Act applies is one assigned by Govt. at the time of settlement though excluded from assessment when the whole estate is assessed. The Act does not apply to Zemindari of killah Sukindah in Orissa which was held in perpetuity at a fixed jama under a Sanad confirmed by S. 33 Reg. XII of 1805 and the resumption and transfer were without jurisdiction. Art. 14 Limi. Act is inapplicable where the order to be set aside is made without jurisdiction. 9 I C 688=15 C W N 300.

—No notice is required to be served under the Act on patnidars or subordinate tenure—holders. A I R 1931 Cal 284=130 I C 497.

—A person not impleaded in the Commissioner's inquiry under Ben. Villa. Chaukidari Act is not entitled to any notice and under S. 61 the report is final and conclusive against him though not against one entitled to notice. 21 C W N 238=32 I C 545.

—Prima facie a Zemindar's title is of full enjoyment and Govt. must prove its power of resumption and assessment. Chakran lands set apart with Govt's permission could only be resumed under S. 8 (4), Reg. I, 1793 and S. 41 Reg. VIII, 1793. Held that Govt. cannot resume some Chakran lands in Orissa on its failure that any piece with the Zamindaries was not assessed for revenue. The Zemindars allotted some lands to Chowkidars for their maintenance of their free will, without there being any obligation for such grant. When some grants were made with Govt. Officer's approval, they are not made resumable by it. 19 C W N 65=42 Cal 710=23 M L J 457=2 L W 11=17 M L T 1=17 Bom L R 32=21 C L J 31=26 I C 676=42 I A 30 (P. C.)

—Lease—Construction of lease. 6 C L J 572.

—Putnidar on paying some rent to Zemindar can hold Chaukidari Chakran lands included in patni kabuliyat. A I R 1922 Cal 281=66 I C 357.

—The Zemindar has a qualified title to Chakran lands included in revenue paying estate. So after resumption and transfer to him the estate is in confirma-

## BENGAL VILLAGE CHAUKIDARI ACT

VI OF 1870 (Contd.)

tion and continuance of his existing state with an additional liability to pay revenue. S. 51 Villa. Chauki. Act maintains validity of contracts, regarding Chakran lands, which may or may not include other lands unaffected by resumption. The Chowkidar vacated and Zemindar took possession and allowed the former's tenants as his own. Held that on transfer under the above Act to the Zemindar, his transferee could not take them as trespassers. 22 C W N 997=27 C L J 560=45 C 515=41 I C 759

—On resumption and transfer of chaukidari chakran lands included in a patni settlement to a zemindar, he becomes entitled to elaim from the patnidar the payment of a fair and equitable rent in respect of it in addition to patni rent. [52 I A 335 relied on] 35 C W N 597

—Chakran land resumed and transferred to the zemindar under Bengal Act 6 of 1870 pass to the patnidar by such transfer. Not only the said Act recognises the zemindar's existing title to the resumed lands but the estate under transfer is confirmation of his state and when contracts concerning it are made with third parties, their rights under the contracts are preserved. 44 Cal 841=2 Pat L W 1=32 M L J 565=21 C W N 609=19 Bom L R 462=15 A L J 390=22 M L T 489=(1917) M W N 459=6 L W 101=25 C L J 499=40 I C 981=44 I A 117 (P. C.)

—S. 1—Whether some lands in thana Indas in the Bankura Dt. & called simandari were chakran within S. 1 The High Court, in absence of Lower appeal Court's finding held referring to Bengal Dt. Gazetteer of Bankura that simanadars's duties were similar to those of Chaukidars & so the Act applied. 43 Cal 227=20 C W N 404=33 I C 553

—S. 1—Assigned "Appropriated", meaning of. See 42 Cal 710 (P C)

—S. 1—S. 1 is inapplicable where there is definite & conclusive evidence to show the nature of the services required of the tenure-holder. 28 C L J 281=48 I C 362

—S. 1—The act was recently applied to the plff's zemindari in Orissa, which he held at a fixed jama in perpetuity under a Govt. Sanad of 1803, confirmed by S. 33 Reg. XII of 1805. The tenures found to be recently resumed could not have been assigned at the time of sanad or in 1805 for maintaining village watchman, held that Chowkidari Act was inapplicable & the resumption & transfer were without jurisdiction. Art. 14 Lim. Act was inapplicable to plff's suit Per Woodroffe J. Assuming that the sanad of 1805 was

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## BENGAL VILLAGE CHAUKIDARI ACT

VI OF 1870 (Contd.)

equivalent to Govt. Settlement, as such assignment did neither assign nor exclude them from assessment, such lands if any would not be governed by Act VI of 1870. 15 C W N 300=9 I C 688

—S. 48—Under s. 48, the Collector cannot settle village Chowkidari Chakran land with one of several Zemindars. 37 C 937

—Ss. 50, 51—Lmt. Act art. 144—Suit for possession. see 41 C 728

—Ss. 50 & 51—Zemindar's title to Chowkidari Chakran lands is a qualified one, so when they come into his possession owing to vacating by Chowkidar before resumption & transfer to him by the Collector, the Zemindar is not a trespasser. A settlement prior to resumption is not invalid as against a person getting a permanent under-tenure after it. The new estate is in continuation of his pre-existing interest. 45 Cal 515=27 C L J 560=22 C W N 997=41 I C 759

—Ss. 50 & 51—The Government resumed Chaukidari Chakran lands settled in patni & transferred them to Zemindar who settled them with the plffs. Held that Zemindar could not make such settlement & plffs. had no right against putnidars; also that Government transfer after resumption created no new estate but only in continuation of the Zemindar's existing estate. 22 C W N 660=28 C L J 160=46 I C 435

—51—When there is no special term in a putni lease, the putnidars are not liable for any additional rent for Chaukidari Chakran lands resumed & given to Zemindar under s. 51, which patnidars have a right to hold. 40 I C 395

—51—Chaukidari Chakran lands transferred by Govt. to Zamindar cannot be held rent-free by Patnidar. A I R 1925 Cal 681 = 29 C W N 328=52 C 576=86 I C 781

—51—Chaukidari Chakran lands are given for services & a chaukidar in possession does not acquire occupancy rights. He is not to be ejected so long as he does his duties as he is not a trespasser-Zemindar's title remains unaffected though it is appropriated to the officer doing the duties of a watchman. Upon transfer to the Zemindar it is his mal & Zeriad land but once a choice is made to treat it as his mal he cannot subsequently change it. 52 I C 181

—S. 51—Chaukidari chakran lands resumed by Govt. and transferred to zemindars under s. 52 cannot be claimed by the plaintiff under a prior pottah unless he pays additional rent. A I R 1925 P C 226=52 I A 355=L R 6 P C 206=53 C 6=30 C W N 553=24 L W 221=42 C I J 227=(1925) W N 724=49 M L J 722=90 I C 607



**BENGAL VILLAGE CHAUKIDARI ACT**

**VI OF 1870 (Conold.)**

—Ss. 58 and 61—Proceedings set up under S. 58 and Commissioner set up under S. 61—Ordersheet in proceedings before Commissioners showing that what they were intending to do was to hold at head of order-sheet as a "Chowkidari chakran resumption proceeding"—Presumption reasonable in those circumstances is that they were intending to ascertain what Chowkidari Chakran lands, if any, in the district could be resumed by Government.

36 C W N 548-A I R 1932 C 638  
—S. 60—s. 60 does not make the procedure laid down in Regulation VII of 1882 applicable to proceedings under this Act.

A I R 1931 Cal 284=130 I C 497  
—Ss. 60, 61—When proceedings under s. 61 comply with Reg. VII of 1822 & after full notice to parties concerned then order under s. 61 is final & binding upon civil courts. If the order is under s. 61 it will be presumed that official acts are regularly done under s. 114 (e). Evi. Act. Plff. claimed possession as chakran land while deft. as lakhiraj, held that is deft. had no notice of proceedings under s. 61, they are not such evidence against him so as to shift the onus of proof on him. 91 C 322

—S. 61—"Final and conclusive" refer to Civil Court also and not to Revenue Courts only. 95 I C 536

—S. 61—Commissioner's order under—Finality of—Question as to whether lands were originally assigned by Government before Act—Failure of Commissioner to consider, and to record finding on—Order not final in case of. 36 C W N 548-A I R 1932 C 638

—S. 61—Finding in terms that lands were assigned before Act—Not always necessary 36 C W N 548-A I R 1932 C 638

—S. -61—requires the commission to determine three things, viz (a) what lands are chaukidari chakran lands, (b) their extent and boundaries and (c) the name of the village for the benefit of which such lands are assigned. Had the Commissioners in the present instance definitely answered those three questions any conclusions at which they arrived would have been final and not susceptible to question in a Civil Court. 36 C W N 548

=A I R 1932 C 638

**BENGAL VILLAGE SELF-GOVERNMENT ACT**

**V OF 1919,**

It seems clear from the general provisions with regard to the procedure of these Courts, that the intention of the legislature was to set up in rural areas special tribunals for the expeditions, in expensive and summary determination of civil disputes involving small amounts. 36 C W N 641=55 C L J 563-A I R 1932 C 727=140 I C 267=I R 1932 C 703-A L R 1932 C 807

**BENGAL VILLAGE SELF-GOVERNMENT ACT**

**V OF 1919 (Contd.)**

—Ss. 8, and 101 (2) (e)—Election-Meetings are different from an ordinary meeting of the Union Board which are regulated by rules made under s. 102 (2c) A I R 1926 Cal 279=52 Cal 943=90 I C 700

—S. 31—S. 31 expressly excludes private property. The various things which the Union Board is empowered to do under the section according to Cls (a) to (f) are things which cannot be done with respect to privately owned lands with respect to privately owned lands. 36 C W N 119.

—S. 51 Civil Court can entertain a suit to contest the validity of an election. A I R 1926 Cal 279=52 C 943=90 I C 700

—Ss. 63 and—s. 64 does not apply unless plaintiff shows that his Case does not fall within s. 63. A I R 1929 Cal. 190 =55 C 1351=32 C W N 1138=115 I C 47

—S. 61—Suits for compensation for some wrongful act of Union Board in exercise or honestly supposed exercise of their statutory powers are alone governed by s. 64 A I R 1929 Cal 190=55 C 1351 =32 C W N 1138=115 I C 47

—S. 88 Proviso—District Judge's order under—Revision against—Interference in—Not justified unless he has exceeded the powers conferred upon him by S. 88. 36 C W N 641=55 C L J 563=A I R 1932 C 727 (729)=140 I C 267=I R 1932 C 703=A L R 1932 C 807.

—S. 88—The power conferred on the District Judge by the Legislature, to review the decision of the Union Court is wholly unfettered and it would seem that it is always open to the District Judge to set aside an order of the Union Court provided only he declares that he is satisfied that there has been a failure of justice. The power conferred on the District Judge is not limited to a re-consideration of any point of law or procedure which may have arisen in the Union Court, but such power is wide enough to permit of a re-consideration of the evidence and accordingly, if he thinks the justice of the case so demands, the District Judge can apparently reverse a decision of the Union Court on a pure question of fact. Thus in every case decided by a Union Court the unsuccessful party can take proceedings, very little different in actual practice, from a regular appeal. 36 C W N 641=55 C L J 563=A I R 1932 C 727 (729)=140 I C 267=I R 1933 C 703=A L R 1932 C 807

**BERAR.**

—Customs Mahars—Right to carcass 12 M L T 556=15 I C 561

—Succession among Hindus—Sister and paternal uncle's son—Preference. Custom 10 N L R 24=23 I C 229-

**BERAR (Concl'd.)**

—Hindu Law of Mitakshara as interpreted in Bombay, lex loci of. 4 N L R 31.  
—Berar is neither British India nor a foreign territory A I R 1923 Nag 321=76 I C 305.

**BERAR ALIENATED VILLAGE TENANCY****LAW 1921.**

—Act is intra vires. A I R 1930 P C 267=Ind Rul (1931) P C 40=128 I C 664.  
—Landlord cannot eject a perpetual tenant from his field. A I R 1929 Nag 88=113 I C 253.

—This law is not repugnant to Waste Land Rules of 1865. A I R 1927 Nag 304=103 I C 309.

—S. 40—Notwithstanding any contract to the contrary, landlord cannot eject an anti-alienation tenant A I R 1923 Nag 69=71 I C 25.

—Ss. 47, 74 and 75—Tenant forcibly dispossessed continues to be a tenant under S. 47 and cannot claim re-instatement if he voluntarily gives up possession. A I R 1930 P C 28=58 M L J 257=13 N L J 29=31 L W 568=26 N L R 108=57 I A 45=Ind Rul (1930) P C 39 (P C)=121 I C 231.

—S. 47—Son has no right to possess stridhan in daughters' presence. A I R 1928 Nag 55=105 I C 840.

—S. 47—Possessions of landlord from 1894 and of vendor since 1900 can both be tacked. A I R 1927 Nag 342=104 I C 353.

—S. 47—Words "has held" land does not necessarily mean "has occupied or cultivated but held as tenant" A I R 1926 Nag 253=92 I C 58.

**BERAR ELECTORAL RULES.**

—R. 29 (1)—Regulation II, cl (ii) If security is not deposited, the petition can be dismissed by Governor. 60 I C 870.

**BERAR INAM RULES.**

—Conversion into ordinary estates when. See 12 N L R 150=36 I C 518.

—R. (2)—Transfer of new lands to another member of the family ensures for the transferor's life time as Berar Inam Rules confer only a life estate, 9 N L R 188=22 I C 89.

—R. 3—To determine whether a given grant falls into cl. 1 or cl. 3 Government of India's orders sanctioning the grant must be referred to A I R 1930 Nag 279=Ind Rul (1930) Nag 309=124 I C 693.

—R. 5—Terms of sanad cannot be controlled by the rule, grant limited to male descendants cannot descend to females. Berar rules are merely instructions to Revenue Officers. A I R 1922 N 129=21 N L R 124=4 N L J 192=65 I C 194.

—R. 5—Rules regarding any particular grant can be altered or modified by Govt. A I R 1925 P C 184=50 M L J 136=21 N L R 117=52 C 971=30 C W N 122=23 A L J 667=52 I A 294=(1925) M W N 535=88 I C 347.

**BERAR INAM RULES (Cont'd.)**

—R. 5—Alienation of inam is not operative beyond the lifetime of the certificate holder. A I R 1924 Nag 393=78 I C 77.

—R. 5—"Lineal heirs" in r. 5 mean the heirs of first grantee under British Rule. A I R 1924 Nag 234=75 I C 932.

—Rr. 5, 9—Under the section impartibility is not a restrictive condition. A I R 1922 Nag 52=18 N L R 163=5 N L J 25=69 I C 800.

—R. 5—Alienation of inam by inamdar having only a life-interest, is operative during his life-time only and is not binding on his successor or the next holder of inam certificate. 59 I C 473 (Nag).

—R. 5—Beneficiaries under maintenance inam can claim only maintenance. A I R 1926 Nag 225=21 N L R 185=93 I C 199.

—R. 5—Inam becomes hereditary where rent is fixed at settlement. A I R 1930 Nag 24=25 N L R 107=Ind Rul (1929) Nag 302=118 I C 878.

—R. 5 (2)—Transfer of inam for personal services and maintenance is void beyond transferor's life whether to a member of the family or not under Rule V (2) Berar Inam Rules. 22 I C 89=9 N L R 188.

—R. 5 (5)—Benefits of r. 5 (2) mentioned in r. 5 (5) refer to the benefits of r. 5 (3). A I R 1930 Nag 24=25 N L R 107=Ind Rul (1929) Nag 302=118 I C 878.

—R. 6—Inam rules are applicable to Deshpande Vatan. A I R 1924 Nag 234=75 I C 932.

—r. 6 (2)—r. 6 does not apply to Desemukhi Cash inam—An illegitimate son of a Deshmukh passes the share he gets to his son. A I R 1923 Nag 329=75 I C 999.

—R. 14 (2)—Applicability—Temporary alienation or lease—Sanction of Deputy Commissioner—Necessity. Hindu Law—Religious Endowment. 14 N L R 12=43 I C 384.

—R. 59—"Land" which term includes a village acquired by Paragana servants as Govt. officials is divisible through Civil Court. Jagir property is partible unless held on saranjam. A I R 1922 Nag 52=18 N L R 163=5 N L J 25=69 I C 800.

—Class II and IV—Grant of Kazi inam for purpose of service of Haji and maintenance, in perpetuity on condition of service, is both a maintenance and a service grant. The service is service by any member of the family of the first grantee from British Govt. A I R 1922 Nag 254=71 I C 150.

—Class III, r. 5—Daughter's son is entitled to succeed as a lineal descendant to a grant by Muhammadan ruler to grantee and his bafarzandan recognised by Govt. without the word farzand. A I R 1922 Nag 170=65 I C 72.

## BERAR LAND REVENUE CODE 1896.

—An annual tenant may transfer his rights an ejectment suit does not lie because of it in Berar. 12 N L R 11=39 I C 15 (2).

—A co-sharer, under the Berar Land Rev. Code causing forfeiture of the holding through his default and getting its re-grant either by timely payment or purchase in equity he is the trustee of his co-sharers and cannot use his neglect of duty to defeat their title. A co-sharer expending for improvement or repair, can, if it is not gratuitous and benefit has resulted, claim contribution. 10 I C 694=7 N L R 11.

—Entries in Record of Rights are presumed to be correct. A I R 1926 N 197=90 I C 196.

—Decisions under similar provisions of Bombay Revenue Code are admissible in evidence. A I R 1927 Nag 10=22 N L R 147=9 N L J 198=98 I C 22.

—S. 3—Under Berar Land Revenue Code, S. 209 a hindu joint mitakshara family can become a co-occupant. A I R 1925 N 160=81 I C 1009.

—Ss. 4, 5, 86, 87 & 205—A holder of recognised division of a survey number cannot pre-empt another such division of the same number. A sub division agreed to by the parties but unrecognised under S. 4 (5) is not a "recognised division". Recognised divisions are included in "Survey number" of S. 87. Recognition of sub-division under S. 4 (5) does not bar pre-emption. 42 I C 447=14 N L R 51.

—S. 4, 15, 72, 73, 74, 76—Plaff, an unregistered occupant need not pray for declaration in a possessory suit for alienated land. 8 N L R 73=15 I C 895.

—Ss. 4 and 56—Amount payable by anti-jagir tenant to jagirdar is a charge on the holding as revenue. A I R 1923 Nag 5=18 N L R 206=68 I C 289.

—Ss. 4 (4) (5) (10) (14), 86 (1) (2), 205—Paiki-number holder in Berar cannot pre-empt another such number of the same survey number. 9 N L R 16=18 I C 862.

—S. 4 (5)—S. 4 (5) does not recognise a sub-division of a survey number, and as such a pot number is not a separate survey number. 57 I C 240 (Nag).

—S. 4 (5)—In Berar an officer having the Record of Rights, cannot recognise division of a survey-number and pre-emption is not by his recognition. 57 I C 260.

—S. 4 (14) & 205—A person, not a co-occupant within s. 4 (14) cannot pre-empt. Occupant means a holder of unalienated land & s. 205 bars the pre-emption right of a holder or occupier or owner of a survey number in a jagir village the same being alienated. 57 I C 265

—Ss. 4 (14) (15), 60, 72, 105—Occupancy rights in alienated land do belong to

## BERAR LAND REVENUE CODE 1896 (Contd.)

the registered occupant is unpresumable until some other man necessarily owns the rights & is recognised as such. 15 I C 899=8 N L R 76

—Ss. 4 (17), 78 (2), 223—A jagir was conferred in 17th cen. In 1851 the province was taken by the Govt. & the jagir confirmed in 1891 in plff's name. Deft's tenancy commenced about 40 years prior to the jagirdar's suit in 1872, held that there was no presumption under s. 78 (2) & there was also certainty about its beginning. Also that confirmation in 1891 is not an alienation under Ss. 223 & 4 (17) 7 N L R 100=11 I C 369

—S. 4 (17)—To make a village 'alienated' no grant in the soil is necessary. A I R 1930 Nag 213=26 N L R 195=124 I C 451

—S. 56—Purchaser of a forfeited holding is absolutely saved by the sec. against incumbrances created by its ex-occupant & in absence of sale, the forfeiture & its subsequent acquisition are governed by ordinary law & hence subject to equities between the parties. A mortgagee intending to enforce his rights against other property for the mortgaged one must prove that mortgaged property was destroyed in such circumstances as to entitle them in equity to proceed against other property. 10 I C 689=7 N L R 2

—S. 56—Alienated land—Amount payable by inferior holder is charged on holding. A I R 1923 Nag 5=18 N L R 207=61 I C 289

—S. 56—B was the recorded & joint Jagirdar of a village with D and M & he mortgaged it by conditional sale to A but failed to pay the arrears the village was forfeited & became khalsa. D & M were given the occupancy rights by the Collector. But A did not prevent the forfeiture by paying the arrears & remained silent. He sued B, D & M on his mortgage for enforcing it on occupancy rights of D & M. The mortgage debt was found to be binding on the family. Held that the mortgage is unenforceable against occupancy rights unless A proves that D & M as khatedars too undue advantage or equity in A's favour was not created by their conduct & that he was not guilty of contributory negligence. A purchaser under s. 56 is fully protected by itself against incumbrances by the ex-occupant of a forfeited holding; but when the sale is absent the forfeiture & acquisition are governed by ordinary law & hence by equity created by the conduct of the parties. Analogy from case-law does not help as Land Rev. System widely differ in C. P. & Berar. Loss of a legal right because of breach of obligation is implied in forfeiture. 7 N L R 2

—S. 56—Co-sharers

7 N L R 11

## BERAR LAND REVENUE CODE 1896 (Contd.)

--S. 59 (3)—Where ownership of Government is disputed, Revenue Officer has no jurisdiction under s. 59 (3). A I R 1927 Nag 10-22 N L R 147-9 N L J 198  
=98 I C 22

--Ss. 69 and Chapter VIII-A.—It is no doubt true that before Chapter VIII-A was enacted and inserted in the Berar Land Revenue Code the only procedure available for mutation of names was the one provided in s. 69. It, however, does not follow that s. 69 is altogether negatived. When an occupant transfers his holding he has to take steps to get the name of his transferee entered in the register of mutation in accordance with Chapter VIII-A. On the other hand, when he desires to relinquish or surrender his right to occupy the land he has to do so in accordance with s. 69. 28 N L R 20-137 I C 153-I R 1932 N 62-A I R 1933 N 51-A L R 1932 N 180

--S. 69—A registered occupant, in Berar cannot affect his co-occupants' rights by any transfer any more than the rights of the actual occupant where he is interested in the land, 9 N L R 168  
=21 I C 851

--S. 69—No documents for relinquishing occupancy holding is required by Berar Land Rev. Code; also s. 54 T P Act does not apply & the person accepting the relinquishment takes it with all existing encumbrances. 10 N L R 78  
=24 I C 858

--Ss. 69 & 205—Pre-emption suit in a transfer by way of exchange of a divided share in a survey number is unmaintainable. If a co-occupant transfer his share partly for another land & partly for cash, it is an exchange both under Hindu Law & T P Act. Relinquishment under S. 205 Berar Land Rev. Code means a transfer under S. 69 & is usually described as Razinama & Kabuliya. 3 N L R 138

--S. 72 (5)—Gift—Substitution of donee's name in Record of Rights with consent of donor—Gift not effected by registered instrument not rendered valid merely by such substitution. 28 N L R 20-137 I C 153-I R 1932 N 62-A I R 1932 N 51-A L R 1932 N 180

S. 78—No anti-alienation tenancy is established unless the tenant proves that his ancestors or predecessors in title possessed the land prior to the period when the grantee got the village, on payment of a fixed proportion of the revenue. 4 N L J 235

--Ss. 78 and 79 (2)—Landlord issuing a notice of enhancement of rent, is not precluded from issuing a further notice for ejectment of tenants. A I R 1928 Nag 84-10 N L J 253-105 I C 813

## BERAR LAND REVENUE CODE 1896 (Contd.)

--Ss. 78 and 79—In absence of waiver, a person duly served with notice under S. 78 is not entitled to a new one under S. 79 only because more than one year has passed by S. 78 (4) (8) are not confined to tenancies in (2) but enhancement can only be decreed if the judgment is just and proper. Notice under S. 79 unconditionally ends the tenancy but that S. 78 does not because of the tenant's right to appeal. 44 I C 723

--S. 78—landlord's duty to give notice under, before enhancing rent—2 N L R 145

--S. 78 (2) Unless otherwise declared by contract or statute a holding is a non-transferable personal right. An annual tenant in Berar is not permitted to transfer his right. Under that code tenant right is heritable & transferable as 'property' but a transferee by contract, not making a fresh contract with the landlord gets only the transferor's right, title & interest. 53 I C 543.

--S. 78 (2)—A tenant wishing to remain on the land must prove, that no evidence of the commencement as well as the period fixed with the landlord is forthcoming in case of an ante-ijara tenancy. On his failure to do so, no presumption under S. 78 (2) can be made. 44 I C 531

--S. 78 (2)—To apply S. 78 (2) one essential term is that because of antiquity no reasonable evidence is forthcoming to show the commencement. Neither a particular year nor a particular date to prove commencement is needed under S. 78 (2) The sec. becomes inapplicable to ijara villages. 14 N L R 111-42 I C 631.

--S. 78 (2)—A tenant is presumed to be an annual tenant in absence of any proof his being an anti-jagir tenant. Evidence of commencement of tenancy cannot be presumed to have been lost by reason of its antiquity simply because the tenancy did not commence till after a certain point of time. A I R 1923 Nag 129 (2)=68 I C 178.

--S. 78 (2)—A tenancy is presumed not to be permanent, if the rent is enhanced from time to time and annual lease are created formally. A I R 1927 Nag 200-101 I C 252.

--S. 78 (2)—Presumption under, does not refer to the individual—Tenancy or antiquity co-exists with the tenure of the landlord. A I R 1928 Nag 153-11 N L J 21-111 I C 488.

--S. 78 (2)—Word "antiquity" should not be taken to mean absolute antiquity. A I R 1928 Nag 153-11 N L J 21-111 I C 488.

--Ss. 78 (2), 223—A jaghir conferred in 17th Cen. was confirmed by British Govt. & the jaghir commenced 40 years before ejectment suit by the jaghirdar held that no presumption under s. 78 (2) is made & s. 223 is inapplicable. 7 N L R 103



## BERAR LAND REVENUE CODE 1896. (Contd.)

—S. 78 (2)—Tenant holding under tenancy 48 years old at the date of suit is not a tenant of antiquity within s. 78 (2).

A I R 1928 Nag 169=113 I C 225

—S. 78 (4)—Tenant of antiquity paying enhanced rent is not barred from claiming permanency of his tenure. A I R 1928 Nag 153=11 N L J 21=111 I C 488

—S. 78 (4)—Rent payable by tenant of antiquity can be enhanced by landlord. A I R 1928 Nag 153=11 N L J 21=111 I C 488

—S. 78 (4)—Cl. 4 being general all cases in which rent is sought to be enhanced are governed by it. A I R 1921 Nag 104=59 I C 711

—S. 79—The sec. applies to all agricultural tenants. The headings attached to a chapter, sec. or set of them are only preambles to them & may be helpful in interpretation but neither the heading nor the preamble control the clear meaning of that writing. 13 N L R 181=42 I C 694

—S. 79—Before ejectment suit, s. 79 must be fully complied with. A plff. must succeed by the rights as they were at the time of the filing of the suit & not by subsequently acquired rights. 6 N L R 17=5 I C 699

—S. 79—S. 79 considers registered post-card as proper notice. A I R 1921 Nag 116=17 N L R 25

—S. 79—To terminate tenancy from year to year notice is necessary, but it is not in the case of tenancy for one year only. A I R 1926 Nag 201=90 I C 43

—S. 79—A co-owner can sue for his share of rent by making other co-owners parties to the suit and can eject a tenant from his share of property. A I R 1929 Nag 207=Ind Rul (1929) Nag 87=114 I C 615

—S. 79—Proof by lessor that lease-money became due at close of agricultural year and not before is necessary. A I R 1929 Nag 90=Ind Rul (1929) Nag 944=118 I C 52

—S. 79—No mode for serving the notice is given by s. 79. So a notice by a registered post card which is refused by the tenant constitutes a valid acceptance. 53 I C 62

—S. 79 (2)—The terms 'annual tenancy' and 'a tenancy from year to year' mean the same thing. A I R 1931 Nag 105=Ind Rul (1930) Nag 143=122 I C 271

—S. 79 (2)—"Annual tenancy" in s. 79 covers a tenancy from year to year only & not for a year only. No notice for determining a tenancy is necessary when the contract is for one year only. 14 N L R 129=44 I C 212

—S. 79 (2)—Refusal by tenant to pay rent and to execute rent note does not

## BERAR LAND REVENUE CODE 1896. (Contd.)

itself terminate the tenancy; notice under s. 79 is necessary. A I R 1931 Nag 105=Ind Rul (1930) Nag 143=122 I C 271

—Ss. 83 (2) and 216 (K)—Revision Survey Rules framed under—Rule 148 of —Refers only to the sub-division of numbers and is inapplicable to the joining of numbers. A I R 1932 N 99=28 N L R 111=I R 1932 N 92=139 I C 286=A L R 1932 N 283

—S. 96—Under s. 96 an entry in the record of rights is presumed to be true unless the contrary is proved. 54 I C 334

—96—Pre-emption—Right to recognised sub-division—Pre-emption. 44 I C 541=14 N L R 55

—S. 96 B (6)—The conditions or liabilities of holders must be entered in the record-of-rights & an entry in it of an arrangement charging some fields for maintenance is admissible in evidence & presumption in favour of the claimant is raised. 57 I C 271

—S. 96 (d)—Mutation of names under —Not tantamount to rajinama and kabuli-yat. 28 N L R 20=137 I C 153=I R 1932 O 62=A I R 1932 N 51=A L R 1932 N 180

—S. 96 (2)—Record of Rights must be presumed by Court to be correct. A I R 1926 Nag 55=89 I C 763

—S. 158—Patwari is a public servant. 23 Cr. L J 557=68 I C 157

—S. 160 (3)—Rules under r. 4—To verify assessment registers made in December is proper. A I R 1929 Nag 345

=Ind Rul (1930) Nag 21=120 I C 325

—S. 160 (3)—Rules under r. 5—Notices to assesses individually are not necessary. A I R 1929 Nag 345=Ind Rul (1930) Nag 21=120 I C 325

—S. 160 (iii)—Superior holder of alienated village is liable for cess. A I R 1922 Nag 168=4 N L J 42=64 I C 202

—S. 160 (3)—A chaudi is a chaudi even if can conveniently accommodate a school or vice versa. A I R 1929 Nag 345=Ind Rul (1930) Nag 21=120 I C 325

—S. 174 (4)—No right of pre-emption can be defeated by vendee of property subject to pre-emption by creating mortgage on it, but the pre-emptor can take the property subject to mortgage. A I R 1931 Nag 42=26 N L R 383=Ind Rul (1931) Nag 54=130 I C 150

—S. 175—Person aggrieved by irregular procedure adopted by Revenue Officers acting under rules made under s. 160 (3), can appeal to higher revenue authorities, but cannot sue in Civil Court. A I R 1929 Nag 345=Ind Rul (1930) Nag 21=120 I C 325

—Ss. 201 and 205—A temple may be a co-occupant. A I R 1923 Nag 96=71 I C 39



## BERAR LAND REVENUE CODE 1896. (Contd.)

—S. 205—"Sale" in—Does not include judicial sale. 28 N L R 11=I R 1932 N 58=137 I C 125=A I R 1932 N 44=A L R 1932 N 203.

—S. 205—Two distinct survey numbers joined and formed into a single number under S. 85 (2)—Purchaser of portion of field newly formed—Pre-emption right of on sale of other portion—Portions not recognised as sub-divisions of new member under Ss. 4 (5) and 86. A I R 1932 N 99=28 N L R 111=139 I C 286=I R 1932 N 92=A L R 1932 N 283.

—S. 205—Case of relinquishment only is referred to by the words "in favour of a specified person" A I R 1929 Nag 353=Ind Rul (1930) Nag 111. 121 I C 655.

—S. 205—Co-occupant's right to pre-empt is not lost on the property being sold by official Receiver. A I R 1929 Nag 353=Ind Rul (1930) Nag 111=121 I C 655.

—Pre-emption price of 15 N L R 130=51 I C 731.

—S. 205—Resale of property either to vendor or to stranger does not take away the right of pre-emption. A I R 1929 Nag 224=Ind Rul (1929) Nag 111=115 I C 175.

—S. 205—Berar does not recognise pre-emption in trees. A I R 1928 Nag 324=24 N L R 171=11 N L J 182=112 I C 642.

—S. 205—Conveyance of land in lieu of unfixed mehr is not a sale. A I R 1923 Nag 330=20 N L R 126=76 I C 658.

—S. 205—Only a complete sale and not merely the making of a contract of sale raises right of pre-emption. A I R 1924 Nag 327=76 I C 374.

—S. 205—Sale executed by the Court in a suit for the specific performance of contract of sale raises right of pre-emption. A I R 1924 Nag 327=76 I C 374.

—Ss. 205 and 211—A juridical co-occupant is entitled to pre-empt. A I R 1923 Nag 96=71 I C 39.

—S. 205—Resale by vendee to the vendor after the passing of the pre-emption decree does not defeat pre-emptor's right under s. 205. A I R 1923 Nag 26=18 N L R 202=58 I C 498.

—S. 205 & 211—The expression "Co-occupant having a right of pre-emption" is s. 211 refers only to co-occupant at the time of transfer on which pre-emption is claimed on a transferee by inheritance. A right to sue for pre-emption already accrued cannot be transferred to a stranger. So a stranger has no right of pre-emption who is a co-occupant by transfer after the sale sought to be pre-empted. 8 N L R 62=15 I C 570.

—S. 205—When a co-sharer's interest is transferred by ante nuptial agreement, it is neither a sale nor a relinquishment under s. 205 & the other co-sharers are

## BERAR LAND REVENUE CODE 1896. (Contd.)

not entitled to pre-empt, 11 N L R 34=28 I C 355.

—Ss. 205 to 209, 211 (d)—The right of pre-emption in case of a mortgage is wholly in dependant of redemption which may be on the pre-emptor as mortgagor's representative. A. owner of a survey number equally divided it between the two sons B & C. Then A & B mortgaged B's share to D who sued them for foreclosure. Before the decree became absolute A died & C was brought on record. In absence of redemption, foreclosure became absolute & C sued to enforce his pre-emption right held that C's suit for pre-emption was not barred by the foreclosure decree. 17 I C 16=8 N L R 161.

—S. 205—Co-occupant of land in Berar—When a co-sharer loses his right of pre-emption. 6 N L R 86=6 Ind Cas 930.

—Ss. 206 (i) 209 (2)—All Co-parceners have equal right of pre-emption and as such the person to exercise it should be determined by lot. A Manager is not presumed to do an act as manager under s. 206 (1) notice to manager of a joint Hindu family is sufficient. 59 I C 601 (Nag).

—206—Right of pre-emption—Estoppel Pre-emption. 9 N L R 143=21 I C 287.

—Ss. 206 & 211—1 (a)—Only the person entitled to pre-empt can object the failure of notice under s. 206. If a mortgagee having foreclosed, fails to give the notice, the mortgagor's co-occupant can sue to pre-empt under s. 211—1 (a) But the mortgagor cannot plead want of notice as a bar to the fore closure decree being made absolute. 3 N L R 84.

—S. 209—The expression "most nearly related" cannot have any meaning in regard to relationship originating from marriage. It is only when the relationship is based on community of blood, that is consanguinity, that it is possible to determine the degrees of propinquity. 28 N L R 124=A I R 1932 N 113.

—Ss. 209 and 3—Irrespective of the number of co-parceners a joint Mitakshara Hindu family constitutes a single co-occupant. A I R 1925 Nag 160=81 I C 1099.

—S. 210—Transfer to a co-occupant and a stranger jointly is different from a transfer to a co-occupant. A I R 1926 Nag 229=21 N L R 189=92 I C 334.

—S. 211—Co-occupant's right of pre-emption is not lost on a stranger vendee becoming a sharer before suit. A I R 1927 Nag 296=23 N L R 94=103 I C 242.

—S. 211—The Code is not governed by Allahabad Rulings. A I R 1927 Nag 296=23 N L R 94=103 I C 242.

—S. 221—Alienated Village into which survey settlement was introduced under

**BERAR LAND REVENUE CODE 1896. (Concl'd.)**

Berar Settlement Rules of 1865, is not governed by s. 221 as it is not retrospective  
A I R 1930 Nag 213=26 N L R 195=Ind  
Rul (1930) Nag 275=124 I C 451.

—S. 221—A decree-holder of land in alienated village becomes occupant on introduction of survey settlement. A I R 1930 Nag 213=26 N L R 195=Ind Rul (1930) Nag 275=124 I C 451.

—S. 223—S. 223 does not apply unless the tenant has held from a period anterior to the alienation. 4 N L J 235.

—S. 223—Proof of privity of estate as a fact is necessary. Nafargats do not prove the nature of title but only a chain of cultivators. A I R 1927 Nag 99=98 I C 674.

**BERAR LAND REVENUE CODE, (1928)**

—Pre-emption—right of—in Berar—basis of the right. A L R 1933 N 92.

—S. 174 (4)—Mortgage of the property by the vendee does not defeat pre-emptor's right who takes the property subject to the mortgage, if the sale and the mortgage are part of the same transaction. A I R 1931 Nag 42=Ind Rul (131) Nag 54=130 I C 150.

—S. 174 (5)—pre-emption—each survey number a separate estate—co-occupant's right partial pre-emption. A L R 1933 N 92.

—S. 179—'Most nearly related'—Meaning of—See Under Berar L R Code, 1896, S. 209.

**BERAR MUNICIPAL LAW 1886.**

—Malkapur Municipality has no right to tax outside income not brought within its limits. A I R 1922 Nag 10=5 N L J 214=18 N L R 121=65 I C 532.

—S. 41 (1) (A) (b)—'Income' does not mean gross income but net income. A I R 1931 Nag 45=26 N L R 379=Ind Rul (1931) Nag 56=130 I C 152.

—S. 41 (1) (A) (b)—The maximum of Rs. 500 imposed by proviso 1 to r. 1 of Hyderabad Residency O 112, of 18th March 1899, does not restrict the operation of Notification 456, of 29th April 1913. A I R 1927 Nag 102=22 N L R 153=99 I C 423.

—Ss. 42 & 44—A defect in the constitution of a committee imposing the tax is only an informality and is protected by S. 44 (9). A court is precluded by that sec. from holding a tax illegally imposed which is duly notified. S. 42 shows that taxation of buildings or shops for scavenging purposes is for that service and not for actual rendering of it for a latrine existing there. 46 I C 682=15 N L R 42.

—Ss. 51, 53—Imposition of tax by municipal authority challenged as illegal and Ultra vires—Jurisdiction of civil courts—Special Jurisdiction how to be construed—Interpretation of statutes—Same expression used in several Acts must have the same meaning. 16 I C 549=14 Bom. L R 592=

36 B 599.

**BERAR MUNICIPAL LAW 1886. (Concl'd.)**

—Ss. 51 and 53—Civil Court can question legality of Municipal tax. Berar Municipality has no power to assess tax professional income derived by the assessee outside its limits and not mixed up with income arising within its limits. A I R 1922 Nag 10=5 N L J 214=18 N L R 121=65 I C 532.

—S. 53—Any excess of jurisdiction can be challenged in Civil Court. It has no power to review mere erroneous exercise of judgment. Allegations in the plaint determine jurisdiction of courts. Distinct allegations of fact or law as to how this act objected to was ultra vires must be made in the plaint. A I R 1922 Nag 10=5 N L J 214=18 N L R 121=65 I C 532.

**BERAR PATILS AND PATWARIS LAW (1900).**

—Emoluments of Patwari office agreement relating to invalid. 21 I C 855.

—Though the rules are not precisely worded, still they seem to mean that patwari is not responsible for any work outside his circle. A I R 1923 Nag 146=68 I C 157.

—S. 2—As the word 'village' in S. 2 means and includes a group of villages, the suggestion of only one revenue patil for a village cannot be supported. A I R 1927 Nag 398=99 I C 436.

—S. 9—A Patwari's emoluments are to be enjoyed only by the office-holder under S. 9. They cannot be partitioned or assigned. 43 I C 137.

—S. 11—Even though Principal Patel assigns the emolument of the office of Patels, the assignment is void. 9 N L R 175=21 I C 855.

—Ss. 20 and 6 (A) (4)—Civil Court cannot entertain a suit for division of balance of emoluments. A I R 1923 Nag 16=68 I C 506.

**BERAR WASTE LAND RULES 1865.**

—The Berar Waste Land Rules, 1865 are not in the nature of legislation at all but merely administrative Rules. A I R 1930 P C 267=26 N L R 326=60 M L J 7=Ind Rul (1931) P C 40 (P C)=128 I C 664.

—Berar Alienated Villages Tenancy Law is not repugnant to Waste Land Rules of 1865, r. 3. A I R 1927 Nag 304=103 I C 309.

—No proprietary rights are acquired by lessee until grant of sanad by Govt. on his making distinct election and agreeing with the Govt. A I R 1925 Nag 353=87 I C 1036.

**BETROTHAL.**

See Damage.

See Hindu Law—Marriage.

See Tort.

See Marriage.

See Contract—Breach of Contract.

**BETTING**

See Contract Act s. 30

**BHADE KHAT**

See Registration

**BHAG**

See Bomhay Bhagdari and Narwadari Tenures Act V of 1862

**BHAGCHASIS**

—Who are—If hired labourers. B T Act, Ss. 5 (1) (2) (5) and 19. 21 C W N 505  
=39 I C 934

and see

35 C WN 1143

**BHAGDARI AND NARWADARI TENURES ACT.**

See Bombay Bhagdari and Narwadari Act (Vof 1862)

**BHAGDARI CUSTOM**

—Will of Bhagdari property—Consent of heirs—Custom of exclusion of daughters by male agnates—Will inoperative Mahomedan Law, Will. 19 Bom L R 141=41 B  
377=39 I C 83

**BHAGDARI TENURE.**

See Land Tenure

**BHATIAS.**

—Succession—Hindu law or custom—Right of Daughter's son to succeed in presence of collaterals—Bhatias rank as twice born—Small town of Kangarh in Muzaffarnagar District. 105 P W R 1913=  
172 P L R 1913=19 I C 439

**BICYCLE.**

—Whether a vehicle. Bombay Dt. Police Act S 61 (b). 19 Bom L R 349=41  
B 464=10 I C 289

**BID.**

See C P Code O XXI rr. 69 and 82, 84 to 94.

See Contract Act s. 2 (a) and (b).

**BIDDER AND PURCHASER.**

See C P Code O XXI rr. 69, 82.

See Contract Act s. 2 (a) and (b).

**BIGAMY.**

See also (1) Divorce Act 1869  
(2) Marriage.

**BIHAR AND ORISSA BOARD OF REVENUE ACT  
(B AND O. I OF 1913)**

—S. 1—No action of Collector in allotting separate estates on final order from Commissioner can be challenged in Civil Court. A I R 1930 Pat 130=8 Pat 830=11  
P L T 494=Ind Rul (1930) Pat 152=121  
I C 456

—S. 6 (1)—S. 114. C P C does not Control S. 6 (1). A I R 1930 Pat 130=8  
Pat 830=11 P L T 494=Ind Rul (1930) Pat  
152=121 I C 456

—S. 35—The word 'property' means the entire estate of the disqualified proprietor. Any subsequent accretion or acquisition to the estate will be governed

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**BIHAR AND ORISSA BOARD OF REVENUE ACT  
(B AND O. I OF 1913) (Concl.)**

by the Court of Wards. It is not necessary to take over formal charge in respect of each individual property so acquired. A I R 1931 Pat 188=12 P L T 293=10 Pat  
554=131 I C 385

—Ss. 35, 60-A—If the property in question is the interest of a ward in an estate, the Court of Wards may be said to be in possession thereof, when it has done all in its power to bring the estate under its control. Physical possession is no necessary element of the charge. A I R 1931 Pat 188=12 P L T 293=10 Pat 554=  
131 I C 385

**BIHAR & ORISSA COURT FEES AMEND. ACT  
2 OF 1922**

—Act is not retrospective. Court fee under the new Act must be affixed to the memo-of appeal presented to wrong officer before, and received by proper officer after the new Act A I R 1923 Pat 150=3 P L T 820=(1922) Pat 366=1 P L R 12=2 Pat  
264=71 I C 426

**BIHAR & ORISSA MUNICIPAL ACT  
(VII OF 1922)**

—S. 83 (c)—"Amount of annual assessment" does not refer to the amount of annual assessment of each holding A I R 1929 Pat 745=Ind Rul (1930) Pat 312=  
123 I C 392

—S. 92—Maximum of Rs. 120 refers to occupation of one single holding. A I R 1929 Pat 745=Ind Rul (1930) Pat 312=123  
I C 392

—S. 98—Assessment under Act of 1922 of a person assessed in 1912 is not ultra vires. Under Behar and Orissa General Clauses Act 1917 s. 8, previous assessment is not a right. A I R 1930 Pat 189=Ind Rul (1930) Pat 693=11 P L T 390=  
127 I C 453

—S. 100 (1)—Occupation does not determine liability under S. 100 (1). A I R 1930 Pat 370=Ind Rul (1930) Pat 668=  
126 I C 908

—Ss. 105 and 115—The assessment lists are not prepared after notice to the tax-payers. Hence neither the recitals in them nor those in the demand registers based on them are evidence against the assessees. 13 P L T 771=A I R 1933 P 65

—Ss. 116 and 119—No procedure regarding imposition of assessment can be challenged in Civil Court if it was not questioned at the outset. A I R 1930 Pat 189=Ind Rul (1930) Pat 693=11 P L T 390=  
127 I C 453

—Ss. 116, 117 and 95—Assessment under S. 95 is governed by provisions of Ss. 116 and 117. A I R 1929 Pat 235=Ind Rul (1929) Pat 612=11 P L T 38=119 I C 884

**BIBAR & ORISSA MUNICIPAL ACT**  
(VII OF 1922) (*Concld.*)

—S. 119—A suit by the Municipality to enforce its claim can be dismissed if it has failed to dispose of the objection preferred by the assessee in accordance with the Municipal Act. A I R 1929 Pat 235=Ind Rul (1929) Pat 612=11 P L T 38=119 I C 884

—S. 130—House and latrine taxes—Suit for—House admittedly not in existence at date of—Proof of its existence during period for which taxes claimed—Onus of. on Municipality. 13 P L T 771=A I R 1933 P 65

—Ss. 197, 198, 200 and 201—Decision by Municipal Commissioners to remove encroachment on roads bars the grant of injunction permanent or temporary against the removal. A I R 1929 Pat 613=Ind Rul (1929) Pat 670=120 I C 30

—S. 377 (1) and (2)—Cases of Contract are not governed by S. 377 (1) and (2) A I R 1926 Pat 462=7 P L T 529=97 I C 128

**BIHAR & ORISSA PUBLIC DEMANDS RECOVERY ACT (IV OF 1904)**

—S. 26—The rent decree ceases to be so if its holder chooses to sell a part of the holding when it is against the whole. If all the tenants are not made parties, it will only be a money decree. A holding stood on the name of some tenants but a certificate was issued only in the name of one & only a portion was sold in its execution, held, that the purchaser was a purchaser in execution of a money decree & had no priority over a prior purchaser. 56 I C 463

**BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT 4 OF 1914**

—Certificate-holder—Person not the, and not claiming under the, and claiming under title derived before issue of certificate—Suit for recovery of property by—Party to—Secretary of State not a necessary party. 11 P 701

—Ss. 10 and 45—A person applying to set aside the sale on the ground of non-service of notice under S. 10 must prove it. Suit to set aside a sale held more than a year before the Act is not governed by S. 45. 1 P L R 285=71 I C 957

—S. 29—Application to set aside certificate sale under—Decision in—Finding as to character of land in, viz, that it is debottar—Obiter only is, and of little value. On such an application, the Revenue authorities have only to decide (1) whether notice was not served under S. 7 and (2) whether there was a material irregularity in the certificate proceedings or in publishing or conducting the sale. 11 P 701 (720)=141 I C 157=A I R 1933 P 6.

**BIHAR & ORISSA PUBLIC DEMANDS RECOVERY ACT IV OF 1914 (*Concld.*)**

—S. 29 (2)—contains no restrictions like s. 45. The certificate officer can entertain an application to set aside a sale even after one year from date of sale. A I R 1931 Pat 182=12 P L T 58=Ind Rul (1931) Pat 297=132 I C 873.

—S. 29—It is enough if the Certificate Officer is satisfied that there are reasonable grounds to entertain delayed application to set aside sale. He need not set forth his reasons. A I R 1931 Pat 182=12 P L T 583=Ind Rul (1931) Pat 297=132 I C 873.

—S. 29—The provision of s. 29 that the applicant should have sustained substantial injury affects cases in which sale is set aside on some material irregularity other than nonservice of notice. A I R 1931 Pat 182=12 P L T 58=Ind Rul (1931) Pat 297=132 I C 873.

—S. 32—All proceeding before the Certificate Officer under the Act except an inquiry under s. 32 (2) terminate after the sale has been held and the proceeds realised. A I R 1923 Pat 410=2 Pat 257=24 Cr L J 800=74 I C 713.

—S. 43—On plaintiff claiming benefit of general rule, defendant must prove its non-applicability. A I R 1927 Pat 248=6 Pat 606=8 P L T 590=101 I C 707.

—S. 45—Suits to set aside sales held in 1906 are not governed by s. 45. A I R 1924 Pat 183=1 P L R, 285 Civ. 71 I C 957.

—S. 46—Where recorded patnidar holds benami for another or transferring by private arrangement, no suit by beneficiary or transferee to set aside the rent decree exception ground of fraud is maintainable. A I R 1926 Pat 465=5 Pat 415=8 P L T 343=98 I C 893.

—Sch II r. 43—Purchase by judgment debtor in auction in execution of certificate for dues such as sale is valid. All co-sharers can take advantage of the sale due to default of co-sharer purchaser. A prohibited sale can be avoided A I R 1924 Pat 547=3 Pat 458=5 P L T 447=(1924) Pat 240=3 P L R 146 Civ.=78 I C 807.

**BIHAR MUNICIPAL ELECTION RULES**

—r. 40—Qualification of a candidate can be challenged in Civil Court. 63 I C 6 (Pat)

**BILL OF EXCHANGE**

See Negotiable Instruments Act.

—By custom the shah getting payment of the Shah-jog Hundi which comes out to be stolen, forged, false or fraudulent must refund the money with interest unless the drawer or the person doing the fraud is produced by him. Not the drawer's solvency but the Hundi's genuineness is guaranteed by him. Refund claim

**BILL OF EXCHANGE (Concl'd.)**

against the shah must be made as soon as possible so that the shah is enabled to protect himself. 16 Bom L R 434=25

—Acceptance of—Against Goods shipped from enemy port—Outbreak of war after acceptance—Effect. 18 Bom L R 521=41 B 566=37 I C 258

**BILL OF EXCHANGE ACT.**

—Ss. 13 (2) and 89—Negotiable instruments are governed by Ss. 13 (2) and 89 A I R 1926 Mad 1154=(1926) M W N 726=98 I C 318

—S. 27 (3)—“Holder for value” includes a holder having lien on the bill A I R 1925 Bom 369=49 B 270=27 Bom L R 506=87 I C 982

**BILL OF LADING**

See also cases under Shipping.

*Synopsis*

- (1) Meaning of
- (2) Rights and liabilities of shipmaster and shipping co.
- (3) Evidentiary value
- (4) Construction
- (5) Exemption clauses

**(1) Meaning of,**

—A bill of lading is a receipt for goods shipped on board the ship signed by the captain or his representative. A C I F purchaser has a right to ask for the bill of lading and is not bound to pay merely on arrival of the goods at the port. 17 Bom L R 249=28 I C 433

**(2) Rights and Liabilities of shipmaster and shipping Co.**

—Conditions in the bill of lading—company bound to deliver the exact contents shipped—misdescription of goods—company cannot take advantage of any misdescription. A L R 1933 M 517=A I R 1933 M 7=37 L W 27=63 M L J 736=1932 M W N 1233

Bill of Lading—Cargo mixing up of, by accident—Apportionment between consignees See Port Trust. 11 S L R 29=42 I C 659

—Shipping Co. is bound to deliver the goods to the person who proves himself to be the consignee, though they must be satisfied that the bill of lading is bonafied lost. The Co. may not give delivery to one producing the bill & if after consignee's notice, wrong delivery is given, it must suffer. 7 Bur. L T 92=24 I C 70

Also 41 Cal 793

**BILL OF LADING (Concl'd.)****(3) Evidentiary Value.**

—Prima facie evidence of shipment. 28 I C 196

—As to whether possession of B of L is equal to possession of goods see. 18 C W N 309

—The date of the bill of lading is a strong prima facie evidence of the date on which the goods were shipped. 42 I C 382

**(4) Construction**

—Except express contract to the contrary, under general law a carrier by sea must carry the goods under decks & so the clause 'at shipper's risk without option of carrying on deck' clearly favours the ship-owner & is saved from liability for damage due to want of ventilation. 8 Bur L T 273=30 I C 939

—Construction—Clauses not responsible for lack bags and not responsible for counter-marks—Effect. Port Trust. 11 S L R 29=42 I C 659.

**(5) Exemption clauses.**

—Exception Clause—Restraints of Princes—Meaning of—Reasonable apprehension enough—Actual restraint unnecessary. Contract act; S. 65. 10 S L R 100=37 I C 285.

—A bill of lading provided that the Co's liability absolutely ceased when the goods were free of ship's tackle & then they remained at shipper's or consignee's risk. But before delivery to the consignee, the goods were lost by sinking of boats which were overloaded. Held that debt co. was saved by the cessor of liability clause in the Bill; also that carriers by sea for hire are common carriers & the English Common Law applies to them. The clause in the Bill excluded the liability for unseaworthiness of the boats. Privy council decision is binding upon Indian courts though delivered in an appeal not coming from them Per Sadasiva Iyer J. there is no implied warranty of seaworthiness for the lighters & boats employed by a ship. 38 Mad 941=25 M L J 162=14 M L T 137= (1913) M W N 558=20 I C 546.

**BILL OF LADING ACT.**

—S 1—Consignee claiming the goods under the Bill of Lading is liable under its terms. A I R 1928 Bom 5=52 B 37=29 Bom L R 1551=106 I C 470.

—S. 3—S. 3 of the Bills of Lading Act apply only to the master or the person



**BILL OF LADING ACT ((Concl'd.))**

signing the bills. A I R 1925 Sind 221=18  
S L R 106=92 I C 206.

—S. 3—Bills of Lading prima facie  
show that articles are given to shipping  
Company. A I R 1925 Sind 221=18 S L R  
106=92 I C 206.

**BILL OF RIGHT.**

—See Habeas Corpus Act.

**BINNA GOTRA SAPINDAS**

See Hindu Law—Inheritance

**BIRBAM GHATWALI LAND REGULATION**

See Regulations—Beng Reg. 29 of  
1814.

**BIRT**

See Civil Procedure Code, s. 60

See Hindu Law—Religious Office

See Transfer of Property Act, s. 6

See Land Tenure

—Status of birt-dar see 14 I C 117

—A person claiming to be Jagmani

Birt-dar and suing for possessing such  
right must prove grant or custom raising  
a presumption of lost grant. When it  
was on evidence that plff was not in  
possession but his father possessed it  
during his life and the defts were long in  
possession the suit must fail. 12 A L J  
267=22 I C 957

**BIRT JOJMANI**

See also C P C Ss. 9 and 60

—Pragwal using the same kind of  
flag as was used by another Pragwal  
already is liable to the latter for that un-  
lawful act. 18 A L J 679=43 A 20=2 U P  
L R (A) 227=58 I C 873

—S. a Pragwal used a specific flag for  
guiding the pilgrims and the deft his  
agent in his life and his wife's after his  
death put up the similar flag to mislead  
the pilgrims held that the deft's action  
was illegal and the plff. S's real heir can  
restrain deft from using the flag by a  
suit. 18 A L J 679=1921 A 316=43 A 20=  
59 I C 873

—The right of birt jajmani being  
heritable and transferable, the daughters  
to whom they were bequeathed under a  
will can claim the share. 18 A L J 835=  
57 I C 315

—Right to personal service—Not  
attachable in execution. See C P Code  
S. 60 (f). 17 A L J 842=41 A 656=51 I C 539

**'BIRT' TENURES**

See Land Tenure

**BIRTH**

—Entries of birth date in books  
whether admissible in evidence to prove  
age. see 19 C W N 767 (P. C.)

**BLINDNESS.**

See (1) Hindu Law—Succession, Inheri-  
tance

(2) Malabar Law—Joint family

**BLOWING HOT AND COLD.**

—Inconsistent pleas. See Practice,  
Pleadings. 26 M L J 460=24 I C 696  
—Estoppel. 21 O C 188

**BOARD**

See Deed—Construction

**BOARD CIRCULARS**

—A person applying for a copy to  
be sent by post should have his wish  
complied with & if instead a notice is put  
on board that it is ready & if he turns up  
within reasonable time, he should be  
allowed the time up to personal delivery  
to be deducted from the limitation period  
for filing it. 8 O C 150

**BOARD OF REVENUE**

(Madras)

—Per Sadasive Iyer J—Govt Rules at  
p. 125 of Board's standing order cannot be  
considered to be under s. 14 of Pensions  
Act & are ultra vires (1913) M W N 374  
=25 M L J 155=18 I C 353

—Standing Orders (Mad)—Power to  
cancel Dharkhast. (1915) M W N 148=28 I  
C 51

—When an inam was granted for  
maintenance to the plff's & deft's  
ancestors, in absence of original grant it  
cannot be assumed that its operation ceased  
in plff's family on his adoptive father's  
death & it could only go to lineal des-  
cendants & not to the adopted son. In  
case where the Zemindar has the reversion-  
ary right R. 57 of Board's standing order  
is inapplicable. Under the order the govt.  
can only resume it but cannot lapse it.

When a deft collects more than his  
share of rents it is no ouster of the plff  
& the plff's mere declaratory suit is  
maintainable. (1911) 2 M W N 384=12 I C  
548

**BOMBAY ABKARI ACT 5 OF 1878**

—Ss. 6 & 7—Commissioner of Customs  
cannot dismiss a non-covenanted public  
servant of the Excise Department at his  
will. A I R 1922 Bom 17=24 Bom L R 210  
=67 I C 280

—Ss. 32, 67—On 14-3-1910 plff execu-  
ted an agreement for a license to sale  
country liquor in Nasik. On 31st March  
he was informed of the suspension of the  
license by the Collector & on 6th April he  
was informed about its cancellation as he  
had bribed his Head Clerk. He unsucces-  
sfully appealed to the Commissioner & the  
Govt. On 30th March 1911 he sued the Govt.  
for damages. The original Court dismissed  
it as time barred & as the Collector's action  
was bona-fide, held that the revocation of  
the license was on 31-3-1910 & as the suit  
was instituted more than 4 months after it  
was barred. (2) Collector's act was legal  
& bonafied, (3) Though his act was not stri-  
ctly under s. 32 (c), the circumstances were

**BOMBAY ABKARI ACT 5 OF 1878 (Concl'd.)**

so near it that the act must be taken to be under the statute. If any public or private body charged with executing an Act bona-fide wants to put it in motion & honestly believes in the facts which if existing would justify its acts, its conduct will be legal & protected. 37 Bom 101=14 Bom L R 949  
=17 I C 673

—S. 34—Arrears of license fees-recoverable as land tax—priority over mortgage and of licensee. A L R 1933 S 35=26 S L R 390

—S. 34—Abkari revenue arrear—Sale of immoveable property of renter for—Prior mortgage on property—Effect of sale on. See 26 S L R 390

—S. 34—Government has priority when a Licensee pledges his stock of wine to the Bank but is already indebted to Government for unpaid instalments. A I R 1930 Sind 185=I R (1930) Sind 221  
=125 I C 829

—S. 43—License was issued to A to sell liquor with a condition not to sale, transfer or sub-let his right. B was then joined as partner who sued him for partnership account & for recovery of the sum found due held that partnership was not forbidden or opposed to Excise Act. Non-prohibition of taking partners can be inferred from omission of all reference to it in the license sanctioned by Govt. in 1903. 37 Bom 320=19 I C 442=15 Bom L R 227

**BOMBAY ACKNOWLEDGEMENT OF DEBTS REGULATION.**

See cases under Regulations—(3) Bombay Regulation V of 1827

Bombay Act for City surveys and amendment of Bombay Survey and Settlement Act 4 of 1868.

[repealed by Act 12 of 1873 and Bom Act 5 of 1879]

**BOMBAY ADMINISTRATION OF ESTATES REGULATION**

See cases under Regulations—(3) Bombay Regulations—Reg. 8 of 1827

**BOMBAY AGENTS OF FOREIGN SOVEREIGN ETC. ACT 15 OF 1840**

See under Jurisdiction.

**BOMBAY AHMEDABAD TALUKDARS ACT (VI OF 1862)**

—Within the Act the Kasbati lessees were not Taluqdars of Ahmedabad. His interest in lease for a fixed period was not changed into heritable & transferable property by act VI of 1862. Under Ss. 68 & 73 a lessee is clearly bound by the lease whether a true Taluqdar, or a Thakur, Mewasi, Kasbati or Naik. 19 C W N 1087=13 A L J 953=29 M L J 242=(1915) M W N 563=18 M L J 179=2 L W 731=17 Bom L R 730=30 I C 303 (P C)

—The Act does not apply to kasbatis

**BOMBAY AHMEDABAD TALUKDARS ACT****VI OF 1862 (Concl'd.)**

lessees. 39 Bom 625=42 I A 229=17 Bom L R 730 (P C)

—Ss. 10, 15, 16—Taluqdari Settlement Officer is not subordinate to High Court & the latter cannot interfere revisionally under S 115 C P C with former's orders—The decision under S. 16 is the one referred in S. 15 (2) which comes after necessary inquiry & taking of evidence. S. 10 entitles the holder of a decree of the competent Court as of right to have his share divided & to hold it as separate. The sec. does not say that the decree necessarily is res judicata between the parties before the Settlement Officer. 13 Bom L R 118=9 I C 943

—S. 12—Estate under the management of Settlement Officer—Alienation by Thakur or Talukdar, invalidity of Construction Jivai Grant. 17 Bom L R 273

—S. 29 (e)—Decree holder's right to apply to Court was not absolutely barred by S. 29 by submitting his claim to the officer. Before moving the Court for execution under S. 29 (e) he should produce the certificate from the office or to apply to him for it & wait for one month. If no certificate be issued during that time his right to move the Court for execution revived. He was not entitled to deduct the period for which the claim was pending before the Officer. 35 B 324=13 Bom L R 292=10 I C 912

—Ss 29 B, 32 (2) (cc)—Taluqdar's some wanta land was usufructually mortgaged in 1893 by his guardian without sanction to the plff. In 1896 the management came under Talu-Settle-Officer who in 1905 gave notice to notify claims within six months. The plff. did not comply with it. The Officer in 1915 gave him notice under Ss. 202 & 79 A Bom L R Code that the debt was satisfied & his possession was illegal. He filed a declaratory suit against the Talukdar & the T S Officer & for a permanent injunction. Held (1) that "claims against Talukdar or his property" in S. 29 B are not limited to those against his estate & under the Sec. notice of the claim must be given. It must be taken to be registered within 6 months from the date of notice under S. 29 B expired.

(2) Plff's claim was not by adverse possession as the mortgage was only voidable under S. 30 Guardians & Wards Act 1890

(3) Under S. 79-A Land Rev-Cohe with S. 33 (2) (cc) Taluq. Sett. Officer's powers to summary eviction were limited to Taluqdari tenure only. 19 Bom L R 855=42 I C 903

—Ss. 31, 32—A talukdar granted a portion as jiwai to a member of his family

**BOMBAY AHMEDABAD TALUKDARS ACT**VI OF 1862 (*Concl'd.*)

who on 19-4-89 mortgaged it with possession to plff's father. Mortgagor died in 1894 & the mortgagee died the next year but all possession remained with the latter. Plff was under S. 202 Bom Land Rev-Code served with a notice by T. Settlement Officer in Nov. 1907 for vacating & under S. 79 A amended by S. 33 Gujarat Talukdars Act evicted him. He sued for possession. Held his claim be decreed. His possession was adverse for more than 12 years since mortgagee's death. On account of Talukdar's death the incumbrance would not come under S. 31 but would be one arising from Limitation Act. Held also that his possession claimed as an adverse one would not be within S. 33 (2) (cc), Gujarat Talukdars Act 1888. Also that the Collector can only interfere in wrongful Occupation or one contrary to the Act under S. 79 A (a) Bom. Land. Rev. Code with S. 33 (2) (cc) of G T Act 37 Bom 380 =15 Bom L R 378-19 I C 891

—S. 36—A Civil Court can hear a declaratory suit that plff being of the oldest family is the nearer heir than the deft to the late vatandar. 40 Bom 55=17 Bom L R 725-30 I C 925.

**BOMBAY BHAGDARI AND NORWADARI ACT**

(V OF 1862)

—The plff. a bhagdai resident claimed to tether his cattle on land just outside his house. The land was a lane from the main street to some houses neighbouring that of the plff. It was publicly used freely, held that the land was Govt. property. 14 Bom L R 934=37 Bom 87=17 I C 659

—A valid will according to testator's personal law, regarding Bhagdari land is inoperative as offending against that Act. 41 Bom 377=19 Bom L R 141=39 I C 83

—Alienation of unrecognised portion of a bhag—Validity of. See 16 Bom L R 62

—S. 1—The portion must be taken as a recognised sub-Division when it is recognised by the Collector as such on separation by the proprietor of the narva land. A I R 1925 Bom 476=27 Bom L R 958=88 I C 1034

—S. 3—A person who acquires land of a particular tenure (e. g. bhagdari tenure) by adverse possession holds the land subject to the incidents of that tenure. A I R 1931 Bom 511=33 Bom L R 1211

—S. 3—The prior purchaser of an unregistered portion of a bhag is not entitled to compensation in a suit by a subsequent purchaser of the entire bhag for possession, when the latter at the time of purchase did not know the former's rights. A I R 1931 Bom 430=33 Bom L R 499

**BOMBAY BHAGDARI AND NORWADARI ACT**V OF 1862 (*Concl'd.*)

—S. 3—One taking possession of an unrecognised Sub-Division of a bhag under a void lease and continuing in it for 12 years, he acquires by prescription a title to such interest and cannot be evicted during the continuance of the lease. A I R 1930 Bom 448=32 Bom L R 930=I R (1930) Bom. 638=127 I C 910.

See also A I R 1923 Bom 146=24 Bom L R 1315

—S. 3—A mortgagor sold a moiety to the mortgagee and the other to wife for consideration. Then after husband's death wife transferred her share to the mortgagee. This latter sale is void and the Arts. 125, 126 or 141 Limit. Act. do not govern the reversioner's suit for setting it aside. The reality and the appearance of the transaction must be looked to. A I R 1930 Bom. 545=32 Bom L R 1013=54 B 837 =I R (1930) Bom 625=127 I C 897

—S. 3—Obviously the whole but really a part only of the bhag was sold. Transferor for a long time took advantage of the transfer and then applied to avoid it. Though transfer is null and void equity must be considered. A I R 1930 Bom. 121=31 Bom L R 1422=I R (1930) Bom 254=124 I C 126

—S. 3—A right to Bhagdari lands may be obtained by adverse possession—A I R 1928 Bom 377=30 Bom L R 980=I R (1929) Bom 218=114 I C 266

—S. 3—It is a void lease when it is for 500 years. A I R 1923 Bom 146=24 Bom L R 1315=77 I C 932

—S. 3—A compromise effecting dismemberment of the recognised sub-division is void under s. 3. 20 Bom L R 342=45 I C 577

—S. 3—Survey nos. 34, 79, 113, 119 & 159 were recognised sub-divisions & the deft. held a portion of the last by adverse possession & its remainder & other nos. were sold to him by the two owners under different deeds. Under s. 3 the sale-deeds were attacked as void. Held that there was no alienation prohibited by s. 3 as it resulted not in dismemberment of bhags but one owner came to possess some parts of a recognised sub-division. 21 Bom L R 707=51 I C 947

—S. 3—On settling the accounts the defts. mortgaged a house, a part of unrecognised sub-division. The mortgagee was to be reimbursed if possession was not given. Defts. possessed it as plff's yearly tenants from 1879. Plffs were refused possession in July 1909 when the last rent-note ended. On 9-11-1910 plff. sued for possession or Rs. 749 as compensation. Held that (1) under the Act, the mortgage & the rent-notes were void. (2) Considera-

**BOMBAY BHAGDARI AND NORWADARI ACT  
V OF 1862 (Concl'd.)**

tion for mortgage failed abinitio & the suit for recovering was barred by art. 62 Limi. Act. (3) Though void under the Act plffs. can claim under the covenant in the deed. (4) Plff's possession from 1897 to 1909 gave him absolute title to limited interest as mortgagee and (5) the claim on the covenant was within time 39 Bom 358=17 Bom L R 259=28 I C 442

—S. 3—A permanent bhagdari tenant sold his interest to plff. The Collector setting aside the transfer as void under s. 3 put the deff, the bhagdar in possession held that the Collector's action was wrong as s. 3 did not prevent such alienation. Per Beaman J. Rights existing prior to Bhagadari Act with Non-bhagdars or Non-Narwadars but originating in Bhags or shares in such villages those rights are not portions of such Bhags or shares of Bhag-dari village within s. 3 & alienations of such rights is not prohibited by it. 38 Bom 679=16 Bom L R 571=28 I C 127

—S. 3—Under s. 3 Bom Bhag Act alienation of a joint share of a bhag to a stranger is void. 15 B 172 F B.

—S. 3—Transfer by testamentary demise is included in 'alienation' of S. 3. 40 Bom 207=17 Bom L R 1131=33 I C 425.

—S. 3—Lease of an unrecognised subdivision of a bhag Tenant cannot plead invalidity of lease when sued in ejectment. 22 Bom L R 149.

—S. 3—Possession by transfer contravening s. 3 may become adverse & bar suit for its recovery. 10 Bom L R 1128=38 B 116.

—S. 3—Compulsory acquisition—Unrecognised subdivision of narva holding—Provisions of Land Acq. Act s. 32 do not apply. 17 Bom L R 1140.

**BOMBAY BROACH AND KAIRA INCUMBERED ESTATES ACT 14 OF 1877**

—S. 19—Execution applications are included in "suits" in the concluding para of s. 19 Act XIV of 1877. 5 B 448

**BOMBAY, BROACH AND KAIRA INCUMBERED ESTATES ACT XXI OF 1881.**

—S. 28—The disability continues to Thakor's successor also when the estate is taken under the management. A I R 1925 Bom 175=27 Bom L R 88=86 I C 28.

—S. 28—When a Talukdar's mortgage is void under S. 28 of the Broach a Kaira Incumbered Estates Act 1881. after his death, mortgagee cannot recover his money under S. 65 Contract Act. 41 Bom 546=19 Bom L R 545=49 I C 1032.

**BOMBAY BROACH THAKUR'S RELIEF ACT 15 OF 1871.**

—S. 23—Jurisdiction of Civil Courts. 5 B 135

**BOMBAY CANTONMENT ACT III OF 1867.**

—S. 11—Contract by Cantonment committee, suit for damages for breach of, maintainable against committee as body corporate. 14 B 286.

**BOMBAY CITY IMPROVEMENT ACT (IV OF 1898)**

—Apportionment of compensation money can be decided by tribunal of appeal constituted under Bom. Improve. Act 1898. It can also decide titles among the claimants inter se. 36 B 203=14 Bom L R 22=13 I C 855

—Ss. 31, 41, 42 & 45—Ss. 41 & 45 are correlative, both referring to ground & nothing else, which is used as a street. "Street to be formed" vesting in the trust by s. 41 is intended with the ready street vesting in the corporation by s. 45. So when the regular street line is changed & the adjacent owner desired to put forth his building on part of old street, held that the strip of the old street not formed into a new one, is never vested in the trust i. e. it remained Corporation's property & Commissioner's permission to the adjacent owner caused it to be his property under s. 301 (3) of the municipal Act 1883; also as payment is provided for, no price is payable by him for the projection. When there is no contrary contract, interest on unpaid price runs from new owner's possession in sale or acquisition of land.

43 Bom. 181=36 M L J I=21 Bom L R 114=29 C L J 138=17 A L J I=25 M L T 103=9 L W 171=(1919) M W N 321=23 C W N 441=41 I C 404=45 I A 233 (P C)

**BOMBAY CITY LAND REV. ACT (II OF 1876)**

—As to the scope and object of the Act, see 39 B 664

—Ss. 8, 12, 39, 40—Representation as to the nature of tenure in rent rolls kept by the collector—Whether binding on secretary of state. 14 Bom L R 654=16 I C 714

**BOMBAY CITY MUNICIPAL ACT (III OF 1888)**

—That construction should be adopted which facilitates the carrying out of the object by the Act. A I R 1928 Bom. 104=30 Bom L R 169=108 I C 488

—Interference by the corporation with private rights beyond the limited powers under the Act should not be allowed. A I R 1925 Bom 458=27 Bom L R 581=87 I C 771

—Ss. 3 (m), 380—"Owner" in both the sections means the same thing. 109 I C 344

—S. 16 (J)—A servant of a newspaper office printing Corporation advertisement is not on that count disqualified from voting. A I R 1923 Bom 305=25 Bom L R 684=47 B 809=83 I C 856

—S. 33—There is no revision from a decision under the section. A I R 1923 Bom 421=25 Bom L R 463=73 I C 133



## BOMBAY CITY MUNICIPAL ACT

## III OF 1888 (Contd.)

—S. 36 (q)—“Majority” means absolute majority. A I R 1927 Bom 622=29 Bom L R 1430=105 I C 759

—Ss. 36, 37—Regulations of 28th March 1927 are within the powers. At a Corporation's meeting to elect a President, the retiring one presided but the candidates got equal votes & the vote is valid when the Chairman by drawing lots gave a casting-vote. A I R 1927 Bom 622=29 Bom L R 1430=105 I C 759

—S. 36 (p)—For disqualification of the Councillor he must be interested in “the matter” before the meeting. A Councillor is not disqualified from voting on a question of a loan to the Corporation under cl (p) when he has an interest in a lease of land within cl. (g). A I R 1923 Bom 305=25 Bom L R 689=47 B 809=83 I C 856

—S. 63 (k)—When a Municipality contemplates to utilize the ground floor for shops they are proved with the Scheme. A I R 1925 Bom 538=27 Bom L R 1130=90 I C 695

—S. 63 (k)—A Court has no right to interfere with Municipality's discretion as building quarters for Municipal servants being for promotion of public convenience is within its discretion. A I R 1925 Bom 538=27 Bom L R 1130=90 I C 695

—Ss. 69 (b) & 92 (d)—When the parties are different & the terms of the two contracts vary sanction given in a “particular case” does not govern another subsequent contract. A I R 1930 Bom 414=I R (1930) Bom 603=127 I C 491

—S. 69 (b)—The approval is not to the contract but to the ‘purpose’ mentioned in the Sub-section. A I R 1930 Bom 414=I R (1930) Bom 603=127 I C 491

—S. 83—The Standing Committee has powers to dismiss or appoint the servants without application of ordinary law as to dismiss with some safeguards. As a rule a Civil Court is not allowed to review or to hear an appeal unless the servant can show that there is a violation of the safeguards. A I R 1930 Bom 320=32 Bom L R 463=I R (1930) Bom 420=125 I C 324

—Ss. 90, 91, 92, 296—A corporation has power to acquire excess land but it must be bonafide & reasonably. 23 Bom L R 361=63 I C 581

—S. 91—To premises acquired under the Land Acquisition Act, Bombay Rent (War Restrictions) Act (1918) was inapplicable. A I R 1921 Bom 214=45 B 725=23 Bom L R 35=60 I C 571

—S. 91.—S. 31 Land Acqui. Act is inapplicable & transfer from Government is not needed as the acquired property vests in the Corporation directly. A I R 1921

## BOMBAY MUNICIPAL ACT

## III OF 1888 (Contd.)

Bom 214=45 B 725=23 Bom L R 35=60 I C 571

—S. 91—It is not necessary to give notice to the tenants & the sub-tenants when the land is acquired under the Land Acquisition Act. A I R 1921 Bom 214=45 B 725=23 Bom L R 35=60 I C 571

—Ss. 92 & 69—Those provisions which require sanction of the corporation to the contracts are compulsory. A I R 1930 Bom 414=I R (1930) Bom 603=127 I C 491

—S. 110—The debentures of the Bombay Corporation are not in the ordinary form of a negotiable instrument & in the absence of evidence of the market custom are not negotiable. A I R 1928 Bom 436=52 B 810=30 Bom L R 1225=112 I C 824

—Ss. 140, 143 (1) (a) & (2) (d)—A college hostel is for ‘charitable’ purposes under s. 143 (1) (a) & therefore is exempted from general taxation under s. 140 (c). When its part was occupied by a Prof. & Ass. Superi. Held that, that part was liable for general taxes unless such occupation was for supervision, physical well-being & education of students which absolutely necessitated it. A hostelite student's extra fee is not ‘rent’ within s. 143 (2) (d).

43 Bom 281=20 Bom L R 839=47 I C 642

—S. 147—Where there is a contract between land-lord and tenant exempting the latter from liability to rates, s. 147 cannot help the landlord, and he is bound to pay all rates and taxes including those subsequently levied on an increased assessment. A I R 1931 Bom 118=32 Bom L R 1660=Ind Rul (1931) Bom 220=129 I C 743. See also A I R 1931 Bom 122=32 Bom L R 1668=Ind Rul (1931) Bom 223=129 I C 751.

—S. 147—When a landlord contracts to pay all rates and taxes he is bound to pay the whole increased assessment A I R 1931 Bom 122=32 Bom L R 1668=I R (1931) Bom 223=129 I C 751.

—See A I R 1931 Bom 118=32 Bom L R 1660

—S. 147—When the rateable value exceeds the rent at which the premises are let, the landlord can recover the tax for that excess from the tenant & the landlord may contract himself out of s. 147. A I R 1931 Bom 118=32 Bom L R 1660=I R (1931) Bom 220=129 I C 748.

—S. 147—The rent paid was less than the rateable value. The tenant is liable to the landlord for payment of the tax which the landlord has paid on the difference between the rent payable & the rateable value. A I R 1925 Bom 532=27 Bom L R 1092=89 I C 859

—S. 147—When by a contrary agreement protection is given to the landlord it



## BOMBAY MUNICIPAL ACT

## III OF 1888 (Contd.).

must be proved by a very strong evidence.  
A I R 1923 Bom 70=24 Bom L R 479=67  
I C 430.

—S. 154 (2)—Costs of bath tubs & lavatories & electric lamps & fans cannot be deduced from the rateable value. Electric fittings are not machinery. A I R 1922 Bom 386=24 Bom L R 476=67 I C 426.

—Ss. 162, & 485—The notice for enhanced assessment is valid when served on the rent Collector on behalf of the owner's family. A I R 1928 Bom 104=30 Bom L R 169=108 I C 488.

—S. 219—No revision lies to the High Court as the order of the Chief Judge of Small Cause Court is final. He is persona designata. A I R 1930 Bom 231=32 Bom L R 178=I R (1930) Bom 352=125 I C 448.

—S. 231—Within the Meaning of the section a Rent farmer is an owner. A I R 1930 Bom 165=32 Bom L R 332=I R (1930) Bom 440=126 I C 872.

—S. 248 (1) (c) For the objects of this Section a rent farmer is an owner. A I R 1928 Bom 528=11 A I Cr R 546=30 Cr L J 21=53 B 131=30 Bom L R 1442=112 I C 861.

—S. 248—A rent contractor is an owner & a requisition under s. 248 must be complied with by him. A I R 1928 Bom 527=30 Cr L J 17=30 Bom L R 1439=112 I C 849.

—S. 248 (amended) "Employed in any premises" has the sense of servants employed in private residence. A I R 1928 Bom 532=30 Cr L J 5=11 A I Cr R 500=30 Bom L R 1422=112 I C 773.

—S. 249—A go down is premises when more than 20 persons are employed as labourers or workmen though it be adjoining the residential building of the same owner. A I R 1928 Bom 532=30 Cr L J 5=11 A I Cr R 500=30 Bom L R 1422=112 I C 773.

—S. 251 (A) (a)—The expression "directly over or directly under" not only mean vertically above or below but also in contact with or directly adjacent to it. So a building can be erected where in water closet is vertically above or below any residential quarter provided a both-room interferences. 11 Bom L R 1167=34 B 496

—S. 257 (1)—A commissioner has no right to give a notice under S. 257 (1) asking the landlord to keep the water closed in working order by storing sufficient water in the cistern. A I R 1924 Bom 337=26 Bom L R 178=25 Cr L J 968=81 I C 616

—Ss. 289, 293—Effect of—Vesting property in Corporation. see 38 Bom 565=16 Bom L R 104=23 I C 76

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## BOMBAY MUNICIPAL ACT

## III OF 1888 (Contd.)

(affirmed on appeal. see 41 B 291 (P C).)

—Ss. 296, 297 and 301—The Commissioner defined a line one side of a public street under S. 297 and 299 and took possession under S. 301 of appellant's land after notice. It was for widening the street. The appellant's contention was that the proceedings were ultra vires and the compensation should be paid under the Land Acquisition Act. Held that he acted bona fide under Ss. 297 and 299 and compensation was to be under S. 301. Even if it be shown that creation of a regular line was not part of his object, though an incidental result the appellant under the Act cannot go into his motives or his action is not invalidated because of the view with which the regular line was marked out. 42 Bom 462=23 C W N 110=20 Bom L R 937=(1918) M W N 840=8 L W 548=24 M L T 297=48 I C 63=45 I A 125 (P. C.)

—S. 297—Under S. 297 Municipal Commissioner can determine a line on each side of a public street and also substitute a fresh one though widening the street. To get aid of preamble or recital of heading ambiguity cannot be created or imagined. 36 Bom 405=13 Bom L R 1130=12 I C 906.

—S. 296 (b)—Municipality can acquire land outside the street and also out of the regular line of the street provided it is contiguous. A I R 1924 P C 3=22 A L J 11=19 M L W 1=(1924) W N 77=33 M L T 462=46 M L J 169=28 C W N 375=26 Bom L R 193=51 I A 14=5 L R P C 53=48 B 185=2 P L R 108=39 C L J 201=79 I C 948.

—S. 296—A Corporation may acquire more lands than required to construct roads so as to be recouped for the expenses, but the decision should be reasonable and bona fide. A I R 1921 Bom 230=23 Bom L R 361=63 I C 581

—Ss. 297, 300, 301—Street formation—old street—Owner of adjoining Land ordered to set forward his building ownership of such parts. see 36 M L J 1=43 Bom 181 (P. C.)

—S. 345—A third party cannot apply for issue of a mandamus in the case of a building for which the Commissioner's sanction, with a condition that the building shall not contravene any provision of the Act, has been obtained. A I R 1931 Bom 173=33 Bom L R 31=Ind Rul (1931) Bom 261=130 I C 581

—S. 349—B. "Maximum prescribed by S. 349-A" in this section covers an alternative maximum—23 Bom L R 158=61 I C 143

## BOMBAY MUNICIPAL ACT

## III OF 1888 (Concl'd.)

--S. 379-A--When the landlord causes over crowding by letting his rooms to individual tenants notice to abate under S. 379 A must be given to the owner only. 36 Bom. 81=13 Bom. L R 640=12 Cr. L J 459=11 I C 995.

--Ss. 380 & 3 (m)--Owner in S. 380 means the same thing as defined in S. 3 (m). A I R 1928 Bom. 136=30 Bom. L R 339=10 A I Cr R 176=29 Cr L J 520=109 I C 344.

--S. 394--A jointly owned a place which was partly let out. without, municipal license under S. 394 the tenants kept bullocks, some in huts and others in open. He had knowledge about keeping of the bullocks and allowed it. Held that he was guilty under S. 394 whether bullocks were on leased land or unleased open ground. 14 Bom. L R 885 Note=13 Cr. L J 785=17 I C 529.

--Ss. 402, 403 & 471--A structure had shops abutting a street, there was no inter-communication between them and looked like stalls. They were let to tenants. The structure is not a private market. A I R 1928 Bom. 413=30 Bom. L R 1128=52 B 780 =12 A I Cr R 30=30 Cr L J 168=113 I C 506.

--S. 412 A (b)--Ghee is not included in other milk products. A I R 1929 Bom. 274=53 B 627=51 Bom L R 581=31 Cr L J 103=(1929) Cr Cas 41=I R (1930) Bom. 20 =120 I C 356.

--Ss. 418 & 461 (o)--The Commissioner should recognise the current measures in the city under S. 418 and his method for ensuring of faithful use of such measures is given in it. Under S. 461 (10) Corporation is only empowered to make bye-laws for prevention of fraud by false or detective measures. Held that corporation neither under S. 418 nor under S. 461 (o) can say that no unverified measure should be used in the private markets and the 4th bye-law of 3rd Cha. made by the corporation is ultra vires of S. 461. Prohibition of use of honest measures in a private market is not justified under S. 418 or S. 461 (o) on the plea that it would be easier to ensure the measures actually used are not false or defective. 41 Bom. 580=18 Cr L J 701=19 Bom. L R 358=40 I C 701.

BOMBAY CITY MUNICIPALITIES ACT XVIII  
OF 1925.

--S. 46--A house was occupied by 17 tenants and each tenement had a separate number, connexion with the drain and entrance. Each house was made liable for sullage water-tax by the rules of the city Municipality. Each tenement was a house and as such liable for separate tax. A I R 1930 Bom. 68=31 Bom. L R 1249=54 B 14=I R (1930) Bom. 271=124 I C 239.

## BOMBAY CITY MUNICIPALITIES ACTS

## XVIII OF 1925 (Concl'd.)

Ss. 81 (2), 58 (b) and 46--Municipality revising assessment no standing Committee formed--its powers delegated to the President--objection heard by President--proceedings illegal. A L R 1932 B 216=35 B L R 138.

--S. 110--On an order under S. 110 revisional order were made; there is no further revision. A I R 1928 Bom. 376=39 Bom L R 1084=29 Cr L J 1081=112 I C 585

--S. 123--When the Act prescribes a direct method, in direct & capricious method cannot be considered as contemplated by the Legislature. A I R 1930 Bom. 340=32 Bom L R 768=I R (1930) Bom. 501=127 I C 181

--Ss. 123 (7) & 118 (4). A person does not continue the contravention when he fails to demolish a building for which he was convicted under S. 123 (7) or S. 118. A I R 1930 Bom. 340=32 Bom L R 768=I R (1930) Bom. 501=127 I C 181

--S. 123--Reconstructing a wall is included in the construction of a building. A I R 1928 Bom. 389=30 Bom L R 1082=29 Cr L J 1060=112 I C 564

--S. 137--A notice signed by the Chief Officer is legal when there is referring to Standing Committee's resolution that the chief Officer signed it on the committee's behalf. A I R 1930 Bom. 352=32 Bom L R 757=I R (1930) Bom. 517=127 I C 193

--S. 200--In case of continuing offence limitation to prosecute begins to run from the first committal of the offence. A I R 1930 Bom. 340=32 Bom L R 768=I R (1930) Bom. 501=127 I C 181

--S. 206--Though procedure of S. 110 is not followed under S. 206 an assessee can file a suit. A I R 1930 Bom. 68=31 Bom L R 1249=54 B 14=I R (1930) Bom. 271=124 I C 239

## BOMBAY CIVIL CIRCULARS.

--Ch. II cl. 91 (16)--Execution proceeding transferred to Collector--Application for leave to bid at auction to be made to Collector and not to Courts set off whether can be allowed. See 20 Bom L R 708

## BOMBAY CIVIL COURTS ACT (XIV OF 1869)

--See C P Code S. 37, 16 Bom L R 527

--Ss. 8, 26--A suit for declaration & injunction valued at Rs. 540 was filed with 1 st cl. Sub-Judge. Before judgment, the pursuis mentioned that by consent of the parties the property is valueled at Rs. 10500. The decision was appealed against held that (1) the suit was governed by S. 7 (IV) (C) & (d) of the Court Fees Act & as the same computation was for jurisdiction appeal lay to the Dt. Court & not to High Court (2) that according to the

## BOMBAY CIVIL COURTS ACT

(XIV OF 1869 (Contd.))

statutory method it was valued under Rs. 5000, consent of the parties cannot increase it for jurisdiction purposes. 13 Bom L R 158=10 I C 746

—S. 16—Suit under Divorce Act is not an application and hence transfer by Dist Judge to Asst Judge for trial is illegal. 39 Bom 136=16 Bom L R 754=26 I C 599

—S. 17—An Asstt.-Judge decided a suit & the appeal was referred by Dt.-Judge to another Asstt.-judge empowered to try appeals under S. 17. On appeal held that Asstt.-Judge could hear the appeal because empowered under S. 17, 19 Bom L R 852 =42 I C 825

—S. 19—Reference to Asst Judge under Land Acq. Act—Appeal to Dist Court—Second appeal to High Court. See 38 Bom 337

—S. 24—Accounts—Suit for—Jurisdiction to entertain—Test of—Plaint—Valuation of relief in, within pecuniary limit of Court's jurisdiction—Decree to be passed for amount exceeding such jurisdiction—Jurisdiction not ousted by reason of. 56 B 23

—Ss. 24, 27—Respective jurisdictions of first and second class sub-Judges. See 35 M L J 432 (P C)

—S. 24—A suit for declaring invalidity of adoption if so valued can lie before 2nd cl. Sub-Judge even though property affected be worth more than Rs. 5,000. Adoption is not recognised by Mahomedan law. In conversion from Hinduism to it presumption is that Hindu law of adoption & usage is discarded. He who alleges retention has to prove it. 13 Bom L R 251

—S. 25—Probate—Revocation of—Application for, on ground of will being forged—Value of subject-matter of—Value of whole estate covered by the probate, and not the value of the applicant's interest in the property. 34 B L R 1677=A I R 1933 B 120

—S. 25—A—First class sub-Judge is competent to entertain the cases arising throughout the district. A I R 1927 Bom 460=51 B 809=29 Bom L R 947=104 I C 780

—S. 25 In a declaratory suit in which no consequential relief is asked, s. 8 of the Suits Valuation Act would have no application as the Court-fees are not paid ad valorem. It is the real value of the property and not the notional value that would determine the valuation for jurisdiction apart from the valuation for purposes of the Court-fees. 43 B 507; 50 M 640, followed 35 B 264, distinguished and doubted. 33 Bom L R 1437

—S. 28-A (2)—Amount or value of the subject matter in appeal—revocation of

## BOMBAY CIVIL COURTS ACT

XIV OF 1869 (Conclid.)

probate under the Succession Act—interest of the applicant below Rs. 5,000—appeal—jurisdiction of the District Court. A L R 1933 B 120=34 B L R 1677=A I R 1933 B 77

—S. 28 A—Though some or all of the Dt. Judge's powers under s. 28 A are exercised by a Sub-Judge, he continues to be so. A I R 1930 Sind 91=I R (1930) Sind 45=121 I C 173

—S. 32—As the Secretary of State is a necessary & proper party, a Sub-Judge is competent to try a suit for injunction concerning a Municipal election. A I R 1924 Bom. 65=25 Bom L R 992=48 B 43=77 I C 241

—S. 32—Under s. 32 only a Dt. Court can entertain a suit against the Collector as a Court of Wards. 37 Bom 313=14 Bom L R 1207=17 I C 972

## BOMBAY CIVIL COURT REGULATION

—See cases under Regulation—(3) Bombay Regulations—Reg. IV of 1827

## BOMBAY COOPERATIVE SOCIETY ACT VII OF 1925

—S. 54—A Co-operative Credit Society got an award against the debtor & chose to obtain the sum through a Collector as land revenue. He was ordered to be detained in a civil prison but applied for insolvency. The Insolvency Court cannot refuse an interim protection order to him. A I R 1930 Sind 263=I R (1930) Sind 287=126 I C 751

## BOMBAY COTTON CONTRACTS ACT XIV OF 1922

—Statutory by law under—form of contract—literal compliance not essential—sufficient compliance if terms and conditions prescribed in form contained in the contract. A L R 1934 P C 47=57 C L J 99=37 C W N 350=37 L W 350=64 M L J 622=35 B L R 303=141 I C 828=A I R 1933 P C 55

—American cotton—Act inapplicable to. The Act refers only to cotton grown in this country. 34 B L R 1378=A I R 1932 B 631=A L R 1932 B 1204

—Contract for sale or purchase in Bombay of cotton in New York or Liverpool—Not affected by or by the by-laws made thereunder. 34 B L R 1378=A I R 1932 B 631=A L R 1932 B 1204

—Contract for sale or purchase in Bombay of cotton in New York or Liverpool made subject to the rules of the New York Cotton Exchange or the rules of the Liverpool Cotton Association Limited

—Suit in Bombay for determinations of disputes between parties to—Maintainability of—Arbitration and award under New York or Liverpool rules not a condition precedent to. 34 B L R 1378=A I R 1932 B 631=A L R 1932 B 1204

**BOMBAY COTTON CONTRACTS****ACT XIV OF 1922 (Concl'd.)**

—Ss. 2, 3, 4, 7—Section 4 of this Act subjects all transactions in cotton in Bombay to the provisions of the Articles of the East Indian Cotton Association. Article 96 provides for reference to arbitration in cases of difference between the members or between one or more members and others who are not members. Such arbitrators have jurisdiction to enter into the reference in respect of ready transactions whether the submission was in writing or not. A I R 1931 Bom 81 =Ind Rul (1931) Bom 97=32 Bom L R 1451 =128 I C 881

—Ss. 3 & 4, Bye-laws 38 & 81—Art 96 E. I. Association makes arbitration condition precedent to the suit but members are only bound by the article and it is not so made by bye-law 38. Articles are not given the force of law by Act declaring the Articles of Association as lawful. Contracts between the Constituents & the agents must be in writing & as per prescribed forms. A I R 1931 Bom 41 =32 Bom L R 1319=I R (1931) Bom 70=128 I C 614

—S 3 (1)—Disputes between parties in relation to a contract the very factum or existence of which is denied are not disputes which the arbitrators have jurisdiction to decide. In other words, the arbitrators have no jurisdiction to decide whether in fact the contracts were or were not entered into. 34 B L R 697 (700-1) =138 I C 337=A I R 1932 B 341=I R 1932 B 372

—S. 3 (1)—By-laws 38-A and 82—Dispute in relation to a contract—Dispute as to factum or existence of a contract if a—Contract repudiated by one party and acceptance not proved—Jurisdiction of arbitrators to decide dispute in case of—S. 4 of Arbitration Act of 1899—Effect. See 34 B L R 697

—S. 4—association recognised as statutory body—constitution and machinery set out in articles of association declared lawful—provision for arbitration in Art. 96 not condition precedent to suit on contract. A L R 1933 P C 47

—S. 5 and By-law 38-A—An award proceeding on a contract not in the sanctioned form is illegal and void. A I R 1931 Bom 343=33 Bom L R 759=55 B 503 =Ind Rul (1931) Bom 513=134 I C 705

—Bye-laws 80, 81—Hedge contracts between member and non-member of the Cotton Association are governed by Bye-law 81 not 80. A I R 1931 Bom 424=Ind Rul (1931) Bom 443=33 Bom L R 804=133 I C 859

**BOMBAY COTTON DUTIES ACT II OF 1896**

—S. 16 It is wilful obstruction if

**BOMBAY COTTON DUTIES ACT****II OF 1896 (Concl'd.)**

no free access is given to the godown. A I R 1924 Bom 492=26 Bom L R 721=25 Cr. L J 1281=82 I C 353

—S. 17 (1) No other Section qualifies the necessity of a certificate under the section. I R (1930) Sind 127=123 I C 703 (1) Bombay Cotton Trade Association R. 71

—Sale—Vendor's duty to tender goods at the time specified—Delivery of railway receipt whether sufficient See Contract Act. S. 47, 18 Bom L R 96

**BOMBAY COURT OF WARDS ACT (I OF 1905)**

—Decree by Sub-judge—Addition of Court of Wards after decree—Execution proceedings—Jurisdiction of Sub-Judge to entertain. 16 Bom L R 527.

—Retrospective operation. See 38 Bom 194=16 Bom L R 26=37 I C 186

—S. 4 when the sanction is questioned the Secretary of State is a necessary party A I R 1928 Sind 76=22 S L R 63=105 I C 729

—Ss. 4 & 7—Permission under S. 7 is required before sanction under S. 4 is granted. A I R 1928 Sind 76=22 S L R 63=105 I C 729

—Ss. 4, 5—When the Court of Wards has jurisdiction, a Civil Court cannot appoint a manager of lunatic's property. In such cases the Civil Court ceases to function after a person is declared lunatic. Court of Wards should approach to apply for superintending & appointing manager only where it has no jurisdiction or perhaps does not want to exercise it that a Civil Court can appoint. 6 S L R 65 =16 I C 678

—S. 12—Applicability to pending suit see 38 Bom 194

—Ss. 13 (2) & 4 Notification under s. 13 gives rise to a cause of action. A I R 1928 Sind 76=22 S L R 63=105 I C 729

—S. 14. Notices are sufficiently published if printed in Govt. Gazette & in the local newspapers in Gujarati. Some further publication of notices under S. 14 than mere that in the Gazette is desirable. 44 Bom. 493=22 Bom. L R 223=55 I C 939

—S. 16—Though Collector's offer under S. 16 is unprovable in claimant's suit, who rejected it, yet under the proviso it can be used as an acknowledgment starting a new limitation period under S. 19 of that Act. 58 I C 319

—S. 22. A guardian of person cannot be appointed by the court of Wards unless superintendence is assumed by it A I R 1924 Bom 157=25 Bom L R 1232=77 I C 702

—Ss. 23 & 27. If for the benefit of the minor, a dispute can be referred to



## BOMBAY MUNICIPAL ACT

## III OF 1888 (Contd.)

arbitration by a Court of Wards. A I R 1930 Sind 195=I R (1930) Sind 36=121 I C 164

—S. 31. The Sec. is inapplicable to a suit against the Bombay Court of Wards Officer. A I R 1928 Sind 76=22 S L R 63 =105 I C 729

—S. 31. The time is extended to plff's favour by two months when at the time of the cause of action the defts were Government wards but before hearing they ceased to be so. A I R 1924 Bom 364=26 Bom. L R 364=81 I C 750

—Ss. 31 & 32. 3 (c)—Ss. 31 & 32 are inapplicable when a Taluqdar, whose estate is managed by Talu. Sett. Officer, is sued by his creditor even though by notification under S. 3 (c), he is made a court of wards. 22 Bom. L R 619=58 I C 205

—Ss. 31 & 32 Deft. was sued under S. 92 C P C as a trustee for recovering trust money. 1st deft. was minor under the C. of Ws. No notice was given to guardian. Held that (1) S. 31 did not apply as the suit related only to a religious institution. (2) omission to name C of Ws as guardian was not bad under S. 32 & it was a mere irregularity. 40 Bom. 541=18 Bom. L R 563=37 I C 186

## BOMBAY DEKHAH AGRICULTURISTS RELIEF

## ACT (XVII OF 1879)

—See under Dekhan Agriculturists Relief Act, Ed..

## BOMBAY DISTRICT MUNICIPAL ACT

## AMENDMENT (II OF 1884)

—S. 32 (h)—There was no compliance with Rule 74 of the Ahmedabad Municipality which is not ultra vires. Only assessment at fixed rate for previous years can be levied. A I R 1921 Bom. 236=45 Bom. 611=23 Bom L R 48=60 I C 578

## BOMBAY DISTRICT MUNICIPALITIES ACT

## (III OF 1901)

—Suit by Municipality—Plaint in—Signing of by de facto chairman of Managing Committee authorised to sign plaint—Suspension of Managing Committee by Collector at time—Signing of plaint by de facto chairman valid even in case of—In any event it is only an irregularity within meaning of S. 99, C. P. C. 56 B 448=34 B L R 1216=140 I C 213=I R 1932 B 567=A I R 1932 B 562=A L R 1932 B 1153

—Corporation—powers of, A L R 1933 B 245=57 B 278=35 B L R 163=A I R 1933 B 132

—Municipality—Acquisition of land—Compensation—Arbitration—Decision of District Court—Appeal—Construction of

## COURT OF WARDS ACT

## (I OF 1905) (Contd.)

Statutes. 13 Bom L R 958=36 B 47=12 I C 540

—When drainage water through defect in the channel passed into plff's field and caused damage, Municipality is liable for it. Exemption from liability because of non-feasance extends only to neglect of highways and not to drainage works which must be repaired so as not to be a nuisance. 38 Bom 116=15 Bom L R 1034=21 I C 847

—Discussing political subjects which may be necessary sometimes is not ultra vires. A I R 1930 Sind 287=I R (1930) Sind 306=127 I C 690

—The Surat Municipality cannot under its bye-law 6, Cha. 11, cut-off one's water-supply who pays water charges, the other charges remaining unpaid. A I R 1927 Bom 640=29 Bom L R 1465=106 I C 147

—A second meeting is not at all illegal when held to avoid a deadlock. A I R 1926 Bom 576=28 Bom L R 1184=98 I C 454

—Before acquiring the land the Municipality must show that it is required for public purposes. It has no power to acquire it by agreement with the owner. A I R 1926 Bom 347=28 Bom L R 535=95 I C 262

—Electricity Act IX of 1910, S. 14. The licensor should bear the costs of removal when he asks the licensee to remove poles and line for his convenience. A I R 1926 Sind 115=95 I C 226

—The sum mentioned in 3rd Column is the limit value for the calculation of the rate. A I R 1923 Bom 413=74 I C 205

—S. 2—Rule 74 of the Ahmedabad Municipality is not ultra vires, so when it is not complied with assessment at rate fixed for previous year may be levied. A I R 1921 Bom 236=45 B 611=23 Bom L R 48=60 I C 578

—S. 3 (12)—“Such places” in exception refers to “every vacant space” at beginning of paragraph and is not connected with previous paragraph. Vacant space, being in fact road or footway assessable to public is street. A I R 1930 S. 30=I R 1930 S. 65=122 I C 385

See also A I R 1924 B 116=25 Bom L R 1218=81 I C 638

—Ss. 3 (17) and 59 (b) (ii)—Hand-trolleys moving on rails and used for carrying materials by contractors for filling a tank are vehicles under S. 3 (17) and



## BOMBAY DISTRICT MUNICIPALITIES ACT

## III OF 1901 (Contd.)

liable for wheel-tax under S. 59 (b) (ii).

17 Bom L R 63=27 I C 497

—S. 10 (2)—A Sub-Judge is not competent to try an injunction suit against the nominated members not to attend the Municipal meetings and the Government is a necessary party to such a suit. A I R 1924 Bom 65=48 B 43=25 Bom L R 992=

77 I C 241

—S. 14 (3)—A water rate under S. 21

(1) (b) is not under S. 14, a tax. A I R 1923 Sind 1=16 S L R 98=87 I C 258

—S. 15 F—A person was elected a member of the Dt. Muncip. but was then held disqualified. After the ceasing of such disqualification he was elected on the School Board. But the Chairman of the Board held him disqualified. His municipal disqualification does not necessarily imply one for the Dt. Board Ordinary suit is the right remedy & the chairman cannot decide the question of disqualification. A I R 1930 Bom 378=32 Bom L R 614=1 R (1930) Bom 319=124 I C 815

—S. 16—Since the amendment of the Bombay District Municipalities Act by Bombay Act III of 1915 it could not be said of Municipal Councillors that they were public servants who were not removable without the sanction of the Governor in Council. By S. 16, as amended they were removable by the Commissioner and delegated powers were no longer needed by the Commissioner. A I R 1932 S 177=

1932 Cr C 792

—S. 16—"Commissioner" which is to be found in S. 16 is defined in S. 3 as meaning in Sind the Commissioner in Sind. A I R 1932 S 177 (179)=1932 Cr C 792

—S. 16—The delegation of powers by the Governor in Council by virtue of Act V of 1868 would not have the effect of repealing or annulling the statutory provision contained in S. 16 Bombay Act III of 1901; it would merely provide for the vicarious-exercise of the powers of the Governor in Council by the Commissioner by virtue of the delegation. A I R 1932 S 177 (179)=1932 Cr C 792

—S. 22—Corruption—Paying—Voter's Carriage hire, if amounts to See 12 S. L R. 73=49 I C 394

—S. 22—The High Court cannot revise an order of the Dt-Judge when acting under S. 22 as he is the person a designata A I R 1926 Bom 344=50 B 357=28 Bom L R 519=94 I C 660

—Ss. 24 (2), 179, 186 (a)—S. 24 (2) is inapplicable to the chairman of the Management Committee appointed under S. 179 & it can take action under S. 186 (a) A I R 1921 Sind 125=17 S L R 46=80 I C 951

## BOMBAY DISTRICT MUNICIPALITIES ACT

## III OF 1901 (Contd.)

—Ss. 36 (2) & 96—P. W. Committee allowed the erection of a new building. If the cancellation or revocation is other wise proper under S. 96 the General Body may revoke the permission. A I R 1922 Bom 247=46 B 663=21 Bom L R 178=69 I C 19

—S. 38—The Section is applicable when there is an irregularity with regard to the continuance of the chairman as such though President has been elected. A I R 1926 Bom 576=28 Bom L R 1181=98 I C 454

—S. 40—To water rate under S. 71 (1) (b) the Section is inapplicable. A I R 1923 Sind 1=16 S L R 98=87 I C 258

—S. 42—The Secy. of State under S. 42 sued the councillors for money embezzled by Secy & account clerk of the municipality. The defence plea was that S. 42 is inapplicable as such embezzlement was not misapplication under the Sec. held that S. 42 was not restricted to councillor's misapplications & S. 42 applies whoever has made them. Per Batchelor J. From context of "misapplication" it seems that a broad & popular sense & not narrow or etymological sense is meant. 46 Bom 186=17 Bom L R 1115=33 I C 428

—Ss. 42, 54 & 58—Maintaining a school is not a misapplication of funds within S. 42 the Government inspection of primary schools was not allowed under the Rules under S. 58 r. 3. A I R 1925 Bom 278=27 Bom L R 371=88 I C 43

—S. 42—Misapplication of Municipality's money within meaning of Suit by Municipality for Managing Committee members of Municipality Dust bins ordered and paid for by Municipality Negligence of Managing Committee members in giving completion certificates in respect of Suit by Municipality against Managing Committee members for recovery of money paid under contract—Suit not in respect of misapplication of Municipality's money within meaning of S. 42. 56 B 448 (452, 454)=34 B L R 1216=A I R 1932 B 562= I R 1932 B 567=140 I C 213=A L R 1932 B 1153

—S. 42—Municipality—Suit by, to recover money, not as if it were the property of the Government but as if it were the property of the Municipality—Need not be based upon S. 42. 56 B 448 (454)=34 B L R 1216=140 I C 213=I R 1932 B 567=A I R 1932 B 562=A L R 1932 B 1153

—S. 42—Imposes on a councillor a liability to be sued for misapplication, or for facilitating by the neglect of his duty as a councillor the misapplication of moneys of the Municipality, and he is to be sued as if such moneys had been the property of Government. If the moneys had been

## BOMBAY DISTRICT MUNICIPALITIES ACT

## III OF 1901 (Contd.)

the property of Government nobody but Government could have sued in respect of them and therefore if the suit had been brought under S. 42 it could only have been brought by Government. But the Municipality can itself sue for misapplication of its moneys. The reason for providing in S. 42 that moneys may be recovered from a councillor as though the property of Government was to give Government the power to take action in cases in which the Municipality neglects to do so who wrongfully misapplies such property. 56 B 448-A I R 1932 B 562-34 B L R 1216-140 I C 213-I R 1932 B 567-A I R 1932 B 1153

-S. 45—Amendment of by Bombay Act 26 of 1930 Municipal Councillor a public servant within meaning of S. 21 of Penal Code prior to. A I R 1932 S. 177-1932 Cr C 792

-S. 46—Under r. 6 (b) of the Ahmedabad Municipal rules Mill buildings within ambit of water pipe & stand pipe become liable for water-tax. A I R 1930 Bom 145-54 B 80-31 Bom L R 1224-I R (1930) Bom 158-122 I C 430

-S. 46—In Rule 3 of the Ahmedabad Municipality, the expression "shall accrue due on 1st April" does not mean that the watertax & house & property tax in r. 2 are not leviable except on 1st April. A I R 1930 Bom 145-54 B 80-31 Bom L R 1224-I R (1930) Bom 158-122 I C 430

-S. 46 (2)—A servant dismissed by the Karachi Municipality according to rules & bye-laws. But if the dismissal is against the rules & wanton, a civil suit would lie & the Law as to master & servant applies. A I R 1929 Sind 69-113 I C 387

-S. 46—The Ahmedabad Municipal rule 74 is not ultra vires A I R 1921 Bom 236-45 B 611-23 Bom L R 48-60 I C 578.

-S. 48—A Municipality can make byelaws prescribing conditions under which refund can be claimed of the terminal tax A I R 1921 Sind 175-17 S L R 58-80 I C 990.

-S. 48 (j)—Rules of 31-12-1920 of Sehwan Municipality are not ultra vires. A I R 1924 Sind 149-18 S L R 141-78 I C 432.

-S. 50 A Suit to set aside collector's order—Limitation—(i) Wild J. C. (Bilaram J. contra)—Limitation under s. 50 A (2) runs from date of order, if due notice of enquiry was given, not from date of promulgation of order (ii) Per Curiam—Where appeal has been filed even though only from a part of the order time runs only from appellate order. A I R 1931 Sind 146-25 S L R 230-Ind Rul (1931) Sind 113-134 I C 359.

-Ss. 50 (A) & 3 (17)—s. 50 A is applicable when the Municipality or any person

## BOMBAY DISTRICT MUNICIPALITIES ACT

## III OF 1901 (Contd.)

claims property, 32 Bom L R 900-I R (1930) Bom 621-127 I C 509.

-S. 50 A—The Secretary of State is not a necessary party to a declaratory suit of title against the Municipality challenging adverse decision by survey officer confirmed by collector. A I R 1923 Bom 456-47 B 306-25 Bom L R 58-79 I C 192.

See also A I R 1923 Bom 459-47 B 315-25 Bom L R 63-79 I C 197.

-Ss. 50, 54—Negligence—Exercise of statutory powers—Damage—Extraordinary fall of rain—Vismajor—Municipality—Declaration of old site, 13 Bom L R 1138-12 I C 884-35 B 492.

-S. 59—Municipality has no right to take double tax on land as the one on the building & land on which it is situated & again on other on the land. A I R 1922 Bom 158-46 B 205-23 Bom L R 1018-64 I C 177.

S. 59 (2)—A vehicle is not liable for wheel tax when it is kept outside but is plying for hire within the Municipal area. 22 Bom L R 1104-59 I C 389.

-Ss. 59 (iii), (X), 3 (xiv) and s. 81 A—levy of "Tax" on pilgrims—right of collection—lease by the Municipality—ultra vires, the powers of the Municipality A I R 1933 B 245.

-S. 59 (b) (vi) Provi—A main sewer along the road on which plff's land abutted was constructed. On this land there were plff's private latrines cleansed by manual labour. Subsequently flushing system was introduced & connected them with the main sewer at plff's own cost. Under s. 59 (b) (vi) special sanitary cess was levied. The plff sued to recover the cess. Held that Municipality had power to levy the cess & but that though the owner of private latrines must bear the expenses of connection between the premises & the manhole the municipality may be said to have arranged for receiving the sewage by laying down the sewer with intermediate manholes & connected with private land. 44 Bom 527-22 Bom L R 747-57 I C 433.

-Ss. 59 & 76—Octroi duty was imposed on goods imported into walled city by post. It was objected to on the ground that when the rules were made the framers had no idea of importation by post & that procedure under s. 60 was not followed held overruling the objection that s. 76 empowered assessment of octroi duty & as Rule 84 under the old Act was in force, no further byelaws for such assessment were needed. 17 Bom L R 182-23 I C 430.

-Ss. 59, 60—The Government sanctioned the levy of terminal tax on the proposed articles, but omitted one of them. The formalities were not newly observed

## BOMBAY DISTRICT MUNICIPALITIES ACT

## III OF 1901 (Contd.)

for representation to sanction that item & the sanction was obtained. It is illegal to impose tax on that item. A I R 1927 Bom 527=51 B 714=29 Bom L R 1071.

—Ss. 60, 71 (1) (b) & 46 (1)—Preliminary publication for inviting objections is not required by rules under 46 (1) but only to obtain the sanction of the Govern or in council or the Commissioner under s. 46 (a) The expression 'subject to the provisions of chap 7' does not by itself apply s. 60 to cases of water-rate under s. 71 (i) (b) which is excluded from the particular one dealt with. A I R 1923 Sind 1=16 S L R 98=87 I C 258.

—S. 65 (1)—Levy of Sanitary cess under s. 59 (vii) is not illegal though there be no notice under s. 65 (1). A I R 1925 Bom 419=27 Bom L R 447=89 I C 580.

—S. 65 (4)—Though the officer does not sign the list, the legality of the levy remains unaffected. A I R 1921 Bom 236=45 B 611=23 Bom L R 48=60 I C 578.

—S. 69—A municipality may delegate its power to make inquiry. But for giving refund it alone is responsible. By delegation it cannot escape duty imposed by s. 69. A I R 1930 Sind 93=I R (1930) Sind 78=122 I C 398.

—S. 80—Those benefitting by the clause of 31-12-1920 cannot complain against its restrictions. A I R 1924 Sind 149=18 S L R 141=78 I C 432.

—S. 81 A—A right of levying the fees for temporary occupation of Municipal land cannot be leased or auctioned. A I R 1928 Bom 282=52 B 414=30 Bom L R 715=111 I C 620.

—Ss. 81 A & 70—Fees authorized under s. 70 is not a toll. A I R 1928 Bom 282=52 B 414=30 Bom L R 715=111 I C 620.

—Ss. 82 & 23—Plff. was sent a bill for arrears of house-tax but requirement of s. 82 (2) were not mentioned. The bill was unpaid, goods were distrained & payment under protest was made. Held that the procedure of the municipality was illegal. 16 Bom L R 749=27 I C 573.

—S. 82 (3)—The Sec. is rightly complied with if the bill states next step to be taken i. e. a notice of demand. A I R 1930 Bom 145=54 B 80=31 Bom L R 1224=I R (1930) Bom 158=122 I C 430.

—S. 91 A (3)—A right to proceed under s. 96 (4) is not included in the word "permission". A I R 1930 Sind 20=I R (1929) Sind 229=120 I C 85.

—S. 92 (1) (b)—When wooden pillars supporting a gallery facing a street are replaced by masonry pillars & the gallery is also newly replaced there is demolition & reconstruction under S. 92 (1) (b). A I

## BOMBAY DISTRICT MUNICIPALITIES ACT

## III OF 1901 (Contd.)

R 1930 Sind 20=I R (1929) Sind 229=120 I C 85.

—Ss. 92 (1) & 96 (2)—A municipality gave permission to build a house with a condition to leave a strip for widening the street but no regular line was prescribed for the existing or future street under s. 92. Held that the condition was bad. Injunction could be granted against municipality restraining it from pulling down the house. 38 Bom 597=16 Bom L R 529=25 I C 411.

—Ss. 92 & 160—Plff. was offered a price for a plot or to refer it to a Panchayat Possession was given to the municipality but no agreement of price was arrived at. He was asked to refer to Dt. Court. Subsequently by its action was found not to be legal & plff. sued for possession. Held that mistake about the municipality's right to acquire land was of fact & so did not come under s. 21 Contract Act. It was a contract for sale which under s. 54 T P Act created no interest or charge. As it had no power to act under s. 92, s. 160 was inapplicable. Price was the essence of this contract, & as it was not fixed as parties wished there was no price promised within s. 50 Contract Act & it was not a valid sale & possession should be given over to plff. 58 I C 591=14 S L R 22.

—S. 96—Order holding up a person from building on his land where no regular line of street had been fixed—Ultra vires of S. 96. 56 B 135 (160)=34 B L R 143=137 I C 545=A I R 1932 B 259=I R 1932 B 275=A L R 1932 B 177.

—S. 96—All that the Municipality can do is to ask for certain information and impose conditions, and their utmost power is to direct that the work shall not be proceeded with unless and until the question as to the location of the building and "any such street" has been decided to their satisfaction. The effect of the section is to hold up the permission until these questions have been decided to their satisfaction. And when they neither pass orders under sub-section (2) which refers to the imposition of conditions within a month from receipt of the notice, or issue any provisional order under sub-section (3) or any demand for further particulars, within a month, or after the particulars have been received issue no further orders within a month, the building may be proceeded within the manner specified in the notice. 56 B 135=34 B L R 143=I R 1932 B 275=137 I C 545=A I R 1931 B 259 (262)=A L R 1932 B 177.

—S. 96—Repair or alteration of house—Order interfering with owner's right of

**BOMBAY DISTRICT MUNICIPALITIES ACT**

**III OF 1901 (Contd.)**

—Must be based on the provision of the statute applicable to the particular case.

A statutory body like a Municipality acting under a statute must keep strictly within its statutory powers. 56 B 135-34

B. L. R. 143-I R 1932 B 275-137 I C 545-A I R 1932 B 259 (263)=A L R 1932 B 177

—S. 96—"Any provisional order" in s. 96 (4) (a) (ii) means only a subsisting provisional order & so a applicant cannot be restrained in his work only because a provisional order for a moth may have been made months or years ago. 36 Bom 61-13 Bom L R 914-12 I C 551

—S. 96—The plff. applied for permission to reconstruct his house with some balconies on 3-7-1903. On 25th he was permitted to re-build it but as regards balconies, the matter was referred to Committee. After waiting for a year balconies were erected. On 4-8-1904 plff. was ordered to remove them. Plff. brought an injunction-suit. Held that the order about balconies under s. 96 (3) (a) was spent after one month & plff. could proceed under s. 96 (4). "Any provisional order" in s. 96 (4) (a) (ii) means a subsisting provisional one. 13 Bom L R 914

—S. 96—A Municipality can remove an otla constructed without permission under s. 96, whether it is built on a street-land or on land which is part of a public-street. 44 Bom 198-22 Bom L R 61-55 I C 318

—S. 96—A permission practically amounting to refusal cannot be given by the Municipality. A I R 1925 Bom 345-27 Bom L R 429-37 I C 948

—S. 96—A defect in the title of the applicant is not a ground for refusing the permission. Permission once granted becomes irrevocable. A I R 1921 Bom 439-45 B 797-23 Bom L R 244-61 I C 428

—S. 96 (2)—Powers under s. 96 should not be exercised unreasonably & in a manner inconsistent with the Act. Instances in the latter part of cl. 2 are only exemplary & were added abundanti cautela in 1901. Municipality can consistently order a owner to have his doors not projecting on the Street. 9 S L R 126-33 I C 675

—S. 96 (2) (3)—Permission to build a privy was asked on 1-12-1914 & granted on 19th. On 6-1-14 the plff. was ordered not to build further. He sued for cancelling this order & for a perpetual injunction held that the order of 19th was final under s. 96 (2) & the subsequent provisional order was illegal & the plff. is entitled to injunction asked for. 42 Bom 629-20 Bom L R 756-47 I C 145

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**BOMBAY DISTRICT MUNICIPALITIES ACT**

**III OF 1901 (Contd.)**

—S. 96 (4)—A house owner cannot without notifying the intention to the Municipality reconstruct a part of his building. A I R 1930 Sind 20-I R (1929). Sind 229-120 I C 85.

—Ss. 96, 113, 122, 167—A building was erected on approved plans under S. 96. In the plan the doors were shown as opening inwards. In the permission a notice was printed that door should not be projected on over-hung on a public street. The actual doors opened outwards but never projected on the street. But during process of opening only there was some projection of some inches. Plff. was served with a notice to change them & threatened their removal. Plff. asked for an injunction held such suit is maintainable even if there be no notice under S. 167; also that notice at the foot of permission was not a legal order under S. 96; also Ss. 113 & 122 are inapplicable where there is only apprehended encroachment. 7 S L R 31-20 I C 572.

—Ss. 96 & 3 (7)—It amounts to 'building' when a wall is re-built from its foundation. A I R 1923 Bom. 407-76 I C 478.

—Ss. 96 & 36 (2)—The permission to build given by the P. W. Committee can be cancelled or revoked by the General body either of its own motion or on the application of any person adversely affected. Concurring Shah J. held S. 96 must be complied by the cancellation or revocation. A I R 1922 Bom. 247-46 B 663-24 Bom. L R 178 (F B)=69 I C 18.

—Ss. 96 and 113—Projections overhanging public street not coming under S. 113 (3) and allowed to remain long—'Amended' in cl. (6) includes demolition necessary to alter a building to make it comply with the Act or bye-law cannot be removed by Municipality. A I R 1921 Bom. 130-23 Bom. L R 193-62 I C 913.

—S. 106 (3)—Though there is a previous sanction of the managing committee, the Municipality may then order to alter the position of the trap-door. A I R 1930 Bom. 43-31 Bom. L R 1295-I R (1930). Bom. 233-124 I C 105.

—S. 110-R. 21 (3) & 22 (1) Votes should be scrutinized under R. 21 (3) at the specially convened general meeting & by the whole corporate body. If a voter's name is erroneously entered twice in the list, the election is not invalidated. Hiring of carriages for voters is not corrupt practice under R 22 as it is not a consideration for voting. 12 S L R 73-49 I C 294.

—Ss. 113, 122—A stone in a plff's otla projected into the public street for 12 years. The deft. Municipality removed it & plff. prayed for an injunction to restrain



## BOMBAY DISTRICT MUNICIPALITIES ACT

## III OF 1901 (Contd.)

it from obstructing its replacing. Confirming the decree granting injunction, held that Municipality has not justified the action by referring to statutory powers under S. 11<sup>2</sup> or S. 122; also if the powers are statutorily laid down, it does not matter that encroachment existed for 12 or more years. 38 Bom. 15-15 Bom. L R 833=21 I C 313

—S. 120-A—Municipality cannot order an individual owning a well to keep it up though it be used by the public. A I R 1924 Sind 139=17 S L R 340=79 I C 409

—S. 122—The Dt. Municipality cannot under S. 122 order to give up possession of the encroached land when a person has his otla encroaching upon the street land for more than 30 years. 22 Bom. L R 951=53 I C 326

—S. 122 (2)—Possession by stranger of waste lands granted to Municipality by Govt. for 12 years—Land becoming private property S. 122 (2) inapplicable; 9 S L R 1

—S. 122—The section is of no use when the encroachment site on a public street, of over 30 years, no longer remains a part of the street but by adverse possession goes to another. A I R 1922 Bom. 111=46 B 335=64 I C 202

See also 22 Bom. L R 951=53 I C 326

—S. 145 A—The Municipality cannot object when a wall was pulled down & re-built after permission for building an old wall was given. A I R 1922 Bom 344

—S. 151 Sub-Ss. (1) (a) (2) (3)—S. 151 (o) refers to a factory in which offensive or unwholesome smells arise naturally from working it ordinarily. Negligent use causing objectionable smell does not bring it within the Sec. There must be such odour issuing from the premises creating a possibility of being a nuisance to the neighbourhood. A flour mill worked by a camel is not such a factory. A Municipality can under S. 151 only give notice if the smell by ordinarily careful user is so offensive as to be an annoyance to the neighbourhood; if the annoyance is caused only when & because of improper use then the smell must be dangerous to life & health before it can prohibit further use. An unauthorized order of the municipal officer is not subject to S. 151 (2) & (3). 9 I C 886=5 S L R 11

—Ss. 151 (1)—Under S. 151 a Dt. Municipality may require a lime-kiln owner to desist from his work if it opines that it is likely to be a nuisance to the neighbourhood. Unless the power is improper, a Civil Court will not interfere. It is not for the Court to determine whether the action complained of is

## BOMBAY DISTRICT MUNICIPALITIES ACT

## III OF 1901 (Contd.)

or is likely to be a nuisance & whether a particular use within the municipal limits is or is likely to be a nuisance. 44 Bom 738=22 Bom L R 838=57 I C 988

—S. 160—Dt. Court's decision under S. 160 (3) is unappealable. Where a statutory right is created non-existent at common law with a specific remedy for its encroachment; that alone must be resorted to. 36 Bom. 47=13 Bom. L R 958=12 I C 540.

—S. 160 (3)—A plot was acquired by a Municipality when there were boom-prices owing to declaration of the transfer of capital to Delhi. Held compensation under S. 160 (3) is the price which would have been paid by a speculative purchaser. Severance cannot be compensated for when after acquisition its value is increased. 8 S L R 126=27 I C 326.

—S. 160 (3)—No further application for decree is required but the order itself can be executed as a decree. A I R 1923 Bom. 289=47 B 654=25 Bom. L R 305=72 I C 636.

—S. 160 (3)—Decision of Dt. Judge under S. 160 (3) not open to revision under S. 115 C P Code. 40 Bom. 509=18 Bom. L R 340=34 I C 21.

—S. 160 (3)—The Dt. Court exercising jurisdiction has to decide compensation under S. 160 (3) and by S. 115 C P C the Judicial Commissioner can revise the proceedings. 'Procedure' in S. 160 (3) has its popular and not strictly legal meaning and a Dt. Court can award 15 p. c. in addition while granting compensation. 11 S L R 93=44 I C 363.

—S. 167—Malicious prosecution—Suit against Municipality for—Limitation—Starting point of—Date of plaintiff's acquittal and not of institution of prosecution. 56 Bom 135 (141. 157)=34 Bom L R 143=137 I C 545=A I R 1932 Bom 259=I R 1932 Bom 275=A L R 1932 Bom 177.

—S. 167—Managing Committee members of Municipality—Negligence in giving completion certificates by—Damages for—Suit by Municipality for—S. 167 applies to and notice prior to suit necessary thereunder—Managing Committee members not being such at date of suit immaterial. 56 Bom 448 (453, 456)=A I R 1932 Bom 562=34 Bom L R 1216=140 I C 213=I R 1932 Bom 567=A L R 1932 Bom 1153.

—S. 167—Notice under—Necessity—Act to be done in future—Suit against Municipality in respect of—Notice if not necessary in case of, Quare. A I R 1932 S 104=26 S L R 78=137 I C 348=I R 1932 S 73=A L R 1932 S 53.

—S. 167—Notice under—Necessity—Declaration in respect of resolutions which had already been submitted for discussion



**BOMBAY DISTRICT MUNICIPALITIES ACT****III OF 1901 (Contd.)**

in a special meeting of Municipality—Suit for—Notice necessary. A I R 1932 S 104-26 S L R 78-137 I C 348-I R 1932 S 73-A L R 1932 S 53.

—S 167 The definition of officers and servants in R 83 of the Municipal rules is a definition only for the purposes of the rules and not for the purposes of the Act. 56 B 448 (455-6)-34 B L R 1216-140 I C 213-I R 1932 B 567-A I R 1932 B 562-A L R 1932 B 1153.

—S. 167—Officers of Municipality—Suit against—Notice of—Necessary is, and is not obviated by notice given to Municipality itself. 56 B 135 (139, 158)-34 B L R 143-137 I C 545-A I R 1932 B 259-I R 1932 B 275-A L R 1932 B 177.

—S 167—S. 15 (2) of the Limitation Act is not "expressly excluded" by S. 167 of the Bombay District Municipality Act within the meaning of s. 29 of the Limitation Act as amended by Act X of 1922. S. 167 of the Bombay District Municipal Act is therefore subject to S. 15 (2) of the Limitation Act and the plaintiff is entitled to exclude the period of one month of notice from the 6 months' period provided by S. 167 of the Bombay Municipal Act (139-41, 155-7). 56 Bom 135-34 Bom L R 143-137 I C 545-A I R 1932 Bom 259-I R 1932 Bom 275-A L R 1932 B 177.

—S. 167—A suit by the Secretary of State against the Municipality for damages arising from its breach of statutory duty cannot be instituted without giving notice as contemplated by s. 167. The suit should be filed within six months of the date of the damages. 14 Mad 386; A I R 1931 Sind 55, distinguished. A I R 1931 Sind 55—Ind Rul (1931) Sind 53-131 I C 181.

—S. 167—When the land is legally acquired this section is inapplicable to a compensation-suit. The refusal to pay and not entry is the cause of action in such a case. A I R 1930 Sind 30-I R (1930) Sind 65-122 I C 385.

—S. 167—No fresh cause of complaint is given to the litigant with every application for reconsideration. A I R 1925 Sind 322-90 I C 44.

—S. 167—Application of S. 15 (2) of the Limitation Act is excluded by this section. A I R 1925 Sind 322-90 I C 44. Overruled by. A I R 1930 Sind 93-122 I C 398.

—S. 167—The sec. is inapplicable when a suit rests on a contract and the rule of six months' limitation does not apply and also one month's notice is not required. A I R 1930 Sind 209-I R (1930) Sind 93-123 I C 237.

—S. 167—Section not applicable to suit based on contract. 8 S L R 294-29 I C 597.

**BOMBAY DISTRICT MUNICIPALITIES ACT****III OF 1901 (Contd.)**

—S. 167—The Limitation Act Ss. 15 (2) and 29 control this section. A I R 1930 Sind 93-I R (1930) Sind 78-122 I C 398.

—S. 167—A suit without previous notice is liable to be dismissed when it is for an injunction against the Municipality. A I R 1930 Sind 287-I R (1930) Sind 306-127 I C 690.

—S. 167—"Anything done or purporting to be done" in S 167 applies only when something is done and not when apprehended merely. A suit to restrain Municipality from an apprehended injury is not bad only because of absence of notice. 56 I C 527-14 S L R 46.

—Ss. 167, 46—A suit for damages against a Dt. Municipality from wrongful dismissal from service is one "for anything done or purporting to have been done" under the Act and S. 167 bars it if filed more than 6 months after dismissal. 39 Bom. 600-17 Bom L R 652-30 I C 390.

—Ss. 167 & 40—S. 167 is applicable to a suit for recovering the deduction for non-performing the contract which was made under S. 40 from the plff's deposit. A I R 1922 Bom. 380-46 B 123-23 Bom. L R 881-64 I C 357.

—Ss. 178 & 58—The Bombay Government rules under S. 58 with respect to public education must be followed by the Municipality. A I R 1927 Bom. 55-51 B 105-28 Bom. L R 1465-100 I C 98.

—S. 178-(3)—It is not necessary that the person given directions should be municipal servant. A I R 1927 Bom 55-51 B 105-28 Bom L R 1465-100 I C 98.

—S. 178 (1)—The expression "by or under this Act" is not restricted to duties imposed by some provision of the Act. A I R 1927 Bom. 55-51 B 105-28 Bom L R 1465-100 I C 98.

—S. 178—Governor in Council can direct the Commissioner to fix a period for performance when a Municipality has defaulted in its duty "under the Act". A I R 1927 Bom 55-51 B 105-28 Bom L R 1465-100 I C 98.

—Ss. 179, 186 (a) & 24 (2)—S. 24 (2) is inapplicable to a Chairman of the management committee under s. 179 which can act under s. 186 (a). A I R 1921 Sind 125-17 S L R 46-80 I C 951.

—Ss. 184 & 46 (e)—Under r. 90 of the Karachi Municipality, without giving an opportunity of being heard a servant cannot be dismissed at pleasure. A I R 1929 Sind 69-113 I C 387.

—S. 184 (b) and S. 46 (c), rr. 86 and 90—dismissal of employee-power given in general terms and without specification of causes-discretionary-may be exercised

**BOMBAY DISTRICT MUNICIPALITIES ACT**III OF 1901 (*Concld.*)

without notice or hearing. A L R 1933 S 54=26 S L R 469=141 I C 768=A I R 1933 S 93 (2)

**BOMBAY DISTRICT POLICE ACT 4 OF 1890**

—S. 25 A (1) (a) and 1 (b)—Taxation is not restricted to one occasion only. Dist. magistrate can consult the superiors. An action under s. 25 A (1) (b) is not judicial. A I R 1927 P C 176=29 Bom L R 1227=46 C L J 76=53 M L J 81=104 I C 257=51 B 725

**BOMBAY GENERAL CLAUSES ACT (1 OF 1904)**

—“Person”—Meaning of—Limitation  
—Suit against. See under Bombay Karachi Port Trust Act, S. 87. 4 S L R 236=10 I C 972

—S. 21—The expression “any Bombay Act” shows that the Section is for general application. A I R 1924 Bom 1=48 B 87 =26 Bom L R 1=90 I C 13

—S. 21—A notification published in 1919 may be cancelled by the Municipality subjects to the sanction & conditions to which the original was subject. A I R 1924 Bom 47=25 Bom L R 767=25 Cr. L J 330=77 I C 186

**BOMBAY GUJARAT TALUKDARS ACT (VI OF 1888)**

—Bombay Khoti Settlement. 16 Bom L R 586=38 B 709=28 I C 134

—S. 2—Mulgametis are Talukdars only if they hold directly under the Government kathis of Salangpur though Mulgametis are not Talukdars within the meaning of S. 2 (1) (a) Gujarat Talukdars' Act 1888, as they do not hold directly under Government. A I R 1924 Bom 72=25 Bom L R 726=82 I C 867

—Ss. 10, 15, 16—Orders passed by a Talukdari Settlement Officer are not subject to revision by High Court under S. 115 C P C as such officer is not a “Court”. 13 Bom L R 118=9 I C 943

—S 16 A decision under s. 16 does not on the principle of res judicata bar a regular suit. A I R 1925 Bom 241=49 Bom 442 F B=27 Bom L R 345=87 I C 588

—S 16—S 109 C P Code—S 16. No second appeal lies to the High Court against decision under s. 16 of the District Judge. A I R 1925 Bom 241(F B)=49 Bom 442=27 Bom L R 345=87 I C 588

—S. 29 (b)—Decree against Talukdar Estate under the management of Talukdari Settlement Officer—Notice to submit claims Non-submission owing to proceedings of Court—Inability—Sufficient cause. 38 Bom 604=16 Bom L R 511=25 I C 365

**BOMBAY GUJARAT TALUKDARS ACT**(VI OF 1888) (*Concld.*)

—S. 29 B—Notice of claim is necessary before a claim under mortgage can be considered. A I R 1922 Bom 350=24 Bom L R 762=46 Bom 993=68 I C 487

—A sub mortgagee failing to notify his claim before the Settlement Officer is yet entitled to sue on the mortgage, as long as the mortgagee's rights existed. A I R 1922 Bom 200=46 Bom 239=23 Bom L R 1046=64 I C 225

—S. 29 (b)—The words “Claims against the Talukdar or his property” under S. 29-B are not limited to claims against Talukdar's estate. 19 Bom L R 855=42 I C 908

—S. 29 (e)—B obtained a decree for money against G, a Talukdar, on 22-2-1903, and presented his dakhast for execution on 8-12-1903. On 21-9-1905, G's estate came by notice to be in the management of the Talukdari Settlement Officer under S. 29 B of the Gujarat Talukdars Act 1888. B submitted his claim to the officer on 6-3-1906 but it was rejected on 12-8-1908. B then applied to the Civil Court on 12-3-1909 and sought to bring it within time, by claiming to exclude the period taken up before the Talukdari Settlement officer. Held that the period in question cannot be excluded in computing the time for the dakhast, for S. 29 (e) of the Act placed no absolute bar on B's right to apply to the Court for execution by reason of the submission of his claim to the Talukdari Settlement Officer. 35 Bom 324=13 Bom L R 292=10 I C 912

—S. 29 (e)—Decree-holder submitting his claim upon notice by Talukdari Settlement Officer is not entitled to exclude the time taken by proceedings before him, while executing his decree. 13 Bom L R 292=35 B 324=10 I C 912

—S. 29 (e) Sub S. 3—Decree against Talukdar—Certificate of managing officer—Right of decree holder to exclude time from the date of the decree on date of application for certificate. Lim Act Art 182. 20 Bom L R 872=43 Bom 44

—S. 31—A Jivaidar is a Talukdar within the meaning of the Gujarat Talukdar's Act 1888.

A Talukdar and his son mortgaged a portion of Talukdari estate, and after the death of the Talukdar his son sold the property to the mortgagee. The Talukdari Settlement office having issued a notice under S. 79 A of the Bombay Land Revenue Code to summarily evict the mortgagee from possession of the property the latter sued for a declaration that he was entitled to remain in possession.

Held, that the mortgage by the Talukdar ceased to be operative after the death.

## BOMBAY GUJARAT TALUKDARS ACT

(VI OF 1888) (Concl'd.)

That the mortgage by his son was inoperative from the start, for he was not a cosharer with his father in the talukdari estate and not having any interest in the property at the time, he was not competent to encumber the interest to which he might succeed on his father's death that the sale of the property by the son was an invalid alienation under S. 31 (2) of the Gujarat Talukdar's Act 1888; and that the notice of eviction under S. 79-A of the Land Revenue Code, 1879 was valid. 22 Bom L R 906-44 Bom 832-58 I C 88

—S. 31—Talukdari estates includes the Sirkar Udar Jamabandhi land, entered as Vanta in the Inami Vanta kept by the Talukdar. Vanta tenure is prescription of remote antiquity without deeds or grants. A I R 1922 Bom 342-24 Bom L R 709-69 I C 102

—Where mortgaged land is entered in the Inam Register prior to suit as Vanta land, there is no other evidence to prove that it was Vanta, but the mortgagor is a Talukdar, and the mortgaged land is Talukdari the mortgage on the death of the mortgagor over is void. A I R 1922 Bom 342-24 Bom L R 709-69 I C 102

—Ss. 31 and 33—Incumbrance by Jiwaitdar—Adverse possession as an incumbrancer—Inapplicability of Ss. 31 and 33—Bombay Land Revenue Code (Bom Act V of 1879), S. 79 A—Talukdari Settlement Officer incompetent to evict the mortgagee adversely holding as incumbrancer for more than 12 years. 37 Bom 380-15 Bom L R 378-19 I C 891

—S. 33—A mamlatdar in charge of the management of a talukdari village, as a subordinate of the Collector who is the guardian of the minor talukdar, has power under Ss. 150 and 154 of the Bombay Land Revenue Code to attach the ornaments of a khatedar for arrears of assessment due for previous years. 18 Bom L R 323-34 I C 198

—S. 33—The powers of the Settlement Officer to evict a person summarily extend only to estates held under Talukdari Tenure and not to all property of any kind of the individual Talukdar. 19 Bom L R 855-42 I C 908

—S. 33—Powers of Government officer to Talukdari are same as those of Collector with regard to an unalienated village. A I R 1926 Bom 325-28 B L R 416-94 I C 752

—S. 33 (2)—Talukdari Settlement Officer whether a public servant. See 16 Bom L R 766-26 I C 749

## BOMBAY HEREDITARY OFFICES ACT

(III OF 1874)

[Rep. in pt., act XII of 1876; Bom

## BOMBAY HEREDITARY OFFICES ACT

III OF 1874 (Cont'd.)

act III of 1886; Rep in pt and act XVI of 1895; Bom act V of 1886; Rep in pt. Am. and supplemented (Locally) Bom. act VI of 1887).

—Shet sanadi holding is watan and the ordinary law about watandars would apply to such holding. 35 Bom L R 114- A L R 1933 B 250-A I R 1933 B 123

—Desai Inam—Alienability—Family custom, 16 Bom L R 164-38 B 272-23 I C 221

—The Hereditary Offices Act is not superseded by the Contract Act. A I R 1928 Bom 201-30 Bom L R 570-111 I C 278

—Unless a particular property is exempted by Act XI of 1852 a suit for refund of contribution under Act III of 1874 is barred. A I R 1927 P C 217-54 I A 380-51 B 830-29 Bom L R 1484-46 C L J 393-39 M L T 527-53 M L J 475 (P C)=105 I C 694

—S. 3—Mulla is not a hereditary officer within the meaning of s. 3. 34 B L R 944 (946)=A I R 1932 B 456-I R 1932 B 475-139 I C 210-A L R 1932 B 1054

—S. 3—Revenue authorities cannot pass order for resumption Mulla's land. 34 B L R 944-A I R 1932 B 456-I R 1932 B 475-139 I C 210-A L R 1932 B 1054

—S. 4—Only persons who are members of watan family or who descend from common progenitor of original watandar exclude females from succession. 41 Bom 677-19 Bom L R 730-42 I C 450

—Ss. 4 & 15—It is the officiating Kulkarni's exclusive & not the joint family property when the cash allowance is payable by the treasury in lieu of commutation of service. A I R 1929 Bom 368-31 Bom L R 935-53 B 739-I R (1930) Bom 102-122 I C 70.

—Ss. 4 & 5—A permanent lessee or mortgagee of the watan land is not a watandar & this transfer is only valid upto the alienor's life-time. A I R 1926 Bom 280-28 Bom L R 395-94 I C 651.

—S. 5—If the auction-purchaser is a watandar of the same watan he gets a valid title which survives the death of the original watandar while in the case of a non-watandar, his right ceases on the death of the watandar. 46 Bom 726; 37 Bom 81; 28 Bom L R 395, referred to. A I R 1931 Bom 53-32 Bom L R 1415-129 I C 894.

S. 5—An auction-purchaser of watandar's right, title & interest is not a watandar and no absolute title can be transferred by him to the watandar of the same A I R 1931 Bom 53-32 Bom L R 1415-129 I C 894.

—S. 5—If after mortgagor's death the possession is kept a watandar's mortgage;

## BOMBAY HEREDITARY OFFICES ACT

## III OF 1874 (Contd)

should pay the mesne profits. A I R 1925 Bom 325-49 B 583-27 Bom L R 497-87 I C 723

—S. 5—The possession by ghadi watan's mortgagee is not adverse to the mortgagor. A I R 1924 Bom 521-26 Bom L R 814-83 I C 145.

—S. 5—After the death of the mortgagor, the mortgagee in possession becomes a trespasser. 22 Bom L R 385-44 B 500-75 I C 76.

—S. 5—In execution of a decree against the watandar, there was a sale against the widow. If the purchaser is a watandar of the same watan, the reversioners are bound by the sale. A I R 1922 Bom 96-24 Bom L R 249-46 B 726-67 I C 209.

—S. 5—As the mortgage is void against the watandar's heirs after his death, any decree or arrangement resting on watan mortgagee's rights is void. A I R 1922 Bom 110-46 B 345-23 Bom L R 1037-64 I C 208.

—S. 5—In the case of a mortgage of the Kulkarni watan there was a personal agreement to pay if the mortgagee is deprived of the possession, Macleod C J held that the covenant is valid. Shah J. whether the covenant will apply or not is doubtful. A I R 1921 Bom. 437-45 B 1206-23 Bom L R 529-63 I C 234

—S. 5—The inami as well as mirasi rights were transferred. It was shown that latter rights were obtained independently by the watandar. Whether by court or by watandar the transfer does not operate beyond watandar's life times. A I R 1922 Bom. 192-46 B 52-23 Bom L R 799-62 I C 942

—S. 5—Land does not cease to be watan merely by levy of full assessment by collector. In a suit by next holder to recover possession of watan land limitation begins to run from the death of the first holder. 37 Bom 81-14 Bom L R 797-17 I C 170

—S. 5—Mortgage of watan lands remains a mortgage even after mortgagor's death and as such the lands can be redeemed by mortgagor's heir even after 12 years from mortgagor's death. 39 Bom. 587-17 Bom. L R 630-30 I C 396

—S. 5 (1) (a)—A transfer to a watandar of the same watan is valid even if it be by a will. Watandar's power to alienate the watan to a stranger is limited for his life-time only. A I R 1930 Bom. 534-I R (1931) Bom 113-32 Bom L R 1249-128 I C 897

—S 5 (1) (a) Unless the power to transfer without Government sanction is conferred or acquired specifically commuta-

## BOMBAY HEREDITARY OFFICES ACT

## III OF 1874 (Contd.)

tion of service does not authorize alienation. A I R 1930 Bom. 534-I R (1931) Bom. 113-32 Bom. L R 1249-128. I C 897

—Ss. 8 & 13—The Limitation Act is inapplicable & the unauthorised transfer can be set aside by the state A I R 1931 Bom. 24-I R (1931) Bom. 129-32 Bom L R 1398-129 I C 145

—S. 9—Land described in Collectors Revenue Registers as 'Wanta Pasaita' would not remain rent-free if passed in the hands of a third person not a watandar. 7 Bom L R 186

—Ss. 9, 11 & 11 A—An order that the land is liable to assessment means the assessment from the day of the order. Land assessment is an alternative to the watan's summary resumption of possession after the transfer. A I R 1923 Bom. 478-25 Bom L R 785-77 I C 146

—S. 9 (2)—By the expression "decision is final" it is not meant that under proper circumstances the Collector cannot change the rent fixed. A I R 1925 Bom. 534-30 Bom. L R 1404-112 I C 789.

—Ss. 9 (2) & 11 A—The rent should be paid as profits to the watandar when the Collector resumes & levies full rent. A I R 1921 Bom 37-23 Bom L R 561-64 I C 7.

—S. 10—Whether revisional powers rest with High Court on Collector's refusal to issue the certificate. A I R 1926 Bom 308-28 Bom L R 456-94 I C 750

—S. 10—The purchaser of watan lands mortgaged it with possession but on the transfer being declared null and void the mortgagee was asked to pay full rent to the watandar. The alienee obtained possession through Court from the mortgagee, Court's order on the Collector's application to give up possession to him or the mortgagee is ultra vires. But the alienee has a right to the possession on full payment of rent as the mortgagee to the watandar. A I R 1928 Bom 181-52 B 213-30 Bom L R 434-110 I C 697

—S. 10—When the watandar is not a party to the decree the section is inapplicable. A I R 1928 Bom 181-52 B 213-30 Bom L R 434-110 I C 697

—Ss. 11, 11 A—Collector's powers—Deshmukhi watan—Alienation of watan—Adverse possession—Bom. Land Revenue Act Jurisdiction Act, S. 4. 37 Bom. 37-14 Bom. L R 793-17 I C 148.

—Ss. 11, 11 A & 9 (2) A civil court has no power to set aside the orders made under the Section. A I R 1926 Bom. 417-28 Bom. L R 651-95 I C 1078.



## BOMBAY HEREDITARY OFFICES ACT

III OF 1874 (Contd.)

—S. 11 A—Application to the Collector to take action under, not a civil proceeding—Limitation Act S. 14. 20 Bom L R 918=43 B 201=48 I C 467

—Ss. 11, 11 A—The expression "thence forward revert to watan" can only mean that the Act regards the restoration of the watan complete after dispossession or assessment. Assessment under S. 11 A becomes chargeable from the date of the declaration. 25 Bom L R 785=77 I C 146=A I R 1923 B 478

—S. 11 A—The High Court cannot interfere in Collector's order levying full rent as it is one under the Revenue Jurisdiction Act S. 4 (a) para 323 Bom. L R 561=64 I C 7

—S. 15—Parson alleging that a particular Survey number of a village granted under Settlement is outside the settlement has to prove it. Distinction between grants of revenue or of the soil of watan property should not be made unless it is warranted by the settlement. 44 Bom 237=22 Bom L R 275=56 I C 411

—S. 15 While commuting the services the Collector can change devolution. A I R 1929 Bom. 368=I R (1930) Bom. 102=53 B 739=31 Bom L R 935=122 I C 70

—S. 15—The provisions of a Statute authorizing agreements within S. 15 are conditions precedents to exercising the powers under the Statute. A I R 1928 Bom. 201=30 Bom. L R 570=111 I C 278

—S. 15 A widow who holds life-interest in the watan is not a 'holder.' A I R 1925 Bom. 365=49 B 554=27 Bom. L R 463=92 I C 110

—Ss. 15 (1) & 45 (c) A representative watanar's consent though disqualified under S. 45 (c) from officiating as a Kulkarni is valid & binding on his son. A I R 1928 Bom. 215=52 B 369=30 Bom. L R 581=111 I C 268

—S. 15 (1)—When the Collector makes the order, consent must be there, otherwise the order would be invalidated. A I R 1928 Bom. 201=30 Bom. L R 570=111 I C 278

—Ss. 15 & 73—With reference to S. 15 it cannot be said that the knowledge of the Mamlatdar or Chitnis is also the knowledge of the Collector. A I R 1928 Bom. 201=30 Bom. L R 570=111 I C 278

—Ss. 15, 73—Where the Government have adopted a general policy of commutation of kulkarni watans, no investigation or inquiry under s. 73 after the consent of the holders of the watans is necessary. A I R 1931 Bom 212=33 Bom L R 239=131 I C 664

—S. 18—In case of a Mharki watan, not the Collector but the karkun appointed the Panchas. Their award is null & invalid. So a Civil Court cannot entertain the Mahar watanar's suit for restraining the

## BOMBAY HEREDITARY OFFICES ACT

III OF 1874 (Contd.)

villagers from delivering the carcasses of animals & paying baluta to the mangs. A I R 1922 Bom 410=47 B 95=24 Bom L R 917=68 I C 746

—S. 18—Under—Jurisdiction—Civil Courts. 43 Bom 277= 20 Bom L R 993=48 I C 224

—Ss. 25, 36 & 64—Applicability of, to Mharki Vatan—Jurisdiction. Civil Court. 19 Bom L R 779

—S. 32—The cash allowance in commutation of kulkarni watan belongs to the whole family & the representative watanar & his family cannot exclusively claim it. A I R 1926 Bom 364=28 Bom L R 556=95 I C 528

—S. 36—Civil Court can entertain a suit for declaring a person as nearest heir to late Vatanar. 17 Bom L R 725=30 I C 925=40 B 55

—S. 36—Though Government order cannot be cancelled a declaratory suit for being a Watanar can be maintained. A I R 1930 Bom 254=I R (1931) Bom 167=54 B 125=32 Bom L R 155=129 I C 391

—S. 36 (3)—A civil suit can be filed for declaring oneself a watanar and of nearest heirship. A I R 1930 Bom. 254=I R (1931) Bom. 167=54 B 125=32 Bom. L R 155=129 I C 391

—S. 36—A suit is maintainable to determine the question as to who is the nearest heir of the deceased representative watanar. 34 Bom 101; 40 B 55; 32 Bom L R 155, followed. A I R 1931 Bom. 378=33 Bom. 580=Ind Rul (1931) Bom 431=133 I C 847

—S. 36 (3)—The rule of lineal primogeniture shall be presumed to prevail in the watan family as regards succession. Resort can be had to rules of succession to impartible estate like the zamindari. A I R 1931 Bom 378=33 Bom L R 580=Ind Rul (1931) Bom 431=133 I C 847

—Ss. 64, 18.—There was no order under the Rev. Juris. Act S. 4 (a) (3). No suit lies for declaring the voidability of the watan register. In absence of interested party's application no action under S. 18 is possible. A I R. 1922 Bom. 155.

—S. 65—Dismissal of Watanar and forfeiture of property by Government-suit against Government—Bom. Rev. Jurisdiction Act. (X of 1876) S. 4. (A). 21 Bom. L. R. 1155.

—S. 67—Civil Court cannot entertain a Suit for declaration that the plaintiff is the head of watan family. 14 Bom. L. R. 395=15 I. C. 840=36 Bom. 420.

—S. 67—partition-suits for partition. Jurisdiction of civil courts in. 18 B. 516.

—S. 73—Only because the reasons are not written by the Collector himself his order is not invalid. A I R. 1928 Bom. 215=52 B 369=30 Bom L R 581=111 I C. 268.



**BOMBAY HEREDITARY OFFICES ACT****III OF 1874 (Concld.)**

—S. 73—where the Government have adopted a general policy of commutation of kulkarni watans, no inquiry under this section after consent of watan-holders is necessary. A I R 1931 Bom. 212=33 Bom. L. R. 239=131 I C. 664.

—S. 73. when an order commuting watan services is made without fulfilling S. 73, a civil suit can be filed for its cancellation. A I R. 1925 Bom. 365=49 B 554=27 Bom. L R. 463=92 I C. 110.

—Ss. 73 & 15—The knowledge of the Mamlatdar or chitnis is no knowledge of the Collector. A I R. 1928 Bom. 201=30 Bom. L. R. 570=111 I C. 278.

**BOMBAY HEREDITARY OFFICES ACT—AMENDMENT ACT V. OF 1886.**

—The Act has no retrospective effect. A I R. 1928 Bom 291=52 B 393=30 Bom. L R. 591=110 I C. 633.

—S 2—The Section is not retrospective & the daughter succeeding to father takes absolutely when before the Act & a new stock of descent begins from her. A I R 1930 Bom 254=I R (1931) Bom 167=54 B 125=32 Bom L R 155=129 I C 391

—S. 2—The character of the tenure is not altered by a Hindu female's adverse possession. Male heirs are preferred to the female's maternal granddaughter. A I R 1928 Bom 333=I R (1929) Bom 243=30 Bom L R 867=114 I C 390

—S. 2—A male member of original watan family cannot succeed when there is the daughter's son as the deceased female watandar's heir. Both must be of the same family for postponement of the female to the male. A I R 1930 Bom 254=I R (1931) Bom 167=54 B 125=32 Bom L R 155=129 I C 391

—S. 2—When a female watandar is excluded by a male, it must be shown that the common ancestor was the watan-holder. A I R 1928 Bom 166=52 B 132=30 Bom L R 38=107 I C 268

—S. 2—Before the Act a watandar's inherited it. The character of the property remains the same and her son though illegitimate is preferred to her illegitimate daughter. A I R 1927 Bom 191=29 Bom L R 246=101 I C 135

—S. 2—When there is a family custom, a patil appointed by the widow can remain in possession of family lands. A I R 1926 Bom 356=50 B 243=28 Bom L R 740=95 I C 864

**BOMBAY HEREDITARY OFFICES ACT—AMENDMENT ACT (X OF 1923).**

—Act has no retrospective effect. A I R 1924 Bom 393=26 Bom L R 360=81 I C 1018

**BOMBAY HIGH COURT CIVIL CIRCULARS**

—A. S.—Ch VI r. 2—Decree passed in terms of award against a military officer was set aside by High Court under Ss. 115 and 157. 38 Bom 638=16 Bom L R 517=25 I C 371

—r. 17—When an application to set aside a sale is made to a Collector, the applicant should at once be referred to the Court. A I R 1921 Bom 209=45 B 1132=23 Bom L R 476=62 I C 221

—r. 55—No special fee is allowed when a pleader is summoned as a witness. A I R 1922 Bom 116=46 B 89=23 Bom L R 898=64 I C 78

—r. 69 (vie)—Interests of sons of judgment-debtor in a property are not affected by execution sale, if they are expressly saved in sale proclamation. 22 Bom L R 970=58 I C 391

r. 69—Unless issued under some enactment these Circulars are not law. In execution of a decree against the father, joint family property was sold. Omitting to mention that son's share was sold is not conclusive that it was not sold. A I R 1926 Bom 548=50 B 793=28 Bom L R 1082=98 I C 754

—S. 91 (16)—Leave to bid—C. P. C. Ors. 21 and 72. 44 Bom 346=22 Bom L R 106=55 I C 527

—Ch. 8—Costs—Taxation—Costs Taxation. 17 Bom L R 207=39 B 383=28 I C 359

—Ch. 23, r. 16—Non-Official Receivers' remuneration should be proportionate to the dividend distributed. A I R 1925 Bom 472=27 Bom L R 1116=90 I C 656

**BOMBAY HIGH COURT RULES**

—No writ of summons is required when a warrant of arrest is issued within admiralty jurisdiction. A I R 1923 Bom. 51=24 Bom L R 1167=76 I C 433

—r. 27—The sale is not vitiated by not making orders on the caveat. A I R 1923 Bom 51=24 Bom L R 1167=76 I C 433

—r. 36—When the rule is complied with in a sale of ships, it should not be set aside on the ground that the procedure differs from practice and great hardship is caused. A I R 1923 Bom 51=24 Bom L R 1167=76 I C 433

**APPELLATE SIDE.**

—r. 2, (2) and (7)—A Single Judge can extend time and excuse delay. A I R 1927 Bom 68=28 Bom L R 1446=50 B 815=100 I C 147

—Rs. 1, 5 etc. of the Appellate Side. A single judge on the original side cannot stay a suit pending in the Mofussil. 39 Bom 604=17 Bom L R 655=30 I C 560

**BOMBAY HIGH COURT RULES (Consolid.)**

—O. 21. r. 72 A—It is a material irregularity vitiating the sale when a property is sold for smaller amount than the mortgage-debt. A I R 1930 Bom 290=32 Bom L R 436=I R (1930) Bom 396=125 I C 908

—rr. 81, 321, 323—Under the rules the Prothonotary can issue short notice of a motion. 14 Bom L R 629=16 I C 588=36 B 418

—r. 65—Pleader's fee on appeal to High Court from preliminary decree adjudicating a party as agriculturist is Rs. 30 under r. 65 of the Appellate side Rules of Bombay High Court 37 Bom 303=14 Bom L R 1190=17 I C 964

—r. 107—Summons—Service by registered post see 16 Bom L R 204=24 I C 437

—rr. 127, 128, 129—Defendant on whom the third party notice is served can at the hearing of the suit, question the jurisdiction of the Court on the ground that he resides outside its jurisdiction. Leave under cl. 12 of Letters Patent cannot be presumed to have been given unless application for leave is proved to have been made. 22 Bom L R 863=59 I C 28=1921 B 195=45 B 24

—Rr. 130 and 131—Direction to third party order refusing direction—Not a judgment within cl. 15 of the letters Patent—Letters Patent Bom cl. 15. 22 Bom L R 1169=59 I C 533=1921 B 320=45 Bom 428

—Rr. 446, 451 and 457—Mortgage decree—Court—Sale—Commissioner's certificate—Whether purchaser can question—Practice of inserting all the right title and interest in sale proclamation under mortgage decree in proper—Condition of sale, misleading—Vendor's minds not adidem—Execution Sale. 21 Bom L R 281=50 I C 384

—r. 519—Only special affidavits are referred to by the words 'as the Taxing Master shall in his discretion think proper to be settled by counsel' in R. 519. 17 Bom L R 924=31 I C 868

—r. 725—The rule providing for the deposit of Rs. 500 by the appellant as security for costs of the respondent is the governing rule with reference to appeals from Original side and is imperative unless an order is obtained exempting the appellant and should be given effect to even though it is inconsistent with the provisions of O. 41, r. 10 of C. P. C. 14 Bom L R 1106=17 I C 739=37 B 572

**BOMBAY HIGH COURT (ORIGINAL SIDE) RULES**

—Whether attendance of a party or witness is necessary is a matter within the master's discretion to be determined according to the circumstances.

सर्वी. डे. सी. डी. (१) २१/२५

**BOMBAY HIGH COURT (ORIGINAL SIDE) RULES (Contd.)**

ding to usual practice. A I R 1930 Bom 24=31 Bom L R 1020=54 B 62=I R (1930) Bom 121=122 I C 121.

—For attending before the Taxing Master, Pleaders' costs cannot be allowed. A I R 1925 Bom 355=27 Bom L R 532=87 I C 1043.

—Generally the Taxing Master's discretion is not interfered with. A I R 1921 Bom 87=45 B 1234=23 Bom L R 854=63 I C 37.

See also A I R 1930 Bom 24=54 B 62=31 Bom L R 1020=122 I C 121.

—The Master of Equity & the commissioner are judicial officers. A I R 1929 Bom 478=31 Bom L R 1081=I R (1930) Bom 49=121 I C 433.

—The same person cannot represent both an applicant and the respondent or on one side in two capacities & appear by two sets of counsel in an originating summons. A I R 1921 Bom 414=25 Bom L R 1137=85 I C 504.

—English practice should be made the example while apportioning costs in respect of claims & counter claim. The procedure of costs taxation described. A I R 1927 Bom 449=29 Bom L R 673=105 I C 899.

—In taxation matters the English Practice should be followed. A I R 1926 Bom 18=50 B 69=27 Bom L R 1195=91 I C 153.

—The costs must be paid by the party taking taxation. The party taking the review can be made to pay the costs of the opponent by the Taxing Master. A I R 1925 Bom 355=27 Bom L R 532=87 I C 1043.

—R 62—Stay of suit—power of. 39 Bom 604=17 Bom L R 655=30 I C 560.

—R 64—A point of law in a suit before a single judge can be referred to F B by the Chief Justice. A I R 1927 Bom 487=29 Bom L R 1124=51 B 971=103 I C 906.

—R. 96—The debt or his Attorney must be supplied with a copy of the plaint & also the exhibits. If it is not necessary that he be served nor that his Attorney file his power. A I R 1930 Bom 567=32 Bom L R 1333=I R (1931) Bom 69=128 I C 613.

—S. 107—Summons See. 16 Bom L R 204=24 I C 437.

—Rr. 105, 106—Defendant is not prohibited by Bombay High Court Rules from defending the Suit extempore without filing written Statement. 15 Bom L R 126=19 I C 95.

—r. 118—In set off the debt must show that it was barred when the suit was filed but in respect of counter claim it is

## BOMBAY HIGH COURTS (ORIGINAL

## SIDE RULES (Contd.)

enough if he proves that it was time barred at the time of pleadings. A I R 1923 Bom 113-24 Bom L R 998-77 I C 943.

—r. 118—Set off & counter claim are distinguished. A I R 1923 Bom 24-24 Bom L R 328-47 B 182-67 I C 326.

—r. 119—Official Assignee's adjudication must be within a specified period. A I R 1929 Bom 107-31 Bom L R 35-53 B 290-I R (1929) Bom 408-117 I C 440.

—r. 119 B—No separate title is provided for when the deft's counter claim is directed against the plff only. A I R 1930 Bom 216-32 Bom L R 212-I R (1930) Bom 588-127 I C 412.

—r. 122—As the date is important for limitation for appeal the latest date of proving must be mentioned in the notice. A I R 1929 Bom 107-31 Bom L R 35-53 B 290-I R (1929) Bom 408-117 I C 440.

—rr. 127, 129—It is no decision of jurisdiction when a third party gives notice giving direction. A I R 1921 Bom 195-45 B 24-22 Bom L R 863-59 I C 28.

—rr. 130 & 131—An order is not a judgment when it refuses directions under the Sections. A I R 1921 Bom 320-45 B 428-59 I C 533.

Rule 136—Set off—Amount of in excess of amount of plaintiff's claim being in respect of a claim on which a separate action cannot for want of jurisdiction be brought in the Bombay High Court—Rule if applies to case of, Quære. 34 B L R 1401 (1404)=141 I C 387=A I R 1932 B 617-I R 1933 B 83.

—r. 193 (1)—A Chamber Judge can extend time in a case under O 37 C P C. A I R 1926 Bom 578-28 Bom L R 1080-97 I C 766.

—Rules 199, 202 and 348—The appointment of a Receiver is a serious matter and involves serious consequences, and it is desirable that such orders should be made in open Court on proper materials and affidavits and not in a summary manner in which directions are given under the summons for directions in Chambers. 34 B L R 717-138 I C 221-I R 1932 B 353=A I R 1932 B 314=A L R 1932 B 754.

—rr. 212 to 220—Question to be put on an originating summons as well as the applicability of the Sections given. A I R 1927 Bom 195-51 B 247-29 Bom L R 19-101 I C 229.

—r. 214—In a case under S. 42 Spe. Rel. Act the Court can give declaratory relief in an originating summons. A I R 1922 Bom 84-17 B 191-24 Bom L R 449-82 I C 628.

—r. 215 (amended)—When the existence of a partnership is disputed the Section is

## BOMBAY HIGH COURT (ORIGINAL

## SIDE) RULES (Contd.)

inapplicable. A I R 1923 Bom 394-25 Bom L R 390-73 I C 254.

—r. 223—When the disputed facts involve much oral evidence an originating summons is not the proper method. 21 Bom L R 972-53 I C 650.

—R. 223—Originating summons—Practice High Court. see. 21 Bom L R 972-53 I C 650.

—rr. 242 & 243—Reasons for the order are not necessary to be given when it is made on a petition to chamber Judge adjourned in Court. A I R 1927 Bom 113-51 B 267-29 Bom L R 126-100 I C 941.

—rr. 253 & 266—A Court can go into the question of Receiver's accounts & the amendment of decree can be permitted. A I R 1924 Bom 166-25 Bom L R 888-77 I C 171.

—Rules 266 and 267—Costs—Payment of—Decree directing, "When taxed and noted in the margin hereof"—Completion of decree in regard to costs only on day when the costs are actually taxed and not on the day of delivery of judgment providing for payment of costs. 34 B L R 670 (681)=138 I C 832-I R 1932 B 445=A I R 1932 B 378=A L R 1932 B 706.

—Rule 288—Enlargement of time under—Application for—Expiration of appointed time—Application may be made after. 56 B 231 (235)=34 B L R 880-139 I C 845-I R 1932 B 559=A I R 1932 B 615=A L R 1932 B 1003

—Rule 288—"Order" in Consent order included in 56 B 231 (236)=34 B L R 880-139 I C 845=A I R 1932 B 615=A L R 1932 B 1003

—Rule 309—The retainer of an attorney ordinarily comes to an end when the suit is ended. A discharge is necessary during the pendency of the suit and not after it has ended. After the suit is over the attorney is ipso facto discharged so far as the suit is concerned and would need fresh authority from his client to act for him in execution proceedings. 34 B L R 615-138 I C 320=A I R 1932 B 337-I R 1932 B 363

—Rules 318 and 323—Prothonotary of Bombay High Court—Negative register kept by—Application for making entry in—Application for execution is, and entitles applicant to rateable distribution under S. 73 of C P C. 34 B L R 1405 (1409)=A I R 1932 B 622-141 I C 389=A L R 1933 B 270

—R. 329—C P C S. 95 is inapplicable & damages are not limited to Rs. 1,000 in a suit under ordinary original civil jurisdiction. A I R 1926 Bom 523-28 Bom L R 1077-97 I C 763

—Rule 343—It is not open to the

## BOMBAY HIGH COURT (ORIGINAL

## SIDE RULES (Contd.)

parties by consent to ignore the rule requiring leave of Court.

Where the notice of motion was for restraining the defendant from prosecuting the suit which he had filed against the plaintiff in another Court, held that an agreement by the defendant that suit should not be proceeded with till after the disposal of the notice of motion did not amount to a waiver on his part of all objections which he might be entitled to raise to the notice of motion at the hearing both as to the procedure adopted and as to the form and the merits relating thereto 56 B 551-139 I C 741-34 B L R 746-I R 1932 B 538-A I R 1932 B 393-A L R 1932 B 810

—Rule 343—Held that a notice of motion to restrain the defendant from prosecuting a suit which he had filed against the plaintiff in another Court could not be served on the defendant before service of the writ of summons, in the absence of leave of Court obtained under r. 325 of the Rules of 1922 (corresponding to r. 343 of the rules of 1930) and that it was not open to the defendant to waive the objection as to the want of such leave by consent. 56 B 551-34 B L R 746-139 I C 741-I R 1932 B 538-A I R 1932 B 393-A L R 1932 B 810

—The de bene esse examination of the witnesses should ordinarily be held in Court and preferably before the Judge who is to ultimately hear and decide the suit. The Chamber Judge, however, has a discretion given to him to delegate the work to the Prothonotary or one of his Associates.

The practice in the Bombay High Court of the Prothonotary deputing one of his Associates to do this work outside Court hours and of the Associate so deputed charging a personal fee for the work recognised. The charge of fees due to Government under the High Court Rules in such a case, which was also in accordance with the practice of the Prothonotary's office, also upheld on the ground of the party objecting having acquiesced in that practice. 34 B L R 611-138 I C 323-A I R 1932 B 405-A L R 1932 B 961

—r. 373—In absence of express application & due notice to the other party no extension of time can be given by the Court A I R 1931 Bom 125-32 Bom L R 1650-129 I C 890

—r. 385—When a sheriff realises the money & they are with him relief against him for levying poundage is by summons, but in case of non-realization sheriff's remedy is by suit but he has no right to

## BOMBAY HIGH COURT (ORIGINAL

## SIDE RULES (Concl'd.)

poundage when money is paid before attachment. A I R 1927 Bom 420-29 Bom L R 686-103 I C 452

rr. 397, 399—Commissioner taking accounts has power to decide questions of law. 19 Bom L R 798-41 B 719

—r. 484—The rule is inapplicable when an objection once disallowed is allowed by the Commissioner A I R 1924 Bom 231-47 B 593-25 Bom L R 280-82 I C 593

—r. 505—If summons is adjourned to the day of hearing the Costs are in the discretion of the trial judge. A I R 1926 Bom 18-50 B 69-27 Bom L R 1195-91 I C 153

—r. 519—The expression "as the Taxing Master etc" refers only to special affidavits. 17 Bom L R 924-31 I C 868

—rr. 521 & 522—For attorney's costs in respect of instructions for brief the details should be mentioned. All interviews & attendances must be recorded. After the delivery of the brief till the end of the trial Counsel's instructions continue. A I R 1927 Bom 529-29 Bom L R 1093-103 I C 731

—r. 522—The party objecting should show the mistake of law or principle of the Taxing Officer. A I R 1926 Bom 18-50 B 69-27 Bom L R 1195-91 I C 153

—rr. 531 & 529—Before a review under r. 531 of taxation is claim objection under r. 529 must have been already taken A I R 1930 Bom 536-I R (1931) Bom 18-32 Bom L R 1079-128 I C 34

—r. 602—When there are rival Wills, one set up by the caveator must be filed & propounded before the suit proceeds. A I R 1930 Bom 29-53 B 829-31 Bom L R 1011-I R (1930) Bom 126-122 I C 126

—r. 704—Costs of application to be registered as share-holder. 17 Bom L R 207

—r. 736—An appellate Court in exception cases would demand additional security for costs. A I R 1926 Bom 42-27 Bom L R 1216-94 I C 654

—R. 767, security for costs in appeal—amount of the costs likely to be heavy—whether sufficient cause for ordering further security. A L R 1933 B 128-35 B L R 37-A I R 1933 B 120

## BOMBAY HINDU HEIRS RELIEF ACT (VII of 1866).

[Rep. in pt., Act XII of 1873, Bom. Act III of 1886].

—S. 2—In satisfaction of a decree against father, rent of the property inherited by the son only and not the property is attachable. A I R 1929 Bom 233-31 Bom L R 442-53 B 463-Ind Rul (1929). Bom 499-119 I C 179



**BOMBAY IMPROVEMENT TRUST ACT (IV OF 1898)**

—S. 48 (II)—Appeal from order of—Whether lies—Land Acqn. Act. Ss. 18 and 31 (2). 18 Bom L R 826

**BOM. INSOLVENCY RULES, 1910**

—Rr. 2 (2) and Schedule 2, Rr. 25 and 27—Court—Official Assignee enquiring into claims made against estate of insolvent pending insolvency is not a Court. 34 B L R 1175=139 I C 587=A I R 1932 B 569=I R 1932 B 511

—Rr. 112 & 115—Trustee under composition scheme—Rejection of claim by, under r. 115—Order of—Review of, on a notice of motion—Jurisdiction as to—Insolvency Court has, under rule 112 or in the exercise of its inherent jurisdiction. 34 B L R 1172=A I R 1932 B 557

—R. 115—Trustee under composition scheme—Proof of claim lodged for proof before Official Assignee before composition or scheme was arrived at and proof neither admitted nor rejected by Official Assignee—Jurisdiction to call for—Trustee has no, under Rule 115. 34 B L R 1172=A I R 1932 B 557

**BOMBAY IRRIGATION ACT VII OF 1879.**

[Rep. in pt., Act XVI of 1895; Bom. Act III of 1880; Bom. Act III of 1886.]

—Ss. 3, 31, 34 and 35—Suit for compensation for loss of non-supply of water is not triable by Civil Court. Bom. Irrigation Act 7 of 1879. A I R 1922 Bom 8 =24 Bom L R 264=46 B 738=67 I C 43

—Ss. 22 and 23—Control over supply of water from water course is regulated by Ss. 22 and 23, which confer that right on the Gov. alone. 14 S L R 53=62 I C 225

—S. 23—Suit to set aside an order of Collector under Bom. Irrigation Act is not maintainable until an appeal against the order is preferred. 6 S L R 241=19 I C 627

—Ss. 31, 38—Suit for damages against Secretary of State, for deficiency of water caused by reducing the dimensions of sluice is maintainable. 58 I C 769=14 S L R 79

—S. 35—Collector's decision of a claim for compensation under s. 35, bars a Civil Suit for the same relief. A I R 1922 Bom. 8=46 B 738=24 Bom L R 264=67 I C 43

**BOMBAY KARACHI PORT TRUST ACT (VI OF 1866.)**

—Suit against Port Trust for Compensation must be brought within six months from accrual of cause of action. Person in S. 87 means the board, or any officer or servant of the Board. 10 I C 972=4 S L R 236

—A will or gift or trust is not constituted by appointing a receiver under r. 14 of the Provident Fund Rules framed by the Port Trust. 18 S L R 311=76 I C 739=A I R 1924 S 57

**BOMBAY KARACHI PORT TRUST ACT**

VI OF 1866 (Contd)

—S. 7—"Becoming" used in contradistinction with "Being"—Being Registered means in the process of Registration. If an association takes steps to have itself registered, though not actually registered before election, it complies with conditions prescribed by Sec. 4, Sub-S. 2. 1926 Sind 169=20 S L R 314=92 I C 374

—S. 15—Interest means material interest—Manager of firm obtaining bonus in contracts for the firm not disqualified to become Port Trustee unless he is a salaried manager with some share in the profit also—If Company is Joint Stock Company no such disqualification. A I R 1925 Sind 146 =19 S L R 15=86 I C 939

—S. 46—Trustees are statutory bailees to ship-owners and holders of Bills of Lading—Onus on ship-owners to prove that they are holding as bailees of holders of Bills of Lading and have no remedy against them. A I R 1930 Sind 36=122 I C 388

—S. 49—On expiry of free days Trustees may proceed against ship or owner of goods for further charges. A I R 1930 Sind 36=122 I C 388

—S. 50—Trustees have option to sell goods or not where no notice of lien is given by ship owners—Section makes it obligatory only after persons claiming lien call on the Board to sell them. Suit by ship-owners against trustees and holder of Bill of Lading for recovery of money paid under protest. Holder contended goods sold did not bear his marks—Contention valueless against both ship-owners not being responsible for the marks and trustees not being parties to Bill of Lading. A I R 1930 Sind 36=122 I C 388

—S. 56—Under By-Law 6 all goods even if originally irregularly landed must be removed when the storers are called upon to so remove. A I R 1921 Sind 142=26 Cr L J 137=16 S L R 169=83 I C 667

—S. 87—"Person" includes board of trustees Karachi Trust Board can claim benefit of section 87. 89 I C 376

—S. 87—Bombay General Clauses Act (1 of 1904)—Person meaning of—Suit against port trust for compensation—Conveyance from wharf to import yard—Liability of board 'Carrier' meaning of—Lim. Act. Art. 30. 4 S L R 236=10 I C 972

—S. 87—Suit against Port Trust—Limitation—Exclusion of holidays—General Provisions of the Limitation Act regarding exclusion of holidays not applicable. Limitation Act. S. 29 (1) (B). 11 S L R 106=45 I C 168

—Ss. 87 & 88—The word 'person' in s. 87 of the Karachi Port Trust Act technically includes and was intended to include the Board. Ss. 87 & 88 of the Karachi



**BOMBAY KARACHI PORT TRUST ACT**VI OF 1866 (*Concl'd.*)

Port Trust Act do not distinguish suits against private individuals from suits against the Board, but s. 87 deals with the limitation of suits against the Board, or any servant or officer of the Board, while s. 88 defines the responsibility of the Board for the acts of their officers and servants. 11 S L R 126=45 I C 410

**BOMBAY KHOTI LEASES ACT I OF 1865**

See Bombay Survey and Settlement Act 1 of 1865

**BOMBAY KHOTI SETTLEMENT ACT (I OF 1880)**

See also under Land Tenure

[Rep. in Pt., Bom. Act III of 1886; Ss 3, 17 to 22, 28, 33, 39, 41 Am., s. 13 Rep., s. 29 Rep. in Pt. and Am., s. 31-A Ins., Bom. Act III of 1904.]

—A khot is an occupant possessing in some measure a proprietary right, whose interest in the Khoti Village is limited. Kabuliya to Govt. must be in conformity with Custom except as altered by Bombay Act 1 of 1865. A I R 1925 Bom 44=48 B 599=26 Bom L R 754=83 I C 370

—S. 8—In absence of any special agreement between tenant and khot, the former is an yearly tenant entitled to notice under Bom. Land Revenue Code S. 84. A I R 1921 Bom 38=45 B 1001=23 Bom L R 411=61 I C 594

—Ss. 8 and 10—An adverse possession of a khoti land of an occupancy tenant does not extinguish his right to relinquish his occupancy right to the khoti, but his right to actual possession. 45 B 1001=23 Bom L R 411=61 I C 594

—S. 9—Transfer of permanent tenancy with consent of managing khot is valid. 26 Bom L R 421=A I R 1924 Bom 459=80 I C 458

—S. 9—Occupancy tenant has no right to transfer his right unless it is created by custom or conferred upon him by khot at the time of creating the tenancy. 14 Bom L R 1157=12 I C 956

—Ss. 9 & 10—Resignation of occupancy for consideration does not amount to transfer under S. 10. Resignation without consent of all khots is invalid. Lease synchronous with such resignation is also invalid, and as such the tenant is not estopped from showing the title of the khot so found. 16 Bom L R 586 38 Bom 709=28 I C 134

—Ss. 9 & 10—Occupancy tenancy is not forfeited to khot because it is transferred by tenant without khot's consent 44 Bom 267=22 Bom L R 102

—Ss. 9 and 10—Transfer of occupancy tenancy without khot's consent before

**BOMBAY KHOTI SETTLEMENT ACT**I OF 1880 (*Concl'd.*)

khoti settlement Act 1922 is null and void but does not entail forfeiture. 44 B 267=22 Bom L R 102

—S. 10—Mortgage by manager forfeits his share alone and not that of any other co-parcener. A I R 1926 Bom 166=50 B 189=28 Bom L R 71=93 I C 123

—S. 10—Khot's right is not destroyed by payment by Khatedar of the mortgage amount prior to the suit by khot. I R 1923 Bom 33=24 Bom L R 1160=73 I C 880

—S. 10—Transfer of a portion of the khoti lands by the occupant places that portion only at the disposal of the khot. A I R 1922 Bom 257=46 B 470=24 Bom L R 131=68 I C 277

—S. 30—Entry in Settlement Register that interest of any occupancy tenant is not transferable is final only if the person is an occupancy tenant. 43 Bom 565=21 Bom L R 361=51 I C 101

—S. 21—Some of the decisions of Recording Officers are final under S. 21 but mere in a revenue record is not a final decision. 43 Bom 469=21 Bom L R 350=51 I C 7

—S. 21 and Ss. 16 to 20—The decision of the Recording Officer and not a mere entry of a person's name in the Settlement Register is made binding by S. 21. A I R 1922 Bom 329=24 Bom L R 323=46 B 966=67 I C 322

—S. 33 (c)—By R 8 of the rules framed under S. 40, Civil Court is precluded from determining reasonable amount of rent. Occupancy tenant is liable to pay rent on the basis of crop-share determined under R. 8 R. 8 is intra vires. 37 Bom 284=14 Bom L R 1173=17 I C 943

—S. 33—S. 33 prohibits private arrangements by khots with tenants contrary to the terms of the botkhot. A I R 1926 Bom 119=27 Bom L R 1487=92 I C 542

—S. 37—Khot can rely on "mamuli-vahivat" in absence of a new Settlement on the expiry of the old one. A I R 1930 Bom 190=32 Bom L R 175=125 I C 446

**BOMBAY LAND CUSTOM ACT 29 OF 1857**

—S. 8—The words "passed or attempted to be passed" in para 2, must be read before "at any station etc." A I R 1929 Bom 46=53 B 97=30 Bom L R 1494=Ind Rul (1929) Bom 313=115 I C 409

—S. 14—S. 14 contemplates seizure by officer at station under Act only. A I R 1929 Bom 46=53 B 97=30 Bom L R 1494=Ind Rul (1929) Bom 313=115 I C 409

—S. 21—S. 21 does not raise question of good faith, but should be confined to seizure proper. A I R 1929 Bom 46=53 B 97=30 Bom L R 1494=Ind Rul (1929) Bom 313=115 I C 409

## BOMBAY LAND REVENUE CODE 5 OF 1879.

(as amended by Act 6 of 1901.)

—On relinquishment of plots in a talukdari estate held-free of rent and assessment and local fund in Government's favour, the Govt. can recover from plot-holder the assessment and local fund. A I R 1930 Bom 497=32 Bom L R 907= Ind Rul (1930) Bom 613=127 I C 501

—Expartee grant of Sanad at City survey does not entitle the grantee to turn out the person in possession of the land. A I R 1925 Bom 430=27 Bom L R 656=95 I C 831

—Strict construction of the Code in favour of the subject is required. A I R 1927 Bom 601=29 Bom L R 1350=106 I C 239

—Ss. 3 (11) 109, 197, 207—Entry in Revenue Register due to misunderstanding of a certain order can be rectified. Tenant of rice lands have a right to obtain manure over the adjoining waste-land of their superior holder by custom. 14 Bom L R 124=36 B 315=14 I C 473

—S. 3 cl. 19—Agricultural lease of a village does not mean 'alienated village' in cl. 19 of s. 3, and the lessee in such a case does not acquire right to build over the land. 13 Bom L R 883=35 B 462=12 I C 369

—S. 3 Cl. 19—Lease of a Village for for agricultural purpose does not mean alienated village within cl. 19 of s. 3 and the lessee in such a case does not acquire right to build over the land nor the right to levy extra assessment possessed by the lessor i. e. Govt. 13 B L R 883.

—Ss. 3 (20) & 217—Holders of land in alienated village at the time of introduction of Survey Settlement become occupants entitled to rights of occupants in unalienated villages under s. 217. 20 Bom L R 887=43 Bom 77=47 I C 745.

—S. 10—Power of Collector—Mamlatdars Courts Act (II of 1906) S. 23, 36 Bom 123=13 Bom L R 1031=12 I C 709

—S. 37—In absence of specific legislation, public highway cannot be blocked by Govt. A I R 1929 Bom 94=53 B 187=31 Bom L R 97=Ind Rul (1929) Bom 417=117 I C 513

—S. 37—Amendment by Act XI of 1912—Land forming part of a river bed—Lease by Collector—Order by Collector negating plff's, right to the land—Appeal by plff—Suit to recover possession of land—Bar—Limitation Act Art 14. 22 Bom L R 146=55 I C 591

—Govt. has no title to open village sites under S. 37. Possession of a part of land may, sometimes, be sufficient to prove possession of the whole. 8 S L R 331=29 I C 51

## BOMBAY LAND REVENUE CODE

V OF 1879 (Contd)

—S. 37—Collector's order of dispossession relating to private land is ultra vires. Mere entry in Revenue Records does not amount to transfer of possession. Denial of user of land in a particular way is not a denial of title. Only Civil Courts possess power to decide question of title—unless taken away legislature. 24 I C 813=7 S L R 169

—S. 37—Bombay Act. Bhagdari village 37 Bom 87=14 Bom L R 934=17 I C 639

—S. 37—Land at the disposal of collector—Evidence Act S. 110, 19 I C 565=6 S L R 210

—S. 40—Bombay Survey and Settlement Act Ss. 37 & 38—See 20 Bom L R 141=44 I C 872

—S. 48—Conversion of land from agricultural to nonagricultural uses entails liability to extra assessment under S. 35 of Bombay Act I of 1865. 42 Bom 126=20 Bom L R 22=43 I C 744

—Ss. 48 and 214—On alteration of assessment of land converted from agricultural to building sites, the grantee of agricultural assessment is entitled to the altered assessment. A I R 1929 P C 34=31 Bom L R 256=53 B 230=56 I A 51=(1929) A L J 47=49 C L J 179=33 C W N 293= Ind Rul (1929) P C 41 (P C)=114 I C 1

—S. 53—Assessment—Non payment of—Forfeiture of land—Re-grant of land—Previous incumbrances on the land wiped out by the regrant. 15 Bom L R 827=21 I C 310=37 B 692

—S. 53—In absence of a custom rent equivalent to assessment cannot be enhanced. Payment of assessment by tenant raises a strong presumption of occupancy rights. 77 I C 878=A I R 1923 B 449

—S. 56—Grant of land to one co-owner personally subsequent to amendment should be presumed to be an individual one. Other Co-owner desiring to avail of it must prove that in came under S. 90 Trusts Act. A I R 1931 Sind 27=Ind Rul (1931) Sind 40=130 I C 552

—S. 56—Grant of fallow-forfeited land to only one of the Several Co-owners of joint property subsequent to 1901 is individual one. A I R 1921 Sind 212=23 S L R 461=Ind Rul (1929) Sind 175=118 I C 207

—Ss. 56 and 153—Application of S. 56—Only on a forfeiture under S. 153—Trusts Act S. 90, 40 Bom 483=18 Bom L R 438=37 I C 295

—Ss. 56 & 153—A forfeited occupancy can be regranted by Collector under S. 56 of Bom. Land Revenue Code as amended by Bom. Act III of 1901, because it has a retrospective effect. 8 S L R 233=28 I C 95

## BOMBAY LAND REVENUE CODE

V OF 1879 (Contd)

—S. 56—Collector has no power to restore to original occupant a forfeited occupancy transferred to a new tenant under R. 63, 36 Bom 91=13 Bom L R 968=12 I C 545

—S. 61—s. 61 Contemplates area deteriorated for purposes of cultivation or for quarrying. A I R 1928 Bom 180=30 Bom L R 431=109 I C 545.

—Ss. 62, 211—A Commissioner cannot pass an order charging occupancy price for a land granted to a person free from occupancy price and assessment originally. A I R 1931 Bom 238=33 Bom L R 213=Ind Rul (1931) Bom 337=55 B 165=132 I C 497 (F. B.)

—Ss 62 and 211—Commissioner has no jurisdiction to make order fixing occupancy price of land given free to plaintiff by collector long after the grant by the latter. A I R 1931 Bom 238=33 Bom L R 213=55 B 165.

—S. 63—A suit for declaration that an order by Collector disposing of the occupancy to the second defendant was void, and for possession of the land is governed by Art. 120 of the Limitation Act and not 144. A I R 1931 Bom 369=33 Bom L R 772=55 B 447=Ind Rul (1931) Bom 524=134 I C 716.

—Ss. 63 and 64—Proportionate rent can be demanded by land lord for alluvion granted to him by Govt. A I R 1924 Bom 449=26 Bom L R 520=80 I C 427.

—S. 65—Application to use agricultural land as cattle-shed can not be refused without enquiry Shed cannot be ordered to be pulled down. A I R 1924 Bom 369=26 Bom C R 371=81 I C 491.

—Ss. 65 & 66—Land used as a graveyard also a timber depot—Occupation for 50 years—No payment for assessment—Notice by Govt. to eject unless timber depot closed—order ultra vires—Limitation Act Art 14. 17 Bom L R 513=39 Bom 494=29 I C 490.

—S. 66—Fine under s. 66 is not governed by s. 148 A I R 1927 Bom 601=29 Bom L R 1350=106 I C 239.

—S. 66—The actual area built upon and not the whole holding is to be levied with penalty. A I R 1927 Bom 601=29 Bom L R 1350=106 I C 239.

—S. 68—Tenant is not occupant if the origin of tenancy is unknown. A I R 1926 Bom 257=50 B 155=28 Bom L R 424=94 I C 662.

—Ss. 68 and 79 A—Application for transfer of part of occupancy subject to prohibition of alienation is at the most an attempt to alienate and as such it does not justify eviction. 45 B 920=23 Bom L R 279=61 I C 347.

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V OF 1879 (Contd)

—S. 73 A—Houses in an occupancy, with land below—Transfer of without sanction of Collector—Prohibited by s. 73 A—56 B 278 (283-4, 287)=34 B L R 780=A I R 1932 B 370=I R 1932 B 577=140 I C 164=A L R 1932 B 832.

—S. 73 A—Reading s. 73—A in the light of the definitions, the transfer that is forbidden is of the sum of the rights vested in the holder or the interest of the holder in the land, including trees and houses as being things attached to the earth. The section does not preclude the transfer of a part of land. 56 B 278 (282-3)=34 B L R 780=A I R 1932 B 370=140 I C 164=I R 1932 B 577=A L R 1932 B 832.

—S. 73 A—Trees in an occupancy—Sale of apart from land—Not in contravention of S. 73 A—56 B 278 (282 3, 291-2)=34 B L R 780=A I R 1932 B 370=140 I C 164=I R 1932 B 577=A L R 1932 B 832.

—S. 73 A—Transfer of restricted tenure is governed by s. 73 A. A I R 1930 Sind 75=Ind Rul (1930) Sind 60=121 I C 876

—S. 73 A—Suit for specific performance of an agreement to sell restricted tenure without sanction of revenue authorities or for damages is not maintainable A I R 1928 Sind 63=22 S L R 396=105 I C 735.

—S. 73 A—Sale of restricted tenure without Collector's sanction is merely voidable. A I R 1930 Sind 12=Ind Rul (1929) Sind 171=118 I C 203.

—S 74—Rajinama and kabuliyat are only documentary evidence of transfer and do not by themselves constitute transfer. 22 Bom L R 1079=59 I C 114.

—S. 74—Suit by a vendee to recover possession of unalienated lands relinquished by a khatedar to a new katedar under a rajinama executed before he sold the land is not maintainable. 41 Bom 170=18 Bom L R 976=38 I C 838.

—S. 74—T. P. Act s. 54—sale of equity of Redemption. 18 Bom L R 980 (Note)=38 I C 819.

—S. 74—Mere execution of Rajinama and kabuliyat does not necessarily by itself amount to a transfer of property. 22 Bom L R 140=55 I C 619.

—Ss. 74, 76—Rejinama and kabuliyat under Bom. Land Revenue Code, 1879 are not compulsarily registerable. 42 Bom 359=20 Bom L R 358=45 I C 492.

—Ss. 74 and 88 (c)—notice of relinquishment of lease by tenants—Inamdars not authorised to receive notices—relinquishment does not extinguish tenancy. A L R 1933 B 112.

—Ss. 74 and 88—Notice of relinquishment received by Inamdar is not exempted

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from registration unless survey settlement is introduced or powers under s. 88 are conferred on Inamdar. A I R 1921 Bom 371=45 B 898=23 Bom L R 272=61 I C 454.

—S. 79 (A)—Notice of eviction—Guzarat Talukdar's Act (VI of 1883) s. 31. 44 Bom 832=58 I C 88.

—S. 79 A—notice to Collector to recover possession. C P C S 80. 14 Bom L R 577=16 I C 445.

—Ss. 79 A and 202—Talukdari officers Power of, to evict a person summarily Bom. Gujerat Talukdar's Act Ss. 29 B 33 (2) cc. 19 B L R 855.

—S. 79 A—Only persons in wrongful possession and not under any decree of Civil Court, can be evicted by collector under s. 79 A. 12 Bom L R 837=35 B 72.

—S. 79 A—Art 14 of Limitation Act does not apply to a suit by a person summarily evicted under s. 79 A inspite of absence of necessary conditions. A I R 1921 Bom 381=45 B 920=23 Bom L R 279=61 I C 347.

—Ss. 79 and 68—Contract for alienation of occupancy granted under S. 68 subject to prohibition of alienation is not breach of condition of grant, and does not justify eviction. A I R 1921 Bom 381=45 B 920=23 Bom L R 279=61 I C 347.

—S. 81—Registered occupant failing to pay assessment does not lose his occupancy rights even if it is paid up by co-sharer and khata is transferred in his name. A I R 1922 B 198=46 B 221=23 Bom L R 1024=64 I C 201.

—S. 81—Removal of registered occupant's name from the Khata and substitution of his co-sharer's name instead forfeits only the registered occupant's interest and not his occupancy rights. A I R 1922 Bom 198=23 Bom L R 1024=46 B 221=64 I C 201.

—S. 83—Where in a suit for ejectment, the defendant pleaded permanent tenancy, and the plaintiffs failed to prove the commencement of the tenancy, the presumption of permanent tenancy arose in favour of defendants under s. 83. 29 Bom L R 274, followed; 27 Bom L R 1258, distinguished. A I R 1931 Bom 302=33 Bom L R 551=Ind Rul (1931) Bom 410=133 I C 826.

—S. 83—In the case of a tenancy dating from 1864, the mere fact that the landlord permitted the tenant to mortgage the holding and bring it to sale, does not lead to an inference of permanent tenancy. A I R 1931 Bom 417=33 Bom L R 613=Ind Rul (1931) Bom 504=134 I C 696.

## BOMBAY LAND REVENUE CODE

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—S. 83—Where it is found concurrently by the lower Courts that the defendant's ancestors were in possession of the land many years before 1863, the statutory presumption of a permanent tenancy under s. 83 can be raised. 47 Bom 798 P C, distinguished; 23 Bom L R 799 referred to. A I R 1931 Bom 191=33 Bom L R 210=Ind Rul (1931) Bom 290=131 I C 466.

—S. 83—Antiquity of tenancy raises a presumption of its permanency. 22 Bom L R 1215=59 I C 278.

—S. 83—Tenancy proved to exist for nearly 80 years, and whose origin is unknown is presumed to be permanent. A I R 1925 Bom 390=27 Bom L R 890=91 I C 272.

—S. 83—Antiquity of tenancy raises a presumption of its permanency, and as such in absence of such evidence tenancy will be presumed to be of an annual tenure. 22 Bom L R 1394=1921 B 224=45 B 350=59 I C 751.

—S. 83—Absence of satisfactory evidence of Commencement of a tenancy raises a presumption of its permanency. A landlord can by usage enhance rent payable by a permanent tenant. 44 Bom 566=58 I C 289=22 Bom L R 717.

—S. 83—Presumption of a permanent tenancy might be defeated on proof of approximate point of commencement of tenancy. A I R 1930 Bom 39=31 Bom L R 1279=Ind Rul (1930) Bom 204=123 I C 492.

—S. 83—Satara Dt. Possession by ancestors many years before 1863 raises a statutory presumption under S. 83. A I R 1931 Bom 191=33 Bom L R 210=Ind Rul (1931) Bom 290=131 I C 466.

—S. 83—Particular year indicated as that in which the tenancy began is sufficient to defeat presumption. A I R 1926 Bom 55=27 Bom L R 1258=91 I C 347.

—S. 83—The period of a century is so long and indefinite that it is not satisfactory evidence of the Commencement of tenancy. A I R 1927 Bom 270=29 Bom L R 274=101 I C 349.

—S. 83—Tenancy whose origin is traceable, is not governed by S. 83. A I R 1922 Bom 25=24 Bom L R 226=46 B 687=66 I C 315.

—S. 83—Commencement of tenancy within meaning of—Evidence of—Period of 150 years too long and indefinite to constitute. 34 B L R 1131 (1132-3)=140 I C 557=A I R 1932 B 577=A I R 1932 B 1127.

—S. 83—Tenancy traceable to the time of foundation of village in particular



## BOMBAY LAND REVENUE CODE

## V OF 1879 (Contd.)

year, may yet be shown to be of indefinite origin. A I R 1925 Bom 294-27 Bom L R 267-91 I C 265

—S. 83—Under S. 83—the onus is on the landlord to show the commencement of the tenancy, and on his failure to prove the commencement of the tenancy, a presumption arises, in the absence of any proof of intended duration by agreement or usage, that the tenancy is co-extensive with the duration of the tenure of the landlord or those who derive title under him. Having regard to the fact that S. 83 of the Bombay Land Revenue Code does not exclude watan land from its operation and also to the fact that the onus is on the landlord to show the commencement of the tenancy, we must presume that the tenancy of the several defendants was in existence even prior to 1827. The tenancy of the defendants commenced somewhere between the years 1700 and 1850. That being the case, it must be presumed, in the absence of any evidence to the contrary, that the tenancy commenced at a time when the watan lands were alienable under the law prevailing before Regulation XVI of 1827 came into force, and therefore the statutory presumption of permanent tenancy arises under S. 83 of the Bombay Land Revenue Code. 34 B L R 1131 (1134, 1136)—A I R 1932 B 577-140 I C 557-A L R 1932 B 1127

—S. 83—Presumption under—Watan lands not excluded from benefit of. 34 B L R 1131 (1133-4)-140 I C 557-A I R 1932 B 577-A L R 1932 B 1127

—S. 83—Presumption under—Tenancy commencing after commencement of grant to landlord—Presumption arises even in case of. 34 B L R 1131 (1132)-140 I C 557-A I R 1932 B 577-A L R 1932 B 1127

—83—In the case of a tenancy for a fixed period, an agreement to vacate after the expiration of the fixed period is not sufficient to displace the advantage which the tenant has obtained by his long holding, if he continues in possession for many years after he has signed the kabuliyat.

Questions of this class cannot be determined by a clause such as the present, but the matter must be judged in the light of actual facts.

The fact of signing such a kabuliyat in the midst of a long holding at the same rent does not necessarily prevent the tenant from succeeding. The real test in such cases is whether the tenant has continued to occupy the land as before even after the execution of the kabuliyat. 34 B L R 1131 (1133)-A I R 1932 B 577-140 I C 557-A L R 1932 B 1127

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## BOMBAY LAND REVENUE CODE

## V OF 1879 (Contd.)

—S. 83—Tenancy bounded by a definite time or period is sufficient to defeat presumption under S. 83 A I R 1922 Bom 402-24 Bom L R 831-47 B 4-76 I C 71

—S. 83 (2)—Proof of commencement of tenancy is sufficient to defeat presumption under S. 83 (2) even if its terms are not proved. A I R 1921 Bom 454-23 Bom L R 533-63 I C 935

—S. 83 (2)—Where date of origin of tenancy is unknown presumption under—can be raised. 23 Bom L R 533-63 I C 935

—S. 83—Once occupation for very long period is proved, the presumption might not be defeated by tenant signing Kabuliyat for annual tenancy if he continued in possession for many years after the Kabuliyat on the same rent. A I R 1923 Bom 137-25 Bom L R 431-74 I C 292 See also A I R 1921 Bom 395-45 B 303-59 I C 278-22 Bom L R 1214

—S. 83—Permanent tenant cannot be made to pay more than three times the assessment in any one year A I R 1926 Bom 49-27 Bom L R 1339-91 I C 318

—S. 83—While enhancing rent, Court should consider general usage of District and particular usage of the land, A I R 1921 Bom 178-45 B 994-23 Bom L R 395-61 I C 577

—S. 83—Right to enhance rent must be proved by landlord. A I R 1926 Bom 52-49 B 902-27 Bom L R 1336-91 I C 314

—S. 83—Presumption can be raised Under S. 83 in the case of Talukdari estates. A I R 1931 Bom 167-32 Bom L R 1679-129 I C 881

—S. 83—On tenant proving fixity of tenure with reference to Talukdari estates landlord can enhance rent only under agreement or usage A I R 1931 Bom 167-32 Bom L R 1679-129 I C 881

—S. 83—In an ejectment suit by landlord tenancy is presumed to be an annual one unless the tenant proves its antiquity, in which case landlord will have to prove intended duration. A I R 1921 Bom 224-45 B 350-59 I C 751

—S. 83—Proviso—Watan lands in Gujarat are not governed by usage in case of mirasi tenures in Deccan empowering landlord to enhance rent. Landlord must prove 'usage'. A I R 1925 Bom 390-27 Bom L R 890-91 I C 272

—S. 84—Under Khoti Settlement Act a tenant is yearly tenant, and is entitled to notice in absence of any specific agreement between him and the khot. A I R 1921 Bom 38-45 B 1001-23 Bom L R 411-61 I C 594



## BOMBAY LAND REVENUE CODE

V OF 1879. (Contd.)

—S. 84—Notice to quit is necessary even where tenant has disclaimed landlord's title. Per Fawcett, J. A I R 1921 Bom 395=45 B 303=59 I C 278

—S. 84—Annual tenant disclaiming landlord's title forfeits his tenancy and no notice to quit is necessary even where the Transfer of Prop. Act does not apply. A I R 1925 Bom 524=49 B 842=27 Bom L R 1152=90 I C 614

—S. 84—Tenancy shown to end in May does not terminate by notice dated 22nd June in absence of subsequent contract to end it in October. A I R 1929 Bom 3=30 Bom L R 1602=Ind Rul (1929) Bom 224=114 I C 272

—S. 84—Ten days notice is not valid. A I R 1925 Bom 294=27 Bom L R 267=91 I C 265

—S. 85—Civil Court can entertain a suit by a superior holder to recover dues from inferior holder, 42 Bom. 49=19 Bom. L R 820=43 I C 995.

—Ss. 86, 141—Dishonest removal of moveable property in physical possession of another amounts to an offence under S. 424, Penal Code. Lessee removing the crop for the prevention of removal of which a watchman is appointed, commits an offence under S. 142, Bom. Land Revenue code. 5 C L R 130=12 Cr. L J 611=12 I C 987

—Ss. 86 & 87 (4)—Suit to cancel or amend order of Collector is not maintainable but a suit to recover money levied in excess by superior holder is maintainable. A I R 1924 Sind 87=17 S L R 42=80 I C 955

—S. 103—Resolution of 1903 and Note 19 of Anderson's Manual being only departmental orders having no force of Statutory rules a legally introduced Survey settlement is not invalidated merely because those rules are not observed. A I R 1928 Bom 497=30 Bom L R 1255=30 Cr L J 353=Ind Rul (1929) Bom 262=114 I C 854

—S. 103—Where rates are sanctioned on 9th July 1926, and notification is published on 26th July 1926, Survey Settlement is deemed as introduced in 1925-26. A I R 1928 Bom 497=30 Bom L R 1255=30 Cr L J 353=Ind Rul (1929) Bom 262=114 I C 854

—S. 111 & 154—Mamlatdar can, under ss. 114 & 154, attach jewels moveable property of a Khatedar of the Talukdari Village for arrears of assessment, 18 Bom L R 323=34 I C 198

—S. 113—Collector, 12 B 371

—S. 119—Civil Court's jurisdiction is barred in case of dispute between two neighbouring owners, but not in case of dispute between Collector and owner. A I R 1929 Bom 391=53 B 766=31 Bom L R 957=Ind Rul (1930) Bom 137=122 I C 137

## BOMBAY LAND REVENUE CODE

OF 1879 (Contd.)

—S. 121—Settlement of boundary line by Collector does not bar Civil Suit for acquisition of portion by adverse possession. A I R 1921 Bom 13=45 B 67=22 Bom L R 1111=59 I C 440

See also 22 Bom L R 1114 (foot-note) 59 I C 437

—S. 121—Decision of Enquiry Officer as to rights of one owner over the land of adjoining owner being ultra vires can be challenged in Civil Court. A I R 1922 Bom 293=46 B 390=23 Bom L R 1209=64 I C 564

—S. 121—A suit in Civil Court to challenge decision of Survey Officer on a title dispute is maintainable. A I R 1925 Bom 151=26 Bom L R 1264=85 I C 204

—S. 121—In a suit to determine boundaries Civil Court can settle boundaries even if revenue authority had settled the same during suit. A I R 1927 Bom 140=28 Bom L R 1498=99 I C 823

—S. 121—Civil Court can entertain a suit to establish title to neighbour's survey number by adverse possession. 45 B 67=59 I C 440=22 Bom L R 1111

—S. 133—Sanad being a document of title, possession within 12 years of suit need not be proved by Sanad-holder. Entries in Collector's books are not evidence of title. A I R 1925 Bom 477=27 Bom L R 948=89 I C 894

—S. 135—Record of rights does not raise any presumption as to ownership. A I R 1924 Sind 17=17 S L R 206=76 I C 498

—S. 135 H—A certified copy of Record of Rights omitted to be filed in trial Court can be admitted by Appellate Court. A I R 1921 Bom 64=45 B 1339=23 Bom L R 595=64 I C 684

See also A I R 1922 Bom 114=46 B 79=23 Bom L R 745=64 I C 156

—S. 135-J—Record of Rights—Entry in—Correctness of—Presumption of—Correction of entry subsequently—Effect of. See. 34 B L R 975 (978)

—S. 135-J—Entry in Record of Rights, shall, in absence of any other evidence, be presumed to be a true statement of its contents. 17 Bom L R 49=27 I C 478

—S. 135-J—Is not retrospective in effect. 44 Bom 214=22 Bom L R 33=54 I C 667

—S. 135 J—Entries in record of rights are inconclusive. A I R 1930 P C 93=32 Bom L R 368=57 I A 61=58 M L J 322=Ind Rul (1930) P C 150 (P C)=123 I C 166

—Chaps. X—A & VIII—Record of rights in alienated village can be maintained by Government without the Inamdar's

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Consent. A I R 1926 Bom 373=28 Bom L R 559=96 I C 303

—S. 137—Government claims recoverable as land revenue—priority—sale proceeds of land—land revenue due in respect of the land sold—other claims—distinctions between

A L R 1933 S 35=26 S L R 390

—S. 137—Government has priority over the stock of liquor for unpaid instalments even if it is already pledged to a bank. A I R 1930 Sind 185=Ind Rul (1930)

Sind 221=125 I C 829

—Ss. 137, 153 & 155—If Government sells immovable property of a defaulter, other than the land in respect of which land revenue is due, a prior mortgage on the immovable property sold is not extinguished: the immovable property is sold subject to such prior mortgage. The right of forfeiture under s. 153 is only applicable to a holding in respect of which land revenue is due. S. 137 in no way extends that right of forfeiture and sale to other lands of the defaulter in respect of which no land revenue is due. 27 S L R 390—I R 1932 S 110=A R 1932 S 121=139 I C 47

=A L R 1933 S 35

—Ss. 138, 140, 154—Mamlatdar's Courts Act—Revenue Jurisdiction Act ss. 4 & 6.

37 Bom 542=15 Bom L R 665=20 I C 526

—S. 140—Authorises the detention only of crops of the land. 15 Bom L R 665

=37 B 542=20 I C 526

—Ss. 144 & 160—On failure to pay assessment, the Govt. can attach the talukdari village and levy proportional assessment even from holders of rent-free lands from the Talukdar of the Village. 20 Bom L R 748=47 I C 117=43 Bom 6

—S. 148—Fine under s. 66 is not governed by s. 148. A I R 1927 Bom 601

=29 Bom L R 1350=106 I C 239

—S. 154—Distraint of cattle—Penal Code s. 379. 43 Bom 550=21 Bom L R 251

=50 I C 999

—S. 154—Moveable property of the defaulter may be distrained without warrant, A I R 1921 Sind 51=16 S L R 161

26 Cr. L J 195=83 I C 899

—S. 154—Court can distrain cash and currency notes of the defaulter. A I R 1921 Sind 51=26 Cr. L J 195=16 S L R 161

=83 I C 899

—S. 157—No interim order of protection from Insolvency Court can be obtained by a person arrested under order of Manager. Encumbered Estates Act S. 10 with S. 157, Bombay Land Revenue Code. A I R 1927 Sind 123=28 Cr L J 194=7 A I Cr R 345=99 I C 930

—S. 160—Khot's other rights are not affected by temporary attachment of village.

## BOMBAY LAND REVENUE CODE

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A I R 1926 Bom 410=50 B 306=28 Bom L R 750=98 I C 794

—S. 160—A watandar Khot can sue for possession of Khoti-nisbat lands alienated by tenant without his consent while under attachment by Govt. A I R 1926 Bom 410=50 B 306=28 B L R 750=98 I C 794

—S. 166—Mentioning of wrong years does not invalidate a notice. A I R 1923 Bom 478=25 Bom L R 785=77 I C 146

—S. 187—Claims made recoverable as land revenue—no priority over a prior mortgage. A L R 1933 S 35

—Ss. 189 & 197—Mamlatdar holding inquiry into record of Right, whether a Revenue Court Cr. Pro. Code s. 195. 16 Bom L R 678=39 B 310=27 I C 147

—S. 202—Possession of lands exempted from payment of revenue in return for Patelki service is not wrongful simply because Patelkship has ceased. A I R 1921 Bom 167=45 B 894=23 Bom L R 259=61 I C 267

—S. 203—A person is not bound to appeal from an invalid order of forfeiture and his suit for possession after he is dispossessed in pursuance of that order is maintainable. 54 I A 380, followed. A I R 1931 Bom 238=55 B 165=33 Bom L R 213

=Ind Rul (1931) Bom 337=132 I C 497

—S. 203—Plaintiff dispossessed under an invalid order of forfeiture can sue for possession. A I R 1931 Bom 238=33 Bom L R 213

—S. 203—Order by Collector under s. 23 of Irrigation Act—Order under s. 203—Land Revenue Code—Bombay Acts, Irrigation Act s. 23. 19 I C 726=6 S L R 241

—S. 203—Executive order of a Revenue Officer is appealable by aggrieved person irrespective of his being a party to enquiry. 11 S L R 124=45 I C 335

—S. 203—Orders and decisions—Provision for appeal from—Ejectment in pursuance of order—No appeal—Right to sue for possession—Bom Act X of 1876, 5 S L R 46

=10 I C 223

—S. 203—Civ. Pro. Code, 1908, ss. 68, 70, 71. 7 Bom L R 682

—Ss. 203 & 204—Decision or order within ss. 203, 204, does not include Mamlatdar's notice of demand of assessment.

A I R 1922 Bom 274=24 Bom L R 402=46 B 811=67 I C 842

—S. 211—Commissioner's powers—Of annulment or reversal of Collector's order can be exercised at any time. Scope of his powers discussed. A I R 1931 Bom 238=55 B 165=33 Bom L R 213=Ind Rul (1931) Bom 337=132 I C 497

—S. 211—Where before the termination of lease of sheri lands for 30 years, a

## BOMBAY LAND REVENUE CODE

V OF 1879 (Contd)

Deputy Collector in pursuance of Government Resolution directs full occupancy tenure to lessee and permanent tenancy right to tenants on payment of three times the assessment as rent, Collector can under S. 211 reverse the order of Deputy Collector. A I R 1930 Bom 95-31 Bom L R 1235-54 B 19-Ind Rul (1930) Bom 273-124 I C 769

—Ss. 211, 62—S. 211 does not entitle the Commissioner to pass an entirely new order which the Collector himself could not have made. A I R 1931 Bom 238-33 Bom L R 113-Ind Rul (1931) Bom 337-55 B 165-132 I C 497

—S. 213—Survey records—Public inspection—Copies—Adjournment, 5 S. L R 49-10 I C 554

—S. 214—Sandwood trees grown on occupancy holding after survey settlement—Right of Govt. to—Reserved trees—Forest Act, S. 75 (c). 22 Bom L R 884-58 I C 60 =1921 B 435-45 B 110

—S. 216—Court should follow the construction of s. 216 in 18 Bom 525, though doubtful but once adopted in a previous suit between the same parties at least on the principle of stare decisis, but it need not be followed in a suit between different parties. A I R 1921 Bom 87-45 B 1260-23 Bom L R 749-64 I C 162

—S. 216—Contractual rights arising before the Survey are not governed by S. 217. A I R 1925 Bom 435-27 Bom L R 645-89 I C 65

—S. 216—Grants in unalienated villages absolutely or partly free from the revenue are not governed by S. 216. A I R 1921 Bom 78-45 B 991-23 Bom L R 395-61 I C 577

—S. 217—S. 217 does not affect in the slightest degree the special right which a holder claims by virtue of any grant or contract between him and the inamdar. A I R 1923 Bom 79-24 Bom L R 1040-76 I C 897

—S. 217—A village remains an alienated village, even if the whole property in the soil is granted to Inamdar, and as such Inamdar has no power to enhance rent of the permanent tenant. A I R 1921 Bom 23-45 B 61-22 Bom L R 665-63 I C 671

See contra 42 B 112-20 Bom L R 16-43 I C 738

—S. 217 Inamdar of an alienated village to which Survey Settlement is extended on his application, cannot enhance assessment even after the expiry of the period of settlement. 44 Bom 110-22 Bom L R 247-58 I C 198

—S. 217—If permanent tenancy of an Inam village has commenced before its

## BOMBAY LAND REVENUE CODE

V OF 1879 (Concld.)

alienation to the Inamdar, the latter can enhance the rent. 42 Bom 112-20 Bom L R 16-43 I C 738

—S. 217 A Kadim Inamdar like other Inamdars of village in which Survey Settlement is introduced cannot enhance rent of his Mirasdar tenant beyond land revenue dues. on appeal from 42 B 112 22 Bom L R 665-

—Ss. 217, 218 and 40—Rights between Jagirdar and Zamindar to cut and sell timber are not governed by s. 217. A I R 1921 Sind 109-16 S L R 87-79 I C 319

—Ss. 217 and 68—effect of introduction of Survey Settlement on permanent tenancy—whether contractual liability to payment ceases. A L R 1933 B 112

—Ch XII—Mamlatdar holding inquiry, a Revenue court, within S. 195 (1)—Cr. Pro. Code. S. 95 (1)—39 Bom 310-16 Bom L R 678-27 I C 147

## BOMBAY LOCAL BOARDS ACT 6 OF 1923

—S. 27 and 35—With respect to notice S. 35 applies to the meeting for the election of a new president. A I R 1930 Bom 554-54 B 902-32 Bom L R 1252-Ind Rul (1931) Bom 241-130 I C 385

—S. 27—Until new Board begins to function, Chairman and Vice-Chairman continue to perform duty Temporary injunction preventing the Board from functioning should be granted to a person who has brought a suit for declaring the election as illegal and for injunction. A I R 1929 Sind 224-Ind Rul (1930) Sind 159-125 I C 47

—S. 35—Meeting illegally dissolved by president can be continued by the members present with new Chairman. A I R 1927 Bom 603-29 Bom L R 1325-106 I C 265

—S. 35—The word "shall" in s. 35 is not obligatory. A I R 1930 Bom 554-54 B 902-32 Bom L R 1252; Ind Rul (1931) Bom 241

—S. 35 (2) (b)—Notice served by post is properly served. A I R 1927 Bom 603-29 Bom L R 1325-106 I C 385

—S. 35 (2) (b)—Meetings summoned under S. 27 or S. 26 are as much governed by s. 35 as any other special meeting. A I R 1930 Bom 554-54 B 902-32 Bom L R 1252-Ind Rul (1931) Bom 241

—S. 35 (4)—Proceedings are not invalid merely because prescribed formalities had not been observed. A I R 1930 Bom 554-54 B 902-32 Bom L R 1252-Ind Rul (1931) Bom 241

—S. 35 (4)—Meeting properly convened Cannot be dissolved by the President. A I R 1927 Bom 603-29 Bom L R 1325-106 I C 265

## BOMBAY LOCAL BOARDS ACT

VI OF 1923 (Concl'd.)

—S. 63—Service of notice of meetings is not governed by S. 63 but by S. 35 (2) (b) S. 35 (2) (b) applies. A I R 1927 Bom 603=29 Bom L R 1325=106 I C 265

—S. 117 (3)—“Toll for public ferries” is “any toll” within S. 117 (3). A I R 1930 Sind 176=Ind Rul (1930) Sind 191=125 I C 223

—S. 133 (e)—Rules under Local Boards Act are inseparable from those under Education Act. A I R 1930 Sind 246=Ind Rul (1930) Sind 271=126 I C 479

—S. 136—Action based on breach of contract-applicability. A L R 1933 B 203=35 B L R 55

—S. 136—Misdescription does not invalidate a notice addressed to president. A I R 1930 Bom 554=54 B 902=32 Bom L R 1252

—S. 136—Legislative Council can authorise local authority to impose ferry toll and as such, a suit filed against an act of Local Board purporting to recover arrears of such of toll requires one month's notice A I R 1930 Sind 176=Ind Rul (1930) Sind 191=125 I C 223

—S. 136—s. 136 Governs cases of relief that person should become member of School Board and perform functions of that Board. A I R 1930 Sind 246=Ind Rul (1930) Sind 271=126 I C 479.

## BOM. MAMALATDARS COURTS ACT (II OF 1906).

—A suit to set aside a right of way as affirmed by a mamlatdar under Mamlatdar's Courts Act is governed by Art. 47 and not Art. 14 of the Limitation Act. A I R 1931 Bom 256=33 Bom L R 517

—S. 5—Tenant of one cosharer, on being obstructed in possession by another cosharer, he must sue the obstructor and not the landlord. 30 Bom L R 889=112 I C 462=A I R 1929 B 114

—S. 5—Mamlatdar dismissed the suit but the Collector in revision ordered the trial. A mamlatdar cannot send the papers to the Collector for order after the evidence is recorded. He should be directed to take it on file and dispose of it according to law by the High Court in revision. A I R 1923 Bom 60=24 Bom L R 1311=76 I C 442

—S. 5—While the possession was with the tenant, a trespasser dispossessed him and he was sued for possession by the landlords when the tenancy expired. Mamlatdar can issue orders in the landlord's favour if the suit is within 6 months of dispossession. A I R 1928 Bom 243=52 B 453=30 Bom L R 683=111 I C 629

—S. 5—A Co-sharer with sole possession has a right to the summary

## BOMBAY MAMLATDARS COURTS ACT

II OF 1906 (Cont'd.)

remedy when he is dispossessed by another co-sharer. A I R 1929 Bom 114=30 Bom L R 889=112 I C 463

—S. 5 (1)—Provi. After a suit was filed in Mamlatdar's Court, the deft filed one in a Civil Court. The parties may be referred to the latter Court & the Mamlatdar may refuse to exercise jurisdiction. A I R 1930 Bom 184=32 Bom L R 85=I R (1930) Bom 328=125 I C 424

—S. 5 (1)—The words “of any other person” are qualified by “not being a person who has been a former owner or part-owner.” A I R 1929 Bom 114=30 Bom L R 889=112 I C 462

—S. 5 Expl—No joint possession can be decreed when persons claiming it are ousted by a co-sharer. A I R 1929 Bom 114=30 Bom L R 889=112 I C 462

—S. 5 Expl—Joint possession cannot be decreed in a possessory suit against a co-sharer. A I R 1922 Bom 126=46 B 289=23 Bom L R 1016=68 I C 225

—S. 5 Expl—The placing of a tenant by a person who claims to be the joint owner of any property cannot be considered as the exercise by a joint owner of any right which he has over the joint property within the meaning of the Explanation—The disturbance by co-owner's tenant is not the same as the disturbance by the co-owner himself; the latter is protected, not the former. 34 B L R 109=137 I C 760=A I R 1932 B 204=I R 1932 B 338

—S. 23—An applicant or his pleader has a right to a hearing before the Collector. A I R 1930 Bom 184=32 Bom L R 85=I R (1930) Bom 328=125 I C 424

—S. 23—A Collector cannot refuse revision application without hearing the party or his pleader. A I R 1925 Bom 522=27 Bom L R 1115=90 I C 654

—S. 23—Complicated questions are not out of Mamlatdar's jurisdiction. A I R 1924 Bom 352=48 B 384=26 Bom L R 265=80 I C 266

—S. 23—Collector can reject Mamlatdar's finding based on misappreciation of evidence. A I R 1922 Sind 18=16 S. L R. 106=79 I C 847

S. 23—After trial the mamlatdar must give a decision when the case is remanded in revision by a Collector. A I R 1923 Bom 60=24 Bom L R 1311=76 I C 442

—S. 23—Assistance Collector can exercise powers of Collector under S. 23, if he is put in revenue charge of the district. 13 Bom L R 1031=36 Bom 123=12 I C 709

—S. 23—Collector in exercising revisional powers under s. 23, should not exercise appellate powers by weighing the evidence before the Mamlatdar, and come



**BOMBAY MAMLATDARS COURT ACT****II OF 1906 (Contd.)**

to a different conclusion. 'Improper' in S. 23 (2) is just akin to 'irregularity' in C P C S 115. 13 Bom L R 879=12 I C 356=35 B 487.

—S. 23—Collector has no power to make revision by reference. 14 Bom L R 259=14 I C 732

—S. 23—Mamlatdar's decision in a possessory suit On documentary evidence should not be reversed by Collector in revision on appreciation of documentary evidence. 37 B 595=15 Bom L R 680=20 I C 535

—S 23—Dt. Dy. Collector cannot exercise the powers of Collector to revise Mamlatdar's decision under S. 23. 39 Bom 552=17 Bom L R 579=29 I C 954

—S. 23—Collector in exercising revisional powers under S. 23, should not exercise appellate powers by weighing the evidence before the Mamlatdar, and come to a different conclusion. 'Improper' in S. 23 (2) is just akin to 'irregularity' in C P C S. 115 13 Bom L R 879

—S. 23—Assistant Collector, put in revenue charge of the district, can exercise powers of Collector under S. 23, 13 Bom L R 1031

—S. 24—Judicial commissioner's Court as the same-revisional powers as the High Court over Collector's orders. A I R 1922 Sind 18=16 S L R 106=79 I C 847

—S. 24—Judicial Commissioner, Sind, has under S. 24, revisional powers on Mamlatdr's decision. C P C is inapplicable to proceedings under the Act. Mamlatdar can pass ex parte order only when he is satisfied that defendant had notice sufficient to appear on the date fixed. Ex parte decision inspite of defendant's presence, for failure to apply for setting aside ex parte order is bad and must be reversed. 6 S L R 67=16 I C 675

—S. 26—Institution of a civil suit does not ipso facto oust Mamlatdar's jurisdiction. A I R 1930 Bom 184=32 Bom L R 85=I R (1930) Bom 328=125 I C 424

—S. 26 (b) When a civil suit between the parties is pending a mamlatdar cannot entertain a possessory suit. A I R 1928 Bom 53=52 B 203=30 Bom L R 98=107 I C 719

**BOMBAY MAMLATDARS COURT ACT****II OF 1906 (Concl'd)**

—S. 26 (b)—The words "has been" are meant to include pending proceedings. A I R 1928 Bom 53=52 B 203=30 Bom L R 98=107 I C 719

—S. 28—Collector cannot reverse Mamlatdar's decision on facts. 14 Bom L R 107

**BOMBAY MUNICIPAL BROUGHES ACT (XVIII OF 1925)**

—Ss. 99 and 203—suit by Municipality for recovery of octoiduty—failure to prove liability under S. 99—maintainability of suit. A L R 1913 B 300

**BOMBAY NATIVE PASSENGERS SHIP ACT (X OF 1887)**

—Ss. 9, 10 and 31—"Voyage" includes both outward and return journey. A I R 1922 Bom 167=23 Bom L R 1200=23 Cr L J 651=46 B 438=69 I C 91

**BOMBAY NATIVE SHARE AND STOCK****BROKER'S ASSOCIATION**

—Card of member—Effect of insolvency. See Presidency Towns Insolvency Act (III of 1909) S. 52.

—Member of—Defaulting member—Insolvency of—Property vesting in official Assignee on—"Card" or rigot of membership of insolvent or proceeds of sale of "card" is not. 59 I A 318=56 B 374 (P C)

—Nature of—Neither a company nor a partnership but merely a voluntary association resembling a members club. 59 I A 318=56 B 374 (382. 3)=137 I C 776=34 B L R 1178=63 M L J 623=55 C L J 592=36 C W N 999=A I R 1932 P C 186=1 R 1935 P C 215 (2) (P. C.)

**BOMBAY PLEADERS CASTE QUESTION****REGULATION.**

—See under Regulation (3) Bombay Regulations—Reg 2 of 1827.

**BOMBAY PLEADERS ACT 17 OF 1920.**

—S. 10 (3)—The Section is inexhaustive For applying to set aside an ex parte decree no fresh vakalatnama is required. A I R 1922 Bom 113=23 Bom L R 883=49 B 125=64 I C 55

—S. 17—A client compromising the claim before trial cannot alter the agreement with a Pleader to conduct litigation for a certain fee, but the Pleader can retain the whole paid up fees. A I R 1930 Bom 22=31 Bom L R 1221=54 B 1=I R (1930) Bom 183=122 I C 855.



**BOMBAY PLEADERS ACT 17 OF 1920 (Concl'd.)**

—Ss. 17 & 19—There was no special agreement between a pleader & the client & the former died before final decree, Proportionate fee on basis of quantum meruit only can be given. A I R 1925 Bom 513=27 Bom L R 1156=90 I C 604.

—S. 18 Value of the subject-matter is the basis of assessing a pleader's fees. A I R 1928 Bom 247=30 Bom L R 673=111 I

C 886

—S. 18—Pleader's fees should be taxed according to the Act when the Act came in force while an application for executing appellate decree was pending. A I R 1924 Bom 302=48 B 355=26 Bom L R 187=79 I C 749

—S. 18—In a landlord's ejectment suit pleader's fee must be on actual value of the property & not on that for Court fee purposes, A I R 1922 Bom 171=46 B 396=23 Bom L R 1183=64 I C 1003.

—S. 19 (3)—The section says what a client has a right to as professional services in return for the fees, A I R 1930 Bom 22=31 Bom L R 1221=54 B 1=I R. (1930) Bom 183=122 I C 755.

—S. 20—(a) (b) & (c)—For taxing two pleaders fees Courts certificate is not needed. A I R 1927 Bom 399=51 B 492=29 Bom L R 897=102 I C 661.

—S. 25—High Court can suspend a Pleader's sanad if he is adjudicated an insolvent until he obtains the discharge. A I R 1928 Bom 385=52 B 559=30 Bom L R 1011=I R (1929) Bom 211=114 I C 259

—S. 25—How far has a pleader authority to give a notice under s. 80 C P C to a judicial officer. A I R 1928 Bom 338=30 Bom L R 934=113 I C 519

—S. 25—A pleader is guilty of improper conduct & disciplinary action can be taken against him if he criticises a case sub judice in a public meeting. A I R 1922 Bom 361=47 B 117=24 Bom L R 1049=76 I

C 78.

—S. 26—A Dt. Pleader is guilty of improper conduct when he giving himself out as H. C. Pleader sent postcards with his name etc. which amounts to advertisement, more so when he wrongly stated that the court has authorised him to exa-

**BOMBAY PLEADERS ACT 17 OF 1920 (Concl'd.)**

mine wakf accounts. A I R 1929 Bom 335=53 B 640=31 Bom L R 625=I R (1930) Bom 75=121 I C 587

—Sch 3 rr. 1 & 2—Without a notice to the plff. a court has no power to change the sum for pleader's fees shown in the plaint in deft's favour. A I R 1929 Bom 223=31 Bom L R 471=I R (1929) Bom 495=118 I C 799.

—Sch 3 rr. 1 & 2—Costs should be awarded under r. 2 (a) & not under r. 1 (a) when a suit is dismissed for default. A I R 1929 Bom 223=31 Bom L R 471=I R (1929) Bom 495=118 I C 799.

—R. 1 (b)—Pleader's fees are to be on the value of the subject matter in an injunction suit restraining Government from taking proceedings. A I R 1926 Bom 369=28 Bom L R 582=96 C 329.

—R. 5—The Rule is applicable to all appeals or applications under any other local or special Act. A I R 1927 Bom 499=29

Bom L R 1031=103 I C 637.

**BOMBAY PRIMARY EDUCATION ACT 4 OF 1923**

—S. 3 (1)—as amended by Act XV of 1927—District School Board constituted under—Corporation is and is liable to be sued as such. 34 B L R 1500=A I R 1932 B 651=A L R 1932 B 1109.

—S. 9 (1)—No sanction under s. 197 Cr. P C is necessary for the prosecution of an administrative officer of a School Board appointed under s. 9 (1) of the present Act who can be removed by the local authority by the votes of two-thirds of the whole number of Collectors. 33 Bom L R 1177=A I R 1931 B 527.

—S. 27—The rules under the Education Act & the Local Boards Act cannot be separated. A I R 1930 Sind 246=I R (1930). Sind 271=126 I C 479.

—Ss. 27 (1) (4) cl 5 r. 21—When no quorum is fixed for School Board meetings the common Law rule that the majority should attend applies. A I R 1928 Sind 126=23 S L R 128=107 I C 446.

—R. 13—A person was elected member of a Dt. Municipality but was then disqualified. After the ceasing of the disqualification he was elected on the School Board but its Chairman held him disqualified. The Chairman cannot decide the question of his disqualification but a civil suit would lie. Disqualification from the Municipality does not imply one for School Board. A I R 1930 Bom 378=32 Bom L R 614=I R (1930) Bom 319=124 I C 815.

**BOMBA PRIMARY EDUCATION (DT. MUNICIPALITIES) ACT 1 OF 1918,**

—Ss. 9, 10, 8 (b)—Instructions may not conform to recognised school standard. That the child should be educated some where is the object. The right of the parents for giving education elsewhere is not taken away. A I R 1924 Bom 105-47 B 942-25 Bom L R 896-25 Cr L J 338-77 I C 226.

**BOMBAY REGULATIONS.**

See under Regulations—(3) Bombay Regulations.

**BOMBAY RENT (WAR RESTRICTION) ACT 2 OF 1918**

—When during the Act the landlord gives notice to quit some premises which were used as business premises, no fresh notice to quit is needed after the Rent Act has ceased to apply. A I R 1925 Bom 516-27 Bom L R 1086-49 B 567-94 I C 564

—The premises are to be taken as dwelling house when they are mainly occupied for dwelling purposes though business is also carried on in it. A I R 1925 Bom 398-27 Bom L R 937-89 I C 878

—As against the landlord the sub-tenants have no more rights than the tenant. A I R 1922 Bom 273-46 B 526-23 Bom L R 1251-64 I C 692

—The landlord is not prevented from using the premises as his residence. A I R 1921 Bom 34-45 B 1236-23 Bom L R 850-63 I C 41

—In a landlord's possessory suit, possession of the whole house can be decreed though a part is enough for him. A I R 1921 Sind 7-15 S L R 79-62 I C 860

—The Rent Act is inapplicable when the land is acquired under the Land Acquisition Act. A I R 1921 Bom 214-45 B 725-23 Bom L R 35-60 I C 571

—It is a satisfactory cause when there exist necessities of a scheme of great public utility launched by the Municipalities. A I R 1921 Bom 214-45 B 725-23 Bom L R 35-60 I C 571

—Ss. 1, cl (a) (ii), 4—New premises are created when the wall is reconstructed & extensive alterations made. A I R 1927 Bom 648-29 Bom L R 1439-105 I C 764

—S. 2—A sub-tenant is not a tenant of the original landlord & he cannot oppose eviction of the main tenant. A I R 1925 Bom 415-49 B 685-27 Bom L R 938-89 I C 881

See also. A I R 1922 Bom 273-23 Bom L R 1251-46 B 526-64 I C 692

—S. 2—The Occupier is only a licensee & not a tenant when the owner has the control over the premises occupied by others. A I R 1923 Bom 228-25 Bom L R 84-88 I C 316

**BOMBAY RENT (WAR RESTRICTION) ACT****II OF 1918 (Contd.)**

—S. 2—It is a license when there is a grant of an indefinite area varying from time to time for keeping chattels. A I R 1923 Bom 228-25 Bom L R 84-88 I C 316

—S. 2 (1) (b)—The Act is inapplicable to the case of the licensor & licensee. A I R 1923 Bom 228-25 Bom L R 84-88 I C 316.

—S. 2 (1) (b) (ii)—Premises become new when they are so changed as to lose identity. A I R 1929 Bom 220-53 B 432-31 Bom L R 387-1 R (1929) Bom 449-118 I C 545.

—S. 2 (a) (i)—Standard rent between a tenant & a sub-tenant is the same & by such rent is meant rent for which the premises were originally let from the beginning of 1916. A I R 1921 Bom 224-45 B 744-23 Bom L R 133-60 I C 960

—S. 2 (c)—Lessee entitled to recover rent for the premises is 'landlord' within the meaning of S. 2 (c), Bombay Rent Act, and as such, he is entitled to exercise under s. 9. 43 Bom 795-21 Bom L R 397-51 I C 293

—S. 2 (d) (ii)—As amended in 1923—No protection is given to the tenant when premises are mainly & substantially let out as a shop. A I R 1929 Sind 36-22 S L R 417-1 R (1929) Sind 76-115 I C 316

—S. 3—Covenant to pay stipulated rent with penalty to end the lease is not enforceable, and as such, landlord cannot re-enter on the land on tenant's failure to pay stipulated rent. Tenant is bound to pay only standard rent. 22 Bom L R 926-58 I C 69

—S. 6—The tenant has to pay additional Municipal tax. A I R 1925 Bom 532-27 Bom L R 1092-89 I C 859

—S. 7 (1)—Landlord charging additional charges for supplying electric light is not guilty under S 7 (1) of Bombay Rent Act, 1918. 22 Bom L R 900-58 I C 149-21 Cr. L J 725

—S. 8—The meaning of S. 8 is that the landlord is not entitled to recover from the tenant any premium in addition to the rent. But if he does so, the tenant can at once recover it, and this he may do in one of two ways either by deducting it himself from the rent due or by filing an action. Sub-S. (2) makes it clear that from the time the amount of the premium comes into the hands of the landlord it really belongs to the landlord, and the landlord holds it for the benefit of the tenant. In other words, he holds it in a fiduciary capacity, to use technical language "to the use of the tenant." 33 B L R 1563-I R 1932 B 113-135 I C 801-A I R 1932 B 86 (90)=A L R 1932 B 86

—S. 8—Premium recovered by landlord in contravention of—Recovery by—

## BOMBAY RENT (WAR RESTRICTION) ACT

## II OF 1918 (Contd.)

tenant of amount of—Right of—Tenant if has apart from the Bombay Rent (War Restrictions Act) II of 1918, Quære. 33 B L R 1563—I R 1932 B 113-135 I C 801-A I R 1932 B 86 (89-90)=A L R 1932 B 86

—S. 8—Premium recovered by landlord in contravention of—Recovery by tenant of amount of—Suit for—Limitation

—S. 12 of Act inapplicable—Art. 62 and not 120 of Limitation Act applicable. 33 B L R 1563—I R 1932 B 113-135 I C 801=A I R 1932 B 86 (89, 90)=A L R 1932 B 86

—S. 8—Premium for arranging to renew the lease cannot be allowed. A I R 1924 Bom 295-25 Bom L R 1313-84 I C 953

—S. 8—The section is not limited only to landlord but extends to a lessee creating a sub-lease. A I R 1924 Bom 295-25 Bom L R 1313-84 I C 953

—S. 9—Pulling down of old house and building new one is not intended to be stopped by Bombay Rent Act. S 9 demand reasonable and bonafide requirement on landlord's part. 22 Bom L R 880=58 I C 27

—S. 9 (2)—Does not, for eviction of tenant, require that the landlord should himself erect the building. 22 Bom L R 880=57 I C 993

—S. 9—The object is to prevent a statutory tenancy being used as a source of profits by a tenant who does not require it for himself. The first part refers to a tenant who holds over. s. (1) & the second to one who sub-lets beyond his term expecting a statutory tenancy. A I R 1924 Bom 99-25 Bom L R 1178-48 B 257-81 I C 843

—S. 9—Standard rent must be paid by a statutory tenant holding over after notice. A I R 1924 Bom 330-26 Bom L R 141-80 I C 253

—S. 9—Bona fide necessity of a part of the premises leased is not a reasonable requirement of the whole. A I R 1921 Bom 54-23 Bom L R 856-68 I C 330

—S. 9—Landlord in need of rented premises bonafide & reasonably should himself decide & not the court how much is required. A I R 1922 Bom 222-24 Bom L R 95-46 B 632-66 I C 929

—S. 9—To give possession of the premises to one member of the community is not a reasonable & bona fide purpose. A I R 1922 Bom 109-23 Bom L R 972-46 B 132-64 I C 555

—S. 9—When the premises are acquired under the Land Acquisition Act, this Act is inapplicable. 45 B 725-23 Bom L R 35-60 I C 571

## BOMBAY RENT (WAR RESTRICTION) ACT

## II OF 1918 (Contd.)

—S. 9—When limitations created by S. 9 on landlord's rights are removed his rights are revived. 15 S L R 79-62 I C 860

—S. 9—The Act is intended for precluding the landlord from renting at higher rates either to the same or another landlord. The landlord desiring to occupy the house himself can occupy a part required. 45 B 1236-23 Bom L R 850-63 I C 41

—S. 9—When a part of the leased premises were required by the landlord for himself, the tenant offered to give it up under a compromise which can be enforced & the tenancy determined. A I R 1921 Bom 73-45 B 1294-23 Bom L R 559-63 I C 1007

—S. 9—A sub-tenant is not included in 'tenant'. A I R 1922 Bom 197-24 Bom L R 154-67 I C 130

—Ss. 9 & 10—Under S. 10 a Court can postpone execution of an ejectment decree for some time with liberty to apply after a specified period. 45 B 928-23 Bom L R 287-61 I C 273

—S. 9 (1) & (2)—If the tenant seeks protection of the Act, the rent-arrears must be paid before the suit. A I R 1923 Bom 387-25 Bom L R 345-47 B 756-70 I C 920

—S. 9 (2)—Tenant made default in paying the rent though demanded & harassed the landlord by his conduct which is a sufficient cause within s. 9 (2) though the overdue rent is subsequently paid. A I R 1929 Sind 13-23 S L R 29-111 I C 530

—S. 9 (2)—When the servant's occupation is as part of remuneration it is not that of the landlord but such occupation is a sufficient cause for ejecting the tenant. A I R 1922 Bom 70-24 Bom L R 54-65 I C 677

—S. 9 (2)—If the landlord wishes to have the premises for himself he must not be kept out. A I R 1921 Bom 212-45 B 928-23 Bom L R 287-61 I C 273

—S. 10—A Small Causes Court cannot vary an order for possession. A I R 1921 Bom 201-45 B 1048-23 Bom L R 442-62 I C 45

—S. 10—Before the Act was in force, the Presi. Small Cause Court decreed the possession. An order staying execution till further order is within jurisdiction. But it cannot be taken into account that the decree holder did not give reasons for possession prior to the Act. A I R 1921 Bom 212-45 B 928-23 Bom L R 287-61 I C 273

—S. 10 A—A defendant applied for restoration & was successful on merits, but before the order was passed the Act

**BOMBAY RENT (WAR RESTRICTION) ACT****II OF 1918 (Concl'd.)**

expired as the proceedings end ipso facto the debt cannot succeed. A I R 1925 Bom 378-49 B 724-27 Bom L R 595-87 I C 793

—S. 10-A—A notice of motion is not barred when filed within 6 months though comes before the Court after that time. A I R 1924 Bom 36-47 B 764-25 Bom L R 484-86 I C 440

—S. 10 A—To get an interlocutory relief usually the procedure is by motion & the first step is to file a notice of motion. It is deemed to be the application which the applicant desires to make & though it is moved in Court after the prescribed time is over, it is not time-barred if filed within time in the proper office of the Court. A I R 1924 Bom 36-47 B 764-25 Bom L R 484-86 I C 440

—S. 10 A—Limitation for applying by way of motion to the High Court begins from the day on which it is brought on in Court & not from the day on which the copy is lodged with the prothonotary. Madras High Court law differs. A I R 1924 Bom 289-25 Bom L R 13-85 I C 432

—S. 12—The limitation in S. 12 of the Act is inapplicable to a claim for recovery of a premium paid by a tenant. 33 Bom L R 1563-I R 1932 Bom 113-135 I C 801-A I R 1932 Bom 86 (88)=A L R 1932 Bom 86

—S. 13—A finding about the standard rent is a judgment between the parties & not one in rem. A I R 1926 Sind 120-91 I C 97

—S. 13—A lessee rented part of the premises. The rent of the part sub-let is the basis of standard rent for that portion. A I R 1925 Bom 400-49 B 357-27 Bom L R 877-88 I C 886

**BOMBAY RENT (WAR RESTRICTIONS)****ACT 7 OF 1918**

—S. 2—There is no variation in the standard rent as between tenant & sub-tenant, & landlord & tenant. 45 B 744-23 Bom L R 133-60 I C 960

—Ss. 4 (a) & 15—Unless varied by the Committee or without jurisdiction the controller's decision about the size of the premises is final. A I R 1921 Sind 79-16 S L R 158-83 I C 335

—S. 4 (6) & (b)—Unless the conditions of the premises are altered the Controller cannot change the standard rent. A I R 1923 Sind 15-17 S L R 312-73 I C 319

—S. 17—An objection under the section is not want of jurisdiction but is a material irregularity. A I R 1929 Bom 220-I R (1929) Bom 449-53 B 432-31 Bom L R 387-118 I C 545

—S. 17—The monthly rent was below Rs. 30. In an ejectment suit, the plff. must

**BOMBAY RENT (WAR RESTRICTION) ACT****II OF 1918 (Concl'd.)**

apply & annex a certificate under S. 4 (1) (a) & (b) Non-existence of Controller's order is no valid defence, A I R 1929 Bom 220-I R (1929) Bom 449-53 B 432-31 Bom L R 387-118 I C 545

**BOMBAY REVENUE JURISDICTION ACT X****OF 1876**

(Rep. in pt. Act IV of 1894; Act XVI of 1895; rep in pt. and am. Act XV of 1880; Act XII of 1891; am. act XVI of 1877)

—The Act is not ultra vires. A I R 1931 Bom 212-33 Bom L R 239-131 I C 664

—S. 4—Construction of—Strict should be, as it ousts the jurisdiction of the ordinary Civil Courts. 34 Bom L R 944 (947) =A I R 1932 B 456-139 I C 210-I R 1932 B 475-A L R 1932 B 1054

—S. 4—Suit barred by—Mulla-Mulanki service lands—Suit for recovery of possession of, from alienee of such lands form a former holder thereof—S. 4 not a bar to. 34 Bom L R 944-A I R 1932 B 456-139 I C 210-I R 1932 B 475-A L R 1932 Bom 1054

—S. 4—A civil court can entertain a suit for declaring the status of a watandar & of nearest heirship. A I R 1930 Bom 254-I R (1931) Bom. 167-54 B 125-32 Bom. L R 155-129 I C 391

—S. 4—A suit for declaration that plaintiffs are entitled to officiate as watandar kulkarnis falls within s. 4 of the Act. Civil Courts, therefore, have no jurisdiction to entertain in the suit. A I R 1931 Bom 212-33 Bom L R 239-131 I C 664

—S. 4—Of Bombay Rev. Jurisdiction Act, bars a Suit for declaration that plaintiffs are hereditary vatandar or kulkarnis, 44 Bom 261-22 Bom L R 99-55 I C 358

—S. 4—Under Hereditary Offices Act Collector has no power to declare an alienation of a Deshmukhi vatan null and void if alienee's title had become perfect by adverse possession. 37 Bom 37-17 I C 148-14 Bom L R 793

—S. 4—Does not bar a suit to recover possession of land, the Saranjam rights of have been resumed. 41 Bom 408-19 Bom L R 117-39 I C 65

—S. 4 (A)—No suit lies in the Civil Court under s. 4 (a) in respect of a claim against Government where the claim relates to property appertaining to hereditary officer. Nor is the Plff's suit for declaration of title which would bind the Government, entertainable therein. A I R 1931 Bom 47 (1)-32 Bom L R 1370-Ind Rul (1931)-Bom 256-130 I C 400

—S. 4—No suit can be filed for cancellation of watan register. A I R 1927



## BOMBAY REVENUE JURISDICTION ACT X

OF 1876 (Contd.)

P C 217=53 M L J 475=51 B 830=54 I A 380=29 Bom L R 1484=46 C L J 393=39 M L T 527 (P C)=105 I C 694

—S. 4—Unless exempted by Bombay Title to Rent Free Estates Act XI of 1852 a refund suit for contribution under Bombay Hereditary offices Act III of 1874 is barred. A I R 1927 P C 217=53 M L J 475=51 B 830=54 I A 380=29 Bom L R 1484=46 C L J 393=39 M L T 527 (P C)=105 I C 694.

—S. 4—A civil court can give its decision when the Collector refuses to declare an alienation null & void. A I R 1921 Bom 17=45 B 1141=23 Bom L R 376=61 I C 572

—S. 4—A civil court cannot challenge Government's or its officer's decision about the claim to property as watandar. A I R 1930 Bom 254=1 R (1931) Bom 167=54 B 125=32 Bom L R 155=129 I C 391

—S. 4 (a) Civil Court has no jurisdiction to entertain a suit against Secretary of state for India for declaration that Government's order dismissing him from watandar's office and forfeiting his lands is illegal. S. 4 (a) of Bombay Revenue Jurisdiction Act is not ultra vires of Govt of India. 21 Bom L R 1155=54 I C 129

—S. 4 (a), para 3—High Court has no revisional powers over Collector's order under S. 11—A of Bombay Hereditary offices Act. 23 Bom L R 561=64 I C 7

—S. 4 (a)—The section bars a mere declaratory suit of title or otherwise concerning property related to the hereditary office. A I R (1931) Bom 47 (1)=I R (1931) Bom 256=32 Bom L R 1370

—S. 4 (a)—A civil suit can be filed against an order of commutation of watan services made without following the Bombay Hereditary offices Act S 73. A I R 1925 Bom 365=49 B 554=27 Bom L R 463=92 I C 110

—S. 4 (a)—Suit against Govt in a Civil court regarding land, of which the plaintiff is put into occupation by Govt. is barred by s. 4. 6 Bom L R 438=23 B 435

—S. 4 (a) (3)—No suit lies against a Revenue Officer's order that a person is not a watandar. A I R 1926 Bom 417=28 Bom L R 651=95 I C 1008

—S. 4 (b)—An objection to be within the section must be one to them per se admitting the liability to pay revenue on objector's part but quarrels with it amounts or incidence or the validity & effect of the notification of survey settlement as themselves objectionable. A I R 1923 Bom 79=24 Bom L R 1040=76 I C 897

—S. 4 (c)—In execution of a decree in assistance suit a buffalo was attached &

## BOMBAY REVENUE JURISDICTION ACT X

OF 1876 (Contd.)

on pledgee's objection the attachment was raised, the pledgee cannot be sued for damages for fraudulently inducing the mamlatdar to raise attachment. A I R 1929 Bom 267=1 R (1929) Bom 574=31 Bom L R 504=119 C 798

—S. 4 (f)—To the Dt. Magistrate's order for compensation for additional Police the Section is inapplicable. A I R 1924 Bom 1=26 Bom L R 1=48 B 87=90 I C 13

—S. 4 proviso (k)—Civil Court can entertain a suit to set aside resumption of lands by Inam Commissioner claiming to hold the lands free from land-revenue under an order by a competent officer under Act XI of 1852. 21 Bom L R 1166=44 Bom 130=54 I C 105

—S. 4 proviso (k)—Suit to set aside resumption of lands by Collector, claiming to hold the lands free from Commissioner under an order of Inam commissioner under Act XI of 1852 is maintainable in Civil Court. 21 Bom L R 1159=44 Bom 54 I C 98

—Ss. 4 (c), 6—A Mamlatdar may be sued in Civil Court for damages for wrongful attachment for arrears of land-revenue of goods on public road not shown to have belonged to the defaulter, without being invested by Collector with powers under s 140 of Land Revenue Code. 37 B 542=15 Bom L R 665=20 I C 526

—Ss. 4 & 5—A declaratory suit that plff. is Jangam is barred but not a suit that Collector has no power to levy rent in excess of full assessment. A I R 1924 Bom 273=48 B 61=25 Bom L R 1160=82 I C 577

—S 11—The word 'Act' is wide enough to include a judicial or a quasi judicial act, viz., the passing of an order or decision by a Revenue Officer. A I R 1931 Bom 432=33 Bom L R 361

—S. 11—Where Collector granted land free of payment till cultivation and Commissioner ordered payment of occupancy price and the land was forfeited for non payment of such price and the party sued for declaration that forfeiture was illegal and for possession. Held (Baker J. dissenting) suit was maintainable as the order of forfeiture was invalid. A I R 1931 Bom 238=33 Bom L R 213=55 B 165=Ind Rul. (1931) Bom. 337=132 I C 497

—S. 11—A party is not bound to appeal from an ultra vires order passed by a Revenue Officer. The attempt to enforce the order against him will give him cause of action for a suit which will not be barred by s. 11. 54 I A 380, referred to A I R 1931 Bom 238=55 Bom 165=33 Bom L R 213=Ind Rul. (1931) Bom 33=132 I C 497



**BOMBAY REVENUE JURISDICTION ACT X  
OF 1876 (Contd.)**

—S. 11—The suit is not barred when no appeal under Land Rev. Code is made against Collector's refusal to give a sanad. A I R 1923 Bom 416-74 I C 196

—S. 11—Where following upon an order adverse to the plaintiff, the Survey Officer sent him a notice which misled him into believing that appeal was optional, and if one were filed, it need be before the Collector and the plaintiff appealed to the Collector, and without pursuing the case to higher revenue authorities, brought a suit for declaration, the Government is not entitled to rely on the bar contained in s. 11. A I R 1931 Bom 432-33 Bom L R 361

—S. 11—A declaratory suit for rent freights is not barred though notice of demand is given by the Mamlatdar. A I R 1922 Bom 274-24 Bom L R 402-46 B 811-67 I C 842

—S. 11—A suit for cancellation of the order is barred when no appeal is made against the collector's order to remove encroachment, 22 Bom L R 1089-59 I C 122

—S. 11—Section 11 deprives the subject of a right to litigate against the Government and must be construed strictly although not unfairly. A I R 1931 Bom 238-55 Bom 165-33 Bom L R 213-Ind. Rul (1931) Bom 337-132 I C 497

—S. 11—S. 11 must be construed strictly though not unfairly as it curtails right to litigate. A I R 1931 Bom 238-33 Bom L R 213-55 B 165-Ind. Rul (1931) Bom 337-132 I C 497

—S. 11—Manager of an encumbered estate is a Revenue Officer. 32 I C 616

—S. 11—No appeal from Collector's order for removal of encroachment having been filed, a suit to Set aside Collector's order and injunction is barred under S. 11. 22 Bom L R 1089-55 I C 122

—S. 11—A person dispossessed from land by an order of Collector, can, without preferring appeal against such order under S. 203, Bombay land Revenue Code, maintain a suit for recovery of possession. 5 S L R 45

—S. 12—When a matter was not triable by a Civil Court before the Act & was referred to by the Government the High Court can hear it. A I R 1921 Bom 107-45 B 463-23 Bom L R 161-61 I C 146

—S. 12—The section gives jurisdiction according to rules by which the cost of reference should be taxed. A I R 1921 Bom 71-45 B. 1177-23 Bom L R 189-61 I C 271

—Ss. 12 & 4—When S. 4 excludes the jurisdiction, a claim against Government should be preferred to the High Court. A I R 1923 P. C. 194-28 C W N 906-(1923)

**BOMBAY REVENUE JURISDICTION ACT X  
OF 1876 (Concl'd.)**

M W N 638-48 B 1-50 I A 308-26 Bom L R 252-33 M L T 378 (P. C.)-77 I C 100

**BOMBAY SALT ACT (II OF 1870)**

Rep. in pt., Act XVI of 1895 AM., Bom Act. II of 1892, Bom Act I of 1901 figure "(1)" in S. 58 Rep. Bom Act IV of 1905]

—S. 11—A licensee admitted partners but himself manufactured salt. Provision against alienation of the benefits of the license are not transgressed. A I R 1921 P C 137

—Ss. 11, 47—Partnership is not illegal simply because the licensee had taken partners into the business of manufacturing salt without Collector's sanction. 19 Bom L R 381-40 I C 805

—Ss. 11 & 47—A sub-lease without permission can be enforced though it was made a condition in the lease that there will not be a sub-lease without a permission in writing. A I R 1922 Bom 78-24 Bom L R 111-46 B 651-66 I C 393

—S. 47. S. 117 I P C. is applicable to abetment of offence under the Salt Act by general public or more than 10 persons. A I R 1931 Bom. 140-33 Bom L R 56-1 R (1931) Bom 333-130 I C 25

—Rules framed under—Rule 176 of—Contract as between principal and broker —Rule inapplicable to.

Rule applies only where the contract is as between principal and principal. 34 P L R 1639-A I R 1933 B 76

**BOMBAY SINDH COURTS ACT  
12 OF 1866**

—S. 9—S. 9 (c) does not restrict the 3rd Judge to giving his opinion on the points of difference only, but makes it obligatory on him to give his opinion on the appeal. A I R 1930 Sind 225-1930 Cr. C 865-126 I C 449

—S. 9 B—Bench differing on one point only—Whole appeal and not only a part is referred to third Judge—Decision of third Judge controls whole appeal. A I R 1926 Sind 105-20 S L R 362-96 I C 234

—S. 9-B—Bench of two Judges, differing—Judicial Commissioner can refer it to a third Judge or a Full Bench or even omit to take any of these alternatives. A I R 1926 Sind 90-93 I C 448.

—S. 15-A—"General control" in S. 15-A of the Act refers to both administrative and judicial powers of supervision over Court's subordinate. A I R 1930 Sind 265-127 I C 673 (F. B.)

—S. 16—Members of Bar passing resolution sympathizing with satyagraha movement and congratulating leaders sentenced under Salt Act and Penal Code—

**BOMBAY SECURITIES CONTRACTS CONTROL****ACT (VIII OF 1925)**

Active participation in passing the resolution held to amount to misbehaviour with in. S. 16 A I R 1931 Sind 33=1931 Cr C 193

—Court will take serious notice of a pleader's conduct if he fails to keep accounts of the client's money. Where accusations against a pleader are of a criminal nature Court will take disciplinary action before he has been convicted of the offence if it is done in his professional capacity or in the presence of Court. Misbehaviour is not limited to professional misconduct but includes general misconduct also. The powers of Judicial Commissioner's Court are very wide. Proceedings under disciplinary jurisdiction are neither Civil nor Criminal but judicial. Form of procedure is not very important so long a fair notice and chance of hearing is present. If in disciplinary proceedings a pleader is illegally put on oath to which he submits without protest, he cannot subsequently urge that the false evidence given under the oath should not be used to judge his professional conduct. A I R 1929 Sind 121=23 S L R 245=30 Cr L J 445=12 A I Cr R 274=115 I C 318 (F B)

—S. 93—Reference on a difference of opinion in revision can only be made to a Full Bench. A I R 1924 Sind 75=17 S L R 133=83 I C 353 (F B)

—S. 28—Alienation by the zamindar while the Act in force—Subsequent repeal—Effect on their alienation—Consent decree—Collusion—Applicability—Suit to set aside alienation—Limitation. 7 S L R 55=21 I C 514

—S. 28—Where a landlord incompetent to alienate the lands restored to him under S. 28 passed a reference in favour of some arbitrators authorising them to transfer his lands to his creditor in discharge of the amount of the debts found due by him and consented to a decree being passed in terms of this award transferring his land to the creditor. Held, that the proceedings were merely a collusive endeavour to avoid the limitation imposed by law on the landholders' ownership and that the award operated to transfer only a life estate in the land to the creditor. 8 S L R 86=25 I C 949

**BOMBAY SINDH ENCUMBERED ESTATES****ACT 20 OF 1896**

—See C P Code, 1908, s. 80. A I R 1931 Sind 158=25 S L R 200=Ind Rul (1931) Sind 106=133 I C 74.

—The Act does not confer finality on any of the orders made by the manager of the Encumbered Estates.

The Manager of Encumbered Estates in Sind is not a Rev. Officer as defined in the Rev Jurisdiction Act.

**BOMBAY SINDH ENCUMBERED ESTATES****ACT 20 OF 1896 (Contd.)**

There is no hard and fast rule as to what amounts to good faith required by S. 14 of the Lim. Act. It is a matter to be decided on the facts of each case. 9 S L R 167=32 I C 616

—Application made at a late stage when the property is auctioned—No protection will be given under the Act. A I R 1927 Sind 225=103 I C 440

—S. 5—The liability is one which may be valued by the manager and its payment provided in the liquidation scheme. A suit for specific performance of a contract of sale of immovable property does not come within the word liability. A I R 1927 Sind 225=103 I C 440

—S. 7—A suit to set aside any act or order of the manager in his official capacity should be brought within one year from the date of his order as provided for by Art. 14 A I R 1930 Sind 150=124 I C 369

—S. 8—Where plaintiff's case is inconsistent with the liability of the debtor and he proceeds against property not that of the debtor, S. 8 does not apply and stay of proceedings will not be granted. A I R 1926 Sind 279=20 S L R 183=96 I C 1049

—Ss. 8 and 9—Adjudicated Insolvent getting protection—Effect on suit by mortgagee. 9 S L R 48=30 I C 25

—S. 9—A person whose estate is under the management of the Manager, Encumbered Estates, cannot enter into any contract involving him in any pecuniary liability and this applies to bail-bonds entered into by him. A I R 1921 Sind 128=26 Cr L J 193=16 S L R 195=83 I C 897

—Ss. 15, 16 and 17—Power of manager to award future interest after date of order of management. 11 S L R 49=42 I C 6

—S. 29—Restored zemindar can make partition of joint property privately or through Court so as to bind his heirs. 'Alienation' does not include partition. A I R 1931 Sind 118=Ind Rul (1931) Sind 87=132 I C 471

—S. 29—Sanction of Commissioner under S. 29 for sale cannot be utilised for making a gift and a gift made without sanction does not enure beyond the lifetime of the donor. A I R 1931 Sind 17=Ind Rul (1931) Sind 20=25 S L R 72=129 I C 900

—S. 29—Alienation beyond life-time invalid—No title in such alienation after death. 10 I C 550

—S. 29—The sanction given by the Commissioner in Sind under S. 29 for sale of property cannot be utilized in making a gift of that property and a gift made without such sanction does not enure bey-

**BOMBAY SINDH ENCUMBERED ESTATES****ACT 20 OF 1896 (Concl'd.)**

and the lifetime of the donor. A I R 1931 Sind 17

—S. 38—Suits against manager acting officially though not barred—No express provision exists reserving right of suit to party aggrieved except under S. 39. A I R 1930 Sind 150=124 I C 369

—S. 43 A—Court which the power to execute an award under r. 34 made under the Section can transfer it under C P C S. 39 A I R 1922 Bom 377=23 Bom L R 909=64 I C 337 (I)

**BOMBAY STOCK EXCHANGE.**

—Card of membership—Rights of Official Assignee. See Presidency Towns Insolvency Act. 1909 S. 52

**BOM-STOCK EXCHANGE RULES.**

—r. (c) is not an express stipulation within S. 121 Contract Act. It is not concerned with completion of contracts or passing of property. A I R 1926 P C 38=50 B 360=53 I A 92=24 A L J 657=30 C W N 890=28 Bom L R 777=43 C L J 508=51 M L J 1=(1926) M W N 499 (P C)=94 I C 824

**BOMBAY SUMMARY SETTLEMENT ACT 2**

OF 1863

—Certain villages in Chikodi & Manowlee taluqs were granted by a Sanad by Bri. Govt. as "inam dharmadaya" to B to be enjoyed perpetually. Then the taluqs were ceded to the Kolhapur Maharaja on his consenting not to disturb or molest B. But the word was not kept while in trodecreeing Summary Settlement in 1863 the Govt. opined that prima facie B's lands could not be excluded from the benefit of the Settlement because of political tenure & so with his consent the Settlement was applied to the lands. Held that this application was legal & valid A I R 1921 Bom 107=45 B 463=23 Bom L R 161=61 I C 146

—Ss. 4 & 16-B—After the grant of sanad the inamdar & Government divided the revenue in some proportion. The former cannot exclude the latter from sharing the income of waste pasture land. A I R 1927 Bom 462=29 Bom L R 909=103 I C 249

—S. 16—Whether a grant is inam or saranjam only can be determined by Government alone. A I R 1929 Bom 14=53 B 12=30 Bom L R 1463=I R (1929) Bom 273=115 I C 369

—S. 16—The Inam darmadaya grant are made not on political but on religious grounds. The effect of the language of the grant itself is not derogated by occasional reference to it as "jagir" or "Saranjam" A I R 1923 P C 194=(1923) W N 638=48 B 1=

**BOMBAY SUMMARY SETTLEMENT ACT**

II OF 1863 (Concl'd.)

50 I A 308=26 Bom L R 252=33 M L T 378=28 C W N 906 (P C)=77 I C 100.

**BOMBAY SUMMARY SETTLEMENT ACT**

(VII OF 1863)

—Claims dealt with—Claims in which Government is a creditor and holders of land in the position of debtors—Claim against Government by a person having by ancient grant the right to obtain a certain percentage of the revenues of certain villages not within the scope of the Act. 34 B L R 129 (134, 137)=A I R 1932 B 319=139 I C 796=I R 1932 B 539=A L R 1932 B 656

—Grant ancient recognised and continued by British Government—Right under, to receive a specified percentage on the Diwana Dast of villages—Survey and re-survey of villages subsequent and increase of revenues thereunder—Percentage calculated on basis of increase assessments—Grantee's claim to—Applicability of Act to—Suit for declaration of right—Limitation Act, Arts. 131 and 14—Applicability—Starting point. 34 B L R 129 (135-6)=A I R 1932 B 319=139 I C 796=I R 1932 B 539=A L R 1932 B 656

—Inam lands—Settlement—Effect on inalienability of lands. 16 Bom L R 164=38 Bom 272=23 I C 221. [affirmed in 43 Bom 376=1919 M W N 254=23 C W N 753=21 Bom L R 1148=46 I A 15=52 I C 597 (P. C.)

—On alienation of land granted to a mosque and continued at the Survey Settlement in 1979 on payment of annual quit-rent. Govt. cannot levy full assessment on the land in the hands of strangers. 43 Bom 583=21 Bom L R 668=51 I C 910

—S. 2—Absence of Inamdar's signature on the sanad does not affect the fact it was issued and acted upon. A I R 1927 Bom 40=50 B 698=28 Bom L R 1308=98 I C 933

—S. 2 (3)—No absolute estate is held by the Saranjamdar. A I R 1926 Bom 316=50 B 195=28 Bom L R 433=94 I C 737

—S. 2 (3) (iii)—"Lands held for service" in—Shares of revenue of villages or Amals are not. 34 B L R 129 (134-138)=A I R 1932 B 319=139 I C 796=I R 1932 B 539=A L R 1932 B 656

—S. 3—It does not mean that the part is exempted from land revenue when the management of a part of the village is resumed. A I R 1930 Bom 497=I R (1930) Bom 613=127 I C 501

—S. 12—A Desai dying without coparceners can validly dispose of by will his lands which had been the subject of a summary settlement and payment of quit-rent. 21 Bom L R 1148=52 I C 897=43 B 376 (P. C.)

**BOMBAY SUMMARY SETTLEMENT ACT****VII OF 1863 (Concl'd)**

(Affirming 16 Bom L R 164=38 B 272)

—S. 7—A land was recorded as 'private' of temple servants who subsequently transferred it. Alienation and not the grant of sanad is the cause of action for temple committee's declaratory suit. A suit for establishing it as temple property is not barred. A I R 1922 Bom 438=24 Bom L R 902=75 I C 617

—S. 32—Government should determine whether a grant is inam or only saranjam. A I R 1929 Bom 14=30 Bom L R 1463=53 B 12=1 R (1929) Bom 273=115 I C 369

—Ss. 25, 28, 37, 38—By introduction of survey Settlement the khot is under S. 38, bound to comply with all the terms under the settlement. The effect of fixed period terminating before any revised settlement has been introduced is that terms under the settlement remains in force. 14 Bom L R 77=14 I C 434=36 Bom 290

—S. 35—Building of chappas on land —Revision of survey. 42 Bom 126=20 Bom L R 22=43 I C 744

—Ss. 37, 38—Khots in a Khotivillage within which Dunlop's proclamation applied, are entitled only to one-third of sale proceeds of teak trees in the villages sold by Govt. under a kabuliyat passed by them to Govt. 20 Bom L R 141=44 I C 872

—Ss. 37 and 38—Except as changed by the Act Kabuliyat to Government must conform to custom—A I R 1925 Bom 44=48 B 599=26 Bom L R 754=83 I C 370

—S. 38—The Government can fix the demands only at the time of general survey; where the Government levied an illegal attachment and the khot sued for damages; Held, on a construction of the lease, (i) that khots were entitled to faida in kind, (ii) that they were not entitled to claim damages at the old mamul vahivat, (iii) that they were entitled to have grain converted into cash at market rates and, (iv) that the Government was liable even if it had remitted assessment on account of loss of crops by fire. A I R 1931 Bom 455=33 Bom L R 1039

**BOMBAY TALUKDARI ACT (VI OF 1888).**

See Bombay Guzaret Talukdar's Act—[Ed.]

**BOMBAY TITLES TO RENT-FREE ESTATES****ACT II OF 1852**

—Unless exempted by the Act, a suit for refund of contribution under Bom. Hereditary Offices Act III of 1874 is barred. A I R 1927 P C 217=54 I A 380=51 B 830=29 Bom L R 1484=46 C L J 393=

**BOMBAY TITLES TO RENT FREE ESTATES****ACT (I OF 1852 (Concl'd.)**

39 M L T 527=53 M L J 475 (P. C.)=105 I C 694

—Sch. B r. 8—Government cannot make rules for resuming lands granted for hereditary office, nor can the Collector be authorised to resume them summarily when they belong to a village servant shown in the Rule. A I R 1924 Bom 273=25 Bom L R 1160=48 B 61=82 I C 577

—r 10—No absolute estate vests in the Saranjamdar. A I R 1926 Bom 316=50 B 195=28 Bom L R 433=94 I C 737

**BOMBAY TODA GIRAS ALLOWANCE ACT (VII OF 1887.)**

—S. 3—Oevolution of allowance—(i)—Toda giras allowance devolves under s. 3 to the lineal male heirs in male descent and not according to primogeniture. Party setting up primogeniture must prove it, (ii) Suit for declaration by A that he is entitled to the allowance which Government has decided to pay to B is not barred under s. 6, Pensions Act, (iii) Such a suit is not governed by Art. 14, Limitation Act, as it is not one to set aside the Government order. A I R 1931 Bom 473=Ind Rul (1931) Bom 435=33 Bom L R 783=133 I C 837

**BOMBAY UNIVERSITY ACT 22 OF 1857**

[Rep. in pt., Act XII of 1876; Act XII of 1891; Supplemented ss. 2, 3, 8, rep. in pt., and ss. 6, 9 to 14, rep., Act VIII of 1904.]

**BOMBAY VATAN ACT 3 OF 1874**

—See Bombay Hereditary Village offices Act (III of 1874).

**BOMBAY VATAN ACT (V of 1886)**

No retrospective effect is given to Bombay Act V of 1886. 14 Bom L R 1121=37 Bom 107=17 I C 746

—S. 2—Where a Muhammadan watan-dar died leaving a widow, a daughter and a paternal uncle, the daughter who is postponed in the order of succession to the paternal uncle, is excluded from inheritance which will have to be divided between the mother and the paternal uncle in the proportion of one-fourth and three-fourths. A I R 1931 Bom 266=33 Bom L R 469=Ind Rul (1931) Bom 316=55 B 401=131 I C 892

—S. 2—Vesting of property—second adoption if divests. 15 Bom L R 783=37 Bom 598=21 I C 107

—S. 2—Daughter of a Vatandar of Jivak Badal—a personal inam without condition of Service is entitled to inherit to her share in the Vatan. 20 Bom L R 983=43 Bom 323=51 I C 179

—Ss. 8 to 13—Sections 8 to 13 sufficiently safeguard the rights of the State which can be asserted at any time and



**BOMBAY VATAN ACT (V OF 1866) (Concl'd.)**

the alienation set aside at any time irrespective of the law of limitation for suit. (1892) P J 324; 17 B 362; 4 Bom L R 797; 28 B 399; 30 Bom L R 980; 7 Bom 546, referred to. A I R 1931 Bom 24=32 Bom L R 1388=Ind Rul (1931) Bom 125=55 B 21 =129 I C 145

**BOMBAY VILLAGE POLICE ACT (VIII OF 1867)**

—S. 3—Pagis nominated by talukdar can be appointed by the Dt. Magistrate & the share of the salary to be recovered from the Jivaidar. A I R 1924 Bom 470 =26 Bom L R 678=33 I C 30

—S. 3—Dt. Magistrate has power to appoint non-Vatandar servants in a talukdari. Village, and as such a pagi so appointed can sue to recover a moiety of the Salary from the Jivaidar. 44 Bom 377=22 Bom L R 127=55 I C 585

**BOMBAY WAGERS ACT 3 OF 1865**

[Rep. in pt., Act XVI of 1895; Bom Act III of 1886.]

—A stipulation between two parties to a wrestling match for damages in case of default of appearance of one of them is perfectly valid. A I R 1931 Bom 409=33 Bom L R 648=32 Cr L J 1145=Ind Rul (1931) Bom 457=134 I C 345

—S. 1—The agreement is a wagering one when it is for paying differences & the settlement is by cross-contracts. A I R 1925 Bom 511=49 B 689=27 Bom L R 941=89 I C 835

—S. 1—Losses cannot be recovered from constituents by Pakka Addatias when transactions are entered into by the latter for the former intending to pay only the differences A I R 1921 Bom 238=45 B 386 =62 I C 361

—S. 1—Contract to purchase a ticket in a lottery authorised by Govt-Specific performance of See 19 Bom L R 697=42 Bom 676=41 I C 869

—Ss. 1 & 2—Contracts by Pakka Aditias are not wagering ones. A pakka adatia & a broker distinguished. 22 Bom L R 1018=62 I C 361

—Ss. 1 & 2—Pakka adatia—Position of —Contract Act S. 30. 34=M L J 305 (P C) =42 Bom 373=27 C L J 358=44 I C 284=20 Bom L R 561

**BONA FIDES**

See Specific Relief Act. s. 27

See Transfer of Property Act, ss. 41 and 53 etc.

**BONA FIDES (Cont'd.)**

—The person setting up the single defence under Calcutta Municipal Act Ss. 223, 228 of being a bona fide purchaser for value without notice must prove it 19 C W N 37=27 I C 261=42 Cal 625=21 C L J 177

**BOND***Synopsis.*

- (1) General
- (2) Cancellation
- (3) Interest
- (4) Liability under bond
- (5) Limitation
- (6) Nature of bond
- (7) Novation
- (8) Presumption of payment
- (9) Recitals
- (10) Setting aside bond
- (11) Suit on bond

**SEE ALSO CASES UNDER:—**

- (1) Bottomry bond
- (2) Contract Act S. 146 and s. 74
- (3) Deed-Construction
- (4) Stamp Act 1862 art 10
- (5) Stamp Act 1869 ss. 14, 49, sch II art 11
- (6) Stamp Act 1879 ss. 3, 7, 23 sch I art 11
- (7) Stamp Act 1899 s. 2 (5), (22)
- (8) Registration Acts 1866=ss. 52, 53 and Act 1908 ss 49, 50

**(1) General**

—No law contemplates deposit in court of money on bond not in litigation. A I R 1931 Oudh 9=7 O W N 1055=I R (1931) Oudh 85=129 I C 163

—Judgment-debtor—Adjudication instrument subsequent to arrest—Bond taken for appearance—Invalidity. Pres. Towns. Insol. Act S. 17 31 I C 192

**(2) Cancellation**

—The surety bond is extinct as soon as the penalty due upon default is exacted and no cancellation of the bond is necessary 20 I C 414=14 Cr. L J 430=2 Cr. L R 383 = (1913) I U B R 59

**(3) Interest**

—A condition for payment of 22 p. c interest on default of punctual payment of principal with interest is penalty. 23 I C 542.

—Agreement by plaintiff to advance moneys to defendant to recover defendant's property by litigation—Untrue recital of



**BOND (Conclud)**

cash payment in bond held, that plaintiff was entitled to recover the amounts actually advanced but not interest. 10 M L T 18-9 I C 996.

**(14) Limitation**

—Provision for re-payment on happening of certain contingency suit on Starting point—Limitation. Lim. Act, Arts. 66, 67 and 80. 30 P W R 1916=32 I C 575.

**(15) Nature of bond.**

—Breach of bond & that of contract distinguished. 33 I C 920

**BOOKS OF SCIENCE**

See Evidence Act Ss. 57 and 60

**BOOKS, PRESS, REGISTRATION OF ACT**

See Press and Registration of Books Act 25 of 1867

**BOOKS REGULARLY KEPT IN COURSE OF BUSINESS**

See Evidence

**BORAH MAHOMEDANS**

See Mahomedan Law

**BOT KHATA**

See Khoti Settlement Act 1880 ss. 17, 33

**BOUGHT AND SOLD NOTES**

See (1) Contract  
(2) Evidence

—S. 25—The general principles enunciated by s. 11 C P C are of universal application. The plea of res judicata or estoppel is available not only as regards the final conclusion of the court or officer but also regarding all findings necessary for the conclusion whether they are formal issues on the point or not. [ 11 M 309 (F B), foll ].

39 Mad 1202=27 M L J 529=16 M L T 432  
=26 I C 817

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**BOUNDRIES ACT BURMA.**

See Burma Boundries Act 5 of 1880

**BOUNDARY***Synopsis*

- (1) Boundary, erroneous, uncertain or confused.
- (2) Burden of proof.

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**BOUNDARY (Contd.)**

- (3) Conflict between area and boundary.
- (4) Deed—Construction
- (5) Survey maps

See also Cases under:—

- (4) Bombay Land Revenue Code 5 of 1879 ss. 119 and 121
- (2) Bengal Survey Act 5 of 1875
- (3) Bengal Tenancy Act 8 of 1885
- (4) Burden of Proof.

**(1) Boundary erroneous or uncertain or confused.**

—So long as the plaintiff is unable to identify the property from which he desires to eject the defendant he is not entitled to a decree for partition and the Courts have no jurisdiction to grant the plaintiff's prayer in such a case, unless some equity is superinduced by the act of the parties or unless the defendant is shown to be a joint tenant or a tenant-in-common or a co-parcener or an agent, trustee or one occupying a fiduciary position towards the plaintiff in respect to the land. This principle has however; to be applied with reference to the special features of each case. Where in a case of confusion of boundaries it was shown that the defendant obtained possession from the plaintiff's father and that the confusion was caused by the defendant's wrongful act, it was held the inability of the plaintiff to identify the property was no bar to his right to a decree. A I R 1931 Mad 19 =32 L W 957=60 N L J 85=Ind Rul (1931) Mad 259=(1931) M W N 155=129 I C 451 (2)

**(2) Burden of proof**

—Dispute as to boundary—Onus of proof, question of, immaterial—Whole evidence to be considered—Deft. in possession of disputed plot—Onus on plff. 27 C L J 599=23 C W N 593=45 I C 408

—Dispute as to boundary—Possession—Onus of proof—Shifting of—Order of magistrate under S. 145 Cr. P. Code—Onus on person impeaching the order declaring possession. 23 C W N 593=27 C L J 599  
=45 I C 408

—Boundary line running through waste lands which have been the subject of definite possession. Onus on the party alleging. 65 I C 743 (Cal)

**(3) Conflict between area and boundary.**

—Where the area sold was presumably definitely agreed upon between the parties and its length and breadth were clearly

**BOUNDARY (Contd.)****(3) Conflict between area and boundary (Concl'd.)**

stated the inference is that the parties were not left in any doubt as to the measurements the reference to the boundaries is not necessary in such a case. 41 C 493 (P C) explained. A I R 1931 Lah 349=32 P L R 240=131 I C 127

—Where there is seeming inconsistency between area and boundaries in a deed extrinsic evidence, and evidence of user of parties is admissible to prove real intention. A I R 1931 Cal 596=58 C 686 =133 I C 696

—In a conflict between boundaries and areas boundaries must prevail. 18 C L J 541=22 I C 26

—Conflict between—Evidence to show that area within boundaries less, if admissible. See Lessor and Lessee. 26 M L J 25 (P C)=21 I C 750=19 C L J 95=16 Bom L R 42

**(4) Deed—Construction**

—Whether boundaries in title-deed can be ignored. 27 M L J 20=18 C W N 898=20 C L J 407=26 I C 949 (P C)

—Stream—Grant of land bounded by stream—Grantee entitled to the bed up to the middle. 14 A L J 684=36 I C 567

**(5) Survey maps**

—A boundary fence is owned by the adjoining proprietors to the centre of the fence. Where trees grew on the portion of the fence on the side of the plff. Held that the plffs. were proprietors, an entry in the record of rights cannot overrule well settled principles of law. 2 Pat L W 27=40 I C 987,

—Dispute as to—Map prepared for different purpose—Value of—Churland. 19 C W N 565=29 I C 156

**BRAHMOTTAR,**

—See Grant.  
—See Deed—Construction.

**BREACH OF CONTRACT.**

—See Contract Act s 73.  
—See Damages.  
—See Workman's Breach of Contract Act.  
—See Contract—Breach of Contract.

**BREACH OF CONTRACT ACT, WORKMAN'S.**

—See Workman's Breach of Contract Act 13 of 1859.

**BREACH OF STATUTORY DUTY.**

—See Statutory Duties.

**BREACH OF TRUST.**

—See Civil Procedure Code s. 92.  
—See Hindu Law Religious Endowment.  
—See Trust.  
—See Trusts Act s. 23.

**BREEZE.**

—See (1) Easements.  
—(2) Easements Act.

**BRIBE.**

—Money paid as bribe cannot be legally recovered. A I R 1931 R 83=1 R 1931 R 185=132 I C 553.  
See to the same effect. 9 I C 623.

—Money lent for giving suit for—Unlawful object Contract Act S. 23. 185 P L R 1914=84 P W R 1914=24 I C 692.  
—Liability of—Money entrusted lost by negligence Contract Act S. 131. 25 I C 939.

—Bribe to police officer if allowed to credit of Receiver of estate when passing accounts. 20 C L J 113=28 I C 25.

**BRIDGE.**

—See (1) Easements,  
—(2) Easements Act.

**BRITISH BELUCHISTAN REGULATION (IX OF 1896)**

—S. 10—S. 10 creates an estoppel by judgment only when the "matter in issue has been finally decided." In a case in which there is an appeal the only "matter" which is "finally decided" within the meaning of s. 10 is the matter decided by the Appellate Court. 45 Cal 442=22 C W N 121=34 M L J 12=3 Pat L W 381=19 Bom L R 972=26 C L J 568=15 A L J 889=128 P W R 1917=22 M L T 451=(1918) M W N 7=132 P L R 1917=7 L W 62=42 I C 959 (P C).

**BRITISH COLUMBIA FOREST ACT (1924)**

—S. 58—S 58 is ultra vires—Tax imposed by it is beyond competence of Provincial Legislature. A I R 1930 P C 173=Ind Rul (1930) P C 254=124 I C 590.

**BRITISH COLUMBIA TAXATION ACT (1924)**

—Ss. 2 and 48 (3)—Income from business—Profits of business—Cessation of business consequential upon fire—Loss of profit due to—Money received by assessee under use and occupancy insurances on account of whether—Income from business or profits of business. 63 M L J 348=I R 1932 P C 161=136 I C 863=A I R 1932 P C 121 (P C)

**BRITISH GOVERNMENT**

—Faithful subject of—Person being a—Conduct not amounting to—See. 34 Bom L R 453

**BRITISH INDIA**

—Wadhwan Civil Station is not within British India. 14 Bom L R 876=171 I C 534

**BRITISH INDIA, ABSENCE FROM**

—See Lmt Act S. 13

**BRITISH INDIA LAWS**

—Foreign subject—Amenability of, to British Indian laws. See 36 C W N 1088 (1096-7)

—Habeas Corpus Act and Bill of Rights not part of. 36 C W N 1088 (1097)  
=1932 Cr C 796-A I R 1932 C 753

**BRITISH NORTH AMERICA ACT (1867)**

—S. 24—"Person" includes females. A I R 1930 P C 120=31 L W 601=58 M L J 300=Ind Rul (1930) P C 312=126 I C 88

—Ss. 90, 56—Private rights completely constituted cannot be affected by disallowance of Provincial Legislation—Crown Grant under Vancouver Island Settlers Rights Act (1904) read with amending Act of 1917—Grant remaining unregistered at date of disallowance but grantee entitled to registration at that date—Grantee's title is not affected. A I R 1921 P C 234

—S. 91 (27)—S. 498 of Criminal Code and major portion of Combines Investigation Act are intra vires. A I R 1931 P C 94=132 I C 593

—Ss. 91 and 92—Principles of interpretation discussed. A I R 1931 P C 94

—Ss. 91 and 92—Board of Commerce Act (1919) and Combines and Fair Prices Act (1919). Both are ultra vires of the Canadian Parliament. A I R 1921 P C 205

—Ss. 91 and 92—British Columbia Summary Convictions Act of 1915, is not ultra vires. A I R 1921 P C 179.

—S. 101—It does not enable Parliament of Canada to trench on Provincial rights. A I R 1921 P C 205

**BRITISH PROTECTORATE.**

—Protected country is not British Dominion but Crown controls all its foreign relations—It is semi-sovereign. A I R 1926 P C 131=30 C W N 961 (P C)=99 I C 265

**BROACH AND KAIRA INCUMBERED ESTATES ACT (XXI OF 1881)**

—S. 28—Mortgage by Talukdar—Mortgage becoming void on Talukdar's death mortgagee cannot recover mortgage money under Contract Act S. 65. 41 Bom 546=19 Bom L R 545=40 I C 1002

**BROKER**

See (1) Contract;

(2) Contract Act S. 182 et seq

**BROKERAGE**

—See Contract Act

**BROKERAGE CONTRACT**

See Principal and Agent

See Contract

See Contract Act

**BROKER'S NOTES**

See (1) Buddhist Law.

(2) Succession Act 1865 ss. 190, 332.

(3) Will.

**BUDDHIST LAW (BURMESE)***Synopsis.*

- (1) Adoption.
- (2) Alienation.
- (3-4) Ancestral Property.
- (5) Applicability.
- (6) Aurasa son see Succession infra.
- (7) Breach of Promise.
- (8) Conversion.
- (9) Divorce.
- (10) Ecclesiastical Jurisdiction.
- (11) Ecclesiastical Law.
- (12) Gift.
- (13) Husband and wife.
- (14) Inheritance.
- (15) Joint family.
- (16) Joint Property.
- (17) Maintenance.
- (18) Marriage.
- (19) Minor.
- (20) Partition.
- (21) Pre-emption.
- (22) Seduction.
- (23) Sources of Buddhist Law.
- (24) Succession see also Inheritance supra.
- (25) Widow.
- (26) Will.
- (27) Miscellaneous.

**(1) Adoption.**

—Adoption does not require any formality. It requires only course of conduct and publicity of relationship. A I R 1928 P C 197=6 R 520=28 L W 129=48 C L J 177=33 C W N 70=55 M L J 95 (P C)=110 I C 306

Adoption being a contract a minor can adopt. A I R 1925 Rang 350 4=Bur L J 136=92 I C 719.

Allowing amendment in appeal is a matter of judicious discretion. Plaintiff claiming as Kittima son cannot be allowed to claim as Appathitta by amendment. A I R 1926 Rang 49=3 R 483=92 I C 253.

—Manukye Dhammathat—Intention to adopt can be gathered from conduct. A I R 1923 Rang 189=I R 102=87 I C 686.  
Act of Shinbuying though prima facie evidence of adoption is not always a clear indication of it. A I R 1923 Rang 189=1 R 102=87 I C 686.

The Kittima and the Apatittha forms of adoption are quite distinct. The former is an adoption with a view to inherit and the latter merely for bringing up the child out of pity. The treatment of a niece like a daughter does not raise any presumption of an adoption with a view to inherit, especially when she is an orphan child. If the parties were strangers the fact would be very important. 10 L B R 376=87 I C 673.

## BUDDHIST LAW (BURMESE) (Contd.)

## (1) Adoption (Contd.)

—Burmese adoption requires only publicity in testimony of which is the fact of paying the child's school fees before adoption, and his living in the house of the adopter. A I R 1923 P C 156-33 M L T 361-2 Bur L J 260-46 M L J 334-1 R 451 =77 I C 63

Adopted son becoming a monk—Subsequent abandonment of monkhood resumes his old status of adopted son and heir to adoptive parents. 11 L B R 124-66 I C 573

—A Chinese Buddhist can adopt a Burmese girl who will succeed to his properties in the absence of natural children or adopted son. But if she is a stranger, the agnates will exclude her 13 Bur L T L T 132-61 I C 684

—Rule as to laid down in 32 I A 72, 36 I A 192, and 44 I A 25 followed by Chief Court im coming to a conclusion of fact—which on the evidence was held unshakable. A I R 1920 P C 138

—Divorced women can adopt. An adoption is a matter of intenlien and there may be a good adoption without any formal declaration. 11 Bur L T 65-9 L B R 163 =45 I C 737

The object of the adoption is generally to provide the adoptive parents with an heir. The reason for the apadittha adoption is pity for the child. An adoption is not a mere contract nor is it a grant or disposition of property, nor need it be in writing and therefore the fact that a deed of adoption was drawn up does not preclude other evidence of adoption; the question of adoption is a mixed question of fact and law. 1 L B R 273, foll. (1915) II U B R 74-31 I C 94

—Where a claim is based on kittima adoption, it cannot be amended in appeal by advancing an alternative claim based on apadittha. 11 Bur L T 246-41 I C 749

A Kittima child may forfeit his right of inheritance by separating from his adoptive parents. It is however a matter of intention. But where there are no other children with whom the Kittima child seeks to compete or share. The law allows him to inherit in whole or part notwithstanding his separation. 36 I A 192 foll. 45 Cal 1-22 M L T 411-22 C W N 97-27 C L J 68-20 Bom L R 69-(1918) M W N 9 =11 Bur L T 28-44 I A 251-42 I C 863 (P C)

Direct evidence of giving and taking is not necessary to prove an adoption provided there is clear and unambiguous evidence as to the publicity and notoriety of status as a Kittima child. The facts that the adoptive child's name is inserted as joint lender are circumstances showing an intention to adopt with a view to inherit but they are not conclusive. The fact that

## BUDDHIST LAW (BURMESE) (Contd.)

## (1) Adoption (Concl'd.)

a child was brought up, and treated like a natural child may prove adoption but it does not prove adoption with a view to inherit. 12 Bur L T 236-56 I C 954

An adoption made shortly before the death of the adopter is valid. 32 I C 539

In as much as even children of well-to-do parents often assist in cultivating the family acres, no inference against adoption can be drawn from the fact that an adopted daughter worked in the fields for her adoptive parents. 4 Bur L T 158-11 I C 776

—It is not correct to say that in all cases of Kittima adoption there must be evidence of publicity and notoriety, it is only when the fact of adoption has to be inferred from circumstances that such proof is required. Obtaining an inheritance in the natural parents' estate does not negative the idea of there being an adoption. 9 Bur L T 154-33 I C 927

—Second adoption not prohibited, although the first adopted child is living. 11 I C 776.

—It is impossible for persons not related in any way to adopt mutually. A I R 1929 Rang 173-Ind Rul (1930) Rang 39-120 I C 663.

—A Burmese Buddhist monk cannot adopt. A I R 1929 Rang 173-Ind Rul (1930) Rang 39-120 I C 663.

—The effect of adoption is to disinherit the adoptee. There is no other way except adoption if it is intended to disinherit. A I R 1928 Rang 289-6 R 510-113 I C 804.

## (2) Alienation.

—Husband cannot sell the letetpwa property except when he is acting as her agent. What those circumstances may be is a question of proof in each case. When the husband and wife live together and the former, ostensibly with his wife's assent, manages the business of the property on behalf of both, she will doubtless be estopped from subsequently denying that he was authorised to act on her behalf. 6 Bur L T 113-20 I C 341

—Adoptive father having already natural son Plaintiff described as son in adoptive father's will but not given equal share with natural sons and Natural son married to plaintiff's niece which would be impossible if they were brothers—Plaintiff had no status of Keittima son but was merely fondling—Description as son did not prove plaintiff's right to inherit. A I R 1929 Rang 22-6 R 623-Ind Rul (1929) Rang 81-114 I C 513.



**BUDDHIST LAW (BURMESE) (Contd.)****(2) Alienation (Concl'd.)**

—Sale before attachment valid, if bona-fide and for good consideration—The burden of proving fraud rests on the creditor who impeaches the sale. A sharer has an absolute right to dispose of his own share even while the property is undivided subject to the right of pre-emption by co-heirs. (2 L B R 167 F) 11 Ind Cas 781

**(3-4) Ancestral Property.**

—Payin property changing its character raises a (rebuttable) presumption that it has become lettetpwa property (2 L B R 174 foll.) 6 Bur L T 174=21 I C 227

—As regards the payin property of the second marriage of a woman the second husband would be entitled to one-fourth of it. Where mortgage and other deeds were executed by husband for illiterate wife of unsound mind and during her insanity the husband took another wife and surrendered all claim to her property. Held it was for the plff. to prove that the husband had any right title or interest in the property. 6 Bur L T 91=20 I C 233

—House built during coverture on the payin property becomes joint property. 12 Bur L T 202=58 I C 275

—Under S. 13 (2) of the Burma Laws Act all questions arising in Civil cases instituted in the Courts of Rangoon were to be dealt with and determined according to the law for the time being in force administered by the Calcutta High Court. Thus a verbal sale for a share in immovable property at Rangoon in 1890 would be invalid. 6 L B R 98=5 Bur L T 169=17 I C 954

—Cosharers having taken part in the partition of the ancestral immovable property cannot pre-empt among themselves. 8 Bur L T 167=8 L B R 466=31 I C 512

—Person paying consideration but purchasing property in wife's or son's name has to show the object with which the property was purchased to enable Court to decide whether transaction was benami or not. A I R 1929 Rang 257=7 R 751=Ind Rul (1930) Rang 177=123 I C 129.

—All payments the obligation for which was undertaken during coverture must be debited to the joint account even though the actual payment was made by the survivor. 12 Bur L T 228=56 I C 972.

—Gift of the separate property, even though the name of the other party was joined as donor, must be made out of the separate property. Property inherited by either of the parties to the marriage is a joint property. 12 Bur L T 228=56 I C 972

**BUDDHIST LAW (BURMESE) (Contd.)****(3-4) Ancestral Property. (Concl'd)**

—There is no presumption that ancestral property remains undivided till the contrary is proved. Where an intestate's estate is enjoyed by heirs in separate lots for a long period, partition may be presumed. 9 Bur L T 164=33 I C 985

—Property—Ancestral property—Joint undivided—Adverse possession—Burden of proof Lim Act, Art 144. 32 I C 568.

**(5) Applicability**

—A Chinese Buddhist observing certain observances of Burmese Buddhist does not show that he has abandoned Chinese Buddhism. A I R 1930 Rang 192=Ind Rul (1930) Rang 385=127 I C 593

—In absence of custom to the contrary the nearest rightful female heir to an "Ayo" may be determined by law. A I R 1930 Rang 148=8 R 17=Ind Rul (1930) Rang 258=125 I C 338

Succession Act should govern succession to estate of Chinese Buddhist except where he adopts Burmese form of Buddhism in which case Chinese Customary Law should also not be applied—Per Otter, J contra. A I R 1930 Rang 81=8 R 57=124 I C 849

—The Buddhist Law applies to Shan Buddhist resident in Burma. Presumption of marriage arising from cohabitation must rest on habit and repute the alleged husband and must be shown to have clearly revealed his intention to confer on her required status and the alleged wife must be shown to have all along asserted that status. A I R 1923 Rang 218=2 Bur L J 114=1 R 343=77 I C 620

—Burmese Buddhist Law does not apply to Rajbans even if they are Buddhists. Their own customary Law applies to them. 8 L B R 301=35 I C 431=9 Bur L T 248

—Burmese Karens of Burma applicability to Custom 25 I C 342

**(6) Aurasa Son**

See succession infra

**(7) Breach of Promise**

—The law provides for compensation for breach of promise of marriage. Minority is no defence, except the age below which one is physically incompetent to marry. Suit for breach may also be brought under O 32 of C P C. (1918) 3 U B R 75=46 I C 421

—In an action for breach of promise the fact of seduction is considered in measuring damages; but a separate action for damages for seduction does not lie. 13 Bur L T 6=57 I C 815



**BUDDHIST LAW (BURMESE) (Contd.)****(8) Conversion**

—Conversion by one of the parents does not affect the legitimacy of the child subsequently born. 26 I C 700

**(9) Divorce.**

See also Buddhist Law—Husband and Wife; and Buddhist Law—Marriage infra.

—Divorce is obtained on payment of the costs of the suit and abandoning any claim to the joint property of the marriage. A I R 1923 Rang 86=11 B L R 385=1 Bur L J 127=69 I C 980

—Single act of misconduct by husband entitles wife to a divorce by mutual consent. Where in a suit for divorce by the wife, the husband claims certain property to be joint property, the onus is on him to prove it. A I R 1921 U B 2=4 U B R 68=64 I C 957

—The wife can share in pay-in property not brought by her at the time of marriage with a widower, on a divorce by mutual consent. A I R 1921 L B 2=11 L B R 52=64 I C 806

—Suits for divorce should be framed and tried in one or other of the three kinds of divorce, or in the others in the alternative. (1920) 3 U B R 251=59 I C 1005

—A divorce is not permissible without proof of a matrimonial offence. Consequently a suit for restitution of conjugal rights is competent. A I R 1930 Rang 291=Ind Rul (1931) Rang 21=128 I C 373

—Single assault by husband on wife provoked by her, no ground if character of husband does not suggest likelihood of its repetition. A I R 1930 Rang 56=7 R 90=Ind Rul (1930) Rang 137=121 I C 809

—Cruelty and physical violence are quite distinct cruelty is a subjective rather than an objective act. A I R 1930 Rang 56=7 R 790=Ind Rul (1930) Rang 137=121 I C 809

—A divorce is given not to punish a husband but to enable the wife to free herself from a bond which becomes intolerable. A I R 1930 Rang 56=7 R 790=Ind Rul (1930) Rang 137=121 I C 809

—Mere adultery by husband not by itself a sufficient ground. A I R 1929 Rang 307=7 R 451=Ind Rul (1930) Rang 9=120 I C 137

—Marriage is dissolved either by Court or mutual consent or desertion for a time. Divorce is not mere dismissal of wife for adultery. Partition following upon divorce by mutual consent cannot be objected to on ground of misconduct. A

**BUDDHIST LAW (BURMESE) (Contd.)****(9) Divorce. (Contd.)**

I R 1929 Rang 196=7 R 98=Ind Rul (1929) Rang 189=117 I C 253.

—Slapping a wife and cohabitation with and getting a child through another woman, good ground for divorce. A I R 1929 Rang 64=Ind Rul (1929) Rang 176=117 I C 64.

—The children are bound by an agreement of their disposal if not against equity. Filial relations must be proved if the child wishes to have the estate of the abandoning parent. A I R 1928 Rang 289=6 R 510=113 I C 804

Party wishing to divorce must relinquish all the property. A I R 1928 Rang. 125=6 R 1=109 I C 456.

—Divorce by desertion by husband having two wives—Deserted wife takes one-fourth share. A I R 1928 Rang 125=6 R 1=109 I C 456.

—The Burmese Law of divorce is to be determined by the Manugye with such assistance as may be derived where necessary from the other Dammathats. A I R 1928 P C 8=6 R 79=55 I A 38=32 C W N 429=4 O W N 443=47 C L J 577=54 M L J 468=27 L W 830 (P C)=108 I C 345.

—Unless both desertion and failure to provide maintenance are established no right to re-marry arises. A I R 1928 P C 8=6 R 79=55 I A 38=32 C W N 429=4 O W N 443=47 C L J 577=27 L W 830=54 M L J 468 (P C)=108 I C 345.

—Privy Council upheld the decree which granted the wife one-third of husband's property on divorce. A I R 1927 P C 234=5 R 841=54 I A 403=46 C L J 406=32 C W N 173=39 M L T 492=6 Bur L J 231=53 M L J 425 (P C)=105 I C 17.

—Wife obtaining divorce on ground of desertion cannot get husband's whole property. A I R 1927 P C 234=5 R 841=54 I A 403=46 C L J 406=32 C W N 173=39 M L T 492=6 Bur L J 231=53 M L J 425 (P C)=105 I C 17.

—Divorce is constituted by failure to maintain the wife for over 12 years by deserting her. A I R 1922 L B 28=1 Bur L J 24=105 I C 269.

—First wife's not objecting for 24 months does not amount to consent A I R 1927 Rang. 112=6 Bur L J 22=102 I C 473

—A second wife has the right to divorce and to two-thirds of her husband's property at partition on his deserting her and living with first wife. A I R 1925 Rang 242=4 Bur L J 42=3 R 160=88 I C 402

—There is no right of divorce at the mere caprice of either party without proof of misconduct or default. A I R 1924 Rang 182=1 R 722=79 I C 705.

—Adultery of wife entitles husband to require her to leave the house with

**BUDDHIST LAW (BURMESE) (Contd.)****(9) Divorce. (Contd.)**

only the clothes on her body. He can also ask for partition or possession of all the joint property. A I R 1923 Rang 160=2 Bur L J 65=75 I C 6.

Putting part of his property in the name of one of his wives does not mean the divorce of others.

—Onus of proving divorce is on person alleging it. A I R 1923 Rang 155=2 Bur L J 67=74 I C 1037.

—On partition by divorce by consent, even though the pay-in property has changed in form but can be identified, it will go to that party who brought it to the marriage. 11 B L R 48=70 I C 562

—A wife can get a divorce on the ground of punishment by her husband. A I R 1921 U B 2=4 U B R 68=64 I C 957

—Whether it is necessary to claim partition in the suit for a divorce—Civ Pro Code 1908 O II rr. 1, 2. 8 A L J 739 P C.

—If a husband discards his wife on her adultery there is a divorce from the time she leaves him, and her decree-holder cannot attach in execution of a decree against her property in the husband's possession. 9 Bur L T 74=33 I C 118.

—Court will not impute connivance unless there is a strong evidence. If an advocate omits to call evidence he cannot admit evidence after decision. 4 Bur L T 161=11 I C 779.

—Mere caprice and petty quarrels no ground. 7 Bur L T 16=23 I C 380.

—Mere desertion no ground, though an innocent party may obtain divorce on ground of desertion for statutory period. Beating and false allegations of adultery is sufficient cruelty to entitle divorce, 22 I C 945.

—Decision in 6 L B R 18 does not affect the ruling in 1 U B R 1910, 13, 30. (1914) II U B R 32=28 I C 801.

—Where the grounds of divorce are expressly pleaded, absence of specific issue by Court will not prejudice the case. 6 Bur L T 134=7 L B R 79=20 I C 674

—Single incident of ill treatment no ground. If wife stays away after such incident for more than one year it constitutes desertion on her part. 39 I C 114.

—In the Case of reunion after a divorce, the parties revert in the status quo. The status of such parties at the time of the first marriage governs their rights. 11 Bur L T 89=(1916) 2 U B R 127=38 I C 405.

—Divorce as by mutual consent may be allowed on proof of single act of cruelty 46 I C 144

—Second marriage without chief wife's consent entitles her to divorce except where

**BUDDHIST LAW (BURMESE) (Contd.)****(9) Divorce. (Contd.)**

she is barren, or has borne only female children or is suffering from certain diseases ( ss. 217, 332, 265, 267, 311 of the Digest ) In the case of such divorce the property should be partitioned as in the case of divorce by mutual consent. 11 Bur L T 236=9 L B R 191=45 I C 953 (F B).

—Mere physical re-union with a divorced wife does not revive the status of marriage. The reunion must be such that had there been no divorce it would have amounted to a valid marriage. ( 1919 ) 3 U B R 182=54 I C 575

**(10) Ecclesiastical Jurisdiction.**

—Ecclesiastical matters must be determined not merely by the canonical text of the Vinaya, the Atthagatha, Dhammathats and other commentaries must also be considered. 45 I C 923.

—Ecclesiastical Courts are not deprived of their jurisdictional merely because plff is a layman. (1910) I U B R 78=10 I C 996.

—Presiding pongyi who has permitted another pongyi to reside in his kyaung can evict the latter where permission to reside has been determined. The suit can be tried by the Rangoon Small Cause Court. A I R 1930 Rang 199=Ind Rul (1930) Rang 383=127 I C 479.

—Ecclesiastical matter within competence of ecclesiastical authorities—Civil Courts have no jurisdiction. A I R 1929 Rang 77=6 R 783=Ind Rul (1929) Rang 108=114 I C 540.

—A dispute between a pongyi and a layman cannot be settled by ecclesiastical authorities in Burma and any decision if there be must be of the nature of an arbitration. A I R 1924 Rang 141=1 R 494=76 I C 807.

—In the dispute between a monk and a layman an award by the ecclesiastic authority binds only the parties. A I R 1924 Rang 141=1 R 494=76 I C 807.

**(11) Ecclesiastical Law.**

—Presiding monk of "Catudissa Sanghika Monastery" has same powers as any other presiding monk. A I R 1930 Rang. 160=Ind Rul (1930) Rang 327=126 I C 647

—A layman cannot evict a presiding pongi in ordinary state of affairs. A I R 1930 Rang 29=7 R 617=Ind Rul (1930) Rang 115=121 I C 787

—Kyaung being built and offered to pongyi, becomes extra commercium. A I R

**BUDDHIST LAW (BURMESE) (Contd.)****(11) Ecclesiastical Law. (Contd.)**

930 Rang 29=7 R 617=Ind Rul (1930)  
Rang 115=121 I C 787

—According to manukya pay-in includes property acquired during two marriages. A I R 1929 Rang 253=7 R 578=Ind Rul (1930) Rang 102=121 I C 774

—Thinghika property dedicated to rahans of kyaungdaik is vested in head of monastery as trustees. A I R 1929 Rang 372=7 R 245=Ind Rul (1929) Rang 257=118 I C 609

—A Buddhist monk cannot make a contract to purchase property. A I R 1928 Rang 3=5 R 626=106 I C 201

—Pongyi cannot live on charity if he does not either teach or meditate. A I R 1925 Rang 354=26 Cr L J 1622=3 R 352=90 I C 918

—Poggalika gift of kyaung empowers the donee to sue for its possession even if kyaung is Sanghikai property. The body of the sangha only can oust the Presiding monk. A I R 1925 Rang 307=3 R 193=89 I C 589

—A pongyi may own a kyauni as his poggalka property and he can in his life time validly transfer it by gift. A I R 1924 Rang 309=2 R 131=83 I C 557

—Gift to a monk reserves no right in the donor and the delivery of possession is not necessary in the case of a gift by the monk. A I R 1924 Rang 201=2 Bur L J 266=83 I C 329

—To become a monk means to be free from earthly ties and to die a civil death. After renunciation he does not ipso facto relapse to the old status. A I R 1924 Rang 101=I R 430=76 I C 672

—A Buddhist dies a civil death when he enters the priesthood and does not possess any property except that necessary for his religious life. A I R (1922) U B 15=24 Cr L J 510=72 I C 974

—Saduthanthaka property is property belonging jointly to four pongyis. On the death of one member, however, the survivors can admit a new member in his place. 13 Bur L T 147=10 L B R 258=61 I C 778

—A poongyi cannot after ordination, inherit from his lay relatives, nor can the latter inherit, on the death of the poongyi land which had been given to him as an outright gift. 11 Bur L T 161=9 L B R 220=49 I C 317 (F B)

—Civil Courts have jurisdiction to decide suits of a civil nature in which points of Ecclesiastical Law arise (8 L B R 142 foll). Questions of Ecclesiastical Law are to be decided according to the Vinaya, but the Dhammathats is not to be entirely excluded. 11 Bur L T 161=9 L B R 220=49 I C 317 (F B)

**BUDDHIST LAW (BURMESE) (Contd)****(11) Ecclesiastical Law. (Concltd)**

—“Ayanzoungs” are persons in charge of a Kyaung and can sue for possession of land alleged to form part of a Kyaung. 12: Bur L T 264=56 I C 939

—There is a strong presumption that a monk has no property over which he has rights of disposal. 8 Bur L T 237=8 L B R 342=30 I C 112

—Monk cannot enter into valid contract. (1915) II U B R 61=29 I C 613.

—Mere verbal declaration or a delivery of possession is enough to dedicate a religious endowment and becomes irrevocable. 7 Bur L T 63=24 I C 465

—Civil Court can decide dispute between a monk and a layman as to land on which a monastery stands. 7 Bur L T 27=(1913) I U B R 183=23 I C 157

—Monks may and do possess property. They have no right to give away a monastery dedicated to him personally.

If a monk takes the property of another monk and appropriates it, it is valid and called withathagaha gift provided (1) they were intimate (2) associated together (3) they must have spoken about the property (4) Owner alive at the time of misappropriation and (5) taker must know that owner would be pleased. 7 Bur L T 27=(1931) I U B R 183=23 I C 157

—Monk can hand over monastic property for management to a layman and the latter can sue for possession of such property. Monk cannot treat sanghika property as his own poggalika property. 12 Bur L T 264=56 I C 939

**(12) Gift.**

Per Mya Bu, J.—What is known as a “deathbed gift” under the Burmese Buddhist Law is a gift made while the donor is in fact on his death-bed and about to die, or, in other words, when his death is imminent. The gift must also be made by the donor in the hopeless expectation of death, or under pressure of the sense of the imminence of death, the underlying idea of the rule that a death-bed gift is invalid under the Burmese Buddhist law being that such a gift, if recognised, would enable a Burman Buddhist to defy his own personal law and practically to dispose of his property by a method which in effect would be equivalent to, and would operate as, a will, (228-9). The mere fact that the donor had been ill for a few months and was weak and infirm and contemplating an early death at the time of the making of the gift is insufficient to bring it within the purview of a death-bed gift under the Burmese Buddhist Law. (230).

## BUDDHIST LAW (BURMESE) (Contd.)

## (12) Gift. (Contd.)

Per Page, C. J.—A transfer made by a Burman Buddhist whose death is imminent, and who is under apprehension that his dissolution is at hand, is commonly called a "death-bed" gift. (231). 10 R 224 =139 I C 278-A I R 1932 R 104-I R 1932 R 179-A L R 1932 R 249

—Gift—Death of donor—Gift intended to take effect after—Validity of.

If a Burman Buddhist by a voluntary transfer inter vivos assigns property to a person who is or is deemed to be, a stranger, with the intention that such transfer should become operative after his death, the transfer is null and void. Whether having regard to this rule of law, a transfer is void or not depends upon the facts of the particular case. When such a transfer is made by a Burman Buddhist whose death is imminent, and who is under an apprehension that his dissolution is at hand, it is commonly called a "death-bed" gift, and a *presumptio juris et de jure* arises that the transferor intended the transfer to become operative after his death. A transfer of this nature is invalid as being a devise by which a Burman Buddhist has attempted to defeat his own personal law, and practically to dispose of his property by a method which would be in all essentials equivalent to a will. (Page, C. J., and Mya Bu, J.) U. Tezawanta v. Maung Zaw Pe (1932). 10 R 224 (230, 231) =A L R 1932 R 249

—Direction to one of co-heirs to discharge liabilities which are a great deal less than value of his property. Transaction is to be regarded as gift of excess of property over debt—Principle of part performance does not apply to such case. A I R 1929 Rang 272=Ind Rul (1930) Rang 187=123 I C 139

—It is doubtful whether sister can make a valid gift without joining her husband. A I R 1929 Rang 243=Ind Rul (1930) Rang 161=122 I C 897

—Death bed gift is not within competence of Burmese Buddhist. A I R 1929 Rang 243=Ind Rul (1930) Rang 161=122 I C 897

—An oral gift by methild to a monk and subsequent oral gift by him to another is invalid as private trust or gift for want of registered deed. A I R 1924 Rang 260=3 Bur L J 7=80 I C 255.

—Gift of marriage-joint-property by husband without wife's consent is wholly void. A I R 1929 Rang 129=7 R 374=Ind Rul (1929) Rang 249=118 I C 409

Gift that affects inheritance is invalid. A I R 1924 Rang 13=1 R 351 =75 I C 166.

—A deed of gift by a mother to her

## BUDDHIST LAW (BURMESE) (Contd.)

## (12) Gift. (Contd.)

children is invalid if it is to take effect after her death, A I R 1924 Rang 13=I R 351=75 I C 166.

—A monk cannot make a valid gift whether to a layman or another monk, of a monastery or of a site for a monastery. A I R 1924 Rang 141=I R 494=76 I C 807

—A monk can make a death bed gift by delivery of possession. A I R 1924 Rang 201=2 Bur L J 266=83 I C 329

—A gift by a grand-parent to a grand-child is valid even without delivery of possession. (1220) 3 U B R 228=59 I C 999

—Where there has been delivery of possession of the property given to children at the time of entering priesthood, the property passes absolutely to the donee, and the parents have no longer any power of disposal over it. 6 L B R 32=4 Bur L T 195=11 I C 862

—Gift by parent to a Koyin on his entering the priesthood—Possession taken by donee—Gift irrevocable by parents—Subsequent disposition by parents invalid. 11 Ind Cas 862

—Death-bed gifts not valid. A man cannot by interposition of a trustee make a disposition of property, which the law prevents him from making by a direct gift. 11 Bur L T 234=50 I C 522

—Burmese—gift—Death-bed gift—Delivery of possession essential. T P Act, Ss. 122, 133. 40 I C 354.

—Burmese—Gift—Delivery of possession—if essential. 42 I C 68

—Kanwin gift, if not in writing and registered as required by S. 124 T. P. Act, is not valid; and if there be a mutual divorce the property will revert to the husband. 9 Bur L T 87=33 I C 129

—Burmese—Gift—by Parent—to a Koyan. 11 I C 862=4 Bur L T 195

—Burmese—Gift—Possession better title to be shown by power not in possession. 8 Bur L T 72=29 I C 888

—Burmese—Gift—Registration. Act, Ss. 122, & 123 11 Bur L T 259=45 I C 926

—Gift of land by mother and subsequent sale of the same to a stranger. Held Buddhist Law did not apply as no question of inheritance or succession was involved. Revocation cannot be inferred from subsequent sale in the absence of any express act of revocation.

Plea of fraud will not be heard if not expressly pleaded 8 Bur L T 269=8 L B R 185=30 I C 20.

Buddhist law applies to shinbyu gifts. Gifts made publicly by both or surviving parent at the time of the Shinbyu ceremony is valid although possession was not given; but such property remains at the disposal



**BUDDHIST LAW (BURMESE) (Contd.)****(12) Gift. (Contd.)**

of the donor for donor's life time. If the donee predeceases the donor his heirs cannot take benefit of the exception regarding possession. 8 Bur L T 149=8 L B R 190=30 I C 665.

—Gift in unfit state of mind is not valid; so also a gift made in contemplation of immediate death. Preferential treatment on ground of service has never been supported as a general rule ss 162, 163 and 164 of kinwan Mingyi's Digest explained 5 Bur L T 291=6 L B R 77=18 I C 466 (F. B.)

**(13) Husband and Wife**

See also Buddhist Law—Divorce; and Buddhist Law—Marriage supra and infra.

—The husband and wife in a Burmese Buddhist marriage do not hold the property as joint tenants but as tenants-in-common. Thus the idea of an interest in common asserted by the Dhammathats is preserved without the evil consequences following from holding that that is the joint interest of partnership. There is nothing in the texts which would point more to joint ownership than to tenancy-in-common, and therefore it is quite right to prefer the one which leads to the least evil consequences. After all, the ancient law has still a wide scope if admittedly all property acquired by either or both of the spouses before or during marriage passes into the common enjoyment and it is only dealt with by either according to his or her vested interest therein. 59 I A 216=10 R 261 (279-80)=55 C L J 497=137 I C 1=-3 M L J 167=A I R 1932 P C 152 =I R 1932 P C 171 (P. C.)

—Married persons hold during the subsistence of the marriage an interest in all property belonging to either or both. Partition takes place either on death or on divorce. Property consists of three kinds: payin, which is the property which had belonged to the spouses individually before marriage: lettepwa, which is the property accruing to either spouse individually either by particular exertion or by succession after the marriage; sometimes, therefore, described as of two kinds, viz., ordinary lettepwa and lettepwa by succession; and hnazon, which is the property acquired by the spouses during the marriage by their exertion or from the produce of the property they already had. On partition lettepwa goes two-thirds to the spouse who actually made it or succeeded to it and one third to the other. Hnazon and payin are equally divided. 59 I A 216=10 R 261 (258)

—Husband and wife—Wife—Fault

**BUDDHIST LAW (BURMESE) (Contd.)****(13) Husband and Wife (Contd.)**

of, causing forfeiture of her interest in property of marriage—Mere going away, or desertion, not a. 59 I A 216=10 R 261 (271)

—Husband and wife—Property of—Lettepwa, being property which wife had inherited during marriage—Gift by wife of—Valid to extent of her two-thirds interest is. 59 I A 216=10 R 261=55 C L J 497=137 I C 1=63 M L J 167=A I R 1932 P C 152=I R 1932 P C 171

—The interest of a Buddhist couple in marriage property is not saleable within C. P. C. S. 60 and is variable and indeterminate. A I R 1927 Rang 274=5 R 478=104 I C 516

—Mya-nge does not definitely mean lesser wife. A I R 1925 Rang 41=3 Bur L J 108=97 I C 72

—Decree against husband does not affect wife's share in the joint property. A I R 1924 Rang 165=1 R 555=77 I C 402

—The property of the husband and wife while living, forms one estate in which all the family members have an interest though under the control of the couple. A I R 1923 Rang 110=1 Bur L J 267=4 U B R 140=77 I C 53

—In the Property inherited by wife during marriage—Husband takes only a third share. A I R 1921 L B 46=11 L B 48=70 I C 562

—In the mortgage of joint property by husband acting as the wife's agent and managing the family business, the wife is presumed to have acquiesced. 13 Bur L T 129=10 L B R 267=61 I C 701

—Cohabitation without marriage gives no marriage rights. 7 Bur L T 88=7 L B R 301=24 I C 60

—Desertion by wife for more than 6 years. Subsequently each applied for divorce, but was not granted. Held, the conditions contemplated by S. 17 of ch. V of the Manugye for the dissolution of marriage become complete. 7 Bur L T 197=25 I C 95

—Divorce by husband for wife's misconduct; subsequent suit for partition is maintainable. 38 Cal 629=75 C W N 766=21 M L J 749=8 A L J 739=13 Bom L R 464=14 C L J 15=(1911) 2 M W N 397=4 Bur L T 153=6 L B R 18=10 M L T 479=38 I A 140=11 C 497 (P. C.)

—Burmese—guardianship of girl aged seven—Husband and wife living separate—Husband, natural guardian—Guardians and Wards Act. Ss. 9, 17 (1) 19 (b). 8 Bur L T 73=29 I C 890

—An Eindanngyi can alienate her payin property without husband's consent. Where a husband allowed his wife to



**BUDDHIST LAW (BURMESE) (Contd.)****(13) Husband and Wife (Contd.)**

receive certain land in mortgage in her sole name and to take the rent, the mortgagor is justified in believing wife to be sole mortgagee and the husband is estopped from disputing a redemption by the wife. 4 Bur L T 244=121 C 200

—Where partition could be granted only on ground of divorce being separately proved, a separate suit for partition will not be barred under O. 2 rr. 1 and 2 C. P. C. 38 Cal 629=13 Bom L R 464=15 C W N 766=21 M L J 749=8 A L J 739=14 C L J 15=(1911) M W N 397=4 Bur L T 153=6 L B R 18=10 M L T 479=11 I C 497=38 I A 140 (P. C.)

—Taking a second husband while the husband is in imprisonment amounts to desertion by wife and adultery. 7 Bur L T 240=23 I C 940

—Burmese Husband and wife—Living Separately—Natural guardian. Guardian and wards Acts, Ss. 9, 17 (i) 19 (b). 8 Bur L T 73=29 I C 890

—Where husband has full authority of the wife to mortgage her property the mortgagee is entitled to a declaration that he is the owner and to possession. 8 Bur L T 97=27 I C 788

—Mortgage of joint property by husband with wife's knowledge and consent also binds the wife. (Per Twomey C. J., Parlett and Maung Kin. J. J. Contra). 12 Bur L T 31=10 L B R 36=51 I C 563 (F. B.)

—A house built during coverture on the paying property becomes the joint property and neither can oust the other. 12 Bur L T 202=58 I C 225

—Property acquired by husband during marriage becomes joint property unless earnings kept separate and distinct. 41 I C 410

—Second wife can get equal share in the inheritance if she proves that her status was superior to that of a lesser wife or concubine. The latter gets two-fifth of the inheritance, but she lives separate she gets nothing. There is no presumption that a woman who cohabits with a man, who she knows is married is a mistress and not a wife. Lesser wife or lawful concubine is not necessarily a mistress. 4 Bur L T 235=12 I C 191

—Where it was clear that though the business was carried in husband's name only, the wife knew of the transactions regarding joint property, the wife was held bound. Held also that the wife was a necessary party. 8 Bur L T 66=29 I C 881

—Without joining wife, the husband can sue for moneys given by him to another. A I R 1930 Rang 295=Ind Rul (1931) Rang 70=129 I C 508

**BUDDHIST LAW (BURMESE) (Contd.)****(13) Husband and Wife (Conclu.)**

—Husband and Wife—Husband and wife dying within short interval. Relatives of each should be regarded as succeeding to the half interest which each of them possesses irrespective of the nearness of the relatives on one side as against those on the other. 8 R 480=Ind Rul (1931) Rang 92=129 I C 524

—Husband acting on behalf of the marriage partnership can bind the whole of the partnership property. And the partnership property is liable for a debt contracted by the husband alone, if the debt can be held to have been taken in the interests of the partnership. But where a husband is adjudicated an insolvent and the Receiver merely sells 3rd share of the husband, it cannot be held that the whole partnership interest is sold and consequently where the wife after the discharge of her husband sells her 3rd share in discharge of joint debts and with the consent of the husband, the sale operates to transfer title of 2-3rd share to the vendee and the latter is entitled, in a suit against the purchaser of the 3rd share, to partition and possession of his 3rd share. A I R 1930 Rang 345=Ind Rul (1931) Rang 60=128 I C 844

—A wife can sell away property to meet expenses while her husband is in jail and the sale binds him. A I R 1930 Rang 211=Ind Rul (1930) Rang 375=127 I C 471.

—Wife has no definite right in the salary of husband though it may be joint property. A I R 1930 Rang 147=Ind Rul (1930) Rang 350=127 I C 174

—Sale of property inherited from parents by the wife on behalf of marriage partnership binds the husband also. A I R 1929 Rang 213=Ind Rul (1930) Rang 188=123 I C 140.

—The debts incurred during coverture binds both husband and wife but decree passed against one after divorce cannot bind other unless made party to it. A I R 1929 Rang 223=Ind Rul (1930) Rang 159=122 I C 287.

—Husband and wife are partners and so wife can sue in respect of partnership asset in her capacity as surviving partner—Contract Act, s. 45. A I R 1929 Rang 306=7 R 806=Ind Rul (1930) Rang 135=121 I C 807.

—The presumption that husband was acting on behalf of his wife and himself can be drawn when money is borrowed on a promissory note purporting to have been taken for husband and his sister. A I R 1929 Rang 310=7 R 558=Ind Rul (1930) Rang 78=120 I C 910.

—Neither can alienate joint property without other's consent. A I R 1929 Rang 112=Ind Rul (1929) Rang 239=118 I C 127.

**BUDDHIST LAW (BURMESE) (Contd.)****(13) Husband and Wife (Contd.)**

—Husband and wife being partners of marriage, gains of either is partnership property. A I R 1927 Rang 299=5 R 443=105 I C 244.

—Burmese Judicial Separation Evidence Act, s. 112 Legitimacy. 47 I C 620.

—Husband and wife jointly borrowing money does not raise presumption of partnership. (1919) 3 U B R 189=54 I C 513.

**(14) INHERITANCE**

—Where an unmarried Buddhist dies without issue his or her estate does not devolve on the parents, even though they were not separated from him or her in preference to his or her brothers and sister Maung Kun v. Maung Chi 9 R 217 F B. —Ind Rul (1931) Rang 250=133 I C 234.

—Proof of serious misconduct essential to disinherit dog-children. A L R 1933 R 57.

—Rule of disinheritance of dog-children—whether applicable to grand-children. A L R 1933 R 57=A I R 1933 R 50.

—Inheritance—Son—Death without issue of—Heir to—Mother—Childless wife or—Son living with mother and mother in possession of family property inherited from her deceased husband—Heir to such property on son's death without issue is mother and not childless wife, whether son had or had not a vested interest in such property.

So held upon the right interpretation of S. 28 of Vol. X of the Manukye Dhammathat. 10 R 124=137 I C 431=A I R 1932 R 98=1 R 1932 R 132.

—A Burman Buddhist, whose wife had predeceased him, died leaving two sons and daughters. On the death of one son and one daughter, held that the surviving brother and sister took the property equally and that it was for that purpose immaterial whether the property was joint property or the separate property of the several children.

The Court is bound to give effect to S. 17 of Book X of the Manukye in cases which fall within its ambit. 10 R 162=137 I C 650=A I R 1932 R 187=1 R 1932 R 142=A I R 1932 R 395.

—When desertion and intentional and deliberate neglect of the ordinary duties of affection and kindred are proved against any one claiming to inherit, his or her right of inheritance is lost. 5 L B R 231=9 Ind Cas 442

—If a first-born son dies in infancy the status of 'orasa' devolves on the next eldest son when he attains his majority,

**BUDDHIST LAW (Contd.)****(14) Inheritance (Contd.)**

provided that he is unaffected by any of the disabilities or disqualifications mentioned in the texts. He can transmit the right. 10 Ind Cas 778

If a second wife succeeds in proving superior status she would be entitled to share on equal terms with the chief wife. (U B R 1892—1896, Vol. II, 194, U B R 1897—1901, Vol. II 138, 160 Expl) A second contemporaneous wife is not of necessity a lesser wife or a concubine. A lesser wife or concubine, who lives with the husband, gets two-fifths of the inheritance, but when she lives separately, she gets nothing. (U B R 1892-1896 Vol II 145 Rel on) 12 Ind

Cas 191

—Held, that the defendant who lived with the deceased and attended him in his last illness and also paid the expenses of the funeral should be preferred to the plaintiffs, who failed to attend or visit the deceased in his last illness and whose neglect was not cured by their attempt to borrow money for the funeral 11 Ind. Cas 777=4 Bur L T 160

—Kulitha child is not entitled to share the father's estate with the latter's widow (U B R 1892 II 145 fol 2 L B R 54 diss.)—Per Parlett J. dissenting (U B R 1897—1901 II 176; 16 Bom L R 377; 41 Cal 887; 8 L B R 1 Ref.) 9 Bur L T 15=9 L B R 1=33 I C 171 (F B).

—Brothers and sisters are heirs and when living separate from the parent succeed in preference to the parent. 41 Cal 887=16 Bom L R 377=(1914) M W N 449=27 M L J 41=7 Bur L T 105=16 M L T 142=18 C W N 1121=20 C L J 264=1 L W 914=16 Bom L R 377=23 I C 43=41 I A 121 (P C)

—Where a woman re-marries on the death of her husband, the property which falls to her share on division between her and her issue, goes, on her death, entirely to her children by the second marriage. Property acquired by the widow subsequent to the death of second husband descends to the children of both marriages to be divided between them per stirpes and not per capita. 5 Bur L T 1=6 L B R 28=12 I C 797

—Children leaving their father with the divorced mother can claim father's inheritance only when they maintain filial relations with the father. Filial relation implies living and working with the parent. 42 I C 68=11 Bur L T 229=(1917) 3 U B R 23

—Three marriages, with children of each marriage—The children of the marriage during which the property was acquired get half of it, and children of other marriages divide the rest among them. 42 I C 950=11 Bur L T 252

**BUDDHIST LAW (Contd)****(14) Inheritance (Contd)**

—Claim by daughter taken away by divorced mother—Presumption of servance between father and daughter—Daughter to prove relationship—Presumption of mutual claims of parties at settlement of divorce. 7 Bur L T 83=23 I C 948

—Claim by estate child on the death of one of the parents must be made promptly. 9 Bur L T 154=33 I C 927—See also 44 Cal 379

—On death of husband or wife without children, the survivor succeeds to the whole of the deceased's estate, including the deceased's share in the undivided ancestral property. 12 Bur L T 79=52 I C 929

—Mutual abandonment of each other by husband and wife for more than the prescribed period, and both, remarry the marriage is dissolved (3 L B R ref.) Those children who maintain filial relations inherit. 6 Bur L T 75=6 L B R 167=19 I C 85

—Claim of eldest daughter against widowed mother, for one-fourth of the estate, the mother not having remarried, is not maintainable. (1914) II U B R 40 =28 I C 806

See to the same effect: (1914) II U B R 46=28 I C 821 (even though mother remarries).

—Inheritance—Exclusion—Neglect or estrangement necessary—Burden of proof on the party alleging. 7 Bur L T 80=23 I C 915

—Where a father started his daughters in business and arranged for them to live separately so as to avoid internal quarrels. Held, the father did not forfeit his right to inherit the estate left by the daughters. 9 I C 442=4 Bur L T 1=5 L B R 231

—Grand child claiming an equal share with the son of the deceased on the ground that he was the son of the eldest daughter. Held s. 163 of kinwin Mengy did not apply where there is an orasa son and the plff must fail (3 L B R 45 fol) 6 Bur L T 105=7 L B R 27=20 I C 327

—Orasa child predeceasing his parents, his eldest child or his children together receive the same share at the death of their grand-parents as their youngest uncle or aunt. Children of the same parents share equally (3 L B R 45; 3 L B R 8 rel and foll) 9 Bur L T 95=33 I C 127

—Property inherited by wife during marriage is lettetpwa and not hnapazon. The husband is entitled to one-third of such property. 15 I C 380=5 Bur L T 98

—Husband and wife dying without issue simultaneously or within a short interval of one another their property is

**BUDDHIST LAW (Contd)****(14) Inheritance (Contd)**

regarded as joint. 8 Bur L T 145=8 L B R 197=30 I C 594

—Share of a person, who is insane or suffering from incurable disease, goes, on his death, to the coheir who maintained and looked after him during his life-time. 5 Bur L T 61=14 I C 843

—Where kanwin is delivered into the possession of the bride, the husband is entitled to inherit it as against parents-in-law, even if the bride dies child-less in her parent's house (1 Chan. Toon's L C 3 dist). 4 Bur L T 278=11 I C 929=6 L B R 16

—Non-attendance at death-bed is not a ground for exclusion. 44 I C 239

—One of the parents inheriting property during marriage. The other gets a life-interest in such property, on the death of the former. 6 Bur L T 119=20 I C 346

—Daughter can be an aurasa child, but there cannot be an aurasa daughter as well as an aurasa son in the same family. An aurasa daughter is merely a presumptive heir and is liable to be displaced by aurasa son of competent age (6 Bur L T 105 ref and fol). 8 Bur L T 140=8 L B R 113=29 I C 756

—The aurasa son should assert his claim promptly on father's death, otherwise it would lapse. 8 Bur L T 138=30 I C 638

—Ourasa son gets one share and the mother and younger children three shares on the father's death, whether mother remarries or not. 8 Bur L T 154=8 L B R 189=30 I C 640

—Partition on remarriage of mother—Children by first marriage and second husband get three and one shares respectively in unpartitioned property—Court fees. 9 Bur L T 97=35 I C 731

—A pongyi or rahan cannot inherit from his lay relatives. (1918) 3 U B R 91 =47 I C 681

—Buddhist law applies to questions of preemption. Coheirs who take part in the partition of immovable ancestral property have no right of pre-emption as regards such property after the partition—Per Hartnoll J dissenting. 8 Bur L T 167=8 L B R 466=31 I C 512

—Full blood preferred to half blood—young brother or sister preferred to elder brother or sister. 12 Bur L T 103=58 I C 488

—Child claiming through both parents gets a double portion of both the inherited and other lettetpwa property of what a child claiming through one only gets. (1915) II U B R 66=31 I C 87

—A person married three wives in succession. His son by the first wife pr.

**BUDDHIST LAW (Contd)****(14) Inheritance (Contd)**

deceased him. His grandsons sued his daughters by the other wives for shares. Held onus on deft to prove unfilial conduct—That plff did not take part in supporting their lame and blind father did not constitute such conduct; that the plffs were entitled to their deceased father's share; that the plffs must pay their share of the money paid for redemption before getting their share. (1915) II U B R 66=31 I C 87

—Right of the eldest aurasa son to a forth share on his father's death may be asserted so long as the mother is alive, within the period allowed by Lmt. Act. Art. 123, 44 Cal 379=32 M L J 71=21 M L T 97=21 C W N 527=10 Bur L T 138=26 C L J 169=19 Bom L R 294=15 A L J 96=9 L B R 56=38 I C 809=44 I A 42 (P C)

—The rule against ascent of inheritance applies in favour of brothers and sisters of blood as against parents. But a child taken away by the mother on divorce loses its rights of inheritance in the natural father's family. 13 Bur L T 3=55 I C 681

—If there are natural or adopted children of the deceased, the apatittha child gets nothing, otherwise he shares equally with the other heirs of the deceased. 11 Bur L T 221=50 I C 524

—Children of the first marriage get three-fourths of the property taken to second marriage and one-eighth of the lettetpwa of that marriage. The same rule applies to a Keittima child adopted before second marriage. (1915) II U B R 74=31 I C 94

—A man cannot disinherit an heir children of the marriage during which property is acquired take double the share taken by the children of the other marriages, and the out of time grandchildren not being the children of an orasa child together take a quarter of what their parents would have taken had they survived the deceased. The rule of forfeiture operates on proof of unfilial conduct independently of the father's wish. 12 Bur L T 207=55 I C 258

—Share of paternal and maternal uncles and aunts of deceased nephew or niece. 18 I C 497=5 Bur L T 283.

—Share of a great-grand-daughter in her grand mother's estate in competition with her grand-aunts. 8 Bur L T 51=29 I C 741.

—Widow gets one-fourth, her children one-eighth and the children of the former wife five-eighth. 12 Bur L T 75=10 I B R 10=51 I C 588.

—The heir of a deceased husband is his widow and not any of his children except the eldest son in respect of a fourth

**BUDDHIST LAW (Contd)****(14) Inheritance (Contd)**

of the estate. The widow cannot sell even in case of necessity this one-fourth share of the eldest child unless such child be daughter. 15 I C 919=(1912) I U B R 125.

—Status of eldest daughter on death of the eldest child who was son—Status devolves on the elder of two daughters where there is no other son. 15 I C 360=5 Bur L T 73.

—The child having left father on the divorce, and not having resumed filial relation, had no right to inherit the father after the death of the step-mother. On latter's death the estate devolved on her heirs (19 I C 85, 6 L B R 161 fol 21 B R 54 dist p.

6 Bur L T 117=7 L B R 31=20 I C 354.

—Succession to nephew—Division between paternal and maternal aunts per capita and not per stirpes. 8 Bur L T 141=30 I C 635.

—Step-father dying without leaving natural issue or widow the children of his deceased wife by a former husband are entitled to his property under ss. 294 and 215 of the Digest. Limitation runs 12 years from their mother's death, as regards property acquired jointly by their mother and step-father during their marriage, but not as regards mother's Thinthi property.

9 L B R 176=47 I C 139=12 Bur L T 44.

—In the case of Keittima child living apart from his adoptive parents, the question is whether the surrounding circumstances establish an intentional severance of the family tie, so as to be barred from inheritance. (1915) 11 U B R 74=31 I C 94.

**(15-17) Joint Property**

—The interest of the judgment-debtor in the joint property of a Burmese Buddhist husband and wife can be attached in execution of a decree obtained against one of the spouses in respect of an antenuptial-debt contracted by such spouses alone. In such circumstances the separate property (if any) of the judgment-debtor can be attached, 5 R 478; 5 R 296, overruled. Carr, J.—Where a decree had been obtained against the debt contracting spouse before marriage the remedy open to the decree-holder would need further consideration. Maung Ba, J.—While the interest of a spouse in his or her "payin" and in the "lettetpwa" is definite and vested as between themselves neither party has a right to alienate his or her interest in the "lettetpwa" without the consent express or implied of the other Chettyar v. Maung Than Dainu. A I R 1931 Rang 262=9 R 524 F B.

—Ordinarily in the case of insolvency of husband whole property of marriage is



## BUDDHIST LAW (Contd)

## (16) Joint Property (Contd).

liable for satisfaction of insolvent's debts  
—But where receiver merely sells 1-3rd share subsequent sale by wife of her 2-3rd share in discharge of joint debts with consent of husband is effective to transfer that share to vendee. A I R 1930 Rang 345=Ind Rul (1931) Rang 60=128 I C 844

—Land transferred by mother to daughter and her husband as their share of inheritance is their joint *lettetpwa* property. A I R 1930 Rang 176=Ind Rul (1930) Rang 357=127 I C 373

—If a husband and wife each brings a child by previous marriage and there is also a child to them both and if the wife dies, of their joint *lettetpwa* property five-eighths should go to the husband 2/8 should go to the son of both and 1/8 should go to the *atet* sons. A I R 1930 Rang 176=Ind Rul (1930) Rang 357=127 I C 373

—Admission by a coheir that one of the heirs has absolute right to the property cannot affect the other heirs. A I R 1929 Rang 272=Ind Rul (1930) Rang 187=123 I C 139

—Husband's contract to alienate land jointly belonging to him and his wife without the latter's consent cannot be enforced specifically. A I R 1929 Rang 285=Ind Rul (1930) Rang 174=122 I C 910

—Children of first marriage taking share on second marriage cannot inherit property after their mother's death and before or after second marriage. A I R 1929 Rang 265=7 Rang 398=Ind Rul (1930) Rang 42=120 I C 666

—Nephew of widow was treated as heir along with the son and purchase of property was joint on the son's and nephew's names, still the nephew was not paid for his services in family business—Joint interest and joint right held to be created. A I R 1929 P C 246=7 Rang 388=50 C L J 192=(1929) M W N 682=34 C W N 117=Ind Rul (1929) P C 229 (P C)=117 I C 29

—Share of step grandchildren in the jointly acquired *lettetpwa* property of their grandfather and step-grand-mother is one-fifth. A I R 1928 Rang 139=6 Rang 355=113 I C 142

—Husband married a second wife after death of first. The land purchased did not become *lettetpwa* but retained its former character as *payin*. A I R 1927 Rang 318=6 Bur L J 219=105 I C 470

—Property of marriage is liable for partnership debts, even after separation of shares. A I R 1927 Rang 299=5 Rang 443=105 I C 244

—Decree against husband manager can be executed against the impartible marriage property. A I R 1927 Rang 274=5 Rang 478=104 I C 516

## BUDDHIST LAW (Contd)

## (16) Joint Property (Contd.)

—*Payin* property brought by husband is available to satisfy a decree against him for debt incurred in business while living with wife during the subsistence of the marriage—Jointly acquired *lettetpwa* property also can be sold. A I R 1927 Rang 209=5 Rang 296=6 Bur L J 166=103 I C 568

Overruling: A I R 1925 Rang 329=3 Rang 322=94 I C 797

Overruling: 10 L B R 36 (F B)=51 I C 563

—Where part of the joint property was in the name of the husband only and he mortgaged it and the mortgagee brought a suit in which the property was brought to sale, wife was bound by the decree passed against the husband. A I R 1927 Rang 119=5 Bur L J 218=101 I C 354

—*Eindounggyi* with two wives. Property inherited by husband after second marriage is *lettetpwa*. Share of each of two wives in such property is one-sixth. Such share is not liable for husband's debts. A I R 1925 Rang 329=3 Rang 322=94 I C 797

—Claim of an eldest son to one-fourth share on the remarriage of the parent is not a claim as *orasa* son but an entirely different one. A I R 1926 Rang 65=3 Rang 281=90 I C 958

—Re-marriage of the father gives the *orasa* son a right to one-fourth share though his mother's death alone does not give. A I R 1926 Rang 65=3 Rang 281=90 I C 958

—Right of an eldest son to claim one fourth share on the re-marriage of his father is vested and definite and devolves on his heirs and legal representatives. A I R 1926 Rang 65=3 Rang 281=90 I C 958

—Children of first marriage take property brought by parents to the second marriage, if there is joint property of the second marriage. A I R 1923 Rang 110=4 U B R 140=1 Bur L J 267=77 I C 53

—On partition at father's re-marriage, children cease to have claim on share of father at partition or to *lettetpwa* of his marriage with their step-mother. A I R 1924 Rang 71=1 Rang 487=76 I C 838

—Ancestral property is not presumed to be joint. A I R 1923 Rang 92=1 Bur L J 174=74 I C 9

—The burden of proving jointness or separation of ancestral property cannot be laid down as a general rule without regard to the facts and circumstances of each particular case. A I R 1923 Rang 92=1 Bur L J 174=74 I C 9

—Delay in claiming one-fourth share on death of parent would render the suit liable to dismissal. 33 I C 147



**BUDDHIST LAW (Contd.)****(16) Joint Property (Concl'd)**

—The rule of Nissayo and Nissito applies to lettetpwa property, and a wife is entitled to  $\frac{1}{2}$  share in the property inherited by the husband. 13 Bur L T 35=57 I C 950

**(18) Marriage.**

—Union between Burmese woman and Buddhist Hindu for 25 years is legal marriage and the husband is entitled to the custody of the children of the union. A I R 1927 Rang. 280=6 Bur. L J 158=104 I C 348

—Elopement with the intention of marrying and its consummation is sufficient for a valid marriage. A I R 1926 Rang. 88=4 Bur. L. J. 258=27 Cr. L J 725=95 I C 53

—A youth of over 16 years can contract a valid marriage. A I R 1926 Rang. 88=4 Bur. L J 258=27 Cr. L J 725=95 I C 53

—Chinese customary law applies to prove marriage between Burmese woman and half caste chinese. A I R 1926 Rang. 82=4 Bur. L J 255=27 Cr. L J 656=94 I C 608

—Girl below 20 years cannot validly contract without guardian's consent. A I R 1925 Rang. 280 (F. B.)=26 Cr. L J 1613=4 Bur L J 123=3 Rang. 455=90 I C 717

—In the case of 'Marriage' by minor girl—Consent of guardian is not necessary. A I R 1923 Rang. 76=1 Bur L J 144=81 I C 32

—Among Shan Buddhists in Burma—Presumption of marriage rests on habit and repute of the parties. A I R 1923 Rang. 218=1 R 343=2 Bur L J 114=76 I C 620

—Marriage even in Burma is a permanent bond, and the burden of proving that it was been broken is on the person alleging it. A I R 1923 Rang. 155=2 Bur L J 67=74 I C 1037

—Marriage is presumed by cohabitation. A I R 1923 Rang 180=1 R 161=2 Bur L J 79=74 I C 933

—Among Burmese Buddhists when the mother dies and the father marries again, it is usual to make a family partition and settle on the children of the first marriage. A I R 1923 Rang. 57=1 Bur L J 111=74 I C 47

—Polygamy is lawful under the Burmese Buddhist Law. When a claim to inheritance is made by a junior wife she has to prove that she was endowed with proprietary and personal rights before she can succeed to her claim. No ceremony of any kind is essential for the purpose of lawful wedlock. Union lasting for a long period raises a strong presumption of marriage. A I R 1924 Rang 37=1 R 1=73 I C 1044

**BUDDHIST LAW (Contd.)****( 18 ) Marriage (Contd.)**

—Law of the place where a marriage is contracted determines the validity of a marriage. 13 Bur L T 105=22 Cr. L J 123=59 I C 555.

—Consent obtained by pressure is no free consent. 22 Cr. L J 123=13 Bur L T 105=59 I C 555.

—The law does not apply so non-Buddhist non-Burmans marriages celebrated in the time of Buddhist Kings of Burma. 12 Bur L T 48=(1919) U B R 128=10 L B R 77=51 I C 542

—A Burmese Buddhist woman, whether minor or not, cannot be legally married without her consent or will. Cohabitation with a Burmese woman for 3 or 4 months is quite insufficient to raise the presumption of a valid married (4 B L R 175=1 Bur L T 125 foll) 4 Bur L T 124=12 I C 801.

—Marriage between Chinese and Burmese with none of the chinese customary ceremonies is not valid. 9 Bur L T 179=8 L B R 399=34 I C 159.

—Marriage—Breach of contract of—Damages 7 Bur L T 14=23 I C 376 (2).

—Marriage—Chinese man and Burmese woman living together—Law applicable. Cr, P Code S. 488. 7 Bur L T 71=24 I C 572.

—Marriage—Breach of—Compensation. 46 I C 421

—Burmese woman and Chinese woman—Law applicable—Criminal Pro Code S. 488. 24 I C 572.

—No ceremony necessary—Proof of consent—Polygamy allowed Marriage with wife's sister lawful. 22 M L J 360=9 A L J 276=14 I C 475=15 C L J 276=14 Bom L R 204=16 C W N 529=39 C 492=11 M L T 169=(1912) M W N 201=5 Bur L T 65=(1912) I U B R 111=39 I A 57 (P. C.)

—Consent of guardian is necessary to the marriage of a minor except perhaps when the girl is steadfastly determined to marry against the wishes of the guardians. 12 Bur L T 136=10 L B R 50=54 I C 81

—Consent of parties, essential—Promise to give boy in marriage by parents—Breach—suit for damages not maintainable. (1918) 3 U B R 106=49 I C 59

—Wife living away from husband for over a year on account of her husband's cruelty does not dissolve the marriage. 10 Bur L T 212=9 L B R 44=41 I C 143=18 Cr. L J 767

—Imprisonment of husband does not amount to desertion by him. Wife cannot take second husband, and if she does so, it will amount to desertion and adultery by her. If the husband claims divorce on the latter ground he is entitled to all the joint property. 8 L B R 50=29 I C 863.

## BUDDHIST LAW (BURMESE) (Contd.)

## (18) Marriage (Concl'd.)

—Contract by parents to make or compel their child to marry is void. 9

Bur L T 77=8 L B R 347=32 I C 507

—Marriage of minor girl—consent of father, necessary. 43 I C 831

—The validity of a marriage must be decided by the *lex loci contractus*. 13

Bur L T 105=59 I C 555

—Wife, who is an *indaungyi*, may alienate her payin property in any way she likes, without even consulting her husband, provided that she does not give it to a paragon. 12 Ind Cas 200

—Marriage co habitation coupled with intent creates marriage. The marriage ceremony is merely evidence of the intent of the parties and is not a means of creating the tie in itself. A I R 1931 Rang 29=Ind Rul (1931) Rang 14=128 I C 366

—A decree for restitution of conjugal rights is not available to the husband guilty of misconduct. A I R 1929 Rang 307=7 R 451=Ind Rul (1930) Rang 6=120 I C 137

—Consent of parties is essential to constitute legal marriage. A I R 1930 Rang 210=Ind Rul (1930) Rang 368=127 I C 384

—To contract a valid marriage, a youth should be physically fit. A I R 1928 Rang 209=6 R 340=111 I C 474

—Desertion by husband for three years dissolves marriage. A I R 1927 Rang 294=5 Rang 537=6 Bur L J 125=105 I C 399

—A valid marriage under the Buddhist law does not require any ceremony. A I R 1927 Rang 250=5 Rang 359=105 I C 45

—Burmese law applies to a Chinaman marrying Burmese Buddhist woman unless special Custom is proved. A I R 1927 Rang 265 (F B)=5 R 406=6 Bur L J 135=104 I C 478

—The Karens have peculiar marriage ceremony. But if the parties profess Buddhism, though Karens, they may marry according to Buddhist Law. 25 I C 342=15 Cr. L J 590

## (19) Minor

—Minor—*de facto* guardian—Mortgage of minor's estate—whether valid. A L R 1933 R 106

—A mother's sister is a preferential guardian to a putative father or step-father when the estate belonged to the minor's deceased father. A I R 1929 Rang 284=Ind Rul (1930) R 172=122 I C 908

—The immovable property of the minor may be alienated by the natural guardian acting in the minor's interest even though a guardian is appointed by Court. A I R 1928 Rang 109=6 R 329=11 I C 469

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## BUDDHIST LAW (BURMESE) (Contd.)

## (19) Minor (Concl'd.)

—Person holding property by virtue of a certificate under Minors Act holds it as trustee and limitation does not run against the children. 26 I C 700

—Contract of marriage by minor is voidable, and the marriage of a minor youth or of a girl under the age of 20, requires consent of presents unless the parties are steadfastly determined to marry.

Where minor had clandestine intercourse parents cannot withhold consent, and if the young man repudiates the young woman he must pay her his Kobo. 12 Bur L T 219=10 L B R 28=52 I C 653

—Minor—Guardian. 13 I C 373=4 Bur L T 272

—If the eldest son of the deceased be a minor he is not an *aurasa* son, and the whole estate vests in the widow. (1914) 11 U B R 37=28 I C 804.

—Failure by the *orasa* son to claim his share promptly raises presumption of abandonment. On death of the *orasa* son, the next eldest does not become *orasa*. (2 L B R 292 foll). 8 Bur L T 196=29 I C 706.

—The rule as to "out of time" grand children does not apply when all the nearest heirs stand in the same degree of relationship to the deceased. 8 Bur L T 283=8 L B R 302=31 I C 332

## (20) Partition.

—Partition of joint property need not be in writing (25 C 210 fol). Partition deed, after an attachment has been removed is valid. 18 I C 524=5 Bur L T 296=6 L B R 170

—Division between children of two marriages or between the children of the first marriage and their step-mother is per stripes and not per capita. Children are not entitled to a share during the life-time of their mother, but only succeed as representing her. (3 L B R 110 foll). 35 I C 423=10 Bur L T 41

—Child can claim partition during the step-mother's life-time. 9 Bur L T 53=31 I C 875

—Children can claim half the estate on their widower father remarrying. A I R 1929 Rang 155=7 R 240=Ind Rul (1929) Rang 278=118 I C 630

—Children can claim partition of property on the death of one parent and remarriage of the other. A I R 1929 Rang 155=7 R 240=Ind Rul (1929) Rang 278=118 I C 630

—A *keikuma* child can claim the right of *kanitha* child to have partition

**BUDDHIST LAW (BURMESE) (Contd.)****(20) Partition (Contd.)**

after death of one parent and on the re-marriage of survivor. A I R 1929 Rang 218=7 R 193=Ind Rul (1929) Rang 256=118 I C 124

—Stepchildren have right of partition and fresh cause of action arises (1) on death of one parent and re-marriage of the surviving parent. Failing this (2) on death of parent re-marrying they can claim partition from the step parent surviving failing two claim above (3) Finally on death of step-parent. A I R 1928 Rang 139=6 Rang 355=113 I C 142

—On the remarriage of their orasa grandfather, grand children cannot ask for partition. A I R 1927 Rang 111=5 Bur L J 203=100 I C 323

—The grand children take  $\frac{1}{4}$ th of the share of their deceased parent. A I R 1926 Rang 4=3 Rang 464=91 I C 684

—For partition only family is taken into consideration all members are entitled to partition. A I R 1926 Rang 23=3 R 438=91 I C 653

—The children by first marriage have no share in the lettetpwa property of second marriage on a partition being entered into between father and the children. A I R 1924 Rang 71=1 R 487=76 I C 838

—On second marriage by farther—Settlement and partition are to be made in favour of children by first marriage as usual. A I R 1923 Rang 57=1 Bur L J 111=74 I C 47

—On divorce payin does not become lettetpwa as long as pay-in can be indentified. A I R 1921 L B 46=11 L B R 48=70 I C 562

—On the death of the mother and the remarriage of the father, the auratha son is entitled to get from the father one-fourth of the estate jointly acquired by him and his mother. 11 L B R 199=66 I C 538

—Where a Burman Buddhist, on his second marriage, transferred the joint property of himself and his first wife to their daughter by way of inheritance, evidently with the intention of keeping the land out of the hands of his second wife: Held, that the transfer operated as a partition of inheritance and not as a gift. A partition between father and daughter is not invalid merely because the father assigns to the daughter a larger share than she could claim under the ordinary law of inheritance, or if the father thinks it expedient to make over the whole of the joint property to the daughter. 11 Ind Cas 855=4 Bur L T 186

—A partition can be claimed during the step-father's lifetime. 9 Bur L T 53=31 I C 875

**BUDDHIST LAW (BURMESE) (Contd.)****(21) Pre-emption:**

—No second offer to a co-heir is necessary on the refusal of the first offer which must form part of one and the same transaction and must be of some or smaller price. A I R 1925 Rang 194=2 Rang 678=85 I C 295

—A younger son has no right to pre-empt on the sale of property by widow. A I R 1925 Rang 192=2 R 659=85 I C 284

—Sons and wife's sons by first husband can pre-empt when after wife's death husband sells away the joint property. A I R 1925 Rang 85=3 Bur L J 240=2 Rang 529=84 I C 465

—Only a co-heir can pre-empt. A I R 1925 Rang 63=2 R 437=84 I C 287

—Law of pre-emption applies to sales of joint property before partition. A I R 1924 Rang 266=2 Bur L J 21=30 I C 259

—Prompt assertion is essential in order to be entitled to the right. 6 Bur L T 115=20 I C 343

—In case there are conflicting claims among the co-heirs and they fail to come to any agreement, any of them may institute a suit to establish his claim as against the others and also against any purchaser who may have bought or be proposing to buy the property in disregard of their rights. (1919) 3 U B R 154=53 I C 468

—Sale of joint ancestral property by a brother impeached by the widow of his deceased brother—Invalidity—Pre-emption. 8 Bur L T 155=30 I C 601

—Sale of undivided ancestral property—Consent of co-heirs—Remedy of purchaser. 10 Bur L T 1=8 L B R 497=39 I C 257

**(22) Seduction.**

—Where there is no promise of marriage, seduction, even if it results in progeny does not give rise to any cause of action. 42 I C 539

**(23) Sources of Buddhist Law.**

—The Dhammathats are a body of authority consisting of many texts, sometimes contradictory but yet in their entirety forming what may be called the institutional Buddhist Law. There is no difficulty in holding this as the supreme authority where such questions as succession are concerned. But when commercial relations or execution for debt come into question, then they are not necessarily in accordance with modern conditions. 59 I A 216=10 R 261 (279)=55 C L J 497=137 I C 1=63 M L J 167=A I R 1932 P C 152=1 R 1932 P C 171 (P C)



## BUDDHIST LAW (BURMESE) (Contd.)

## (23) Sources of Buddhist Law (Concl'd.)

—Dhammathats is a collection of rules in accordance with the custom and usage of the Burmese people. A I R 1925 P C 216=30 C W N 529=5 R 186=52 I A 265=6 L R P C 160=89 I C 773

—The "Manukye" is a safe and proper guide when not in conflict with justice or equity and the present feelings of the Burmans. A I R 1925 Rang 34=2 Rang 328=84 I C 966

—From Dhammathats, a general principle should not be laid down and applied to different circumstances. A I R 1921 U B 23=4 U B R 11=63 I C 814

—Decisions of the Rangoon High Court are consistent with the settled law as stated in the Manukya Dhammathat Vol X, s. 42 as regards the rights of an inferior or lesser wife living apart from her husband. A I R 1926 Rang 111=3 R 658=94 I C 464

—Where Manukya is not ambiguous other Dhammathats need not be referred to. A I R 1929 Rang 253=7 R 578=Ind Rul (1930) Rang 102=121 I C 774. See also A I R 1929 Rang 282=7 R 409=Ind Rul (1930) Rang 46=120 I C 670

—Dhammathats are merely directory. A I R 1929 Rang 307=7 R 451=Ind Rul (1930) Rang 9=120 I C 137

—Maung Ba, J.—The Manukye should always be followed when it is not ambiguous because it has a commanding position. A I R 1928 Rang 225=6 R 427=112 I C 413

## (24) Succession.

—The rule for division between children of two earlier marriages in the ratio of two to the children of the marriage during which property is acquired to one to the children of the other marriage applies only in cases where there has been no previous partition. A I R 1931 Rang 302

—Where a Burman with children by a former marriage marries a woman with children by a former marriage, the husband's children jointly get only one-fifth of the property acquired during the subsequent marriage, A I R 1931 Rang 192=Ind Rul (1931) Rang 270=133 I C 494

—A child by the first wife of a Burmese Buddhist is not entitled to claim immediate partition with his father on the death of his mother in the property inherited by the mother from her ancestor. But where the father marries a second wife during lifetime of first wife, the child can claim partition on his mother's death. 8 R 524=Ind Rul (1931) Rang 71=129 I C 503

## BUDDHIST LAW (BURMESE) (Contd.)

## (24) Succession (Contd.)

—Where a person divorces his wife from whom he has a daughter, the daughter is an heir so long as she continues to be in filial relationship with him and his marriage will not give her any right to partition. A I R 1931 Rang 302.

—Of the inherited lettetpwa property of the marriage of father, and step-mother, step-mother is entitled to one-half share as against children of father's former wife.

Ind Rul (1931) Rang 257=133 I C 481

—Where the two wives of a Burmese Buddhist lived separately, the children by one wife are not entitled to succeed to a share in the estate left by the other wife at her death. A I R 1931 Rang 67=8 R 590

=Ind Rul (1931) Rang 114=131 I C 50 (2)

—In Burmese Buddhist Law the shares to which heirs become entitled by reason of an event giving them a right to partition become vested in those heirs from the date on which the right to partition arises.

A I R 1931 Rang 302.  
—Appathitta child takes half and relatives the other half of the property in the absence of natural or kittima child.

A I R 1925 Rang 178=2 R 661=85 I C 286.

—The relative of a deceased married person being maintained by him during the life time of such person receives the share of the deceased.

A. I. R. 1925 Rang 34=2 R 328=84 I C 956.

—Even though plaintiff's grandmother on whom the amount of share depends, died before the propositus, limitation runs from the latter's death. A I R 1925 Rang.

80=2 R 514=84 I C 918.

—Living separate does not affect the grand-children's right of inheritance. A I R 1925 Rang 80=2 R 514=84 I C 918.

—Once the right to inherit is proved mere separate residence of minors and consequent not making funeral ceremonies does not divest it. A. I. R. 1925 P. C. 29=3 R. 29=52 I A 73=29 C. W N 824=47 M. L. J. 853=(1925) M. W. N. 23=3 Bur. L. J. 340=84 I C 899.

—A younger half brother or half sister is preferred to the deceased's elder brother's son. A. I. R. 1924 Rang 367=3 Bur. L. J. 137=84 I C 279

—Heirs claiming through husband and wife take per capita and not per stirpes. A. I. R. 1924 Rang 367=3 Bur. L. J. 137=84 I C 279.

—Younger child though eldest son has no orasa status. A. I. R. 1924 P. C. 238=2 R. 693=51 I A 334=48 M. L. J. 1=3 Bur. L. J. 304=29 C W N. 653 (P. C.)=84 I C 567

—Children of second marriage are not heirs against their mother on the father's death. A. I. R. 1924 Rang 298=2 R 123. =83 I C 426

## BUDDHIST LAW (BURMESE) (Contd.)

## (24) Succession (Contd.)

—An orasa son can have partition of  $\frac{1}{4}$ th joint property within 12 years of the death of his father. A I R. 1924 Rang. 323=2 R. 168=83 I C. 550.

—Grand-children who have lost their parents before grandparents take per capita. A. I. R. 1924 Rang. 73 (F B)=1 R 316. =83 I C. 10.

—Children by first marriage have no share after partition. A. I. R. 1924 P. C. 88=51 I. A. 1=19 L. W. 477=51 C. 374=46 M L J 618= (1924) M W N 662=3 Bur. L. J. 333=29 C. W. N. 559=5 R. 175 (P. C.) 80 I C. 1031.

—A mother inherits in preference to the sister though joint when the minor dies. A. I. R. 1929 Rang. 148=7 R. 75=Ind. Rul. (1929) Rang. 221=117 I. C. 589.

—Children or grand-children exclude great grand-children entirely from inheritance. A. I. R. 1928 Rang. 139=6 R. 355 =113 I. C. 142.

—The guardian of a lunatic inheriting some property, is not entitled to it after the lunatic's death. A. I. R. 1928 Rang. 300=6 R. 485=113. I. C. 808.

—The heirs of an orasa son can claim one-fourth share of the property. A I R 1928 Rang 258=6 R 318=112 I C 233

—After the death of both the parent and step-parent, children by first marriage can sue for share. A I R 1928 Rang 225 =6 R 427=112 I C 413

—During the first marriage, the dwelling house being burnt down, and during the second marriage the husband obtained a lease of the site from Government it was held that—Land was the lettetpwa property and children by the first marriage were entitled only to one-eighth. A I R 1928 Rang 236=6 R 234=111 I C 17

—Congenital idiots have a right to share inheritance fully. A I R 1928 Rang 130=6 R 128=110 I C 729

—Disinheritance by revengeful conduct is explained A I R 1928 P C 197=55 M L J 95=6 R 520=28 L W 129=48 C L J 177=33 C W N 70=110 I C 396

—All equally related heirs have equal shares, each in his own right. A I R 1928 Rang 67=5 R 747=107 I C 167

—A junior co-wife has no claim over the property inherited by senior wife from parents. A I R 1927 Rang. 277=5 R 448=105 I C 247

—A daughter living with her maternal grandmother, and receiving some monetary provision from her father on his accidental visit has the right to inherit to her father even though her mother made a re-marriage A I R 1927 Rang 250=5 R 359=105 I C 45

—A daughter can have interest in her father's property acquired during coverture

## BUDDHIST LAW (BURMESE) (Contd.)

## (24) Succession (Contd.)

only. A I R 1927 Rang 143=5 R 125=6 Bur L J 55=101 I C 634

—The right of children to inherit is not affected by the divorce of parents. It depends on the presence or absence of filial relations. A I R 1927 Rang 250=5 R 359=105 I C 45

—The right of inheritance of an adopted son is not affected by living separate unless there is a severance of filial relationship. A I R 1927 Rang 195 =6 Bur L J 10=100 I C 1007

—A step-child has to prove the resumption of filial relations when taken away by one of the spouses on divorce in order to become an heir. A I R 1927 Rang 40=4 R 412=5 Bur L J 193=99 I C 387

—Kittama adopted son cannot claim quarter share. A I R 1926 Rang 148 (F B)=4, R 184=5 Bur L J 122 (F B)=98 I C 621

—Eldest adopted child can claim as orasa. A I R 1926 Rang 146=5 Bur L J 70=98 I C 565

—On the remarriage of the surviving parent, younger children collectively take  $\frac{1}{4}$ th share and the eldest takes quarter as auratha. A I R 1926 Rang 211=4 R 207=98 I C 4

—A succession certificate for the Buddhist son's property cannot be obtained by a Matomedan father A I R 1927 Rang 31=5 Bur L J 111=98 I C 155

—Nephews and nieces are preferred to uncles and aunts. A. I. R. 1926 Rang. 113 (F B)=4 R 27=5 Bur L. J. 51. =95 I C. 918

—The elder brothers and sisters are excluded from inheriting to a deceased brother or sister by younger brothers and sisters. A. I. R. 1926 Rang. 142=4 R. 62=96 I C. 370.

—By S. 115 of the Evidence Act, a son's widow is not estopped from questioning the agreement between the father and the son to, exclude heirs from inheriting the property against law. A. I. R. 1926 Rang. 131=5 Bur. L. J. 56=95 I C. 879

—The eldest daughter has a right to her share as orasa in spite of her living separately from the father and failing to assume her dead mother's duties. A. I. R. 1923. Rang 271=2 Bur L. J. 138=1 R 370. =76 I. C. 814.

—A minor son cannot become an orasa son because the doctrine of the orasa son depends on his being a substitute of his father. A. I. R. 1925 Rang 245=4 Bur L. J. 67=94 I C. 531.

—The surviving husband of a surviving daughter is treated as one of the heirs of the father. A I R 1926 P C 29=4 R



## BUDDHIST LAW (BURMESE) (Contd.)

## ( 24 ) Succession (Contd.)

513=( 1926 ) M W N 489=3 O W N 735=94  
I C 916

—Children or grand children are preferred to great grand children in the matter of succession. A I R 1926 Rang 4=3 R 464=91 I C 684

—Step-child of an inferior wife living separate is not entitled to succeed to step-parent. A I R 1926 Rang 69=3 R 521=93 I C 87

—Representation is not a principle of Buddhist Law. Partial representation allowed to grand-children in competition with children is an exception. A I R 1926 Rang 4=3 R 464=91 I C 684

—An orasa has the right to claim one half share in the joint property of the step-parent even though he did not take his share on the death of the surviving parent. A I R 1926 Rang 23=3 R 438=91 I C 653

—An orasa has the right to share on the death or remarriage of the surviving parent even if the Orasa takes his share on the death of his parent. A I R 1926 Rang 23=3 R 438=91 I C 653

—A Burman marrying more than once and dying leaving Huapazan property has no issue of last marriage—Step-children take 1-6th, if there is an issue of last marriage they take 4th only. A I R 1925 Rang 340=3 R 549=4 Bur L J 189 (F B)=90 I C 341

—Father's cousin is excluded by mother's half sister. A. I. R. 1925 Rang. 231=3 R. 86=89 I C. 447.

—Father's younger sister is preferred to mother's sister's son. A. I. R. 1925 Rang 235=4 Bur. L. J. 88=3 R. 271=88 I C. 657.

—A daughter has no right to the lettetpwa property in the presence of her father who has a right to half share with the son of the first marriage of the deceased woman. A I R 1925 Rang 120=3 Bur L J 225=2 R 521=86 I C 496

—An inferior wife loses her right to succeed her husband by living separate. A I R 1924 Rang 105=2 Bur L J 292=2 R 62=79 I C 501

—Children must exercise their right in parent's estate before the latter's death and their right is not vested after remarriage. A I R 1923 Rang 239=I R 363=2 Bur L J 109=76 I C 612

—Pongy's right to inherit is not revived on his abandoning religious principles. A I R 1925 Rang 150=4 U B R 159=76 I C 161

—A wife's right to inherit the husband's property is not affected by living separate. A I R 1923 Rang 150=2 Bur L J 58=75 I C 200

## BUDDHIST LAW (BURMESE) (Contd.)

## ( 24 ) Succession (Contd.)

—The share of grand-child as against grandmother is half of "pay in" and one-eighth of "lettetpwa."—A I R 1923 Rang 171=1 R 34=74 I C 104

—A child without breaking the filial relation can succeed the father even though living at every interval with either the father or the divorced mother. A I R 1923 Rang 206=1 R 42=74 I C 100

—Inferior wife must prove her rights. A I R 1924 Rang 37=1 R 1=73 I C 1044

—Children of one marriage do not have any interest in property of other marriage. A I R 1931 Rang 67=8 R 590=Ind Rul (131) Rang 114=131 I C 50 (2)

—S 308 of Kinwun Mingyi's Digest enables the relatives of husband and wife to inherit half interest of each irrespective of nearness of relatives on one side as against those on other. A I R 1930 Rang 237=Ind Rul (1931) Rang 92=129 I C 524

—Per capita or stirpes—Division of the deceased's estate between his nephews and nieces is to be per capita and not per stirpes. A I R 1930 Rang 237=Ind Rul (1931) Rang 92=129 I C 524

—The general rules of partition—applicable to ordinary joint property applies also to the undivided ancestral property. A I R 1931 Rang 32=8 R 524=Ind Rul (1931) Rang 71=129 I C 503

—An only daughter can claim 4th share in the joint property on her father's death and on her mother's remarriage even though minor at the time of the former but major when the mother re-married. A I R 1930 Rang 319=Ind Rul (1931) Rang 25=128 I C 377

—Out of property taken to later marriage, child of earlier marriage as heir takes 4th share and out of jointly acquired property of later marriage 1/8th. A I R 1930 Rang 190=Ind Rul (1930) Rang 389=127 I C 597

—A child loses the right of inheritance if through a conflict filial relations between the father and the child are shattered. A I R 1930 Rang 146=Ind Rul (1930) Rang 356=127 I C 372

—Where female holder of Ayo dies leaving full brother's daughter and half sister former is entitled to succeed in preference to latter. A I R 1930 Rang 148=8 R 17=Ind Rul (1930) Rang 238=125 I C 333

—A daughter born after the divorce between her parents and taken by father at the age of five is entitled to inherit in spite of the remarriage of the mother.

## BUDDHIST LAW (BURMESE) (Contd.)

## (24) Succession (Contd.)

A I R 1930 Rang 264=Ind Rul (1930) Rang 349=127 I C 173

—A daughter has the right to inherit the father's property in the absence of widow or other children even though she has no filial relationship with the father who is separated from the mother. A I R 1930 Rang 161=Ind Rul (1930) Rang 322=126 I C 642

—Full nephew or nieces and half blood sister or brother have equal right of inheritance. A I R 1930 Rang 75=8 R 23=Ind Rul (1930) Rang 263=125 I C 343

—Elder brother or sister is excluded by younger brother or sister but the children of the former are not excluded by those of the latter of the deceased. A I R 1930 Rang 59=7 R 81=Ind Rul (1930) Rang 136=121 I C 808

—A son living separately with the consent of his parents and always assisting them in any family crisis, is still orasa. A I R 1929 Rang 365=7 R 569=Ind Rul (1930) Rang 106=121 I C 778

—The child of the first marriage is entitled to  $\frac{1}{4}$ th and step mother to  $\frac{1}{4}$ th of the pay in property on a person inheriting it after the death of his first wife. A I R 1929 Rang 253=7 R 578=Ind Rul (1930) Rang 102=121 I C 774

—Children by first wife are entitled to  $\frac{1}{4}$ th and those by third to  $\frac{1}{4}$ th share on a suit after person's death by children by third wife against children by first wife of share in first wife's inherited property. A I R 1929 Rang 343=7 R 526=Ind Rul (1930) Rang 69=120 I C 901

—On the death of a surviving parent, having children, Orasa son cannot get the remainder when he has already obtained his share on father's death. A I R 1929 Rang 282=7 R 409=Ind Rul (1930) Rang 46=120 I C 670

—Even though a step-grand child has obtained his share on his grand father's death, still a nephew is excluded from succeeding to the property of the step grand-mother. A I R 1929 Rang 137=7 R 459=Ind Rul (1929) Rang 244=118 I C 404

—Half brothers and sisters are preferred to grand parents as succession cannot ascend. A I R 1923 Rang 124=1 Bur L J 263=11 L B R 460=72 I C 4

—Cogent evidence of general repute is essential when a claimant has no blood relations with the deceased. A I R 1923 Rang 171=1 R 34=74 I C 104

—Two months and fourteen days is not a short period to come within the provisions of the exceptional rule of

## BUDDHIST LAW (BURMESE) (Contd.)

## (24) Succession (Contd.)

succession. A I R 923 Rang 1 136=11 L B R 376=1 Bur L J 253

—An inimical act of disobedience bars the succession. A thwanokta son is a dogson, incorrigible and at enmity. A I R 1922 U B 12=4 U B R 104=70 I C 904

—Collaterals and step-grand children have equal shares in the joint ancestral property only. A I R 1922 L B 29=1 Bur L J 56=70 I C 855

—A Chinese Buddhist heir is proper. Heirs may or may not be of the same religion or nationality. A I R 1922 L B 29=1 Bur L J 56=70 I C 855

—The filial affection is not affected by the child living separate. A I R 1922 L B 29=1 Bur L J 56=70 I C 855

—Separate residence and different nationality are no bars to succession. A I R (1922) L B 29=70 I C 855

—The eldest born child either the son or the daughter is orasa which is decided before death of a parent and is attained prior to the parent's death in the midst of brothers and sisters. 11 L B R 220=68 I C 49

—An orasa son after his father's death has a right to recover  $\frac{1}{4}$ th of the property with mesne profits. 11 L B R 292=67 I C 769

—On the remarriage of the father the Auratha son can have one fourth share in the property jointly acquired by his parents. A I R 1921 L B 68=11 L B R 199=66 I C 538

—The step-mother's separate property can be inherited by the step-son to the exclusion of the collaterals and the parents of the step-mother. 10 L B R 396=13 Bur L T 216=64 I C 415

—On the father surviving and not remarrying, the fact that the eldest son has his usual right to claim  $\frac{1}{4}$ th share of the parent's joint property is unauthorized. 13 Bur L T 207=64 I C 23

—Step-brothers are preferred to the mother's sister of the deceased. A I R 1921 U B 21=4 U B R 20=63 I C 841

—Property inherited by one wife during marriage is available only to her children after her and her husband's death. (1921) 4 U B R 11=63 I C 814

On the death of a husband and wife within a short period not exceeding one month, the surviving parents of both share the joint-acquired property of the former. 10 L B R 288=13 Bur L T 194=63 I C 715

—A son of second marriage takes in his own right  $\frac{1}{4}$ th share in the huapazon property of first marriage. (1920) 3 U B R 272=63 I C 28

**BUDDHIST LAW (BURMESE) (Contd.)****( 24 ) Succession (Concl'd.)**

—A step-child is entitled to  $\frac{1}{4}$ th property of his mother and step-father in the absence of any children of that marriage, or if any other marriage but he has no share in the property jointly acquired by the step-father along with another wife (1920) 3 U B R 237-60 I C 7

**(25) Widow**

—Subject to specific rights of others, a widow can absolutely dispose of her property. 9 Bur L T 56-31 I C 948

—Widow inherits in preference to a son A I R 1929 P C 246-7 R 388-50 C L J 192=(1929) M W N 682-34 C W N 117-Ind Rul (1929) P C 229 (P C)=117 I C 29

—An inequitable contract cannot be specifically enforced and the doctrine of part performance is not applicable in such a case. A I R 1929 Rang 335=Ind Rul (1930) Rang 344=127 I C 168

—A widow has right to alienate half of the Hiapazone property in any way she likes but as regards the other half, necessity is to be proved by the alienee. 17 I C 956-5 Bur L T 170

—Widow's power of disposal of her husband's and her own property is absolute under the Burmese Buddhist Law. 9 Bur L T 56-31 I C 948

—A Burmese Buddhist widow has absolute disposing power with regard to the joint property of her husband except some specified property and one-fourth of the joint-property claimed by the eldest son. 8 Bur L T 203-8 L B R 501-30 I C 588

—The right of an auratha son to the joint property of his deceased mother and the widower father prevails upto  $\frac{1}{4}$ th share against a transferee from the widower. 8 Bur L T 25-8 L B R 115-27 I C 632

**( 26 ) Will.**

—The Burmese Buddhist law recognizes only one form of succession i. e., intestate succession; and testamentary succession is opposed to the fundamental principles of the Burmese Buddhist law. It is therefore contrary to the principles of Burmese Buddhist law that a Burman Buddhist by means of what is, or is in effect, testamentary disposition, should attempt to evade the rules of succession and inheritance prescribed under the personal law to which he is subject. 10 R 224 (226, 231)=139 I C 278=A I R 1932 R 104=I R 1932 R 179=A L R 1932 R 249

**BUDDHIST LAW (BURMESE) (Contd.)****( 26 ) Will (Concl'd.)**

A will is almost unknown to the Burmese. 11 Bur. L T 234-50 I C 522

—A Chinese Buddhist is entitled to make a will A. I. R. 1930 Rang 192=Ind Rul (1930) Rang 385=127 I C 593

—A document being in the nature of a will is invalid if it makes a departure from legal devolution. A. I. R. 1927 Rang 271-5 R. 371=105 I C. 51

—A Burman Buddhist cannot make a will. A. I. R. 1925 Rang 8-2 R 388-84 I. C. 385

**(27) Miscellaneous**

—Children of first marriage are entitled to  $\frac{1}{4}$ ths of property brought to second marriage on the death of their father and  $\frac{1}{4}$ th of their lettetpwa of first marriage (1915) 11 U B R 74=31 I C 94

—Burmese Buddhist Law regarding delivery is abrogated by s 123; T P Act A I R 1924 Rang 13-1 R 351 (P C)=75 I C 166

—Hindu Law and Buddhist Law are not similar. In the latter there being no joint inheritance suit for partition does not lie but only suit of Administration lies. A I R 1928 Rang 73-5 R 785=108 I C 809

—“Custodian” literally means the person in possession of the estate and “partition” means separation A I R 1928 Rang. 73-5 R 785=108 I C 809

—Conduct of parties is relevant to explain a deed capable of several meanings though it may not vary or alter the deed. A I R 1924 P C 88-29 C W. N 559-5 R 175-51 I A 1-19 L W 477-51 C 374-46 M L J 618= (1924) M W N 662-3 Bur L J 333-80 I C 1031

—For the proof of relationship the fact of general reputation is relevant A I R 1923 Rang 171-1 R 34-74 I C 104

—In the absence of children, the grand children of the deceased have the same rights as children 8 Bur L T 283-8 L B R 392-41 I C 332

—When trustees are empowered to settle disputes relating to the possession of kyaung they can appoint successor to the head of kyaung. A I R 1929 Rang 372=7 R 245=Ind Rul (1929) Rang 257=118 I C 609

**BUDDHIST LAW (CHINESE)**

—In the case of adoption by a Chinese widow consent of male relations of husband is necessary 9 Bur L T 187-34 I C 99

—Chinese customary law allows to testamentary power to a Chinese Buddhist. 13 Bur L T 18-57 I C 993

## BUDDHIST LAW (CHINESE) (Contd.)

—Chinese widow marrying a Burman does not become Burman. A I R 1923 Rang 180=1 R 161=2 Bur L J 79=74 I C 933

—A Chinaman's son from a Burmese wife becoming Burmese in dress and habits, but retaining Chinese worship and funeral rites retains Chinese customs. A I R 1930 Rang 218=Ind Rul (1930) Rang 365=127 I C 381

—Chinese domiciled in Burma are governed by customary rules of inheritance even though in conflict with Burmese Buddhist Law, and have testamentary powers. A I R 1929 R 22=6 R 623= I R (1929) R 81=114 I C 513

—Burmese Law governs Chinese Buddhist domiciled in Burma. A I R 1927 R 299=5 R 443=105 I C 244

—Letters of administration must be obtained by heirs. I R 1930 R 365=127 I C 381=A I R 1930 R 218

—Marriage by a Chinese widow after the mourning period is valid. A I R 1923 Rang 180=2 Bur L J 79=1 R 161=74 I C 933

—A Chinese widow is entitled to Letters of Administration for benefit of adopted son. 12 Bur L T 69=10 L B R 23=51 I C 608

—A Chinese Buddhist widow's Share in husband's estate is one-third in absence of any customary law.

—Alienation by a mother of minor's property is valid to the extent of her interest in it. 13 Bur L T 9=57 I C 883

—Mere refusal to reside in family house by a Chinese Buddhist widow cannot deprive her of her right to maintenance. 9 Bur L T 187=8 L B R 404=34 I C 99

—A Burman widow of a Chinaman leaving Children by Chinese wife administering the estate for herself and the Children can mortgage it for necessity A I R 1930 P C 26=(1930) M W N 149=31 L W 576=58 M L J 178=57 I A 38=8 R 172=Ind Rul (1930) P C 41 (P C)=121 I C 233

—A daughter born of a Chinaman and Burmese lady gets one-fourth share in her mother's estate under succession Act if she died as Chinese or under Burmese Buddhist Law if she died as Burmese. A I R 1930 Rang 222=Ind Rul (1930) Rang 362=127 I C 378

—The Indian Succession Act is not applicable to Chinese Buddhist, but under s. 13 of the Burma Laws Act, the Buddhist law is applicable. 7 Bur L T 246=8 L B R 222=24 I C 357

—Burmese wife of a Chinese Buddhist husband adopting Chinese customs is governed by Chinese Law. A I R 1924 Rang 219=2 R 94=80 I C 749

## BUDDHIST LAW (CHINESE) (Concl'd)

—Under the Chinese Buddhist Law the heirs are bound to maintain unmarried daughters. 11 Bur L T 224=50 I C 543

—Consent of girl's parent's validates a marriage by a Chinese Buddhist after elopement. Consent of his father is not necessary. 8 Bur L T 198=8 L B R 208=30 I C 715

—No ceremony or form is indispensable for a valid Chinese marriage. Long-cohabitation raises a presumption of valid marriage. 9 Bur L T 81=32 I C 848=8 Cr L R 357=17 Cr L J 112=8 L B R 225

—No ceremony except betrothal, receipt of presents by brides family and handing over of wife, is essential for a valid marriage. Long co-habitation and repute raise a presumption of marriage. A I R 1926 Rang 90=5 Bur L J 17=96 I C 762

—Person alleging that son born of a Chinese father and Burmese mother is a Buddhist must prove it A I R 1930 R 218=I R 1930 R 365=127 I C 381

—Sons share equally their father's property. On failure of sons, the property goes to daughters; and widow succeeds only on the failure of sons and daughters. Chinese widow remarried to a Burmese Buddhist is governed by customary Law of Chinese Buddhist, and as such on her death children succeed by turn to the property of her first husband, while the property belonging to her at the time of marriage goes to her second husband. A I R 1923 R 180=1 R 161=2 Bur L J 79=74 I C 933

—On failure of natural children or adopted son of a Chinese Buddhist a Burmese girl adopted by him succeeds to his property. But his agnates will exclude her if she is a stranger. 13 Bur L T 132=61 I C 684

—Children exclude widow from inheritance. A I R 1923 Rang 236=2 Bur L J 102=79 I C 244

—On failure of sons by principal wife sons by secondary wife or concubine inherit. A I R 1926 Rang 90=5 Bur L J 17=96 I C 762

—Acquisition of rights by wife in the property acquired with joint funds of the husband and wife after marriage is doubtful. A I R 1926 Rang 172=4 R 110=97 I C 876

## BUILDING.

See also cases under :—

- (1) Co-owners
- (2) Injunction
- (3) Landlord and tenant—Alteration of conditions of tenancy
- (4) Municipal Acts (Provincial).
- (5) T. P. Act S. 51.
- (6) Rent Acts (Provincial).



**BUILDING (Conold)**

—Contract. 18 Bom L R 156=33 I C 701

**BUILDING AND IMPROVING ON ANOTHER'S LAND**

See also Acquiescence.

See also Improvements.

—Equitable estoppel. Evid. Act s. 115  
A I R 1931 P C 79

—Upon land of another—Estoppel—  
Limitation Act, 1908, art. 149, 13 Bom L  
R 92=9 Ind Cas 765

**BUILDING LEASE.**

See Lease

**BUILDING ON LAND WITHOUT TITLE.**

See Building and improving on  
another's land.

**BUILDING SITES.**

See also (1) Municipal Acts.

(2) Rent Acts.

**BUNDELKHAND INCUMBERED ESTATES ACT  
(U. P. I OF 1903)**

—S. 10 (2)—Creating wakf is included  
in "Give." A I R 1928 All 516=51 A 40  
=26 A L J 1180=111 I C 583

S. 12—Release of some of several  
Co-mortgagors from debt, breaks up the  
integrity of the mortgage as regards them.  
A I R 1926 A 136=L R 6 A 496 (civ)=89  
I C 574.

—S. 12—Proceedings in which plaintiff's  
next friend is also acting as the agent of  
the opposite party are irregular A I R  
1924 All 294=21 A L J 793=L R 5 A 55  
Civ=77 I C 753

—Ss. 12 and 48—Discharge of debt  
under S. 12 of Bundelkhand Incumbered  
Es. Act. entitles mortgagor to recover  
mortgaged property. 39 I C 182

—S. 13—No bond by a disabled pro-  
prietor arranging an unauthorised mode of  
payment of the sum awarded by the Special  
Judge is valid A I R 1921 All 406=19 A  
L J 645=3 U P L R (All) 112=63 I C 542

**BUNDELKHAND LAND ALIENATION ACT  
(II OF 1903)**

—S. 18—Being enexhaustive possession  
can be obtained by proprietor otherwise  
than under it. A I R 1926 All 136=L R 6  
A 496 Rev=89 I C 574

—Alienations between members of  
same tribe permanent or otherwise are not  
governed by the Act. A I R 1926 All 617  
(F B)=49 A 8=24 A L J 945=97 I C 455

—Judgment-debtor can object that  
property, attached by decree-holder under  
a declaration that it belonged to him and  
was thus liable to attachment and sale, is  
not liable to be sold under the Act. A I  
R 1924 All 261=L R 4 A 607=21 A L J  
917=79 I C 532

**BUNDELKHAND LAND ALIENATION****ACT (II OF 1903) (Contd)**

—Defendants setting up rights of  
occupancy, cannot be ejected by plaintiff  
unless he proves his claim to eject the  
former as his sub-tenants. L R J A  
459 (Rev)

—When there is no difficulty in marking  
an exact area of land, person alleging that  
it is incapable of identification must  
prove it. 4 U P L R (B R) 50

—A sub-tenant pleading occupancy  
rights in a suit in ejectment by a recorded  
tenant must prove it. L R J A 54 (Rev)

—S. 2—"Land" does not include trees  
apart from land. A I R 1925 All 587=L R  
6 A 277 Civ=87 I C 262

—S. 3—Pre-emptor, not entitled to  
purchase property under S. 3 of Bundelkh-  
and land Alienation Act, is not entitled  
to a decree for pre-emption. 37 All 662=  
13 A L J 949=30 I C 949

—S. 3—Collector's sanction is necessary  
to confirm sale by pre-emption under S. 3  
of Bundelkhand Land Alienation Act. 37  
All 467=13 A L J 662=30 I C 404

—S. 3, 1 (a)—Alienation to a member  
of same agricultural tribe and resident of  
same District does not require Collector's  
sanction. 115 I C 650

—S. 3—No title as against an agricul-  
turalist can be acquired by a non-agriculturi-  
st benami purchaser A I R 1928 All 511=  
26 A L J 673=L R 9 A=200 Rev. Ind Rul  
(1929) All 426=115 I C 650

—Ss. 3, 16 (A)—A co-sharer who is  
not member of same agricultural tribe as  
that of vendor, cannot pre-empt against  
a vendee though not a co-sharer but is mem-  
ber of same agricultural tribe as vendor  
A I R 1928 A 186=50 A 430=26 A L J 142  
=107 I C 570

—S. 4—The power to determine by  
notification in the Gazette who are to be  
deemed agricultural tribes comprehends  
power to amend, vary or rescind any  
notification whatsoever. A I R 1930 All  
856=14 R D 586=Ind Rul (1931) All 121=L  
R 11 A 256. Rev=(1931) A L J 45=128  
I C 825

—S. 4—Power to determine by notifica-  
tion what tribes are to be deemed as  
agricultural, implies power to amend, vary,  
or rescind any notification A I R 1930 All  
856=14 R D 586=(1931) A L J 115=L R 11  
A 256 Rev=Ind Rul 1931 All 131=128 I C 825

—S. 4—"Brahmans" include Brahmo  
Bhats. A I R 1927 all 486=49 A 887=25 A L J  
678=101 I C 844 (1)

S. 4—An order under S. 4 is deemed  
to operate retrospectively. A I R 1929 All  
421=(1929) A L J 441=51 A 780=121 I C 211

—Ss. 4 & 9 (5)—No mortgage-decree  
can be passed by Court against an agricul-



## BUNDELKHAND LAND ALIENATION

## ACT ( II OF 1903 ) (Contd)

trustee protected by Bundelkhand Alienation Act, by a court, but the case must be referred to Collector to be dealt with as provided by the Act, 41 All 44=17 A L J 294=50 I C 424

—S. 9—Mortgage simple by member of agricultural tribe—Suit to enforce, by sale of mortgaged property—Reference of matter by Civil Court to Collector under S. 9, on the ground that a decree for sale was prohibited by S. 16—Return by Collector of, on ground that, as both mortgagor and mortgagee were members of an agricultural tribe, S. 9 was inapplicable—Full Bench decision of High Court, on a reference by Civil Court under O. 46, r. 1 C. P. C., agreeing with Collector—Civil Court's order on directing the case to be consigned to record room—Amounts to decree dismissing suit. 54 A 482 (488-9)=1932 A L J 584=I R 1932 A 550=139 I C 170=A I R 1932 A 614=A L R 1932 A 1210

S. 9—Ordinarily a suit for sale of the mortgaged property terminates either in dismissal or in a decree under O. 34, r. 4, of the Code of Civil Procedure. In cases in which the mortgagor is a member of an agricultural tribe and the Bundelkhand Land Alienation Act, applies a third course is possible namely a reference to the Collector who can take action under S. 9. In such a case the final order of the Civil Court is a reference to the Collector and no further proceedings can take place before the Court which, ex hypothesi, cannot pass a decree for foreclosure or sale. 54 A 482 (487-8)=1932 A L J 584=139 I C 170=I R 1932 A 550=A I R 1932 A 614=A L R 1932 A 1210

—S. 9—Reference by Civil Court to Collector under—"Return" of reference by Collector—No provision in Act as to. If the Collector cannot take action under S. 9 the proceedings before him terminate. 54 A 482 (485)=1932 A L J 584=139 I C 170=I R 1932 A 550=A I R 1932 A 614=A L R 1932 A 1210.

—S. 9—Collector finding that a person is not entitled protection as agriculturist under Bundelkhand Alienation Act, a foreclosure suit filed against him, must be continued and decided by Civil Court. 36 All 376=12 A L J 503=25 I C 400.

—S. 9 (3)—Though S. 9 (3) is applicable even after decree still action should be taken before decree. A I R 1926 All 136=48 A 67, 23 A L J 927=L R 6 A 453 Civ=88 I C 484.

—S. 9 (3)—Even where a decree is made absolute S. 9 (3) is applicable. A I R 1925 All 171=L R 6 A 101 Civ.=82 I C 1037

—Ss. 9 (1) 10 & 16—Simple mortgage between members of same tribe is not governed by Ss. 10 and 16. A I R 1929

## BUNDELKHAND LAND ALIENATION

## ACT ( II OF 1903 ) (Contd)

All 421=( 1929 ) A I J 448=51 A 780=Ind Rul (1930) All 99=121 I C 211.

—S. 9—Mortgage between members of same tribe is not governed by s. 9. A I R 1926 All 617 (F B)=49 A 48=24 A L J 945=97 I C 455.

—S. 11—Money decree against assets of deceased Hindu to whom Act applicable—Execution of—Lease of property of deceased in accordance with S. 11—Execution of decree by giving—Permissible. 1932 A L J 562=140 I C 292=I R 1932 A 636=A I R 1932 A 571=A L R 1932 A 770

—S. 16—The character of an agriculturist under the Act is a creation of the notification of the Local Government under s. 4 and that character does not exist outside the notification. A I R 1930 All 856=Ind Rul (1931) All 121=14 R D 586=L R 11 A 256 Rev=(1931) A L J 45=128 I C 825.

—S. 16—A preliminary decree for sale was made on a mortgage executed by two brothers of a Joint Hindu family. Before final decree they were declared by Government notification as agriculturists. Held, that the final decree came within the purview of s. 16, and that the sharer of the two brothers only in the joint property could not be sold but also the sharer of the brothers could be sold under the final decree. A I R 1930 All 856=Ind Rul (1931) All 121=14 R D 586=L R 11 A 256 Rev=(1931) A L J 45=128 I C 825.

—S. 16—Section 16 bars any remedy by sale in execution of a simple mortgage whether the mortgagees are agriculturists or non-agriculturists. (1930) A L J 1558=Ind Rul (1931) All 301=53 A 137=130 I C 637.

—S. 16—No character of an agriculturist exists outside the notification. A I R 1930 All 856=1 R D 586=(1931) A L J 45.=L R 11 A 256 Rev=Ind Rul (1931) All 121=128 I C 825.

—S. 16—bars an execution sale of property of a person declared agriculturist by notification after preliminary but before final mortgage—decree against him. A I R 1930 All 856=11 R D 586=(1931) A L J 45=L R 11 A 256 Rev=Ind Rul (1931) All 121=128 I C 825.

—S. 16—Whether mortgagee is agriculturist or not Sales in execution of a simple mortgage are barred by s. 16. Ind Rul (1931) All 301=(1930) A L J 1558=130 I C 637.

—S. 16—operates retrospectively. A I R 1929 All 42=(1929) A L J 418=31 A 780. Ind Rul (1930) All 99=121 I C 211.

—S. 16—bars a sale of property of agriculturist in execution of any decree of civil or Revenue Court Sale by public auction of property of agriculturist under

**BUNDELKHAND LAND ALIENATION****ACT (II OF 1903) (Concl'd.)**

the Bundelkhand Encumbered Estates Act and purchase of it by Govt. are governed by s. 29. A I R 1928 All 211=L R 9 A 130 Rev-Ind Rul (1929) All 500=116 I C 20.

—S. 16—Sale can be objected until the property is sold. A I R 1927 All 486=49 A 887=25 A L J 678=L R 8 A 187 Rev=101 I C 844 (1).

—S. 16—does not govern temporary alienations between members of the same tribe. A I R 1926 All 617=49 A 8=24 A L J 945=97 I C 455.

—S. 16—No decree for sale upon a mortgage between members of the same tribe can be passed in favour of mortgagee but he can get a foreclosure decree. A I R 1926 All 617=49 A 8=24 A L J 945=97 I C 455.

—S. 16—bars a Sale of agricultural land in execution and also the transfer of the decree to Collector for realising the amount otherwise than by sale. A I R 1926 All 339=48 A 392=24 A L J 397=93 I C 1020.

—Ss. 16, 17—Property of agriculturist unsaleable under Bundelkhand Alienation Act does not vest in receiver on his insolvency. 42 All 142=18 A L J 59=58 I C 551.

—S. 16—Trees belonging to the groves of judgment debtor grove holder can be sold in execution of a decree. A I R 1925 All=587 L R 6 A 277 Civ=87 I C 262.

—S. 16 A—Except where Vendor is not a member of agricultural tribe, or where the pre-emptor belongs to the same agricultural tribe as the Vendor pre-emption is not allowed without previous sanction of Collector. I R 1929 A 825=118 I C 233.

—S. 16 A—No substantive right is created by Collector's sanction, but it is needed for the exercise of existing Substantive right. A I R 1928 All 186=50 A 430=26 A L J 142=107 I C 570.

—S. 17—Mortgage deed executed by Collector on behalf of a private party is not exempted from Stamp duty. 38 All 351=14 A L J 422=34 I C 280 (F B).

—Ss. 17, 6 & 22—Collector has no powers to make partition behind back of Co-sharers where Collector acts beyond his powers Civil Court has jurisdiction. A I R 1923 All 458=21 A L J 335=45 A 450=L R 4 A 197 Civ=74 I C 666

**BUNDELKHAND LAND ALIENATION AMENDMENT ACT 7 OF 1929.**

—Retrospective operation of—Deeds executed before Act but sought to be enforced after Act—Act whether has no retrospective effect as regards Quere. 54 A 482 (489)=1932 A L J 584=139 I C 170=I R 1932 A 550=A I R 1932 A 614=A L R 1932 A 1210

**BUNDELKHAND LAND ALIENATION****AMENDMENT ACT VII OF 1929 (Concl'd)**

—Retrospective operation of—Suits which had terminated before Act was passed—Proceedings in—Revival of—Act has no retrospective effect so far as to operate as a 54 A 482 (489)=1932 A L J 584=139 I C 170=I R 1932 A 550=A I R 1932 A 614=A L R 1932 A 1210.

—Burgadars—If hired labourers. See 21 C W N 505=39 I C 934.

**BURIAL.**

—See also cases under C P Code S. 9.

—Right of cremation or of dead on land of another—cannot be acquired by prescription. 1932 P C L 846 (Civ.)=33 P L R 157=138 I C 325=I R 1932 L 464=A I R 1932 L 256=A L R 1932 L 846 (Civ)

**BURIAL GROUND.**

—See C P Code S. 9.

**BURMA.**

—Per Otter and Das, JJ.—The English law of accretion applies in Burma as a rule of justice, equity and good conscience provided that it is not excluded by the natural features, or by the nature of the tenure. The question must be considered in the light of all the material circumstances of the case, including the nature of the property, its growth and its user and, at the same time, the general conditions appertaining to rivers in Burma must be borne in mind. 10 R 1=137 I C 402=A I R 1932 R 27=I R 1932 R 106=A L R 1932 R 49.

—Burma Land and Revenue Act of 1876—S. 18—Rules framed under—Land granted for dhani cultivation under—Accretion to—Grantee's right to—Applicability of English law to case of.

Held by Otter and Das, JJ (Brown J dissenting) that there was nothing in the grants themselves or in the law contained in the Burma Land and Revenue Act of 1876 which, either directly or indirectly, prohibited a land-holder (in which position the grantee and his successors, including the appellant company were) from claiming title by accretion (69) 10 R 1=137 I C 402=A I R 1932 R 27=I R 1932 R 106=A L R 1932 R 49.

**BURMA BOUNDARIES ACTS V OF 1880**

—Ss. 5, 6, 11, 12—Decision of Boundary Officer, determines boundaries finally barring subsequent claim. 11 I C 916=4 Bur L T 201.

**BURMA CO-OPERATIVE SOCIETIES****ACT (VI OF 1927)**

—Ss. 47, 49—Where a suit by a member challenging an order of a liquidator was dismissed on the ground that the Civil Court had no jurisdiction and

**BURMA CO-OPERATIVE SOCIETIES ACT**(VI OF 1927) (*Concld*)

costs were awarded and the liquidator demanded an additional amount as costs which he had actually incurred and the member applied again contending that liquidator had no power to demand additional costs. Held, that the Court had no jurisdiction to entertain the application. A I R 1931 Rang 202=9 R 207=Ind Rul (1931) Rang 289=134 I C 497.

—S. 47 (2)—The Civil Court cannot entertain an application for execution of a holder of a decree against a Society in liquidation. He must apply to the liquidator. A I R 1931 Rang 65 (2)=8 R 585=Ind Rul (1931) Rang 112=130 I C 368

—S. 47 (2) (b)—Under the section the liquidator's jurisdiction is confined to a determination of debts payable by member or past members only. He cannot act under the section if debtor is a stranger. Even if his order is illegal ignoring the law of limitation the Civil Court cannot interfere. A I R 1931 Rang 72=8 R 581=Ind Rul (1931) Rang 119=131 I C 55.

—S. 47 (2) (b)—No revision lies against an order of a liquidator under S. 47 (2) (b) A I R 1929 Rang 113=Ind Rul (1929) Rang 243=118 I C 403.

—S. 47 (2) (b)—An appeal from the liquidator's order under s. 47 (2) (b) either to the Civil Court or to the Registrar of the Co-operative Societies suggested. A I R 1929 Rang 113=Ind Rul (1929) Rang 243=118 I C 403.

—Ss. 47 (4) 49—Orders of liquidator under S. 49 are not admissible to Dt. Judge Liquidator issuing order under S. 47 to pay up time-barred debts is acting within his powers. A I R 1929 Rang 192=Ind Rul (1930) Rang 2=120 I C 130.

—S. 49—In respect of claims against a Society in liquidation the Civil Court's jurisdiction is barred. Persons desiring to enforce claims against it must apply to the liquidator. A I R 1931 Rang 65 (2)=8 R 585=Ind Rul (1931) Rang 112=130 I C 368

**BURMA COURTS ACT XI OF 1922.**

—Land suit within S. 2 does not include a suit for rent, Suit whose value does not exceed Rs. 500 is subject to second appeal A I R 1926 Rang. 19=3 R 390.=91 I C 639

—S. 9 (1) (b)—Jurisdiction and forum are not effected by increase of claim in appeal. 1924 Rang 354=2 R 408=3 Bur. L. J. 207=86 I C 568.

—S. 11—second appeal against findings of fact—when competent. A L R 1933 R 62=A I R 1933 R 35=142 I C 829.

—S. 11—provides appeals in addition to appeals under s. 100, Civil P. C., A I R 1931 Rang 56=8 R. 485=Ind. Rul. (1931) Rang 50=128 I C 834

**BURMA COURTS ACT XI OF 1922 (*Concld*)**

—S. 11 bars a second appeal from an order setting aside sale under O. XXI. r. 92. A I R 1929 Rang 148=7 R 37=Ind. Rul. (1929) Rang 189=117 I C 253

—S. 26—Art. 182 Lim. Act governs execution of chief Court's decree by high court. A I R 1928 Rang. 317=6 R 566=Ind Rul (1929) Rang 66=114 I C 674.

**BURMA COURTS MANUAL**

—Para 307 (A) I—No commission on the amount of the mortgage money realised by sale of mortgaged property can be claimed by receiver A I R 1929 Rang. 168=7 R 126=Ind. Rul. 1929 Rang 214=117 I C 582.

**BURMA ELECTORAL RULES.**

—r r 36, 48—Perverse or unreasonable decisions by Election Commissioners in election matters can be interfered with by High Court under s. 45 Specific Relief Act. A I R 1927 Rang 324=5 R 504=6 Bur. L J 240=105 I C 428.

—R. 45—Governor can by notification set aside an election on Commissioner recommending a candidate's election void and also costs against him and can also make an order as to costs by subsequent notification. A I R 1928 Rang 293=Ind. Rul (1929) Rang 196=117 I C 57

—S. 56—Revenue Courts can entertain claims against Govt. only and not claims between rival proprietors cognizable by Civil Court, A I R 1925 Pat 68=5 P L T Sup. 1. (F B)=93 I C 454.

**BURMA FOREST ACT 4 OF 1902**

—S. 25. Selling timber does not include selling a house built with timber. 81 I C 75

—Ss. 33, 77—Licensee is liable for illegal acts of his servant acting within scope of his employment. (1918) 3 U B R 114=11 Bur. L T. 267=50 I C 668 =20. Cr. L. J. 332.

—Ss. 71, 72—Deficiency in price on resale can be recovered from first purchaser under Burma Land Revenue Act. 16 I C 90=5 Bur. L T 140

—Immoveable property includes growing plant tree. A I R 1929 Rang 200=7 Rang 706=Ind Rul. (1930) Rang 49=120 I C 689

**BURMA INSOLVENCY RULES.**

—R. 189 is ultra vires as it relates both to moveable and immoveable property A I R 1924 Rang 88=1 R 433=76 I C 669

**BURMA LAND AND REVENUE ACT.**

(II of 1876)

—Land leased from Govt. can be alienated giving good title to the alienee though he may be ejected by the Govt. A I R 1925 Pat 68=5 P L T Sup 1 (F.B)=93 I C 454

## BURMA LAND AND REVENUE ACT

(II OF 1876) (Contd.)

—Ss 4&5—Civil Court has no jurisdiction to entertain a suit for title to land boundaries of which are not defined by Rev Officer under Lower Burma Land and Revenue Act. 8 Bur L T 264=8 L B R 260=33 I C 580.

—S 6--Grants-Making of-Quaere whether S. 6 provides at all for, 10 R 1 (37)=137 I C 402=A I R 1932 R 27= I R 1932 R 106=A L R 1932 R 49

—Ss. 6, 8—Squatter cannot retain possession of land as against grantee of it by Govt. 5 Bur L T 36=14 I C 809

—S. 11—There is very little difference between voluntary relinquishment of possession within the meaning of S. 11 and abandonment of land. And, with regard to abandonment of land, the general rule is that, although non-payment of revenue is a very important factor for consideration, it is not necessarily by itself sufficient proof of the intention to abandon land. 10 R 1 (34, 67)=137 I C 402=A I R 1932 R 27=I R 1932 R 106=A L R 1932 R 49

—S. 18—The general rule is that, although non-payment of revenue is a very important factor for consideration, it is not by itself sufficient proof of the intention to abandon land.

Where land granted under the rules framed under S. 18 of the Act became submerged in about the year 1914 and was after that for several years unfit for *dhani* cultivation, and revenue was not paid during those years, but there was no evidence of any kind of any action on the part of the grantees or their successors in interest indicating any desire to abandon that land beyond non-payment of revenue and a claim to the land was made not very long after the land re-appeared, held that there was no sufficient evidence of the intention on the part of the owners to abandon the land. 10 R 1 (345, 67)=137 I C 402=A I R 1932 R 27=I R 1932 R 106=A L R 1932 R 49

—S. 18—Rules framed under—Land granted for *dhani* cultivation under—Accretion to—Grantee's right to—English law of accretion—Applies (Brown J dissenting). 10 R 1

—S. 18—Grants declared to be made in accordance with the Rules framed under the Burma Land Revenue Act were made in about the year 1894 and the subsequent years. Rule 2 of the rules (framed under S. 18 of the Act) in force at the time provided that land might be disposed of by grant of the status of land-holder, and the grants in question were made under that rule.

Held that by virtue of S. 8 of the Act the grantees must be held to have obtained a permanent heritable and trans-

## BURMA LAND AND REVENUE ACT

(II OF 1876) (Contd.)

ferable right of use and occupancy and not a mere temporary right. 10 R 1 (13-16, 36)=137 I C 402=A I R 1932 R 27=I R 1932 R 106=A L R 1932 R 49

—S. 19—Once a Squatter has received a notice from revenue authorities to quit the land held by him, he cannot sue for ejectment with regard to the same. A I R 1928 Rang 188=6 R 214=110 I C 636

—S. 19—A suit for declaration of title by a person ejected from State Waste land is not maintainable. A I R 1927 Rang 236=6 Bur L J 100=104 I C 365

—S. 19 rr. 51, 52—A civil suit by a squatter delivering peaceful possession of land to persons ordered by Revenue authorities to occupy is not maintainable. A I R 1925 Rang 203=4 Bur L J 15=3 R 171=86 I C 531

—S. 22—S. 22 may not operate to exclude the applicability of the law of accretion to all lands which are subject to the Act, but it does indicate that in deciding what are the rights of any particular person to land the provisions of the Act and the rules there under must ordinarily be the sole or at least chief consideration. 10 R 1 (29)=137 I C 402=A I R 1932 R 27=I R 1932 R 106=A L R 1932 R 49

—S. 45—Under Ss. 44 and 45 of Act II of 1876, it is a condition precedent to have recourse to the special procedure prescribed in that Act that a sum has fallen due for the terminal tax "and a written notice of demand for it has been served on any one of the persons liable for it" It is only when such conditions are fulfilled that S. 45 is brought into play. 10 R 412=1 R 1932 R 195=139 I C 566=A I R 1932 R 123 (F B)

—S. 45—No protection order under Provincial Insolvency Act. S. 31 can be passed in favour of a person arrested by order under S. 45. A I R 1928 Rang 81=5 R 806=109 I C 145

—S. 46—Cases dealing with dues to the municipality in the nature of land revenue or land rate in lieu of capitation tax are governed only by S. 46. A I R 1927 Rang 289=5 R 458=105 I C 258

—Ss. 46 and 47—Prescribe the manner in which arrears of "property taxes" can be recovered. Where a purchaser and defaulter do not collude, a sale under Ss. 46 and 47. is governed by S. 48. A I R 1927 Rang 289=5 R 458=105 I C 258

—S. 47—Where corporation having no notice of mortgage on property sells it for default in payment of property tax, the purchaser, even if mortgage—Suit is instituted, gets it free from the mortgage.



## BURMA LAND AND REVENUE ACT

(II OF 1876) (Concl'd)

A I R 1929 Rang 175=7 R 113=Ind Rul (1929)  
Rang 207=117 I C 575

—Ss. 55 (b), 56—Civil Court has no jurisdiction to pass mortgage-decree in respect of land over which no one has a right of grantee or land-holder. 10 I C 864  
=4 Bur L T 117

—S. 56—Grant made under rules framed under S. 18 of Act—Title to land based upon, and upon law of accretion—Suit against Government in respect of—Jurisdiction of Civil Court to entertain—Not barred by S. 56. 10 R 1 (12, 36)=137 I C 402=A I R 1932 R 27=I R 1932 R 106=A L R 1932 R 49

—S. 56—Jurisdiction—Question of jurisdiction L B R 1893—1900, 293.

—S. 56 (a)—A sale can be declared by Civil Court as being fraudulent and not binding on plaintiff. A I R 1923 Rang 17=11 L B R 313=67 I C 636

—S. 56 (a)—Suit for possession of land between individual Jurisdiction Civil Court. 8 Bur L T 191=30 I C 772

## BURMA LAND REV. ACT (III OF 1876)

—Ss. 19 and 56—Revenue authorities to decide questions under S. 19. 12 I C 22

—S. 48—Auction—purchaser, guilty of fraud or Collusion, does not acquire good title free from incumbrance under the Land and Revenue Act. 15 I C 433=5 Bur L T 108

## BURMA LAWS ACT XIII OF 1898

—S. 13—Principle intended to be given effect to by—Recognising and respecting of particular habits and customs of the various communities under British rule. 10 R 97 (103)=137 I C 211=A I R 1932 R 59=I R 1932 R 97=A L R 1932 R 109

—S. 13—Buddhist within meaning of—Chinese Buddhist is a. 10 R 97 (103)=137 I C 211=A I R 1932 R 59=I R 1932 R 97=A L R 1932 R 109

—S. 13 (1)—Law applicable to Buddhists is Buddhist Law. Chinaman living in Burma can dispose of property by will. A I R 1929 Rang 22=6 R 623=Ind Rul (1929)  
Rang 81=114 I C 513

—S. 13—Applicability of to Chinese Buddhist succession. 7 Bur L T 23=24 I C 467

—S. 13—The term "Hindus" under succession Act X of 1865, S. 186 and Burma Laws Act XIII of 1893, S. 13 does not include Kalais sect in Burma. Persons migrating to a different country and settling among people of that country are presumed to have accepted its law. A I R 1922 P C 197=30 M L T 126=49 Cal 310=1 Bur L J 15 48 I A 553=11 L B R 155=42 M L J 193 (P C)=66 I C 609

—S. 13—Suits for breach of promise of marriage between Burmese Buddhists being suits involving marriage questions are appealable not only under S. 100, but also under S. 30 of the Lower Burma Act. 65 I C 411

## BARMA LAWS ACT (XIII OF 1898) (Concl'd)

—S. 13—The question of child's fraternity is not one succession, inheritance, marriage or caste or any religious institution or usage within the meaning of S. 13. (1914)  
11 U B R 23=26 I C 996=16 Cr L J 84

—S. 13—Burmese law—Damages for seduction—Law applicable to suit. 13 Bur L T 6=57 I C 815

—S. 13—Verbal sale of a share in immovable property at Rangoon in 1890 is invalid according to the T P Act then applicable though not extended. 5 Bur L T 169=6 L B R 98=17 I C 954

—S. 13—Hindu Law—Applicability of—"Hindu Law" meaning of—Kalais, law applicable to. 37 I C 780

—S. 13—In case of adoption to Chinese Buddhist Chinese Customary law is applicable. 9 L B R 179=47 I C 148=12 Bur L T 21

—S. 13 (1)—The personal law of the Chinese Buddhists in Burma is prima facie Chinese Customary Law.

The meaning and effect of S. 13 (1) is that the Burmese Customary law is to be applied in Burma to Burmese Buddhists and the Chinese Customary Law to Chinese Buddhists, not because these customary laws are part and parcel of the Buddhist religion, but because they are the personal law by which the Burmans and Chinese in Burma who profess the Buddhist religion respectively are governed. 10 R 97=137 I C 211=A I R 1932 R 59=I R 1932 R 97=A L R 1932 R 109

—S. 13 (1)—Must be construed as laying down that in "any question regarding succession, inheritance, marriage or caste or any religious usage or institution" where the parties profess the Buddhist or Mahomedan or Hindu religion the rule of decision shall be the personal law that governs the community or religious denomination to which the parties belong, except in so far as their personal law in Burma "has by enactment been altered or abolished or is opposed to any custom having the force of law. 10 R 97 (104)=137 I C 211=A I R 1932 R 59=I R 1932 R 97=A L R 1932 R 109

—S. 13 (1) In absence of special custom marriage between Chinaman and Burmese Buddhist woman is governed by Burmese Law A I R 1927 Rang 265=6 Bur L J 135=5 R 406 (F B)=104 I C 478

—S. 13 (1)—The term 'Buddhist' within S. 13 (1) does not apply to Chinese Buddhists. A I R 1930 Rang 81=8 R 57=Ind Rul (1930) Rang 209 (F B)=124 I C 849

—S. 13 (1) Buddhist monk can contract within Contract Act S. 11. No rules of conduct in Vinaya can be law unless enforced by Burma Laws Act S. 13 (1). Question of sale is not one relating to



**BARMA LAWS ACT (XIII OF 1898) (Concld)**

religious usage. A I R 1929 Rang 354=7 R  
677=Ind Rul (1930) Rang 81 (F B)=121  
I C 705

—S. 13 (1)—Burma is governed by  
Mahomedan Law of pre-emption A I R  
1926 Rang 79=4 R 13=Bur L J 267=95 I C 83

—S. 13 cl. (2)—Applicability of Ma-  
homedan Law to settlement of Mahomedan,  
7 Bur L T 75=23 I C 903

—S. 13 (2)—Questions arising in  
civil cases in the Courts of Rangoon—By  
what law, determined—Common law of  
England 14 Bur L R 77

—S. 13 (3)—Chinese Buddhists cannot  
according to justice, equity and good con-  
science be governed by Chinese Customary  
Law. A I R 1926 Rang 172=4 R 110=97  
I C 876

**BURMA (LOWER) CIVIL COURTS**

ACT (VI OF 1903)

—Ss. 2 (6), 38—Erroneous order  
passed after consideration of facts and  
law cannot be interfered in revision. No  
second appeal lies on a Small Cause Court  
—suit Purchase, by a person having  
notice of lien, is subject to lien. 4 Bur  
L T 142=12 I C 855

—Ss. 11 & 12—Court, dealing with  
the case on Govt. Advocate's certificate  
can proceed with it, only in case of  
erroneous decision of the Judge. 8 Bur  
L T 247=8 L B R 274=30 I C 724=16 Cr  
L J 676

**BURMA (LOWER) COURTS ACT**

6 OF 1900

—S. 30—Appellate Court can re-open  
the whole case, but cannot lightly dis-  
turb concurrent findings of fact. A I R  
1921 L B 60=11 L B R 178=66 I C 500

—S. 30—provides an appeal on a  
Suit for breach of contract of marriage.  
A I R 1922 L B 6=11 L B R 99=65  
I C 411

**BURMA (LOWER) TOWNS AND VILLAGE**

LANDS ACT (IV OF 1898)

—Ss. 24, 25, 26—Co-owner cannot sue  
another co-owner for damages for use and  
occupation. Govt.—ground—rent is a tax  
under Ss. 24, 25, 26 of Lower Burma  
Town and Village Lands Act. 9 Bur L T  
69=32 I C 630

—Ss. 29, 34—Where a transferee of  
lease from Govt. lessee fails to get his  
name entered in rolls, and to take steps  
to obtain possession allowing document of  
lease to remain in transferor's possession,  
he cannot sue a second transferee for  
possession of the property transferred to  
him by the transferor after surrendering  
the original lease and receiving new  
lease of it. A I R 1929 Rang 333=7 R  
276=Ind Rul (1929) Rang 297=119 I C 217

**BURMA (LOWER) TOWNS AND VILLAGE**

LAND ACT (IV OF 1898) (Concld).

—S. 41—Civil Court's jurisdiction is  
not ousted under Lower Burma Towns  
and Village Lands Act, in litigation be-  
tween private persons. Encroachment by  
lessee enures for the benefit of lessor.  
8 L B R 71=29 I C 872

—S. 41 (b)—ultra vires—Indian  
Councils Act s. 22. 13 M L T 53=1913  
M W N 45=18 I C 22 P. C.

**BURMA (LOWER) VILLAGE ACT**

(3 OF 1889)

—The term "Police Officer" does not  
include village Headman having power of  
arrest. A I R 1924 Rang 245=2 R 31=3  
Bur L J 11=25 Cr L J 924 (F. B.)=81  
I C 240

**BURMA MUNICIPAL ACT 3 OF 1898**

(AS AMENDED BY ACT 1 OF 1931)

—S. 42 A—Default in procuring stamp  
paper for executing license does not  
empower Committee to cancel the license.  
A I R 1924 Rang 132=2 Bur L J 231=77  
I C 864

—S. 46—While taxing premises,  
machinery placed in them, is not to be  
taxed under S. 46 of Burma Municipal Act,  
unless it makes them fit for the purpose  
for which they are used 7 Bur L T 44=7  
L B R 119=24 I C 395

—Ss. 46 (1) (A) (a) 68, (69)—Tramway  
Company are occupiers of land on which  
Tram lines are laid within meaning of Ss.  
68 and 69 of Burma Municipal Act. 14  
Bur L R 23=4 L B R 220

—S. 63—Injunction preventing munic-  
ipality from imposing and collecting a tax  
cannot be given. A I R 1923 Rang 75=7  
Bur L J 145=74 I C 34

—S. 51 (8)—Legality of a published  
notification of levy of tax cannot be  
questioned by Civil Court. A I R 1923  
Rang 75=1 Bur L J 145=74 I C 34

—S. 92—Night-soil is refuse, rubbish  
or offensive matter within S. 98 (2) 13 Bur  
L T 62 & 136=10 L B R 203=59 I C 823

—Ss. 92 & 146—Words "refuse, rubbish,  
offensive," in S. 98 (2) of the Act include  
night soil.

It is imperative duty of Burma  
Municipal committee to provide sites for  
disposal of nightsoil. Right to injunction  
is not barred by compensation provision in  
S. 146. 13 Bur L T 62=59 I C 823

—S. 98—Municipality is not bound  
to remove night-soil. An injunction can  
restrain nuisance by municipality. 10 L B  
R 203=13 Bur L T 62 & 136=59 I C 823

—S. 114 (1)—Scope of-do prohibit  
the establishing of a private market not in  
existence at the commencement of the Act.  
A I R 1933 R 47=A I R 1932 R 1=141  
I C 41

**BURMA MUNICIPAL ACT 3 OF 1898 (AS AMENDED BY ACT 1 OF 1931) (Concl'd.)**

—S. 142—Bye-Law No. 5, 8, 2 (6) applies to those cases in which some part of the building is used in common. A I R 1924 Rang 109=2 Bur L J 298=25 Cr L J 1136=81 I C 960

—S. 142 (d)—Bye-laws for levying license fee on lodging houses are ultra vires 13 Bur L T 107=22 Cr L J 113=59 I C 545

—S. 142 (r)—Word 'keep n bye-law made by Rangoon Municipal Committee means keeping for some lengthened time. 8 L B R 328=35 I C 518=10 Bur L T 24 =17 Cr L J 342

—S. 142 (d)—Unreasonable bye-laws of public bodies working for profit, may be disallowed.

But, only ultra-vires or invalid bye-laws of municipal bodies can be interfered by court. 13 B L T 107=59 I C 545

—S. 146—Right to injunctions is not taken away by general provisions. 13 Bur L T 62 & 136=10 L B R 203=59 I C 823

**BURMA OIL FIELDS ACT 1 OF 1918**

—S. 2—"Gas" is not "oil" A I R 1927 Rang 201=5 Rang 133=102 I C 830

—S. 13—Mortgage is not void merely because mortgagee was not holding certificate on date of mortgage. A I R 1928 Rang 136=6 R 423=111 I C 105

**BURMA REGISTRATION MANUAL**

—Document which is a lease only within wider definition of Registration Act is not governed by the direction A I R 1925 Rang 273=4 Bur L J 99=3 R 379=90 I C 693

**BURMA REGISTRATION OF BUSINESS NAMES ACT 8 OF 1920**

—S. 3 (c) is referred to by the proviso A I R 1929 Rang 260=7 R 296=Ind Rul (1929) Rang 310=119 I C 742

—Ss. 3 (b) and 5 (1)—Mortgage by a widow in the name of the firm of her husband is not binding on the sons. A I R 1929 Rang 267=7 R 296=Ind Rul (1929) Rang 310=119 I C 742

**BURMA REGISTRATION REGULATION**

—See Regulations-Burma Regulations -Reg 2 of 1897

**BURMA RURAL SELF-GOVT ACT 4 OF 1921**

—Ss. 28 (1) (c) and 52—Literal interpretation in favour of the subject of any statutory provision in the nature of taxation clause is essential. Failure to observe this principle is subject to revision A I R 1929 Rang 210=Ind Rul (1930) Rang 58=120 I C 698

—S 28 (1) (c)—Authorization by Dt. Judge to a lessee to collect fees authorized by Statute is ultra vires. A I R 1929 R 210=Ind Rul (1930) Rang 58=120 I C 698

**BURMA RURAL SELF-GOVT ACT**

4 OF 1921 (Concl'd.)

—S. 56—Chapter VIII, Rule 3 of rules made under S. 79 of Act—Contract by Chairman of District Council within scope of his authority but not in writing as required by Chapter VIII of Rule 3 of the Rules—Work done by other party to contract under, benefits of which accepted by District Council—Compensation for —Other party entitled to, as against the council, though he cannot sue upon the contract. 10 R 522 (527)=A I R 1932 R 176

—S. 79, r33—Election petition—District Judge's order on—Revision against—Interference in justified only where order is one made without jurisdiction. 10 R 517 (521) =A I R 1933 R 2=140 I C 782 (F B)

—rr. 34, 36 and 39—Order of a Dt. Judge acting under r. 34 or of Assistant Judge nominated by him to hear petition challenging election is not revisionable A I R 1929 Rang 352=Ind Rul (1930) Rang 200=124 I C 264

—S. 79 r. 39—Election petition—District Judge disposing of—Court subordinate to High Court within meaning of S. 115 C. P. C. and his order open to revision *Semble* 10 R 517 (519-20)=A I R 1933 R 2=140 I C 782 (F B)

**BURMA (UPPER) LAND AND REVENUE**

REGULATION.

—See Regulations—(4) Burma Regulations—Reg 3 of 1899.

**BURMA (UPPER) OIL FIELDS REGULATION.**

—See Regulations—(4) Burma Regulations—Reg 6 of 1910.

—R 22—Court must enquire into truth of Defence of permanent tenancy in ejectment Suit brought under S. 12 of Burma Waste Land Grant Rules. 9 Bur L T 152=9 L B R 27=33 I C 888.

**BUSTOO LAND.**

—Valuation—Prospective rise Land Acquisition Act s. 23. 41 Cal 967.

**BUTCHER'S LICENSE.**

—See Madras Dist. Muni. Act s. 198.

**BUTWARA KHASRA MAP.**

—Prepared by Collector—Admissibility in evidence—Evidence Act s. 13. 38 I C 491.

**BUTWARA PAPERS.**

—Admissibility in evidence. 38 I C 205.

—Not admissible against persons not party. 37 I C 829.

**BYE-LAW**

—Ultra vires—Excess of the powers conferred by main enactment. Berar Muni. Law Ss. 79 & 116. 51 I C 341.

—Rules and by-laws must not be in excess of power authorising them nor

**BYE-LAW (Concl'd)**

repugnant to Statute or general principles.  
A I R 1931 Lah 476=32 P L R 493=Ind  
Rul (1931) Lah 615=32 Cr L J 913=(1931)  
Cr Cas 700=12 Lah 635=132 I C 519.

—A District Municipality as to how  
to carry on offensive trades declared ultra  
vires—Bom Act III of 1901, s. 48 (b) (III)  
4 Bom L R 585.

**BYRAGI.**

—See Hindu Law—Inheritance.

**CALCUTTA CORPORATION PROVIDENT****FUNDS RULES.**

—r. 19—As payment is to be made to  
a legal representative, that to an uncle as  
de facto guardian is not a valid payment.  
A I R 1928 Cal 743=32 C W N 515=55 C  
1231=113 I C 166.

—r. 19—The deposit money should  
be paid to one who is entitled to receive  
it under testate or intestate succession. A  
I R 1928 Cal 743=55 C 1231=32 C W N  
515=113 I C 166.

**CALCUTTA GAZETTE**

—Publication of revenue sale—In  
object of Beng Land Rev Sale Law Ss. 5,  
6 and 13. 42 Cal 897 (P. C.)

**CALCUTTA HIGH COURTS (APPELLATE****SIDE) RULES**

—Even though full Court-fees are  
not punctually paid, the Registrar may  
admit an appeal out of time. A I R 1127  
Cal 238=44 C L J 557=99 I C 901

—R. 17—All documents irrelevant to  
the appeal should be excluded under  
R. 17. 18 C L J 122=21 I C 425

—Ch 2 r (1) sch cl (3) Value of the  
suit out of which the application arises  
must not exceed Rs. 1000. A I R 1931 Cal.  
92=34 C W N 876=I R (1931) Cal 320  
=129 I C 880

—Ch IV r (1) (5)—The real difference  
between 'solemn affirmation' and 'affi-  
davit' is that the applicant is to solemnly  
affirm that the statements made in the peti-  
tion are true to his knowledge, whereas  
in the case of an affidavit it may be sworn  
by any person acquainted with the facts  
of the case. 58 C 1389=135 I C 798=I R  
1932 C 158=A I R 1932 C 160.

—Chap. VII, r 1—There is no rule  
which provides for annexing documents  
to plaint on the country it is for-bidden  
by rr. 2 and 9 of O. VII C P C. A I R  
1931 Cal. 458=58 C 418=Ind Rul (1931) Cal  
542=134 I C 538

—Ch 7 rr 2 and 3—Not these rules but  
rule, I applies to appeals against orders in  
appeal under Presi Towns Insol Act. s 8.  
A I R 1928 Cal 786=56 C 667=33 C W N  
21=I R (1929) Cal. 295=115 I C 39

—Chap. VII r 11—Where plaintiff  
relies upon defendant's residence or place

**CALCUTTA HIGH COURTS (APPELATE****SIDE) RULES (Cont'd)**

of business as giving jurisdiction, the  
facts showing this must be stated in plaint;  
the street and number must be given. Plaint  
should also contain particulars of the loan  
etc. when these are not available, the suit  
should be framed as one for account. A I R  
1931 Cal 458=58 C 418=Ind. Rul (1931) Cal  
842=134 I C 538

—Ch. 9, r. 50 & Note 1 & r 52—To all  
second appeals r 50 & its Note I apply. r.  
52 does not make any change as to contents  
of paper book to which r 50 is applica-  
ble. A I R 1925 Cal 1116=85 I C 770.

—Ch XI r. 4—The rule applies where  
the Dy. Registrar certifies that all the pro-  
ceedings were in order but not if it is  
otherwise. The chief Justice can only hear  
review application only when the Judgment  
court cannot do it or one of the Judges  
in appeal is unavailable. 20 C W N 967=24  
C L J 235=35 I C 348

—Ch. 12 r. (3) and Ch 4 rr. (1) (5)—  
Affidavit—Verification or solemn affirmation  
not taking form of—Court fee of Rs. 2  
prescribed by Chapter 12 r 3, of Appellate  
Side Rules—Necessity. 58 C 1389=135 I C  
798=I R 1932 C 158=A I R 1932 C 160.

—Ch XIII r 9—In a lease the condition  
was that the lessee cannot assign without  
lessor's consent. It was refused when  
asked for. Plaintiff in order to decide  
whether he can assign without defen-  
dant's consent applied on an originating  
summons. It was held that the Court can  
decide the question & the consent was un-  
reasonably withheld & the lessee can assign  
without such consent.

"Unreasonable" means without fair,  
solid & substantial Cause 24 C W N 1007  
=50 I C 105=48 Cal 176

—Hechele's Rules Ch. 28 R 1 if ultra  
vires Lim. Act. S. 12. 23 C W N 280  
=53 I C 46=46 Cal 721.

**CALCUTTA HIGH COURT**

(General Rules and circular orders)

—Under cl (2) (ii) of the Calcutta  
High Court General Letter No. 16 if there  
is any holiday or holidays immediately  
following the day of notification of the  
requisite number of stamps and folios, Such  
holiday or holidays must always be exclu-  
ded in computing the period of limitation  
for appeal. This exclusion is not restricted  
to the cases where the stamps and folios  
are supplied on the reopening. A I R 1931  
Cal 731=58 C 969=35 C W N 451=Ind Rul.  
(1931) Cal 895=134 I C 895

—Relating to Practice & Procedure in  
District Courts.—ch. I. By consent of parti-  
es, a day though holiday was fixed for  
examining deff's witnesses but the plff's  
pleader remained absent. Again it was ai-

CALCUTTA HIGH COURTS (APPELLATE  
SIDE) RULES (Concl'd)

journed to next day also a holiday without consent of parties, the pleader again absented himself. And the suit was dismissed as the witnesses were not cross-examined. Held the procedure was irregular. A I R.

1921 Cal 184=25 C W N 330=61 I C 775

—Ch. 1—It is illegal to remove property A I R 1928 Cal 815=48 C L J 288  
=33 C W N 174=56 C 460=30 Cr L J 199=12  
A I Cr R 58=113 I C 572

—Ch. 1 p 31 r 93—As amended has the force of law. A I R 1928 Cal 815=56 C 460=30 C L J 199=12 A I Cr R 58=48 C L J 288=33 C W N 174=113 I C 572

—Ch. 2—It is not ultra vires to appoint a guardian under the Guardians & Wards Act on the affidavits of the parties in uncontested proceedings. A I R 1926 Cal. 1193=44 C L J 40=97 I C 692

—Ch. 2 r 1 Sch cl 3—Execution proceedings clearly arise out of a suit. Original suit from which the application arises must not have been valued above Rs. 1000. A I R 1931 Cal 92=I R (1931) Cal 320=34 C W N 876=129 I C 880

—Ch. 2 r 1—A single Judge in revision cannot deal with orders made in suits above Rs. 1000 though the order itself concerns a sum below that sum. A I R 1930 Cal 744=I R (1931) Cal 175=129 I C 367

—Ch. 11 r 45 (c)—An act by a pleader named in vakalatnamah, if allowed by court, would be valid even without endorsement in writing, but acceptance of a Vakalatnamah must be by endorsement in writing 20 C W N 287=23 C L J 297=32 I C 395=43 C 884

—R 122 Notes 6 8 & 9—The District Judge cannot set aside Sub-Judge's orders for commissioner's remuneration. His powers are for maintaining efficiency among Pleader Commissioners. 34 I C 855

—Ch. 26, r 77—Shereff's poundage is not to be paid when attachment before judgment does not result in execution. 26 C W N 673=70 I C 488 (2)

—Ch. 34 r 7 ch 36 r 57 (a)—Only one fee can be allowed in revision applications. 25 C. W N 826=68 I C 451 (1)

—Ch. 36 rr 6 9 32 & 72—A solicitor can retain as much of the client's money as he can claim against him. he cannot retain the sums disallowed by the Taxing Master. A I R 1923 Cal 603=27 C W N 537 77 I C 1022

—Ch. 36 r 32—The proviso applies only to the Taxing Officer's jurisdiction & discretion & not of the Court. It applies only where the Court or judge has ordered or does not order otherwise. A I R 1922 Cal 402=49 C 618=26 C W N 870=69 I C 823

—ch. 36 r 69—The rule is not ultra vires. Even though the suit be time barred

## CULCUTTA HIGH COURT (Concl'd.)

an attorney's application for payment order against the client out of money in his own hand is not time barred. 48 C 817=25 C W N 800=66 I C 209

—Ch. 36, r. 93—If the plff. grossly exaggerates his claim & only its 1/5th is decreed, costs should be allowed as in an 'ordinary cause.' 48 C 427=32 C L J 168 =25 C W N 297=60 I C 337

—Ch. 38 r. 59—Limitation in an attorney's suit for taxed costs does not run until at the earliest the allocatur is issued. A I R 1930 Cal 651=52 C L J 197=I R (1931) Cal 259 (F B)=129 I C 787

—Ch. 38 r. 59—On an attorney's application for costs a court should not entertain questions like set-offs & damages. A I R 1930 Cal 651 (F B)=52 C L J 197=I R (1931) Cal 259=129 I C 787

—Ch. 38 r. 59—The rule is inapplicable to attorney's application for costs entailing enquiry which application is not be summarily dealt with. A I R 1930 Cal 651=52 C L J 197=I R (1931) Cal 259=129 I C 787

## CALCUTTA HIGH COURT INSOLVENCY RULES.

—There is no such thing as petition under the insolvency rules in connexion with a notice of motion. The person who wants to bring a proceeding must first make up his mind whether he should bring it by a writ or by a notice of motion or by summons or by a petition. He should produce an affidavit in support of his notice of motion and not something which he calls a petition under the insolvency jurisdictions. 36 C W N 337=138 I C 741 =I R 1932 C 511=A I R 1932 C 621=A L R 1932 C 396

—rr. 17, 18, 19 and 30—An ex parte order for examination of persons thereunder can be made. A I R 1921 Cal 58=48 C 1089=25 C W N 750=66 I C 715

—r. 74—The adjudication order shall go as a matter of course if the court is vested with the jurisdiction & all the prescribed conditions are fulfilled. A I R 1926 Cal 640=30 C W N 173=94 I C 793

—r. 123—Debt must be proved though admitted in the composition deed. A I R 1926 Cal 176=53 C 448=29 C W N 1019=90 I C 449

—r. 178—Official Assignee has no right to any commission when he sells a charged property. A I R 1927 Cal 529=54 C 317=102 I C 539

## CALCUTTA HIGH COURT (ORIGINAL SIDE).

—The question whether a certain document should be admitted to probate cannot be decided upon an originating summons. Only after the Probate Court has decided it finally, it is given to any one to know what is contained in the Will. A I R 1931 Cal 138=52 C L J 475=130 I C 217

## CALCUTTA HIGH COURT ORIGINAL SIDE

## NOTIFICATION

—Condition 12—Compensation for deficiency may be recovered by the purchaser when there is an error as to area in the notification. It cannot be refused on the ground that he is benefited in spite of the mistake. A I R 1930 Cal 821=57 C 783=I R (1931) Cal 428=130 I C 908

## CALCUTTA HIGH COURT (ORIGINAL SIDE)

## RULES.

—It cannot be decided upon an originating summons whether a certain document should be admitted to probate. No one can be allowed to know the testator's dispositions till the Probate Court decides the matter finally. 52 O L J 475=130 I C 217

—If wrongly settled & entered by the Registrar, the Court can correct its own order. A I R 1928 Cal 756=32 C W N 854

—By analogy C P C O 9 r. 13 applies but in cases of negligence the rule does not prevent the restoration of the suit on proper terms. A I R 1928 Cal 864=32 C W N 411=I R (1929) Cal 489=116 I C 633

—A suit not summons is the proper remedy as the matter is contentious when the estate is under administration and there is a claim by its creditor. A I R 1927 Cal 518=31 C W N 630=103 I C 120

—Ch. 2, rr. 1 & 4—Not the Cri. P. C. but the High Court Rules decide the question whether a Vakil can act in a Criminal appeal from Original Side. Unless a question of Hindu or Muhomedan Law is involved he cannot act A I R 1928 Cal 675=55 C 858=32 C W N 319=29 Cr L J 1022=112 I C 350

—Ch. 4—In an offence under S. 195 Companies Act, the investigating Police Officer may be allowed to inspect and take notes but not the copies of the offender's depositions. A I R 1930 Cal 521=57 C 424=I R (1930) Cal 725=126 I C 405

—Ch. 7—Service by registered post must be on a partner or person controlling the business. Application of the rule must comply with C P C O 30 r. 3. A I R 1922 Cal 390=49 C 394=69 I C 236

—Ch. 7—The signatory must prove his authority by affidavit in a suit by a corporation. A I R 1927 Cal 780=31 C W N 1030=105 I C 568

—Ch. 7—When a person other than the plff or his agent verifies the plaint, he must verify his authority by an affidavit. A I R 1927 Cal 773=31 C W N 1031=105 I C 564

—Ch. 10—Setting aside an ex parte decree is justified by the absence of notice. A I R 1929 Cal 63=32 C W N 684=55 C 1292=I R (1929) Cal 309=115 I C 85

## CALCUTTA HIGH COURT (ORIGINAL) SIDE

## RULES (Contd.)

—Ch. 10—To a dismissal order for default under r. 36 the principle that where an order has not been perfected the Judge can reconsider the matter is applicable. A I R 1925 Cal 83=28 C W N 755=83 I C 128

—Ch. 10—The rule is not ultra vires. A I R 1924 Cal 1025=51 C 905=28 C W N 916=81 I C 1048

—Chap. X. r. 36—Applicability—Rule 36 ceases to apply as soon as a case reaches the Prospective List. A I R 1931 Cal 671=58 C 736=Ind Rul (1931) Cal 657=133 I C 209

—Ch. 13—As agreed in the lease, the lessee can assign his interest with the lessor's consent which should not be refused unreasonably. On refusal of such consent the lessee applied to the High Court to determine whether he could assign in absence of lessor's consent. Held that the proper procedure was followed and the assignment can be executed without consent. A I R 1921 Cal 99=48 C 176=24 C W N 1007=60 I C 105

—Ch. 13—Leave to cross-examine deponents was granted after agreement. A I R 1928 Cal 177=54 C 1075=109 I C 380

—Ch. 13—Unconditional leave to defend should be given when there is a denial of the plff's main claim. No security should be ordered only because looking at the statement of both sides he thinks the plff's case to be a better one. An order for selling the security is wholly without Jurisdiction. A I R 1926 Cal. 713=53 C 412=30 C W N 228=93 I C 60

—Ch. 13—Where defendant's attorney gave the plaintiff another opportunity by again entering appearance after defendant had already appeared in person, the period of 10 days runs from the date of the later appearance A I R 1926 Cal 668=30 C W N 298=96 I C 839

—Ch 13—merely saying that statements in the plaint are true is not enough but the affidavits must strictly conform to the form. A I R 1926 Cal. 842=53 C. 776=30 C W N 706=96 I C 182

—Ch 13 A—Security bond given under see under Principal and Security.

—Ch. 14—The defendant in contempt cannot ask for the benefit of Court's procedure except for defence purposes. The extent of such right is discretionary. A party has a right to resist proceedings against him. A I R 1929 Cal 117=55 C 1110=I R (1929) Cal 333=115 I C 189

—Ch. 16—The principle of 49 I. A. 307 equally applies to the filing of a requisition for drawing up an order or a decree. A I R 1925 Cal 291=29 C W N 163=92 I C 563



## CALCUTTA HIGH COURT (ORIGINAL) SIDE

## RULES (Contd.)

—Chap. 16 r. 26—Withdrawal—Costs—Where suit is withdrawn for want of jurisdiction High Court will not make payment of costs a condition for filing fresh suit except for special reasons.

A I R 1931 Cal 791 (2)=35 C W N 434

—Ch. 17—Rule 2—Transferee—Decree-holder—Application under O 21, r. 16 of C P C by—May be construed with an application for transmission of the decree for execution. 11 P 94 (96)=13 P L T 402 =137 I C 472=I R 1932 P 151=A I R 1932 P 168=A L R 1932 P 208

—Ch. 26, r. 20—Under the rules of the High Court, Original Side, a person to whom costs of an interlocutory application or hearing have been awarded has a choice between proceeding with taxation and execution at once and leaving both taxation and execution until after the final determination of the suit. But the correct rule is that such costs are not to be taxed or executed before the final determination of the suit unless a special direction is given to that effect.

59 C 1358=142 I C 76=A I R 1933 C 19

—Ch. 27—When there are High Court Rules on its Original Civil Jurisdiction side, C P C O 21 r. 86 is inapplicable. A I R 1930 Cal 324=57 C 106=I R (1930) Cal 546=125 I C 594

—Ch. 27—In a sale by the Registrar under ordinary contract, the decree-holder choosing to rescind the contract on the purchaser's failure to pay the balance can forfeit the deposit. A I R 1930 Cal 324=57 C 106=I R (1930) Cal 546=125 I C 594

—Ch. 27—Sale under attachment substituted prior to a mortgage suit. But the purchaser at execution of mortgage decree can have the sale set aside when he knew of it after purchase. A I R 1929 Cal 207=33 C W N 177=I R (1929) Cal 695=118 I C 887

—Ch. 27, r. 37—Order XXI, r. 89. Civil Procedure Code, applies to applications to set aside mortgage sales on the original side and the applicant need not deposit anything more than the 5 per cent of the purchase money. Original Side Rules do not apply to such cases. A I R 1931 Cal 688=58 C 510=Ind Rul (1931) Cal 715=133 I C 587

—Ch. 28, r. 67—Attorney and client—Bill of costs—Application by attorney for realisation of costs—Summary enquiry, not proper—Lim. Act. Art. 84 applicable. 46 Cal 249=23 C W N 473=51 I C 941

—Ch 28 r. 93—The rule is very strict & prohibits any articulated clerk of attorney to hold any other engagement.

## CALCUTTA HIGH COURT (ORIGINAL) SIDE

## RULES (Contd.)

R. 370 It is not certain whether a single Judge can dispense with Court's general order. 19 I C 578

—Ch 28, r 370—Not consistent with C. P. Code of 1882 C P C O 21 R 22 43 Cal 903 (F B)

—ch. 28, r 426—The Registrar cannot be ordered by the High Court to report under R 426 where the Commissioner of Partition can make a title to the property sold under court's authority but not by the Court. 40 Cal 140=18 I C 954

—ch. 34—Only one Counsel's fee can be allowed as the rules under C P C S 115 are discharged. A I R 1921 Cal 77=25 C W N 826=68 I C 451

ch. 35—The matter does not fall under r. 29 & the caveator is liable for costs when besides asking the executor to prove the will undue influence & forgery are alleged. A I R 1929 Cal 290=56 C 55 =I R (1930) Cal 154=121 I C 570

—ch. 36—Taxation—Detail relating to matter of—Must be left to Taxing officer. 58 C 1439 (1445)=35 C W N 993=136 I C 539=I R 1932 C 219=A I R 1932 C 233=A L R 1932 C 215

ch. 36—No refresher but only one Counsel's fee should be allowed when an appeal from dismissal of revision is dismissed. A I R 1921 Cal 77=25 C W N 826=68 I C 451

—ch. 36—As the sheriff's right to poundage is not a common law right, he cannot claim it when in an attachment before judgment the claim is settled before decree. A I R 1921 Cal. 763=26 C W N 673=70 I C 488

—ch. 36 r. 32—Neither this rule nor r. 6 controls the discretion & jurisdiction of the judge. A I R 1922 Cal 402=49 C 618=26 C W N 870=69 I C 823

—ch. 36, {r. 32—The Taxing officer himself has jurisdiction to allow fees to any extent in excess of the maximum or production of a written consent of the client or his representative or recognised agent. The Court has also jurisdiction to allow fees in excess where consent is proved, although it is not proved in every instance by a consent in writing. 58 C 1439 (1443)=35 C W N 993=136 I C 539=I R 1932 C 219=A I R 1932 C 233=A L R 1932 C 215

—ch. 36—Rule 69 is inapplicable when there is no dispute about the bargain & the attorney promises to give time to the client. A I R 1921 Cal 67=48 C 817=25 C W N 800=66 I C 209

—ch. 36—Courts have discretion as regards limitation & neither art 81 nor 181 Limitation Act applies to an application under r. 69 A I R 1921 Cal 67=48 C 817=25 C W N 800=66 I 209

CALCUTTA HIGH COURT (ORIGINAL) SIDE  
RULES (Conclud)

—ch. 36 rr. 71 to 73—Taxing officer—Matter not in discretion of—Application to Court in respect of—May be made before taxation is finally concluded. 58 C 1439 (1444)=35 C W N 993=136 I C 539=I R 1932 C 219=A I R 1932 C 233=A L R 1932 C 215

—ch 36. r. 178—The Official Assignee cannot claim commission on a sale to which Sch. II is not applied. A I R 1926 Cal 1033=43 C L J 580=97 I C 294

—ch 38, r. 67—Rules and orders Attorney's application for recovery of costs against client—Limitation. Practice 23 C W N 473=46 Cal 249=51 I C 941

## CALCUTTA IMPROVEMENT ACT (BENG. ACT 5 OF 1911)

—See also Land Acquisition Act

—If an acquisition of certain premises is not, justified by the provisions of the Act, the Trustees, a statutory body cannot notify their intention to make the acquisition and under colour of proceedings taken under the Act enter into transactions either for their benefit or to their prejudice 59 C 240 (244-5)=35 C W N 889=137 I C 628=I R 1932 C 357=A I R 1932 C 178

—Introduction into, of S. 26 (2) of Land Acquisition Act of 1894 as amended by Act XIX of 1921—Not permissible. 58 I A 259=59 C 55 (63, 66-7)=61 M L J 684=1931 A L J 475=33 B L R 1006=35 C W N 794=54 C L J 14=132 I C 748=A I R 1931 P C 149 (P C)

—Introduction into, of S. 54 of Land Acquisition Act of 1894 as amended by Act XIX of 1921—Permissibility of—Quaere 58 I A 259=59 C 55 (62) (P C)

—In dealing with the property the Improvement Trust Tribunal acts as a Court under the Land Acquisition Act and under S. 115. C P C., as well as under S. 107 of the Government of India Act. 36 C W N 370 (373)=I R 1932 C 610=139 I C 180=A I R 1932 C 660

—The Tribunal under the Calcutta Improvement Act (V of 1911) is not a Court subject to the superintendence of the High Court within the purview of cls. 16 and 39 of the Letters Patent. 58 I A 259=59 C 55 (66)=61 M L J 684=1931 A L J 475=33 B L R 1006=35 C W N 794=54 C L J 14=132 I C 748=A I R 1931 P C 149 (P C)

—It was never intended that the safeguards should be abrogated by the trust & acquire land through another body indirectly. 48 Cal 916=56 I C 630

—Ss. 24, 78 and 81 of the Act are not the only provisions under which the Board may act S 24 of the Act confers very wide powers; and upon the basis thereof

CALCUTTA IMPROVEMENT ACT (BENG.  
ACT 5 OF 1911) (Contd)

the Board must be held to be fully competent to enter into an arrangement, the effect of which may be summarised thus the owner by a redeemable rent charge is able to add to her existing irregularly shaped land a block on the new street so as to give her a compact and good-looking plot of proper depth and frontage and the Trust gets back what is apparently a fair price for that block and a sum, which apparently represents the fair value of the advantage which the owner obtains by having her land brought up to the edge of the new road and with a frontage running along its entire length. Such an arrangement is a fair one and there is nothing in the Act itself or anywhere else prohibiting the trust from entering into such an arrangement. 59 C 240 (248-50)=35 C W N 889=A I R 1932 C 178=137 I C 628=I R 1932 C 357

—S. 39—The trustees cannot initiate a street Scheme under S. 39 The area to be benefited must be first determined and then the scheme should be drawn up under S. 40 The words 'proving building sites' in S. 39 mean making land fit for building site, which is not so now. The Board can compulsorily acquire land only for the purposes mentioned in the preamble & developed by Ss. 39 & 52. 44 Cal 219=21 C W N 8=24 C L J 246=36 I C 749 Reversed in. 47 Cal 500 (P C).

—S. 39, 41, 78 (1) & (2)—The Board may not delineate before the scheme is submitted for sanction. Board inquiring under S. 78 (2) is not disentitled to reject the application as not being within the section. 31 Cal L J 334=47 Cal 604=57 I C 37.

—S. 40—Scheme to be drawn up under S. 40 See Supra. 21 C W N 8=36 I C 749=44 Cal 219.

—Ss. 41 & 42—The words 'laying out or relaying out' in S. 41 (b) do not refer to entire land to be benefited by the scheme. The word 'Street' does not include the abutting lands & houses there on but mean the same thing as S. 3 (37) Calcutta Municipal Act. 21 C W N 8=24 C L J 246=36 I C 749=44 Cal 219.

—Ss. 41 (a), 42 (a), 78, 18—The Board can compulsorily acquire land for recompment. Meaning of the words "recompment", "betterment" and "affected" (Full Bench N R Chatterji J dissenting) 22 C W N 1=27 C L J 1=44 I C 770=45 C 343

—S. 42 (a)—"Affected"—Street scheme Portion of entire plot acquired admittedly required for street to be driven through it—Remainder is obviously "affected" by the execution of the scheme in case of, within meaning of the word in S 42 (a). 59 C 240 (248-50)

## CALCUTTA IMPROVEMENT ACT (BENG

## ACT 5 OF 1919 (Contd)

—S. 42 (a)—The trustees, under S. 42 (a) can acquire land compulsorily for recoupment, which land may not be necessary for the scheme & if they opine that thereby its value may increase. 38 M L J 511=11 L W 566=18 A L J 521=22 Bom L R 586=47 I A 45 (P C)=47 Cal 500=32 C L J 65=24 C W N 881=2 U P L R 98=56 I C 42.

—S. 49 (2)—Civil Court's jurisdiction to question trustees authority is not barred by S. 49 (2) but it shows that when the sanction is published, the presumption is that it is duly framed & sanctioned. 21 C W N 8=24 C L J 246=36 I C 749=44 Cal 219

—S. 54—The Section is inapplicable to land affected by the scheme but included for recoupment only. A I R 1924 Cal 85=50 C 531=75 I C 346.

—Ss. 68 & 69—The trustees are not empowered to compulsorily acquire land for recoupment but S. 69 only empowers to compulsorily acquire it only for purposes of the act Ss. 68 & 69 distinguish between acquisition by agreement and compulsory acquisition. 21 C W N 8=44 Cal 219=24 C L J 246=36 I C 749.

—S. 71—No appeal lies to the Privy Council from a decision of the High Court of Bengal arising out of land acquisition proceedings taken for the purposes of the Calcutta Improvement Act (V of 1911). The joint effect of the Calcutta Improvement Act of 1911 and of Act XVIII of 1911 is to give a special and strictly limited right of appeal to the High Court from an award of the Tribunal, and to provide that subject to this right only, the award should be final. 58 I A 259=59 C 55=61 M L J 684=1931 A L J 475=33 B L R 1006=35 C W N 794=54 C L J 14=132 I C 748=A I R 1931 P C 149 (P C).

—S. 71—The special Court to hear references is a Court under the Land Acqn. Act, governed by C. P. Code with the powers of a Judge, & thus it has an inherent power to call for records of other Courts. 43 Cal 239=20 C W N 360=34 I C 263.

—S. 78—A clause in the resolution of the Calcutta Improvement Trust ran as follows—"Where as a portion of the said premises No. 12-1, Durga Road, not being required for the execution of the road-works in the said scheme, and the purchaser as owner applied under the provisions of S. 78 (1) of the said Act to the Board that the acquisition of the said premises shall be abandoned." Held, that the clause only meant that the portion in question was not required for the road that were to be opened up, but it did not necessarily mean that it was not required for the purpose of the street scheme under S. 39, which may have other purposes than that of

## CALCUTTA IMPROVEMENT ACT (BENG

## ACT 5 OF 1919) (Concl'd)

merely laying out roads. 59 C 240 (247)=35 C W N 889=A I R 1932 C 178=137 I C 628=I R 1932 C 357.

—Ss. 78 & 81—S. 78 refers to abandonment of acquisition of unnecessary land while S. 81 refers to disposal of superfluous land thus neither sec. creates a right to acquire land compulsorily. 21 C W N 8=24 C L J 246=36 I C 749=44 Cal 219.

—S. 78 (4)—Where a deed of rent-charge is not a document of the character contemplated by s. 78 (4) and the procedure provided for by s. 79 is not the procedure for its enforcement. 59 C 240 (243-4, 246-7)=35 C W N 889.

—S. 81—Whether refers to compulsory acquisition Sec. 21 C W N 8=24 C L J 246=36 I C 749=44 Cal 219.

—Ss. 122 & 123—These secs refer to method of account & not to the question of compulsory acquisition of land for recoupment. 21 C W N 8=24 C L J 246=36 I C 749=44 Cal 219.

—Ss. 155 and 160—Scope of Sec 21 C W N 8=24 C L J 246=36 I C 749=44 Cal 219.

## CALCUTTA IMPROVEMENT (APPEALS) ACT (IMPERIAL XVIII OF 1911)

—S. 3—A decision determining a principle of compensation can be appealed against. A I R 1924 Cal 574=28 C W N 461=83 I C 442.

—Ss.—It does not limit pecuniary jurisdiction of Small Cause Court Chief Judge. A I R 1926 Cal 853=31 C W N 142=94 I C 170.

## CALCUTTA IMPROVEMENT TRIBUNAL.

—President can make an order as to costs and to execute the same as Civil Court A I R 1921 Cal 413=26 C W N 30=65 I C 177.

## CALCUTTA MUNICIPAL ACT. (III of 1899)

—Powers of compulsory land acquisition should not indirectly enable another body acquire land through the corporation however good the purposes may be. A I R 1921 Cal 159=48 C 916=66 I C 600

S. 3 Sub. s. (30) A lessee is an 'occupier' within S 3 Sub. s (30) and when the owner is given notice under s. 408 to carry-out certain improvements & is obstructed by the lessee, he may refuse to give him facilities for making them. If the tenants prove refractory the lessee can proceed under S. 622 it being not necessary for the owner to find a cause under it. The lessee can be proceeded against under S. 574 & 575 if he fails to do his part. 41 Cal 164=14 Cr. L J 490=2 Cr L R 279

—Ss. 3 (30) 37, 47—Meaning of 'occupier' in S. 37 2)—Occupier when entitled to vote 45 Cal 950=49 I C 454.

## CALCUTTA MUNICIPAL ACT

(III OF 1899) (Contd.)

## CALCUTTA MUNICIPAL ACT

(III OF 1899) (Contd.)

—Ss. 3 (32), 408 & 755—The shebait is only a manager of the deity & not an owner. The petitioner shebait was given notice under S. 408 to improve debutter bustee land, which at the time was not in his possession & which was being managed by shebait in turns. It was held that he was not liable for making improvements as he was not the owner within S. 3 (32). 41 Cal 104=14 Cr L J 569=17 C W N 1084

=21 I C 169

—S 3 (46), 361, 416, 419 & Sub. S. 574—The word 'Street' in S. 3 (46) includes a passage less than 20 ft. wide. To create a public right of way there must be owner's dedication with the consent of the general committee under S. 416 (1). So a roadway made as part of a buster and according to approved plan, remains a private street until the owner proceeds under S. 419 or he otherwise agrees with the general committee. 17 C W N 1250=

14 Cr L J 511=20 I C 991

—Ss. 36, 37 (2) (e), 47, 54 Sch. IV & V—Objectors to the final publication of election roll must move before they are finally published. When an application, to reject the nomination papers and to declare them inoperative because some of the approvers were not entitled to vote, was made it was held that at that stage no alterations can be made in the election roll. 46 Cal 132=50 I C 307

—S. 53—One of the shebait working in turns, who was not in possession of property and whose period was over long ago is not an 'owner' under S. 3. 41 Cal 104=17 C W N 1084=21 I C 169=2 Cr L R 173=14 Cr. L J 569

—S. 56—Corrupt practices in elections are not dealt with in the Act. The effect of such practices must be provided for: 22 C W N 678=46 I C 729

—S. 56, Sch. V R 2—Nomination paper—Description of candidate—Rai Bahadur So and So if sufficient description—Delay in presenting the petition—Effect. 22 C W N 951=48 I C 736

—S. 127—Executive officer's duties are administrative. A I R 1927 Cal 802=46 C L J 260=31 C W N 1040=55 C 228=103 I C 533

—S. 141—In an appeal to the Small Causes Court the assessee must show that the valuation of the executive officer is either wrong or excessive. A I R 1927 Cal 802=55 C 228=46 C L J 260=31 C W N 1340=103 I C 533

—S. 142—An appeal under the section to the High Court is not a second appeal and not under C. P. C. A I R

1927 Cal 802=55 C 228=46 C L J 260=31 C W N 1040=9 A I Cr R 25=28 Cr L J 871=103 I C 533

—Ss. 152, 158 & 160—Notice for re-valuation only is provided for in S. 158 & no fresh notice is necessary when the Chairman alters his valuation-basis after hearing objections under S. 160. 37 I C 932

—S. 162—In appeals under S. 162 the Small Cause Court Judge has to decide the question of valuation only, and he has no jurisdiction to see the manner in which the land is assessed after the valuation is settled once. 15 C L J 500=15 I C 452

—Ss. 223 & 228—S. 228 making the consolidated rate a first charge on the property subject to revenue arrears is not controlled by S. 223 which makes the purchaser liable for the arrears for the year immediately prior to the purchase. The charge under S. 228 is not enforceable against the purchaser who pleads and proves that he is a bona fide purchaser for value without notice. A mortgagee of property within the Calcutta Municipal limits foreclosing the mortgage gets title by involuntary alienation yet he is to be taken as a purchaser with notice of arrears for he can make enquiries in the matter. 42 Cal 625=19 C W N 37=21 C L J 177=27 I C 261

—S. 228—The section applies to assessment on land and building: 87 I C 229=A I R 1925 C 1067

—S. 286—A house drain made by the adjoining owner comes within S. 286 and vesting of a road or drain in a Municipality does not confer full proprietary right in the soil itself under it. The property of such authority is only so much as is necessary for the maintainer and user of high ways and if the high way ceases to be such the full and undivided rights of the full owner come in existence. 44 Cal 689=24 C L J 358=21 C W N 234=37 I C 96

—S. 298, 299, 574:—It cannot be presumed that a private drain of a landlord is a place declared for public use by the Corporation. When it is not shown that the Corporation had no power to make use of it as a drainage, it must be the landlord's private property and so the tenant cannot be asked to change his connecting drain for Municipal convenience and also he cannot be fined for neglecting to do so. 38 Cal 268=13 C L J 327=15 C W N 412=8 I C 706=11 Cr. L J 701

—Ss. 299 & 593—Notice under S. 299 When served on one co-owner according to S. 593 is binding on other co-owners. 44 I C 413.



## CALCUTTA MUNICIPAL ACT

(III OF 1899) (Contd)

—Ss. 320, 574—Receiver appointed by Court whether owner of premises he is holding. 7 C W N 706=30 C 721.

—S. 336—Vesting of High way in public authority—Right of private individuals to sue with leave in respect of nuisance. C P Code, S 91. 21 C W N 595=40 I C 74.

—S. 341—A projecting verandah supported by the beams of the adjoining room is not a fixture under s. 341. 15 C W N 730=13 C L J 611=10 I C 310

—S. 341—Sheets of tin. attached to shop by hinges and supported by props, forming verandah are not fixtures. A I R 1921 Cal 385=48 C 602=33 C L J 377=22 Cr L J 619=63 I C 155

—S. 341—A platform on its own foundation forms part of the building & also projects on a public street. It is not fixture within the meaning of S. 341. 28 C L J 494=49 I C 93.

—S. 341—There was no evidence as to when the platform which was ordered to remove was constructed. It was in front of plaff's building & over a drain in public street. The fixture should be after the building was erected under s. 341 & as there was no evidence as to time when the fixture was attached, the Magistrate's order was not proper. 23 C W N 752=21 Cr L J 768=29 C L J 605=58 I C 352.

—S. 341—It is no fixture within S. 341, when a projection forms an integral part of a house and a suit is maintainable to restrain the Municipality from acting on S. 241. 13 C L J 611=10 I C 310=15 C W N 730.

—Ss. 341, 618, 619—Payment of Compensation is not a Condition precedent to the demolition of structures. Assessment of compensation amount can only be fixed by Court of Small Causes. Declaratory suit under Sp. Rel Act s. 42 lies before removal. 32 M L J 631=21 C W N 194=24 C L J 498=43 I A 243=36 I C 912=44 C 87 P C.

—S. 342—Extension of to a Municipality—No repeal of S. 202 of Bengal Municipal Act of 1884 in that Municipality by reason of. 59 C 811.

—S. 342—Corresponding section in Bengal Municipal Act within meaning of S. 342 of Calcutta Municipal Act of 1899 does not correspond to S. 202 of Bengal Municipal Act 59 C 811 (816)=1932 Cr C 71=36 C W N 51=33 Cr L J 371=136 I C 303=A I R 1932 C 65=I R 1932 C 255=A L R 1932 C 221

—Ss. 343 & 442—S 442 does not control s. 343, also as the owner of land under s. 3 (32) means both the landlord & the tenant a notice under s. 343 to remove the tenant's

## CALCUTTA MUNICIPAL ACT

(III OF 1899) (Contd)

put served upon the landlord must be complied with by him. 19 C W N 391=28 I C 653=21 C L J 497.

—Ss. 370 to 375—The chairman & the general Committee both disapproved of some building plans. No cause of action arises to sue for the plan being sanctioned. Their decision cannot be reviewed by a Court as long as they act within their rights bonafide. But if their action is mala fide, the only remedy is to apply under S. 45 of the Spe. Rel Act. 17 C W N 929=40 C 836=22 I C 388.

—Ss. 374, 376, 631, 580—S. 376 governs 374 & When the chairman does not refuse or grant permission to perform some work the only remedy is to apply to the general committee with a written request. No appeal to the committee lies unless there is chairman's refusal. No imprisonment in default of fine can be imposed under the act. at any rate when there is a daily penalty. 15 C W N 906=12 Cr L J 375=11 I C 143.

—Ss. 375 and 377—Chairman and General Committee constituted tribunals to decide on plans for buildings—Civil Courts no power to interfere. 22 I C 388.

—S. 408—A owner whose house was vested in the Receiver was given notice under S. 408 Receiver should be requested to comply with it & if he refuses High Court should be approached. If it refuses the owner should satisfy the Magistrate in regard to his diligence & the general committee might proceed against occupiers. 38 C 714=15 C W N 1002=12 Cr. L J 361=11 I C 129.

—Ss. 408, 419, 574 & 598—The petitioner was served with a notice on 3-1-1916 for constructing some works under S. 408 within 3 months. After 3 months petitioner gave notice under S. 419 & raised some objections. At the hearing the time was changed to 6 months Magistrate refused to take any steps on the application by the Municipal when the petitioner remained unmoved. Then there was a second application, prosecution & conviction. Magistrate's dealing with the application was no bar to the prosecution & period of 6 months began from 3-1-1916. 18 Cr L J 400=38 I C 960.

—Ss. 408, 575 & 622—The lessor trustee owner was given notice under S. 408 Cal Mun. Act. But he is saved from the obligation when he obtains an order under S. 622 against his lessee only & is obstructed by the sub-tenants from making the improvements. Semble If the subtenants are refractory the lessee under S. 622 can take action against them. 41 Cal 164=20 I C 746=14 Cr L J 490.

Ss. 408, 409 & 622—The owner did



## CALCUTTA MUNICIPAL ACT

(III OF 1899) (Contd)

not comply with Municipal requisition as is was impossible due to an occupier of a part of the property. Owner's liability is discharged only to the extent of the impossibility by the occupier's conduct. A I R 1924 Cal 334=27 C W N 787=50 C 813=338 C L J 360=77 I C 529

—Ss. 408 & 409—By proceeding under S. 409 there is no waiver of notice under S. 408. A I R 1924 Cal 334=50 C 813=27 C W N 787=38 C L J 360=77 I C 529

—S. 449—Old S. 449 cannot be carried out by the procedure of the new S. 363 A I R 1926 Cal 1138=53 C 974=44 C L J 37=27 Cr. L J 1146=97 I C 666

—S. 466 (c)—A trade licensed carrier, over & above the license for animals kept by him, must also take out a license for the premises where they are kept under S. 466 (1) 24 C W N 744=58 I C 924

—S. 478 (29-5)—Landlord cannot be liable if the tenant allows accumulation of offensive matter on the land. A I R 1931 Cal 337 (1)=34 C W N 931=(1931 Cr. Cas 401 (1)=I R (1931) Cal 448=131 I C 272

—S. 495—Tea dust is an 'article of human food' within S. 495. 23 C W N 911=30 C L J 130=52 I C 223=20 Cr. L J 607 =47 Cal 53

—S. 495—Like the corresponding sec. of the Eng. law S. 495 is positive & when a servant sells adulterated articles it is the beneficial owner who must be punished also when he is unaware of the servant's conduct when the seller is a partner other partners also will be liable. 16 C W N 455 =14 I C 205=13 Cr. L J 205=39 Cal 682.

—S. 495 (a) Sub cl. 1—Every case depends on its own evidence as there exists no statutory presumption of purity, Corporation's standard is to be relied on or not is for the Court but it should not fix its own standard. The accused was convicted on the ghee being adulterated when the following were the results of two samples R W 24. 6; 25. 9 B R 44; 45 Saponification 222; 220 & under wellsmann's test the colour was shewed. 47 Cal 633=24 C W N 388=56 I C 586=21 Cr. L J 490

—S. 507—Seller. meaning of 39 C 682 =16 C W N 455=14 I C 205

—S. 556—Land for Dharmashala can be acquired by the Municipality. A I R 1922 P C 333=16 L W 673=31 M L T 155 =49 I A 255=43 M L J 634=49 C 838=27 C W N 125=21 A L J 27=37 C L J 67 (P C) =69 I C 114

—S. 557—Valuation of land. 11 C W N 875

—S. 557 (c)—Market value, how determined. Land acquisition Act, S. 23 41 Cal 967=18 C W N 884=23 I C 412

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## CALCUTTA MUNICIPAL ACT

(III OF 1899) (Contd)

—S. 557 (D)—One holding with one assessment was partitioned into two plots & one of the owners applied for his separate assessment, which was refused. Afterwards the Corporation acquired in separate Proceeding both the plots. It was decided that there was no estoppel for the corporation although the owner was deprived of the benefit of presumption under S. 557 (D). 28 C L J 144=22 C W N 538=46 I C 138

—S. 557—Presumption under this section is applicable to acquisition of the whole holding. A I R 1925 Cal 65=28 C W N 779=81 I C 1004

—Ss. 559, Sub S. 52 & 561—A theatrical performance continued beyond 1 A M & the three co-sharer owners & managers were convicted for breaking bye-law 83 made under S. 559 Sub. S-52 & sentenced on to pay Rs. 20 fine & the others Rs. 10 each. It was held by chitty J, that there was only one offence & the fine should not exceed Rs. 20 in all. 21 C W N 1009=26 C L J 29=40 I C 322=18 Cr. L J 674

[Overruled by 44 Cal 1025 Ed=21 C W N 1016=42 I C 305=26 C L J 215

—S. 559—Bye Laws. 83 & 85—Each person is liable to be punished with maximum fine when several persons are jointly convicted for breaking bye-law 83 made under S. 559 (52) which forbids performances beyond 1 A. M. Per Mookerjee J. Prima facie there is no division of responsibility between participants in a crime & hence each is liable. The intention of the legislature for departure from this fundamental principle must be clearly expressed. 44 Cal 1025=21 C W N 1016=26 C L J 215=42 I C 305=10 Cr. L R 31=18 Cr. L J 945 (F B)

—Ss. 559 (52) & 591—The General Committee is fully empowered to frame bye-laws & to make its breaches punishable & so Bye-law 45, regulating the hours of theatrical performance is legal; also abatement secs. of the Penal code apply to offences under such bye-Laws. 24 C W N 196=54 I C 781=21 Cr. L J 173

—S. 559—R. 24 framed by Local Government under S. 11 (2) (f) & (i) Motor Vehicles Act 1914 does not supersede Byelaw 10 framed under cl. 18 A I R 1921 Cal 107=33 C L J 19=25 C W N 21=22 Cr. L J 401=61 I C 641

—S. 559—A motor car is included in "carriage." A I R 1921 Cal 107=33 C L J 19=25 C W N 21=22 Cr. L J 401=61 I C 641

—Ss. 574 and 598—Notice under S. 401—Extension of time on objection—Negotiation pending notice, does not make requirements of notice unenforceable—Complaint giving wrong particulars thrown out—No bar to fresh prosecution. 38 I C 960

## CALCUTTA MUNICIPAL ACT

(III OF 1899) (Contd.)

—Ss. 578 & 631—An unlicensed pleader practised in the year 1917-1918. He was an offender under S. 578 & a complaint within 3 years from 31st March 1918 was within time. Per Richardson J. If an unlicensed person carried on profession after 1st July each year offence under S. 578 is committed. It is doubtful whether continuance of it is a continuing the offence or separate offences on each day. If it is for one day only the prosecution must be within three months. Per Shamsul J. For the pleader's profession, it is not necessary that he should attend or address the court daily. Per curiam. It is only when there is no criminal case & a public body is interested that the High Court interferes with an acquittal order. 24 C W N 415=31 C L J 127=55 I C 731=21 Cr. L O 363

—Ss. 589 Sub S. (18)—Bye-Law framed under breach of Offence under S. 96 (4) (a) of the Police Act or the Municipal. 41 I C 129

Ss. 589, 341, 102 & 63 (3)—S. 580 does not bar the corporation who is also the Committee's secretary from signing notices when no contrary provisions are found, S. 589 only applies when it is signed by the chairman. Printed proceedings are not sufficient legal proof by themselves unless they are in accordance with S. 78 I. Evi Act. A notice under s. 589 signed by the secretary instead of by the Chairman is an irregularity under s. 102. 30 I C 343=7 Cr L R 88=16 Cr. L J 659.

—Ss. 617, 618 and 619—Fixing of compensation amount—Only small Cause Court has jurisdiction. 20 M L T 383 (P C)=44 Cal 87=18 Bom L R 878=24 C L J 498=36 I C 912

—S. 622—Occupier, meaning of. 41 Cal. 104=17 C W N 1084=21 I C 169

—S. 622—Owing to some tenant's obstruction requisition for improvements was not complied with. The liability of the owner is discharged only so far as compliance is made impossible A I R 1924 Cal 334=50 C 813=38 C L J 360=27 C W N 787=771 C 529

—S. 631 The complaint is time barred when it is made on 11-5-1920 for the offence alleged to be committed on 5-9-1919 22 Cr L J 559=62 I C 575 (C)

—S. 631—Limitation begins from first obstruction A I R 1921 Cal. 385=48 C. 602=22 Cr. L J 619=33 C L J 377=61 I C 155

—S. 637—The Section by itself does not include any area in Calcutta town. A I R 1927 Cal 748=31 C W N 1007=103 I C 674

—Sch. IV Rr. 9-10—The expression "One individual person in Rr. 9, 10, sch 4 is an individual who himself is a member of the

## CALCUTTA MUNICIPAL ACT

(III OF 1899) (Contd.)

joint family or association of individuals Only such individuals can be on the voters' list, & they can represent them properly. 15 C L J 488=39 C 754=15 I C 441

—A municipal candidate sent in his nomination papers consisting of a letter and three forms of nomination paper all stitched together. The form contained the candidate's name, signature and description as voter, and also the names and signatures of the proposer, seconder and 18 approvers. Held the nomination paper was not valid as it did not contain candidate's description as voter, the description in a letter being insufficient. Held also that nomination paper was bad because the seconder was one of the 18 approvers and approver no. 15 was a firm. 28 C L J 289=22 C W N 943=48 I C 314=46 C 119. See also 22 C W N 957

## CALCUTTA MUNICIPAL ACT 3 OF 1923

—Municipal Magistrate can deal with non-Criminal proceedings A I R 1927 Cal. 509=54 C 532=31 C W N 506=45 C L J 469=28 Cr. L J 407 8 I A Cr. R 35=101 I C 183

—S 3—Whether a building is new or not has reference to the date of the Act coming in force A I R 1926 Cal. 1138=53 C 974=44 C L J 37=27 Cr L J 1146=97 I C 666

—S 3 (5)—In Bengal, generally, hats are held on a particular day or days in a week, while bazars are held daily. The meaning given to a bazaar by the Calcutta Municipal Act, does not militate against the ordinary meaning of the word and a bazar which is known as a hat for the reason it is held on a particular day or days in the week, would not cease to be a bazaar. That the sellers of commodities assemble only on one day at a bazaar, and have no sort of right of occupying any particular place for the sale of their commodities cannot have the effect of taking the place occupied by them out of the category of shops—A collection of which would ordinarily be denominated a bazaar, and is a bazar within the meaning of the Calcutta Municipal Act 36 C W N 1085=A I R 1933 C 322=A L R 1933 C 250=60 C 296

—S. 3 (5)—The real meaning of the word "shop" as used in the Calcutta Municipal Act must be ascertained according to the meaning which the word has acquired in the country or the locality where the statute is applicable, and that must be taken to be the ordinary meaning of the word. 36 C W N 1085

—S. 3 (57)—When there is no evidence of public user of a blind alley and the evidence of public expenditure in conserving it is flimsy, such evidence is not sufficient to prove conversion of the private land with a public street, A I R 1931 Cal 433

## CALCUTTA MUNICIPAL ACT

## 3 OF 1923 (Contd)

=35 C W N 397=32 Cr L J 590=Ind Rul (1931)  
Cal 390=58 C 1124=(1931) Cr. Cas 585=130  
I C 870

—Ss. 12 and 65—Corporation's power:  
—delegation to Chief Executive Officer—  
plea not specifically taken—not valid. A L  
R 1933 C 190=56 C L J 578=A I R 1933 C 341

—S. 27—It cannot be correctly in-  
ferred from the section that improper  
acceptance of a void nomination is not an  
admissible ground for the purpose of S 46  
A I R 1928 Cal 209=55 C 173=32 C W N  
264=109 I C 739

—S. 27—Owing to holidays, time for  
deposit money was extended by the Cor-  
poration. A candidate paid the deposit  
after three days but within the extended  
period. His nomination is void even then  
the Section being mandatory. A I R 1928  
Cal 209=55 C 173=32 C W N 264=109 I C 739

—S. 47—Candidate or his agent con-  
nived at procuring application by voters in  
the name of dead persons as he had no  
reason to believe imposture. No corrupt  
practice was proved. A I R 1929 Cal 137  
=32 C W N 1155=I R (1929) Cal 433=116  
I C 145

—S. 127—Applicability of—re valua-  
tion on amalgamation of premises—S. 127  
does not apply so as to control the provi-  
sions contained in Ss. 131 and 134. A L R  
1933 C 420=36 C W N 1032=141 I C 32=A I  
R 1933 C 128

—S. 127—How to calculate annual  
value. Explanation of "Reasonably expec-  
ted to let." A I R 1927 Cal 659=31 C W N  
864=46 C L J 535=103 I C 683

Ss. 127, 131 and 134—Amalgamation  
of premises—Assessment on, cannot be  
higher than the assessment on separate  
valuation of the amalgamated premises  
during the currency of the assessment  
that was in force at the time of amalgama-  
tion. 36 C W N 1032=A I R 1933 C 128  
=141 I C 32=A L R 1933 C 420

—S. 127 (b)—The consideration that  
an area is not fully developed is not im-  
portant in the matter of assessment. The  
depreciation contemplated in s. 127 (b) is  
that due to the age of the building and  
cannot include a deduction on the ground  
of the building being situate in an undevel-  
oped or not fully developed area. A I R  
1931 Cal 506=58 C 793=55 C W N 283=Ind  
Rul (1931) Cal 684=133 I C 332

—S. 131—Increase in the value of  
land need not be proved by the Corpora-  
tion. A I R 1928 Cal 450=47 C L J 315=32  
C W N 378=109 I C 618

—S. 131—Under Calcutta Rent Act  
(1920) S. 26, assessment cannot be in creas-  
ed above the standard rent. A I R 1927  
Cal 659=31 C W N 861=46 C L J 535 (F B)  
=103 I C 683

## CALCUTTA MUNICIPAL ACT

## 3 OF 1923 (Contd)

—S. 137 (1)—Notice comes after com-  
pletion of general valuation. A I R 1930  
Cal 770=52 C L J 100=34 C W N 1054=I R  
(1931) Cal 347=130 I C 283

—S. 131 (2) (a) & (c)—A subject can  
ask for new valuation for reducing assess-  
ment. A I R 1930 Cal 770=52 C L J 100  
=34 C W N 1054=I R (1931) Cal 347=130  
I C 283

—S. 138—To all cases of increase in  
valuation the section is applicable. A I R  
1930 Cal 770=52 C L J 100=34 C W N 1054  
=I R (1931) Cal 347=130 I C 283

—133 (2)—To the Executive Officer's  
valuation under S. 131 (2) (a) or (c) also  
the right of objection applies. S. 139 (2)  
does not drastically cut down the general  
language of sub s. (1). A I R 1930 Cal  
770=52 C L J 100=34 C W N 1054=I R  
(1931) Cal 347=130 I C 283

—S. 139 (e)—The objection should be  
within time when owner is given notice  
but not so in other cases. A I R 1930 Cal  
770=52 C L J 100=34 C W N 1054=I R  
(1931) Cal 347=130 I C 283

—S. 140—No analogy exists between  
the award of the land Acquisition Collector  
& the assessment orders under S. 140 of  
the Municipal Executive Officer. Per  
Cumming A I R 1928 Cal 450=47 C L J  
315=32 C W N 378=109 I C 618

—S. 141—Evidence should be so  
recorded by the Small Cause Court Judge  
as to enable the Appellate Court to decide  
the rightness of his decision. A I R 1930  
Cal 306=33 C W N 1173=I R (1930) Cal 675  
=126 I C 131

—S. 141—If the assessee does not  
give evidence to the contrary the assess-  
ment should be confirmed. A I R 1928  
Cal 450=47 C L J 315=32 C W N 378=109  
I C 618

—Ss. 141 & 142—Full evidence should  
be recorded by the Small Cause Court  
Judge. A I R 1927 Cal 659=31 C W N 864=  
46 C L J 535=103 I C 683

—S. 141 (2)—Where there is no ques-  
tion of want of bona fide on the part of a  
person who was to file an appeal from an  
order of the Deputy Execution Officer.  
'Sufficient Cause' may be held to have been  
made out for extension of period of limi-  
tation to file appeal. A I R 1931 Cal 596  
=58 C 793=35 C W N 283=Ind Rul (1931) Cal  
684=133 I C 332

—S. 142 (3)—Appeal under S. 142 (3)  
to the High Court is not a second appeal  
under S. 100 C P C & is not confined only  
to questions of law. A I R 1928 Cal 450=47  
C L J 315=32 C W N 378=109 I C 618

—S. 146 (b)—Last words of the  
clause do not control S. 139. 52 C L J 100  
=34 C W N 1054=I R (1931) Cal 347=130  
I C 283.

## CALCUTTA MUNICIPAL ACT

## 3 OF 1923 (Contd)

—S. 149—Owner's share of Municipal tax payable under, not virtually a tenant's tax.

The tax is imposed by S. 149, Calcutta Municipal Act, 1923, upon the owner and in law is a liability of the owner. The discharge thereof is a benefit to the owner. 36 C W N 1144=A I R 1932 C 886=140 I C 1= I R 1932 C 679 (F B)

—S. 175—A person is carrier within Sch. 6 item 18 even if he only carries passengers. A I R 1930 Cal 368=34 C W N 452=I R (1930) Cal 880=127 I C 672

—S. 175—Whether license is necessary should be decided by the Magistrate. When an application to cancel notice is under consideration rr. 12 to 14 need not be resorted to. A I R 1926 Cal 614=27 Cr L J 549=43 C L J 231=93 I C 1045

—Ss. 175 and 391—Object of the sections—the nature of the license required by them are different. A L R 1933 C 368=37 C W N 344

—S. 205 of the Act of 1923 does not apply to Howrah in the absence of a notification extending the same thereto. A notification issued under S. 641 of the old Act (III of 1899) extending the provisions of S. 228 of that Act to Howrah, though kept alive by S. 25 of the Bengal General Clauses Act (I of 1899) does not continue to be in force after the repeal of the old Act and cannot be deemed to have been issued under the provisions re-enacted in the Act of 1923. 36 C W N 11 (15)=138 I C 28=A I R 1932 C 315=59 C 1007=I R 1932 C 409.

—S. 205—Under s. 205 rates and taxes are a first charge. Taxes accruing due during Hindu widow's lifetime can be enforced against properties in the hands of her daughter succeeding as reversioner. A I R 1931 Cal 557=35 C W N 341=Ind Rul (1931) Cal 747=133 I C 699.

—S. 239 (1)—In the absence of evidence of public users of a blind alley, and the flimsy nature of the evidence of public expenditure in conserving it, the conversion of the private land into a public street cannot be said to be proved. A I R 1931 Cal 433=35 C W N 397=32 Cr L J 590=Ind Rul (1931) Cal 390=58 C 1124=(1931) Cr Cas 585=130 I C 870.

—S. 271—To determine owner's liability for conviction for not complying with notice under S. 271, ejectment-suit against tenant or injunction against premises owner or only an application under S. 527 are immaterial questions but in awarding sentence such questions should be considered. A I R 1929 Cal 490=30 Cr L J 1026=(1929) Cr. Cas 172=119 I C 369.

—Ss. 271 & 278 (1) (b)—Corporation

## CALCUTTA MUNICIPAL ACT

## 3 OF 1923 (Contd)

should only see whether there is proper accommodations sanitation and not whether there is proper access to privy and no requisition for it is required by S. 278 (1) (b). A I R 1930 Cal 285=51 C L J 469=I R (1930) Cal 856=127 I C 552.

—S. 299—A structure complained of whether erected before or after the "building" falls within the section. Present Act cannot be interpreted by the similar provisions of the 1899 Act. A I R 1929 Cal 440=(1929) Cr Cas 72=I R (1930) Cal 215=122 I C 549.

—Ss. 299 and 364—Demand of encroachment fees—subsequent vesting of road in Corporation—technical error—not illegal and ultra vires—A L R 1933 C 190=56 C L J 578=A I R 1933 C 341.

—S. 323—The word "proceedings" means proceedings before a Magistrate and not proceedings before a committee of the corporation, which precede the application to a Magistrate. A I R 1931 Cal 433=35 C W N 397=32 Cr L J 590=Ind Rul (1931) Cal 390=58 C 1124=(1931) Cr Cas 585=130 I C 870.

—S. 346—Notice under S. 359 cannot be refused by the corporation. Previous prosecution and fine under S. 346 of the bustee owner is immaterial. It is wrong to prosecute within six months of the notice. A I R 1927 Cal 218=44 C L J 579=28 Cr L J 19=7 A I Cr R 330=99 I C 933.

—S. 363—Onus to prove that the work was finished more than five years previously lies on the owner. A I R 1930 Cal 222=(1930) Cr Cas 222=50 C L J 527=I R (1930) Cal 440=124 I C 488.

—S. 363—Though necessary for privacy S. 363 is contravened when boundary walls 18 feet high are erected without sanction. A I R 1929 Cal 781=(1929) Cr. Cas 525=33 C W N 777=I R (1930) Cal 612=125 I C 740.

—S. 363—Before the Act of 1923, demolition order for a building erected without sanction was passed. The new corporation reaffirmed the General Committee's sanction to proceed under the old S. 449. As the proceedings were irregular the demolition order is invalid. A I R 1925 Cal 1251=29 C W N 898=52 C 962=26 Cr L J 1533=90 I C 317.

—S. 363—It is impossible to fulfil old S. 440 by the procedure under the new S. 363. A I R 1926 Cal 1138=53 C 974=44 C L J 37=27 Cr. L J 1146=97 I C 666.

—S. 363 (2)—S. 363 (2) does not apply to cases falling under S. 364 (1), and sub-ss. (3), (5) and other sub-sections. A I R 1931 Cal 433=35 C W N 397=32 Cr L J 590=Ind Rul (1931) Cal 390=58 C 1124=(1931) Cr Cas 585=130 I C 870.



## CALCUTTA MUNICIPAL ACT

3 OF 1923 (Contd)

—Ss. 363, 364—Under s. 363 the work is unlawful from the beginning and proceedings must be taken within five years of erection. But under s. 364, the illegality begins only upon expiry of the notices mentioned therein and proceeding must be taken within five years of such expiry. A I R 1931 Cal 433=35 C W N 397=32 Cr L J 590=Ind Rul (1931) Cal 390=58 C 1124= (1931) Cr. Cas 585=130 I C 870.

—S. 364—Application—emergency—used in cases even when there is no danger to public—order under—not mandatory—discretion permitted to Magistrate.

A L R 1933 C 190.

—S. 364—S. 363 (2) does not apply to cases falling under s. 364 (c), and sub-ss. (3), (5) and other sub sections. A I R 1931 Cal 433=35 C W N 397=32 Cr L J 590=Ind Rul (1931) Cal 390=58 C 1124= (1931) Cr Cas 585=130 I C 870.

—S. 386 (1) (a)—Charge under—Summons to answer—Omission to mention place of occurrence in—Itself a material irregularity. 36 C W N 132.

—S. 386 (1) (a)—The expression grain is confined to seeds of cereal plants such as Barley, Oats etc, and does not include Dal; and storing Dal without taking out a license is not an offence under s. 386 (1) (a) of the Calcutta Municipal Act, 1923. A I R 1931 Cal 705=58 C 955=Ind Rul (1931) Cal 914=32 Cr L J 1235=134 I C 914.

—S. 386 (1)—Premises were let on monthly rent as vacant site but the tenant used the same for purpose necessitating a license without landlord's permission. The latter is not liable for use without licence. A I R 1931 Cal 5=(1931) Cr. Cas 37=34 C W N 930=53 C L J 65=1 R (1931) Cal 160=129 I C 320.

—S. 391—License for holding a carnival—refusal of, by corporation—whether justified under the implications of the section. A L R 1933 C 368=37 C W N 344.

—S 400—limits of a "bazar"—Corporation's powers to define limits—includes the powers to extend them. A L R 1933 C 250

—S. 400—The power to define limits must include the power to extend the limits according to the facts and circumstances of a particular case. If in the opinion of the Corporation, it was expedient or necessary to include Nos. 56-1, 56-2 56-3, and 58, Chetla Road, within the limits of the bazar at No 56; the action taken by the Corporation in this behalf could not be characterised as ultra-vires or illegal 36 C W N-1085 (1087).

—S. 449—A building erected without sanction before the Act of 1923 was ordered to be demolished and the new Corporation reaffirmed the sanction by the General

## CALCUTTA MUNICIPAL ACT

3 OF 1923 (Contd)

Committee to proceed under the old S. 449. As the prosecution is irregular, the demolition order is not valid. A I R 1925 Cal 1251=52 C 962=26 Cr L J 1533=29 C W N 898=90 I C 317.

—S. 478—A landlord is not liable when the tenant allows offensive articles to accumulate on the leased land. 34 C W N 931=1 R (1931) Cal 448=131 I C 272.

—S. 531—High Court can revise an order of the Magistrate appointed under this Section. A I R 1925 Cal 1251=29 C W N 898=52 C 962=26 Cr. L J 1533=90 I C 317

—S. 533—The Section is subject to C P C S. 200 (b). A I R 1928 Cal 483=48 C L J 190=32 C W N 1091=30 Cr L J 231=12 A I Cr. R 204=1 R (1929) Cal 178=114 I C 82

—S. 535—A person in whose favour an order under S. 535 (2) (a) was made subsequently applied for costs. The application can be considered. A I R 1930 Cal 487=57 C 497=1 R (1930) Cal 732=126 I C 412

—S. 538—Special limitation is inapplicable to a son's suit to recover Provident Fund of Corporation's employee. A I R 1928 Cal 542=1 R (1929) Cal 351=115 I C 271

—S. 538—The section is inapplicable for a money-suit for the Provident Fund. A I R 1928 Cal 743=55 C 1231=32 C W N 515=113 I C 166

—S. 557—Cl. 4 means if a proceeding between Aug. 1926 & Aug. 1927 would have been barred under the Act or any other law it is not barred until the latter date. A I R 1930 Cal 222=(1930) Cr. Cas 222=54 C L J 527=1 R (1930) Cal 440=124 I C 488.

—S. 557—Procedure of Act V of 1926 to a proceeding for contravening both the old & the new Acts. A I R 1928 Cal 207=55 C 964=47 C L J 208=32 C W N 454=10 A I Cr. R 174=29 Cr. L J 509=109 I C 237

—Sch. XVII—Rules 30 & 32 were not intended to apply to boundary walls which come within "building" by the Act of 1923 A I R 1929 Cal 781=(1929) Cr. Cas 525=1 J 1929 Cal 412=33 C W N 777=1 R (1930) Cal 612=125 I C 740

—Sch. XIX (8)—The expression "grain" in Sch. XIX (8) is confined to seeds of cereal plants such as Barley Oats etc, and does not include Dal and storing Dal without taking out a license is not an offence. A I R 1931 Cal 705=58 C 955=Ind Rul (1931) Cal 914=32 Cr. L J 1235=134 I C 914

## CALCUTTA PORT TRUST ACT. (III OF 1890)

—S. 83—Structures on private land are prohibited by the section & to that extent it interferes with private rights. A I R 1925 Cal 404=51 C 1030=26 Cr L J 397=84 I C 941



## CALCUTTA MUNICIPAL CONSOLIDATION

## ACT 2 OF 1888 (Concl'd)

—S. 83—It is an erection when a bandh is added to the Hoogly river. 22 Cr. L J 504=62 I C 328 (Cal)

—S. 84—Injunction cannot be issued by a Civil Court to stop the proceedings for contravening s. 83. A I R 1928 Cal 464 =55 C 978=32 C W N 576=112 I C 712

—S. 84—Commissioners themselves have to remove the obstructions when there is a conviction under S. 84. 22 Cr. L J 504=62 I C 328 (Cal)

—Ss. 112, 113 and 114—Sole risk meaning of—Expiry of three days from date of landing—Liability of commissioners for loss of goods. 46 Cal 56=50 I C 58

—S. 142—In a suit by the Corporation of Calcutta against the Commissioner of the Port of Calcutta for damages for flooding the engine room of the plaintiff's pumping station, the defendant pleaded bar of cause of action by s. 142 of the Calcutta Port Act. Held, that when the facts stated in the plaint are insufficient, the procedure of binding parties to the order was inapplicable and that the defendants had to show by other evidence that the facts proved brought the case within the words of s. 142. A I R 1931 Cal 666=58 C 264=Ind Rul (1931) Cal 846=134 I C 542

## CALCUTTA RENT ACT III OF 1920

—Landlord's ejectment suit against the tenant after due notice was dismissed when the Act was in force. But it ceases to apply when at the hearing of the appeal the Rent Act had expired. A I R 1928 Cal 436=47 C L J 530=110 I C 715

—Order about standard rent being a judgment *in rem* it cannot be reopened by the subsequent tenant. A I R 1927 Cal 305=31 C W N 308=100 I C 781

—When a notice to quit is given to the tenant, he becomes a trespasser & cannot claim the benefit of the Act. A I R 1926 Cal 481=30 C W N 152=92 I C 1001

—A lease included property outside Calcutta, though tenancy for it was not intended to be created. Rent Controller can fix standard rent for property in Calcutta. A I R 1926 Cal 250=53 C 15=30 C W N 114=91 I C 417

—Before November 1918 premises were leased for more than Rs. 250 & after the Act Application for standard rent of a part was made. The Court can find the proportion to be fixed. A I R 1926 Cal 372=87 I C 796

—President's decision cannot be revised by the High Court though it opines that no sufficient attention is given or one element of a question of fact is given insufficient importance. A I R 1924 Cal 629=28 C W N 467=83 I C 368

## CALCUTTA RENT ACT III OF 1920 (Concl'd)

—To the landlord's transferee also the Act is applicable. A I R 1924 Cal 57=50 C 491=75 I C 521

—S. 1 (4)—President of C. I. because of the proviso cannot hear appeals from Rent Controller's decisions where the proceedings before him did not end on 31-3-1924, if they related to premises whose rent exceeded Rs. 250 monthly or Rs. 3000 yearly on 1-11-1918. A I R 1925 Cal 571=29 C W N 281=52 C 551=86 I C 139

—S. 2—Various blocks like servant's quarters, offices, garage & the main building come within 'Premises'. A I R 1926 Cal 681=53 C 479=30 C W N 308=95 I C 289

—S. 2—The Act fixes the standard rent for which no application to the Controller is required. A I R 1926 Cal 481=30 C W N 152=92 I C 1001

—S. 2—To determine whether electric lights & fans go with & form a part of the demised premises or building, the intention of the parties & the nature of the agreement should be considered. A I R 1926 Cal 469=53 C 123=42 C L J 87=30 C W N 274=90 I C 4

—S. 2—Whether property is premises depends upon whether it was let out for purposes shown in s. 2 (c). Actual user may go to prove the question. A I R 1923 Cal 311=67 I C 302

—S. 2—In case of a furnished flat, hire of furniture cannot be fixed by the controller though he can fix the rent of the premises. His order does not affect the original parties. A I R 1924 Cal 868=28 C W N 774=81 I C 853

—S. 2 (e)—Premises as defined in S. 2 (e) does not include a part of a hut. A I R 1924 Cal 535=69 I C 976

—Ss. 2 (e) & 15—A workshop is not included in 'premises' as S. 2 defines it. It makes no difference whether the engineer uses room for retiring or for office. A I R 1921 Cal 470=26 C W N 102=68 I C 907

—Ss. 2 (f) (ii) & 15—Standard rent for the portion sublet by the tenant is to be fixed not under s. 2 (f) (ii) but under S. 15 (3), by which the portion sub. let is considered first let when the whole premises were let out. A I R 1923 Cal 553=27 C W N 569=77 I C 623

—Ss. 2 (g) & 11 (5)—One whose tenancy expires even before the Act is a tenant & so entitled to its benefit though ejectment suit was filed before the Act came in force. Tenant cannot get advantage of s. 11 if the rent is not paid under S. 11 (5). A I R 1922 Cal 391=49 C 369=25 C W N 967=68 I C 361

—S. 4 (3) (IV)—A 3 years lease with option to renew it for the same period is not one for five years & more. A I R 1922

## CALCUTTA RENT ACT III OF 1920 (Contd.)

Cal 514=39 C L J 85=49 C 928=26 C W N 711=86 I C 227

—Ss. 4 & 11—The owner of premises gave a lease to the plff, and asked his monthly tenant to attorn to the plff. As this circumvented the Rent Act the plff's lease was held void A I R 1924 Cal 57=50 C 491=75 I C 521

—S. 8—When an application for fixing standard rent is made decision must be given though after proceedings begin relationship of landlord & tenant ceases. A I R 1924 Cal 715=51 C 577=29 C W N 30=78 I C 874

—S 8 President of the Tribunal in increasing the standard rent for entitling the landlord to recover rent neither notice nor a certificate is necessary. A I R 1922 Cal 475=26 C W N 961=70 I C 551

—S. 9—No prohibition exists with respect to premium paid under agreement prior to 15th March 1916. A I R 1926 Cal 927=53 C 492=97 I C 376

—S. 10—The term is not 'desire' but 'require' i.e. it implies more than a mere wish & an element of need is implied. So a landlord having enough premises for his need cannot be allowed to eject the tenants only because he chooses for his own convenience or profits to vacate his own occupied premises & then asking the tenants to do the same. A I R 1923 Cal 223=26 C W N 499=69 I C 963

—S. 11—Breaches during tenancy should be considered but the tenant is not deprived of the benefit of the Act by harmless breach which is waived. A I R 1926 Cal 624=30 C W N 199=94 I C 857

—S 11—Tenants are not deprived of the protection under the Act, though in breach of agreement to repair fixtures are removed in contravention of the covenant. A I R 1925 Cal 791=29 C W N 636=88 I C 589

—S. 11 Landlord refused rent & rent controller's office was closed at expiry of fortnight from the due date, so after reopening the payment was made at the first opportunity. S 11 (4) & (5) are sufficiently complied with A I R 1925 Cal 791=29 C W N 636=88 I C 589

—S. 11 (5)—Before the rent is actually due if there is an agreement for extending the time for payment, then the time during which under S. 11 (5) the rent is to be paid is the extended time but when there is already default, subsequent acceptance by the landlord is to no purpose. A I R 1923 Cal 227=26 C W N 678=70 I C 494

—S. 11—In spite of a prior agreement for higher rent, a tenant regularly paying standard rent cannot be ejected. A I R 1922 Cal 394=49 C 150=70 I C 75

—S 11—s. 114 T P Act is not expressly excluded by the Rent Act. A I R 1922 Cal 394=49 C 150=70 I C 75

## CALCUTTA RENT ACT III OF 1920 (Contd.)

S. 11—Proviso—Reasons mentioned in it are illustrative, and not exhaustive. A I R 1921 Cal 213=25 C W N 1012=68 I C 417

—S. 11 (5)—A defaulting tenant cannot claim advantage under the Act. A I R 1922 Cal 391=49 C 369=25 C W N 967=68 I C 361

See also A I R 1922 Cal 380=49 C 383=69 I C 988

—S. 14—It is not necessary that the tenant should continue as such at the time of claim. Tenant & landlord include extenuant & ex-landlord respectively A I R 1928 P. C. 227=56 C 80=55 I A 344=32 C W N 1093=55 M L J 464=28 L W 862 P C=111 I C 300

—S 15—There can be a retrospective fixing of rent. A I R 1928 P C 227=56 C 80=55 I A 344=32 C W N 1093=55 M L J 464=28 L W 862 P C=111 I C 300

—S 15—Controller has jurisdiction when the premises were first let as whole. But against his wrong decision an appeal under S 18 to the President of Impro. Tribunal is the proper remedy. A I R 1928 P C 227=56 C 80=55 I A 344=32 C W N 1093=55 M L J 464=28 L W 862 (P C)=111 I C 300

—S. 15—When no rent is fixed the Section is inapplicable. A I R 1927 Cal 305=31 C W N 308=100 I C 781

—S 15—A party to an application to fix standard rent & not a stranger should have borne the expense of improvement. A I R 1926 Cal 681=53 C 479=30 C W N 308=95 I C 289

—S 15—On breach of covenant notice to end tenancy was given & an ejectment suit was filed. Then during the pendency of suit tenant's application for the standard rent is incompetent though ejectment decree is given after Rent Controller's order for standardization of rent. A I R 1926 Cal 708=30 C W N 236=93 I C 56

See A I R 1926 Cal 687=92 I C 332

—S 15—To take advantage of the section the tenant must pay arrears as well as the full allowable rent. A I R 1926 Cal 481=30 C W N 152=92 I C 1001

—S 15—There must be a finding under Cl. (3). It is question of fact whether rent is unduly low the test is the rent at which the premises were let on 1-11-1918 in fact. A I R 1924 Cal 629=28 C W N 467=83 I C 368

—S 15—Certificate must be given by the Rent Controller & his order under the Section can be revised by the High Court. A I R 1923 Cal 169=49 C 931=26 C W N 845=70 I C 371

See also A I R 1922 Cal 427=26 C W N 78=49 C 528=68 I C 274.

—S. 15 (1) Standardization of rent is possible only before the lease expires. A I R 1922 Cal 427=49 C 528=26 C W N 78=68 I C 274

**CALCUTTA RENT ACT III OF 1920 (Contd.)**

—S. 15—An application against the order of refusal to fix standard rent can be heard on the Appellate side of High Court. A I R 1921 Cal 486=26 C W N 52=64 I C 709.

—S. 15—Tenancy was unlawful but the landlord always treated it as valid, standard rent must be fixed when applied for. A I R 1921 Cal 486=26 C W N 52=64 I C 709.

—S. 18—The old Act applies when the case was filed before the Amendment of 1924 A I R 1927 P C 97=54 C 508=54 I A 152=52 M L J 655=(1927 M W N 340=29 Bom L R 868=31 C W N 646=38 M L T 95=26 L W 435=25 A L J 956=46 C L J 341 (P C)=101 I C 38.

—S. 18—In revision before the President a new point cannot be raised for the first time. A I R 1926 Cal 305=53 C 393=42 C L J 588=30 C W N 116=91 I C 1011.

—S. 18—Controller will not standardize the rent as the sub-lease to prostitute does not make the contract invalid but when purpose of letting is continuing a brother, the contract is void. A I R 1925 Cal 315=51 C 1005=80 I C 682.

—S. 18—President can determine whether Rent Controller can pass the order for standardization of rent. A party in not disentitled from applying to the President by his objection to Controller's objection. A I R 1923 Cal 180=27 C W N 287=73 I C 47.

See also A I R 1923 Cal 33=37 C L J 101=27 C W N 50=72 I C 221.

—S. 18—President cannot revise the order when the Rent controller has not decided the standard rent. A I R 1922 Cal 427=26 C W N 78=49 C 528=68 I C 274.

—Ss. 18, 24, 141—When the President acts under s. 18, he is a civil court and C P C applies. He can pass order as to costs & enforce it. A I R 1921 Cal 413=26 C W N 30=65 I C 177.

—S. 19—Recovery of unauthorized rent fine or premium is prevented by the Section. A I R 1926 Cal 927=53 C 492=97 I C 376.

—S. 20—President of Tribunal can hold summary inquiry & the procedure of Cr. P C Chap 22 applies. A I R 1923 Cal 339=37 C L J 298=71 I C 611.

—S. 20—The section is not ultra vires. A I R 1921 Cal 708=48 C 955=33 C L J 551=22 Cr L J 354=25 C W N 661=61 I C 210.

—S. 23—Controller is civil court. A I R 1922 Cal 427=26 C W N 78=49 C 528=68 I C 274.

—S. 23—Rule 4 is ultra vires. A I R 1921 Cal 708=48 C 955=33 C L J 551=22 Cr L J 354=25 C W N 661=61 I C 210.

—S. 24—Revision application cannot

**CALCUTTA RENT ACT III OF 1920 (Concl'd.)**

be treated as a suit but further evidence can be taken by the President. A I R 1926 Cal 305=53 C 393=42 C L J 588=30 C W N 116=91 I C 1011.

—S. 24—No reference under C P C O 46 r. 1 can be made by the Rent controller. A I R 1925 Cal 391=40 C L J 578=29 C W N 521=84 I C 543.

—S. 24—President of Tribunal increased rent decided by controller, Neither notice under S 8 nor controller's certificate is necessary. A I R 1922 Cal 475=26 C W N 961=70 I C 551.

—S. 26—Assessment under Municipal Act cannot be increased above the standard rent. A I R 1927 Cal 659=31 C W N 864=46 C L J 535=103 I C 683.

**CALCUTTA SMALL CAUSE COURT**

**RULES OF PRACTICE.**

—r. 96—The Small Cause Court has no jurisdiction to entertain a suit for declaration of title to property attached in execution of a decree where property exceeding Rs. 2,000 in value has been attached and the total decretal amount for which the decree can be executed also exceeds Rs. 2,000. 58 C 1251=Ind Rul (1931) Cal 903=134 I C 903.

**CALCUTTA SUBARBAN POLICE ACT II OF 1866**

—S. 18—A stall is not a place of public resort where soda water is sold not to be consumed on the premises. A I R 1923 Cal 135=49 C 451=26 C W N 56=34 C L J 198=22 Cr L J 561=62 I C 577.

—S. 47 A—An investigating Police Officer in the area governed by the Act has a diary under S 47 A & so no privilege attaches to it. A I R 1924 Cal 542=24 Cr L J 757=74 I C 261.

—S. 93—The question as the necessity of an order under s 62 A (4) or 93 A to prohibit in the town or the suburbs of Calcutta any procession or assembly on a particular day in a particular place is entirely for the Commissioner to decide. A I 1931 Cal 410=35 C W N 716=32 Cr L J 844=Ind Rul (1931) Cal 558=(1931) Cr Cas 506=132 I C 174.

**CALCUTTA UNIVERSITY ACT ( II OF 1857 )**

See also Universities Act 8 of 1904.

—Acceptance of trusts—Garnts burdened with conditions—Effect of illegal conditions—University Regulation—Founding of chairs to be filled by Indian Professors—Exclusion of one trustee, effect of Students, meaning of. 22 C L J 593=34 I C 657.

—S. 57—Evidence. 8 W R 499.

**CALENDAR**

See Limitation Act S. 25.

## CANADA

—Acts of Parliament of—Draftsman of—Judicial Committee is not—Reference to it of question of validity of statute without reference to particular facts—Undesirability of.  
A I R 1932 P C 36.

—The Parliament and Government of Canada have exclusive legislative and executive authority for performing the obligations of Canada, or of any province there of, under the convention entitled "Convention relating to the Regulation of Aerial Navigation."

The Parliament of Canada has legislative authority to enact, in whole or in part, the provisions of S. 4, Aeronautics Act Ch 3.

The Parliament of Canada has legislative authority to sanction the making and enforcement, in whole or in part, of the regulations contained in the Air Regulations, 1920.  
A I R 1932 P C 36.

(CANADA) BRITISH COLUMBIA MUNICIPAL ACT (1914)

—S. 141—Bye-law does not bind those ratepayers who hold exempted lands, but they collectively can be made liable for debenture debt & interest. A I R 1921 P C 240.

—S. 197—'Building' includes site. A I R 1921 P C 240.

—S. 216—When the assessee is otherwise entitled to, he is not stopped from claiming exemption. A I R 1921 P C 240.

—S. 484—The section is inapplicable to a suit for declaration that a certain is not taxable & for injunction for stopping its sale for taxes. A I R 1921 P C 240.

(CANADA) MONTREAL STATUTE.

—Art 1387 (g)—"Every person" implies to persons in the province on whom the duties are thrown. A I R 1921 P C 163.

—6 Edward 7, C 11—Decision of 1914 A C 176 that the Statute was ultra vires was not obiter dictum. A I R 1921 P C 163.

—S. 4 Geo 5 C 9, 4 Geo 5, C 10 & 4 Geo 5, C 11—The Statutes have done away with the difficulty concerning taxation as the earlier ones were indirect. A I R 1921 P C 163.

—4 Geo. 5, c 10—For, taxation of property outside province, person to whom property is transferred must be domiciled or ordinarily resident within the province. A I R 1921 P C 163.

(CANADA) CITIES & TOWNS ACT OF QUEBEC (1909).

—Art 5755—To proceeding under this art also, the rights of appeal from judgments of various Courts apply. A I R 1921 P C 219.

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## CANADA DOMINION ACT 1905.

—A Rly. declared for general advantage of Canada comes within the exclusive legislative jurisdiction of Canadian Parliament. Yet lands acquired by it as a subsidy given to aid its construction & not held by it as part of its 'Railway' within S. 2 (21) of the Dominion Rly Act (R S. Can 1906, C 37).  
A I R 1921 P C 234.

## CANADA LAND REGISTRY ACT.

—The Statutes 4 Geo. 5 c 9, 4 Geo. 5 c 11 & Geo. 5, c 11—do away with the difficulty of taxation under the earlier indirect statutes. A I R 1921 P C 163.

—S. 104—Whether the Section is applicable to special grants or ordinary Crown grants. A I R 1921 P C 234.

## CANADA QUEBEC CIVIL PRO. CODE.

—S. 504—No appeal lies from Circuit Court's judgment. A I R 1921 P C 219.

## (CANADA) QUEBEC CODE.

—Art 45—A right of fishing may be separately transferred & such a right may be permanent. A I R 1921 P C 200.

## (CANADA) QUEBEC STATUTE.

—10 Geo. 5 c 79, ss. 64 & 62—From Circuit Court's judgment, there is no right of appeal. A I R 1921 P C 219.

## (CANADA) VANCOUVER ISLAND SETTLERS RIGHTS ACT 1904.

—S. 3—Though not bound by technical rules of procedure or evidence, Lieutenant Governor in Council should judicially act while deciding a matter under S. 3. A I R 1921 P C 234.

## CANAL AND DRAIN NORTHERN INDIA ACT 8 OF 1873.

—S. 3—The Legislature in putting into law Regulation VI of 1901 deliberately intended a retrospective effect, i. e. that even if a valid title had been conferred by Regulation I of 1872, such a title should no longer be considered valid by the Courts and should be open to challenge exactly as any other title recorded in the Settlement is so open. 72 I C 989.

—S. 6—Where the construction of the Raya Branch caused the flood water to go the plaintiff's property in the High floods of 1917 and thereby caused them serious damage. Held, that action of the Canal Officers in constructing this channel came under S. 6 and any suit for damages must be brought within 90 days of the date of damage. A I R 1924 Lah 192-4 Lah 432-79 I C 185

—S. 15—Where the canal authorities cut the bank of a canal to avoid accident to the adjoining railway and not to the canal and plaintiff's adjacent mills were damaged. Held that Art 2 was not applicable as the act alleged was not done in



## CANAL AND DRAIN NORTHERN INDIA ACT

8 OF 1873 (Contd)

pursuance of any enactment. A I R 1927 P C 72=1927 M W N 334=4 O W N 471=31 C W N 835=26 M L W 134=28 P L R 453=39 M L T 343=10 Lah 161=103 I C 1.

—The words "may execute all works which may be necessary for the purpose of repairing or preventing such accident" are independent of the preceding words "may enter upon any land adjacent to such canal," A I R 1924 Lah 169=4 Lah 428=79 I C 208.

—S. 20—Where a water-course is thirty years old a Court will draw a presumption that it was started by agreement or action was taken under: S. 20 or S. 21. A I R 1929 All 271=1929 A L J 463=10 L R A Cr 89=12 A I Cr R 19=30 Cr L J 669=116 I C 785.

—Ss. 20 and 23—Canal authorities powers of, to confer right of irrigation from private water-course. 177 P W R 1918=50 I C 299

—S. 31—A person using canal water stored in a tank for building a pucca house transgresses R. 10 of the Rules framed under the Act but incurs no penalty for there is none attached to such user, 23 Cr. L J 17=7 P L R (1922)=64 I C 497

—S. 32 (e)—Agreement to pay for use of water course in proportion to area irrigated illegal and opposed to public policy. 216 P L R 1915=22 I C 398=8 P R 1913 (Rev)

—S. 47—When a lambardar pays canal dues he has a right to recollect them as well as to recover interest paid to Government from subordinate Zemindars including Muafidar. 32 I C 556

—S. 67—For preventing intersection of canal and stream, the Government constructed a super-bridge. To prevent submergence of neighbouring lands practice was to remove the silt—Practice continued for over half a century—In 1917 despite warnings by experts, the canal authorities discontinued the practice—Plaintiffs crops were damaged by floods—Suit for damages—Held, that the suit is cognisable by Civil Courts and that the action of the canal authorities was unreasonable and negligent entitling the plaintiff to damages. A I R 1928 All 735=51 All 291=26 A L J 1151=9 L R A Rev 311=114 I C 727

—S. 63—Divisional canal officer has jurisdiction to decide differences even after warbandi is fixed by him. A I R 1929 Lah 260=113 I C 311

## CANAL COLONIES

—In the Lower Chenab Colony, it is a conclusive evidence of residence that there is the grantee's habitable house.

3 P R (Rev) 1914=26 I C 756

## CANAL DUES

See Canal

## CANCELLATION

See (1) Lmt Act arts. 91 and 95

(2) Specific Relief Act s. 39

## CANCELLATION RECEIPT STAMP

See Stamp Act, 1199, s. 12 (3),

## CANONGOE PAPERS

See Kanungoe Papers

## CANON LAW

—Under Canon Law one common ancestor is sufficient to bring the parties within prohibited degrees. Marriage between persons related as second cousins of the half-blood is hence void—Subsequent dispensation may, however, be granted under certain circumstances. A I R 1931 Pat 213=12 P L T 380 Ind Rul (1931) Pat 335=133 I C 175

Canon Law. Whether Established church is subject to ordinary Courts. Roman Catholic Church is not such a church. Rules binding on voluntary Associations.

35 M L J 407=47 I C 941=8 M L W 208

—Law governing temporal rights in Roman Catholic Churches—Dedication of property to a church. Succession of trustees from the faith of the church.—Right to recover properties from the seminists—Effect of recantation on the trusteeship.

15 I C 399

## CANTONMENT

—Peshawar-plot situate in-occupier not a proprietor unless he has acquired by purchase—license-ejectment-compensation.

A L R 1933 L 528

—A license in favour of grantees is created when a Regu. allows sale to Civilians with military authorities' sanction. But a declaratory suit is justified when there is a transfer without consent. But the right to sell materials of the house remains unaffected. A I R 1924 All 415=22 A L J 354=L R 5 A 242 Civ=46 A 427 =78 I C 642

—There cannot be an adverse possession of land in cantonment. A I R 1922 All 57=66 I C 582

—Unless acquisition for the purpose is proved, mere declaration of lands to be within the cantonment area does not vest the ownership in Government. A I R 1927 Cal 786=31 C W N 1033=105 I C 565

—When the Cantonment came in existence all the owners of land were compensated for surrendering their occupancy rights; so even if it be assumed that the suit house was there even before the formation of the Cantonment, the presumption is that the owner also was compensated. It was held that the suit house-owners were licensees the land was lawfully resumed & they cannot be



**CANTONMENT (Contd.)**

compensated as owner's. 36 B 1-15 C W N 909-21 M L J 1100-10 M L T 97=(1911)2 M W N 23-14 C L J 268-13 Bom LR 788-12 I C 117-8 A L J 1219-38 I A 204 (P C)

—When it was to be decided whether the appellant's house within Cantonment limits was held by him in proprietary right or under Military tenure, it was decided that if it be assumed that the house existed prior to the possession by cantonment authorities, there is a probability that the defendant was compensated for, that no proprietary right passed to him & the building can be acquired, that the appellants were mere licensees & that the land was lawfully resumed. 15 C W N 909 P C

**CANTONMENT LAND.**

—After Cantonment was established possession of an enclosed plot remained with original owner who was mentioned as 'malik' in records. Then with permission of cantonment authorities, he built shops on a portion of it which were let out. The owner is the licensee of the whole area. A I R 1930 All 587-I R (1931) All 57-128 I C 441.

—Compensation would vary according to whether the owner was deprived only of ownership or of ownership & possession. A I R 1930 All 587-I R (1931) All 57-128 I C 441.

—Cantonment Land cannot be possessed adversely. A I R 1922 All 57-L R 3 A 169 Rev-66 I C 582.

—The alleged permanent tenancy in Cantonment area must be proved by defendant. It is not proved by show that they possessed it for a long time without a lease, the rent was never changed, the succession to it has been established & the buildings are erected on it, also no presumption in defendant's favour can be made on these facts. 56 I C 813.

**CANTONMENT RULES.**

—Provision for appeal from assessment whether legal Taxation. 38 Bom 293-16 B L R 121-23 I C 779.

—S. 32—A gift property situated in Cantonment must be in accordance with S. 123 T P Act under S. 32 of the cantonment act. 54 I C 829.

**CANTONMENT ACT XV OF 1910.**

—S. 15—When the Committee is empowered to levy water tax, it cannot be altered without Government sanction. A I R 1926 Sind 130-20 S L R 325-92 I C 361

**CANTONMENT ACT II OF 1924.**

—S. 5—Acquisition for the purpose must be proved & mere declaration of land being within cantonment area does not vest the ownership in Government. A I R 1927 Cal 786-31 C W N 1033-105 I C 565

**CANTONMENT ACT II OF 1924 (Contd.)**

S. 118—A takhtposh or moveable wooden platform is not "earth, or material of any description, or any offensive matter, or rubbish." A I R 1927 Lah 647-28 Cr L J 683-9 A I Cr R 24-103 I C 411.

—S. 181—There cannot be subsequent modification or cancellation in part when once the permission is given without reservation. A I R 1930 Lah 822-I R (1930) Lah 749-126 I C 525.

—Ss. 200 and 210—scope—applicability of. A L R 1933 I 450.

—S. 249—Mere refusal of a tenant liable to pay rent to a contractor of the Cantonment Committee duly authorised to collect it from him or to his servant, does not amount to an obstruction within S. 249 and a complaint in such a case founded upon S. 249 is clearly misconceived. 138 I C 282-I R 1932 A 385-A I R 1923 A 386-A L R 1932 A 894.

—S. 259—scope of—"recoverable by the Cantonment Authority under the Act" meaning of expression. A L R 1933 I 450.

—Section 287 of the Cantonments Act makes s. 107 of the Transfer of Property Act applicable to Cantonment. A I R 1931 Lah 501-32 P L R 361-Ind Rul (1931) Lah 913-134 I C 289.

—Ss. 6 & 11—Sanction to alienate land with a condition that vendee would let out the bungalow to be built on the CANTONMENTS HOUSE ACCOMODATION ACT (II OF 1902).

land to a Military Officer when necessary & should not claim to live in it. The condition is perfectly just. A I R 1924 Bom 258-25 Bom L R 938-85 I C 442.

—Ss. 6, 8, 9, 18, 21—In case of dispute between the landlord & the tenant as to rent for house in cantonment & when it is referred to the arbitration Committee its decision is final amount of rent is matter of contract between the officer & the owner when procedure under the Act is not observed. 11 A L J 129-18 I C 708.

—Ss. 19 (1) 22—A tenant of a house in cantonment cannot deduct repairs-expenses from the rents when the repairs were decided by him as necessary & executed by him. 8 A L J 1060-11 I C 471.

—Ss. 37 & 6—In an appeal by a person unsatisfied by notice under S 6 the commanding officer's decision is final. 10 S L R 113-37 I C 267.

**CANTONMENT HOUSE ACCOMODATION ACT. VI OF 1923**

—S 18—If the owner does not raise the question of enhancement till the tenancy commences & a notice for repairs is given to him, he has no right to enhanced rent from the commencement of the tenancy. A I R 1926 All 746-25 A L J 91-97 I C 71

S. 30—One aggrieved by a notice under

**CANTONMENT HOUSE ACCOMMODATION****ACT VI OF 1923 (Conclld.)**

s. 7 can only appeal under S 30 whether the notice is legal or otherwise. There exists no jurisdiction in Civil Courts. A I R 1925 Bom 162-49 B 152-27 Bom. L R 56-86 I C 81

**CANTONMENT REGULATION**

See Regulations—(1) Imperial Regulations-cantonment Regulation of 1836

**CANTONMENT TENURE**

—See Land Tenure-Cantonment tenure

**CARRIAGE**

See Carrier

**CARRIERS.***Synopsis.*

- (1) Bailee and carrier
- (2) Carrier by sea
- (3) Carriers in inland waters.
- (4) Condition, special
- (5) Contract with several carriers.
- (6) Goods at consignor's risk
- (7) Goods of dangerous nature.
- (8) Liability of consignor
- (9) Liability during war
- (10) Lien
- (11) Measure of damages
- (12) Mis-delivery
- (16) Misdescription.
- (14) Nature of liability of and action against carriers.
- (15) Negligence
- (16) Railway Company
- (17) Recovery of value or goods or damages or freight paid.
- (18) Special Contract
- (19) Uninsured goods.
- (20) Who are carriers.

See also (1) Carriers Act 3 of 1865

- (2) Railways Act 4 of 1879
- (3) Railways Act 9 of 1890
- (4) Railway Company.

**(2) Carrier by sea.**

—By Sea—Rights of—Carrier not entitled to benefit of the provisions of the Carriers Act (111 of 1865)—Freight, meaning of voyage becoming impossible owing to war Carrier entitled to charges for unloading Contract Act, S 65, 18 Bom L R 126-40 Bom 529-33 I C 536.

—By sea—Negligence—Liability of carrier for—Contract to the contrary, if valid Contract Act, S, 151 52 I C 236.

**(3) Carriers in inland waters**

—Plaintiffs shipped in the 2nd defendant Co's boats paddy in 1st defendant's name. He took delivery without producing

**CARRIERS (Conclld.)****(3) Carries in inland water (Conclld.)**

mate's receipt. The plffs. sued 2nd defendant for debts due from the 1st deft. It was held that the Co was not liable. Mate's receipts are not bills of lading. A document given by an officer of an inland waters carrier is not a mates receipt & its law is inapplicable to that document and instrument is negotiable & the property in it passes to bonafide transferee for value when it is transferable like cash by delivery & can be sued only the holder. The Co's receipt here was not a negotiable instrument and more over the plffs could not sue as no contract was made with them. 9 I C 465

**(4) Conditions, special.**

—By sea—Liability of—Limitations on—Conditions in Bill of Lading that Company not liable for damage by sweetenings, fermenting heat, etc., or by the negligence of servants or for any damage capable of being covered by insurance—Validity of conditions. 45 I C 168

**(5) Contract with several Carriers.**

—When goods are to be conveyed by several carriers under an indivisible contract with which carrier it was entered into is a question of fact. A I R 1927 Cal 394-54 C 430-31 C W N 358-100 I C 903

**(6) Liability of Consignor**

—Primarily the consignor is answerable for freight. A I R 1929 Pat 265-10 P L T 287-8 Pat 669-I R (1929) Pat 417-117 I C 305

—The cosignor is liable for freight & the consignee is not liable when there is no independent express or implied contract. A I R 1931 Cal 33-I R (1931) Cal 155-57 C 168-129 I C 315

—Vendor Rights and liabilities of, 2 Agra 11.

**(9) Liability during**

—A carrier is exempted from liability after he is commandeered during war by 'Restraint of Rulers' clause. But carriage after it must be paid under contract Act S. 70. A I R 1924 Mad 885-20 L W 378-80 I C 892

**(10) Lien**

—The plaintiffs shipped in the 2nd defendant co's boats paddy in 1st defendant's name. He took delivery without

**CARRIERS (Contd)****(10) Lien (Concl'd.)**

producing mate's receipt. The plffs sued 2nd defendant for debts due from the 1st defft. It was held that the Co. was not liable. Mate's receipts are not bills of lading. A document given by an officer of an inland waters carrier is not a mate's receipt & its law is inapplicable to that document. An instrument is negotiable & the property in it passes to a bona fide transferee for value when it is transferable like cash by delivery & can be sued on by the holder. The Co's receipt here was not a negotiable instrument & moreover the plffs. could not sue as no contract was made with them. 9 I C 465-4 Bur L T 21

—A carrier has lien upon the goods

**(11) Measure of damages**

—When under the contract the carrier does not deliver the goods, damages can be measured by the value at the place of destination. Principles shown. A I R 1921 Cal 315=33 C L J 72=61 I C 14

**(12) Mis-delivery**

—The plff Noel William Freeman sent goods from London to Calcutta under a bill of lading which said that they were to be delivered to Mr. N. W. Freeman or his assigns. The Consignee's address was "N. W. Freeman, Calcutta." The consignee failed to take the delivery & the def. Co. made them over to the Port Commissioners & a notice was posted to "N. W. Freeman Esq. Calcutta" which reach one Nigal W. Freeman. He took wrong delivery under an indemnity bond. Afterwards he delivered goods to the plff. in a bad condition. The Co. was sued for damages for misdelivery Held that it was not liable as it acted reasonably & properly. It is for the consignee to be ready to take delivery & should inquire about the exact arrival of the goods. 44 Cal 703=38 I C 421

See also

24 I C 70

**(14) Nature of liability of and action against carriers.**

—No route was mentioned by which the goods were to be carried & the longer one was more convenient. It was held that the cartage should be calculated on the distance of the longer one as that was the only convenient one. 11 I C 43

—Liability in respect of goods delivered for carriage—Right of consignee to have goods re-weighed before taking deli-

**CARRIERS (Contd)****(14) Nature of liability of and action against carriers. (Concl'd.)**

very and to compensation for—Demurrage for delay in taking delivery—Demurrage not chargeable after notice of intention to sell has given to the consignee. Contract Act, S. 151. 41 I C 337

—It is established with reference to continuous carriers that (1) the carrier with whom the contract is made, is liable for loss in absence of any contract limiting his liability, though the loss may have happen anywhere upto reaching the destination (2) The consignor cannot hold the Co. with which he has not contracted, liable in the absence of contract to the contrary though such Co. may be liable in tort for breach of duty. (3) The consignor may at his option sue either Co., when by agreements they are agents inter se. The word 'carrier' defined. 34 M L J 553=8 L W 46=24 M L T 175=45 I C 485

—Suit against for non-delivery of goods—Limitation. 24 I C 676

—Suit against—For return of moveables consigned. Lim Act Arts 31 and 150. 29 M L J 342=2 M L W 805=18 M L T 236=30 I C 840.

—In India a common carrier's liability is the same as that of an insurer, which may be varied by a contract. Absence of negligence must be proved by the common carrier. If absence of evidence of negligence is the contention, the question is one of law but it is a question of fact, whether the evidence justifies the inference of negligence. 21 C L J 565=29 I C 260.

—Carriage of goods for no hire or reward—Not acting as carrier—Bomb Act VI of 1886, s. 87, 4 S L R 236=10 I C 972.

**(15) Negligence**

—Unless expressly exempted from liability a carrier is answerable for injury due to negligence in executing the contract. When a passenger upon-specially reduced fare has allowed terms to be made for him by agent, it can be presumed that he was content to accept risks without enquiring into the terms agreed to by the agent. 19 C W N 905 (P C)=31 I C 684.

—In India, a common carrier by sea may contract out the common Law liability for his or his servants' negligence in clear & unambiguous words. 10 L B R 292 (F B)=62 I C 378.

—Perial of the sea must be proved by sea carriers. Negligence is not proved by saying that accident could be averted by greater foresight. A I R 1924 Mad 773=47 M L J 150=20 L W 91=47 M 610=(1924) 47 M L J 150=20 L W 91=47 M 610=(1924) M M L W N 648=80 I C 154.

**CARRIERS (Contd.)****(15) Negligence (Contd.)**

—Negligence—liability for, when negligent act followed by abnormal occurrence—Burden of proof—Vis Major, See India Contract Act Ss. 151 and 152 and Negligence Carrier. 25 C L J 37-38 I C 702 see also 21 C W N 1125-43 I C 263.

—Negligence—Loss of goods—Stipulation exempting from liability—Construction of contract or grant. See Railways Act Ss. 41, 42, 122 21 I C 499.

—Goods were consigned to a Railway Co. under risk note Form H. by which the plff. was charged lower rates & the co's liability for loss was limited to the loss of one or more complete packages due to wilful neglect or theft. In transit some goods were lost. It was held that as there was a special contract the consignor must prove that the case fell within the limitation contracted. 39 All 418-15 A L J 321-39 I C 130.

—Presumption of wilful neglect from loss of goods See Railways Act S 76. 32 I C 551.

—The plaintiff attempted to board a moving tram-car but failed & slipped & suffered injuries to his toes by the wheels. He sued the defendant tramway Co. for damages alleging that the foot board was not alright. It was held that the plff. was not entitled to damages as he himself was negligent. A passenger should not attempt to enter or leave the car in motion & one who does it, does it at his own risk. A prudent man should not or would not do that, but if he does it & suffers by it, the company is not liable. 13 Bom L R 345 =35 Bom 478-11 I C 362

**(16) Railway Company.**

—Rly. Companies are not insurers of safety of passengers. They are obliged for safety as due care & proper forethought may secure. Burden of explanation is on the Company for an accident which does not happen except through company's default. If this burden is not discharged, proof of accident itself some what evidence's company's negligence. A I R 1919 P C 236

—As the railway company is not bound to reweigh the goods or certify its shortage at the time of delivery, a consignee cannot refuse to take delivery on Co's refusal to reweigh them. 58 I C 200

—It depends upon agreement & usual course of business whether the delivery is to be made at consignee's house or at the journey's end. It is no breach of duty of the carrier if he delivers at the house addressed on the goods & when the carrier has

**CARRIERS (Contd.)****(15) Negligence (Contd.)**

not to deliver at the house, his liability ceases when the goods are brought to its destination & the consignee is made to take delivery within reasonable time. 20 Bom L R 591-44 I C 401

—Some tins of ghee were sent to the plaintiff at Barielly on the deff Railway & the sender signed Risk Note Form A, by which the Co. was not liable for loss arising from the condition of the consignment. The plff found one tin cut open & five other leaking & refused to take them unless they were weighed & a note of shortage made on the receipt. The Co.'s servants refused who afterwards sold them away. In a suit for damages it was held that consignee must be given facilities to weigh the goods on the spot & also Risk Note signed by the consignor does not preclude consignee's right to receive the goods as ordered. 13 A L J 417-29 I C 207

—It is not the duty of a railway company to reweigh the goods or certify its shortage & if the consignee refuses delivery on its refusing to do so, the goods remain at his risk and so he should suffer damages after such refusal. 22 C W N 902 =45 I C 933

—Carriers are not liable for any loss if the consignee, for his convenience or by laches allows them to remain at the destination & ready to be delivered, charging of demurrage does not imply their liability as ware house-owners. 18 A L J 764-58 I C 1000

—Railway-Misdelivery-Delivery without getting back railway receipts—No proof of negligence—fraud of third person—Non-liability, See Railways Act, S. 77. 35 M L J 35-41 M 871-24 M L T 38-49 I C 69

—The Railway Company is liable for damages for breach of general duty if a passenger by its mere invitation or permission suffers injury. But subject to statutory limitations this general duty may be governed by specific contracts, which may enlarge, diminish or exclude it. Such contracts define the duties of the parties & the plff. cannot be allowed to make more out of it than he is entitled. But if the contract deprives a passenger prima facie of his right to benefit from care, the onus is on the Co. to prove that he has assented to it. This the passenger may do either by himself or through his agent, authorised antecedently or by ratification. The intention may be inferred from his conduct. If he leaves the negotiation to his agent & intends that he should make terms on which he is to be conveyed, he cannot afterwards allege want of authority. If the agent does not care to peruse the terms on the back of the ticket, it is not the Co. who should



**CARRIERS (Contd.)****(16) Railway company (Concl'd)**

suffer by his neglect. If the Company does nothing misleading the agent as well as the principal are both bound. Otherwise it would be impracticable for Railways companies to arrange for consignors & travellers without in convenience & delay those dealing with them. 19 C W N 905=31 I C 684

**(17) Recovery of value of goods or damages or freight paid.**

—Where goods in possession of a Carrier on another's behalf are wrongfully put on board a vessel and the vessel innocently accept them in the ordinary course of business, the carrier is entitled to demand the goods. A I R 1931 Cal 269=52 C L J 365=Ind Rul (1931) Cal 786=134 I C 82

—A bought gunny bags from L & resold to B, who booked freight with C. Goods were taken by L to C's vessels & obtained mate's receipt. A & B contracted that till full payment seller's lien subsisted on mate's receipts or Bill of Lading. C issued to B the Bills without production of receipts & the Bills were negotiated for value. A paid L & got the mate's receipts & gave notice to C not to give the Bills to B except on production of mate's receipt. C replied that they were given to B. A sued B & C asking from B value of goods & from C the price as damagee held that under S. 83 Contract Act general property passed to B, C's issuing Bills to B was not a wrongful act. Delivery to B was incomplete & A had a right to possession & can claim damages from C. 52 C L J 365=A I R 1931 Cal 269=134 I C 82

—Freight paid is unrecoverable. 44 M 145=40 M L J 57=13 L W 273=(1921) M W N 38=29 M L T 85=62 I C 372

—Goods accepted by consignee—Acceptance whether precludes claim for damages. 14 C L J 472=39 Cal 311=12 I C 596=16 C W N 329

**(18) Special Contract**

—A common carrier does not cease to be so, by making a contract limiting his liability. 11 N L R 174=31 I C 474

—Under agreement with the City the Toronto Street Ry. Co. was bound to keep the part of the road occupied by it, in sound repairs. It is not bound to improve the condition beyond the already existing state. A I R 1917 P C 216

—When a Bill of Lading contained a special clause which forfeited claims of

**CARRIERS (Contd.)****(19) Uninsured goods (Concl'd)**

shippers & receivers of cargo for untallied goods in case of shortage, stamped with a rubber stamp & with different ink & the shipper accepts the bill he cannot sue for shortage because of proper notice. 30 M L T 18 (H. C.)=62 I C 709

**(20) Who are carriers**

—A carrier is employed to carry goods for others for reward. The Port Trust Board removed consignee's goods from wharf to import yard, & stored no fee was to be charged for this removal. It is not a carrier for this removal, it being a part of landing & deliver. So art. 30 of Limitation Act was inapplicable to a suit for compensation for injury to goods. 10 I C 972=4 S L R 236

**CARRIERS ACT (III OF 1865)**

—The Carriers Act applies to Railways only to a limited extent. A I R 1931 Cal 585=35 C W N 338=Ind Rul (1931) Cal 797=134 I C 93

—Railway—Carriage of goods—Contract rate to be enhanced, when. See Contract, Construction. 13 A L J 444=37 A 326=28 I C 857

—In India a common carrier has two distinct liability, one as an insurer, another as an obligation for safe carrying. If the goods do not come under the Sch. to the Act, the carrier's liability can be limited by a special contract unless the loss occurs from negligence or criminal act seems to be the effect of Ss. 6, 8, & 9 of Carriers Act 1865. It was held that cl. 10 of the agreement did not cover loss through negligence or criminal act. In India there is a statutory prohibition against exempting the carrier from his liability under above circumstances, the English interpretation of law is applicable which is to distinguish between insurance risks & carrying risks which should not be extended to those risks in absence of clear provisions. The late carrying flat was on fire & was scuttled under S. 9. Carriers Act & it was held as there was no contrary evidence the loss was due to the negligence or the criminal act. The clause "warranted no recourse against carriers" was in the policy issued by the plff. Insurance Co. This was not relinquishment by the Co. for not exempted risks. The Insurance Co. cannot sue in their own name as they claimed by way of subrogation & not of assigning, but the Jute Co. was the proper plff. It was for the plff. to prove the amount of damages but for this default it is not proper to dismiss the suit. 15 C W N 226=38 C 28=9 I C 354



## CARRIERS ACT (III OF 1865) (Contd.)

—Carriers by water—Act not applicable to—English mercantile Law applicable. 38 M 941=20 I C 546

—Applicability of—Carriers by sea. not within the Act, Contract Act. S. 65.

18 Bom L R 126=40 B 529=33 I C 536

—Scope of—Contract act, 1872, ss. 15, 69, 72, 78, 32 P W R 1911=9 I C 966

—If a special contract limiting the liability is legally entered into a common carrier does not cease to be so. 11 N L R 174=31 I C 474

—S. 2—The Act is inapplicable to carriage by sea. A I R 1928 Bom 5=52 B 37=29 Bom L R 1551=106 I C 470

—S. 2—"Common Carrier" as defined in the section does not refer to his liability. 11 N L R 174=31 I C 474

—S. 2—"For all persons indiscriminately means simply that carriers can not refuse business—Carrier is answerable to owner for safe and sound delivery. A I R 1924 P C 40=5 L R P C 121=26 Bom L R 571=51 C 304=34 M L T 53=51 I A 28=22 A L J 173=19 L W 277=(1924) M W N 158=28 C W N 302 (P. C.)=80 I C 1038

—Ss. 2 & 6—In India the duties & liabilities of the common carriers in India are governed by English Law & not by the Contract Act. He is liable as an insurer, in the absence of a special contract or Statute for injury to goods except due to Act of God and King's enemies. A licensee of a ferry is a common carrier. (1918) 3 U B R 120=50 I C 562

—S. 3—Scheduled and non-scheduled articles—Package containing—Loss of—Value of non-scheduled articles—Right to recover—Consignor has, though value of scheduled articles cannot be recovered by him owing to absence of declaration. 59 C 472 (476)=36 C W N 129=138 I C 89=A I R 1932 C 344=1 R 1932 C 397

—Ss. 3, 4, 89—The value & description of goods worth more than Rs. 100 must be made known to a common carrier before it can be held liable for its loss, though higher rates are chargeable. Yet the carrier will be liable for the loss of or damage to such goods if it arises from his negligence or criminal act or of his servants' or agents'. It makes no difference if the merchandise is stated as luggage. The defendant must prove the absence of negligence. 19 I C 756=17 C W N 970=41 C 80

—Ss. 5, 8, 9—Some tea chests were consigned to the deft, Rly. Co. from Assam to Chittagong & thence to England, by the plff under an ordinary railway receipt for land transport. Owing to breach on the lines the Rly. Company had to take the goods from Gauhati to Chandpur by river through 2nd deft's flats under an agreement with him. On the flat there was a fire

## CARRIERS ACT (III OF 1865) (Contd.)

& some chests were destroyed. The plaffs sued both the defts for the value & it was held that as no notice within 6 months was served on the 1st defendant Company under S. 77 Railways Act 1890, its liability was gone. There was no contract between the plaff & 2nd defendant who was a sub-contractor under the agreement. The 1st deft. was not the 2nd deft's agent to make contracts. The Second deft was a common carrier & hence answerable to the plff. & also as the plff established to 2nd deft's negligence he should succeed. 23 C W N 998=47 Cal 6=57 I C 406

—S 6 For limiting the carrier's liability it is necessary that the nature of the contract must have limited the liability under the contract expressly & in writing or the circumstances may be such that he may be engaged on a different type of business, A I R 1924 P C 40=5 L R P C 121=26 Bom. L R 571=51 C 304=34 M L T 53=51 I A 28=22 A L J 173=19 L W 277=(1924) M W N 158=28 C W N 302=80 I C 1038

—Ss. 6, 7, 8, 9—A steamer Company, unlike a Railway is an insurer for carriage of goods subject to S 6 Carriers Act. If the goods consigned to a steamer Co. are lost or damaged the onus lies on it to prove that it has not occurred through the negligence or criminal act of it or its agents or servants, 17 C W N 633=40 Cal 716=17 C L J 639=19 I C 245

—S 8—Where goods are addressed to a place beyond the sphere of a carrier's business so that from another point he must forward them by another carrier he is responsible for the goods for the whole journey unless he limits his liability by agreement. The agreement restricting liability must not, however be inconsistent with the Carriers Act (III of 1865) An agreement exempting him from liability for the negligence of the carrier by whom he forwards the goods is in contravention of S 8 of the Carriers Act and is unenforceable because the carrier by whom he forwards the goods is his agent in the matter of the transport and a stipulation by which a carrier is to be exonerated from liability even for the negligence of his servants or agents is contrary to the provisions of S. 8. 59 C 472

—S 8 Negligence is presumed by loss of goods & if the common carriers do not rebut it by showing that they are not guilty of it as would entail their liability they are liable for damages. A I R 1931 Mad 115=1930 M W N 816=I R (1931) Mad 402=130 I C 658

—S. 9—A canal company carrying goods under a contract with a Railway company was sued for damages for loss of goods. Held that for negligence the former company was liable (1930) M W N 816=I R (1931) Mad 402=130 I C 658

**CARRIERS ACT (III OF 1865) (Contd.)**

—S. 9—Loss from an unknown cause is presumptive proof of negligence, A I R 1928 Cal 371-I R (1929) Cal 436-  
116 I C 148

—S. 9—As loss of goods is prima facie proof of negligence, in a suit against carrier negligence need not be proved by the plff. A I R 1921 Cal 315-33 C L J 72-  
61 I C 14

—S. 10—Under S. 10 Carriers Act notice of loss must be given as the defendant's knowledge about it is insufficient  
38 C 50-9 I C 960

—S. 10—The plff. must give notice of loss under S. 10 of the Act as the carrier getting knowledge by the way is not enough  
38 C 50-9 I C 960.

—S. 10—To successfully sue the carrier company for damages due to short delivery the plff. must under s. 10 of the Act give notice of it to the Company though it may get knowledge from any other source. A clause in the Bill of Lading does not limit the requirements of the section. 27 C L J 294-41 I C 919.

—S. 10—The condition was held not unreasonable when a contract with carrier provided that no claim in respect of this contract shall be valid unless in writing & given to the office within six months of default, loss or damage. A I R 1928 Cal 371-I R (1929) Cal 436-116 I C 148.

—S. 10—Notice to local agent suffices A I R 1927 Cal 394-54 C 430-31 C W N 358-100 I C 903.

—S. 25—Common Carriers—Contract Act—Not applicable to Bill of Lading. 38 Mad 941-20 I C 546-20 M L J 162.

—S. 38 and 9—Injury to goods entrusted to carrier—Negligence—Onus of proof  
23 C W N 998-47 Cal 6-57 I C 406.

**" CARRY ON BUSINESS " MEANING OF**

See also C P Code Ss. 16 to 20.

**CASBATI.**

—See Land Tenure.

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**CASE LAW.**

—See Practice—Precedent.

**CASH.**

—See Rent.

**CASTE.**

See also (1) C P Code s. 9.

(2) Hindu Law-Caste, Conversion.

—As regards the racial claim maternity is of no importance. A I R 1925 P C 298-30 C W N 289-28 Bom L R 161-53 I A 42-3 R 582-23 A L J 1016-49 M L J 821-43  
C L J 23-92 I C 200.

—Ex-communication is a mode of enforcing payment of fine or is a punishment in its default. A I R 1924 Nag 157-  
76 I C 341.

—Agambadiars—Custom—Devolution of stridhanam of childless widow. 23 I C 124.

—Elavaniyars are sudras and not yeenajathiars also the word 'vania' in it does not connote the vania class. 27 M L J 253-(1914) M W N 822-I L W 675-  
26 I C 7.

—Though the temple be public, it can be owned by a-caste or its section.  
4 L W 228-34 I C 551.

—Right to own and enjoy property, though a fluctuating body C P Code O I R 8.  
24 C W N 206-54 I C 742.

**CASTE DISABILITIES REMOVAL ACT**

( XXI OF 1850. )

—Protection afforded by extends only to actual person who either renounces his religion or has been excluded from the communion of any religion or has been deprived of caste. 6 Luck 487 (496-7)-8 O W N 83-A I R 1931 O 301-14 O L J 263-132 I C 779.

—When once a person has changed his religion and his personal law, that law will govern the succession rights of his children. A I R 1931 Oudh 301-8 O W N 83-Ind Rul (1931) Oudh 331-132 I C 779.

—Property of a father converted to Muhomadanism is heritable by his Hindu son. His share would be according to

# CASTE DISABILITIES REMOVAL ACT (XXI OF 1850) (Contd.)

Hindu Law as he would be put in the same position as if his father is not converted.

8 S L R 156=27 I C 357.

—Conversion—Remarriage of Hindu widow—No forfeiture of Estate. 11 C L J 678.

—Only protects the rights of the person who has lost his religion. Rights of unconverted relations to succeed to the convert are not protected by the Act. Hence a Hindu cannot succeed to a relation who has become a Mussalman. A I R 1931 Oudh 301=8 O W N 83=Ind Rul (1931) Oudh 331=132 I C 779.

—Brahmin's marriage with a Sudra female is valid and their son is legitimate but has a right to 1/10 share only of his father's as well as uncle's estate. The act is inapplicable to him. A I R 1931 Bom 89=23 Bom L R 1348=I R (1931) Bom 225=130 I C 17.

—Shia Law determines the heirs to the estate of a Hindu converted to shia. A I R 1928 Oudh 138=3 Luck 154=4 O W N 1243=107 I C 890.

—Regu. VII of 1832 or Act XXI of 1850 apply to Oudh at least from the date of annexation and so both of them are inapplicable to a convert renouncing his religion before that date. A I R 1928 Oudh 138=3 Luck 154=4 O W N 1243=107 I C 890.

—Due to Act XXI of 1858, a Hindu daughter cannot be an heir to her father who has become a Muhommadan. A I R 1927 Mad 72=24 L W 675=(1926) M W N 952=98 I C 867.

—The person who has changed his religion is relieved from forfeiture by the Act and not any one else who is affected by such a change. A I R 1927 Mad 72=24 L W 675=(1926) M W N 952=98 I C 867.

# CASTE DISABILITIES REMOVAL

## ACT XXI OF 1850 (Contd.)

—Right of inheritance is not lost even after conversion. A I R 1924 Pat 420=3 Pat 152=5 P L T 203=(1924) Pat 85=78 I C 749.

—It is not intended to enlarge the convert's interest in any property or to remove any restriction to which it was originally subject. 44 M 891=41 M L J 243=(1921) M W N 594=14 L W 257 (F B)=64 I C 676.

—The Burmese Buddhist relations of the deceased Muhammanan convert cannot succeed if they fail to show that they had a right to succeed otherwise than as Muhammadans. A I R 1922 L B 15=64 I C 514.

—The same rights to individuals after apostasy are secured by Act XXI of 1850 as they existed before. 89 P R 1915=31 I C 476.

—Right to inherit is not forfeited by exclusion from caste. A I R 1930 Pat 564=Ind Rul (1931) Pat 85=129 I C 133.

—S. 9 of Reg. VII of 1832 and Act XXI of 1850 set aside the penalties under Hindu Law for renunciation of religion or caste-exclusion. A Hindu became a Muhomedan in 1845. His son who remained a Hindu has no right to his father's share in joint family property and no suit can be brought after 12 years, if the above enactments allow it and as the right was barred in 1857, neither art. 142 of Act IX of 1871 nor art. 141 of Act XV of 1877 removed the bar. 13 Bom L R 427=10 M L T 25=(1911) 2 M W N 432=10 I C 477=21 M L J 645=15 C W N 545=8 A L J 552=33 A 356=13 C L J 575=38 I A 87 (P C).

—Looking to caste Disabilities Removal Act a Hindu widow does not lose her right to her husband's estate by con-

# CASTE DISABILITIES REMOVAL ACT

(XXI OF 1850) (Contd.)

version to Muhomedanism. 35 A 466=11 A  
L J 678=20 I C 335.

—Effect of—Hindu widow—Conversion to Islam—Re-marriage—No forfeiture of inheritance. 23 M L T 81=44 I C 299.

—The sons of a christian convert to Islam sold some villages to their cousins Occupancy tenants of one village sued for possession by pre-emption. Held that the plff's suit should be dismissed as their right was inferior to that of the vendors as the vendees being christians were not deprived of their right to succeed to the vendors. 1

Lah 376=2 Lah L J 523=55 I C 420.

—The caste Disabilities Removal Act keeps a person's rights intact as they were before apostasy. 89 P R 1915=31 I C 476.

—Scope and effect of Hindu Law—Conversion. 15 C W N 545 P C=8 A L J 552=13 Bom L R 427=10 I C 477.

—S. 1—The words "he is deprived of caste", have to be read with those preceding as meaning what is generally understood by the word "outcaste" one excluded from religion and community. The Act does not apply to the case of a Hindu who has become a Jativaishnava. A I R 1931 Cal 741=35 C W N 726=54 C L J 61=

134 I C 1272.

—S. 1—The section applies only to actually converted or out-casted person but succession to him is governed by the law applicable to him after conversion, A I R 1930 P C 251=I R (1931) P C 12=128 I C 268.

—S. 1—The act is inapplicable to determine the heirs of the propositus when his ancestor had changed his religion. A I R 1928 Oudh 138=3 Luck 154=4 O W N 1243=107 I C 890.

# CASTE DISABILITIES REMOVAL ACT

(XXI OF 1850) (Concl'd)

—S. 1—If there is no previous right conversion does not give a right to partition. A I R 1921 Mad 224=44 M 891=14 L W 257=41 M L J 243=(1921) M W N 594 (F B)=64 I C 676.

(1921) M W N 386 overruled.)

—S. 1—Christian convert's descendants cannot sue as reversioners to the deceased Hindu's estate. The act is applicable to the convert himself only. Per Oldfield J In S 1 'renunciation' & 'deprivation' apply only to rights already accrued. The protection under the Sec is given only to the convert, Per Backwell J. "having been excluded & being deprived of caste" do not refer to an individual who by birth belongs to another caste. 40 Mad 1118=37 I C 753.

# CASTE PANCHAYATS.

—Jurisdiction—Power of the civil courts to control—Libel—caste Dispute. 15 A L J 629=40 I C 641.

# CASTE QUESTIONS

See C P Code. S. 9

# CASTES AND SECTS

—Ballavacharis and Bhats. Characteristics and origin. See Rel. Endowments. 17 C W N 741 P C=19 I C 337.

# CATTLE TRESPASS ACT (I OF 1871).

—Civil Courts do not hear suits for compensating expenses incurred to release cattle unlawfully impounded. Act I of 1871 gives a special remedy. 2 C P L R 344.

—Damages, Suits for. 16 C 159.

—S. 22—In absence of loss & unless specifically claimed no Compensation can be given. Sentence of imprisonment under S.



**CATTLE TRESPASS ACT**

(1 OF 1871) (Contd.)

22 is illegal when it is in default of compensation. A I R 1930 Nag 149=31 Cr L J 278=26 N L R 158=I R (1930) Nag 121=121 I C 665.

—Ss. 1 and 18—Object of private cattle pounds—Resumption by government not questionable by Civil Court—Act—under—sovereign power Jurisdiction—Civil Courts. 39 Cal 615=13 I C 965.

—S. 10—The lessee of grazing land can under S. 10 impound the cattle whose owner refuses to pay rents for grazing & such impounding is not unlawful or an attempt at distraint though the owner to prevent it has to make the payment Per Huda J. Such seizure is illegal & amounts to an attempt of theft which can be resisted by force. 18 Cr L J 849=41 I C 817

—S. 10—If a watchman has order to capture trespassing cattle while watching crops on land, he can seize them while trespassing on land in his charge. 31 I C 372=7 Cr L R 23=16 Cr L J 772.

—S. 10—Right to seize cattle subsists only until the cattle leave the land. A I R 1925 Nag 50=25 Cr L J 1004=81 I C 716.

—S. 10—The section authorizes impounding cattle by a watchman having general instructions from the cultivator or occupier to do so, 16 Cr L J 722=31 I C 372 (M)

—S. 22—Words "reasonable compensation for the loss caused by the seizure of detention of the cattle"—meaning of—Magistrate, whether can award pleader's fees to a successful complainant. A L R 1933 M 548.

—S. 22—The defendant should prove the justification for seizure when sued for damages for illegal seizure of cattle & such sued is not barred by Cha. 5 of the Act. 44 I C 237

—S. 22—The owner of the cattle & not the complaining agent can be compensated. A I R 1929 Nag 152=30 Cr L J 633=(1919) Cr Cas 18=13 A I Cr R 63=I R (1929) Nag 136=116 I C 424.

**CATTLE TRESPASS ACT (1 OF 1871) (Concl'd)**

—S. 32—No Compensation need be claimed in the complaint. A I R 1928 Mad 369=29 Cr L J 325=108 I C 80.

—S. 22—Grazier of cattle is agent within s. 22 A I R 1929 Nag 152=30 Cr L J 633=(1929) Cr C 18=13 A I Cr R 63=I R 1921 Nag 136=116 I C 424.

—S. 22—Compensation order is illegal when loss is not proved & compensation is not claimed in the petition. A I R 1923 Pat 292=4 P L T 231=(1923) Pat 96=1 Pat L R Cr 34=24 Cr L J 311=72 I C 71.

—S. 22—Compensation is not fine & an order for it is appealable, A I R 1922 Bom 191=46 B 58=23 Bom L R 836=22 Cr L J 624=63 I C 160.

**CAUSE OF ACTION.**

—See C. P. Code s 20, O. II r. 2 O IX R 8.

—See Damages.

—See Tort.

**CAVEAT.**

—See Probate.

—See Will.

—See Probate & Adm Act Ss. 50, 70, 71.

**CAVEATEMPTOR.**

—See C P Code O XXI r 93.

—See T P Act s. 55.

—In the case of a sale of a pro-note or other chose in action, the rule of caveat emptor is applicable. 150 P L R 1915=76 P W R 1915=29 I C 887.

—Doctrine of—Applicability to court sale. C P C O 21 R 71. 23 M L T 9=34 M L J 156=43 I C 685.

—Doctrine—applicability to execution sale. 36 M 194=21 M L J 969=12 I C 444.

—Principle of—Applicability to India Vendor and Purchaser. 15 M L T 240=38 M 887=23 I C 570.

**CELEBACY.**

—It is not an institution for charitable or religious purposes, which under pretext of celebacy tempts to crime & vice. 11 I C 166.

**CENSUS REGISTER.**

—See Evd Act S. 74.



**Central Provinces Civil Courts (Act XVI of 1885)**

—S. 8—Deputy Commissioner—Principal Court of original jurisdiction: Cent. Prov. Land Rev. Act, S. 136 (g) 1 Pat. L J 290.

—S. 15—Originally the plff sued for Rs. 1651-15-0 but subsequently he gave up apart of his claim leaving the balance of Rs. 1,000-3-0. Through mistake Rs. 988-3-7 were prayed for. The first Court dismissed, on appeal to the Dt. judge it was remanded & ultimately decree for Rs. 988-3-7 was passed. It was held that the suit value being Rs. 988-3-7, an appeal lay to the Dt. Judge & not to sub-divisional Judge. Jurisdiction in appeals is governed by S. 15. It is reduced claim which is the suit value for appeal purposes when a plff. voluntarily does so. 44 I C 287.

—S. 21—The weight of authority is clearly in favour of the view that the High Court's power to interfere in cases under S. 36 of the Legal Practitioners Act is only its general power of superintendence and control over subordinate Courts and is very limited in extent; but a power of interference or revision certainly exists. 28 N L R 4 (6) = 137 I C 66 = 33 Cr L J 408 = I R 1932 N 57 = A I R 1932 N 50 = A L R 1932 N 260.

—S. 21—Power of superintendence and control given by—Similar to that given to chartered High Courts by S. 15 of the Indian High Courts Act, 1861, and now given by S. 107 of the Government of India Act. 28 N L R 4 = 137 I C 66 = 33 Cr L J 408 = I R 1932 N 57 = A I R 1932 N 50 = A L R 1932 N 260.

**Gen. Pro. Courts Act. I of 1917.**

—S. 9 When a question of law is referred to Bench the judge dealing with the case need not be on it. A I R 1929 Nag. 251 = 12 N L J 148 = I R (1930) Nag. 89 (F B.) = 121 I C 57

—S. 10 (b) (ii).—C. P. C. — S. 98 (2) — Judges comprising Bench hearing appeal involving only a question of fact—Difference of opinion between—Procedure on—Decree appealed from must be confirmed under S. 98 of opinion between—Procedure on—decree (2) C P C—Point of difference cannot be referred to a third judge. 28 N L R 80 = A I R 1932 N 88 = 140 I C 630 = A L R 1932 N 143.

—S. 10 (b) (ii)—C P C—S 98 (2)—Not controlled by S. 10 (b) of C P Courts Act. 28 N L R 80 = 140 I C 630 = A I R 1932 N 88 = A L R 1932 N 143.

**Central Provinces Court fees amendment Act. (1 of 1923.)**

—The Act is not retrospective A I R 1926 Nag. 71 = 89 I C 407.

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**Central Provinces Court of Wards Act (XXIV of 1899)**

—A commission cannot voluntarily permanently alienate the immoveable property of a person under the Court of wards. 62 I C 193.

—After the C P Act I of 1915 a suit against minor based on S. 68 Contract Act cannot be maintained. A I R 1921 Nag. 105 = 17 N L R 20 = 61 I C 563.

—Ss. 7, 18—Superintendents of Hindu joint family property—Commissioner's sanction—Mortgage of joint family property—Competency—Commissioner's sanction to the proposal to mortgage enough. 17 C L J 619 = 40 Cal. 784 (P C)

—Ss. 10, 12, 26, 27—Before notification under 10 is published if a claim is presented for arbitrament to a Civil Court, S. 12 of the C P Court of Wards Act is inapplicable. S. 26 is inapplicable to a suit filed against predecessor-in-title of a government Ward & continued against him under O. 22 R 4 C P C Statutes which restrict rights to sue must be strictly interpreted. Words which limit existing remedies must be taken in a restricted sense. Civil Court's jurisdiction cannot be restricted unless clearly expressed. 17 I C 621 = 8 N L R 169.

—S. 16 (2) C.—A decree for specific performance of a contract of sale by a guardian of minor's property cannot be passed except for minor's benefit. 45 I C 192 See also 131 I C 331 (P C)

—S. 18 (2)—Deputy Commissioner can execute documents for documents for Court of Wards. A I R 1926 Nag. 466 = 95 I C 824.

—S. 31—The amended section declares that property or person of the minor is not answerable for necessities under Contract Act S. 68. 17 N L R 20 = 61 I C 563 (2)

—S. 31—Powers of Court of Wards to bind minor's estate are not greater than those of natural guardian. A I R 1922 Nag. 98 = 18 N L R 145 = 5 N L J 49 = 65 I C 53.

**Central Provinces General Clauses Act I of 1914**

—S. 5 (C). The section does not require the proceedings to continue before the original Court & not before one to which jurisdiction is transferred by amendment. A I R 1929 Nag 282 = 12 N L J 82 = 1 R (1929) Nag. 314 = 119 I C 682.

**Central Provinces Land Alienation Act (11 of 1916)**

—S. 9 (3)—The section applies also to suit instituted after commencement of Act. A I R 1921 Nag. 146 = 64 I C 729.

**Central Provinces Land Alienation Act (11 of 1916)—(Concl.)**

—S. 16 (1) "Made" qualities not 'execution' but 'decree or order'. A I R 1921 Nag. 93 = 60 I C 545.

**Central Prov. Land Rev. Act (XVIII of 1881)**

—Waste Land Sale Rules of 1862 (Central Provinces)—Estate transferred under—Land Revenue Act of 1881 if applies to—S. 72 of Act—jurisdiction of settlement Officer to declare estate a "mahal" and to ascertain and determine the status and rents of tenants of estate under. *see* 28 N L R 169 (176) (F. B.)

—The proprietors are not prohibited from permanently leasing a village for valuable improvements by C P Tenancy Act as well as C P Land Revenue Act. 9 I C 113.

—Agreement by *lambardar* not to demand *haq* is valid. A I R 1923 Nag. 211 = 70 I C 72.

—Definition of "Malik Makbuza" distinguishes it from other proprietors. In the C P a person can simultaneously be a *malguzar* and a *malikmakbuza* in the same mahal and transference of one such estate does not affect the rights and liabilities attached to the other. 4 N L R 2.

—Permanent Lease—Power of proprietors to grant. 9 Ind. Cas. 113.

—S. 4 A and 69 (4)—S. 69 (4) of C P Land Rev. Act deals with classification of land and not the proprietary rights; also is applicable to *bhogra* land—An assignee, of proprietary rights in such a land is 'proprietor' within S. 4. A 12 N L R 139 = 36 I C 547.

—S. 4 (3)—A settlement officer fixed the cess. His sanction is enough and no sanction for rates is required. A I R 1922 Pat 339 = 1 Pat 83 = 69 I C 672.

—Ss. 4 (3) and 153—No suit lies to recover unsanctioned and unrecorded *deshra Bhet* and *Kot Chhauni*. A I R 1922 Nag. 19 = 64 I C 722.

—Ss. 22, 136 — H (1) — A partition application dismissed by the Deputy commissioner was appealed on to the commissioner who dismissed it and the High Court was approached in second appeal. Held that an appeal from Deputy Commissioner lay to the District Judge under s. 136—H (1) C P Land. Rev. Act amended by Bengal Act. IV of 1906 and as the appellant wrongly made it to the commissioner his second appeal cannot be maintained. 9 I C 202 = 13 C L J 412.

—Ss. 33, 82 & 89—Land. Rev. Act does not provide that a Record of rights under S. 82 is incomplete until chief commissioner's declaration under S. 80. Hence the *plff.* must prove in an ejectment suit that the person recorded as tenant is not a tenant. 45 I C 470.

—Ss. 50; 51, 65—A *zemindar* permanently

**Central Prov. Land Rev. Act (XVIII of 1881)—(Contd.)**

alienated one village for Rs. 29 annual rent. By the settlement of 1898, the defendants, representing the transferees were recorded as the *kadars*. were sued for a part of *Zemindar's takoli* which he paid under the settlement. Held that they were not liable as there was no settlement officer's order holding them responsible for *jama* also under Ss. 50, 51 Land. Rev. Act the Settlement Officer cannot give proprietary rights to the defendants for the first time, he cannot fix the *the kajama*, that the parties were not landlord and tenants that the Rev. authorities would have been approached by the *plff.* 1 N L R 71.

—Ss. 63; 65 A Sub-S — 4 cl. (d) 83—*Declaratory suit—Wrong entry in khewat—Secretary of State to be made party—Devour Settlement: Sp. Rel. Act. S. 42.* 17 A L J 408.

—Ss. 64, 108 & 116—As land Revenue for *malik makbuza* plot is paid through the the *malguzar* under S. 64 and when a sale for arrears of revenue payable to the *malguzar* is made S. 108 is applicable. 48 I C 92.

—S. 65.—To enforce a charge under S. 65 which comes under S. 100 T P Act, a suit for sale must be brought. In such all persons interested in the land must be parties. When a new cause of action is added to the plaint, it dates back to the institution of the suit with ref. to limitation. Such an amendment cannot be allowed when it deprives the defendant's right to plead bar by limitation. 1 N L R 117.

—S. 65 A — The *Plff.* *zemindar* got surrender of the tenure from the successor of a protected *gaontia* who got by the owner's resignation. The *defts.* in possession pleaded illegality of relinquishment and adverse possession. It was held that there was nothing in S. 65 of which disentitled a *gaontia* from relinquishing his rights. There was no adverse possession as the *zemindar* had no claim to present possession as long as the *gaontia* tenure was there. Rights of such a nature as would bind a *zemindar* after the *gaontia* tenure is extinguished cannot be given to others by a *gaontia*. 1 Pat L. J. 293 = 1 Pat L W 449 = 37 I C 107.

—S. 65 A — A protection certificate in respect of a joint family property issued in the name of one member does not make it a self-acquired property. It limits the *zamindar's* rights of ejectment and rent enhancement. A subsequent statute forbidding partition does not change the nature of joint property. When a person in representative capacity accepts a lease and gains by it, the advantage under s. 90 Trust Act is for the benefit of all. 10 N L R 64 = 24 I C 855 (F B.)

—S. 65 A — Powers of a protected *gaontia* see. 1 Pat. L J 293.

—S. 65 A (3)—Decree for ejectment of the *Kodar* on failure to pay *Jama* whether S. 65 (A) (3) applies see. 15 N L R 39.

## Central Prov. Land Rev. Act

(XVIII of 1881) — (Contd.)

—S. 65 (A) 4 — Interest in a thekadari tenure is not transferable and an award directing such a sale is not legal and enforceable hence no decree can be passed on such award  
54 I C 274.

—S. 65 A sub Sec 4 cl. (b) — 'Joint' and 'Separate' should be interpreted according to Hindu Law, when applied to the Hindus. A family with no joint property may separate within the proviso by separation in food, but where there is such property separate in food as well as in estate must be proved. Division of each separate property may not be shown  
19 C L J 255 = 20 I C 28.

—S. 65 A sub S (4) C — To prove separation under proviso of cl. (b) to S. 65 (A) (4), there must be separation in mess as well as estate as regards the Hindus. When the plff. separated in mess before his father's death and he gave some land for his maintenance, it was held that such separation cannot bring the case within the first proviso to S. 65 (4) (b), as from the receipt of maintenance grant, no separation in estate and from joint family follows  
20 I C 28 = 19 C L J 255.

—S. 65 A — Sub. S. (4) (d) — When the deputy commissioner has to fix a thekadar's jama under S. 65 (4) (d). No arrears of it for Art 110 Lim. Act 1908. are due until the dispute is concluded and the amount is finally fixed by proper action 7 N L R 169 = 12 I C 804.

—S. 65 A (4) (g) — 124 A — A Thekadar having no right to fell timber trees under the lease does not get that right by S. 65 (A) 4. which only affects such rights already possessed under S. 124 A. 13 N L R 1 = 38 I C 686.

—Ss. 65 A, 70, 77, 83 — Suit for correction of entry in khewat as to status of plff. see  
27 I C 322.

—Ss. 65 A, 132 and 152 (a) — S. 65 A retains some families in the gaontiaship of their villages and protects them against transfers and sub divisions, the eldest male heir can resign his rights as gaontia on the death of the last protected gaontia but subsequently he cannot transfer it to his brother.

—Per Atkinson J (Inam J. contra) If separate certificates at different times protect two or more villages forming a protected tenure, the eldest male heir cannot split them for his choice of resignation or adoption. The election is irrevocable and automatically another heir of equal degree succeeds. The younger son cannot surrender the estate to the zemindar when there is no evidence for the eldest son's resignation. A person affirming the resignation must establish it.

—By S. 132 the Dy. Commissioner determines protection claims under S. 65 A. The eldest son can recover the gaontiaship if he proves his better title than that of the

## Central Prov. Land. Rev. Act

(XVIII of 1881) — (Contd.)

younger son who is entered in the Record of Rights. And the presumption arising out of such entry can be rebutted by the fact that the Government and the zemindar held the eldest son as the sole successor 3 Pat L J 229 = 4 Pat L W 256 = 44 I C 817.

—S. 67 — Government Ryot — Judgment-debtor deceased — Crops grown by heir and not liable to attachment in execution of decree — Liability of legal representative. 21 I C 372.

—Ss. 68, 72, 83, 120 (b) & 152 (b) — The debts were recorded as skikmi gaontias of the plffs. in the Record of Rights. A suit under S. 83 was brought for amending the entry so as to describe them as mortgagees in possession but the jurisdiction of the court was questioned. It was held that Settlement Officer's order to make the entry was under S. 68 or S. 72 and it can be reviewed under S. 83 by a Civil Court and such a suit comes under art 120 and not art. 14 of Lim. Act. It is a declaratory decree which can be effected by Dy. commissioner under S. 120. 19 C W N 1303 = 21 C L J 646 = 30 I C 61.

—S. 69 — S. 69 decides whether one proprietor's land is sir land or not. It is inapplicable when it is to be decided who is the proprietor. When the defendant is wrongly entered as proprietor of sir land and a suit to correct such entry is brought rule of limitation in S. 69 (n) C P Rev. Code is inapplicable.  
48 I C 932.

—S. 69 — Land not falling under S. 69 (1) cannot become sir land until the settlement officer finally records it as such and it becomes so from the date of the order. 9 N L R 99 = 20 I C 554.

—S. 69 (4) — Applicability of Lmt Act suits under s. 69 (4) see. 46 I C 879.

—Ss. 69 (4) and 83 — Wrong entry concerning sir land in the Record of Rights can be remedied only under S. 69 (4) and 83. Such an entry is final unless questioned in a suit under S. 83. 11 N L R 56 = 28 I C 888.

—Ss. 71, 138 (1) — When there is one lambardar only he may collect, and pay the revenue from malik makbuzas, on looking to the ref. in S. 138 (a) to S. 71 of Act XVIII of 1881 A malik makbuza has to pay the revenue not to a co-sharer but through a lambardar. He cannot bind a Malik makbuza by an agreement to which he is no party by the maxim 'delegatus non potest delegare'. A statute should be so interpreted that as far as possible, no word, sentence or clause becomes void, insignificant or superfluous. Whether a matter is res judicata or not depends on facts of the particular case. Alternative defences can be admitted. 5 N L R 189.

—S. 72 — Waste Land Sale Rules of 1861 — Estate transferred under — Declaration as

**Central Prov. Land Rev. Act**  
(XVIII of 1881) — (Contd.)

malah of—Ascertainment and determination of status and rents of tenants in such estate  
—Jurisdiction of Settlement Officer as to. 28  
N L R 169 (176) (F B).

—S. 72 — See under s. 49 of C P Tenancy Act. 13 N L R 179.

—S. 74—When a holding has been assessed and if a plot proprietor claims exemption from revenue, a civil court can only put in force Settlement Officer's or Dy. Commissioner's decision under S. 74. A civil court can fix the amount payable by each co-sharer out of the total revenue of a mahal. 1 N L R 140.

—Ss. 74, 132 and 152—C was the mortgagor of a malguzari village excluding some sir and khudkasht lands which remained with the mortgagors A and B. After an absolute foreclosure decree C became the owner, but the revenue for lands remaining with A and B had to be paid by C and C sued them for this amount. It was held that a Civil Court was competent to take up such a suit also it was held that a proprietor's claim to hold land wholly or partially revenue free against the malguzar whether as a suit or as a defence to a suit is unmaintainable by a Civil Court under Ss. 74 and 132 read with S. 152. Before liability or right under S. 69 Contract Act accrues it is sufficient if the original liability and its discharge by interested person exist. Under that section also the right of imbursement arises when the payment is under compulsion of law and it is necessary for saving the estate of the person from whom the demand is made. 6 N L R 27 = 5 I C 705.

—S. 83—When wazib-ul-arz did not mention the custom of paying Desehra Bheat and kotchhauni and the direction under S. 77 (d) for its insertion was absent. Held that no suit lies for its insertion in the Record and for correction. A I R 1922 Nag. 19 = 64 I C 722.

—S. 83.—Limt. Act Art. 14 governs a suit to amend settlement of entries A I R 1922 Nag. 76 = 5 N L J 199 = 65 I C 970.

—S. 83—The Government must be given notice of the suit by the plff. as S. 83 is imperative. 13 I C 184 = 16 C L J 28.

—S. 83—Only cancellation or amendment of an entry in Record of Rights is allowed by S. 83 of C P Rev. Act 1881, and so a suit for that purpose, not being a suit for setting aside a government officer's order is not governed by Art. 14 of the Lim. Act 1877 but by Act. 120. 14 I C 50.

—S. 87—A widow was only a temporary thekadar but settlement officer's subsequent order created permanent hereditary right. Such interest is held by the widow as such of her husband & it goes to her husband's heirs & not to her heirs as stridhan A I R 1930 Pat 357 = I R (1930) Pat 497 = 125 I C 145.

**Central Prov. Land Rev. Act**  
(XVIII of 1881) — (Contd.)

—S. 117—The question was whether a malguzar can take the assessed revenue from his maufi khairati tenants under s. 117. Held that a malguzar can demand revenue, under the section only from proprietors & not tenants & the section is inapplicable in a malguzari village to rent free maufi khairati tenants. 1 N L R 153.

—Ss. 136 F H & 22—If an applicant is entitled to partition, the court must do unless under s. 136 F, a co-sharer in possession puts forth a valid objection. In absence of such an objection the courts refusal to partition is appealable to the High Court, as such decision decides "the right of the parties." 5 Pat L J 140 = 55 I C 438.

—S. 136—A Partition under the Rev. Act does not come in force from the date of the commissioner's sanction but from the first day of agricultural year next after its publication by Dy. Commissioner under S. 136 (1). Two Hindu brothers came to a private partition, then there was a revenue partition sanctioned on 9th April 1894 & notified after 1st June 1894. So the revenue partition came in force only from 1st June 1895 & the rule of Hindu Law was inapplicable to the revenue partition. 17 I C 144 = 8 N L R 139.

—S. 136 G.—Under the the C P Civil Courts Act 1885, the Dt. Judge becomes the Dy. Commissioner as the original Civil Court & so Dy. Commissioner's order under S. 136 C C P Rev. Act 1881 is the Dt. Judge's decision & hence appealable to the High Court. 1 Pat L J 290 = 37 I C 115 = 2 Pat L W 404.

—Ss. 136 G & H. — Dy. Commissioner's order under S. 136 G is appealable as if passed by a Dt. Judge under Bengal Civil Courts Act. If the appeal is made to the Commissioner from such an order, no second appeal to the High Court lies from the Commissioner's orders. 17 C W N 155 = 14 I C 160.

—S. 136 (H) — (1) — "C P Civil Court Act 1885" in S. 136 (h) (1) C P Rev. Act refers to the Bengal Civil Courts Act 1887 as that is the law in Sambalpur after the Sambalpur Civil Courts Act 1906. So when a Dy. Commissioner under S. 136 (g) makes an order or decree it is appealable to the Dt. Judge & so no appeal lies to the High Court from the Commissioner's orders in appeal. 38 C 391 = 13 C L J 42 = 9 I C 202.

—Ss. 137, 141—Mukkadam gumastah, duties liabilities and responsibilities of—Receiving information of non-bailable offence—Agent omitting to report see. 11 I C 785.

—S. 137—Lambardar has no right to Mukkadam Gomasata's remuneration. A I R 1921 Nag 88 = 63 I C 1000.

—S. 137—In calculation of lambardari haq the amount of cesses must be excluded. A I R 1921 Nag 88 = 63 I C 1000.



## Central Prov. Land Rev. Act

( XVIII of 1881 )—(Conclud)

Ss. 137 to 140.—A non-resident lambardar appointing a gumashtah to perform Mukkad-dam's duties cannot get contribution for his wages from his co-sharers as he is his agent only. 43 I C 967.

—S. 138—Raiyati land can be leased by a lambardar Gaontia without his co-sharer's approval. 24 C L J 38 = 37 I C 261.

—S. 139 proviso—When applies see.

19 C L J 202

—S. 152 (a)—Disqualified Chief's estate was under Govt. supervision. The Political Agent sub-leased his Gaontia interest. Then local Govt. gave protected status on thekadar. Civil Courts cannot try the question of the validity of grant of such status if the original lease is not fraudulent. A I R 1930 Pat 357 = I R (1930) Pat 497 = 125 I C 145.

—S. 152 (b) (13-a)—When an imperfect partition of revenue shares in a mahal is made by a Revenue Officer, his orders determining the respective liabilities for land—revenue of the co-sharers are ultravires. Civil Court can decide the allotment & it is not prevented by S. 152 (b) (13 a) from fixing each co-sharer's liability. 1 N L R 100.

## Central Provinces Land Revenue. Act XVI of 1889.

—Ss. 69 (4) and 83—*Settlement entry of land as "Sir" of defendant—Suit under S 83 to set aside, within one year after settlement comes into effect—provision in S. 69 (4) as to—In-applicable to cases in which question involved is as to proprietary rights in the land.* A I R 1932 N 36 (37-8) = I R 1932 N 44 = 14 N L J 171 = 136 I C 884 = A L R 1932 N 78.

—S. 87—At a settlement proprietary rights conferred do not give any new rights also it does not remove any existing rights of the grantee, otherwise obtained. The award makes the property heritable and alienable, but these could be enjoyed only in accordance with the personal law. Hence in a question of devolution or alienation, we have to go behind the grant and see the grantee's position and rights before the award. 2 N L R 1.

—S. 151.—The collector compensated the plaintiff under S. 151 for infringing his rights. Then a reference under S. 19 Land Acquisition was made by the collector on his application and the Dist. Judge refused to hear it as reference to Civil Court was provided by S. 151. It was held that the Civil Court can fix the amount to be paid under S. 151 as being the intention of the section. 2 N L R 172.

## C. P. Land Revenue Act (II of 1917)

—C. P. C.—Application of on matter on which Land Revenue Act of 1917 silent—Permissible. 14 N L J 39 (Rev).

## C P Land Revenue Act (II of 1917)—(Contd)

—The C. P. Land Rev. Act II of 1917 is not retrospective in its effect. An entry in a Settlement Record of a person as malik makbuza muafidar does not entitle a Civil Court to hold his heir as thus privileged. 16 N L R 106 = 55 I C 426.

—S. 2.—It is not a survey-number when escheated malik makbuza fields are leased to malguzar for a term of settlement. He cannot mortgage his rights as he is only allowed to cultivate for a fixed period. A civil suit cannot be based on such a mortgage. A. I. R. 1930 Nag. 297 = I. R. (1930) Nag. 352 = 26 N L R 181 = 127 I C 352.

—S. 2—A person subsequently ceasing to be a proprietor may be included in Lambardar. A I R 1930 Nag. 210 = I R (1930) Nag. 241 = 123 I C 897.

—S. 2—As it is agriculture to keep khud-khast land under grass cattle cannot be grazed free of charge. A I R 1929 Nag. 108 = I R (1929) Nag. 124 = 25 N L R 16 = 116 I C 76.

—S. 2—All co-sharer Ganotias have a share in the tenancy. Gaontia is a proprietor of bhogra land & lessee from Government of the rest. A I R 1926 Nag. 373 = 95 I C 381.

—S. 2—Proprietary and occupancy right must be in same person. A I R 1923 Nag. 93 = 19 N L R 26 = 71 I C 129.

—S. 2 (17)—sir land-trees standing on whether part of the land. A L R 1933 N 30 = 29 N L R 1 = 16 N L J 1 = 142 I C 147 = A I R 1933 N 53.

—S. 26—Application—Dismissal for default of—Fresh application for same relief not barred—Party not restricted to remedy in S. 28 (2). 14 N L J 39 (Rev.)

—S. 46 (5)—Mortgage of trees is a transfer of rights in the occupancy in a portion of the tenancy holding & there can be no registration of the document in contravention of the section. A I R 1922 Nag. 252 = 70 I C 34.

—S. 66—A person's title is not affected so as to file a suit by patwari's entries in khasra & jamabandi but Settlement officer's such entries under S. 66 (1) gives a cause of action. A I R 1930 Nag. 92 = I R (1929) Nag. 17 = 26 N L R 94 = 120 I C 321.

—Ss. 68 (3), 68 (6) and 220—Entry of Settlement Officer under S. 68 (3)—no appeal, revision or review under S. 68 (6)—entry becomes conclusive—jurisdiction of Civil Courts barred to set aside entry. A L R 1933 N 177.

—S. 76—The Revenue Board has to sanction the levy & not the rate of cess. A I R 1922 Pat. 399 = 1 Pat. 83 = 69 I C 672.

—Ss. 78 and 80 (1)—Bazar dues—Recovery of Right of—Declaration of—Suit for—Entry in village *wajib-ul-arz* under S. 78 that no one has a right to levy bazar dues in village—Suit not brought within one year from date of assessment being offered to proprietor under last Settlement—Suit barred under S. 80 (1) in case of. A I R 1932 N 159 (161).



## C. P. Land Revenue Act (II of 1917) — (Concl'd)

## C P Land Revenue Act (II of 1917) — (Cont'd)

—S. 80—A suit to set aside an entry is not bad when a copy of *wajib-ul-arz* was not produced as though applied for was not granted. A I R 1926 Nag. 324 = 8 N L J 36 = 87 I C 81.

—Ss. 78, 83.—A suit must be within S. 78 for being maintained under S. 83 concerning a matter in the Record of Rights. A I R 1922 Nag. 19 = 64 I C 722.

—S. 80—*Wajib-ul-arz* at the time of granting proprietary rights did not restrict them & in subsequent *wajib-ul-arz* restrictions on inferior proprietor's rights were not recorded. Ordinary rights of the proprietor were not taken away. A I R 1929 Nag. 139 = I R (1929) Nag. 186 = 116 I C 666.

—S. 80.—A suit to set aside an entry is not bad when a copy of *wajibul-arz* was not produced as though applied for was not granted. A I R 1926 Nag. 324 = 8 N L J 36 = 87 I C 81

—S. 80—No presumption in favour of his due inquiry can be made when Settlement Officer's order is not produced. A I R 1925 Nag. 324 = 8 N L J 36 = 87 I C 81.

—S. 80—The section applies to an entry according to settlement Officer's order & not contrary to it A I R 1925 Nag. 34 = 81 I C 1039.

—S. 80—No question of limitation arises where Revenue authorities refuse to interfere. A I R 1924 Nag. 256 = 20 N L R 70 = 78 I C 872.

—S. 82—Only entry in the Record of Rights is presumed to be correct & not every entry of the settlement. A I R 1925 Nag. 452 = 89 I C 741.

—S. 83—Limi. Act art. 14 & not art. 120 governs a suit for amending settlement entries. A I R 1922 Nag. 76 = 5 N L J 199 = 65 I C 970.

—S. 106—Civil Court can set aside Dy. Commissioner's order about village customs. A I R 1925 Nag. 371 = 87 I C 1054.

—S. 107—Money belonged to A & B but the lease was in A's name B's rights against A remains unaffected by A's omitting to declare B's name in the transaction. Whether the lease is voluntary or compulsory the rule applies. A I R 1927 Nag. 207 = 100 I C 772.

—S. 107 Thekadar cannot challenge the lease & *kabuliyat*. 91 I C 304.

—S. 108 A Civil Court cannot question the terms of a lease when with it the *Kabuliyats* are also drawn up by Settlement Officer under the section A I R 1930 Nag. 209 = I R (1930) Nag. 347 = 127 I C 347.

—S. 109 A lease granted by a protected *thekadar* before the Act came into force is valid as the prohibition against transfer contained in s. 109 of the Act did not apply, there having no such provision in s. 65-A of the old Act. A I R 1931 Nag. 72 = 27 N L R 15 = Ind Rul (1931) Nag. 111 = 132 I C 463.

—S. 109. It is not meant that there shall be no inquiry under S. 108 unless lease has expired by the expression 'protected thekadar shall be entitled on the expiry of his lease to a renewal and on occurrence of any such renewal the provisions of s. 108 shall apply.' A I R 1930 Nag. 209 = I R (1930) Nag. 347 = 127 I C 347.

—S. 109 On application under s. 112 Dy. Commissioner transferred *theka* to the applicant but he rejected subsequent application under s. 109 (3) which cannot be entertained by a Civil Court. The order rejecting transfer is not without jurisdiction though transfer was not made by thekadar. A I R 1929 Nag. 201 = I R (1929) Nag. 261 = 118 I C 469.

—S. 109. Village was exclusively possessed by thekadar's family & no arrangement for joint or separate enjoyment was proved. Exclusive possession can be claimed by thekadar. A I R 1928 P C 96 = 24 N L R 179 = 55 C-725 = 55 I A 150 = 54 M L J 576 = 27 L W 763 (P C) = 108 I C 365.

—S. 109 A protected thekadar cannot be given exclusive possession against other members of his family. A I R 1924 Nag. 163 = 79 I C 400.

—S. 109 Thekadar's co-sharers may partition privately affecting several co-sharers' tenants' surrenders. A I R 1924 Nag. 383 = 78 I C 134.

—S. 111 The question of notice does not arise when the proprietor claims to eject the *thekadar*. An application for forfeiture by the proprietor would in itself be notice of an extension to terminate the *theka*. A I R 1931 Nag 72 = 27 N L R 15 = Ind Rul (1931) Nag 111 = 132 I C 463.

—S. 111 When the protected status of the *thekadar* is forfeited, the *theka* itself is also forfeited, subject to the provisions that the rights of an occupancy tenant in the whole or part of the *sir* or *khudkash* land may be reserved in favour of the *thekadar*. A I R 1931 Nag 72 = Ind Rul (1931) Nag 111 = 27 N L R 15 = 132 I C 463.

—Ss. 111, 220 The Order of a Revenue Court under s 111 directing forfeiture of the protected status cannot be challenged in Civil Court. The latter's jurisdiction is barred under s. 220 (1). A I R 1931 Nag 72 = 27 N L R 15 = Ind Rul (1931) Nag 111 = 132 I C 463.

—Ss. 111, 220 (1)—When protected status is forfeited, *theka* itself is also forfeited but rights in *sir* may be reserved in favour of *thekadar*—Question of notice does not arise when proprietor applies for forfeiture—Order of forfeiture cannot be challenged by Civil Court. A I R 1931 Nag. 72 = 27 N L R 15 = Ind Rul (1931) Nag. 111 = 132 I C 463

—Ss. 122, 123 and 188—Revenue assessed on *patti* payable by *lambardar*—Default in

## C P Land Revenue Act (II of 1917)—(Contd)

payment by him of—Sardar lambardar paying same—Rights of. *See* under this Act, Ss. 188, 123 & 122 28 N L R 214.

—S. 128. For debts due to the Society agriculturist's house is not exempted from sale A I R 1927 Nag 217 = 23 N. L. R. 66 = 103 I C 131.

—S. 131. To warrants under this section C P C O 21 r. 24 applies and it is no offence when a time barred warrant under the section is resisted A I R 1924 Nag 68 = 19 N L R 183 = 25 Cr L J 223 = 76 I C 655.

—S. 137. Village proprietors are not liable for Mukadam Gomastha's remuneration over 5 p. c. on land revenue only. Festival expenses cannot be debited against the proprietors. 63 I C 1000

—S. 138 Intention of the parties determines surrender or transfer. The former can only be to a landlord. It can be received by lambardar and also by the whole body of proprietors. 6 N L J 73.

—S. 151—A claim to pre-empt under s. 151 is enforceable in execution proceedings, and not by separate suit. A I R 1928 Nag 48 = 23 N L R 144 = 10 N L J 228 = 106 I C 170.

—S. 151 Application under the Section cannot be entertained when it is for pre-empting the property sold in execution under C P C by a Civil Court A I R 1926 Nag. 193 = 21 N L R 157 = 91 I C 962. overruled A I R 1928 Nag 48

—Ss. 153 & 132 (h) A suit is barred by S. 153 to recover village cesses compulsorily paid previously unless they are sanctioned by chief commissioner or recorded either at the last settlement or by under S. 132 (h) by the Dy. Commissioner A I R 1922 Nag 19 = 64 I C 722.

—S. 156 No agreement is required to claim set off. A I R 1927 Nag 175 = 100 I C 812

—S. 159. S. 220 bars a suit for revenue chargeable but unassessed as it is for apportionment of revenue. A I R 1925 Nag 419 = 22 N L R 121 = 89 I C 292.

—S. 160 (3) Application of s. 6 Limi. Act is not barred. A I R 1926 Nag. 236 = 91 I C 563.

—S. 160 (2) Limitation for a suit instituted after Act II of 1917 is provided in the Limi. Act. A I R 1923 Nag 164 = 6 N L J 1 = 71 I C 140.

—S. 160 Three years & one day is the limitation period under this section. A I R 1922 Nag. 261 = 69 I C 527.

—S. 169 Limitation for suit under s. 169 (1) (b) runs from the date of Dy. Commissioner's order and not from Commissioner's order in appeal. A I R 1924 Nag 275 = 20 N L R 115 = 79 I C 161.

## C P Land Revenue Act (II of 1917)—(Contd)

—S. 169 An application under s. 14 cannot extend the six months period fixed in a suit under the Section. Its operation is excluded by s. 29 Limi. Act. A I R 1923 Nag. 308 = 6 N L J 205 = 73 I C 1021.

—S. 169 There was a partition order for filing a civil suit. It may not be filed within 6 years from the order. A I R 1928 Nag 86 = 19 N L R 11 = 71 I C 205.

—S. 173—Where a person does not hold the *sir* land from another person, he is not liable to pay rent to the latter. 111 I C 527.

—S. 173 When a co-sharer holds *sir* or khudkashat land in severalty and at an imperfect partition it is allotted to another's patti and if he is unrecognised or not created tenant by Dy. Commissioner's order or by a co-sharer in whose patti it is, he does not become a tenant A I R 1921 Nag. 80 = 17 N L R 107.

—S. 182—Lambardar may sue to eject transferee of absolute occupancy holding alienated by cosharer's consent except his. A I R 1925 Nag. 140 = 21 N L R 139 = 82 I C 495.

—S. 187 When appointed under this section a lambardar is presumed to have all powers under S. 188. A I R 1928 Nag. 123 = 11 N L J 1 = 107 I C 527.

—Ss. 187 to 189 A mahal lambardar can exercise powers in another patti though not its proprietor. A I R 1923 Nag. 153 = 6 N L J 85 = 19 N L R 59 = 71 I C 777.

—Ss. 188, 123 and 122 *Revenue assessed on patti payable by lambardar—Default in payment by him of—Sardar lambardar paying same—First charge over estate if acquired by—Sale of portion of estate in enforcement of—Sardar lambardar's right of.* 28 N L R 214 = 140 I C 532 = A I R 1932 N 171 = A L R 1932 N 357.

—S. 188 Negligence may be presumed where lambardar has not leased leasable trees A I R 1922 Nag. 211 = 70 I C 72.

—S. 188 On division of a mahal patti & not the mahal is the unit to appoint the lambardar. He is not given more rights by S. 188 (2) (a) than already possessed. A I R 1923 Nag. 153 = 6 N L J 85 = 19 N L R 59 = 71 I C 777.

—S. 188 There is no sole right of the lambardar of joint village to appoint village servants. A I R 1929 Nag 328 = 31 Cr. L. J. 20 = I R (1930) Nag 7 = 1926 Cr. Cas. 532 = 120 I C 215.

—S. 188 Lambardar can't transfer rights of other co sharers without their consent. A I R 1925 Nag 101 = 81 I C 276.

—S. 188 Lambardar is not authorised to lease the land held separately by his co-sharers by the section A I R 1925 Nag. 181 = 7 N L J 241 = 85 I C 73.

—S. 188 In a suit for profits against the landlord, interest should be allowed from 1st

## C P Land Revenue Act (II of 1917)—(Contd)

Nove. of the year for which it is claimed. A I R 1927 Nag. 62=9 N L J 7=93 I C 196.

—S. 188 Lambardar can file a suit to recover rent arrears due to his predecessor. A I R 1926 Nag. 244=22 N L R 11=98 I C 357.

—S. 188—Ex-proprietor who becomes an occupancy tenant of his *sir* land held in severalty is tenant of the purchaser of his village share. The latter and not the *lambardar* can claim rent from him. A I R 1928 Nag. 229=108 I C 790.

—S. 188—The words "collect the village profits" in S. 188, sub S. (2) (c), includes profits said to have been derived by co-sharers in the village from excess *sir* and *khudkashat* land possessed by them. A I R 1928 Nag. 176=11 N L J 113.

—S. 188 Payment in past is not implied agreement. Unless agreed to co-sharers are not bound to share expenses of public festivals. A I R 1927 Nag. 267=102 I C 612.

—S. 188. Unless agreed and services are required the co-sharers may not share the remuneration of mukadam gumashta and havalldar. A I R 1927 Nag. 267=102 I C 612.

—S. 188 Condition in a *wajib-ul-arz*—Consent of every co-sharer in petty cases is not necessary. A I R 1923 Nag. 336=7 N L J 193=26 Cr. L J 382=84 I C 862.

—S. 188 Landlord means the whole body of them. Legislative sanction is given to pre-existing practice by the section. A I R 1923 Nag. 286=6 N L J 231=84 I C 639.

—Ss. 188 & 192. A non-resident *lambardar* engaging a servant to work for him cannot charge his wages from his co-sharer unless previously agreed. 58 I C 958.

—S. 188 A co-sharer leased his *sir* land and the lessee recorded as, occupancy tenant surrendered the land to *lambardar*. It becomes separate *khudkashat* of the original grantor & the *lambardar* cannot lease it but possession can be claimed by the original tenant. A I R 1921 Nag. 163=63 I C 733.

—S. 188 The plff. has a right to interest as an offer for half the sum really due is a refusal to discharge the debt. A I R 1923 Nag. 211=70 I C 72.

S. 188 (2) (c) No ground exists for giving interest when co-sharer does not demand his share of the profits. A I R 1923 Nag. 197=19 N L R 24=73 I C 142.

—S. 188 (2) (c) The suit is not premature if brought within six months of the end of the year. A I R 1923 Nag. 287=6 N L J 234.

S. 189—*Lambardar* continues to be so even after he ceases to be proprietor. A I R 1930 Nag. 210=I R (1930) Nag. 541=123 I C 897.

—S. 192 Unless fixed by a revenue officer any *lambardar's* remuneration cannot be recovered by a suit. A I R 1928 Nag. 68=105 I C 567.

## C P Land Revenue Act (II of 1917)—(Contd)

—S. 192—*Sadar lambardar* as such has no right to any remuneration. A I R 1927 Nag. 175=100 I C 812.

S. 192 Under the Land Rev. Act a *Sadar lambardar* has no right to any remuneration at all. A I R 1926 Nag. 318=23 N L R 31=93 I C 121.

—S. 192—Cost of collection can be awarded on general principles or under Contract Act, s. 70. A I R 1923 Nag. 164=6 N L J 1=71 I C 140.

—S. 192 Even though not fixed by the Dy. Commissioner under s. 192, a *lambardar* is entitled to get the remuneration when his right to it is admitted. A I R 1922 Nag. 111=66 I C 465.

—S. 192 (1) Fixing *lambardar's* remuneration is not a condition precedent for a civil suit to recover it. When the appointment is prior to new Act s. 192 does not abrogate *lambardar's* right to recover *lambardari* dues fixed under rules under s. 137. A I R 1925 Nag. 129=20 N L R 142=83 I C 172.

—Ss. 193 (c) and 199—*Patti* not recorded in *Wajib-ul-arz* or shown in settlement map—Proof of, by other evidence—Permissible in Revenue Court. 15 N L J 92.

—S. 201—Civil Court—Jurisdiction—Liability a civil right accruing on happening of a contingency—Enforcement of—Civil suit for—Maintainable. 14 N L J 37 (Rev.)

—S. 201—"Rule or Custom"—Statement of liability in cash or kind enforceable at option of party not by itself a Failure to discharge such liability not contravention of rule or custom. 14 N L J 37 (Rev.)

—Ss. 202, 220 Where a lease of *Malguzari* forest was made without sanction and the Deputy Commissioner took the forest under protection; *Held*, a suit in the Civil Court for recovery of consideration was not barred by S. 202 but lessee had no right to get damages. A I R 1931 Nag. 137=Ind Rul (1931) Nag. 153=134 I C 281.

—S. 203—Non-agricultural holder of site—Transfer of site by, with permission to occupy—Right of non-agricultural holder as to.

—In a case in which no declaration has been made under S. 5 (5) in respect of a village and there is no evidence to show what the contract between the proprietor and the holder of the site was, no presumption will be made that the holder of the site had anything more than a license to occupy and that license cannot carry with it a right to transfer with permission to occupy unless such permission is proved. The fact that the holder has built houses of substantial value on the site is immaterial.

—S. 203 is not confined to the rights of agricultural holders only: their rights and

## C P Land Revenue Act (II of 1917)—(Contd.)

liabilities are determined by the first three sub-clauses of the section and holders in general are governed by the remaining sub-clauses. 14 N L J 254 = A I R 1932 N 30 = I R 1932 N 42 = 136 I C 882 = A L R 1932 N 55.

—S. 203—Transfers of all houses in *abadi* without *malguzar's* permission are forbidden. A I R 1930 Nag. 89 = 13 N L J 1 = I R (1930) Nag. 122 = 121 I C 666.

—S. 203—Even one becoming agriculturist after entering *abadi* is incompetent to transfer the site. A I R 1924 Nag. 225 = 75 I C 925.

—S. 203 Unless Easements Act S. 60 or Land. Rev. Act S. 203 or the village *wajib-ul-arz* protects the licensee, the license of the *abadi* plot is revocable at the grantor's will. 67 I C 373.

—S. 203. Those who have insufficient site for agriculture can purchase *abadi* site without landlord's consent. The validity of the transfer may be decided by a Civil Court A I R 1929 Nag. 64 = I R (1929) Nag. 68 = 114 I C 452

—S. 203. License can be inherited. Mortgage of a house is not necessarily an abandonment. The stranger must prove that the transferor had such interest. A I R 1925 Nag. 396 = 86 I C 763.

—S. 203. Unless the land was given as house site to the tenant, his occupation may be determined by the landlord selling the land. A I R 1925 Nag. 81 = 82 I C 182.

—S. 203. Entry in *wajib-ul-arz* is not included in "contract." A I R 1929 Nag. 59 = 11 N L J 240 = 113 I C 176.

—S. 203. When *abadi* land is sub-divided in *pattis* a tenant in one *patti* of a *mahal* cannot hold house site in the *abadi* land of another *patti*. A I R 1928 Nag. 86 = 10 N L J 262 = 110 I C 834.

—S. 203 (1) A tenant can transfer site without landlord's consent subject to exceptions. A I R 1929 Nag. 59 = 11 N L J 240 = 113 I C 176.

—S. 203 (1) Landlord is entitled to possession when owner of house site does not intend to construct a residential house. A I R 1928 Nag. 69 = 23 N L R 150 = 109 I C 177.

—S. 203 (1) "Every person" includes females but excludes married ones living with husbands. A I R 1928 Nag. 69 = 23 N L R 150 = 109 I C 177.

—S. 203 (2) Landlord has no right to sue for re-entry by the tenant's mortgage. A I R 1925 Nag. 204 = 82 I C 1056.

—S. 203 (3) Proviso—extent of applicability A L R 1933 N 60.

—S. 203 (8) Lambardar's consent was held not necessary when it was expressly provided

## C P Land Revenue Act (II of 1917)—(Contd.)

that a tenant of 30 years can transfer his house site. A I R 1929 Nag. 41 = 24 N L R 85 = 11 N L J 123 = 109 I C 647.

—S. 212 Raiyatwari fields are a part of a person's estate. When one heir possesses such lands other heirs have a right to share in them. A I R 1923 Nag. 307 = 6 N L J 161 = 73 I C 959.

—S. 218 Term "mineral"—definition of loose "boulders" lying on the surface ground—are not "minerals" within the meaning of the section. A I R 1933 N 175.

—S. 219 A trespasser on communal land may be ejected temporarily but not permanently by the Dy. Commissioner. A I R 1923 Nag. 326 = 75 I C 914.

—S. 219 Those who disobey summary ejection order under S 219 become liable to be punished under S. 188 L. P. C. The Act has no provision for enforcing the order. A I R 1922 Nag. 209 = 17 N L R 88 = 23 Cr. L J 19 = 64 I C 499.

—S. 220 See C P Land Revenue Act, s. 202 A I R 1931 Nag. 137 = Ind. Rul. (1931) Nag. 153 = 134 I C 281.

—S. 220 The section is inapplicable where neither any correction nor any ruling is sought for matters under it. A I R 1924 Nag. 256 = 20 N L R 70 = 78 I C 872.

—S. 220 Civil Court's jurisdiction is not excluded when no question regarding agreement with government or with proprietor is involved. A I R 1929 Nag. 139 = I R (1929) Nag. 186 = 116 I C 666.

—S. 220 Though based on mistake of fact revenue Court's order on a matter in within jurisdiction is not *ultravires*. A person purporting to be a member of protected *thekadar's* family applied under S. 112. Upon inquiry Dy. Commissioner held appellant as entitled to be maintained out of income of *theka* & transferred it to him. Though as a fact it was otherwise his order was not without jurisdiction. Civil Court is barred from questioning the order by this section. A I R 1929 Nag. 201 = I R (1929) Nag. 261 = 118 I C 469.

—S. 220 A Civil Court can entertain a co-sharer's suit to possess *abadi* site against owner of another *patti* in the same village. A I R 1929 Nag. 17 = 112 I C 648.

S. 220 Like *lambardars* *Sadar lambardar* has a right to remuneration but not until it is fixed. A I R 1926 Nag. 274 = 22 N L R 87 = 92 I C 909.

—S. 220 *Lambardar's* suit for his remuneration arrears can be tried by a Civil Court. A I R 1925 Nag. 129 = 20 N L R 142 = 83 I C 172.

Ss. 220 (1) and 111—Revenue Court's order forfeiting protected status cannot be challen-



**C P Land Revenue Act (II of 1917)—(Concl'd)**

ged in the Civil Court. A I R 1931 Nag. 72 = 27 N L R 15.

—S. 228 Expl.—proviso to the section—effect of—term “mineral”—cannot be dissociated from the idea of extraction. A L R 1933 N 175.

—S. 229 For lambardars' remuneration the same state of things is continued by the section as existed under Act XVIII of 1881 A I R 1922 Nag. 111 = 66 I C 465.

**Central Provinces. Laws Act ( XX of 1875 ).**

—Mortgagee by conditional Sale prior to—Redemption—Right of T. P. Act, S. 61. 14 N L R 184.

—S. 5 Inheritance—Personal law of parties as to—Custom excluding—Onus of proof of, is on party setting up the custom. 28 N L R 267 (268-9) = 141 I C 73 = A I R 1933 N 16.

—S. 5 — converts from Hinduism case to be so and when the religion to which they are converted regulates succession to property, they become subject to that law for inheritance and succession except the contrary custom is well proved. The word ‘Hindu’ in S. 5 refers to those who follow Hindu religion in some form at least but it cannot be extended to those who have never possessed it or are converted from it. It is applicable to non-conformists and dissenters but never to apostates. The Gonds of the C P are not Hindus but if any family or sect except that religion then only such law is applicable to to that family or sect. 44 I C 435

**C. P. Local Self-Government Act ( IV of 1920 )**

There was no clear law regulating bazaars or markets in these provinces prior to Act. IV. of 1920. beyond the inclusion of markets as one of the matters which were placed under the control and administration of the District Council and Local Boards under S. 9 of the former Local Self-Government Act. I of 1883. No particulars were laid down in that Act as to how the district Council was to control markets, and in particular, there was no mention of fees of tolls, neither was the question of the rights of land-owners to hold markets touched upon, nor was any mention made of private markets. There would however appear to be a right recognised in land owners to hold markets or bazaars upon their land, provided that they did not infringe the rights of others, and the holding of such markets would, it seems, include the levying of market fees or tolls. A I R 1932 N 159.

—S. 23 (1) — “ Any market ” in—Means not a public market. 28 N L R 98 = A I R 1932 N 105 = 139 I C 374 = I R 1932 N 108 = A L R 1932 N 145.

**C P Local Self-Government Act**

(IV of 1920)—(Concl'd)

—S. 23 (1) and (3)—Private market—Notification under S. 23 in respect of—Effect of—Suit not filed as required by S. 23 (3)—Private market converted into public market in such a case. 28 N L R 98 = I R 1932 N 108 = A I R 1932 N 105 = 139 I C 374 = A L R 1932 N 145.

—S. 27—Nistar dues—Levy of, for ten years—Right to levy fees or tolls by long usage does not give. A I R 1932 N 159.

—S. 29—The plaintiff is entitled to invoke this section only if he can prove that the village in which the market is situated has been notified by the Local Government under S. 25 Local Self-Government Act.

The mere fact that the Deputy Commissioner has by his order referred the plaintiff to the Civil Court would not clothe him with a right of action under S. 29, if, under the statute, he is not entitled to it. 28 N L R 98 = A I R 1932 N 105 (106-7) = I R 1932 N 108 = 139 I C 374 = A L R 1932 N 145.

—S. 73. — The section does not govern claims arising out of contract. A I R 1930 Nag. 179 = 26 N L R 81 = 13 N L J 71 = I R (1930) Nag. 247 = 123 I C 903.

**Central Provinces Municipal Act ( XVI of 1903 )**

—Ss. 2 (f), 44—Summary procedure is not available to recover rent for municipal buildings, as such rent is not a tax. A I R 1923 N 264 = 19 N L R 122 = 73 I C 52.

—S. 21 (1)(b)—Provisions about certificate are not mandatory : 127 I C 337 = A I R 1930 N 157.

—Ss. 30, 31—An auction sale for the Municipality & confirmed by President in a meeting becomes a contract. A I R 1924 Nag. 227 = 78 I C 1052.

—S. 39 — Service of notice on members forming quorum is not necessary. I R 1930 N 337 = 127 I C 337 = A I R 1930 N 157.

—Ss. 52, 53 — Municipal Committee are not owners of all lands within Municipal limits. 47 I C 892.

—Ss. 64, 68 — S. 68 does not apply to leased nazul land—Cowshed is a building : 92 I C 796 = A I R 1926 N 281.

—S. 66 (1) (3) — Delay in passing orders on a notice under S. 66 (1) of C P Municipal Act raises a presumption of sanction to build 48 I C 889 = 20 Cr. I J 89.

—S. 66 (5) — Circumstances of the Case determine reasonableness of time under S. 66 (5) of C P Municipal Act. 11 N L R 87 = 16 Cr. L J 232 = 29 I C 660.



**C P Municipalities Act II of 1922.**

—Notification 456 of 29-4-1913 is not subject to the maximum of Rs. 500 imposed by R 1 Provi. 1 of Hyderabad Residency O. 112 of 18-3-1899. A I R 1927 Nag. 102 = 22 N L R 153 = 99 I C 427.

—S. 12 (1) (a)—A member of it Hindu family with an annual income not below Rs. 120 can vote. Explan. to cl. (a) applies only when the total income is more than Rs. 120, but not the individual income. A I R 1926 Nag. 66 = 21 N L R 182 = 88 I C 480.

—S. 25 (1)—The committee has to get sanction for paying allowance and unless refused party receiving it receives it legally. A I R 1929 Nag. 213 = I R (1929) Nag. 130 = 116 I C 418.

—S. 33—Section 33 governs a bye-election of Vice-President on a casual vacancy and the statutory President has a right to preside at the meeting. Rule 20 does not apply to such bye-election. A I R 1931 Nag. 175 = 27 N L R 244 = Ind Rul (1931) Nag. 188 = 134 I C 860.

—S. 37—Committee—definition of—is a corporation aggregate—extent of powers defined. A L R 1933 N 36 = 29 N L R 57.

—S. 38 (g)—public streets—use of—not to be used as dumping ground for building material. A L R 1933 N 36.

—S. 44—Auction sale by Municipal Committee—Procedure to be followed in case of—Signed memorandum—Preparation of, on completion of contract—Contract in writing in shape of sale deed or lease deed on payment of purchase-money—Necessity. 28 N L R 130 = A I R 1932 N 128 = A L R 1932 N 256.

—S. 44—Auction sale by Municipal Committee—Re-sale in case of, on ground of purchaser's default to pay balance of purchase-money and other charges—Notice given by committee demanding payment of balance of purchase-money and other charges on or before a certain date—Re-sale held before that date not valid and purchaser at original sale not liable for deficiency on re-sale. 28 N L R 130 = A I R 1932 N 128 (130) = A L R 1932 N 256.

—S. 66 The Act and Notification No. 9 of 1931 do not empower Municipal Committees to levy octroi duty on motor cars. Cars do not come within the term 'metals and their manufactures'. A I R 1931 Nag. 156 = 27 N L R 175 = Ind Rul (1931) Nag. 178 = 134 I C 850.

—S. 66 When circumstances within certain limits are referred to, it means those within the specified limits and not property outside the limits giving rise to them. Land Revenue payable is not within 'circumstances' which is qualified by "within those limits". A I R 1928 Nag. 243 = 107 I C 902.

—S. 66 (2) and (4)—Power to alter a tax under S. 66 (4) does not depend upon maximum imposition under S. 66 (2) A I R 1930

**C P Municipalities Act II of 1922—(Concltd)**

Nag. 153 = (1930) Nag. 179 = 13 N L J 13 = 122 I C 691.

—S. 66 (2), r. 5 (b)—Payment of Haisiyat tax towards income-tax may be excluded but those towards insurance premia and house-rent may not be wholly excluded : 23 N L R 161 = 106 I C 397 A I R 1928 N 71.

S. 67 (8)—Not only under S. 67 (8) but also under the old Act, Government Notification imposing a tax is conclusive proof of its legal imposition. A I R 1930 Nag. 157 = I R (1930) Nag. 337 = 127 I C 337.

—S. 68 (9)—Though imposed according to Notification in Gazette, the legality of the tax can be considered by a Civil Court. A I R 1930 Nag. 153 = I R (1930) Nag. 179 = 13 N L J 13 = 122 I C 691.

—Ss. 70 and 91—Land or drain—Ss. 91 and 70 inapplicable to. 15 N L J 93 = A L R 1932 N 376

Ss. 93 and 94—Drain—Encroachment upon—License for—Municipal Committee can, under the powers conferred by paragraph II, Revenue Book Circular IV—I, give such license only for two months. 15 N L J 93 = A L R 1932 N 376.

Where the structure erected was of a permanent nature and amounted to a public nuisance and the sanction of the appropriate Nazul authority was not obtained, held that the Court had power to direct the removal of the nuisance. 15 N L J 93 = A L R 1932 N 376.

S. 176 (2) (1)—The Judicial Commissioner's Court has jurisdiction to revise orders passed by the Court to the Sub-Judge, First Class, on Municipal election petitions. A I R 1931 Nag. 82 (2) = 27 N L R 61 = Ind Rul (1931) Nag. 88 = 131 I C 424 (F B).

—S. 176 (2) (iii) Commissioner is not authorized by rules under the section to withhold application for sanction of allowance. His refusal to forward it is ultra vires. A I R 1929 Nag. 213 = I R (1929) Nag. 130 = 116 I C 418.

**C P. Municipal Rules**

—r. 20 See C P Municipalities Act, s. 33 A I R 1931 Nag. 175 = 27 N L R 244 = Ind Rul (1931) Nag. 188 = 134 I C 860.

**Gen. Pro. Settlement Code**

—S. 223—Produce of forest lands means Sewajama in S. 223 of C P Settlement Code 13 N L R 1 = 38 I C 684.

**Central Provinces Stamp Law Rulings Circulars, 1887.**

—Nos. 7, 9, 11 and 12—Agreement for sale must be for price paid or promised and further it must be unattested. A I R 1927 Nag. 72 = 98 I C 631.

## Cen. Pro. Tenancy Act 1859

A Village tank let for fishing and growing water-nuts is not land let for agricultural purposes under S. 2 (5) of C P. Ten. Act 11  
N L R 122 = 31 I C 294.

## Central Provinces Tenancy (Act IX of 1883)

—Applicability of—to absolute occupancy tenants—ordinary tenants—and absolute occupancy tenants—distinction between Right of Occupancy—Loss of Right, 6 N L R 6.

—S. 6—Transfer of occupancy holding by tenant is voidable by landlord, 10 N L R 146 = 26 I C 698.

—S. 38—Under s. 38 (2) interest on prior mortgage for 5 years or for the period since execution whichever is longer should be included as part of the sum secured, A I R 1921 Nag 161 = 64 I C 99.

—S. 38—A *zar-i-peshgi* lease means a mortgage within the meaning of s. 38 (2), A I R 1921 Nag. 161 = 64 I C 99.

—S. 38—The expression 'and the previous sums if any secured by mortgage of the holding'—in s. 42 of the Act, should be interpreted unrestrictedly.

It covers also sums due to contemplating mortgagee and to another creditor, 12 N L R 51 = 33 I C 489.

S. 38—Alienation of absolute occupancy holding by a Hindu Widow for her husband's nephew's marriage, is not binding upon the reversioners, 8 N L R 154 = 17 I C 366.

—S. 38 (2)—Criterion for determining necessity for notice to landlord of intention to mortgage occupancy holding is the annual rent of entire holding with interest, 17 I C 370 = 8 N L R 147.

—S. 38 (2)—Word 'interest' in S. 38 (2) of the Act, means Compensation for the use of money or grain including repayments in grain.

Necessity, for notice to landlord of usufructuary mortgage of occupancy holding, is determined by money value of usufruct or grain, 10 N L R 21 = 23 I C 213.

—Ss. 41, 51 (1) — All occupancy tenants of *malik maqbuza*, before 1st. January 1884, are not affected by amending Acts XVI and XVII of 1889. All such tenants after 1st. January 1884 are made Sub tenants by the amending Acts, 8 N L R 39 = 14 I C 788.

—S. 41 (2) — Mortgage of absolute occupancy-holding and other properties for sum requiring notice under S. 41 of the Act effected without such notice is void and the Court is not bound to apportion value and uphold the mortgage, 7 N L R 20.

—S. 42—As the section requires express passing of *sir lands* if express words are not used by parties who desired to leave open the question, the vendor cannot plead the Statute

## Central Provinces Tenancy

(Act IX of 1883)—(Concl'd)

as objection to vendee's claim for the rights, 48 C 591=19 A L J 361=34 C L J 1=25 C W N 938=14 L W 228=(1921) M W N 310=17 N L R 84=48 I A 220=A I R 1921 P C 13=40 M L J 418 (P C)=61 I C 769.

—S. 42—Applies only to sales of three specified kinds and to mortgages of any kind, 8 N L R 123=17 I C 129.

—S. 42—Court executing mortgage-decree must look at its substance and not at its form only, 57 I C 177.

—S. 43—In C. P. a landlord's suit against tenant's transferee who takes possession of a holding in execution of a decree on mortgage voidable by the landlord is not governed by Art 91 of Limi. Act; The tenant is bound by the transfer & landlord cannot cancel it, A I R 1922 Nag 60=18 N L R 11=76 I C 884.

—S. 43—On transfer of a part of occupancy holding Civil Court can entertain a suit for ejectment, 7 C L J 499=12 C W N 636=35 C 470.

—S. 43—Suit to recover arrears of rent from absolute occupancy tenant—LIMITATION ACT, 1908 arts. 110, 132, 3 N L R 81.

—S. 45—Policy and scope—Contract to sell with cultivating rights in *sir land*—Specific relief, 6 N L R 185 = 8 Ind. Cas. 1184.

—S. 49—Rent fixed by Settlement officer under S. 49 must be paid by occupancy tenant, 7 N L R 17.

—S. 92.—Tahsildar's decision under S. 92 of the Act, that a person is a tenant is not res judicata barring Civil Court's jurisdiction to try the same issue, 4 N L R 63.

—S. 94.—Transfer by tenant of his tenant-right to the landlord is a surrender. Surrender is not ejectment within S. 94 of the Act, 5 N L R 97 = 3 I C 51.

—S. 94 (1)—Applies to cases of ejectment of tenants. Tenant holding over may be treated as a tenant or as a trespasser, 6 N L R 95 = 6 I C 937.

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—Only the Revenue Court can entertain a tenant's suit to maintain a person as his sub-tenant, A I R 1923 Nag. 4.

—'Landlord' in the Act denotes the whole body of landlords, and anything to be done by them must be done by the whole body or their agent, 12 N L R 24=33 I C 758; see to the same effect 13 C P L R 113; and 2 N L R 45; and 63 I C 352.

—Cultivation of betel leaves is an agricultural purpose within the Act, 12 N L R 57 = 33 I C 497.

—Cultivation of water-nuts is not an agricultural purpose and as such no tenant's

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(XI of 1898)—(Contd)

rights are acquired over such area. 11 N L R 49 = 28 I C 869.

—Landlord can sue his tenant for arrears of rent to obtain personal decree and a decree for sale of the holding. 3 N L R 164.

—Tenant in possession of *ser* land—Ejectment suit—Burden. 1 N L R 32.

—S. 2—Holder of land for growing vegetables is a tenant. A I R 1927 Nag. 19 = 9 N L J 215 = 97 I C 694.

—Ss. 2, 41.—'Holding' means a parcel of land held under one indivisible lease.

—'Holding' cannot be partitioned so as to bind the landlord.

—'Devolution of tenancy right' excludes taking by survivorship under Hindu Law.

—S. 2 (11)—As to whether rights of tenant are joint property see. 57 I C 339.

—Ss. 4 (a), 69 — Defence of lease by proprietor can be set up in an ejectment suit against tenant of Bhogra land 4 Pat. L J 505 = 53 I C 96.

—S. 5 — A mortgage without *malguzar's* consent is valid till he avoids it. A I R 1923 Nag. 91 = 19 N L R 10 = 71 I C 325.

—S. 6.—If the landlord can enforce his right under the old S. 41, it is evident that tenant's right to be reinstated must be enforced under old sub S. (8). The new S. 6 abolishing the old S. 41 (8) cannot take away a right already vested & got under the old Act. So a revenue officer can entertain a tenant's application for reinstatement. A I R 1926 Nag. 499 = 22 N L R 114 = 96 I C 905.

—Ss. 21, 32—No permanent title to land is acquired under an unregistered permanent lease by *Thekadar* and sanctioned by the *zamindar*.

—Bonafide permanent improvements on land by tenant entitles him to compensation. Landlord is bound by equities affecting *Thekadar* on surrender.

—Assessment of Compensation for improvements without assessors' aid is irregularity. 26 I C 476.

—S. 32.—Tenant can claim improvement compensation only if he is ordinary or occupancy tenant.

—A sub-tenant can claim it only if improvement is consented to by the landlord. A I R 1922 Nag. 47.

—S. 34—A holding was taken as surrendered when it was left uncultivated without paying rent for more than two years. *Malguzar* executed the decree by ejecting the tenant. No right to forfeit exists which can be waived. A I R 1930 Nag. 139 = I R (1930) Nag. 30 = 120 I C 334

—S. 35 — Abandonment or surrender of holding—What amounts to—Payment or

## Central Provinces Tenancy Act.

(XI of 1898)—(Contd)

tender of entire rent—Effect—Forfeiture—Rights to enter see. 42 I C 270.

—S. 35.—It is clearly an implied surrender when an ordinary tenant when he leaves the holding uncultivated and its rent unpaid after a transfer. A I R 1923 Nag. 4.

—S. 35.—If not fraudulent the reversioner is bound by a Hindu widow's surrender of an ordinary tenancy. A I R 1924 Nag. 95 = 73 I C 126.

—S. 35—Surrender of a part of holding is invalid. A I R 1922 Nag. 216 = 18 N L R 82 = 64 I C 902.

—S. 35—Surrender of portion of a holding by tenant with landlord's consent is valid. 10 I C 692 = 7 N L R 8.

—S. 35 (4)—has no application to a case of obstruction by landlord. 14 N L R 176 = 48 I C 188.

—S. 35 (4) No—knowledge of landlord is necessary for implied Surrender.

Payment of rent by one of several persons entitled to a holding, is solely on his own behalf. 43 I C 180.

—S. 35 (4)—Alienee's possession of holding under its alienation by a female holder without legal necessity is not adverse to the reversioner. 48 I C 623.

—S. 35 (4)—Landlord is not bound to wait for two years after death of his tenant or abandonment of land by him.

—He, or a tenant put by him, may plead implied surrender under S. 35 (4). 49 I C 219.

—S. 35 (4)—Suit by tenant for possession of land against landlord as alienee from his guardian, is maintainable. 9 N L R 54.

—S. 35 (4)—Surrender under—Effect on encumbrances created by tenants—Implied surrender—Plea of, to whom available see. 14 N L R 107 = 46 I C 244.

—Ss. 35 (4), 91—Will of tenancy right is not valid. Hence a true—tenant can recover possession from the devisee of the holding. If rent is paid on behalf of true tenant, there is no implied surrender. 47 I C 28.

—S. 36—Civil Court has no jurisdiction to entertain a suit for possession of occupancy tenancy by an heir.

—Testamentary disposition of occupancy tenancy is invalid. 44 I C 1001.

—S. 36—Civil Court cannot interfere when possession is given to the claimant by the revenue court. A I R 1925 Nag. 277 = 21 N L R 25 = 87 I C 1045.

—S. 36.—An application to surrender of occupancy holding was set aside, surrender was cancelled & possession was given to the female heir & the liabilities were discharged from her funds. She does not become absolute

## Central Provinces Tenancy Act.

(XI of 1898)—(Contd.).

owner. A I R 1925 Nag 306 = 21 N L R 62 =  
89 I C 44.--Ss. 136, 46.—On reinstatement of tenant's heir the landlord can recover consideration paid by him for surrender of occupancy tenancy.  
14 N L R 125 = 47 I C 32--Ss. 38, 41 (3) (b)—Landlord's right to yearly rent is not forfeited, simply because of his inaction for one month after receipt of notice of intention to sell the holding by tenant.  
3 N L R 40.--S. 39—*Absolute occupancy holding—Tenant of member of joint Hindu family—Mortgage of holding without legal necessity by—Valid under Act 1898.*

--Sons obtained by birth no vested interest in an absolute occupancy holding so long as Act 1898 was in force. 27 N L R 371=136 I C 235=I R 1932 N 27=A I R 1932 N 28.

--S. 39—Absolute occupancy right is not a proprietary right but a tenancy A I R 1922 Nag. 222=65 I C 952.

--Ss. 39, 44, 62 (1)—Acquisition of Tenancy rights by prescription—Limitation see.  
17 I C 606.

--S. 41—If a proprietor has notice of a mortgage of absolute occupancy holding he is put on his election whether he will preempt or not immediately. But the fact that he had not received any notice and consequently had taken no action for ten years cannot cause his right to lapse. He can still claim that the mortgage is void as against him. 14 N L J 149=A I R 1932 N 47 (48)=136 I C 876=I R 1932 N 36=A L R 1932 N 61.

--S. 41—The law applicable to the devolution of occupancy holding is the law existing at the date of devolution. A I R 1926 Nag. 433=9 N L J 207=95 I C 589.

--S. 41—Inheritance and not survivorship governed the devolution of absolute occupancy holdings under the Act 1898 whether the holder or holders of tenancy was or were interested in it, was or were the sole tenant or co-tenants or joint co-parceners. A I R 1926 Nag. 433=9 N L J 207=95 I C 589.

--S. 41—S. 6 does not validate mortgage which is voidable under s. 41 (7). A I R 1929 Nag. 30=24 N L R 153=113 I C 128.

--S. 41—As against a mortgagee, a malguzar purchasing absolute occupancy tenant's rights is entitled to possession. A I R 1930 Nag. 119=12 N L J 156=I R (1930) Nag. 185=122 I C 697.

--S. 41—In the case of mortgage of absolute occupancy holding along with other property, no apportionment of the mortgage-debt in proportion to their values, can be made by Court. 10 I C 698=7 N L R 20.

--S. 41—Purchaser of holding at execution Sale for landlord's money-decree, cannot

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(XI of 1898)—(Contd.)

impeach mortgage of the holding even if it is declared invalid against the landlord before.  
15 N L R 48=43 I C 907.

--S. 41—A malguzar cannot sue to eject when occupancy holding is mortgaged before possession under such decree is after it. A I R 1927 Nag. 277=103 I C 71.

--S. 41—Landlord cannot eject the mortgagee when foreclosure decree was got before but the tenant was actually dispossessed after the Act of 1920 came in force. A I R 1927 Nag. 127=23 N L R 50=10 N L J 29=101 I C 284.

--S. 41—The new Act does not abolish landlord's right to sue for ejectment the tenant under the old Act. A I R 1923 Nag. 33 = 68 I C 427.

--S. 41—Without applying for re-instatement tenant's forcible possession does not amount to reinstatement. A I R 1926 Nag. 328=93 I C 125.

--S. 41—On transferee's ejection by the landlord, tenant under Sub-s (8) applied for reinstating to the Revenue Officer even after the enactment of the new Act. S. 6 of Act of 1920 cannot override a vested right. A I R 1926 Nag. 499=22 N L R 114=96 I C 985.

--S. 41—If the transfer is without his consent the landlord can eject the transferee of a part of absolute occupancy holding. A I R 1924 Nag. 264=7 N L J 105 = 78 I C 834.

--S. 41—A transfer without the consent of the landlord of a part of an absolute occupancy holding will not give the landlord a right of re-entry under s. 41. A I R 1924 Nag. 139=7 N L J 99=81 I C 664.

--S. 41—On getting tenant's notice of his intention to transfer, the landlord must inform his desire to purchase to him &amp; apply to Revenue Officer to fix the value or should sue within time on paying the fixed price. Otherwise the transfer cannot be avoided. A I R 1927 Nag. 110=22 N L R 19=91 I C 290.

--S. 41—Time fixed to deposit landlord's costs may be extended when tenant applies for reinstatement. A I R 1926 Nag. 499=22 N L R 114=96 I C 905.

--S. 41 (2)—A notice under the Section need not be worded as accurately as a plea. The particulars shown in the section may not be given in the notice but the Section shows the circumstances in which the notice must be given by the tenant. 4 N L J 131=65 I C 816.

--S. 41—The case was governed by art. 120 when a in a pre-emption suit under S. 41 (5) the tenant merely gave notice but had not actually sold the holding. A I R 1922 Nag. 14=65 I C 959.

--S. 41—Pre-emption, suit for—Art. 10, Limitation Act applies—Ss. 7 and 17 excluded.  
1 N L R 6.



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(XI of 1898)—(Contd.)

—S. 41—Securing a debt or discharging it determines whether a document is mortgage or lease. A I R 1922 Nag. 156=4 N L J 262=65 I C 241.

—S. 41 (2)—The term "mortgage" in s. 38 (2) includes a *zar-i-peshgi* lease. 64 I C 99 (N)

—S. 41 (2)—Periodical payment is not within "premium." A I R 1921 Nag. 137=59 I C 419.

—S. 41 (2)—Mortgage in the form of lease cannot operate against landlord. 4 N L J 262=A I R 1922 Nag. 156=65 I C 241.

—S. 41 (2)—Mere posting of notice is not giving of notice. Limitation runs after the receipt of notice. 12 N L R 42=32 I C 991

—S. 41 (2), (5), (7)—No prescribed notice being given landlord can eject the original tenant mortgagee in possession under a foreclosure decree on mortgage by Vendee of the holding. But he has no right of pre-emption. 15 N L R 109=51 I C 721.

—S. 41 (3) (a)—Claim to purchase in s. 41 (3) (a) means a claim for which specific performance may be enforced. 2 N L R 27.

—S. 41 (3) (b)—Purchaser from tenant is not liable in a suit for a simple money-decree for rent by Malguzar against him and the tenant.

Malguzar cannot recover the year's rent from purchaser even in spite of such contract between purchaser and tenant.

3 N L R 111.

—Ss. 41 (5), 47—Landlord cannot eject a purchaser of occupancy holding at a sale in execution of a mortgage-decree, even if the mortgage is effected without his consent, but can pre-empt it only. 50 I C 936.

—S. 41 (6)—Malguzar purchasing property from subsequent mortgagee in possession—Nature of suit to recover money-charge on purchase money see. 34 I C 704.

—S. 41 (7)—Landlord cannot re-enter on alienation of part of occupancy holding by the tenant. 58 I C 112.

—S. 41 (7)—Transfer of sub-lease by tenant without landlord's consent is valid. 14 N L R 188=43 I C 970.

—S. 41 (8)—In an ejectment suit by landlord against transferee of occupancy right, the question of abandonment of holding by tenant does not arise. 12 N L R 86=34 I C 698.

—S. 43—Only the sole landlord or the representative of his co-sharers can sue for enforcing a charge. 4 N L J 138=63 I C 352.

—S. 43—Landlord's priority charge for rent is a security on the holding. But he cannot claim priority for his money claim over an incumbrance otherwise binding on him. 7 N L R 107=11 I C 694.

—S. 43—Landlord cannot claim priority for his money claim over an incumbrance

## Central Provinces Tenancy Act.

(XI of 1898)—(Contd.)

otherwise binding on him under s. 43.

7 N L R 107.

—S. 44.—Possession in one year is no evidence of possession in previous years. 50 I C 196

—Ss. 44, 56 (2)—Occupancy rights are not acquired in village Service lands. Sub-lease of such lands for not exceeding one year is void. 23 I C 604.

—S. 45.—The section does not prohibit ordinary tenures of sir lands. 87 I C 72=A I R 1925 N 377.

—S. 45.—If trees are sold on the same day as the surrender of occupancy holding it constitutes one transaction and is not valid. 21 N L R 25=87 I C 1045=A I R 1925 N 277.

—S. 45.—Both form one transaction but only surrender is void when surrender is after 9 months from sale & the agreement to surrender is made on the date of sale. A I R 1925 Nag. 302=22 N L R 136=86 I C 515.

—S. 45 (1)—The transaction of Surrender of occupancy rights in Sir lands, if distinctly separate from that of sale of the Village share, is valid. 7 S L R 220=13 Cr. L J 522=15 I C 794.

—S. 45.—The protection under S. 45 (5) cannot be claimed by the would be tenant if a proprietor executing a deed for future tenancy loses his proprietary rights in the meanwhile. A I R 1921 Nag. 170=5 N L J 251=69 I C 870.

—S. 45.—When there is a devolution by death the Section is never applicable. A I R 1921 Nag. 34=4 N L J 43=62 I C 246.

—S. 45.—Does not apply to leases not effecting proprietary rights. 3 N L R 159.

—S. 45.—The will can be admitted in evidence though illegally registered when sir land is transferred by it without reserving occupancy right. A I R 1921 Nag. 34=4 N L J 43=62 I C 141.

—S. 45.—For transfer by will of cultivating rights in sir land no sanction is required. A I R 1921 Nag. 34=4 N L J 43=62 I C 141.

—S. 45.—On transfer of proprietary rights in villages, by a decree in pursuance of award not based on deeds duly registered before the Act, the tenant acquires occupancy rights in Sir lands of the Villages. (1918) M W N 885=28 C L J 447=24 M L T 345=14 N L R 165=48 I C 141=46 Cal. 76=21 Bom. L R 53=23 C W N 297=45 I A 179 (P. C.)

—S. 45.—On sale of proprietary rights in a Village, the ex-proprietor becomes an occupancy tenant of the Sir land. 55 I C 573.

—S. 45.—Tenant, securing unconditional Sanction to transfer cultivating rights in Sir land, can transfer them to any person. 58 I C 23.

—Ss. 45 (5), 69 (c)—Ex proprietary occu-



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pancy tenant can eject his ordinary tenant.

11 N L R 170 = 31 I C 470.

—Ss. 45 (5) & 69 (c)—The ordinary tenant does not become a sub-tenant when under S. 45 (5) the proprietor becomes the occupancy tenant of the Sir & under S. 69 (c) the exproprietary occupancy tenant can eject him.

11 N L R 170 = 31 I C 470.

—S. 46.—When co-sharer's as well as an occupancy or absolute occupancy tenant's rights become merged in one person he is an occupancy or absolute occupancy tenant according to the tenancy. A I R 1925 Nag. 125 = 20

N L R 162 = 82 I C 126.

—S. 46.—Registration is ineffective when it contravenes the Section. A I R 1927 Nag. 30 = 22 N L R 128 = 97 I C 1015.

—S. 46.—Transfer of trees standing on occupancy holding is invalid. A I R 1925 Nag. 277 = 21 N L R 25 = 87 I C 1045.

—S. 46.—Those transfers are not prohibited which can be made otherwise than a registered deed like an oral sale for a sum below Rs. 100 under T. P. Act S. 54. A I R 1926 Nag. 432 = 9 N L J 123 = 96 I C 353.

—S. 46.—Gift not to the nearest heir—Effect. Even if a gift of his holding to his daughter by an occupancy tenant who has a son is invalid and the landlord sets it aside, the daughter can immediately re-enter and the result is exactly the same as if the gift were valid; except that there have been two sets of procedure and one change of possession more than was necessary. A I R 1923 Nag. 195 = 71 I C 409.

—S. 46.—Mortgage of occupancy land even inter partes is invalid. A I R 1925 Nag. 130 = 81 I C 873.

—S. 46.—By mortgaging trees, occupancy rights in a part of the holding are transferred & the deed cannot be registered contravening S. 46 (5). Such a registered deed cannot operate concerning any property which it purports to transfer. A I R 1922 Nag. 252 = 70 I C 34.

—S. 46.—The transaction is valid when through mistake occupancy field along with others was included in the mortgage-deed. A I R 1929 Nag. 6 = I R (1929) Nag. 43 = 113 I C 891.

—S. 46.—When ownership in sir rights is separate from that in trees mortgage of trees on sir land is not illegal. A I R 1929 Nag. 6 = I R (1929) Nag. 43 = 113 I C 891.

—Ss. 46 & 47.—On division of sir land between two co-proprietors of a village for several possession, the partition is incomplete & each has a share in a separate patti making his separate sir. A I R 1922 Nag. 126 = 67 I C 121.

—S. 46.—Devolution of rights of occupancy tenant see, 10 I C 733.

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—S. 46.—The holding was divided & there was an accretion to one co-sharer's share. On his death, others cannot be said to have occupied his holding & cannot resist landlord's claim to possess. A I R 1922 Nag. 21 = 18 N L R 48 = 5 N L J 213 = 69 I C 359.

—S. 46.—The brother's son, who will ordinarily be excluded from succeeding to an occupancy holding if not cultivating jointly with the previous holder will be preferred to daughter's daughter's son. A I R 1922 Nag. 117 = 5 N L J 270 = 18 N L R 105 = 67 I C 292.

—S. 46.—If she is otherwise qualified by her personal law a female can inherit an occupancy holding. A I R 1922 Nag. 207 = 5 N L J 261 = 67 I C 229.

—S. 46.—Succession to occupancy holding of a Hindu is governed by Hindu Law except where provided by Statute. 3 N L R 112.

—S. 46.—Suit by a proprietor to eject a purchaser of occupancy holding under a Sale deed registered owing to an incorrect description of property as absolute occupancy holding, is maintainable. 1 N L R 112.

—S. 46 (1)—A proprietor is said to 'occupy' land when he holds cultivating possession of sir land. A I R 1927 Nag. 245 = 23 N L R 75 = 103 I C 178.

—S. 46 (1)—Occupancy right, acquisition of by joint family—Alienation by father if binding on minor sons see. 4 Pat. L J 354.

—S. 46 (2)—Has retrospective operation. Therefore, no decree for Sale can be passed on unregistered mortgage of occupancy holding. 10 N L R 42 = 23 I C 888.

—Ss. 46 (2), 70 (2)—On insolvency of tenant his ordinary and occupancy holdings do not vest in Court or receiver. 13 N L R 215 = 42 I C 710.

—S. 46 (3)—Mortgage of occupancy holding with consent of a co-sharer is valid. On foreclosure of mortgage occupancy holding, the mortgagee becomes a tenant. 50 I C 274.

—S. 46 (5)—Registration after 21 st Oct. 1898 of document executed before that date, is invalid under S. 46 (5) and such document is ineffective. 13 N L R 165 = 42 I C 384.

—S. 46 (5)—Registration of document induced by false recitals, is invalid. Civil Court has jurisdiction to declare such document as inoperative. 43 I C 16.

—S. 46 (5)—Recitals in the deed presented for registration may not be questioned by the Registrar. 52 I C 744.

—Ss. 46, 47, 48, 70, 71, 72, 95.—Suit to avoid transfer of tenant-right prohibited by S. 46 or 70, is not maintainable.

8 N L R 22 = 13 I C 909.

—Ss. 46, 47, 95.—Surrender is not transfer within the meaning of S. 46. Co-sharers,

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dispossessed of occupancy holdings surrendered to them by the tenants, by revenue officer under S. 46, can sue for possession other co-sharers in possession.

3 Pat L J 88=441 C 317.

—Ss. 46, 47 and 95.—Suit for tress is cognisable by Civil Court.

3 Pat L W 77=38 I C 98=1 Pat L J 525.

—Ss. 46, 47, 95.—S. 47. is the only provision for avoiding unauthorized transfer by an occupancy tenant. Civil Court has no jurisdiction in such cases.

17 C W N 621=17 C L J 616=18 I C 273.

—S. 47.—Landlord should apply to Revenue Court when an occupancy tenant effects a transfer to a stranger.

A I R 1922 Nag 126=67 I C 121.

—S. 47.—About 1903 H's absolute occupancy holding was begun to be cultivated by the deft who in turn allowed H to cultivate his own. The record was unchanged 8 rents were paid by each for land actually cultivated in another's name till in 1917-18 the Settlement Officer recorded them as occupancy tenants. Held that if the original arrangement was wholly an exchange, the landlord lost his right to cancel it many years before the suit. If it was only arrangement among the tenants inter se, he could not interfere at all.

A I R 1923 Nag 144=83 I C 946.

—Ss. 47, 48, 60, 71, 72.—Occupancy tenant, lease by for more than a year is not valid.

10 N L R 159=26 I C 708.

—S. 47 (1)—Avoidance of transfer of holding by tenant is the matter for Revenue Courts only.

50 I C 681.

—S. 49.—When ownership of land is transferred by proprietor, the sir right in the land is a constituent part of his ownership in the sir. A I R 1923 Nag 93=19 N L J 26=71 I C 129.

—S. 49.—Widow's transfer to a reversioner is invalid if without sanction of revenue authorities. A I R 1925 Nag 95=81 I C 878.

—S. 49.—On determination of the lease, a lessee permanent or not, not being a proprietor within S. 49, does not retain any interest in the sir as an occupancy tenant.

A I R 1925 Nag 274=8 N L J 44=21 N L R 133=87 I C 253.

—S. 49.—A private agreement consistent with the Act, about the rent payable can be effected only upto next settlement, but at that time such rate is superseded by the rate fixed by the Settlement Officer.

A I R 1925 Nag 452=89 I C 741.

—S. 49.—Rent for occupancy holding fixed by Settlement Officer is the normal rent.

13 N L R 179=42 I C 292.

—Ss. 49, 51.—Private agreement as to rent payable lasts until it is superseded by the settlement by Settlement Officer.

10 I C 697=7 N L R 17.

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## Central Provinces Tenancy Act

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—Ss. 50 and 70.—When S. 71 prohibits sale of a holding, the alienee in possession may ask for compensation before possession is given to plaintiffs.

A I R 1923 Nag 111=68 I C 252.

—S. 52 (b)—Cultivation of oranges for market is not diversion of land to non-agricultural purposes. 15 N L R 60=50 I C 967.

—S. 55.—Bhumakh, refusing to do private work of the Malguzar, is liable to ejectment.

14 N L R 152=46 I C 779.

—S. 56 (2). Kotwar retained in possession of village service holding, being a sub-tenant is not liable to ejectment on a new settlement.

561 C 769.

—Ss. 59, 60. Transfer of the estate by a Malik Makbuza, does not terminate his tenant's tenancy.

3 N L R 162.

—S. 60 To contracts before the Act, the section is inapplicable.

A I R 1922 Nag 227=18 N L R 85=77 I C 798.

—S. 60. Suit for ejectment by the occupancy tenant against a sub-lessee served with notice to end the sub-lease by the end of the year, is maintainable.

48 I C 948.

—S. 60.—No prescriptive title can be acquired by a sub-lessee of an occupancy tenant precluded from granting a perpetual lease.

53 I C 212.

—S. 60. Sub-tenancy from year to year—Termination—Notice—Necessity—Intention of parties—Presumption.

43 I C 392.

—Ss. 60, 70 and 72 Sub-lease of occupancy tenancy for more than one year is invalid.

10 N L R 159=26 I C 708.

—Ss. 62 (2), 63 (1), 69 (c). Tenant of sir land—Holding entirely of sir land—Suit for ejectment—under s. 69 (c)—Cognizable by revenue officer—Holding over—Tenancy continued.

9 N L R 158.

—S. 63. An agreement to remit rent is valid only for one settlement.

A I R 1923 Nag 247.

—S. 67 A woman having Hindu widow's interest in the village and being the sole malguzar gave possession of the land in question (sir & khudkasht) to the deft., who was sued to be ejected as a trespasser by the plff, the sole reversioner. Held that plff., should go to the Revenue Court.

A I R 1921 Nag 169=61 I C 593.

—S. 69. Tenant, ejected otherwise than under the Act, has a right to sue his landlord for possession.

2 N L R 121.

—S. 69 (e)—Proprietor becoming occupancy tenant—Effect on position of ordinary tenant—Liability to ejectment see 11 N L R 170.

—S. 70. Registration of the mortgage is not valid when property is mortgaged with

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trees &amp; a well in an ordinary field.

A I R 1928 Nag 248=11 N L J 119=109 I C 586.

—S. 70 The consideration cannot be recovered when a sale is opposed to law prohibiting sale of exproprietary rights. On not getting possession the deft cannot recover consideration alleging that the so-called surrender was a sale in opposition of the Act and the registration was fraudulently effected, but before returning possession he can claim compensation. A I R 1923 Nag 111=68 I C 252.

—S. 70. Personal law applies to tenancy matters except as the tenancy law limits or alters it. The Act does not limit Hindu widow's power to accelerate by surrender, the succession to her husband.

A I R 1922 Nag 24=65 I C 180.

—Ss. 70 & 71. Tenant's widow transferred the tenancy to daughter on her death her father's heir will succeed in preference to her husband. The tenancy will revert to landlord when there is no such heir.

A I R 1922 Nag 24=65 I C 180.

—Ss. 70, 71 Suit for ejectment by a tenant against a person in possession of the holding under its incomplete sale, is maintainable.

42 I C 288.

—S. 70. 'Co-sharers' or co-tenants' mean persons who are parties to the contract of tenancy. So, unless a collateral relative is a co-sharer of the tenant, he is not entitled to inherit rights of the tenant. 1 N L R 178.

—S. 70 (5) A deed purporting to be a surrender of unpartitioned village to one of the co-sharers by tenant, even if registered may be in fact a deed of sale. Suit by the co-sharer, for possession based on such deed is not maintainable.

41 I C 954.

—S. 81 Test of maintainability of appeal from a decree under S. 81 of the Act, is the nature of the suit as originally framed.

56 I C 845.

—S. 81 (b)—Adjudication between rival claimants in a rent suit gives a right of second appeal.

47 I C 540.

—S. 85.—Holding split up in two—Forfeiture for arrears on one—Right of tenant to save it without paying the arrear on the other.

10 N L R 129.

—S. 85 Ejectment of a recorded tenant in execution of a decree for arrears of rent against him, means a forfeiture of the entire holdings.

2 N L R 101.

—S. 88—Suit by tenant against malguzar for crops between his ejectment and re-instatement is not maintainable. 11 N L R 105=

29 I C 836.

—S. 92—An ejected tenant's suit against a co-sharer since ceasing to be a lambardar is not one between a landlord and a tenant & a

## Central Provinces Tenancy Act

(XI of 1898)—(Contd)

Civil Court can try it. A I R 1922 Nag. 27=65 I C 127.

—S. 92—When a tenant's occupancy holding goes to some persons under a foreclosure decree, it may be possible that they also become tenants of the whole proprietary body and that can only arise when both parties accept such status. A I R 1921 Nag. 17=4 N L J 55=63 I C 46.

—S. 93—No subsequent suit lies when a Revenue Officer having power to grant costs, does not do so. They must be held to have been dis-allowed by him. A I R 1922 Nag. 169=8 N L R 65=65 I C 67.

—S. 93—Disputes between neighbouring tenants as such cannot be settled under the Act. A I R 1922 Nag. 169=18 N L R 65=

65 I C 67.

—S. 94—Suit, by a co-sharer for possession against a mortgagee in possession of a share of other co-sharer under a sale decree obtained against the latter, is not maintainable.

45 I C 184.

—S. 94 (1)—Refusal by landlord to put the tenant in possession, amounts to ejectment. 11 N L R 8=27 I C 864.

—S. 94 (1)—Special limitation under s. 94 (1) applies only to cases of ejectment by whole body of landlords or their agent.

28 I C 250.

—S. 94 (1)—Limitation for a suit by tenant for possession of holding, against a person in possession under the settlement after the ouster, is as under s. 94 (1). 15 C P L R 125.

—S. 94 (3)—Procedural law has generally retrospective operation. So provided to s. 94 (3) has retrospective operation. 11 I C 912=

7 N L R 125.

—S. 94 (3)—Proviso to s. 94 (3) has retrospective operation 7 N L R 125.

—S. 95, 97—Suit by an occupancy tenant for possession of Sir land is cognizable by a Revenue Officer. The nature of such suit is not changed by a claim for mesne profits.

54 I C 827.

—S. 95—It is surely a partial private partition when sir or khudkasht is divided among village co-sharers to be held in severalty and each co-sharer's separately held plot of land is a separate patti of the village of which he is the only landlord and if he leases it, he still remains so. The co-sharers can re-distribute the lands of separate ownership at any time and either khudkasht or tenancy can always be transferred to another patti or the shamilat patti.

A I R 1922 Nag. 27=65 I C 127.

—S. 95.—The Act does not apply to disputes between neighbouring tenants. A I R 1922 Nag. 169=18 N L R 65=65 I C 67.

—Ss. 97 & 67—under s. 97 only Revenue Officer's civil court can try an ejectment suit under s. 67 against the tenant. 61 I C 593.

## Central Provinces Tenancy Act

(XI of 1898)—(Conclud)

—S. 97—Suit between landlord and tenant with stranger impleaded as co-defendant is triable only by a Judge who is also Revenue Officer. 45 I C 654.

—S. 97—Tenancy in respect of a fractional share of a field undefined by metes and bounds cannot exist. 14 N L R 62=44 I C 845.

—S. 97—Suit by heir of tenant illegally ejected against landlord for possession of holding is triable only by a Judge who is also a Revenue Officer. 50 I C 770.

—S. 110—On ejection of the transferee by the landlord tenant can apply to be reinstated under old s. 41 (8) to Revenue Officer even after the enactment of the new Act. A I R 1926 Nag. 499=22 N L R 114=96 I C 905.

—S. 117—Small cause court has no jurisdiction to try nazarana suit by landlord against tenant. 9 N L R 91=20 I C 261.

## Central Provinces Tenancy Act I of 1920.

—Act I of 1920 is not retrospective. 1 L J 41=109 I C 543.

—Waste Land Sale Rules of 1862—Estate transferred under—Applicability of Tenancy Acts of 1898 and 1920 to. See.

28 N L R 169 (F. B.)

—Benami holding of tenancy is not bad under the Act. I R (1921) Nag. 284 =

118 I C 684.

—An auction purchaser in execution of a rent decree of an absolute occupancy comes in the shoes of one who holds the first charge and can redeem qua holder of the equity of redemption. A I R 1927 Nag. 119=9 N L J 229=99 I C 445.

—Devolution of occupancy holding is governed by the law existing at the time. A I R 1926 Nag. 433=9 N L J 207=95 I C 539.

—Intention of law is against disposition by will. A I R 1926 Nag. 222=90 I C 247.

—Even after the Act of 1917, a lambardar without co-sharers' consent cannot recover beyond his share, when there is a transfer in opposition of s. 12. A I R 1926 Nag. 345=22 N L R 86=9 N L J 90=94 I C 941.

—Possessory mortgagee of a partial interest in a village is not a landlord and cannot sue the tenants for rents. A I R 1925 Nag. 183=82 I C 201.

—Occupancy rights in *sir* land can be willed away with the *malguzari* share to which they relate without the sanction of the Revenue Authority. A I R 1923 Nag. 141=

71 I C 207.

—A tenant can be ejected by landlord alone for arrears of rent. 68 I C 855 =

A I R 1923 N 351.

—S. 1—Absolute occupancy right is tenant

## Central Provinces Tenancy Act I of 1920—(Contd)

right. A I R 1930 Nag. 124=Ind. Rul. (1930) Nag. 131=25 N L R 198=122 I C 259.

—S. 2—Only because a khudkasht plot of land is left under grass, villagers have no right to graze the cattle free of charge on it. A I R 1929 Nag. 108=I R (1929) Nag. 124=25 N L R 16=116 I C 76.

—S. 2—Tenancy can only be created by a contract & not by acquiescence or by implication. The landlord's failure to protest against a person's possession for five years is wholly insufficient to prove that landlord has contracted with him. A I R 1929 Nag. 13=I R (1929) Nag. 94=114 I C 622.

—S. 2—One of the two lambardars may sue to recover a village site, when he is not acting adversely to the other. A I R 1928 Nag. 275=108 I C 434.

—S. 2—Though personal, a tenancy can be held benami. A I R 1926 Nag. 239=92 I C 80.

—S. 2 (6)—A village tank over which the landlord gives a right to fish and grow water nuts (*singhara*) is not land let or occupied for agricultural purposes or for purposes sub-servient to agriculture within s. 2 (5). 11 N L R 122=31 I C 294.

—Ss. 3, 65—Tenant—meaning of—includes sub-tenant—re-mission of land revenues.

A L R 1933 N 111=29 N L R 10.

—S. 4—Absolute occupancy tenancy can be created by a landlord. A I R 1922 Nag. 222=65 I C 952.

—S. 5 A Hindu widow cannot surrender her husband's holding so as to defeat the reversioner's right with intention to defeat his expectancy, although according to the nature of the property she can surrender it. A I R 1930 Nag. 65=I R (1930) Nag. 209=26 N L R 1=123 I C 449.

—S. 5 With regard to absolute occupancy tenant, landlord may re-enter, if nearest heir fails to take up tenancy. A I R 1930 Nag. 124=I R (1930) Nag. 131=25 N L R 198=122 I C 259.

—S. 5 The section gives succession rights to a holding after tenant's death. But all the Jt. Hindu family incidents do not apply during tenant's life. I R (1930) Nag. 117=121 I C 661.

—S. 5—A mother can acquire title to her deceased son's property by prescription, but such title is only a limited title; son's reversioners succeed on her death: 114 I C 454 = A I R 1928 N 329.

—S. 5—As under S. 41 Tenancy Act 1898, the law of survivorship did not apply to absolute occupancy a person could not get vested right by birth in it before the Act of 1920. A I R 1927 Nag. 381=104 I C 291.

—S. 5 An absolute occupancy tenant cannot bequeath any of his rights. A I R 1925 Nag. 190=82 I C 1038.



## Central Provinces Tenancy Act I of 1920—(Contd)

—Ss. 5 and 11—A tenant under the Central Provinces Tenancy Law which formerly permitted transfers could transfer nothing beyond his tenant right in the holding. Therefore any transfer engrafted on the tenant right, whether by way of mortgage of sub-lease, and whether consented to by the landlord or not, comes to end when the tenant right is itself determined by operation of law. If a tenant after having made a transfer which is valid as against himself and as against the landlord were to voluntarily surrender his tenancy the law will presume that the tenancy has a continuance in order to work out the rights created by such a valid transfer. This principle has however no application where the tenant right comes to an end by operation of law, that is, when the tenant dies without heirs entitled to succeed under the law. The determination of tenancy in such a case enlarges the rights of the landlord and gives him a right to immediate possession leading to the forfeiture of the rights of the transferee in the land. 28 N L R 93 = I R 1932 N 110 = 139 I C 369 = A I R 1932 N 107 (109) = A L R 1932 N 169.

—S. 6. The section does not remove the voidability under S. 41 (7) Tenancy Act 1898 of mortgages contravening it, but it applies to mortgages executed after it came in force. A I R 1929 Nag. 30 = 24 N L R 153 = 113 I C 128.

—S. 6—There is a distinction between a surrender and a transfer by a limited holder where the limited holder has done all that was required of her under ss. 5 and 6, before transferring. A I R 1928 Nag. 32 = 10 N L J 257 = 105 I C 559.

—S. 6—A sale by a widow in possession of her husband's absolute occupancy fields without legal necessity is invalid and can be set aside by the reversioners though landlord agreed to the transfer. A I R 1926 Nag. 367 = 95 I C 626.

—S. 6 Hindu widow's interest in occupancy tenancy is subject to Tenancy Act though it is same as a widow's estate. A I R 1922 Nag. 222 = 65 I C 952.

—Ss. 6 (2) and 105 During tenant's minority his mother contracted to sell the field. Landlord was given notice and he exercised his right of pre-emption. Subsequently minor cannot claim possession alleging want of legal necessity A I R 1928 Nag. 249 = 11 N L J 125 = 109 I C 615.

—S. 6 (4) (c) — Sub-cl (4) (c) of s. 6 must be read with the rest of the section; the rest of the section refers to transfers after passing of the Act of 1920. Clause 4 (c) does not refer to other transfers. Section 6 does not do away with the voidability under cl. (7) of s. 41, Tenancy Act of 1898, attached to mortgages executed in contravention of that section, and the landlord is entitled to claim possession of the holding which the occupancy

## Central Provinces Tenancy Act I of 1920—(Contd)

tenant mortgages, 24 N L R 153, approved, 23 N L R 50; A I R 1927, Nag. 277, overruled. A I R 1931 Nag. 4 = Ind Rul (1931) Nag. 33 = 27 N L R 108 = 130 I C 97 F B

—S. 6 (5)—When the proprietor exercises his right of pre-emption and deposits the amount which has been fixed by the revenue officer as the value of the land free from encumbrances, the mortgage debt becomes a charge on the purchase-money in exoneration of the lien.

Any mortgage lien on an absolute occupancy holding is transferred from the holding to the purchase money when the *malguzar* pre-empts, and in any suit brought on the basis of a mortgage, such pre-empted land must be excluded when the mortgaged property is brought to sale. 14 N L J 149 = A I R 1932 N 47 (48) = 136 I C 876 = I R 1932 N 36 = A L R 1932 N 61.

—Ss. 6 and 10 Landlord's rights cannot be taken away by the new act when an absolute occupancy holding is transferred under the old Act. A I R 1923 Nag. 33 = 68 I C 427.

—S. 9. A collector to whom a decree is transferred for execution under C. P. C. S. 68 and C P Tenancy Act S. 9, has execution powers only and cannot decide other matters. A I R 1928 Nag. 297 = 109 I C 381.

—Ss. 11 and 5—Devolution of interest in occupancy holding by inheritance and not by survivorship—nature of agricultural holding —C. P. Tenancy Act (1898) A L R 1933 N 180.

—S. 11. The reversioners cannot challenge Hindu widow's surrender of the occupancy holding. A I R 1927 Nag. 362 = 102 I C 888.

—S. 11.—Omitting to state survivorship regarding occupancy holding in the section has no more meaning or effect than omitting to mention that the interest in that section is the interest in the holding and difference in the language is of no importance. A I R 1927 Nag. 272 = 102 I C 711.

—S. 11 A Hindu widow's surrender is valid against reversioners when it is to the landlord and of a tenancy inherited from a male. A I R 1927 Nag. 129 = 23 N L R 1 = 99 I C 187.

—S. 11 The section applies to male as well as female tenants. A I R 1927 Nag. 68 = 23 N L R 9 = 9 N L J 221 = 98 I C 669.

—S. 11 'Collaterals' means those of her husband when there is a devolution of a Hindu married woman's self-acquired occupancy tenant right A I R 1927 Nag. 68 = 23 N L R 9 = 9 N L J 221 = 98 I C 669.

—S. 11—"Collaterals" and "kindred" should be construed differently so as to suit the principles of personal law of each tenant. A I R 1927 Nag. 68 = 23 N L R 9 = 9 N L J 221 = 98 I C 669.

—S. 11. When the separation is only in mess and residence but not in estate, the



## Central Provinces Tenancy Act I of 1920—(Contd.)

rule of Hindu Law that a joint son excludes a separated one must not be applied A I R 1927 Nag. 107=9 N L J 163=97 I C 730

—S. 11 To occupancy holding in C P the rule that lease of joint family property though in manager's name passes by survivorship.

A I R 1926 Nag. 277=92 I C 916.

—S. 11 A Hindu widow cannot will away her husband's occupancy holding. A civil suit does lie to oppose such disposition A I R 1926 Nag. 222 = 90 I C 247.

—S. 11 To a tenancy under the Act, Hindu Law of succession by survivorship does not apply. A I R 1924 Nag. 372 = 78 I C 63.

—S. 11 Provi. (ii)—Under this sec. the succession is not to be confined to the collaterals of the female tenant only but her husband's collaterals also can succeed. I R (1930) Nag. 153 = 122 I C 377.

—S. 12. When there is a surrender of an occupancy field which is afterwards leased to a stranger, the transfer is good until set aside under Ss. 12 and 13. A I R 1928 Nag. 338 = 111 I C 358.

—S. 12 When an owner of an independent patti accepts a surrender or transfer from tenant of another's patti and then gives it to another tenant the patti owner can prove his claim in a Civil Court. A I R 1928 Nag. 221= 107 I C 671.

—S. 12 A mortgage-deed is not within the prohibition of S. 46 (5) when it differentiates the land and the trees thereon and implies that title under which the trees are held is different from that of the land and they can be validly mortgaged. A I R 1928 Nag. 41 = 23 N L R 174 = 10 N L J 162 = 104 I C 843.

—S. 12. Sir land held in severalty was surrendered to proprietor by ex-proprietary tenant the lambardar cannot apply under S. 13 to set it aside and he cannot be given possession by the Revenue Court. A I R 1927 Nag. 325 = 103 I C 818.

—S. 12. Where a malik makbuza land was treated by the holder as tenancy holding for more than 12 years, he cannot claim higher rights than an occupancy tenant and so his creditor cannot attach it. A I R 1927 Nag. 330 = 103 I C 697.

—S. 12. Surrender of occupancy rights contravening the section is not void but voidable only and so the consideration of such a transfer is not illegal under Contract Act S. 23, debarring the transferees' rights of contribution among themselves A I R 1926 Nag. 315 = 22 N L R 86 = 9 N L J 90 = 94 I C 941.

—S. 12. (1) (ii) Is not contravened when occupancy right is sold to a distant heir in spite of the nearer one. A I R 1925 Nag. 421 = 21 N L R 144 = 94 I C 655.

—S. 12. The mortgage is valid when proprietors of the trees mortgage fruit trees

in occupancy fields. A I R 1925 Nag. 414 = 8 N L J 153 = 93 I C 850.

—S. 12 A lease of occupancy holding is not necessarily registrable due to S. 12 (4). A I R 1926 Nag. 335 = 93 I C 633.

—S. 12 (2). Does not refer only to transfers permitted by sub sec. (1) The use of the words "by this Act" puts the matter beyond doubt. A mortgage of the cultivating rights in the mortgagor's sir land with the sanction of the revenue authorities is not prohibited by S. 12 (2) 28 N L R 166 = 15 N L J 8 = 138 I C 184 = A I R 1933 N 81.

—S. 12 (4) It is an incidental provision and prevents or discourages improper transfers as far as possible. A I R 1926 Nag. 345 = 22 N L R 86 = 9 N L J 90 = 94 I C 941.

—Ss. 12 & 13. Transfer by occupancy tenant valid but for S. 12. Can be avoided only to the extent of according to S. 13 and no civil suit lies for it. A I R 1925 Nag. 442 = 87 I C 826.

—Ss. 12 & 13. It is doubtful whether Ss. 46 & 47 apply to a mortgagee in possession of property under a foreclosure-decree. 1 Pat. L J 525 = 3 Pat. L W 77 = 28 I C 98.

—S. 13. So long as the tenant is living with his rights existing, lambardar as such has no preferential right and cannot have possession of land sold by the tenant to a stranger A I R 1929 Nag. 65 = I R (1929) Nag. 20 = 113 I C 110.

—S. 13. A surrender is contestable under this Section when on such surrender the landlord, creates a tenancy in favour of a stranger. A I R 1928 Nag. 338 = 111 I C 358.

—S. 13. The lambardar who sues for joint possession must share in the costs of obtaining the surrender when one co-sharer gets a surrender from the tenant. 108 I C 878 (N).

—S. 13. A Hindu widow may surrender the tenancy even for defeating the reversioners. They can only attack it as a transfer under the Section. A I R 1927 Nag. 330 = 103 I C 801.

—S. 13. Transfer to one co-sharer with lambardar's consent can only be challenged on ground of fraud and under S. 13 ejectment proceedings would lie in Revenue Court.

A I R 1927 Nag. 161 = 100 I C 27.

—S. 13. Landlord can get possession only by applying under the Section to a Revenue Officer when an occupancy tenant transfers his holding. Civil remedy under S. 105 is barred. A I R 1926 Nag. 177 = 89 I C 231.

—S. 13. When a tenant transfers his right to a co-sharer, lambardar cannot lease the land to a stranger without proceeding under the Section. A I R 1925 Nag. 259 = 8 N L J 52 = 87 I C 115.

—S. 13. To matters between landlord & trespasser the act is inapplicable. A I R 1923 Nag. 261 = 6 N L J 224 = 73 I C 15.

## Central Provinces Tenancy Act I of 1920—(Contd.)

—Ss. 13 & 105. Revenue Courts can entertain questions about avoiding of transfer of occupancy or ordinary holding but illegality of transfer-deeds can be questioned only in Civil Court : 50 I C 681 (N).

—S. 21. A sub-tenant of an occupancy holding is not answerable for rent-arrears to the landlord. A I R 1928 Nag. 211 = 11 N L J 82 = 109 I C 775.

—S. 21 Deft. 3 purchased standing crops before 3 months of the suit. The purchase being without landlord's knowledge does not start limitation against the landlord. But it runs from the date when the crops are begun to be cut from which date there is appropriation. A I R 1924 Nag. 87 = 7 N L J 80 = 81 I C 651.

—S. 27. Under S. 27 (2) (b) a person holding sir land as tenant is deemed to be its sub-tenant, but as Act I of 1920 is not retrospective, the rights acquired before the Act of 1898 remain untouched and ordinary tenants of sir land continue to be so. 11 N L J 41 = 109 I C 543.

—S. 35 The mere transfer of occupancy right does not entail its forfeiture and so all parties return to the original status if a landlord elects to cancel the transfer. A I R 1930 Nag. 193 = 26 N L R 190 = I R (1930) Nag. 268 = 124 I C 252.

—S. 35 (4) Ordinary tenant is deemed to leave the holding uncultivated and the rent of it unpaid after a transfer even if it is cultivated by the transferee who is not a sub-tenant or malguzar or anybody else and the rent is paid in full, and there is clearly an implied surrender. A I R 1923 N 4.

—S. 37 Occupancy rights in malik makbuza acquired before 1884 can be extinguished by S. 37 — Such occupancy tenant is a sub-tenant if not recorded in last settlement before 1920. I R 1929 N 128 = 116 I C 80 = A I R 1929 N 112.

—S. 37 Looking to S. 37 a person not recorded an occupancy tenant but as a sub-tenant in the settlement of 1913 preceding the Act of 1920 does not get the status of occupancy tenant. 107 I C 661 (N).

—S. 37 It can be ordinarily presumed that a cultivator on partnership basis is a tenant, that in sir is sub-tenant and in khudkasht an occupancy tenant. A I R 1926 Nag. 35 = 90 I C 76.

—S. 38 There is no presumption that a sub-tenancy for a single year continues after that year. A I R 1927 Nag. 320 = 23 N L R 148 = 103 I C 713.

—S. 39 Notice & order of ejectment are not needed when the arrears are decreed. A I R 1929 Nag. 20 = 25 N L R 119 = 12 N L J 57 = I R (1929) Nag. 138 = 116 I C 426.

—S. 41 Under the old Act, a malguzar has no vested right to eject the mortgagees. He cannot do so after the new Act but can only

## Central Provinces Tenancy Act I of 1920—(Contd.)

proceed under the latter Act. 9 N L J 192 = 98 I C 767.

—S. 45 (5) Sir lands were leased with possession to plff. for 5 years ending with April 1917. During that period debts granted to him another one for 11 years beginning from the end of the first lease. In plffs suit for possession, after the expiry of the first lease, the deft. said that under the tenancy Act they were occupancy tenants of the sir on the loss of proprietary rights in the village & so the subsequent lease being void was unenforceable. Held that the debts' plea was proper. 5 N L J 251 = 69 I C 870.

—S. 46. A holding given to a Mukaddam Gunashta, who is only a village servant in lieu of service is village service holding. A I R 1927 Nag 208 = 101 I C 693.

—S. 49. Though surrender is void, the sale is not so when a surrender & a sale forming the same transaction are separable. A I R 1931 Nag 6 = I R (1931) Nag 27 = 130 I C 91.

—S. 49 The owner becomes occupancy tenant of sir land, when such owner is declared insolvent and an order is made vesting his land in the receiver. A I R 1929 Nag 338 = 12 N L J 117 = 26 N L R 46 = I R (1930) Nag 86 = 121 I C 51.

—S. 49--To occupy any part of his sir land as a "proprietor" is to enjoy the proprietary rights in any portion of it. A I R 1929 Nag 808 = 12 N L J 117 = 26 N L R 46 = I R (1930) Nag 86 = 121 I C 54.

—S. 49--Land *khudkasht* at the time of mortgage-subsequent declaration as sir land-mortgage-decree-foreclosure-status of mortgagor. A I R 1933 N 177.

—S. 49-The section impliedly treats sir land as held in severalty. A I R 1924 Nag 381 = 78 I C 730.

—S. 49 Where the sale of a village share and the surrender of the ex-proprietary rights in Sir appertaining to that share form part of the same transaction, the two transactions when evidenced by separate deeds are distinct and separable. Although the surrender is void, the sale if in other respects, cannot be avoided and declared illegal. A I R 1931 Nag 6 = Ind Rul (1931) Nag 27 = 27 N L R 113 = 130 I C 91.

S. 49. The surrender is void when it forms part of the transaction of sale. A I R 1929 Nag 257 = 12 N L J 86 = I R (1929) Nag 289 = 118 I C 865.

—S. 49. The sale is void when a village is sold without reserving occupancy in sir-land which was not sanctioned by a Revenue Court. A I R 1928 Nag 232 = 110 I C 351.

—S. 49. When an ex-proprietor becomes an occupancy tenant of his sir land held in severalty, he becomes a tenant of the purchaser of his share & lambardar cannot ask him for rent. A I R 1928 Nag 229 = 108 I C 790.

## Central Provinces Tenancy Act I of 1920—(Contd.)

—S. 49-Ex-proprietary occupancy tenant is not a tenant of the proprietary body. A I R 1928 Nag. 39=23 N L R 160=10 N L J 167 =106 I C 429.

—Ss. 49 & 50-After sending a case to proper authorities for orders, Sub-Divisional Officer's sanction would be valid & sufficient though it may after turn out to be not according to those orders. A I R 1926 Nag. 343=94 I C 829.

—S. 49-A compromise among parties after the new Act does not revive rights in *sir* land extinguished before it. A I R 1926 Nag. 216 =90 I C 162.

—S. 49-After the mortgage mortgagor becomes occupancy tenant also of lands becoming *sir*. A I R 1924 Nag 155=76 I C 637.

—S. 49 (1)-Latter portion of s. 49 (1) is not retrospective. A I R 1923 Nag 227=19 N L R 110 = 6 N L J 227=72 I C 438.

—S. 49 (1) The section has no retrospective effect over the tenancy rights created before the Act. A I R 1925 Nag 249=83 I C 752.

—S. 49 (2)-Registration in contravention of Registration Officer taking mistaken view of law. A I R 1933 N 30.

—S. 49 (2)—S. 45 cannot be applied to a case of devolution by death, and so sub-s (3) of that section does not forbid the registration of a Will by which *sir* land is bequeathed. 4 N L J 44 = 62 I C 430.

—S. 49 (2) Revenue Officer's permission is not required when a Hindu widow relinquishes the whole estate including *Sir* land without reservation in favour of reversioners. A I R 1927 Nag 394 = 102 I C 30.

—S. 49 (2). A mistake in procedure under S. 49 (2) C P Tenancy Act does not invalidate registration. A I R 1928 Nag 283=111 I C 148.

—Ss. 49 & 45. Widow's husband's heirs becoming occupancy tenants due to loss of proprietary right, by execution-sale for a decree against her succeed to her occupancy right. A I R 1923 Nag 93 = 19 N L R 26 = 71 I C 129

—S. 50 A contract for selling a share in a village with cultivating rights in *sir* can be specifically performed when conditions required for sanctioning a transfer of *sir* exists A I R 1926 Nag 465=22 N L R 101 = 9 N L J 125 = 96 I C 898.

—S. 50 Unless the form is restricted transfer of cultivation rights in *sir* can be sanctioned. It may be in any form sanction for part is included in that for the whole. A I R 1926 Nag 343 = 94 I C 829.

—Ss. 50 and 12 (2)—Only the proprietor of *sir* land can divest himself of the occupancy rights and the Insolvency Court cannot even apply under s. 50 A I R 1924 Nag 158=76 I C 634

—S. 60 To contracts prior to the Act, the section is inapplicable. A I R 1922 Nag 227=18 N L R 85 = 77 I C 798.

## Central Provinces Tenancy Act I of 1920—(Contd.)

—S. 60 A lessee of occupancy tenant can be ejected without notice to quit as such a lease for a period exceeding a year is invalid. 95 I C 461.

—S. 62. Landlord can move the proceedings when in a compulsory acquisition of part of holding Govt. Officials fail to take steps for proportionate reduction of rent. A I R 1928 Nag 143 = 106 I C 665.

—S. 65 A sub-tenant cannot claim suspension or remission of rent as the section is inapplicable to him A I R 1928 Nag 149 = 108 I C 881.

—S. 68 In case of doubt the tenant can proceed under the section but he is not protected if having knowledge about the dispute of landlord's title, he chooses one claimant. A I R 1927 Nag 237 = 101 I C 647.

—S. 75 (1) When a decree for rent is passed the rent ceases to be due within the section. A I R 1926 Nag 352 = 22 N L R 63 = 96 I C 1027.

—S. 89 After a Hindu widow's surrender the landlord made a lease in favour of a stranger according to her wishes. The whole transaction amounting to a transfer is not binding on the reversioners after her remarriage or death 26 N L R 342=1 R (1931) Nag 14=128 I C 414.

—S. 89—Absolute occupancy holding is a right created by Government and conferred on old *malguzars* who had lost their proprietary rights in course of time and so is not a contractual tenancy right. A I R 1930 Nag 65=26 N L R 1 = I R (1930) Nag 209=123 I C 449.

—Ss. 89, 5, 11. A Hindu widow's surrender of absolute occupancy or occupancy holding for defeating reversioner's expectancy is of no effect, she may do so to shun the liability for rent. A I R 1930 Nag. 65 = 26 N L R 1 = I R (1930) Nag 209 = 123 I C 449.

--S. 89. A Hindu widow cannot wilfully defeat a reversioner's expectancy as rights of an absolute occupancy tenant resemble those of owner of the property. A I R 1930 Nag 65 =26 N L R 1=I R (1930) Nag 209 = 123 I C 449.

—S. 89 A reversioner's rights cannot be defeated by a Hindu widow by transferring or wasting any property inherited from her husband. A I R 1930 Nag 65 = 26 N L R 1 = I R (1930) Nag 209 = 123 I C 449.

—S. 89 When four out of five brothers make a surrender for discharging a debt binding to all, it is binding on the fifth and is valid if the value of the holding does not exceed the debt. A I R 1930 Nag 8 = 26 N L R 130 = I R (1930) Nag 71 = 12 I C 39.

—S. 89 (1) When a landlord desires to determine the tenancy the section does not apply. A I R 1928 Nag 70 = 24 N L R 3 = 105 I C 495.

—S. 89. It is not that tenancy cannot be ended in other ways at the desire of both

## Central Provinces Tenancy Act I of 1920—(Contd)

the contracting parties. A I R 1927 Nag 320=  
23 N L R 148=103 I C 713.

—S. 89. For a surrender by a Hindu widow next reversioner's consent is not needed. A I R 1926 Nag 431=95 I C 456.

—S. 89. Collusive surrender can be restrained by an injunction. A Hindu widow's surrender under the Section affects only her interest in the holding she would be treated as dead by fiction of law. A I R 1925 Nag 251=  
8 N L J 14=95 I C 371.

—S. 89. Surrender must be made only to the lambardar. Surrender to a fractional co-sharer is in valid and so no contribution can be asked for from other co-sharers. The shares of other co-sharers must be paid by him. A I R 1926 Nag 310=93 I C 106.

—S. 89. It is a transfer and not a surrender and the lambardar is not bound by it when there is a surrender to some co-sharers only. A I R 1926 Nag 178=89 I C 51.

—S. 89. Co-tenant's surrender of undivided share is valid when the co-tenant's sons succeed and are accepted by the landlord. A I R 1925 Nag 124=22 N L R 17=80 I C 734.

S. 89. Landlord's consent to a gift may be taken as surrender and re-grant to transferee. A I R 1922 Nag 222=65 I C 952.

—S. 95. The right to remove the fruits from the trees in the field of a tenant by a stranger cannot be acquired by prescription. 109 I C 58.

—Ss. 95 & 96. Landlord and tenant-tress-shade of the trees affecting crops unfavourably—no presumption that they were deliberately allowed to remain by the tenant. A L R 1933 N 156.

—S. 96. "Trees" means all trees on which lac can be propagated. A I R 1930 Nag 143=  
13 N L J 62=I R (1930) Nag 168=122 I C 440.

—S. 97. Trees existing in a stranger's field may be attached. A I R 1924 Nag 42=19 N L R 150=77 I C 620.

—S. 100 Under a subsequent sale of proprietary interest in a lease of sir if the purchaser buys also the lessor's interest, he becomes only the occupancy tenant's lessee. A I R 1925 Nag 383=88 I C 126

Ss. 100 and 105. No civil suit for possession of a village service tenant lies. A I R 1923 Nag 51=71 I C 48.

—S. 104. A mortgagee without impleading owners of equity of redemption foreclosed the mortgage and on the basis of such decree entry was made in settlement records. Ss. 80 & 104 do not help the mortgagee to defeat the redemption right of the owner of such equity. A I R 1929 Nag 246=25 N L R 19=  
I R (1930) Nag 222=123 I C 462.

—S. 104 When the remedial right to recover possession is lost tenancy right also ends. A I R 1928 Nag 281=109 I C 403.

## Central Provinces Tenancy Act I of 1920—(Contd)

—S. 104 To a tenancy right in the C P S. 28 Limitation Act is applicable. A I R 1927 Nag 352=107 I C 522.

—S. 105 (a) and 93—S. 105 (2) prohibits a court from exercising jurisdiction over the partition of holdings under S. 93 of the Act and S. 93 only refers to the breaking up of a holding. 27 N L R 341=A I R 1932 N 31=135 I C 413=I R 1932 N 13=A L R 1932 N 53.

—S. 105 Civil Court's jurisdiction is not barred when occupancy tenant's transfer is void apart from the Act. A I R 1930 Nag 193=26 N L R 190=I R (1930) Nag 268=  
1241 I C 252.

—S. 105 A Civil Court cannot consider whether there was a transfer or not when a Revenue Officer under S. 13 gives to a person the possession of occupancy holding. A I R 1930 Nag 205=13 N L J 33=I R (1930) Nag 191=122 I C 703.

—S. 105 A Civil Court can try a suit for possession as the purchaser is a trespasser where the sale-deed of occupancy holding worth more than Rs. 100 is unregistered. A I R 1929 Nag 65=113 I C 110.

—Ss. 105 & 13 Mother of a minor intended to transfer absolute occupancy holding and the landlord exercised the statutory right of pre-emptors. The minor son's civil suit for possession because of want of legal necessity is barred. A I R 1928 Nag 249=11 N L J 125=  
109 I C 615.

—S. 105 Civil Court's jurisdiction is not barred when the alienation is bad under general law. Occupancy tenant's right to transfer is limited by S. 12. If S. 12 is transgressed, S. 13 allows "any person who, if he survived the tenant without nearer heirs, would inherit the holding or his landlord to apply" to the Revenue Court which has exclusive jurisdiction in such a matter. A I R 1927 Nag 226=10 N L J 96=101 I C 822.

—Ss. 105 & 13. When an occupancy tenant transfers the holding, it can be set aside and landlord can get possession by applying under S. 13 to a Revenue Officer but under S. 105 no civil remedy lies. A I R 1926 Nag 177=  
89 I C 231.

—Ss. 105 & 100. After the Act, a service tenant cannot civilly sue for being restored to possession. A I R 1923 Nag 51=71 I C 48.

—S. 105—S. 105 (2) Applies and no civil suit lies when the land is recorded rent free and the tenant claims it as such. A I R 1922 Nag 207=67 I C 229.

—S. 106. Only rent-arrears for 3 years can be claimed such a suit can be tried by a Judge who is a Revenue Officer also. A I R 1926 Nag 212=90 I C 279.

—S. 109. A tenant's rights to sue in Civil Court under Spe. Rel. Act S. 9 or to approach



## Central Provinces Tenancy Act I of 1920—(Contd)

Revenue authorities are alternative and a civil suit is not conditional on the application being rejected by Revenue authorities.

A I R 1925 Nag 383=88 I C 126.

—S. 110. The malguzar cannot sue for ejectment when occupancy holding was mortgaged before the Act of 1920 but the possession under such decree is taken after it.

A I R 1927 Nag 277=103 I C 71.

—Sch. II. Limitation for suit for possession against license, from tenant, by fresh grantee of the tenancy runs from the grant.

A I R 1926 Nag 51=87 I C 823.

—Art. 1. As the trees do not form holding or its part the mere non-exercise by tenant of his right under S. 96 for propagating lac for more than two years does not extinguish it. A I R 1930 Nag 143 = 13 N L J 62 = 1 R (1930) Nag 168=122 I C 440.

—Art. 1. A suit within two years of dispossession can be maintained when an owner wrongfully gets possession from Revenue authorities but is subsequently dispossessed. A I R 1929 Nag 129 = I R (1929) Nag 233 = 117 I C 281.

—Art. 1. An absolute occupancy holding originally given for agricultural purposes but which for long is utilized for building is still a holding within the meaning of Art. 1. A I R 1929 Nag 5=25 N L R 9=112 I C 657.

—Sch. II, Art. 1. The words "possession" and "person" do not include within their scope a claim for "joint" possession. A I R 1928 Nag 96=10 N L J 174=111 I C 76.

—Art. 1. The art is applicable to claims for joint possession as well as to the lessee of an absolute occupancy tenant.

A I R 1928 Nag 178=108 I C 785.

—Art. 1. The specific article of this Act is applied when this as well as the more general article of the Limitation Act are applicable. A I R 1927 Nag 402 = 10 N L J 246 = 105 I C 431.

—Art. 1. Limitation runs from the day of co-widow's death when a co-widow sues to set aside gift of husband's property made by the former. A I R 1927 Nag 226=10 N L J 90=101 I C 822.

—Art 1. The article is inapplicable to a suit for enforcing mortgage of absolute occupancy holding. A I R 1927 Nag 119=9 N L J 229=99 I C 445.

—Art. 1. A mere assertion by a widow that her adopted son was tenant since adoption does not imply that widow is dispossessed. A I R 1927 Nag 76=98 I C 537.

—Art. 1. Holding includes part of holding. A I R 1926 Nag 387=92 I C 824. See A I R 1926 Nag 305=22 N L R 46=93 I C 110.

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## Central Provinces Tenancy Act I of 1920—(Contd)

—Art. 1. A holder of survey-number comes within 'tenant' in Sambalpur area.

A I R 1926 Nag 289=92 I C 708.

—Art. 1 "Tenant" includes an absolute occupancy tenant.

A I R 1926 Nag 61=92 I C 62.

—Art. 1. To a suit by occupancy tenant dispossessed from a portion of the holding the section is applicable.

A I R 1925 Nag 225=83 I C 3.

—Art. 1.—The article cannot be said to refer only to the whole holding & not to its part. A I R 1925 Nag 197 = 78 I C 214.

—Art. 1.—The plff sued for possession of a holding alleging that he was an occupancy tenant who was dispossessed by deft in July 1920. The deft's contention was that the plff was out of possession since 1918 & surrendered his tenancy & that the malguzar had given possession to the deft. During pleadings the plff's pleader stated that he was out of possession since the end of 1918 & that he was not actually dispossessed by the deft, but that he was sued because he was in wrongful possession. In reply it was said that as plff. had no possession within two years of the suit, art. 1 barred the claim. On the day for arguments, the plff: applied for amending the pleadings alleging that due to oversight he had stated that he was dispossessed in 1918, whereas he was dispossessed of two fields out of three in 1919 & of one in 1920 & also he applied to file copies of jamabandis. Held, that as plff. had not relied of jamabandis in the plaint he cannot amend the pleadings for getting out of the effect of his admission & that under Art 1 it was not necessary that the dispossession should be necessarily by the landlord & that the plff's suit is surely barred. A I R 1925 Nag. 127=80 I C 355.

—Art. 1—Limitation is the same in case of dispossession by a stranger as in that by landlord. A I R 1924 Nag. 249=20 N L R 103=78 I C 743.

## Gen. Pro. Land Tenures.

—See Land Tenures.

## C. P. Waste Land Sale Rules of 1862.

—Waste lands were sold by Government under a sanad issued pursuant to Waste Land Sale Rules of 1862. The lands were sold "with all rights of forests, pasturage, mines, fisheries, and all the other proprietary right and interest, for ever, free from all present or future demand on account of Government land revenue, but subject to all general taxes and local rates, now or hereafter to be imposed by law in respect thereof, and to all claims of Government of India, in respect of



**C P Waste Land Sale Rules of 1862)---(Concl'd)**

such land other than claims of Government land revenue."

—*Held* that the transfer of the estate by the Crown under the Waste Land Sale Rules of 1862, as evidenced by the sanad in question was not governed by the Crown Grants Act (XV of 1895) that the provisions of the Central Provinces Land Revenue Act (XVIII of 1881 of the Indian Legislature) applied to the estate conveyed as above so as to invest the Settlement Officer with jurisdiction to declare the above estate as a mahal and ascertain and determine, under S. 72 thereof, the status and rents of tenants therein; and that the Central Provinces Tenancy Act governed the relation between the landlord and tenants in the above estate.

—Neither the Waste Land Sale Rules of 1862 nor the terms of the sanad, even by implication, purport to convey to the purchaser any sovereign rights in the lands. The purchaser got no more than proprietary rights in the demised lands in perpetuity discharged only from all demands for land revenue on the part of the Crown. 28 N L R 169 = I R 1932 N 67 = 15 N L J 35 = 137 I C 750 = A I R 1932 N 75 = A L R 1932 N 111 (F. B.)

**Ceremonies.**

- See  
 (1) Hindu Law - Adoption.  
 (2) Hindu Law - Marriage.  
 (3) Mohomedan Law - Pre-emption.  
 (4) Pre-emption.  
 (5) Buddhist Law - Adoption-marriage.

**Certificate.**

- See also  
 (1) C. P. Code, Ss. 41, 86, 62 and o. 21, r. 93.  
 (2) Evidence.  
 (3) Evidence Act.

**Certificate of Administration.**

- See under  
 (1) Administration.  
 (2) Succession Certificate Acts 1860 and 1889.  
 (3) Succession Property Protection Act 1841.  
 (4) Majority Act 9 of 1875.  
 (5) Minors Act 40 of 1858.  
 (6) Minor's Act 20 of 1864.

**Certificate of Guardianship.**

—See also Minors Act 40 of 1858.

**Certificate of Sale.**

—See C P Code O. 21 r. 94.

**Certificate to collect Debts.**

See Administration.  
 See Succession Certificate Act.

**Certified Copies.**

See also (1) Evidence.  
 (2) Evidence Act ss. 65, 77.

**Certified Purchaser.**

—See Benami Transactions—Certified Purchaser.

—Suit by real purchaser—Assignee and representatives of the former—Defences open. C P Code, S. 60. 12 A I J 1145.

**Certifying Counsel.**

See Legal Practitioner.

**Certiorari, Writ of**

—When and under what circumstances the writ of certiorari may be issued is mentioned A I R 1931 Mad 120 = 1930 M W N 1059 = 33 L W 109 = I R (1931) Mad 410 = 130 I C 666

—Union Panchayat President rejected the nomination of one who was not on the Electoral Roll. No writ of certiorari can be issued as he was within the rules and his act was ministerial and not judicial A I R 1928 Mad. 127 = 28 L W 642 = 1928 M W N 727 = 56 M L J 162 = 113 I C 874.

—The writ will not be issued where the party is given an opportunity to appear and be heard but deliberately avoids such opportunity. 1932 M W N 18.

—Grant of writ in case of Municipal election see under Election.

—Jurisdiction of the High to issue writ is not confined to "Courts" subordinate to that High Court. 61 M L J 479 = 1931 M W N 798 = 34 L W 448 = A I R 1932 M 33 = 55 M 137.

—(i) *Certiorari* can only be taken away by express negative words (ii) It lies not only in respect of strictly judicial acts or in respect of orders of Courts but acts of competent authorities determining rights of persons. (iii) The term 'final' in Statute does not preclude such writ. (iv) *Certiorari* lies in respect of an order of a Collector or Revenue removing Board a member of a Village Panchayat Court under Madras Village Courts Act (1931) M W N 798 = 34 L W 448 = 61 M L J 479.

—The writ will only issue where it is shown that the Court, whose order is sought to be made the subject of the writ, has acted either without jurisdiction or in excess of it. In any case, however, the issue of the writ is purely discretionary in the High Court: 63 M L J 282 = I R 1932 M 559 = A I R 1932 M 529 = A L R 1932 M 1099 = 36 L W 122 =

**Certiorari, Writ of—(Contd)**

1932 M W N 524 = 55 M 942 see to the same effect 62 M L J 644 = 1932 M W N 61 = 35 L W 360 = A I R 1932 M 321 = I R 1932 M 456 = A L R 1932 M 746.

—Erroneous decision in exercise of jurisdiction is not without jurisdiction. And further, that the writ of certiorari should only be granted where no other suitable remedy exists. 62 M L J 644 = A I R 1932 M 321 = A L R 1932 M 746.

—The remedy by way of *certiorari* can only be taken away by express negative words and not merely by words directing that certain matters shall be finally determined. But even in case where *certiorari* is taken away, a writ may be issued if the authority acted without jurisdiction. A I R 1931 Mad. 123 = 60 M L J 260 = (1931) M W N 317 = 33 L W 497 = 130 I C 509.

—Words "final" or "without appeal"—Use in statute of—Remedy by *certiorari* available even in case of, if the other conditions are satisfied. 55 M 137 (143-4) = 61 M L J 479 = 1931 M W N 798 = 34 L W 448 = 135 I C 705 = A I R 1932 M 33 = I R 1932 M 193.

—Writ of *certiorari* cannot be issued when the applicant had not objected to jurisdiction and got decision in the original court on merits. A I R 1927 Mad 130 = 50 M 130 = 24 L W 778 = (1926) M W N 985 = 51 M L J 742 = 99 I C 152.

—While issuing *certiorari* writ the High Court does not act under statute but under inherent powers devolving upon it from the old English supreme court. So the rules laid down by that Court ought to be followed. A I R 1927 Mad. 130 = 50 M 130 = 51 M L J 742 = 24 L W 778 = (1926) M W N 985 (F B) = 99 I C 152.

—When other equally efficacious remedies are there writs of *certiorari* are not granted generally. A I R 1926 Mad 297 = 49 M 49 = (1926) M W N 467 = 92 I C 918.

—Writ of—Jurisdiction of High Courts in India to issue Press Act 1 of 1910 S. 3 Etc. 37 M L J 139 = 23 C W N 986 P C = 52 I C 209.

—Jurisdiction 15 C L J 517 = 16 C W N 1105 = 16 I C 257.

—High Court's jurisdiction with reference to *certiorari* is original and corrective or supervisory and extends over all the tribunals under it. A I R 1930 Mad 896 = I R (1931) Mad. 147 = 128 I C 851.

**Cess.**

See also cases under:—

(1) B T Act.

(2) Cess Acts (Provincial).

(3) Landlord and Tenant.

—Kanganom, Kulavettu, Melwaram Urai, kudivaram Urai, Swathantram, Kongovi—Truppani, Kattalavasi, Aiyamar—Nature

**Certiorari, Writ of—(Concld)**

and legality of. Madras Estates Land Act. Ss. 3, 2 (11) 143. 36 M L J 109.

—When it is necessary to show that a condition in an agreement is a cess and should not be recognized, it should be shown that payment is unrecognized by the Settlement Officer over and above show that the condition refers to a payment which is within the meaning of 'cess'. 10 I C 465.

—There is no presumption of a custom in Rohtak Dt. that a person is exempted from cess only when he becomes the owner of plot on which his house stands. If a Collector without proof presumes such custom, the Financial Commissioner revisionally interferes. When some Sunars became biswadars by purchasing, they were not responsible for Kudhi Kamini Cess. 2 P W R 1912 Rev. 13 I C 865.

—Levy of summary cess—Interest in immoveable property—Impeachment of—Limitation—Limitation Act, 1908, art. 144. 13 Bom. L R 1047.

—Principal and agent, 30 C 1011 = 7 C W N 535.

—Payments made to Zamindar by occupiers of village *abadi* on marriages whether ground rent or cess. 11 Ind. Cas. 217.

**Cess Summary.**

—Whether interest in immoveable property see. 36 Bom. 171 = 12 I C 716.

**Cession of Territory.**

See Act of State.

See Crown.

See Grant.

**Cestui Que Trust.**

See Trust.

See Trusts Act.

**Ceylon Civil Procedure Act.**

S. 34—Agreement admitting liability—Promissory notes for payment—Dismissal of suit on Promissory Note—Second Suit on agreement. Accord and Satisfaction.

18 C W N 617.

**Ceylon Evidence Ordinance (XIV of 1895).**

—Ordinance is only application of Evidence Act to Ceylon. A I R 1925 P C 229 = 52 I A 372.

—S. 9—Intercepted correspondence between the respondents in divorce cases cannot be considered as evidence against the person to whom it is addressed. A I R 1925 P C 229 = 52 I A 372.

**Ceylon Insolvency Ordinance.**

—Under the Ceylon Bankruptcy law discharge of a debtor discharges the insolvent's debt also for which an action in Ceylon was possible and though the place of payment may have been fixed in British India. 26 M L T 88 = 10 L W 535.

Ss. 126 and 130—Effect of insolvency certificate granted by a Ceylon Court—Extinguishment of debt. 14 I C 560.

**Ceylon Land Acquisition Ordinance (Liv of 1917)**

—The ordinance has no retrospective effect  
A I R 1921 P C 138.

**Ceylon Land Registration Ordinance.**

—S. 17 In absence of fraud or collusion or the later deed a mere device to obtain priority, a subsequent registered deed takes effect over an unregistered prior deed. A I R 1930 P C 214 = I R (1931) P C 43 = 128 I C 667.

**Ceylon Law**

—Presumption of legal marriage can be drawn when persons are living as man & wife. A I R 1927 P C 185 = 4 O W N 759 = 54 M L J 388 (P C) = 104 I C 327.

**Ceylon Ordinance (X of 1863).**

—S. 9. The Crown's rights under Waste Lands Ordinance of 1897 are not taken away by a partition decree. A I R 1921 P C 173 = 1922 A C 262.

—Ss. 2 and 9—Unregistered business is not prohibited. But in absence of registration the partnership deed or the transactions between the partners and third persons are void and one of the partners can sue the other for his share of the profits, (1929) M W N 847.

**Ceylon Trust Ordinance IX of 1917.**

—S. 93. Meaning of words used is not affected by the legislature's object. A I R 1930 P C 214 = (1930) M W N 211 = I R (1931) P C 43 = 128 I C 667.

**Ceylon Waste Lands Ordinance 1897.**

—S. 21—Words "which can only be cultivated after intervals of several years" do not apply to *chena* lands—What is meant by such lands is stated. A I R 1921 P C 173 = 1922 A C 262

**Chairman.**

See also,

- (1) Company,
- (2) Corporation.

**Chambers of Commerce.**

—Arbitration by—Award—Jurisdiction—Custom of trade, cognisance of, by Chamber. 20 C W N 365

**Champaran Agrarian Act I of 1918**

—S. 4—An Asstt. Settlement officer recorded under S. 4 in the schedule the entries under cl. (1) (a) & the new rent with the order that the new rent be noted in the Record of right under S. 4 (2) which was made accordingly. Held, that this was a final decision under S. 4 (4) & its correctness unquestionable in any Court. 4 Pat L J 312 = 50 I C 857 = (1920) Pat 4.

**Champerly and Maintenance.**

—For financing a suit there may be a valid transfer on agreement that the proceeds of the suit be divided between the transferee & the transferor. The Court has to determine whether it is fair or not & its purpose is not improper for promoting gambling in litigation or for injuring others. Generally in the assignee's suit if he proves the assignment, the assignor cannot object to the want of consideration & this is inapplicable where the transferor being a party to the suit, pleads that it was without consideration & fictitious. 33 A 626 = 8 A L J 652 = 11 I C 932.

—A reversioner of a Hindu widow, not in possession agreed with the pff to convey half of the property after decree for supplying the litigation expenses. Held that it was neither a wager nor opposed to public policy. It did not amount to sale enabling the pff to obtain possession by suing those in possession, who were not bound by the agreement. 140 C 139.

—In India, English champerty law is not in force hence champertous contracts are invalid only if they are opposed to public policy. If the agreement to give funds for litigation, is in equitable or extortionate or for gambling in litigation or encouraging bad suits to harass third parties, it will not be enforced by Courts, but such an agreement per se, is not champertous. 2 C 233, P. C. = 4 I A 23.

**Chance.**

—Of heir apparent—Relinquishment of—Validity. 2 Ind. Cas 865

**Chandayand.**

—See custom ( Punjab )

**Chandu.**

—See Opium Act 1878 S. 7.

**Change of Attorney.**

—See Legal Practitioner.

**Change of case in appeal.**

—See Appeal.

—See C. P. Code Ss. 96 to 112, and O 41.

**Change of Law.**

—See also cases under ( L ) Appeal.

( 2 ) Practice

**Channel.**

—See Canal.

**Charge.**

See Deed—Construction.

See Mortgage.

See T P Act, ss. 58 95 and 100.

See Hindu Law—Maintenance.

**Charitable and Religious trusts act (XIV of 1920)**

—(i) The word trust is used in the Act in a wide sense so as to include *wakfs* though a *wakf* is not really a trust, and the Act applies to *wakfs* for public and charitable purposes.

( ii ). Where *wakf* is admitted but trustee denies he is trustee and say that the *wakf* is not a trust to which the Act is applicable, the District Judge can proceed under the Act. A I R 1931 Pat 354 = 10 Pat 506 = 12 P L T 793 = Ind Rul (1931) Pat 449 = 134 I C 417

—Mahant technically a minor—scheme of management...not necessary. A I R 1933 L 391.

—The trust falls within the Act when there are provisions for sadabarat and contributions are given towards marriages and education of Brahman children. A I R 1929 Pat 723 = I R (1930) Pat 437 = 10 P L T 677 = 124 I C 629.

—A large portion of profits from the endowed property was earmarked for supporting and maintaining some stated persons who are also the settlor's relatives and the remaining for shia community. Acts 14 of 1920 and 42 of 1923 are inapplicable as the *wakf* in not wholly for public purposes. A I R 1930 Oudh 53 = I R (1929) Oudh 525 = 119 I C 365.

—Trust under the Act is not to be so wide in its purpose as a *wakf* under the Mussalman *wakf* Act of 1923. A I R 1929 Oudh 225 = I R (1929) Oudh 387 = 6 O W N 316 = 4 Luck 429 = 117 I C 739.

—Under a settlement decree land was given to a Mahant and as his heirs as occupancy tenants without a right to transfer with a condition that the grant will last so long as the temple exists but it was not stated that income is to be devoted to temple-expenses. The act does not apply as the grant is not for temple but is personal. A I R 1928 Oudh 241 = 5 O W N 50 = 3 Luck 392 = 108 I C 98.

—S. 2—District Judge's Court is a Court Subordinate to the High Court. A I R 1929

**Charitable and Religious trusts Act.**

(XIV of 1920)—(Contd)

All. 581 = I R (1930) All 139 = (1929) A L J 911 = 51 All. 957 = 121 I C 267.

—S. 3—It is not a public purpose when benefit is given to stated persons or class of them like kindreds, dependants and others A I R 1929 Oudh 225 = I R (1929) Oudh 387 = 6 O W N 316 = 4 Luck 429 (F B) = 117 I C 739.

—S. 3—In case of a trust partly private and partly public the one interested can apply not under S. 3. Charitable Religious Trusts Act but under S. 4 Mussalman Wakf Act of 1923. A I R 1929 Oudh 225 = I R (1929) Oudh 387 = 6 O W N 316 = 4 Luck 429 = 117 I C 739.

—S. 3—Substance and primary intention of creator must be seen. A I R 1929 Oudh 225 = I R (1929) Oudh 387 = 6 O W N 316 = 4 Luck 429 = 117 I C 739.

—S. 3—'Interest in trust' depends upon nature of trust. A I R 1928 All 758 = 50 A 880 = 26 A L J 1379 = 111 I C 129.

—S. 3—Secretary of public institution having a right to stay in *Dharmshala* created by trust is one interested in it. A I R 1928 All 758 = 50 A 880 = 26 A L J 1379 = 111 I C 129.

—S. 3—One claiming adversely to the trust and who is liable under the Section is not a proper party.

A I R 1925 Cal 537 = 78 I C 174.

—S. 5—All the temple trustees should be made parties and served with notice for an application under S. 3. A I R 1925 Mad 135 = 82 I C 733.

—S. 5—Under the Section permission was granted but the alleged trustee failed to sue and Dt. Judge passed orders against him. A regular suit for declaration of his right to property can be maintained. A I R 1929 All 506 = I R (1929) All 865 = (1929) A L J 653 = 51 A 805 = 118 I C 513.

—S. 6—On non-compliance with order under s. 5 (5) a suit was filed for breach of trust under s. 6. Any relief under s. 92 (1) C P C can be given by Dt. Judge. A I R 1930 All 582 = I R (1931) All 33 = 128 I C 385.

—S. 6—Accounts for the whole trusteeship can be ordered when a suit is based on this section. A I R 1930 All 582 = I R (1931) All 33 = 128 I C 385.

—S. 7—Application to District Judge for advice is a case. A I R 1929 All 581 = Ind. Rul. (1930) All. 139 = (1929) A L J 911 = 51 A 957 = 121 I C 267.

—S. 10—Defendant may either furnish security or deposit money. A I R 1924 Lah 408 = 69 I C 658.

—S. 10—It is a 'case' within C. P. C. s. 115 when an order asking deft. to deposit money in court under the section is made. A I R 1924 Lah 408 = 69 I C 658.

—S. 12—Under the Act, High Court has revisional powers. A I R 1929 All 581 = 51 A



**Charitable and Religious trusts Act.**

(XIV of 1920)—(Concl'd)

957=(1929) A L J 911=I R (1930) All 139 =  
121 I C 267.

**Charitable Endowments Act (VI of 1890).**

—Suit against Secretary alone can be justified when there is a claim against the committee. A I R 1924 Oudh 128=26 O C 333=

80 I C 425.

—S. 2—The trust is covered by Act XIV of 1920 when sadabarat is provided for and contributions are made for marriages and education of Brahman children. A I R 1929 Pat 723=10 P L T 677=I R (1930) Pat 437=

124 I C 629.

—S.14—The Act is inapplicable when the claim defies the trust & is on a title superior to that of the settlor. A I R 1926 Oudh 431=2 Luck. 507=29 O C 176=3 O W N Sup. 56=13 O L J 762=96 I C 47.

**Charity.**

See Charitable and Religious Trusts Act 1920.

See Charitable Endowments Act, 1890.

See C. P. Code, s. 92.

See Cypress.

See Hindu Law—Religious Endowment; Will.

See Muhammadan Law—Wakf.

See T. P. Act, s. 14.

See Will.

See Religious Endowment.

See Trust.

**Charter Act (St. 23 & 24 Vict. C. 104).**

See also cases under C. P. Code S. 115.

—Only in Cases of excessive exercise, or non-exercise of powers or of grave injustice, powers under Charter Act are exercised by High Court. 20 C W N 1080=1 P L J 465=3 P L W 55=37 I C 129.

—S. 1—'Trust' is not used in strict technical sense. A I R 1926 Mad 706=49 M 349=50 M L J 699=(1926) M W N 897=96 I C 1011

—Ss. 12 and 15 See Also Govt. of India Act 1915, S. 107.

—S. 12—Leave to sue under—Grant of leave by Register. 41 Cal 771=18 C W N 631=26 I C 284.

—Ss.13,15 Order passed by single Judge of High Court under S.15 is appealable, under S. 15 of Letters Patent Act. 2 Cr. L R 18=1913 M W N 595=20 I C 633.

S. 15—Government of India Act. S. 107—jurisdiction of the High Court—power of superintendence over subordinate Courts—Bombay Appellate Side Rules 1—appellate jurisdiction to be exercised by a Division Bench.

A L R 1933 B 135

**Charter Act (St. 23 & 24 Vict. C. 104)—(Cont'd)**

—S. 15—Order of lower Court refusing to issue a commission will not be interfered in revision by High Court. 15 M L T 339=23 I C 522.

—S. 15—Contempt of Court—High Court ...Jurisdiction Same as that of Kings Bench in England—No such jurisdiction Conferred by S. 15 21 M L J 832.(F B)=121 I C 293.

—S. 15—High Court, interference under to arrest gross miscarriage of justice C P Code O 9, R 13, 26 M L J 368=15 M L T 217=23 I C 14.

—S. 15—High Court—Power of superintendence—Mofussil Courts, subject to appellate jurisdiction contemplated no jurisdiction to single judge on Original Side, to stay suit in mofussil Court. 17 Bom L R 655=39 Bom 604=30 I C 560.

—S. 15. High Court—Power of Superintendence Order of Dt. Judge under Ch. IX of the B T Act.—Revision. 29 I C 177.

—S.15—Interference under, in exceptional cases—Order of lower court directing certain issues to be tried first before taking evidence. C P Code O 14, R. 2 and O. 15, R. 3 (1) 20 C L J 426=26 I C 954.

—S. 15. Interlocutory orders of miscarriage of justice-type can be interfered with by H. Court. 42 Cal. 926=27 I C 917.

—S. 15. Order, finally deciding any matter directly at issue in the Case, in respect of rights, of parties, is a final order. So order as to Scope of enquiry before Land Acquisition Judge is not a final order for appeal purposes. 13 C L J 90=9 I C 183=15 C W N 848.

—S. 15. Order, bad on merits, granting temporary injunction may be interfered with by High Court. 41 Cal. 436=18 C W N 176=19 C L J 47=21 I C 861.

—S. 15. Power of High Court under. Injunction. 41 Cal 436=18 C W N 176=21 I C 861.

—S. 15. Prov. Ins. Act, S. 46 (3)—Appeal filed out of time—Order of Court directing Receiver to execute a deed of transfer of property of insolvent, without making Receiver party—Interference by High Court. 18 M L T 200=39 M 593=30 I C 703.

—S. 15—Power of interference under—only in extra-ordinary cases—always subject to enactments of Indian Legislature. 30 M L J 486=19 M L T 364=34 I C 372.

—S. 15—Revision by High Court, from interlocutory orders is warranted by S. 15. 9 I C 672=9 M L T 273=21 M L J 484=(1911) 2 M W N 369.

—S. 15—Suit more than Rs. 1,000 in value—Execution Sale—Sub-Judge, order by—Revision—Sonthal parganas Regulation, V of 1893, S. 27. See Sonthal Parganas Regulation V of 1893, S. 27. 41 Cal. 876=18 C W N 612=22 I C 951.



## Charter Act (St. 23 &amp; 24 Vict. C. 104—(Concl'd))

—S. 15—High Court has power to Superintend over Courts of Collector and Deputy Collector acting under Act X of 1859. 38 C 832=15 C W N 863=14 C L J 284=11 I C 207.

—S. 15—The High Court has ample powers under s. 15, Charter Act, to revise an order which is in the nature of an interlocutory order. (28 C 680, 31 M 60 F.) Where the petitioner, who was examined as a witness by the plaintiff, did not attend on the day to which the case was adjourned, although he had given an under-taking to do so, and the lower Court thereupon ordered that his defence might be struck off; *Held*, that the lower Court had no power to pass the order complained of, and that its order was not warranted by any of the provisions of the Code of Civil Procedure. 10 M L T 451.

—S. 15—Revision of interlocutory orders Evidence Act, 1872, ss. 124, 162.

2 M W N 1911, 369.

## Charter Party.

See Bill of Lading.

See Contract.

## Chastity

- See (1) Hindu Law—Maintenance.  
(2) Husband and Wife.  
(3) Mahomedan Law—Inheritance.

## Chattel.

—Mortgage of—Priority—See Mortgage.

## Chaukidari Chakran Land.

See also Bengal village Chaukidari Act.

See also Land Tenure.

See also Chakran Land.

—Chaukidari Chakran Land is not excluded from the patni-lease simply because zamindar reserves powers to appoint and dismiss Chaukidars. 22 C W N 487=44 I C 526.

—Suit for possession of Chakran land in patni-lease, is not a Suit for Specific performance of Contract. 18 I C 239

—Patni rights remain untouched by resumption. A I R 1923 Cal 734=28 C W N 114=50 C 577=74 I C 153

—Resumed Chaukidari land is a separate estate for a particular purpose only. Occupancy rights in Chaukidari lands may be acquired by tenant. 13 C L J 109=15 C W N 61=81 C 828.

—Resumed—Settled with Zamindar not registered as proprietor—Such land not estate

—Suit for rent not barred under Land Reg. Act, S. 78. 19 C L J 236=18 C W N 158=20 I C 250.

## Chaukidari Chakra Land—(Cont'd)

—On resumption and resettlement of Chaukidari Chakran land comprized in putni, the Zamindar is entitled to a share of profits over and above the revenue assessed 45 Cal 685=41 I C 964=27 C L J 494.

—Putnidar is entitled to Chaukari Chakran land comprized in putni after its resumption irrespective of Zamindar's settlement. 47 I C 1164.

—Ryots settled by putnidar taking possession of resumed Chakran lands, cannot be ousted by a person taking settlement of those lands from Zamindar.

Recital of retention of Chakran lands by Zamindar in a sale deed, does not estop the vendee from claiming those lands.

Tenancy may be created by verbal settlement capable of being specifically enforced. 15 W N 976=13 C L J 271=9 I C 374.

—Rights of a person settled by Govt. order after resumption are not affected by ultra vires Settlement of the same chakran—lands by collector in contravention of the Govt. order. 46 I C 883.

Chaukidari Chakran lands are not excluded from putni—lease simply because the Zamindar reserves powers to appoint or dismiss chaukidars. 53 I C 1004.

—Chaukidari chakran lands vest in patnidar even if the Zamindar reserves powers to appoint or dismiss chaukidars in the putni—lease. 32 C L J 15=58 I C 841.

—Patnidar is liable to pay rent only, for Chaukidari Chakran lands vested in him after resumption, unless otherwise agreed upon under the putni-lease. 47 I C 840.

—Chakran tenant in possession under unauthorized Settlement by zamindar after resumption can be ejected by darputnidar entitled to khut rent from Chakran tenant. 22 C L J 290=31 I C 249.

—Onus of proving appropriation of Chaukidari Chakran lands by the zamindar for remunerating his servants not performing police duties lies on the Govt. 43 Cal 1104=31 M L J 745=20 M L T 235=20 C W N 1245=(1916) 2 M W N 175=4 L W 251=14 A L J 1009=18 Bom L R 838=24 C L J 296=43 I A 172=37 I C 223 (P. C.)

—Suit by landlord for use and occupation of land against a trespasser without a prayer for ejectment is no waiver of his right to sue for ejectment. Suit for khas possession by a vendee of resumed lands settled with another, against a tenant holding over is maintainable. 19 C W N 478=21 I C 197.

—Conditions in the putni regulate the rights of patnidar and zamindar even after settlement of land with the latter. In absence of conditions determining the mode of

**Chaukidari Chakran Land—(Concl'd)**

rent, assessment is to be made on basis of the annual value. 27 C L J 532=46 I C 187.

—On resumption zamindar has no right to share in the profits of settlement effected by the patnidar. A I R 1922 Cal 473=26 C W N 943=36 C L J 145=67 I C 440.

—Zamindar has a right to some rent when no condition as to rent of chakran lands is stated in the putni lease. A I R 1921 Cal 466=34 C L J 275=66 I C 357.

—Resumption by Govt.—Settlement with zamindar—Transfers by Chaukidar come to an end. A I R 1922 C 193=35 C L J 185=69 I C 67.

—Zamindar has to pay revenue for resumed land paying revenue settled with him. No title to chakran lands is acquired by auction-purchaser of a parent estate. 45 Cal 765=41 I C 894=27 C L J 491.

**Chaukidar.**

—Police Officer—Within the meaning of S. 25 of the Evidence Act. 28 I C 654.

**Chelas.**

- See Hindu Law (1) Inheritance.
- (2) Rel. Endow.
- (3) Succession.

**Cheque.**

- See Negotiable Instruments—Cheques.
- See Nag. Instr Act.
- See Banker and customer.

—Cashd subsequently—Suit for recovery of amount Limi. Act, Art. 64. 38 Bom 293=16 Bom L R 121=23 I C 779.

—Payment by cheque—whether absolute discharge under Contract Act S. 62. A I R 1931 Nag 113=27 N L R 56=Ind Rul (1931) Nag 155=134 I C 283.

—Payment by cheque effective to extinguish debt—Revival of debt if cheque is not paid. Lim. Act S. 20. 19 C W N 724=42 Cal 1043=31 I C 626.

—Payment by, effective to save limitation within S. 20 of the Lim. Act. 19 C W N 724=42 Cal 1043=31 I C 626.

**Chief Court—Jurisdiction.**

- See Jurisdiction.
- See C P Code s. 9.

**Child.**

—Meaning of—Fatal Accidents Act S. 1—Son adopted after death of decess. 122 P L R 1914=22 I C 846.

**Chin Hills (Regulation V of 1896.)**

—S. 4—An application under s. 488 Cr P. Code is not of a civil nature—Clause 1 is qualified by cls. 4 and 5. A I R 1925 Rang. 140=25 Cr. L J 111=4 U B R 169=76 I C 111.

**China and Corea orders in Council. Art XXXV**

—English Legal principles—Applicability to Foreigner. 18 C W N 705 (P C)=1 M L W 989=23 I C 678.

**Chinese Law.**

—An adopted son has no right in case of intestate succession in Straits Settlement. A I R 1921 P C 65=59 M L J 256=32 L W 507=1 R (1930) P C 260=124 I C 884.

—Principles of English law not inflicting hardship can be applied in Straits Settlements. A I R 1932 P C 65=59 M L J 256=32 L W 507=1 R (1931) P C 260=124 I C 884.

**Chit Fund.**

—Hypothecation by subscriber of amount payable by Karaswan—Right of mortgagee to sue—Limitation—Starting point from the date it becomes payable. 11 L W 238.

—Suit by share holder assignee for amount due—Set off whether allowable. C P C O 8, R 6. (1912) M W N 1235=16 I C 686.

—Whether an association within the meaning of S. 4 Companies Act—Whether manager of chit fund cannot be sued. 11 Bur L T 255=50 I C 513.

—Court will not interfere with manager's decision as regards security to be given by prize-winners to his satisfaction. 27 M L J 447=(1914) M W N 715=1 L W 818=25 I C 669.

—The contract is not a wager and can be enforced when it is agreed that winners will get prizes and subscribers the refund of Contribution without interest. A I R 1927 Mad 583=52 M L J 687=(1927) M W N 545=38 M L T 390=50 M 696=26 M L W 796 (F B)=103 I C 318 Overruling. 52 I C 989; and A I R 1926 Mad. 168=92 I C 968.

—A subscriber to the kuri chit made default in paying an instalment and passed a bond to the manager. The representatives of this subscriber and the manager were sued on the bond by a successful highest bidder, held that he would have sued for enforcing the trust against the manager or for its administration. A I R 1928 Mad 256=(1927) M W N 721=108 I C 404.

—The provision is penal when security was given to the stake holder for the instalment-money agreeing to pay it as and when they fell due, substantial interest on the chit fund or unpaid instalment and also to pay the whole amount if further default is

**Chit Fund—(Contd)**

made for one month. A I R 1928 Mad 245 = (1927) M W N 527 = 108 I C 319.

—Prize-winning subscriber was to furnish security for payment of future subscriptions. Such persons passed to the stake-holder a bond stamped as if it was a mortgage by which it was agreed that when required the property was to be mortgaged to stake-holder. There was also a clause that we and the properties are liable for any future arrears held that it was intended to create a charge on the properties. A I R 1927 Mad 1069 = 39 M L T 404 = 53 M L J 730 = 106 I C 508.

—If the stake-holder defaults to pay prize-money, it is not just that the subscriber should not pay further subscriptions. A I R 1926 Mad 926 = 23 L W 210 = 93 I C 641.

—500 People agreed to pay Rs. 2 each at every instalment and at each of the 50 drawings Rs. 100 was to be paid to the winner and he was to go out without any future liability. After the last drawing those who did not get prize had a right to get money back without interest. After paying 48 instalments the stake holder was sued by a subscriber for the sum paid with interest. Held that transaction void ab initio. S. 65 Contract Act was inapplicable and it amounted to a wagering agreement. A I R 1926 Mad 168 = 49 M L T 791 = 22 L W 772 = (1925) M W N 857 = 92 I C 968 Overruled 103 I C 318 (F. B.)

—500 Subscribers paid a rupee per month. The chit was to be continued for 50 months and each month two prizes of Rs. 25 each were to be drawn; the prize-winner was to receive Rs. 25 at once and had to pay thereafter only eight annas a month while if he got a second prize he would get another Rs. 25 and he would cease to contribute with his name being removed from the drawing. In the end those who were not prize-winners would be paid back their paid subscriptions. The drawing was discontinued after 27 months by the stake-holder and he was sued for refunding subscriptions. Held that such a suit can be maintained and the agreement was a lottery. A I R 1925 Mad. 281 = 47 M L J 876 = 85 I C 1016. Impliedly overruled in 103 I C 318 (F. B.)

—The provision is penal when successful bidders of the first chit agree by bond to stake-holders to pay the instalments regularly with a provision that on default of one instalment, the whole arrears should become due. A I R 1925 Mad. 177 = 21 L W 54 = 47 M L T 833 = 85 I C 261.

—At the second auction the successful bidder gave to the stake-holder a bond which inter alia provided that if deft. failed to pay subscriptions, not only the dividend, interest and premium would be forfeited but he would be liable to pay the full sum with 1½ p.c. interest p. m. from the auction date and that

**Chit Fund—(Concl'd)**

he should further within 15 days pass another deed to the plff. for the due payment of the future chit-amounts and for abiding by the bond. The bond was passed-held that the provisions were not penal. A I R 1922 Mad. 67 = 42 M L J 551 = (1922) M W N 203 = 67 I C 995.

**Chittagong Port act (Bengal V of 1914).**

—S. 29 The Commissioners are not bound by the agreement when S. 29 is not complied with. A I R 1927 Cal. 465 = 54 C 189 = 103 I C 2.

—S. 38 (g)—It is not *ultra vires* of the Commissioners to let out a steam tug for operation outside the Chittagong river. A I R 1927 Cal. 465 = 54 C 189 = 103 I C 2.

**Chittahs**

—Prepared for distributing public revenue on a partition of an estate are public documents. 15 C W N 515 = 10 I C 287.

**Chose in action.**

See Contract Act, s. 78.

See T. P. Act, ss. 132 to 137.

—Suit, by mortgagee of right to sue for debt, for recovery of the debt is maintainable within limitation which begins from the date when it becomes payable. 11 L W 238 = 27 M L T 269 = 56 I C 146.

—Promissory Note—Assignment—Rights of assignee—Effect of Neg. Ins. Act. Ss. 48, 78. 18 C W N 494 = 19 C L J 335 = 22 I C 500.

—Sale of—Rule of *Caveat emptor* applies. 150 P L R 1915 = 76 P W R 1915 = 29 I C 887.

**Chota Nagpur.**

—Meaning of "putra poutradi" according to custom in Grant, Construction. 58 I C 486.

—Custom in—Grants by Maharaja are impartible. 1 Pat L J 109 = 20 C W N 876 = 35 I C 383.

—The estate of Maharajah of Chota Nagpure and his family is impartible and decends by primogeniture. 35 I C 392.

—Under Raiyat, status of BENG. RENT ACT, S. 82 20 C W N 1240 = 1 P L J 543 = 37 I C 658.

**Chota Nagpur Incumbered estates Act (VI of 1876**

—[Ss. 2, 3, 4, 7, 12, 17, 19, AM., S. 18 rep. in pt. and am. Act V of 1884; ss. 2, 3, 5, 7, 9, 10, 12, 18, am. ss 2-A, 10-A, 12-A, 14-A, 18-A, 18-B, 19-A, 19-B, 21-A, 21-B, INS. ss. 4, 23 rep. in. pt. and am. s. 24, rep. Ben. Act III of 1909; applied to the Deo Estate, with modifications, Act IX of 1886]

—The object of the Act is to preserve the

### Chota Nagpur Incumbered estates Act (VI of 1876)—(Contd.)

estate for the heir, and any dealings with the property which might have the result of keeping the heir out of possession attracts the operation of S. 12-A. 13 P L T 509=A I R 1932 P 337 (339, 40)=A L R 1933 p 16

—The object is to relieve embarrassed land holders in Chota Nagpur. A I R 1925 Cal 116=40 C L J 331=82 I C 886.

—To immoveable property outside Chota Nagpur the Act is in applicable. A I R 1925 Cal 116=40 C L J 331=82 I C 886.

—The Act does not apply to land outside Chota Nagpur. Proceedings before Collector under s. 14 of Bengal Patni Taluks Regulation of 1819, is of a ministerial nature. Suit, by a talukdar, to recover money deposited to prevent Patni Sale, is maintainable. 46 Cal 1=35 M L J 347=24 M L T 66=(1918) M W N 441=8 L W 186=22 C W N 1009=28 C L J 165=20 Bom L R 856=16 A L J 569=5 Pat L W 64=45 I C 827=45 I A 103 (P C) (On appeal from and affirming.) 27 I C 526.

—The Chota Nagpur Estate Act has no application to land outside Chota Nagpur, and aims at the protection of debtor and preservation of his estate as far as practicable. The Act does not affect civil rights of mortgagee from the disqualified proprietor. 16 C L J 527=17 C W N 754=17 I C 957.

—A Title got by lapse of time is not void. A I R 1929 Pat. 117=8 P. 549=I R (1929) Pat. 251=115 I C 699.

—Language of the Act being obscure is difficult to be construed. A I R 1925 Cal 116=40 C L J 331=82 I C 886.

—Whether Manager is a Court. A I R 1929 Pat 694=10 P L T 879=I R (1930) Pat 273=122 I C 817.

—S. 2—Heirs included in. 11 P 89.

—Ss. 2, 3, 5, 8, 11, 12 and 19 (d) The Act is inapplicable to land outside Chota Nagpur. Therefore manager of encumbered estate cannot deal with debts and liabilities secured on such outside property. No rents for such property under the patni-lease, can be received by the proprietor until he pays up the mortgage-debt. 27 I C 526.

—Ss. 2, 3 & 5—Prohibition to sue is not restricted to debts stated in S. 7. Non-institution of the suit by the creditor does not time-bar the claim except as regards the claim allowed by the commissioner. A I R 1929 Pat 694 = 10 P L T 879 = I R (1930) Pat 273 (F B) = 122 I C 817.

—Ss. 2, 12—In a mortgage suit against several debts, one was struck out under S. 2. But the claim against him can be revived if under S. 12 he is restored to possession & enjoyment. 6 P L J 328 = 63 I C 743.

### Chota Nagpur Incumbered estates Act (VI of 1876)—(Contd.)

—Ss. 2, 3 and 21—S. 3 is not limited by S. 21. A I R 1923 Pat 85 = 6 P L J 685 = (1922) Pat 112 = 65 I C 283.

—S. 3—General scope of the statute should be considered. No distinction exists between filing a suit and issue of summons. A I R 1929 Pat 694 (F B) = 10 P L T 879 = I R (1929) Pat 273 = 122 I C 817.

—S. 3—Executing a decree for debts and liabilities of defaulting proprietor is barred except those incurred to Government. A I R 1928 Pat 457 = 7 Pat 480 = 10 P L T 21 = 112 I C 236.

—S. 3—Vesting order under s. 2 does not bar institution of suit and the claim remains though a suit is filed. A I R 1928 Pat 179 = 7 Pat 199 = 9 P L T 252 = 105 I C 643.

—S. 3—Proprietor, who is not a holder of property, is not entitled to protection under the Act. (1918) Pat 8 = 3 Pat L J 156 = 4 Pat L W 116 = 43 I C 120.

—S. 3—"Such debts and liabilities" mean "all debts and liabilities to which the holder is subject". A I R 1928 Pat 457 = 7 Pat 480 = 10 P L T 21 = 112 I C 236.

—S. 3—Deed of release executed by a disqualified proprietor is invalid and inoperative. 19 C W N 102 = 29 I C 429.

—S. 3—Mortgage suit remains pending till a final decree is passed or the same becomes time-barred. A I R 1927 Pat 105 = (1926) Pat 358 = 8 P L T 189 = 99 I C 959.

—S. 3—Landlord usufructually mortgaged a portion of the estate. The mortgagee sued the tenant for rents and got the decree. Subsequently the manager took charge of the estate. This does not bar execution-proceedings. A I R 1928 Pat 153 = 6 Pat 742 = 109 I C 833.

—Ss. 3 and 2—A rent-decree against tenant got by proprietor's usufructuary mortgage, cannot be executed by him. A I R 1926 Pat 524 = 96 I C 587.

—S. 3—It is not needed to notify the claim when the decree is against the manager. 61 I C 902 (Pat.)

—Ss. 3, 8 and 12—Property subject to control of Court of Wards under a vesting order made under the Act—Mortgagee of—Right of—Nature of—Attachment and sale of such right in execution of decree against mortgagee—Jurisdiction as to—Court having. 11 P 473 = 137 I C 377 = 13 P L T 466 = A I R 1932 P 148 = I R 1932 P 149 = A L R 1932 P 635.

—Ss. 3 and 12 (a)...Contract involving pecuniary liability, by an heir of a disqualified owner is void. 32 I C 937.

—Ss. 3 and 12...All remedies which but for S. 3 could have been enforced against the



Chota Nagpur Incumbered estates Act  
(VI of 1876) — (Contd)

proprietor by the creditor become enforceable on possession being obtained by the latter. A I R 1922 Pat 287 = 3 P L T 94 = (1922) Pat 152 = 6 P L J 328 = 63 I C 743.

—Ss. 3, 12, and 22—Suit relating to encumbered estate, without making the manager a party is not maintainable. Civil Court's jurisdiction is barred when the estate is held by Rev. authorities. Estate may be released on accumulation of interest rendering it insolvent. 29 I C 420.

—Ss. 3 21-B, 2-A—Even though manager be made a party a suit instituted before the estate is taken over cannot proceed after the estate is taken over. A I R 1923 Pat. 85 = (1922) Pat 112 = 6 P L J 685 = 65 I C 283.

—S. 3 (1) and s. 12 (2)—Remedies of all the creditors are not determined by the commissioner's mere approval of a scheme. A I R 1926 Pat 260 = 5 Pat 404 = (1926) Pat 65 = 94 I C 624.

—S. 3 (c)—Ratification, after removal of disqualification, of a debt incurred during it, is invalid under s. 12 of Amending Act III of 1909 B. C. (1918) Pat 318 = 4 Pat L J 1 = 47 I C 705.

—Ss. 8 and 17—Delegation of powers of manager to lease to Commissioner or Lt. Governor is invalid. 4 Pat L J 580 = (1919) Pat 305 = 53 I C 833.

—Ss. 8, 22—No suit for declaration against a manager would lie for cutting down interest decreed by Court in good faith under s. 8. 4 Pat L J 321 = (1919) Pat 235 = 51 I C 69.

—S. 12—Sanction of the Commissioner is essential for sale of property released under s. 12 of the Act in execution of a decree. 10 Bom. 342; A I R 1923 Bom 276, relied on. A I R 1920 Pat 375; distinguished. A I R 1931 Pat 97 = Ind Rul (1931) Pat 213 = 12 P L T 505 = 131 I C 533.

—S. 12—In absence of Commissioner's sanction, property released under the section cannot be in execution of money decree against its holder. A I R 1931 Pat 97 = I R (1931) Pat 213 = 131 I C 533.

—S. 12—Personal covenant implied in the mortgage is not prohibited but simply the enforcement of mortgage itself. A I R 1929 Pat 375 = 8 Pat 212 = 11 P L T 258 = I R (1930) Pat 143 = 121 I C 367.

—S. 12—Charge may be valid during the life-time of the holder but an alienation is void ab initio. A I R 1929 Pat 117 = 8 Pat 549 = I R (1929) Pat 251 = 115 I C 699.

—S. 12—Stayed proceedings under s. 3 are not revived when the property holder or his heir is restored but not under cl. (2). A I R 1928 Pat 179 = 7 Pat 109 = 9 P L T 252 = 105 I C 643.

Chota Nagpur Incumbered estates Act  
(VI of 1876) — (Contd)

—S. 12—On holder's death restoration should be to the heir and not to any devisee. A I R 1925 Cal 116 = 40 C L J 331 = 82 I C 886.

—S. 12 A—An application to set aside a sale held in execution on one of the grounds mentioned in O. XXI, r. 90, and on the ground that the property was not liable to be sold by s. 12 A of the Act is one under s. 47 of the C P Code and order made thereon is hence appealable. A I R 1931 Pat. 97 = Ind Rul (1931) Pat 213 = 12 P L T 505 = 131 I C 533.

—S. 12 A—S. 12 A and s. 3 refer to alienation *inter vivos* and not to Wills. A I R 1925 Cal. 116 = 40 C L J 331 = 82 I C 886.

—S. 12 A—*Khorposh* grant attracts operation of and requires for its validity the previous sanction of the commissioner. 13 P L T 509 = A I R 1932 P 337 (340) = A L R 1933 P 16.

—Ss. 12, 12 A—Released estate cannot be sold for money decree against proprietor without Commissioner's sanction—Rejection of objection before sale does not operate as *res judicata*. A I R 1931 Pat 364 = Ind Rul (1931) Pat 292 = 10 Pat 582 = 132 I C 868.

—S. 12 A (1)—*Bar imposed by—Inapplicable when the proprietor does not fall within S. 12 A (1) to (5) as being the person who was the holder of the property when the application under S. 2 was made.* 11 P 89 (92-3) = 13 P L T 398 = 137 I C 448 = A I R 1932 P 143 = I R 1932 P 143 = I R 1932 P 152 = A L R 1932 P 219.

—S. 12 A (1) (b) and (3)—Mortgage of 10th Octo. 1915 is void when property is released on 2nd Oct. 1915. A I R 1925 Pat 470 = 4 Pat 478 = 6 P L T 497 = (1925) Pat 104 = 86 I C 721.

—S. 12 A (1) to (5) and (6)—Sub-sections. (1) to (5) apply to the owner who was also the person who was the holder when the application under S. 2 to take the property under management was made, whereas sub-sect. (6) applies to all owners to whom the property is restored, whether they fall under sub-sections. (1) to (5) or not. 11 P 89 (92) = 13 P L T 398 = 137 I C 448 = A I R 1932 P 143 = I R 1932 P 152 = A L R 1932 P 219.

—S. 17—It was held that the estate was not bound by contracts entered into with the Bengal Government. A I R 1924 P C 156 = 47 M L J 562 = 51 I A 208 = 3 Pat 625 = 34 M L T 120 = 22 A L J 935 = 5 I R P C 190 = 29 C W N 342 = (1924) M W N 710 = 21 L W 1 = 5 P L T 639 = 3 P L R 157 Civ. (P C) = 80 I C 841.

—S. 17 R 16—Commissioner's Sanction for Completed contract of *patti* lease is sufficient for S. 16 even if the document of the contract had not been submitted for Sanction. Sanction for lease to an unincorporated company may mean Sanction for lease to an incorporated Company. Zamindar has



### Chota Nagpur Incumbered estates Act (VI of 1876)—(Conclud)

no right to resume if his interests are not affected by the lease. 42 Cal 1029 = 29 M L J 80 = 17 M L T 377 = 2 L W 555 = 13 C W N 585 = 13 A L J 534 = 21 C L J 446 = 17 Bom L R 449 = 30 I C 55 = 42 I A 97 (P C).

—S. 22—Order of manager under the Act—*Bona fides*—Suit to set aside, not maintainable. 29 I C 420.

—S. 23—S. 23 applies only to certain suits instituted during the period that an estate is under management under the Act. The suit of 1917 was instituted after the estate has been released to Jadu Charan and before it was again taken under management. The suit of 1917 therefore was not brought under S. 23 of the Act, but under S. 9, C P C. 13 P L T 509 = A I R 1932 P 337 (342) = A L R 1933 P 16.

—S. 23—Through a Civil Court a devisee can oust an heir though to him only restoration can be made. A I R 1925 Cal 116 = 40 C L J 331 = 82 I C 886.

—Ss. 23, 21 and 21-B—Words "but to all such suits the manager shall be made a party"—significance. A L R 1933 P. 16.

### Chota Nagpur Encumbered Estates Amendment Act (B & O-8 of 1922).

—The Act is procedural only and applies to estates vested before its coming in force. A I R 1927 Pat 105 = (1926) Pat 358 = 8 P L T 189 = 99 I C 959.

### Chota Nagpur Landlord and Tenant Procedure (Act I of 1879).

[ Repealed Beng. Act VI of 1908 ]

—Reasonable notice to quit must be given to a tenant holding over under Act I B C of 1879. 11 I C 368 = 16 C L J 30.

—S. 3—Rent Court whether can sell in execution of rent decree portion of tenure free of incumbrances. 38 I C 451.

—S. (10) A—Involuntary sale of occupancy holding in execution before Chota Nagpur Tenancy Amendment Act came into force is valid and operative unless set aside in due course of law. 2 Pat L W 149 = 42 I C 387.

—S. 10 (b)—Governs transfers between 1st January and 4th November 1903. A I R 1925 Pat 741 = 4 Pat 838 = 6 P L T 500 = (1925) Pat 320 = 88 I C 1032.

—S. 21—Agreements valid at inception are not in validated by S. 26—but it validates specially those agreements which would be otherwise invalid due to S. 21. A I R 1925 Pat 297 = (1924) Pat 307 = 6 P L T 144 = 82 I C 988.

### Chota Nagpur Landlord and Tenant Procedure (Act I of 1879)—(Conclud)

—Ss. 21 and 24—Alterations introduced by—Invalidation of all private agreements for enhancement of rent. Rent Recovery Act (X of 1859) S. 17. 16 C L J 422 = 17 C W N 430 = 16 I C 929.

—Ss. 31, 38, and 91—Suit for ejectment of Tenant—Decree not enough till execution. No effect on tenant's title—Attornment by tenant's mortgagee to landlord not enough. 21 I C 955.

—Ss. 37 (4 and 5), 144—Revenue Court—Suit for arrears of rent—Appeal to Commissioner—Decision of Judicial Commissioner whether a decree under the Act—Jurisdiction. C P Code, S. 2. 16 I C 904.

—S. 37 (4)—Specific Relief Act, s. 9. 13 C L J 250 = 15 C W N 387 = 9 I C 478.

—Ss. 39 and 42—Apply only to possessory suits and not to titles suits cognizable by Civil Court. 143 P L R 1912 = 196 P W R 1912 = 141 I C 47.

—S. 47—Amendment of plaint allowed by Deputy Commissioner, in a suit remitted to Deputy Collector by High Court after setting aside order for sale in execution for misdescription of property and after ordering amendment of the plaint by consent of parties, is illegal. Limitation in O. 6, R. 18 C. P. is inapplicable to amendment ordered under general powers of High Court. When amendment of plaint is ordered, amendment of decree is unnecessary. 19 C W N 200 = 22 I C 778.

—S. 123—Portion of tenure unexempted from sale by Commissioner under S. 123, may be sold in execution of entire rent-decree. 16 C W N 1024 = 40 Cal 623 = 15 I C 842.

—S. 124—Only rights and title of the defaulter in a resumable under tenure, are acquired by a purchaser at auction sale concluded before the tenancy Amendment Act. 13 I C 201.

### Chota Nagpur Tenancy (Act VI of 1908).

—The mere existence of a general legal proposition (if such there be) that non-accrual of a right of occupancy is an inherent incident in a *ghatwali* or *digwari* tenancy would not rebut the statutory presumption that the Record of Rights is correct until the contrary is proved by evidence. It must be proved that there is no local custom under which the existing entry that the raiyat has an occupancy right in the holding could be correctly made. Though the Statute cannot affect such an incident, the custom may have done so all along. The entry in the Record of Rights must be assumed to have been made with full knowledge of the general proposition, and it must be shown that no local

## Chota Nagpur Tenancy Act VI of 1908—(Contd)

custom or usage or other circumstances exist which would overbear that proposition since such existence must be taken to be implied in the entry. A I R 1931 Pat 136=9 Pat 952= I R (1931) Pat 146=130 I C 162.

—Applicability to proceedings in execution of rent-decree under Bengal Act of 1859 See. 20 C W N 582=34 I C 385.

—Order of remand by Judicial Commissioner in a revenue case, is neither appealable nor revisable. 25 I C 899.

—Regulating appeals and second appeals—Proceedings Governed by the Civil Procedure Code. 42 I C 859.

—When a holding is not recorded as Mundari khunt-katti tenancy in Record of Rights no evidence can be admitted to be so in execution. A I R 1931 Pat 136=9 Pat 952= I R (1931) Pat 146=130 I C 162.

—Possession of Goraiti tenure may be resumed by the zamindar when services are refused by the grantee. A I R 1929 Pat 587= I R (1930) Pat 288=122 I C 832.

—Relationship between landlord and tenant and not tenant and strangers is affected and regulated primarily by the provisions. A I R 1929 Pat 734=10 P L T 595=I R (1930) Pat 12=120 I C 300.

—Although relationship be not admitted entry in the Record of Rights about relationship of landlord and tenant is sufficient ground for a rent-suit in Revenue Court. A I R 1939 Pat 24=11 P L T 387=8 Pat 581= I R (1929) Pat 675=120 I C 35.

—No notice to under raiyat is needed. A I R 1929 Pat 630=10 P L T 625=I R (1929) Pat 599=119 I C 551.

—Agricultural land is not defined in the Act perhaps intentionally. A I R 1926 Pat 527=6 Pat 48=7 P L T 641=97 I C 789.

—It is material irregularity when in sale proclamation the property is under-valued. A I R 1924 Pat 524=3 Pat 325=5 P L T 88= 83 I C 772.

—A decree-holder withdrawing the deposit of decretal sum cannot refuse to recognise him as co-tenant. A I R 1924 Pat 669=(1924) Pat 281=6 P L T 220=3 Pat L R 268= 83 I C 203.

—Any part of the holding cannot be exempted from sale in execution of rent decree. A I R 1923 Pat 64=1 Pat 750=4 P L T 439= 71 I C 345.

—Some persons were shown to have khunt katti rights in khewat. They are not permanent tenure-holders necessarily. A I R 1921 Pat 426=2 P L T 638=63 I C 764.

—S. 3—A resumable grant was made to A and his brothers. On extinction of A's branch it cannot be resumed so long as brother's branches are there. A I R 1930 Pat 78=I R (1930) Pat 368=123 I C 640.

## Chota Nagpur Tenancy Act VI of 1908—(Contd)

—S. 3—Korkar is land reclaimed from waste for rice cultivation. A I R 1928 Pat 87=105 I C 58.

—S. 3—A landlord is not the same as a proprietor. Tenant may also be a landlord as defined in s. 3. A I R 1928 Pat 87= 105 I C 58.

—S. 3—A landlord usufructually mortgaged his interest and then sued for cess accrued due prior to it and got the decree. It is only a money decree and not a rent decree. A I R 1929 Pat 321=8 Pat 366= I R (1929) Pat 551=118 I C 727.

—S. 3—(ii) Forest produce in S. 3 of the Act includes live animals. 39 I C 868.

—S. 3 (23)—If some formalities are followed a cess-decree operates as a rent-decree. A I R 1927 Pat 266=6 Pat 317=103 I C 464.

—S. 3 (23)—A Revenue Court can try a suit for cess. A I R 1927 Pat 266=6 Pat 317= 103 I C 464.

—S. 3 (23)—Personal services do not come within rent. A I R 1929 Pat 587=I R (1930) Pat 288=122 I C 832.

—Ss. 3 (23), 208, 210 (1), (2)—Rent-decreeholder can, with leave of Deputy Commissioner, proceed either against the entire tenure or other properties of the judgment-debtor. Part-payment of decree by one of the several judgment debtors, does not release him from liability for the balance. 12 I C 599.

—Ss. 3 (26) and 4—Classification under S. 4 is inexhaustive and does not cover all tenants under S. 3 (26) who are governed by T. P. Act. A I R 1929 Pat 444=10 P L T 453=I R (1929) Pat 497=118 I C 305.

—S. 4—After a village or its part is deserted by a khuntkatti founder's family, a cultivating tenancy like thika doami arises. A permanent and non-resumable tenancy arises when a family settles down on a deserted village site and reclaims land already cleared or partially cleared of jungle. But there is no permanency of rent. A I R 1928 Pat 451=9 P L T 379=7 Pat 752=111 I C 675.

—S. 4—Mundari Khuntkattidar is a tenant under s. 4. A I R 1928 Pat 87=105 I C 58.

—S. 4—The enumeration of tenant in s. 4 4 is inexhaustive. A I R 1921 Pat 426=2 P L T 638=63 I C 764.

—Ss. 4, 41—Provisions relating to tenants generally apply to under-raiyats. In absence of any contract or custom, such tenancy would be from year to year. Verbal notice to quit is sufficient to terminate such tenancy. 17 C W N 810=19 I C 588=40 C 856.

—S. 5—Intention at the beginning of tenancy by person getting right and not that of the landlord determines the nature of tenancy. A I R 1929 Pat 220=I R (1929) Pat 513=119 I C 545.

## Chota Nagpur Tenancy Act VI of 1908—(Contd)

## Chota Nagpur Tenancy Act VI of 1908—(Contd)

—S. 5.—The grantee is a tenure-holder under S. 5 when all the rights are granted by the pattah except that of receiving rent payable to superior landlord. So in execution of a decree his interest can be sold.

70 I C 976 (Pat).

—S. 7.—Dowami thikas are raiyati tenancies grown into tenures. A lease to reclaim and settle land tenancy is essentially a cultivating tenancy and mere description of tenants as tenure-holders does not show that their interest is not permanent. Tenant is dowami thekadar when his ancestors reclaiming land settled it from earliest times. A I R 1929 Pat 376 = 10 P L T 359 = I R (1930) Pat. 136 = 121 I C 360.

—S. 11.—Tenure transferee not having his name entered in the sheristha of landlord—no payment of rent—effect of. A L R 1933 P C 150 = 1933 M W N 522 = 37 L W 767 = A I R 1933 P C 122.

—S. 11.—The claimant has to prove registration. A I R 1921 Pat 357 = 2 P L T 580 = (1921) Pat 355 = 6 P L J 677 = 64 I C 358

—S. 11.—For filing a rent-suit registration is a condition precedent. Decree cannot be obtained before and executed after registration. A I R 1921 Pat 357 = 2 P L T 580 = (1921) Pat. 355 = 6 P L J 677 = 64 I C 358.

—S. 11.—Suit for possession by purchaser in a Sale under Chota Nag. Ten. Act is maintainable. 37 I C 955.

—S. 11.—Transferee of tenure obtaining khewat containing his name as a holder from settlement Department is not a registered transferee in landlord's office. 19 C W N 461 = 27 I C 605.

\*—S. 11.—Transferee of tenure, if can sue for rent before he gets himself registered. Res judicata. 2 Pat L W 146

—S. 11 (4)—Suit for arrears of rent, based on unregistered transfer of tenure under Amending Act 1903, Could not be decreed.

—Payment of rent to superior landlord and entry in record of rights do not amount to registration under the Act (1917) Pat 63 = 1 Pat L W 571 = 38 I C 59.

—S. 14.—Except lands on which there are mines, resumption of jagir tenure ends all sub-tenures. A I R 1923 Pat. 76 = 3 P L T 628 = 24 Cr. L J 279 = 72 I C 999.

—S. 14.—Limitation begins from the date of suit for annulling sub-tenancy. On clear demand for re-entry resumption occurs. Sub-tenancy by successor de facto is covered by the Section. A I R 1924 Pat 449 = 3 Pat 320 = 5 P L T 85 = 2 Pat L R 69 Civ. = (1924) Pat 60 = 78 I C 474.

—Ss. 14 (4), 208, 212.—Sale in execution of a rent decree should be set aside on a deposit under S. 212 of the decretal amount by a ryot

at fixed rates or any person having an interest in the property sold. 4 Pat L J 11 = 49 I C 193

—S. 19.—It refers to land held by him as raiyat for the time being and in the village where he is a settled raiyat. A I R 1930 Pat. 236 = 11 P L T 207 = I R (1930) Pat 529 = 125 I C 561.

—S. 20.—Thiccadar cannot acquire occupancy or non-occupancy right in the land that he cultivated as such. A I R 1922 Pat 28 = 3 P L T 107 = (1921) Pat 296

—Ss. 20 (3) 139 (6)—Occupancy right acquired before the act is not affected by S. 20 Occupancy raiyat if appointed ijaradar, does not lose his occupancy rights. Suit by headman for recovery of agricultural land is barred by S 139. 19 C W N 578 = 21 C L J 629 = 27 I C 538.

—Ss. 22, 46, 78, 139 and 139 A.—Plaintiff was a settled raiyat having occupancy holding in a village and also homestead land. Defendant's father took settlement of a portion of raiyati land in the village from the proprietor (landlord) for cultivation; later on he took in verbal settlement of a portion of the homestead land from plaintiff. The lease by the plaintiff to defendant's father not being for any specified term was not binding upon the landlord under S. 46 (2) of the Act; but, although the lease was invalid, the plaintiff, who brought the defendant's father on the land took nazaranu and allowed him to build a house upon the land and to remain in possession for over 10 years. After that period plaintiff served the defendants with notice to quit, treating them as tenants-at-will or as yearly tenants liable to be ejected be service of notice, and the notice not having been complied with instituted a suit for ejectment:

*Held*, (1) that the defendants did not acquire the status of a raiyat because they did not hold the land either immediately under a proprietor or immediately under a tenure-holder, which was essential under S. 6 (2) of the Act; (2) that the incidents of the homestead land were the same as those of the land of which the defendants were raiyats and they could only be ejected on the grounds stated in S. 22 of the Act; (3) that the Civil Court's jurisdiction to entertain the suit was not barred under S 139 (4) or (8) of the Act; and (4) that, though the lease was invalid, the plaintiff could not in the circumstances of the case eject the defendants. 11 P 456 = 139 I C 394 = 13 P L T 608 = A I R 1932 P 257 = I R 1932 P 223 = A L R 1932 P 574.

—S. 23.—Desposition to strangers by will is not prohibited, but it can be challenged by the landlord. A I R 1929 Pat 734 = 10 P L T 595 = I R (1930) Pat 12 = 120 I C 300.

—S. 25.—Enhanceability of rent is an ordinary incident of an Occupancy tenant. A I R 1930 Pat. 392 = 11 P L T 251 = I R (1930) Pat 571 = 125 I C 795.

## Chota Nagpur Tenancy Act VI of 1908—(Contd)

—S. 26—Agreements are not invalidated which are valid at inception. A I R 1925 Pat 297 = 6 P L T 144 = (1924) Pat 307 = 82 I C 988

—S. 26—Agreement to pay enhanced rent made when Act of 1859 was in force, is not invalidated by S. 26 of Act VI B C of 1908. 17 C W N 430 = 16 C L J 422 = 16 I C 929.

—S. 27—Invalidates a contract to pay enhanced rent. 51 I C 27.

—Ss. 27, 115, (2) 217, 170—Rent enforcement proceedings before Deputy Commissioner are judicial proceedings subject to appeal to High Court 17 C L J 593 = 40 C 518 = 20 I C 420

—S. 36 and 46—Landlord can recover the consideration paid for surrender of occupancy tenancy on their reinstatement of tenant's heir. 14 N L R 125 = 47 I C 32.

—S. 41—Settlement creating non-occupancy tenants, can be made by a Thekadar. Such non-occupancy tenants cannot be ejected by landlord on Surrender of the lease by thekadar. 3 Pat L W 333 = 39 I C 521.

—S. 41 (d)—After the lease expires, a non-occupancy raiyat admitted into land under a registered lease for a term can be ejected under S. 41 (d). A I R 1929 Pat 18 = 7 Pat 675 = 9 P L T 811 = 110 I C 494.

—S. 46—A Civil Court has jurisdiction though plff. misdescribed the deft. as korfa raiyat in the notice, he being actually a trespasser. 11 P L T 539 = I R (1930) Pat 739 = 127 I C 835.

—S. 46—A lease is for five years only when no period is agreed upon. A I R 1929 Pat 635 = 10 P L J 661 = I R (1930) Pat 104 = 121 I C 328.

—S. 46—Yearly tenancy is not recognized by the Act. A I R 1929 Pat 630 = 10 P L J 625 = I R (1929) Pat 599 = 119 I C 551.

—S. 46—The receiver cannot sell the house and homestead lands of an insolvent raiyat which are a part of his raiyati holding. A I R 1927 Pat 353 = 8 P L T 669 = 106 I C 298.

—S. 46—Except as regards transactions after 1903 the section is intended to have retrospective effect. A I R 1928 Pat 109 = 8 P L T 850 = 105 I C 33.

—S. 46—An immediate landlord cannot sue for ejecting his under-tenant but under S. 46 application should be made to Dy. Commissioner. A I R 1926 Pat 403 = 6 Pat 69 = 8 P L T 231 = (1926) Pat 288 = 97 I C 175.

—S. 46—The arrangement is not clearly illegal when a tenant receiving consideration from a stranger agrees with the landlord to surrender the holding and the land-in turn agreed to resettle it to the person paying that consideration. A I R 1924 Pat 793 = 75 I C 601

—S. 46—Landlord acquires no right by a fraudulent surrender. A right can surrender

## Chota Nagpur Tenancy Act VI of 1908—(Contd)

the holding to the landlord in spite of a previous sale or mortgage by him. A I R 1924 Pat 100 = 2 Pat 898 = 4 P L T 562 = 75 I C 209.

—S. 46 (2) and (6)—The Notification under S. 46 (6) only validates a transfer which would be invalid under S. 46 (1). It has no application to a case where the transfer is invalid under S. 46 (2), under which a transfer is not binding on the landlord unless it is made with his consent in writing. 138 I C 97 = 13 P L T 328 = I R 1932 P 169 = A I R 1932 P 218 = A I R 1932 P 320.

—S. 46 (4)—Landlord's ejectment suit against under-raiyat cannot be tried by a civil court. A I R 1929 Pat 577 = I R (1930) Pat. 169 = 121 I C 473.

—S. 46 (4)—A civil court can entertain a landlord's claim not falling within Section. A I R 1928 Pat. 232 = 108 I C 887.

—Ss. 46 & 47—Mortgage before the Act is extended to Manbhum does not fall within the Section. A I R 1923 Pat. 375 = 4 P L T 311 = 1 Pat. L R 217 = (1923) Pat. 184 = 2 Pat. 538 = 72 I C 1049.

—Ss. 46, 211—Transfer of holding in Manbhum District before Dec. 1909 is not invalid under S. 46 of Act VI of 1908. 7 Ind. Cas. 763.

—S. 47—Application to set aside sale—Limitation, one year. 20 C W N 1243 = 37 I C 683.

—S. 47—Sale of ryoti holding under a final mortgage decree for sale passed after the Act is bad. 40 C 534 = 21 I C 117.

—S. 47—Sale of raiyati interest in execution of mortgage decree, may be objected even after the decree for sale. 1 Pat. L J 33 = 34 I C 733 = 3 Pat. L W 399.

—S. 47—Suit for sale of raiyati interest under a mortgage executed before the Amending Act, is maintainable. 4 Pat. L J 411 = 50 I C 515.

—S. 47—The section is contravened when a raiyati holding is sold in execution of a decree and whether objected to or not is illegal. A I R 1930 Pat. 236 = 11 P L T 207 = I R (1930) Pat. 529 = 125 I C 561.

See also A I R 1928 Pat. 227 = 7 Pat. 178 = 9 P L T 228 = 107 I C 145.

—S. 50—Tenant cannot be ejected when he denies the title and landlord's application under S. 50 is dismissed but not because of such denial. A I R 1927 Pat. 57 = (1926) Pat. 332 = 8 P L T 171 = 97 I C 123.

—S. 51 A (2)—Fixed jama—Tenant's rights of—Variation nominal and unexplained is insufficient to destroy. 11 P 569 (576-7) = 138 I C 419 = A I R 1932 P 157 = I R 1932 P 185.

—S. 51-A (2)—Statutory presumption under, not directly applicable to a case—Court may nevertheless act on a similar presumption if the facts justify the necessary inference.



## Chota Nagpur Tenancy Act VI of 1908—(Contd)

11 P 569 (577) = 138 I C 419 = A I R 1932 P 157 = I R 1932 P 185.

—S. 51-A (3)—Continuity of tenure—Sub-division of tenure does not by itself affect.  
11 P 569 (579) = 138 I C 419 = A I R 1932 P 157 = I R 1932 P 185.

—S. 52—When a co-sharer landlord sues for apportioning rent and makes the tenants and other co-sharers parties to the suit, the right to rent is held to be in suspense till a decree is passed.  
59 I C 314 (Pat.)

—Ss. 59, 79—Stipulation in Mokarari tenures for ejectment on non-payment of rent is enforceable. 17 C W N 1068=20 I C 294.

—Ss. 61 (2), 61 (8), 139 (2)—Revenue Officer can allow Commutation of rent during pendency of suit to correct entry in record of rights. 23 C W N 372.

—Ss. 63, 215 and 258—Order under S. 63 is appealable to officers mentioned under S. 215. A I R 1928 Pat. 370=7 P A T 421=9 P L T 496=29 Cr. L J 420=108 I C 556.

—S. 64 (3)—It is not merely a tenant or resident of a village who can make *korkar* in that village. A I R 1928 Pat. 87 = 105 I C 58.

—S. 64 (3)—Bar under—Applicability of—Confined to cases in which landlord's consent is required but is not obtained—Civil suit not barred when landlord's consent is not necessary. 13 P L T 781.

—S. 64 (3)—The suit was held barred when tenants reclaimed lands of a village and mundari khuntkattidar after 2 years from re-clamation sued to eject them, as maliks. A I R 1928 Pat. 87 = 105 I C 58.

—Ss. 64 (3) and 67—Suit by *ghatwal* to eject raiyats who had more than 2 years before commenced conversion of jungle land into *korkar*, held barred under S. 64 (3). Held also that the operation of the bar was not affected by a change of *ghatwal* either within or beyond the period of two years prescribed for the application to the Deputy Commissioner. 13 P L T 781.

—S. 64 (3), 67—Under S. 67 occupancy right is acquired by the *korkardar* and under S. 64 (3) landlord's consent to conversion will be presumed when landlord fails to eject a *korkardar* within two years from the time when the latter begins to convert lands into the *korkar*. A I R 1921 Pat. 506 (2)=2 P L T 635 = 63 I C 783.

—S. 64 (3) and 67—Trespasser can acquire occupancy rights in land by prescription. 38 I C 478.

—S. 67—A Jalsasan tenure cultivated by *raiya* becomes occupancy holding. A I R 1929 Pat. 630 = 10 P L T 625 = I R (1929) Pat. 599 = 119 I C 551.

—Ss. 68 and 139 cls. (2) and (4)—Civil Court has jurisdiction to try suit for ejectment of under-raiyat. 23 I C 407.

## Chota Nagpur Tenancy Act VI of 1908—(Contd)

—Ss. 68, 71, 139—Specific Relief, Act, 1877 s. 9. 13 C L J 250.

—S. 71—Vested rights under the old Act are not taken away by the Amendment of 1920. A I R 1926 Pat. 561 = (1926) Pat. 233 = 8 P L T 397 = 97 I C 608.

—S. 71—Tenant's status makes no difference while determining whether a suit is of the tenant for possession from the landlord. A I R 1926 Pat. 561 = (1926) Pat. 233 = 8 P L T 397 = 97 I C 608.

—Ss. 71, 217—High Court should not interfere with the order under S. 217 passed by a Revenue Officer. 3 Pat. L W 281 = 3 Pat. L J 143 = 43 I C 933.

—S. 72—Landlord is not bound by tenant's in embrance. This section does not resemble S. 86 (6) of the B. T. Act. A I R 1924 Pat. 100 = 2 Pat. 898 = 4 P L T 562 = (1924) Pat. 117 = 75 I C 209.

—S. 72 (4)—For ejecting an under-raiyat no such suit against him or any notice or formality is required. After a surrender by raiyat, an under-raiyat's right ceases and he becomes a trespasser. 10 A I Cr. R 420 = 9 P L T 728 = 29 Cr. L J 642=110 I C 98.

—S. 74—Section has no retrospective effect. A I R 1925 Pat. 297 = 6 P L T 144 = (1924) Pat. 307 = 43 I C 988.

—S. 74-A—The section is applicable to both classes of village headmanship whether with land or not. A I R 1929 Pat. 436 = 1 Pat. (1930) Pat. 402 = 124 I C 82.

—S. 77-S. 77 Leaves untouched the incidents of *ghatwali* tenures except so far as the Local Government may otherwise direct by notification. 13 P L T 781.

—S. 77—A person possessing *ghatwali* lands for only ten years before tenancy Act of 1908 has no right to occupancy right under Act I of 1879. A I R 1925 Pat. 306 = 6 P L T 534 = (1924) Pat. 304=84 I C 383.

—Ss. 77 and 208—*Ghatwali* tenure...Sale of, for arrears of rent not allowed. 1 Pat L J 601 = 2 P L W 427 = 36 I C 963.

—S. 78—The section only is applicable for saving homestead only as long as tenant continues to be Raiyat of other land. A I R 1930 Pat. 236=11 P L T 207=I R (1930) Pat. 529=125 I C 561.

—S. 78—The section does not create raiyati interest but only regulates incidents of homestead tenancy. A I R 1930 Pat. 236 = 11 P L T 207 = I R (1930) Pat. 529 = 125 I C 561.

—S. 81—If the tenant pays rent of trees separately that of the holding, they should be entered by the Settlement Officer. A I R 1929 Pat. 328 = 8 Pat. 266 = 10 P L T 311=I R (1930) Pat. 68 = 120 I C 756.

—S. 81—Particulars entered in the Record of Rights are presumed to be contained in



## Chota Nagpur Tenancy Act VI of 1908—(Contd.)

the order under S. 80. The order should be produced by the person alleging the contrary. A I R 1927 Pat. 97 = (1926) Pat. 338 = 8 P L T 239 = 99 I C 492.

—S. 81—Record of rights—Record of easement in—Suit for declaration, incorrectness of entry—Onus of proof on plff. 2 Pat. L J 323 = 2 P L W 282 = 39 I C 868.

—Ss. 81, 83, 87 and 256—No title is acquired by landlord to land purchased in execution of a decree passed after Cho. Nag. Ten. Act came into force and after the land was recorded in the record of rights as mundari khankati at Settlement. 20 C W N 582 = 341 I C 385.

—Ss. 81, Cl. (n) 91—Suit by zemindar against jagirdar for possession—Whether suit barred by S. 91—S. 81 cl. (n) whether includes coal in mine not opened—Minerals lying on surface of soil—Scope of suit referred to in clause (b) of S. 91—Jurisdiction of Civil Court, presumption to be made in favour of—Dismissal of suit under S. 94, whether necessary—Stay of suit till final publication of Record of Right—S. 91, sub-section (1) Proviso, relief to be obtained under—No relief by appointment of Receiver or by grant of injunction. 17 C W N 408 = 17 I C 490 = 17 C L J 239.

—Ss. 81 (b) & 51 (a) (5)—To an entry as "occupancy raiyat with rent subject to enhancement" S. 51 A is inapplicable in Manbhum. A I R 1930 Pat. 392 = 11 P L T 251 = I R. (1930) Pat. 571 = 125 I C 795.

—S. 82—Under raiyat, status of; in Chota Nagpur—Interest void or voidable—Distinction between proceedings with respect to a tenure-holder and a raiyat. 20 C W N 1240 = 1 Pat. L J 543 = 2 Pat. L W 435 = 37 I C 658.

—S. 83—High Court has power of superintendence over Courts subject to its appellate jurisdiction. 18 C W N 782 = 19 C L J 300 = 23 I C 896.

—S. 83—Settlement Officer—Jurisdiction of Settlement Officer to enquire into nature of tenancy and record an entry in the Record of Rights. 20 C W N 582 = 34 I C 385.

—S. 83—Any order under S. 83 refers only to the draft record. A I R 1926 Pat. 369 = 94 I C 1007.

—S. 83—Draft Record of Rights is admissible to rebut presumption of correctness of final Record of Rights. A I R 1924 Pat. 248 = 2 Pat. 814 = 81 I C 326.

—Ss. 83, 127, 128, 132, 258—Entry in record of rights under S. 132 conclusively determines rights and obligations between landlord and tenant. 1919 Pat. 147 = 50 I C 454.

S. 84—No suit under S. 87 was filed—correctness of the entry is presumed and cannot be challenged in Civil Court. A I R 1930 P C

## Chota Nagpur Tenancy Act VI of 1908—(Contd.)

45 = 31 L W 352 = 32 Bom L R 515 = 51 C L J 502 = I R. (1930) P C 129 = 123 I C 145.

—S. 84—Order under S. 80 contained no particulars stated in S. 81 such particulars should be entered in the Record of Rights and presumption under S. 84 (3) applies. A I R 1927 Pat. 97 = (1926) Pat. 338 = 8 P L T 239 = 99 I C 492.

—S. 84 (3)—Parties challenging an entry in the record of right must prove by evidence that it is correct. A I R 1931 P C 30 = 60 M L J 253 = 53 C L J 11 = 35 C W N 233 = 33 L W 277 = Ind. Rul. (1931) P C 101 = 10 Pat. 296 = 12 P L T 375 = 131 I C 325.

—S. 84 (3)—Record of Rights is presumed to be correct. A I R 1931 P C 30 = 35 C W N 233 = 53 C L J 11 = I R. (1931) P C 101 = 131 I C 325.

—S. 84—Record of Rights is not conclusive proof of tenancy rights. A I R 1922 Pat. 28 = 3 P L T 107 = (1921) Pat. 296.

—S. 87—Subsequent agreement may vary a decree under S. 87. A I R 1930 Pat. 384 = I R. (1930) Pat. 640 = 126 I C 848.

—S. 87—No second appeal lies to the High Court against a decision under S. 87. A I R 1923 Pat. 135 = (1922) Pat. 109 = 6 P L J 634 = 65 I C 285. See also 5 P L J 697 = 1 P L T 705 = (1920) Pat. 302 = 58 I C 434.

—S. 87—Second appeal to High Court from an appellate decision by Judicial Commissioner against decision of Revenue officer under S. 87 is incompetent. (1920) Pat. 302 = 1 Pat. L T 705 = 58 I C 434.

—Ss. 87 and 258—It is not that no court shall try any issue already decided by such a decree so as to bar a debt in a suit brought against him from raising the issue. (1921) Pat. 369 = 70 I C 232.

—Ss. 87 (1), (2), 139 (3), 224 (2)—Appeal to High Court from an appellate decree by Judicial Commissioner in a suit for arrears of rent valued at more than Rs. 100 on account of forest produce, is competent. 20 I C 51.

—Ss. 87, 224, and 264—Decision of Revenue Officer under S. 87 is subject to appeal to Judicial Commissioner but not to second appeal to High Court. 15 C L J 145 = 16 C W N 294 = 13 I C 193 = 39 C 241.

—Ss. 87, 258, 264 (viii)—Decision on appeal, by Judicial Commissioner passed against that of a Revenue officer under S. 87 can not be modified by Civil Court. 43 Cal 136 = 19 C W N 998 = 23 C L J 118 = 31 I C 691.

—S. 88—The man lands are held as remuneration for collecting rents. The jagirdar must give up possession of the subject of iara when the term expires, not only the lands of the tenants but also the man lands. 2 P L T 777 = 64 I C 695.

## Chota Nagpur Tenancy Act VI of 1908—(Contd)

—S. 89—Settlement Officer can revise Attestation Officer's order under the Section and this bars a civil suit. A I R 1926 Pat. 64 = 90 I C 489.

—S. 101 (2)—Decree for rent—Execution of...Arrest of judgement-debtor in the first instance if legal. *See*. 34 I C 22.

—S. 123—Rent decrees execution—Exemption of portion of tenure from sale by Commissioner—Remaining portion if may be sold as in execution of rent-decree Rent Recovery 16 C W N 1024 = 40 C 623 = 15 I C 842.

—S. 132—The section refers to khuntkatti lands only, A I R 1922 Pat 28 = 3 P L T 107.

—Ss. 132 and 137—Notification under S. 127—Record of Rights under S. 132, if conclusive—Questions arising between tenant *inter se* not affected. (1919) Pat 147 = 50 I C 454.

—S. 138—Civil Court, and not Deputy Commissioner, has jurisdiction to try a suit for possession of holding by a decree-holder—purchaser in execution of a rent decree. S. 47 of C P Code is inapplicable to such a suit. 4 Pat L J 716 = (1919) Pat 354 = 52 I C 711.

—S. 139—Dy. Commissioner only can try a suit filed against a trespasser but found to be non-occupancy holding A I R 1924 Pat 267 = 2 Pat 746 = 5 P L T 422 = 77 I C 587.

—S. 139—Dy. Commissioner cannot entertain a suit for possession of occupancy holding because of deft's denial of the tenancy right; when the relationship of landlord and tenant is not admitted. But such suit lies in a Civil Court. A I R 1926 Pat 64 = 90 I C 489.

—S. 139—The section is inapplicable when a question of title is involved. (1926) Pat 246 = 96 I C 452.

—S. 139—A suit can be entertained by a civil court if the plaint shows that tenancy is duly terminated. A I R 1930 Pat 143 = I R (1930) Pat 337 = 123 I C 609.

—S. 139—An ejectment suit lies in a Civil Court as the Act does not provide for ejecting a tenant of proprietor's private land like *amphibias* or *zeavit*. A I R 1929 Pat 444 = 10 P L T 453 = I R (1930) Pat 497 = 118 I C 305.

—S. 139—A suit lies only in a Revenue Court when it is among rival claimants for declaration of Pradhan rights. A I R 1928 Pat 515 = 7 Pat 816 = 9 P L T 544 = 122 I C 309.

—S. 139—If landlord alternatively claims declaration that defts are liable for rents, an ejectment suit against a trespasser lies in Revenue Court only. If alternative relief is not asked, Civil Court's jurisdiction is not ousted. A I R 1929 Pat 18 = 7 P 675 = 9 Pat L T 811 = 110 I C 494.

—S. 139—Only a suit between landlord and tenant is referred to by S. 139 (4) A I R 1928 Pat 198 = 7 Pat 82 = 9 P L T 724 = 109 I C 477.

## Chota Nagpur Tenancy Act VI of 1908—(Contd)

—S. 139—Civil Court can try title suits but not summary suits for possession. A I R 1927 Pat 203 = 6 Pat 296 = 8 P L T 841 = 104 I C 580.

—S. 139—A Revenue Court can try a suit for recovering cess. A I R 1927 Pat 266 = 6 P 317 = 103 I C 464.

—S. 139—A Civil Court should entertain a suit for declaration of title as occupancy *raiya*ts with recovery of possession by tenant dispossessed of their lands by their landlord who settled the land with other tenants. A I R 1928 Pat 128 = 9 P L T 340 = 105 I C 561.

—S. 139 A—The section does not retrospectively affect a right of action accrued before 1920 and S. 139 (5) as amended in 1924, has no such effect on a right accrued before that date. A I R 1925 Pat 109 = 8 P L T 850 = 105 I C 33. *See* A I R 1927 Pat 203 = 6 Pat 296 = 8 P L T 841 = 104 I C 580.

—S. 139 A. No civil suit to eject an under-*raiya*t by his immediate land lord lies but under S. 46 application should be made to Dy. Commissioner. A I R 1926 Pat 403 = 6 Pat 69 = (1926) Pat 288 = 8 P L T 231 = 97 I C 175.

—S. 139. A—No Civil suit for declaration as occupancy tenant and for possession lies. A I R 1926 Pat 363 = 6 P 64 = 7 P L T 870 = (1926) Pat 223 = 96 I C 1036.

—S. 139 (2)—For application of the provision rent payable must be for agricultural land though the person sued may not be agricultural *raiya*t. A I R 1926 Pat 527 = 6 Pat 48 = 7 Pat L T 641 = 97 I C 789.

—S. 139 (2)—Dispute regarding mode of payment of rent—Pendency of suit to correct entry in record of rights—Jurisdiction of revenue officer to allow commutation. 23 C W N 372.

—Ss. 139 (2), 61 (2) and (8)—Pendante lite, commutation of rent is not barred when a suit for correcting an entry in Record of Rights is filed. 23 C W N 372 = 98 I C 837.

—S. 139 (3) (a)—Civil Court can try a suit for rent of basti land part of which has been cultivated. 17 C W N 615 = 40 C 402 = 16 I C 776.

—S. 139 (4)—A declaratory suit that deft. tenant is not occupancy tenant and that he cannot hold land against plff's wishes can be tried by a Civil Court. A I R 1927 Pat 348 = 8 P L T 606 = 104 I C 800.

—Ss. 139 (4) and 139. A—A Civil Court cannot try an ejectment suit against an under tenant. A I R 1927 Pat 472 = 101 I C 645.

—S. 139 (5)—The suit is not for ejectment under the section when tenant gave charge of his land to another who took possession but was sued for possession by the tenant. A I R 1927 Pat 326 = 6 Pat 436 = 104 I C 205.

—S. 139. CL. (5)—"Application". meaning of Specific Relief Act S. 9. 9 I C 478 = 13 C L J 250 = 15 C W N 387.

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—S. 139 (5)—Suit by plff. claiming occupancy right by, reason of his having rendered the land cultivable, for declaration of title and possession, is triable by a Civil Court. (1918) Pat 131=4 Pat L W 189=44 I C 262.

—S. 139 (6)—Suit by headman for recovery of agricultural land—Bar. 19 C W N 578=21 C L J 629=27 I C 538.

—S. 139 (6). (8)—Suit by landlord to eject a prodhan in Deputy Commissioner's Court is not maintainable. (1918) Pat 65=5 Pat L W 199=45 I C 72.

—S. 157—A rent decree passed against some tenants, one of whom only appeared and admitted plaintiff's claim is *ex parte* against other tenants. A I R 1922 Pat 400=1921 Pat 345=2 P L T 734=62 I C 886.

—The functions of the Deputy Collector are restricted to a decision upon the question of fact as to who had actually in good faith received and enjoyed rent before the institution of the suit. 11 P 629 (633)=A I R 1932 P 353=140 I C 576=A L R 1932 P 607.

—S. 177—No rent suit would be permitted to be defeated by intervenor, payment of rent to whom is disbelieved. (1917) Pat 189=2 Pat L J 386=41 I C 191.

—S. 177—In a suit by landlord for rent, the third person put forward as the landlord by the tenant, is not a necessary party. 57 I C 28.

—S. 177—No question of title to land can arise under s. 177—though determined, it is only incidental: I R 1930 Pat 648=126 I C 856=A I R 1930 Pat 273.

—S. 177—An order under the section is appealable to the Dy. Commissioner and not to the Judicial Commissioner. A I R 1929 Pat 258=I R (1930) Pat 32=120 I C 320.

—See also A I R 1924 Pat 807=(1924) Pat 278=84 I C 286. See also 4 P L J 163=50 I C 712.

—S. 177—Under the Old Act Zerpeshgirdars had a right to be registered but to a rent suit they were not necessary or proper parties. A I R 1928 Pat 615=8 Pat 122=9 Pat L T 627=113 I C 681.

—S. 177—If in proceedings under the section Dy. Collector decides a question of title or interest in land appeal lies not to the Dy. Commissioner but to the Judicial Commissioner. A I R 1924 Pat 807=(1924) Pat 278=84 I C 286.

—S. 177—A person should be made a party to a suit when he is alleged to have a right to receive rent. A I R 1924 Pat 522=2 Pat L R 24 Civ.=5 P L T 614=79 I C 601.

—S. 177—The section is inapplicable when in a rent suit it is pleaded that payment is made to a stranger. A I R 1922 Pat 480=1 Pat 255=69 I C 858.

—See 2 U P L R Pat 1920=57 I C 28.

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—S. 177—The tenant himself cannot claim to receive rent. A I R 1923 Pat 55=3 P L T 131=(1922) Pat 54=6 P L J 603=64 I C 1003.

—Ss. 177-Provido—Deputy Collector... Decision of one question of title—*res judicata* is not, in any subsequent title brought under the proviso. 11 P 629=A I R 1932 P 353=140 I C 576=A L R (1932) P 607.

—Ss. 177 and 218 (2)—Deputy Collector... Decision upon a question of title by—Appeal from—Nevertheless lies only to the Deputy Commissioner and not to the Judicial Commissioner. 11 P 629=A I R 1932 P 353=140 I C 576=A L R 1932 P 607.

—Ss. 177, 218, 239—Order under s. 177 is appealable to Deputy Commissioner. 4 Pat L J 163=50 I C 712.

—S. 178—When an ejectment decree is fully executed powers vested in the S. D. O. under Cl. (3) cannot be exercised. A I R 1922 Pat 29=3 P L T 108=6 P L J 300=(1921) Pat 195=63 I C 779.

—S. 178 (2), (3)—Extension of statutory time for payment of rent, even after expiry thereof and after execution has been applied for, may be granted by the trial Court. 16 C W N 1090=16 C L J 520=15 I C 689.

—S. 181—Limitation runs from the date on which the decree is signed. A I R 1924 Pat 712=5 P L T 374=2 Pat L R 7=78 I C 224.

—S. 181-A—A rent decree cannot be executed by one who is assignee of the decree but not of landlord's interest. A I R 1928 Pat 144=6 P 807=9 P L T 678=108 I C 432.

—Ss. 184, 191 (2), 208 (2) and 210—Arrest of judgment-debtor in the first instance, in execution of a rent-decree is legal. 20 C W N 111=34 I C 22.

—S. 185—Term "warrant of execution" is not limited to cases of attachment of the person or moveable property only of the judgment-debtor. A I R 1928 Pat 615=8 Pat 122=9 P L T 627=113 I C 681.

—S. 190—When tenure is to be sold for arrears notice is needed to give jurisdiction for selling, to the Court. A I R 1928 Pat 615=8 Pat 122=9 P L T 627=113 I C 681.

—S. 208—Under S. 208 nothing but the whole holding can be sold by the Dy. Commissioner for rent arrears. A I R 1929 Pat 28=7 Pat 832=10 Pat L T 36=1 R (1929) Pat 622=119 I C 894.

—S. 208—All the tenants are necessary parties. Not the landlord but tenants should select the representative for this sec. and ch. 14 B. T. Act. A I R 1929 Pat 188=10 P L T 125=8 Pat 620=1 R (1929) Pat 314=116 I C 538.

—S. 208—Only in cases of fraud and want of jurisdiction rent sale can be questioned by a Civil Court. A I R 1928 Pat 615=8 Pat 122=9 P L T 627=113 I C 681.

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—S. 208—This section and Rent Recovery Act make a complete Code for actual sale and its effect but this does not prevent the operation of C P C provisions for instituting execution proceedings. A I R 1928 Pat 615 = 8 Pat 122 = 9 P L T 627 = 113 I C 681.

—S. 208—In execution-sale for a rent-decree, the purchaser gets only the judgment-debtor's interest in the tenancy. A I R 1928 Pat 243 = 9 P L T 372 = 106 I C 563.

—S. 208—S. 16—B. Rent Recovery Act applies to sale of tenure for cess-arrears. A I R 1927 Pat 266 = 6 Pat 317 = 103 I C 464.

—S. 208—A decree for cess is like a rent decree if some formalities are fulfilled. A I R 1927 Pat 266 = 6 Pat 317 = 103 I C 464.

—Ss. 208 and 214—Sale of tenure under S. 208—all parties interested in the tenure not impleaded as defendants in rent suit—sale not valid—jurisdiction of Civil Courts.

A I R 1933 P C 150 = 37 L W 767.

—Ss. 208, 211 (1)—Rent decree against some of the registered tenants may be executed as a money-decree in Civil Court, but not as a rent-decree under S. 208. 18 W N 170 = 23 I C 105.

—Ss. 208 and 209 (a)—Order directing issue of sale certificate under S. 208 of Cho. Nag. Ten. Act and S. 11 of Bengal Rent Recovery Act, by a Deputy Commissioner is not appealable to High Court. 5 P L J 191 = (1920) Pat 73 = 1 Pat L T 146 = 55 I C 27.

Ss. 211 and 212—Sale in execution of rent decree—Deposit of decretal amount by transferee of occupancy holding—Withdrawal by land holder—decree holder of Recognition of tenancy by him does not amount to. [N.B.—In this case the withdrawal by the landlord was under protest and in pursuance of the Court's order.] 11 P 257 = 13 P L T 387 = 138 I C 20 = A I R 1932 P 192 = I R 1932 P 163 = A L R 1932 P 250.

—Ss. 211 and 270—Decision under S. 211 of Deputy Collector is not appealable to Deputy Commissioner but is revisable by the latter. 5 Pat L J 468 = 1 Pat L T 729 = 58 I C 268.

—S. 212—Those interested in part only are not excluded from the class of persons "who claim an interest therein." A I R 1928 Pat 615 = 8 Pat 122 = 9 P L T 627 = 113 I C 681.

—S. 212—Raiyat at fixed rates—Right to avoid a sale by depositing decretal sum. 4 Pat L J 11 = 49 I C 193 (1).

—Ss. 212, 215 (1) (c)—Order to deposit money to set aside sale is one relating to execution thereof in S. 215. Proof of title is not necessary to set aside sale under S. 212. 36 I C 829.

—Ss. 212 and 215 (3)—Order, rejecting an application by a dar mukaridar to set aside

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sale on depositing the decretal amount, by a Dy. Collector is an order under S. 212 and such is appealable. 2 Pat L J 153 = (1917) Pat 97 = 37 I C 891.

—S. 213—Khorposhdars do not come within s. 213. A I R 1928 Pat 615 = 8 Pat 122 = 9 P L T 627 = 113 I C 681.

—S. 213—A suit to set aside an execution-sale is not barred. A I R 1923 Pat 64 = 1 Pat 750 = 4 P L T 439 = 71 I C 345.

S. 213—The section does not bar the declaration of the effect of a particular sale. A I R 1929 Pat 321 = 8 Pat 366 = 1 R (1929) Pat 551 = 118 I C 727.

—Ss. 213, 215—High Court ought to interfere in revision on an order under S. 215 of Dy. Collector refusing to summon witnesses in an application to set aside execution sale (Mullick, J. Diss.) (1919) Pat 60 = 49 I C 389.

—Ss. 213, 265 and 280—It is not an application to execute a decree or an order when it is applied to set aside an execution-sale. So the application abates if on the applicant's death nothing is done to substitute names within time. A I R 1923 Pat 29 = 1 P L R 55 = 4 P L T 367 = (1922) Pat 363 = 2 Pat 243 = 69 I C 613.

—S. 214—If the rent suit was without jurisdiction, s. 214 allows another suit to set aside the sale thereunder on the ground of want of jurisdiction. A I R 1929 Pat 188 = 10 P L T 125 = 8 Pat 620 = I R (1929) Pat 314 = 116 I C 538.

—S. 214—Suit for declaration that certain auction sale, although ostensibly rent sale, was not so in fact and cannot operate as rent sale, is a suit "to set aside or at all events to modify the effect of the sale" within section the suit does not come under S. 177 and Art 12 limitation Act is applicable. A I R 1928 Pat 615 = 8 Pat 122 = 9 P L T 627 = 113 I C 681.

—Ss. 215 (3) and 224—Appeal to High Court—Inherent power of High Court to stay execution of decree appealed from. (1919) Pat 145 = 52 I C 185 = 4 P L J 371.

—Ss. 215 (3), 178 (3) and 224—An order extending time under s. 178 (3) is appealable to Judicial Commissioner. A I R 1922 Pat 20 = (1921) Pat 195 = 6 P L J 300 = 3 P L T 108 = 63 I C 779.

—S. 217—Application under Order on No jurisdiction to High Court to revise. 3 Pat L W 281 = 3 P L J 143 = 43 I C 933.

—S. 217—A Dy. Collector as Dy. Commissioner tried and decreed *ex parte* a rent suit. An application for setting it aside was dismissed for default and a further one for restoration of the previous one also met the same fate. No second application is possible as the Act does not provide for it. The dismissal order cannot be appealed against to



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the Dy. Commissioner and so the Dy. Commissioner's order setting aside the decree was invalid and not revisable by Revenue authorities under S. 217 but by the High Court.  
3 U P L R (Pat) 13=60 I C 175.

—S. 218—An appeal lies to Dy. Commissioner from decision of Dy. Collector in a rent suit below Rs. 100 and in which the person set up by defendant as landlord is not made a party. 2 Pat L W 154=1917 Pat 183=42 I C 790.

—S. 218—In a rent-suit below Rs. 100 High Court cannot revise Dy. Commissioner's appellate judgment from the decree of the Dy. Collector. A I R 1928 Pat 567=113 I C 697.

—S. 218—Appeal lies to the Dy. Commissioner when under S. 177 title is not decided. A I R 1930 Pat 273=I R (1930) Pat 648=126 I C 856. See also A I R (1929) Pat 258=120 I C 320.

—S. 218—In proceedings under S. 177 if the Dy. Collector decides question of title appeal lies to Judicial Commissioner. A I R 1924 Pat 807=(1924) Pat 278=84 I C 286.

—S. 218 (2) and 177—Deputy Collector—Decision of, under S. 177, upon a question of title—Appeal from—Nevertheless lies only to Deputy Commissioner and not to Judicial Commissioner. 11 P 629=A I R 1932 P 253=140 I C 576=A L R 1932 P 607.

—S. 224—Appeal lies to J. C. if a combined suit for rent exceeding Rs. 100 is brought against several tenants. 2 P L T 734=(1921) Pat 345=62 I C 886.

—Ss. 224 (2), 87—Appeal lies to High Court from decision of Judicial Commissioner in appeal on a suit for declaration of wrong entry in record of rights under S. 87. 40 I C 891.

—Ss. 224 (2), 87—No second appeal lies from Decision under s. 87. A I R 1923 Pat 135=1 U P L R (Pat) 25=(1922) Pat 109=6 P L J 634=65 I C 285.

—S. 227—Order under this section setting aside a decree is final. To come under S. 157 decree may not appear to be ex parte on its face. A I R 1922 Pat 400=(1921) P H C C 315=2 P L T 734=1 Pat 32=62 I C 886.

—S. 231—Application to set aside execution sale—Limitation. 20 C W N 1213=37 I C 683.

—S. 231—Art 95 Lim. Act governs a suit for setting aside a sale under C N Tenancy Act. A I R 1926 Pat 401=5 Pat 759=(1926) Pat 225=8 P L T 124=96 I C 529. See A I R 1926 Pat 47=90 I C 325.

—S. 237—Suit for recovery of possession against a person as trespasser, there being no ejectment by landlord, is not governed by

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S. 237. 'Application' in S. 237 does not include a suit. 16 I C 418.

—S. 240—Forum of appeal is the same though it is in respect of only Rs. 41 in a collective suit for more than Rs. 100 A I R (1922) Pat. 400=(1921) Pat. 345=2 P L T 734=1 Pat. 32=62 I C 886.

—S. 256—Entry in Record-of-Rights that land was the *mundari kounkati* of the tenants...Conclusiveness of entry...No title in the landlord. 20 C W N 582=34 I C 385.

—S. 256—It was objected that as Record of Rights showed the holding to be *maurusi* *Khuntkattidar* it was non-transferable. Lower Court receiving evidence to show that it was *mundari khuntkatti*. Such evidence is unacceptable. A I R 1931 Pat 136=9 Pat 952=12 P L T 125=I R (1931) Pat 146=130 I C 162.

—S. 258—Judicial Commissioner hearing appeals, if a "Revenue Officer"—Decision of Commissioner, if *res judicata*, in Civil suit. 19 C W N 998=31 I C 691.

—S. 258—There is no constructive *res judicata* under s. 258 that any land which in the rent settlement proceeding the plaintiffs either unsuccessfully claimed or did not claim (though they might have claimed) to be covered by the rent entered in that particular *khata* of the Record-of-Rights, does not belong to him. So a suit for declaration of title confirmation of possession of that land is not barred. A I R 1931 Pat 31=I R (1931) Pat 158=130 I C 174.

—S. 258—Under this Section a Civil Court cannot entertain a question of title or possession of land ejected from under S. 65. A I R 1929 Pat 467=I R (1930) Pat 231=122 I C 583.

—S. 258—Words "directly or indirectly" in S. 258 apply to the machinery used to change the decision and not to the result. A I R 1928 Pat 244=10 P L T 854=7 Pat 388=I R (1929) Pat 487=118 I C 135.

—S. 258—The fraud or want of jurisdiction in s. 258 refers to order passed under s. 213 refusing to set aside the sale. A I R 1927 Pat 382=8 P L T 688=106 I C 430.

—S. 258—A Civil Court can question a fraudulent decree obtained under S. 139. A I R 1927 Pat 382=8 P L T 688=106 I C 430.

—S. 258—So long as fraud is not distinctly established from gross negligence, fraud and gross laches are not identical. A I R 1926 Pat 528=5 Pat 768=96 I C 437.

—S. 258—Though Revenue Court in its decree decides an issue, it can be subsequently raised by the deft. in a suit against him. A I R 1921 Pat 218=(1921) Pat 369=70 I C 232.

—Ss. 258 and 84 (3)—When a tenure suit shown to be non-resumable a declaratory suit lies for it to be resumable. A I R 1926 Pat 369=94 I C 1007.



### Chota Nagpur Tenancy Amendment Act (V of 1903)

—S. 31—Purchase of tenure on 28-5-1892—Necessity for registration—Otherwise arrears not recoverable—Chota Nagpur Ten. Act (VI of 1908) S. 11 effect of, 1 Pat L W 571 = 1917 Pat 63 = 38 I C 59.

—S. 35—See S. 124 Chota Nagpur land-lord and tenant procedure Act. 13 I C 201.

—S. 41—Special or second appeal, 10 C W N 281 = 33 C 378.

### Chota Nagpur Tenancy Amendment Act VI of 1920

—Ss. 38 and 39—Vested rights under the old Act are not taken away by this Amending Act. A I R 1926 Pat 561 = 8 P L T 397 = (1926) Pat 293 = 97 I C 608.

—S. 258—S. 258 prohibits in respect of rent settled under s. 85 any claim in a suit that it is not a fair rent for the land in respect of which it has been settled. S. 258 does not imply any constructive *res judicata* and hence a suit, for declaration of title and confirmation of possession in respect of land which in rent settlement the plaintiffs either unsuccessfully claimed or did not claim at all, is not barred. 75 I C 670; 32 C W N 472, explained and distinguished. A I R 1931 Pat 31 = Ind Rul (1931) Pat 158 = 130 I C 174.

### Christian Marriage Act (XV of 1872)

—S. 4—Minor child of christian—father Presumption as to religion—Change of religion by mother—Marriage of child to *chamar* invalid. 32 I C 897.

—S. 5—Solemnised according to rules rites etc.—Meaning. Divorce Act Ss. 41 18 and 19. 11 Bur. L T 69 = 47 I C 544.

—Ss. 41, 46—Registrar refusing to take any steps towards marriage between a Christian and a Jewess divorced according to Jewish Law may be ordered by the Court to Solemnise the marriage. 16 C W N 417 = 15 I C 398.

—S. 68—Hindu marrying a Christian according to Hindu mode. Commits offence under S. 68. 40 Mad. 1030 = 33 M L J 113 = 23 M L T 163 = (1917) M W N 589 = 6 L W 126 = 41 I C 654 = 9 Cr. L R 492 = 18 Cr. L J 840. (F B.)

—S. 68—Marriage between a native christian not professing Christianity at the time of marriage and a Bhangi girl, is not punishable under S. 68 (Walsh J. Diss) 40 All 393 = 16 A L J 414 = 45 I C 519 = 19 Cr. L J 615.

—S. 80—Marriage register—entry in—certified copy—whether evidence of marriage. A L R 1933 S. 25 = 26 S L R 423 = 139 I C 490 = A I R 1933 S. 27.

—S. 88—Objections to validity of marriage are not dealt with by the Act. "Personal law"

### Christian Marriage Act (XV of 1872)—(Concl'd)

includes any such law apart from any personal law about the form of marriage forbidding any party to make a marriage contract with another A I R 1930 Bom 105 = I R (1930) Bom 280 = 54 B 288 = 32 Bom L R 17 = 124 I C 776.

—S. 88—Personal law is that applicable to religious community. A I R 1930 Bom 105 = I R (1930) Bom. 280 = 54 B 288 = 32 Bom L R 17 = 124 I C 776.

### Christians.

—Law governing marriage of Christians domiciled or resident in India is the law of the community to which they belong. A I R 1931 Pat 213 = 12 P L T 380 = Ind Rul (1931) Pat 335 = 133 I C 175.

### Chukain Right

—Nature of—Contract of sale—Misrepresentation by non disclosure of facts—Suit for revision by purchaser—Silence whether amount to misrepresentation—T P Act, S. 55. 42 Cal 28 = 24 I C 193.

### Chundawand.

See Custom (Punjab).

### Chur

See also Alluvion and Diluvion.

See also Bengal Alluvion and Diluvion Act and Regn. (XI of 1825.)

See also Regulations—(2) Bengal regulation—Reg. 10 of 1825.

See also Fishery.

See also Landlord and Tenant.

—Government gets title to formation in rivers only if it is proved that the bed does not belong to anybody. 35 C L J 196 = 60 I C 395.

—Forming in non-navigable rivers flowing through or by the side of permanently settled estates, if resumable and assessable with revenue. 22 C W N 872.

### Church

—Roman Catholic—Law—Applicable to—Right to the Temporal possessions of the Church—Canon Law—Departure from proof. 8 L W 208 = 35 M L J 407 = 47 I C 941.

—Worshippers—Right of, to exclude others from seats—Caste distinction. Rel. Association 39 Mad 1060.

### Circuit Committee.

Proceedings of— is good evidence in questions relating to rights of Government with respect to Zemindari property. 3 C L J 1 P C = 10 C W N 161 = 3 A L J 55 = 8 Bom L R 1 = 16 M L J 1 = 1 M L T 3 P C = 29 M 52 = 33 I A 46.

## Circumstantial Evidence.

See Evidence.

## Citation

See Practice—Precedents.

## City of Rangoon Municipal Act.

See under Rangoon City Municipal Act 6 of 1922.

## Civil and Revenue Courts.

See Jurisdiction.

See Tenancy Acts (Local).

See C P Code.

## Civil Court.

See C. P. Code, s. 9.

See Jurisdiction.

See Tenancy Acts (Local).

—Duty of, to co-operate with executive in attaching excisable articles. C P Code, S 60. 11 N L R 67=29 I C 339.

—Duty of—U B R 1902-1903, Vol II, Buddhist Law—Ecclesiastical. 1.

—Suit in re-opening question of title settled in revenue court in partition proceeding—Barred—U P Land Revenue Act. Ss. 111 and 114. 23 I C 965.

## Civ. Pro. Code (Act VIII of 1859).

—[Repealed Act 10 of 1877]

—S. 15—Adopted son not entitled to present possession—Title recognised within 12 years by adversaries—No suit need be brought. A I R 1925 Mad 497=48 M 1=93 I C 705.

—S. 15—Declaratory decree without possibility of consequential relief cannot be passed. A I R 1925 Mad 497=48 M 1=93 I C 705.

## Civil Procedure Code Act 23 of 1861.

[Rep. Act X of 1877.]

—Applicability of Sonthal Parganas jurisdiction. 18 C W N 994 (P. C.)

## Civil Procedure Code (Act 14 of 1882).

—Attachment—Withdrawal of—Transfer of property attached—No order withdrawing attachment—Validity of transfer. 13 A L J 750

—Test for purposes of court fee.

(1914) M W N 910.

—S. 2—Preliminary decree can be objected to in appeal from final decree without appealing from the preliminary in cases under C P C 1882. 21 C L J 459 = 24 I C 18.

## Civil Procedure Code (Act XIV of 1882)—(Contd.)

—S. 2—A dismissal order of an appeal for default is not a decree as defined in C P C 1882. An appeal was dismissed for default under C P C 1882 held that the only executable decree was that of the original Court and limitation for execution runs from the date of that decree. 5 O L J 252=47 I C 125.

—S. 13—An interlocutory order operates as res judicata unless forthwith challenged by an appropriate proceeding in a superior tribunal. A I R 1921 Cal. 699 = 34 C L J 415 = 70 I C 6.

—S. 13, Explan. (4)—Omission of in the New Code—Effect. 30 M L J 379.

—S. 36—Principal is bound by the acts of a pleader appointed by his special agent. A I R 1922 P C 225 = 26 C W N 376 = 24 Bom L R 606 = 30 M L T (P C) 109 = 48 I A 534 = 44 Mad 736 = 41 M L J 645 = 14 L W 244 = (1921) M W N 552 (P C) = 70 I C 281.

—S. 37 (a)—General and special power of Attorney diff. between—Diff. between old and new codes—Nature of document to be determined by contents, not by stamp duty. C P Code O 3 R 2 38 Mad 134.

—Ss. 102 and 103—Dismissal of suit for rent for default—No bar to suit for subsequent period. 22 I C 820

—S. 108—Ex-parte decree, set aside against some trial and second decree against all—Two decrees, merger of—Suit to set aside decree Fraud. 37 A 485=42 I A 171 (P C).

—S. 211—Mesne profits for 3 years from the date of the decree should be taken as awarded when under S. 211 they are awarded but no period for their calculation is prescribed in the decree. 1 L W 443 = 24 I C 484.

—S. 211—Distinguished from O 20 R 11 of New Code—Future mesne profits discretionary under old code. 2 I W 8.

—S. 211—Ascertainment of mesne profits—Proceedings are in execution under Code of 1882. A I R 1925 P C 117 = 26 P L R 243 = 48 M L J 482 = (1925) M W N 313 = 2 O W N 355 = 41 C L J 339 = 6 P L T 366 = 27 B L R 848 = 4 Pat. 507 = 52 I A 188 = 22 L W 7 = 30 C W N 361 (P C) = 88 I C 482; see also 2 P L T 245 = 1921 Pat. 158 = 61 I C 4.

—Ss. 211 and 396—Suit for partition—Order ascertaining rights of parties is not preliminary decree under Code of 1882. A I R 1923 Mad. 147 = 16 L W 297 = 43 M L J 406 = 46 M 47 = 74 I C 804.

—S. 211—"Decree" in s. 211 signifies the ultimate decree which alone has operative force and is capable of execution. A I R 1921 Cal. 699 = 34 C L J 415 = 70 I C 6.

—S. 211—Decree where necessary may be interpreted by reference to the judgment. A I R 1921 Cal. 699 = 34 C L J 415=70 I C 6.

—S. 211—In no case can the plaintiff claim mesne profits for any period subsequent to an

## Civil Procedure Code (Act XIV of 1882)—(Contd.)

offer by the defendant to restore him possession. A I R 1921 Cal. 699 = 34 C L J 415 = 70 I C 6.

—Ss. 230, 235 and 245—Application for Execution and powers of Court. U B R 1904, 1st. Qr. Execution of Decree, p. 1.

—Ss. 223 and 224—Duty of Court to which decree is transferred for execution. Lim. Act. Art. 182 (5). 31 M L J 300.

—Ss. 223, 224, 228 and 230—Proper court which is—Transfer of decree to another Court. 39 Mad. 640 = 31 M L J 300 = 36 I C 682 P C.

On appeal from 23 M L J 236 = 15 I C 738.

—Ss. 228, 230—Duty of Court to which decree is transferred for execution. 39 Mad. 640.

—S. 244—Decree against Hindu widow—Execution sale of right to share in the offerings—Suit to set aside sale for fraud—Bar. Shebaitship. 27 M L J 100 (P C).

—S. 244—Decree for partition—Compromise by father without leave of Court—Remedy of son to re-open the matter by application under S. 241. 26 M L J 460.

—S. 244—Sale-decree under Ss. 88 and 89 T P Act was obtained by B against F in 1888, to the execution of which F's adopted son A raised objections in 1904 under S. 241, some of which were disallowed. In 1907 A sued raising the old objections with some new parties without any reason to avoid S. 244 held that under the Sec. the suit was barred. 30 M L J 238 = 3 I W 257 = 32 I C 354 (P C).

—S. 244—"Representative"—Purchaser of a portion of non-transferable occupancy holding. 18 C W N 971.

—S. 244—A decree-holder purchasing his debtor's share in joint family property sued for partition held that the suit was competent and necessary as the executing Court cannot partition under S. 244. 1 Lah 134 = 1 Lah L J 10 = 56 I C 254.

—S. 248—Execution without notice being actually served is void. A I R 1921 Cal 609 = 25 C W N 972 = 64 I C 476.

—S. 248—Notice under S. 248 is necessary but not when such notice was given on a previous occasion. Notice to judgment-debtor's representative for transfer of decree cannot be taken under the Sec as notice upon a previous execution-application. Execution-order is nullity without notice if requisite. 26 C L J 180 = 41 I C 853 = 22 C W N 390.

—S. 248—Order for execution to be made by Court and not by Registrar—Delegation of functions to Registrar. *ultra vires* C P Code O 21, R 22. 20 C W N 889.

—S. 248—Execution against Official Assignee—Notice, Necessity for. 27 M L J 150 (P C).

## Civil Procedure Code (Act XIV of 1882)—(Contd.)

—S. 248—Revival of decrees of the original side—Notice to judgment-debtor—Necessary. Lim Act Art 188. 22 M L J 20.

—S. 253—Execution can proceed against surety for restitution under S. 253 as if he were the judgment-debtor. Though such execution may be had against family property, it cannot be after bona-fide partition after order but before attachment. Proviso added long after the enactment does not help interpretation. They are so often inserted *ex abundanti cautela*, with very little aid to interpretation. 27 M L J 112 = (1914) M W N 742 = 24 I C 474.

—Ss. 257, 257-A and 258—Bond for Rs. 300 payable in monthly instalments, made up of Rs. 195 decree-debt, Rs. 35 cash and Rs. 70 future interest was passed. The pff under S. 258 notified the satisfaction of the decree and it was so recorded. Then the pff applied for sanction under S. 257-A which was granted. The pff sued for thirteen instalments of the bond to which the def's plea was that bond provided for interest on decretal amount and was without Court's sanction. Held the bond as not one for satisfying the judgment debt and providing for the payment, directly or indirectly of sum exceeding the decretal sum. The suit must be decreed as it was an agreement for paying a sum by which the decree was satisfied with interest on that amount. 40 C 284.

—S. 257-A—Under S. 257-A every agreement for the satisfaction of a judgment-debt which provides for the payment directly or indirectly of any sum in excess of the sum due under the decree is void, unless it is made with the sanction of the Court which passes the decree. There is no essential difference between an agreement for the satisfaction of a judgment-debt and an agreement in satisfaction of the same.

A mortgage-bond for an amount in excess of the amount due under the decree and given in satisfaction of the decree held to fall under S. 257-A. 34 B L R 404 (408) = 138 I C 459 (2) = 1 R 1932 B 393 = A I R 1932 B 237 = A I R 1932 B 869.

—S. 257-A—The mere fact that some of the executants of the mortgage deed were not judgment-debtors under the decree in lieu of which the mortgage was taken will not affect the application of S. 257-A. 34 Bom L R 404 (409) = 138 I C 459 (2) = A I R 1932 B 237 = 1 R 1932 B 393 = A I R 1932 B 869.

—S. 257-A—Repeal of by C P C of 1908-S. 13 (c) of the Dekhan Agriculturists Relief Act not affected by. 34 B L R 404 (406-7) = 138 I C 459 (2) = A I R (1932) B 237 = 1 R 1932 B 393 = A I R 1932 B 869.

—S. 257-A—The Court, when informed that the decree has been satisfied, is not expected to go into the details as to how the

**Civil Procedure Code (Act XIV of 1882)—(Contd)**

decree is satisfied, and to allow the argument that S. 257-A has no application to a case in which the Court was informed of the fact of settlement in pursuance of the terms of S. 258 of C P C of 1882 or the corresponding provision in R. 2 of O XXI of the Code of 1908 will only open to decree-holders minded to be unfair a very easy contrivance to support transactions not sustainable under S. 257-A. 34 B L R 404 (409)=138 I C 459 (2)=A L R 1932 B 237=I R 1932 B 393=A L R 1932 B 369

—S. 257-A—Compromise between parties in execution need not be sanctioned by Court in express terms—Passing order in terms thereof amounts to sanction. 1 Lah L J 222.

—S. 257-A—Agreement for sum in excess of the decretal-debt made by a person other than the debtor whose legal representative was not brought on record on his death is not invalid. (1911) 1 M W N 96=8 M L T 326=9 I C 415.

—S. 257-A—Validity of an agreement under S. 257-A is not a question purely of law only. Agreements under the Sec. are not rendered illegal but are only unenforceable in execution or by a suit. The rule applies to execution proceedings and is beneficial to the debtor when it is decided to supersede a decree with an agreement to be enforced by a suit only the agreement is an adjustment under S. 258 and not in satisfaction of a decree. 35 Mad 75=21 M L J 709=9 M L T 487=(1911) 1 M W N 290=9 I C 875.

—S. 257-A—Agreement to pay with interest in instalments the sum decreed without interest was made Held that provision for interest was separable but was void for want of sanction. 38 Bom 219=15 Bom L R 1129=22 I C 284.

—S. 257 A—Money paid under an unsanctioned agreement to give time must be deducted from the decretal-debt. 21 M L T 351=41 I C 208.

—S. 257-A—Agreement to accept less than the decretal-debt in instalment is one to give time within S. 257-A and is void unless sanctioned Held that a suit for damages for its breach cannot be sustained where no sanction was obtained. 7 L W 503=(1918) M W N 292=24 M L T 16=45 I C 16.

—S. 257-A—An instalment agreement with interest and in default of regular payment the whole sum became payable was entered into in execution of a decree and compromise was noted and attachment raised held that it amounted to a sanction and the agreement was binding and interest was recoverable in execution and instalment cannot be delayed by reason of litigation

1 Lah L J 222.

—S. 257-A—Payment was made to the

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**Civil Procedure Code (Act XIV of 188)—(Contd)**

decree-holder for forbearance to execute, without the necessary sanction held that the payment contravened S 257-A and must be adjusted towards the decree. (1918) M W N 146=7 L W 36=43 I C 871.

—S. 257-A—After the repeal, sanction under S. 257-A is unnecessary. The agreements would be valid if for reasonable consideration, S. 63 contract Act is inapplicable to debtor's agreement with his decree holder and such agreement must have consideration. Any such agreement varying the decree need not be in writing and it is proveable orally.

24 I C 391.

—Ss. 263 and 264—The plffs informed the Court of their possession under a mortgage-decree but 8 years afterwards sued the defts., alleging their dispossession after 2 month's possession. The deft's plea was that no possession was given and as there was no execution the suit is incompetent. Held that definite procedure for symbolical possession must be strictly followed, any omission being material held, also that regularity of proceedings cannot be presumed when execution-records are available. 20 P R 1917=26 P L R 1917=22 P W R 1917=39 I C 753.

—S. 263—In execution of a decree for possession formal possession under S. 263 was given to the decree-holder. Within 12 years from such possession, a suit was brought on execution proceedings. Held that the judgment debtor tacitly acquiesced and the transfer of possession was legal and the debtor's subsequent possession amounts to a trespass and is not a continuation of the previous possession. 10 N L R 60=24 I C 850.

—Ss. 268 and 274—Debtor's interest in usufructuary mortgage was attached in execution. Held that the debt becoming due, it ought to be under S. 261 and the mortgagor paying to the judgment debtor in ignorance of such attachment is protected. 39 Mad. 389=28 M L J 338=28 I C 284.

—S. 269—A bond given under a rule framed under powers conferred by a sec is deemed to be in pursuance of an order of the Court made under the Code. 37 Mad. 17=24 M L J 637=20 I C 775 (F B).

—Ss. 274 and 276 :—A private transfer of immoveable property after an attachment order is passed but not actually effected is not invalid unless compliance with all the formalities under S. 274 are proved. 1 O L J 549=26 I C 204.

—Ss. 278 283 and O 21 Rr. 58—A Joint order that the property was jlt family property passing by survivorship and was therefore unattachable was passed on two claim petitions, one by the plff. who claimed them under sale prior to attachment, the other by the survivor. Held that the order was not against the plff. and they were not bound to



**Civil Procedure Code (Act XIV of 1882)—(Contd.)****Civil Procedure Code (Act XIV of 1882)—(Contd.)**

set aside the order as the attachment was raised even if it were so. 26 M L J 499 = 26 I C 532.

—Ss. 278, 282, 283, 284 and 287, Lim Act, Art. 11. 18 Bom. L R 782.

—S. 283—In a declaratory suit under S. 283, it was shown that the purchaser of judgment debtor's property paid less than the market value for retaining it in possession. Held that the plff. can sale the right, title and interest of the debtor i. e. of remaining in occupation. 21 C L J 302 = 28 I C 576.

—S. 285 When a property is attached by two Courts, a sale by a Court without jurisdiction can be set aside and for it a suit is unnecessary. (1914) M W N 796 = 25 I C 906.

—Ss. 294, 321—Benamidar for decree-holder mortgagee—Purchase at auction—Leave to bid, not obtained by decree-holder Effect of absence of leave. 21 Bom. L R 296.

—S. 294—Decree-holder purchasing without sanction, such purchaser is voidable not void. A I R 1922 P C 336 = 16 L W 190 = 3 P L T 523 = 31 M L T 209 = 49 I A 312 = 1 Pat. 733 = 21 A L J 23 = 27 C W M 294 = 44 M L J 718 = 37 C L J 430 = 25 Bom. L R 630 (P C) = 67 I C 914.

—S. 295—Limitation Act 1908, 13, Art. U B R 1904, 4th Qr. Limitation Act, sch. II, art. 13.

—S. 295—Money paid into Court, whether payment under section. Mad. Civil rules of Practice. (1914) M W N 309.

—Ss. 310 A, 312, 588, 612—An order under S. 312 or for refusing to cancel a sale under S. 310—A cannot be revised in the first instance as being appealable under S. 588. 4 M L T 96.

—S. 310—A—Applicability to sale under public Demands Recovery Act. 18 C W N 766.

—S. 310—A—Execution sale of holding—Deposit of decree amount by transferee—Withdrawal by landlord without objection—Landlord estopped from pleading no interest in the holding. 43 I C 732.

—S. 311—The C P C 1908 does not retrospectively affect the order and a second appeal lies against an order under S. 244 C P C 1882 rejecting an application for setting aside fraudulent and irregular sale. 22 C L J 266 = 16 I C 290.

—S. 311—Contrasted with provisions of O 21, R 90 of C P Code. 1 L W 1033.

—S. 311—A transferor of a portion of non-transferable occupancy holding can apply under O 21 R 90 to set aside the sale in execution of rent-arrears decree. If such entire holding is transferred, the tenancy is terminated and the tenant abandons the holding but if a portion is transferred, there is no forfeiture, the tenancy subsists and the

tenant is liable for rents. 19 C W N 326 = 23 I C 839.

—S. 315—Execution purchaser, when he discovers that the judgment-debtor had no saleable interest in the property sold, can sue for refund of purchase-money, and is not restricted to the special procedure in execution mentioned in s. 315. A I R 1923 Cal 85 = 36 C L J 132 = 27 C W N 1 = 50 C 115 = 70 I C 606.

—Ss. 313, 315—Auction Sale under—Sale of property in which judgment-debtor had no saleable interest—Purchaser's right to refund of money—Suit or application O 21, R 93. 40 Mad 1009.

—S. 316—*Lis pendens*—Auction sale—Subsequent suit for maintenance—Subsequent confirmation—Effect, T.P Act Ss. 52. (1915) M W N 15.

—S. 317, —S. 317 does not bar a suit for confirming possession of immoveable property against certified purchaser's private transferee as plff's benamidar. 32 I C 963.

—S. 317—"Certified purchaser" in S. 317 does not include his transferee and the real purchaser can put forth his claim, but when it is for defeating justice, the transferee can prevent the real purchaser from obtaining it. 19 C L J 330 = 19 I C 909.

—S. 317—Purchaser at fictitious Court sale if protected. Lim. Act, Art 113. 27 M L J 93 (P C).

—S. 317—Whether applicable to fictitious suits, decree and sales in execution. 18 C W N 133 = 22 I C 86.

—S. 319—Order giving symbolical possession under S. 319 on auction-purchaser's application after 3 years after sale-confirmation is not a nullity. It can be passed by the Court on its own motion and there is no fixed period. 40 I C 605.

—S. 325-A—S. 325-A does not affect the Collector's lessee. His alienation binds him even though the lease provides for transfer being voidable at the lessor's instance. 16 N L R 64.

—S. 325-A—A transfer contravening S. 325-A is void and S. 43 T P Act is inapplicable to it. Per Mitra A J C—Equitable rule of S. 43 T P Act does apply to it. 13 N L R 130 = 42 I C 200 (F B).

—S. 325-A—A transfer contravening S. 325-A is void with no legal effect. 35 M L J 733 = 16 A L J 993 = 14 N L R 181 = 48 I C 312 = 45 I A 219 = 46 Cal 183 = 23 C W N 350 = 29 C L J 201 = 25 M L T 64 = 9 L W 327 = 21 Bom L R 541 = 1 U P L R (P C) 14 (P C).

—S. 335 O 21, R 103—Conclusive effect of the order mentioned, applicable to both plff and deft. 38 I C 218.

—S. 335—Order disallowing obstructor's objection was not given effect to by the



## Civil Procedure Code (Act XIV of 1882)—(Contd)

auction-purchaser and he sued the person in possession after 3 years. Held there was no estoppel for the debts under S. 335 even though, if previous possession was given and no suit was brought within a year they would have been bound by it. 23 M L T 233 = 45 I C 24.

—S. 335—An order for joint possession of the decree-holder with the claimant made on petition under S. 335 is final subject to claimant's suit. When the claim for joint possession was disallowed and he was not evicted claimant has the right to sue. 1914 M W N 897=27 I C 90.

—S. 335—A stranger claiming to be in possession of the property and offering obstruction to an auction-purchaser is bound by an order under s. 335 passed after notice to him. A I R 1921 Bom 122=23 Bom L R 62=45 B 573=61 I C 764.

—S. 335—On the application of the auction-purchaser notice under s. 335 for removal of obstruction was issued to a person in possession of the property who had been a party to the suit but had not been party to the compromise on which the decree was passed. The Judge passed an order against him wrongly holding that he was bound by the decree. The order is one under s. 335. A I R 1921 Bom 122=45 B 573=23 Bom L R 62=61 I C 764.

—Ss. 336, 337, 344, 357—Insolvency under Civ. Pro. Code. 9 O C 42 (B).

—Ss. 336, 341, 344, 349—Arrest. 8 M 503.

—S. 354—Where proceedings in Insolvency are taken under the Civil Procedure Code of 1882 the whole property of the insolvent vests in the Receiver whether mentioned in the application or not, Punjab Laws Act does not apply. A I R 1922 Lah. 103=4 Lah. L J 164 = 62 I C 929.

—Ss. 355, 356, 358—An application was made to the Insolvent Estate Court by the insolvent to order the Receiver to pay the surplus, which was rejected held that the order of discharge must be presumed under S. 355 as soon as it was complied with and S. 358 would be applicable and the petitioner was entitled to surplus under S. 356. 26 P L R 1810=8 I C 222.

—S. 367—Compromise by head of Mutt with junior Pandarasamudhi not to dismiss him bad—Decree not to be set aside altogether. 30 M L J 274.

—Ss. 367 and 368—Death of defendant—Pending suit—Duty of Court of decide representative. Charge. 19 C L J 19.

—Ss. 368, 588 Cl. (18)—Order of abatement—Appeal. 129 P L R 1917.

—S. 371—Mortgagor's first redemption suit filed in his personal right abated on his death during its pendency His son again sued as a co-parcener held that as the first suit was not in a representative capacity, under

## Civil Procedure Code (Act XIV of 1882)—(Contd)

s. 371 the second suit was not barred. 40 Bom. 248 = 18 Bom L R 33 = 33 I C 771.

—S. 372—Party substituted not bound unless served with summons, attachment. 27 M L J 150 (P C)

—S. 373 S. 10 O 23 R 1—Suit, withdrawal of, with liberty to bring a fresh suit, on payment of costs—non Payment of—Subsequent suit, whether barred. 19 C L J 529.

—S. 373—Where the plff. was permitted to withdraw from the suit on petition under s. 373, the order must be read with petition and interpreted as permitting to institute a new suit. 34 M L J 515 = 44 I C 889.

—S. 373—Withdrawal of suit on payment of costs—Institution of suit without payment. O 23. R 1 23 I C 210.

—S. 375—A compromise-decree creating mortgage and directing sale in default of punctual payment is a mortgage decree and so executable. An agreement on which such a decree is passed is lawful under s. 375 and the decree is not one without jurisdiction. Registration is unnecessary as falling under s. 17 Exce. (6) Regis. Act. A penalty contained in a consent-decree can be relieved against. 37 I C 764.

—S. 375—Question of correctness of a decree under s. 375 must be raised not in execution but in appeal. A consent decree for Rs. 2,750 was passed by a Dt. Munsiff which was objected to in execution on the ground of pecuniary jurisdiction Held that the jurisdiction is decided not by the relief given but by the suit—valuation in the plaint and even if a decree be without jurisdiction it cannot be objected to in execution 27 M L J 388 = 15 M L T 415 = 1 L W 446=24 I C 135.

—S. 375 A—Execution application cannot be with drawn with liberty to file a fresh one. 36 All. 172 = 12 A L J 253 = 22 I C 961.

—Ss. 375 and 462—Guardian appointed by Court of Wards—Compromise without leave of Court is valid. 48 C 469 = 48 I A 27 = 19 A L J 171 = 40 M L J 201 = (1921) M W N 115 = 29 M L T 202 = 33 C L J 211 = 23 Bom L R 698 = 25 C W N 797 = 14 L W 253 (P C) = 59 I C 911.

[ On appeal from 37 I C 971 ]

—S. 392—Under s. 392 local investigation may be held to supplement evidence. The map is surely a correct record of boundaries of estates and villages when a possessory suit is based on Thakbust map. 24 I C 618.

—S. 443—Where a certificated guardian was proposed for appointment as guardian *ad litem* the Court might presume his consent A I R 1921 Cal 584=34 C L J 302=66 I C 433.

—S. 444—Appointment of Guardians. A W N 1907, 225=29 A 675.

—S. 454—"Married woman" means a femme couverte as opposed to femme sole and not to a widow. 17 O C 318=1 C L J 503=25 I C 917.

## Civil Procedure Code (Act XIV of 1882)—(Contd.)

## Civil Procedure Code (Act XIV of 1882)—(Contd.)

S. 462—Guardian appointed under Bengal Court of Wards Act, 1879 can compromise proceedings without leave of Court. A I R 1921 P C 22 = 48 C 469 = 19 A L J 171 = 23 Bom. L R 698 = 33 C L J 211 = 25 C W N 797 = 40 M L J 201 = 14 L W 253 = (1921) M W N 115 48 I A 27 = 29 M L T 202 = 59 I C 911

—S. 470—The word 'Person' in s. 470 is wide enough to cover a corporate body like the Court of Wards. A I R 1931 Oudh 177 = 8 O W N 349.

—S. 470—The Court of Wards is entitled to file an interpleader suit, and the mere fact that no such capacity to sue has been conferred upon it under s. 48 of the old Court of Wards Act does not oust the jurisdiction of the Civil Court to take proceedings under s. 470. upon the plaint filed by Court of Wards.

A I R 1931 Oudh 177 = 8 O W N 349.

—S. 491—Compensation, L B R 1893-1900 411.

—Ss. 491, 497—An order compensating improper attachment is appealable. 11 I C 349.

—S. 522—A decree based on award under S. 522 is unappealable. When appellant's guardian did not apply for setting aside award within limitation under S. 158 held that award decree cannot be interfered within revision. Time for filing objections cannot be extended. 18 C W N 626 = 18 C L J 35 = 17 I C 7.

—Ss. 525 and 526—Arbitration decree on award under S. 526 cannot be appealed against or revised. 14 P L R 1911 = 7 P W R 1911 = 9 I C 38.

—S. 539—In applying S. 539 and appointing new trustees and setting a scheme, the Court should consider the founder's wishes, institution's past history and other circumstances. It may also lay down rules for facilitating management and appointing trustees. 20 C W N 1118; 24 C L J 198; 31 M L J 290; 20 M L J 110; (1916) 1 M W N 460; 43 C 1085; 8 L B R 517; 14 A L J 741; 4 L W 269; 18 Bom. L R 611; 9 Bur. L T 141; 35 I C 30; 43 I A 127 (P C). (On appeal; from 5 Bur. L T 221 = 18 I C 105).

—S. 539—Mutt—Head ex-officio of temple—Suit for removal if maintainable—Power of Court, 32 M L J 271.

—S. 539 (S. 92 C P C 1908)—For managing a mosque and election of trustees a scheme was framed. In a subsequent quarrel for a trustee's election it was declared valid held the order was in execution of a decree of court by which the scheme was framed and was appealable. 7 Bur. L T 298 = 24 I C 915.

—S. 539—Suit under—Removal of trustee not to be ordered—Distinction between old Code and new. 34 I C 551.

—S. 539—Permission granted under s. 539 is not limited to any particular species of suits mentioned therein. A I R 1921 P C 123 = 48 C 493 = 48 I A 12 = 25 C W N 794 = 13

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—S. 583—Application or restitution—Reversing decree—Direction to restore benefit, implied—Execution C P Code s. 144. 29 I C 380.

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—S. 583—Decree for redemption against mortgagee with possession was reversed on appeal and in execution of first Court's decree mortgagee applied to it for recovering mesne profits during dispossession and a decree for Rs. 5000 was obtained and in its execution plff's equity of redemption was purchased by the decree-holder and the application for setting aside sale was refused held in mortgagor's assignee's redemption suit Sub-Judge can decree mesne profits as restitution and the aggrieved persons can appeal or apply for revision. 38 All 163 = 20 C W N 425 = (1916) 1 M W N 234 = 3 L W 293 = 18 Bom L R 382 = 19 M L T 206 = 23 C L J 411 = 33 I C 505 = 43 I A 43 (P C).

—S. 584—Second Appeal—Finding of fact—No jurisdiction of High Court to interfere in. Mad. Rent Recovery Act s. 53. 37 Mad 443 (P C).

—S. 588—Difference between this and new s. 104. Letters patent (Cal.) cl. 15. 20 C W N 594.

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( ACT. V OF 1908 )

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" 13	76	76	...	...	" 6	111	111	...	121
" 14	77	77	...	61	" 7	...	...	...	...
" 15	78	78	...	53	" 8	...	...	...	...
" 16	79	79 & 80	...	54	" 9	112	112 & 113	...	122
" 17	80	80	...	55	" 10	113	370	...	106
" 18	81	81	...	56	O. 9 R. 1	96	96	...	109
" 19	82	82	...	57	" 2	97	97	5	...
" 20	84, 83	83, 84, 82	...	57, 58, 85	" 3	98	98, & 99	...	110
" 21	82 para. 2	85	...	59	" 4	99	98, & 99	...	110
" 22	86	86	...	...	" 5	99-A	...	...	...
" 23	85	85	...	59	" 6	100	101, 101	...	111 112
" 24	87, 88	87, 88	...	...	" 7	101	100 & 101	...	113
" 25	89	89 & 104	...	60	" 8	102	102 & 103	...	114
" 26	91	90, 92	...	66	" 9	103	103, 108,	...	119
" 27	422	422 & 468	...	62, 68	" 10	105	109, 588,	...	116
" 28	468	468, 561	...	62, 348	" 11	106	105 & 106	...	116
" 29	468	468	...	62	" 12	107	107	...	117
" 30	91, 92	91, 92	...	64, 65	" 13	108	108, 109,	...	119
O. 6, R. 1	...	...	...	...	" 14	109	109	...	...
" 2	...	...	...	...	O. 10, R. 1	117	117	...	...
" 3	...	...	...	...	" 2	118	118 & 119	...	125
" 4	...	...	...	...	" 3	119	119	...	125
" 5	...	...	...	...	" 4	120	120	...	127
" 6	...	...	...	...	O. 11, R. 1	121	...	...	...
" 7	...	...	...	...	" 2	...	...	...	...
" 8	...	...	...	...	" 3	...	...	...	...
" 9	...	...	...	...	" 4	...	...	...	...
" 10	...	...	...	...	" 5	...	...	...	...
" 11	...	...	...	...	" 6	125	125	...	...
" 12	i,	...	...	...	" 7	...	...	...	...
" 13	...	...	...	...	" 8	126	126	...	...
" 14	51	51 & 52	...	27	" 9	...	...	...	...
" 15	51	51 & 52	...	27	" 10	...	...	...	...
" 16	...	...	...	...	" 11	127	127	...	...
" 17	Cf. 53	Cf. 53	...	29	" 12	129	129	...	...
" 18	Cf. 53	Cf. 53	...	29	" 13	...	...	...	...
O. 7, R. 1	50	50	...	26	" 14	130	130	...	...
" 2	50	50	...	26	" 15	131	131	...	...
" 3	50, cl. 3	50, cl. 3	...	26	" 16	...	...	...	...
" 4	50, para. 4	50, cl. 4	...	26	" 17	...	...	...	...
" 5	50, para. 5	50, cl. 5	...	26	" 18	133 & 134	133 & 134	...	...
" 6	50, para. 6	50, cl. 6	...	26	" 19	...	...	...	...
" 7	...	...	...	...	" 20	135	135	...	...
" 8	...	...	...	...	" 21	136	136	...	...
" 9	58	57, 58	...	38	" 22	...	...	...	...
" 10	57	41	...	30, 50	" 23	...	...	...	...
" 11	53, 54	53, 54	...	29, 31, 32	O. 12 R. 1	...	...	...	...
" 12	55	55	...	...	" 2	...	...	...	...
" 13	56	56 59	...	36	" 3	...	...	...	...
" 14	59	58, 62 &	...	39	" 4	...	...	...	...
" 15	60	63	...	...	" 5	...	...	...	...
" 16	61	60	...	...	" 6	...	...	...	...
" 17	62	61	...	...	" 7	...	...	...	...
" 18	63	58, 62, 63	...	39	" 8	...	...	...	...
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O.12.R. 8	"	...	...	...	O.18.R.14	190	190	...	172
" 9	"	...	...	...	" 15	191	191	...	...
O.13.R. 1	138, 140	138, 140	...	128, 129	" 16	192	192	...	173
" 2	139	138 & 139	...	128	" 17	New.	...	...	...
" 3	140	140	...	129	" 18	"	...	...	...
" 4	141	141	...	132	O.19.R. 1	194	194	...	...
" 5	141-A	141	...	132	" 2	New	...	...	...
" 6	142	142	...	134	" 3	196	196	...	...
" 7	142-A	142	...	134	O.20.R. 1	198	198	...	183
" 8	143	...	...	...	" 2	199	200	...	184
" 9	144	144	...	135, 136	" 3	202	{ 201, 202 } & 203	...	185
" 10	187	137	...	137	" 4	203	{ 201 202 } & 203	...	185
" 11	145	...	...	138	" 5	204	204	...	186
O.14.R. 1	146	146	...	139	" 6	206 & 221	257 & 258	...	189 & 206
" 2	146, cl. 6	146, cl. 6	...	139	" 7	205	204, 205 & 206	...	189
" 3	147	147	...	139	" 8	...	...	...	...
" 4	148	148	...	140	" 9	207	207	...	190
" 5	149	149	...	141	" 10	208	208	...	191
" 6	150	150	...	142	" 11	210	210	...	194
" 7	151	151	...	143	" 12	211 & 212	211 & 212	...	196 & 197
O.15. 1	152	...	...	144	" 13	213	213	...	...
" 2	153	...	...	...	" 14	214	214	...	...
" 3	154	154	...	145	" 15	215	215	...	...
" 4	155	155	...	145	" 16	215 A	...	...	...
O.16.R. 1	159	159	...	149	" 17	...	...	...	...
" 2	160	160	...	151	" 18	New.	...	...	...
" 3	161	161	...	151	" 19	216	216	...	195
" 4	162	162	...	151	" 20	217	217	...	198
" 5	163	163	...	152	O.21.R. 1	257	257	...	206
" 6	164	164	...	153	" 2	258	258	...	206
" 7	165	165	...	154	" 3	...	...	...	...
" 8	166	167	...	...	" 4	223 (5)	223 (5)	...	...
" 9	167	...	...	159	" 5	223 para(6)	223 (6)	...	...
" 10	168	168	...	160	" 6	224	224	...	...
" 11	169	169	...	160	" 7	225	225	...	286
" 12	170	170	...	160	" 8	226	226	...	286
" 13	New.	...	...	...	" 9	227	227	...	287
" 14	171	171	...	...	" 10	230 (1)	230 & 23	...	207
" 15	172	172	...	167	" 11	{ 256 235	256 235	13	...
" 16	173	...	...	...	" 12	236	236	...	212
" 17	174(1), 175	174, 175	...	168, 169	" 13	237	237 & 238	...	213
" 18	174	174	...	169	" 14	238	237 & 238	...	213
" 19	176	...	...	...	" 15	231	230 & 231	...	207
" 20	177	...	...	...	" 16	232	232	...	208
" 21	...	177	...	126, 170	" 17	245	245	15	...
O.17.R. 1	156	156	...	146	" 18	246	{ 233, 243 & 246	...	209
" 2	157	157	...	147	" 19	247	247	...	...
" 3	158	158	...	148	" 20	New.	...	...	...
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" 3	180	180	...	...	" 23	249	249	...	247
" 4	181	181	...	172	" 24	{ 250 251 paral	250 251(1), 343	...	221
" 5	182	182	...	172	" 25	{ 343 & 251 343	343 & 251	...	222
" 6	183	183	...	172	" 26	239 & 240	239 & 240	...	272
" 7	185-A (3)	...	...	...	" 27	941	241	...	290, 291
" 8	184	184	...	172					293
" 9	185	185	...	172					
" 10	186	186	...	172					
" 11	187	187	...	172					
" 12	188	188	...	172					
" 13	189	189	...	172					

Comparative Table.

1908	1882	1877	1861	1859	1908	1882	1877	1861	1859
O 21, R. 28	242	242	...	292	O. 21, R. 73	292	292	...	...
" 29	243	233, 243	...	209	" 74	...	...	...	...
" 30	254	& 246	...	201 & 232	" 76	296	286 & 296	...	248
" 31	259	254	...	200	" 77	297	297	...	251
" 32	260	259 & 260	...	200	" 78	298	298	...	252
" 32 (5)	O. 42, R. 30	259 & 260	...	200	" 79	299, 300	299	...	261 & 266
" 33	...	...	...	...	" 80	& 301	302	...	267
" 34	261 & 262	261 & 262	...	202	" 81	302	303	...	...
" 35	263	263	...	199 & 223	" 82	303	303	...	...
" 36	264	264	...	224	" 83	304	304	...	...
" 37	245-B.	...	...	...	" 84	305	305 & 503	...	243
" 38	337	251, 343	...	222	" 85	306	306	...	253
" 39	339 & 340	339, 340	...	276 & 279	" 86	307	307	...	254
" 40	337-A.	...	...	...	" 87	308	293, 307	...	254
" 41	267	267	...	219	" 88	& 308	309	...	255
" 42	255	255	...	...	" 89	309	310	...	...
" 43	269	269	...	233	" 90	310	310	14	...
" 44	...	...	...	...	" 91	310-A	...	...	...
" 45	...	...	...	...	" 92	311	311, 314	...	256
" 46	268	268 & 301	...	236, 239	" 93	312	312, 311	...	...
" 47	...	274, 276	...	& 240	" 94	313	313	...	...
" 48	...	...	...	...	" 95	312 & 314	& 314	...	257 & 256
" 49	...	...	...	...	" 96	315	315	...	258
" 50	...	...	...	...	" 97	316	316	...	259
" 51	270	269	...	233	" 98	318	318	...	263
" 52	272	270 & 272	...	237 & 238	" 99	319	319	...	264
" 53	273	273	...	...	" 100	328 & 334	328, 299	...	226, 261
" 54	274	274	...	235 & 239	" 101	329 & 330	& 334	...	266 & 268
" 55	275	275	...	245	" 102	CF. 331, 335	329, 330	...	227 & 228
" 56	277	277	...	242	" 103	331 & 335	331 & 335	...	229 & 269
" 57	...	...	...	...	" 104	332	332	...	230
" 58	278	278, 280,	...	246	" 105	332, 335	333	...	231
" 59	279	281 & 283,	...	...	" 106	333	333	...	...
" 60	280	278, 279,	...	...	" 107	332, 335	...	...	...
" 61	281	280, 281	...	246	" 108	361	361	...	99
" 62	282	& 283	...	246	" 109	362	362	...	100
" 63	283	278, 280,	...	246	" 110	363, 365	363 & 394	...	101, 102
" 64	284	281 & 283,	...	246	" 111	366	365 & 366	...	104
" 65	286	278, 280,	...	246	" 112	367	368	...	103
" 66	287	281 & 283	...	246	" 113	O. 37, R. 1	367	...	...
" 67	289	282	...	...	" 114	359	347, 350	...	281
" 68	290	271, 280	...	246	" 115	370	353 & 359	...	106
" 69	291	281 & 283	...	246	" 116	372 A & 371	370	...	...
" 70	287	284	...	246	" 117	372	371	...	...
" 71	293	286 & 296	...	248	" 118	582	372	...	...
" 72	294	287, 289	...	249	" 119	last para	582,	...	...
" 73	294	& 290	...	249	" 120	last para	582,	...	...
" 74	294	287, 289,	...	249	" 121	last para	last para	...	97
" 75	294	290	...	249	" 122	373	373, 374	...	97
" 76	294	287, 289	...	249	" 123	374	373, 374	...	98
" 77	294	& 291	...	249	" 124	375	375	...	...
" 78	294	287,	...	249	" 125	375 A.	...	...	...
" 79	294	last para	...	249	" 126	376	376	...	...
" 80	294	289 & 291	...	249	" 127	377	377	...	...
" 81	294	293, 307	...	254	" 128	378	378	...	...
" 82	294	& 308	...	254	" 129	379	379	...	...
" 83	294	294	...	...	" 130	380, 380	380 &	...	34 & 35
" 84	294	294	...	...	" 131	(2) & 381	381	...	...



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0.26.R. 1	383	383, 384	...	175	" 2	438	438	...	...
" 2	384	& 385	...	175	" 3	439	...	...	...
" 3	385	384	...	175	0.32R. 1	440	440	...	...
" 4	386	385	...	175	" 2	442	442	...	...
" 5	387	383, 384	...	175 & 176	" 3	443, 446	443, 446	...	...
" 6	388	385, 386	...	177 & 178	" 4	445, 456	443, 456	...	...
" 7	389	387	...	...	" 5	440 & 443	445, 440	...	...
" 8	390	...	...	...	" 6	441, 444	441	...	...
" 9	392	389, 390	...	179	" 7	461	461	...	...
" 10	393	390	...	179	" 8	462	462	...	...
" 11	394	392, 393,	...	180 &	" 9	447	444	...	...
" 12	395	398, 399	...	307	" 10	446	446	...	...
" 13	396	& 409	...	...	" 11	448, 449	448	...	...
" 14	396par2&3	392, 393,	...	180	" 12	458, 459	458, 459	...	...
" 15	397	398, 399	...	181	" 13	450 to 453	450 to 453	...	...
" 16	398	394, 395	...	181	" 14	454	...	...	...
" 17	399	400	...	181	" 15	455	...	...	...
" 18	400	394, 395,	...	181	" 16	460, 463	463	...	...
0.27.R. 1	...	400	...	181	0.33R. 1	464	464	...	297
" 2	417	37, 38, 417,	...	17 cl. 3	" 2	401	401	...	299, 300
" 3	418	432 & 49	...	& 26 cl. 6	" 3	403	403	...	301
" 4	419	50, 417,	...	...	" 4	404	404	...	304
" 5	420	418, 435	...	...	0.33.R. 4	406	406, 407	...	302, 304
" 6	421	49, 50, 417,	...	26	" 5	405, 407	405, 407	...	305
" 7	423	418, 435	...	52, 67	" 6	408	408	...	306
" 8	426, 427	419	...	67	" 7	409	409	...	308
0.28.R. 1	465	419, 420,	...	67	" 8	410	410	...	...
" 2	466	421	...	69	" 9	414	414	...	309
" 3	467	423	...	71	" 10	411	411	...	...
0.29.R. 1	435	427	...	19	" 11	412	412	...	...
" 2	436	465	...	20	" 12	...	...	...	...
" 3	436	466, 467	...	20	" 13	...	...	...	...
" 4	435	466, 467	...	26	" 14	...	...	...	310
" 5	436	49, 50, 417,	...	45, 63	" 15	413	413	...	...
" 6	436	418, 435	...	45, 63	" 16	415	...	...	...
" 7	436	69, 436	...	...	0.34.R. 1	T. P. Act.	...	...	...
" 8	436	436	...	...	" 2	S. 85	85	...	59
" 9	436	...	...	...	" 3	T. P. Act.	...	...	...
" 10	436	...	...	...	" 4	S. 86.	...	...	...
" 11	436	...	...	...	" 5	T. P. Act.	...	...	...
" 12	436	...	...	...	" 6	S. 87.	...	...	...
" 13	436	...	...	...	" 7	T. P. Act.	...	...	...
" 14	436	...	...	...	" 8	S. 88.	...	...	...
" 15	436	...	...	...	" 9	T. P. Act.	89	...	60
" 16	436	...	...	...	" 10	S. 89.	...	...	...
" 17	436	...	...	...	" 11	T. P. Act.	...	...	...
" 18	436	...	...	...	" 12	S. 90.	...	...	...
" 19	436	...	...	...	" 13	92	92	...	65
" 20	436	...	...	...	" 14	93	...	Sec. 2	...
" 21	436	...	...	...	" 15	94	...	...	...
" 22	436	...	...	...	" 16	96	96	...	109
" 23	436	...	...	...	" 17	97	...	Sec. 5	...
" 24	436	...	...	...	" 18	99	98, 99	Sec. 7	110
" 25	436	...	...	...	0.35.R. 1	471	471	...	...
" 26	436	...	...	...	" 2	472	472	...	...

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1908	1882	1877	1861	1859	1908	1882	1877	1861	1859
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" R.4	473	473	...	...	" 16	555	555	...	...
" 5	474	474	...	...	" 17	556	556	...	346
" 6	475	...	...	328	" 18	557	97 & 557	5	...
O.36, R.1	527	527	...	328	" 19	558	558	...	347
" 2	528	528	...	329	" 20	559	559	...	73
" 3	529	529	...	330	" 21	560	560	...	...
" 4	530	530	...	331	" 22	561	561	...	348
" 5	531	531	...	...	" 23	562	562	...	351
O.37, R.1	538	...	...	...	" 24	565	565	...	353
" 2	532	532	...	...	" 25	566	566	...	354
" 3	533	533	...	...	" 26	567	567	...	354
" 4	534	534	...	...	" 27	568	568	...	355
" 5	535	...	...	...	" 28	569	569	...	356
" 6	536	536	...	...	" 29	570	570	...	357
" 7	537	...	...	74, 75	" 30	571	571	...	349 & 359
O.38, R.1	477, 478	477, 478	...	75, 76	" 31	574	574	...	359
" 2	479	479, 588	...	...	" 32	577	577	...	350
" 3	480	480	Sec. 24	78	" 33	O.58, R. 4	...	...	...
" 4	481	481	...	81, 82, 83	" 34	576	576	...	359
" 5	483, 484	483, 484	...	84	" 35	579	579	...	360
" 6	485	485	...	85	" 36	580	580	...	360
" 7	486	486	...	86	" 37	581	581	...	361
" 8	487	487	...	87	O.42, R. 1	587	587	...	37
" 9	488	488	...	89	O.43, R. 1	588	588	...	36, 94
" 10	489	489	...	...	" 2	590	590	...	363 & 365
" 11	490	490	...	...	" 1	592	592	...	366
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" 2	493	504	...	93	O.45, R. 1	598	598	...	...
" 3	494	493 & 496	...	95	" 2	600	600	...	...
" 4	496	494	...	93	" 3	...	...	...	...
" 5	495	493 & 496	...	...	" 4	...	...	...	...
" 6	498	...	...	...	" 5	...	...	...	...
" 7	499	498	...	...	" 6	601	601	...	...
" 8	500	499	...	...	" 7	602	602	...	...
" 9	501	...	...	91	" 8	603	...	...	...
" 10	502	501	...	...	" 9	604	...	...	...
O.40, R.1	503	502	...	95 & 243	" 10	605	...	...	...
" 2	503	494	...	...	" 11	606	606	...	...
" 3	503	305 & 503	...	95 & 243	" 12	607	...	...	...
" 4	...	503	...	95 & 243	" 13	608	608	...	...
" 5	504	...	...	92	" 14	609	...	...	...
O.41, R.1	541	...	...	...	" 15	610	610	...	...
" 2	542	492, 503 &	...	333 & 335	" 16	611	...	...	...
" 3	543	504	...	334	O.46, R. 1	617	617	28	...
" 4	544	541	...	336	" 2	618	619	29	...
" 5	545	542	...	337	" 3	619	619	32, 33	...
" 6	546	543	...	338	" 4	620	620	34	...
" 7	547	544	...	...	" 5	621	621	...	...
" 8	...	545	...	...	" 6	646.A	...	...	...
" 9	548	546	...	...	" 7	646.B	...	...	...
" 10	549	547	Sec. 36	340	O.47, R. 1	623	623	...	376
" 11	551	...	...	...	" 2	624	624	...	...
" 12	552	548	...	341	" 3	625	625	...	...
" 13	550	549	...	342	" 4	626	626	626 & 629	378
" 14	553	551	...	...	" 5	627	...	...	...
		552	...	344	" 6	628	627	...	379
		550	...	343	" 7	629	629	...	...
		553	...	345	" 8	630	630	...	380

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1908	1882	1877	1861	1859	1908	1882	1877	1861	1859
O.47.R. 9	629 last para.	629	...	...	Sch. 3. R.4	322-B	...	...	...
O.48.R. 1	93	93	2	...	" 5	322-C	...	...	...
" 2	94	...	...	...	" 6	322-D	...	...	...
" 3	644	644	...	...	" 7	323	322	...	...
O.49.R. 1	636	...	...	...	" 8	324	324	...	...
" 2	...	...	...	...	" 9	324-A	325	...	...
" 3	638	...	...	...	" 10	325	321	...	...
O.50.R. 1	...	...	...	...	" 11	325-A	...	...	...
O.51.R. 1	...	...	...	...	" 12	325-B	...	...	...
Second Schedule.					" 13	325-C	...	...	...
Sch.2R. 1	506	506	...	312 & 313	"	...	10	...	4
" 2	507 para.	507, para. 1	...	314	"	...	17	...	5
" 3	508	508	...	315	"	...	114	...	123
" 4	509	509	...	316	"	...	115	...	123
" 5	510, 507 (2) & 511	507, 510, 511, 512	...	314, 319	"	...	116	...	124
" 6	512	510, 511 & 512	...	319	"	...	143	...	39 & 134
" 7	513	513	...	317	"	...	209	...	193
" 8	514	514 & 515	...	318	"	...	224	...	285
" 9	515	514 & 515	...	318	"	...	236	...	214
" 10	516	422 & 468	...	62	"	...	245	...	215
" 11	517	517	...	321	"	...	300	...	262
" 12	518	518 & 519	...	322	"	...	301	...	265
" 13	519	518 & 519	...	322	"	...	328	...	226
" 14	520	520	...	323	"	...	331	...	229
" 15	521	521	...	324	"	...	335	...	269
" 16	522	522	...	325	"	...	345	...	273, 280
" 17	523	523 & 524	...	326	"	...	346	...	273, 280
" 18	Cf.S.19Act IX of 1899	...	...	...	"	...	358	...	282
" 19	524	523 & 524	...	326	"	...	369	...	105
" 20	525	525 & 526	...	327	"	...	402	...	292
" 21	526	525 & 526	...	327	"	...	406	...	303
" 22	Cf.S.3Act IX of 1899	...	...	...	"	...	426	...	70
" 23	...	...	...	...	"	...	491	...	88
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Sch 3 R.1	321	322	...	...	"	...	540	...	332
" 2	322-A	323	...	...	"	...	564	...	352
" 3	...	...	...	...	"	...	572 & 573	...	...
					"	...	574 & 576	...	359
					"	...	583	...	362
					"	...	592 & 593	...	367 & 370
					"	...	630	...	380
					"	...	643	16 & 19	...
					"	...	649	...	296
					"	...	650	...	220
					"	...	652	40	...

COMPARATIVE TABLE OF THE SECTIONS OF THE CODE OF  
1882 AND 1908

C. P. C., 1882.	C. P. C., 1908.	C. P. C., 1882.	C. P. C., 1908.	C. P. C., 1882.	C. P. C., 1908.
1	S. 1.	47	Cf. O. 2, rr. 6, 7.	99-A	O. 9, r. 5.
2	S. 2.	48	S. 26, O. 4, r. 1.	100	O. 9, r. 6.
3	Ss. 154, 156, 157, 158.	49	Cf. S. 137.	101	O. 9, r. 7.
4	S. 4.	50	O. 7, rr. 1, 2, 4, 5, 6.	102	O. 9, r. 8.
4-A	S. 5.	51	O. 6, rr. 14, 15 (1)	103	O. 9, r. 9.
5	S. 7.	52	O. 6, r. 15 (2, 3).	104	Omitted.
6 paras. (c) & (d).	Omitted.	53	O. 6, r. 17; cf. O. 7, r. 11	105	O. 9, r. 10.
6 last para	S. 6.	54	O. 7, r. 11; cf. O. 6, r. 18.	106	O. 9, r. 11.
7	Cf. S. 4.	55	O. 7, r. 12.	107	O. 9, r. 12.
8	S. 8.	56	O. 7, r. 13.	108	O. 9, r. 13.
9	Omitted.	57	O. 7, r. 10.	109	O. 9, r. 14.
10	"	58	O. 7, r. 9.	110	O. 8, r. 1.
11	S. 9.	58 last para.	O. 4, r. 2.	111	O. 8, r. 6.
12	S. 10.	59	O. 7, r. 14.	112	O. 8, r. 9.
13	S. 11.	60	O. 7, r. 15.	113	O. 8, r. 10.
13, Expln. 6	S. 14.	61	O. 7, r. 16.	114	Cf. O. 6, r. 2.
14	S. 13.	62	O. 7, r. 17.	115	Cf. O. 6, rr. 14, 15
15	S. 15.	63	O. 7, r. 18.	116	Rr. 16, 17.
16	S. 16.	64	O. 27, O. 5, r. 1.	117	O. 10, r. 1.
16-A	S. 18.	65	O. 5, R. 2.	118	O. 10, r. 2.
17	S. 20.	66	O. 5, r. 3.	119	O. 10, r. 3.
18	S. 19.	67	O. 5, r. 4.	120	O. 10, r. 4.
19	S. 17.	68	O. 5, r. 5.	121	O. 11, r. 1.
20 & 21	Omitted.	69	O. 5, r. 6.	122	Cf. O. 48, r. 2.
22	Ss. 22, 23 (1).	70	O. 5, r. 7.	123	O. 11, r. 3.
23	Ss. 22, 23 (2).	71	O. 5, r. 8.	124	O. 11, r. 5.
24 1st and 3rd paras.	Ss. 22, 23 (3).	72	O. 5, r. 9.	125	O. 11, r. 6.
24 para 2	Omitted.	73	O. 5, r. 10.	126	O. 11, r. 8.
25	S. 24.	74	O. 5, r. 11.	127	O. 11, r. 11.
26	O. 1, rr. 1, 4 (a).	75	O. 5, r. 12.	128	O. 12, r. 2.
27	O. 1, r. 10 (1).	76	O. 5, r. 13.	129	O. 11, rr. 12, 13.
28	O. 1, rr. 3, 4, (b).	77	O. 5, r. 14.	130	O. 11, r. 14.
29	O. 1, r. 6.	78	O. 5, r. 15.	131	O. 11, r. 15.
30	O. 1, r. 8 (1).	79	O. 5, r. 16.	132	O. 11, r. 17.
31	O. 1, r. 9.	80	O. 5, r. 17.	133	O. 11, r. 18 (1).
32	O. 1, rr. 8 (2), 10 (2, 3, 5), 11.	81	O. 5, r. 18.	134	O. 11, r. 18 (2).
33	O. 1, r. 10 (4).	82	O. 5, rr. 19, 20 (1).	135	O. 11, r. 20.
34	O. 1, r. 13.	83	O. 5, r. 20 (2).	136	O. 11, r. 21.
35	O. 1, r. 12.	84	O. 5, r. 20 (3).	137	O. 13, r. 10.
36	O. 3, r. 1.	85	S. 28, O. 5, rr. 21, 23.	138	O. 13, r. 1 (1).
37	O. 3, r. 2.	86	O. 5, r. 22.	139	O. 13, r. 2.
38	O. 3, r. 3.	87 & 88	O. 5, rr. 24, 29.	140	O. 13, rr. 1 (2), 3.
39	O. 3, r. 4.	89	O. 5, r. 25.	141	O. 13, r. 4.
40	O. 3, r. 5.	90	O. 5, r. 26.	141-A	O. 13, r. 5.
41	O. 3, r. 6.	91	O. 5, r. 30 (1, 2).	142	O. 13, r. 6.
42	O. 2, r. 1.	92	O. 5, r. 30 (3).	142-A	O. 13, r. 7.
43	O. 2, r. 2.	93	O. 48, r. 1.	143	O. 13, r. 8.
44	O. 2, rr. 4, 5.	94	S. 142, O. 48, r. 2.	144	O. 13, r. 9.
45	O. 2, rr. 3, 6.	95	S. 143	145	O. 13, r. 11.
46	Cf. O. 2, rr. 6, 7.	96	O. 9, r. 1.	146	O. 14, rr. 1, 2.
		97	O. 9, r. 2.	147	O. 14, r. 3.
		98	O. 9, r. 3.	148	O. 14, r. 4.
		99	O. 9, r. 4.	149	O. 14, r. 5.

Comparative Table.

C. P. C., 1882.	C. P. C., 1908.	C. P. C., 1882.	C. P. C., 1908.	C. P. C., 1882.	C. P. C., 1908.
150	O. 14, r. 6.	206 third		249	O. 21, r. 23.
151	O. 14, r. 7.	para.	S. 152.	250	O. 21, r. 24 (1).
152	O. 15, r. 1.	207	O. 20, r. 9.	251	O. 21, rr. 24 (2, 3), 25
153	O. 15, r. 2.	208	O. 20, r. 10.		(1).
154	O. 15, r. 3.	209	S. 34.	252	S. 52.
155	O. 15, r. 4.	210	O. 20, r. 11.	253	Cf. S. 145.
156	O. 17, r. 1.	211 & 212	S. 2 (12), O. 20, r. 12.	254	O. 21, r. 30.
157	O. 17, r. 2.	213	O. 20, r. 13.	255	O. 21, r. 42.
158	O. 17, r. 3.	214	O. 20, r. 14.	256	O. 21, r. 11 (1).
159	O. 16, r. 1.	215	O. 20, r. 15.	257	O. 21, r. 1.
160	O. 16, r. 2.	215 A.	O. 20, r. 16.	257-A	Omitted.
161	O. 16, r. 3.	216	O. 20, r. 19.	258	O. 21, r. 2.
162	O. 16, r. 4.	217	O. 20, r. 20.	259	O. 21, r. 31.
163	O. 16, r. 5.	218-220	Cf. S. 35 (1, 2).	260	O. 21, r. 32.
164	O. 16, r. 6.	221	S. 20, r. 6 (3).	261	O. 21, r. 34 (1-4).
165	O. 16, r. 7.	222	Cf. S. 35 (3).	262	O. 21, r. 34 (5).
166	O. 16, r. 8.	223 first	S. 38.	263	O. 21, r. 35.
167	O. 16, r. 9.	para.		264	O. 21, r. 36.
168	O. 16, r. 10.	223 second	S. 39.	265	S. 54.
169	O. 16, r. 11.	and third		266	S. 60.
170	O. 16, r. 12.	paras.		267	O. 21, r. 41.
171	O. 16, r. 14.	223 fourth	S. 41.	268	O. 21, r. 46.
172	O. 16, r. 15.	para.		269	O. 21, r. 43.
173	O. 16, r. 16.	223 fifth	O. 21, r. 4.	270	O. 21, r. 51.
174 & 175	O. 16 rr. 10, 13, 17 & 18.	para.		271	S. 62.
176	O. 16, r. 19.	223 sixth	O. 21, r. 5.	272	O. 21, r. 52.
177	O. 16, r. 20.	para.		273	O. 21, r. 53.
178	O. 16, r. 21.	224	O. 21, r. 6.	274	O. 21, r. 54.
179	O. 18, rr. 1, 2, (1).	225	O. 22, r. 7.	275	O. 21, r. 55.
180	O. 18, rr. 2 (2, 3), 3.	226	O. 21, r. 8.	276	S. 64.
181	O. 18, r. 4.	227	O. 21, r. 9.	277	O. 21, r. 56.
182	O. 18, r. 5.	228	S. 42.	278	O. 21, r. 58.
183	O. 18, r. 6.	229	S. 43.	279	O. 21, r. 59.
184	O. 18, r. 8.	229-A	S. 45.	280	O. 21, r. 60.
185	O. 18, r. 9.	229-B	S. 44.	281	O. 21, r. 61.
185-A first		230 first	O. 21, r. 10.	282	O. 21, r. 62.
and second		para.		283	O. 21, r. 63.
paras.	S. 138	230 second	O. 21, r. 21.	284	O. 21, r. 64.
185-A		para.		285	S. 63.
third para.		230 third	S. 48.	286	O. 21, r. 65.
186	O. 18, r. 7.	and fourth		287	O. 21, rr. 66, 70.
187	O. 18, r. 10.	paras.		288	Omitted.
188	O. 18, r. 11.	231	O. 21, r. 15.	289	O. 21, r. 67.
189	O. 18, r. 12.	232	O. 21, r. 16.	290	O. 21, r. 68.
190	O. 18, r. 13.	233	S. 49.	291	O. 21, r. 69.
191	O. 18, r. 14.	234	S. 50.	292	O. 21, r. 73.
192	O. 18, r. 15.	235	O. 21, r. 11 (2).	293	O. 21, r. 71.
193	O. 18, r. 16.	236	O. 21, r. 12.	294	O. 21, r. 72.
194	O. 18, r. 17.	237	O. 21, r. 13.	295	S. 73.
195	O. 19, r. 1.	238	O. 21, r. 14.	296	O. 21, r. 76.
196	O. 19, r. 2.	239	O. 21, r. 26 (1, 2).	297	O. 21, r. 77.
197	O. 19, r. 3.	240	O. 21, r. 26 (3).	298	O. 21, r. 78.
198	S. 139.	241	O. 21, r. 27.	299	O. 21, r. 79 (1).
199	S. 33, O. 20, r. 1.	242	O. 21, r. 28.	300	O. 21, r. 79 (2).
200 & 201	O. 20, r. 2.	243	O. 21, r. 29.	301	O. 21, r. 79 (3).
202	Cf. S. 137.	244	S. 47.	302	O. 21, r. 80.
203	O. 20, r. 3.	245	O. 21, r. 17.	303	O. 21, r. 81.
204	O. 20, r. 4.	245-A	S. 56.	304	O. 21, r. 82.
205	O. 20, r. 5.	245-B	O. 21, r. 37.	305	O. 21, r. 83.
206 first	O. 20, r. 7.	246	O. 21, r. 18.	306	O. 21, r. 84.
and second		247	O. 21, r. 19.	307	O. 21, r. 85.
paras.	O. 20, r. 6.	248	O. 21, r. 22.	308	O. 21, r. 86.



Comparative Table.

	C. P. C., 1882.	C. P. C., 1908	C. P. C., 1882.	C. P. C., 1908	C. P. C., 1882.	C. P. C., 1908
C						
1	309	O. 21, r. 87.	375-A	O. 23, r. 4.	435	O. 29, r. 1.
2	310	O. 21, r. 88.	376	O. 24, r. 1.	436	O. 29, rr. 2, 3.
3	310-A	O. 21, r. 89.	377	O. 24, r. 2.	437	O. 31, r. 1.
4	311	O. 21, r. 90.	378	O. 24, r. 3.	438	O. 31, r. 2.
5	312	O. 21, r. 92.	379	O. 24, r. 4.	439	O. 31, r. 3.
6	313	O. 21, r. 91.	380	O. 25, r. 1 (1, 3).	440	O. 32, rr. 1, 4 (2).
7	314	O. 21, r. 92.	381	O. 25, r. 2.	441	O. 32, r. 5 (1).
8	315	O. 21, r. 93.	382	O. 25, r. 1 (2).	442	O. 32, r. 2.
9	316	S. 65, O. 21, r. 94.	383	O. 26, r. 1.	443	O. 32, rr. 3 (1), 4 (2).
10	317	S. 66.	384	O. 26, r. 2.	444	O. 32, r. 5 (2).
11	318	O. 21, r. 95.	385	O. 26, r. 3.	445	O. 32, r. 4 (1).
12	319	O. 21, r. 96.	386	S. 76, O. 26, r. 4.	446	O. 32, r. 9.
13	320	Ss. 68, 70, 71	387	O. 26, r. 5.	447	O. 32, r. 8.
14	321		388	O. 26, r. 6.	448	O. 32, r. 10 (1).
15	322		389	O. 26, r. 7.	449	O. 32, r. 10 (2).
16	322-A		390	O. 26, r. 8.	450	O. 32, r. 12 (1).
17	322-B		391	S. 78.	451	O. 32, r. 12 (2, 3).
18	322-C		392	O. 26, r. 9.	452	O. 32, r. 12 (4).
19	322-D		393	O. 26, r. 10.	453	O. 32, r. 12 (5).
20	323	The Third Schedule.	394	O. 26, r. 11.	454	O. 32, r. 13.
21	324		395	O. 26, r. 12.	455	O. 32, r. 14.
22	324-A		396	O. 26, rr. 13, 14.	456	O. 32 rr. 3 (2, 3), 4 (4)
23	325		397	O. 26, r. 15.	457	O. 32, r. 4 (1).
24	325-A		398	O. 26, r. 16.	458	O. 32, r. 11 (1).
25	325-B		399	O. 26, r. 17.	459	O. 32, r. 11 (2).
26	325-C		400	O. 26, r. 18.	460	Omitted.
27	326	S. 72.	401	O. 33, r. 1.	461	O. 32, r. 6.
28	327	S. 67.	402	Omitted.	462	O. 32, r. 7.
29	328	O. 21, r. 97.	403	O. 33, r. 2.	463	O. 32, r. 15.
30	329	O. 21, r. 98.	404	O. 33, r. 3.	464	O. 32, r. 16.
31	330	O. 21, r. 98.	405	O. 33, r. 5.	465	O. 28, r. 1.
32	331	O. 21, r. 99.	406	O. 33, r. 4.	466	O. 28, r. 2.
33	332	O. 21, rr. 100-101, 103.	407	O. 33, r. 5.	467	O. 28, r. 3.
34	333	O. 21, r. 102.	408	O. 33, r. 6.	468	O. 5, rr. 28, 29.
35	334	O. 21, rr. 97, 98.	409	O. 33, r. 7.	470	S. 88.
36	335	O. 21, rr. 97, 99, 103.	410	O. 33, r. 8.	471	O. 35, r. 1.
37	336	S. 55.	411	O. 33, r. 10.	472	O. 35, r. 2.
38	337	O. 21, r. 38.	412	O. 33, r. 11.	473	O. 35, r. 4.
39	337-A	O. 21, r. 40.	413	O. 33, r. 15.	474	O. 35, r. 5.
40	338	S. 57.	414	O. 33, r. 9.	475	O. 35, r. 6.
41	339	O. 21, r. 39 (1-4).	415	O. 33, r. 16.	476	O. 35, r. 3.
42	340	O. 21, r. 39 (5).	416	S. 79, O. 27, r. 1.	477 & 478	O. 38, r. 1.
43	341 & 342	S. 58.	417	O. 27, r. 2.	479	O. 38, r. 2.
44	343	O. 21, r. 25.	418	O. 27, r. 3.	480	O. 38, r. 3.
45	344-360-A	Repealed by the Provincial Insolvency Act, 1907.	419	O. 27, r. 4.	481	O. 38, r. 4.
46	361	O. 22, r. 1.	420	O. 27, r. 5.	482	Omitted.
	362	O. 22, r. 2.	421	O. 27, r. 6.	483 & 484	O. 38, r. 5.
	363	O. 22, r. 3 (1).	422	O. 5, r. 27.	485	O. 38, r. 6.
	365	O. 22, r. 3 (1).	423	O. 27, r. 7.	486	O. 38, r. 7.
	366	O. 22, r. 3 (2).	424	S. 80.	487	O. 38, r. 8.
	367	O. 22, r. 5.	425	Omitted (see Sec. 55, sub-Sec. 2).	488	O. 38, r. 9.
	368	O. 22, r. 4.	426	O. 27, r. 8 (1).	489	O. 38, r. 10.
	369	O. 22, r. 7.	427	O. 27, r. 8 (2).	490	O. 38, r. 11.
	370	O. 22, r. 8.	428	S. 81.	491	S. 95.
	371	O. 22, r. 9 (1, 2).	429	S. 82.	492	O. 39, r. 1.
	372	O. 22, r. 10.	430	S. 83.	493	O. 39, r. 2.
	372-A	O. 22, r. 9 (3).	431	S. 84.	494	O. 39, r. 3.
	373	O. 23, r. 1.	432	S. 85.	495	O. 39, r. 5.
	374	O. 23, r. 2.	433	S. 86.	496	O. 39, r. 4.
	375	O. 23, r. 3.	434	S. 87.	497	S. 95.
					498	O. 39, r. 6.

Comparative Table.

C. P. C., 1882.	C. P. C., 1908.	C. P. C., 1882.	C. P. C. 1908.	C. P. C., 1882.	C. P. C. 1908.
499	O. 39, r. 7.	565	O. 41, r. 24.	611	O. 45, r. 16.
500	O. 39, r. 8.	566	O. 41, r. 25.	612, 613,	
501	O. 39, r. 9.	567	O. 41, r. 26.	615	Omitted.
502	O. 39, r. 10.	568	O. 41, r. 27.	616	S. 112.
503	O. 40, rr. 1-3.	569	O. 41, r. 28.	617	S. 113, O. 46, r. 1
504	O. 40, r. 5.	570	O. 41, r. 29.	618	O. 46, r. 2.
505	Omitted.	571	O. 41, r. 30.	619	O. 46, r. 3
506-526	The Second Schedule.	572 & 573	Cf. S. 135.	620	O. 46, r. 4
527	O. 36, r. 1.	574	O. 41, r. 31.	621	O. 46, r. 5
528	O. 36, r. 2.	575	S. 98	622	S. 115.
529	O. 36, r. 3.	576	O. 41, r. 34.	623	S. 114 O. 47r. 1
530	O. 36, r. 4.	577	O. 41, r. 32.	624	O. 47, r. 1
531	O. 36, r. 5.	578	S. 99.	625	O. 47, r. 3
532	O. 37, r. 2.	579	O. 41, r. 35.	626	O. 47, r. 4
533	O. 37, r. 3.	480	O. 41, r. 36.	627	O. 47, r. 5
534	O. 37, r. 4.	581	O. 41, r. 37.	628	O. 47, r. 6
535	O. 37, r. 5.	582	S. 107 (2), O. 22, r. 11.	629	O. 47, rr. 7, 9.
536	O. 37, r. 6.	582-A	Cf. S. 146.	630	O. 47, r. 8.
537	O. 37, r. 7.	583	Cf. S. 144 (1).	631	S. 116.
538	O. 37, r. 1.	584	Cf. S. 100.	632	S. 117.
539	Ss. 92, 93.	585	Cf. S. 101.	633	S. 122.
540	S. 96.	586	S. 102.	634	S. 118.
541	O. 41, r. 1.	587	S. 108, O. 42, r. 1.	635	S. 119.
542	O. 41, r. 2.	588	S. 104, O. 43, r. 1.	636	O. 49, r. 1
543	O. 41, r. 3.	589	S. 106.	637	S. 128 (2) (1).
544	O. 41, r. 4.	590	S. 108, O. 43, r. 2.	638	S. 120 (1), O. 49, r. 3
545	O. 41, r. 5.	591	S. 105.	639	S. 120 (2).
546	O. 41, r. 6.	592	O. 44, r. 1.	640	S. 132.
547	O. 41, r. 7.	593	O. 44, r. 2.	641	S. 133.
548	O. 41, r. 9.	594	O. 45, r. 1.	642	S. 135.
549	O. 41, r. 10.	595	S. 109.	643	Omitted.
550	O. 41, r. 13.	596	S. 110.	644	O. 48, r. 4.
551	O. 41, r. 11.	597	S. 111.	645	S. 137.
552	O. 41, r. 12.	598	O. 45, r. 2.	645-A	S. 140.
553	O. 41, r. 14.	600	O. 45, r. 3.	646	Omitted.
554	O. 41, r. 15.	601	O. 45, r. 6.	646-A	O. 46, r. 6
555	O. 41, r. 16.	602	O. 45, r. 7.	646-B	O. 46, r. 7.
556	O. 41, r. 17.	603	O. 45, r. 8.	647	S. 141.
557	O. 41, r. 18.	604	O. 45, r. 9.	648	S. 136.
558	O. 41, r. 19.	605	O. 45, r. 10.	649	Ss. 36, 37.
559	O. 41, r. 20.	606	O. 45, r. 11.	650	Omitted.
560	O. 41, r. 21.	607	O. 45, r. 12.	650-A	S. 29.
561	O. 41, r. 22.	608	O. 45, r. 13.	652	Ss. 122, 129, 130, 131.
562	O. 41, r. 23.	609	O. 45, r. 14.	653	S. 59.
564	Omitted.	610	O. 45, r. 15.		

**Pre-emble.**

*Synopsis.*

- (1) Code, if exhaustive.
- (2) Code, if retrospective.
- (3) "Consolidate and amend."
- (4) Courts of Civil Judicature.
- (5) Extent of the Code.
- (6) Interpretation.

**(1) Code, if exhaustive.**

—The Code is not exhaustive of all the forms of procedure : 1917 P H C C 137=2 P L J 306=1 P L W 326=39 I C 779; see to the same effect 3 C L J 67=33 C 927; and 2 P L J 361=1 P L W 551=39 I C 763.

—But as regards matters specifically dealt with by the code, the code is exhaustive : 6 C W N 825=4 Bom L R 793=29 I A 196=29 C 707 P C; see to the same effect A I R 1926 568; and A I R 1926 L 670; and 18 C W N 954=20 I C 815; and 23 A 167; and 33 C 927; and 35 C 353; and 36 C 354; and 41 C 442.

—Where a particular matter is not dealt with by the Code it is not to be presumed that such matter is prohibited, but it should be deemed to be permissible unless it is shown to be prohibited by law : 14 C W N 586=11 C L J 435; see to the same effect 36 C 193; and 3 C L J 29 and 10 C W N 719 and 10 C L J 91=1 I C 677; and 17 M L J 143; and 17 A 29; and 33 C 927; and 58 I C 748=1 L 339; and 15 A 84; and 84 I C 134=48 M 494; and 11 A 267 F B; and 5 A 163 F B; and 37 C 399.

—The Code does not prohibit the power of the Court to punish for contempt : 17 C W N 1253=18 C L J 452=20 I C 81=41 C 173; see also 8 B 380.

—Court having particular power before the Code retains that power unless such power is specifically taken away by the Code. 34 C 97; see 13 C 189; and 5 C 819.

**(2) Code, if retrospective.**

—The Code is retrospective so as to affect all rights and matters dealt with by it except the right of appeal : 17 C W N 622=19 I C 391=40 C 704; see also 124 I C 817=A I R 1930 C 422=57 C 148.

—Right of appeal is not affected retrospectively : 1912 P W R 272=169 P L R 1912=16 I C 834.

—Section 48 governs application for execution of mortgage decree got under the old Code. 51 P R 1870.

—The Code applies retrospectively to all cases pending or about to be instituted at the time it came into force. 9 I C 815.

—But where the Court has already exercised jurisdiction under the old Code it remains unless removed or affected by the new Code. 4 C 655 F B.

**(3) "Consolidate and amend."**

—"Consolidation means collection of statutory law on the subject and bringing it down to date. Construction of a consolidating statute must be with reference to the circumstances existing at the time of the consolidating Act itself and with those existing at the time of the preceding Act" : 22 I A 107=22 C 788 (P C.)

—Where the meaning is plain no regard should be paid to the previous law. But in case of doubt resort may be had to the previous state of the law. 56 I C 163=47 I A 33=43 M 550; see to the same effect 23 I A 18=23 C 563; and 20 M 97; and 28 C 517; and A I R 1926 M 906.

**(4) Courts of Civil Judicature.**

—The expression "Courts of Civil Judicature" means all Courts which try suits and proceedings of a civil nature, see cases under s. 9.

—Insolvency procedure is civil procedure but the procedure of Insolvency Courts both in the Mofussil and in Presidency Towns is regulated by special Act though in certain matters the procedure of the Code is applied. see Pro. Ins. Act 1920 s. 5 and Pres. Towns S. 90. Ins. Act. 1909.

—The Code applies to Revenue Courts except where its operation is negated by the special or local law governing such Courts. 19 A 510; see also 5 A 406; and 2 C W N 127; and 18 C 368 F B; and 21 C 514; and 22 A 182; and 21 M 236; and 6 A 170; and 29 M L J 474=31 I C 59; and 12 C 50; and 35 C 799; and 14 A 347; and 21 A 405; and 40 C 518; and 10 M L J 398; and 27 C 508; and 21 C 428; and 38 C 832; and 21 O C 220=48 I C 119; and 9 I A 174=9 C 295.

—Even where the trial of the suit is specially provided for by the special or local law, the Code will apply where and appeal is taken to a Civil Court from the decree of the Revenue Court, or such decree is transferred for execution to the Civil Court : 5 C W N 279=28 C 532.

—The Code applies to proceedings on the Admiralty side of the High Court : 12 B 237.

—The Code applies to proceedings in the testamentary and intestate jurisdiction of the High Courts and Mofussil Courts except as otherwise provided by the Indian Succession Act 1925 : 9 Bom 241; see to the same effect 24 C 39.

—The Code does not apply to Mamlatdar's Courts : 13 B 552; see to the same effect 6 S L R 67=16 I C 675; and 17 B 645.

—But the High Court has revisional jurisdiction over the Mamlatdar's Courts under s. 115 of the Code : 21 B 775; and see to the same effect 23 B 761; and 2 Bom L R 1136=25 B 395 F B; and 18 B 449.

**(5) Extent of the Code.**

—See also cases under s. 1.

—The Code applies to foreigners : 25 A L J 356=A I R 1927 A 413=49 A 669; see also 20 B 133; and 13 M L J 287=7 C W N 754=26 M 544 P C; and 35 M L J 189=47 I C 708.

—The Code applies to property situate outside the jurisdiction of British Courts : 2 Bom L R 47=24 B 407.

—The Code applies to the procedure of all Courts of Civil Judicature except as regards cases under s. 4 of the Code.

**(6) Interpretation.**

—See cases under Construction of statutes.

## C. P. C. 1908 SECTION 1

- (1) British India.
- (2) Scheduled Districts.
- (3) Scheduled Districts to which the Code is extended.

## (1) "BRITISH INDIA."

—But retains its own law until altered by the Crown or the Legislature—19 Bom., 680.

—Where however the Sovereignty over territories is ceded to the Govt of India only for limited purposes, such territories will not form part of British India. This rule will apply to lands given for railway Administration : 2 C. W. N. 1=9 P. R. 1897=7 Sar. 239 = 24 I. A. 137 = 25 C. 20 p. c., cantonment areas : 14 Bom. L. R. 876=17 I. C. 534=37 BOM 152, civil stations etc : 10 B. 186

—The Cantonment of Secunderabad is not part of British India 21 Cal., 177.

—And in 9 B. 244 it was held that the Cantonment of Wadhwan is within the limits of British India; but this was dissented from in 17 I. C. 534=14 Bom. L. R. 876=37 B. 152.

—The Agency tracts have special jurisdiction of their own, and the Subordinate Judge of Vizagapatam cannot, in a suit pending before him, attach before Judgment properties situate in the tracts : A. I. R. 1925 M. 1100=48 M. L. J. 680=38 I. C. 430

—British Indian Courts have Jurisdiction over foreigners : A. I. R. 1927 A. 413=101 I. C. 673=25 A. L. J. 356=49 A. 667

—Court will not pass a decree against a foreign subject if it cannot enforce it : 101 I. C. 438=23. S. L. R. 46=A. I. R. 1927 S. 160.

—It has been held that native States of Kathiawar do not form part of British India 10 C. W. N. 361=33 I. A. 1=8 Bom. L. R. 129 = 3 A. L. J. 250 = 3 C. L. J. 395 = 1 M. L. T. 115=16 M. L. J. 115=33 C. 219 p. c.; nor do the Tributary Mahals of Orrissa ; 6 C. W. N. 573 = 29 C. 400;

—The Berars are held by the Govt. of India under a sort of mortgage under the treaty of 21 st. May 1853 with the Nizam, and the Code extends to them by Notification No 949 I B of 26 th March 1909: see 6 N. L. R. 49 = 6 I. C. 429.

## (2) SCHEDULED DISTRICTS.

—They are parts of British India to which the General Acts and Regulations and the Jurisdiction of the ordinary Courts of Judicature do not apply, unless the Legislature has expressly made them applicable : A. I. R. 1919 P. C. 150 = 42 M. 813 = 46 I. A. 151 = 17 A. L. J. 694 = 21 Bom. L. R. 914 = 30 C. L. J. 209 = 23 C. W. N. 1033=37 M. L. J. 11 = 26 M. L. T. 127 = 10 M. L. W. 362 = 1919 M. W. N. 502 = 51 I. C. 185 P. C.

अपेक्षित ३१. २१. ३१. (१) २५

## C. P. C. (1908) S. 1 (Contd.)

## (3) SCHEDULED DISTRICTS TO WHICH THE CODE HAS BEEN EXTENDED.

—The present code, as contrasted with the former codes, is divided into (a) "body of the Code" and (b) "rules." It has been held that the former creates jurisdiction, while the latter are rules indicating the mode in which the jurisdiction is to be exercised 41 Ind. Cas 598=44 Cal 929=21 Cal W N 877=26 Cal L J 49 F B.

—The "body of the code" being substantive law cannot be altered except by the Legislature. But as regards the "rules," power has been given under s. 122 of the Code to the various High Court to effect amendments subject to the provisions of Part X of the Code.

—The "body of the Code" should be read in conjunction with the provisions of the "rules" 20 Ind. Cas 39=41 Cal 108=18 Cal L J 613.

—But in case of conflict between them, the former must prevail 22 Ind. Cas. 690; 1926 Mad 676=1926 M W N 341=51 M L J 90=95 2nd Cas 439

—The clear words of the Code will prevail over the forms in the schedule : 40 Ind. Cas 816=21 Cal W N 1147; see also Pre-emble-Interpretation.

## C. P. C. 1908 SECTION 2.

- (1) Legislative Changes.
- (2) Decree and Order, distinction between.
  - (a) "Rights of Parties as to Matters in controversy"
  - (b) "Conclusively Determines"
  - (c) "Formal Expression"
  - (d) "Suit"
- (3) Decree : Preliminary and Final
- (4) Orders which are "decree"
- (5) Orders which are not "decree" but which are appealable.
- (6) Orders which are neither "decree" nor appealable.
- (7) Orders in Arbitration Proceedings.
- (8) Orders in Execution Proceedings.
- (9) Orders in Restitution Proceedings.
- (10) Orders dismissing suit or appeal.
- (11) Orders rejection plaint or memorandum of appeal.
- (12) Orders returning plaint or memorandum of appeal.

## (2) DECREE AND ORDER, DISTINCTION BETWEEN.

—Adjudication which is neither decree nor order is not contemplated by the Code 19 C. W. N. 449 : 42 C. 614. (P. C.) 28 I. C. 710.

C. P. C. (1908) S. 2 (2) (Contd.)

(2) DECREE AND ORDER DISTINCTION  
BETWEEN. (Contd.)

(a) "Rights of Parties as to Matters in  
Controversy."

—Under the old Code no decision came under the definition of decree, unless it decided the suit or appeal: 10 Bom. L. R. 514; see also 13 A. L. J. 381 = 28 I. C. 687

Under the present Code any adjudication which conclusively determines the rights of the parties as to any or all matters in controversy is a decree: see A. I. R. 1929 M. 223 = 29 L. W. N. 237 = 1929 M. W. N. 62 = 56 M. L. J. 387 = 115 I. C. 375.

—It does not include an order passed on an application preliminary to the institution of the suit itself, e. g. an application for leave to sue etc: 17 M. L. T. 447 = 2 L. W. 519 = 29 I. C. 393.

—It includes matters, which, though they are common ground, must have been actually decided if any question had arisen and which are the foundation of the whole determination: 20 Ind. Cas. 950 = 25 M. L. J. 279 = 14 Mad. L. T. 176 = 1913 Mad. W. N. 643.

—"The matters in controversy in the suit" are those matters which appear to be disputes between the parties ranged on one side as plaintiffs and on the other as defendants, not matters which from the subject of any dispute between a person, who is already a plaintiff in the case and other persons who are seeking to be made plaintiffs in place of another plaintiff who is defeated. Therefore, where one of the two plaintiffs dies, the dispute between the surviving plaintiff and a third person, each of whom to be the legal representatives of the deceased plaintiff is not a "matter in controversy in the suit" within the meaning of S 2 (2) C. P. C., and consequently, an order substituting one of them in place of the deceased plaintiff is not appealable either under S. 104 or O. 33. 20 I. C. 898 = 16 O. C. 350

—"Matters in controversy in the suit" may also arise at a subsequent stage of the suit: (Per Wazir Hasan J.)—A. I. R. 1928 O. 362 = 110 I. C. 826 = 5 O. W. N. 633 = 3 Luck 628.

—The word "rights" means substantive rights with regard to the subject-matter of the suit. For illustrations see 45 Ind. Cas. 100 = 3 P. L. J. 99. (appellate Court holding that plff. was entitled to possession and sending back the case for ascertaining mesne profits); 1928 Bom. 236 = 30 B. L. R. 503 = 52 Bom. 360 = 109 Ind. Cas. 734. (claim to mesne profits refused on ground of limitation); 19 Ind. Cas. 971 = 18 Cal. L. J. 133. (order on application under O. 34, r. 6); 30 Ind. Cas. 497 = 18 Oudh Cas. 121; 35 Ind. Cas. 158 = 14 All. L. J. 328; 4

C. P. C. (1908) S. 2 (2) (Contd.)

[2] Decree and order distinction between (Contd)

(a) "Rights of Parties as to matters in  
Controversy (Contd)"

N. L. R. 54 (refusal to make a conditional decree for fore closure absolute); L. R. 5 A 156 (Rev), (order deciding cardinal issue and remanding the case); 40 Ind. Cas. 579 = 3 P. L. J. 67 = 1 P. L. W. 781. (decision on right to accounts); 20 Cal. L. J. 478; and cases under sub-heading-(3) Orders Which are decrees.

—Where the name of one of the debts was struck off as being unnecessarily joined, it was held that decision against the first debt was nevertheless valid: A. I. R. 1927 B. 131 = 29 Bom. L. R. 107 = 100 I. C. 956 = 51 B. 125.

—In a partition suit, the plff. need not plead that the lands purchased by the debts at a sale in execution were liable to partition: A. I. R. 1925 Pat. 433 = 86 I. C. 785 = 6 P. L. T. 152.

(b) "Conclusively Determines"

—The expression does not mean that the decision must be such as to completely dispose of the case. Thus, a preliminary decree is a decree although it does not finally dispose of the case. The expression means that the decision must be one which is complete, so far as regards the Court expressing it, as to the rights of the parties in question: A. I. R. 1931 M. 471 = 60 M. L. J. 167 = 132 I. C. 654 = 33 L. W. 143 = 1931 M. W. N. 590 = 54 M. 337; see also 14 C. L. J. 35 = 16 C. W. N. 124 = 10 I. C. 371, and see cases under sub-headings (2), (3), and (5) below.

—Where the officer passing a Judgment is not a "Court" at all, the Judgment or order is not a decree, A. I. R. 1925 Bom. 241 = 27 Bom. L. R. 345 = 49 Bom. 442 = 87 Ind. Cas. 588. F. B.

(c) "Formal Expression"

As to the significance of the words "Expressed an adjudication" see A. L. R. 1933 M. 432.

—Some of the Nagpur and Lahore cases, holding that absence of a formal decree will not make an adjudication any the less a decree, if it otherwise satisfies the conditions of a "decree," see A. I. R. 1921 N. 108 = 17 N. L. R. 66 = 62 I. C. 467; A. I. R. 1930 N. 122 = 26 N. L. R. 24 = 127 I. C. 887 (following 19 C. W. N. 755, and A. I. R. 1923 C. 308); 41 P. R. 1911 = 115 P. L. R. 1911 = 179 P. W. R. 1911 = 9 I. C. 1019. A. I. R. 1930 L. 125 = 31 P. L. R. 386 = 124 I. C.; 676, 66 P. R. 1919 = 32 P. L. R. 1919 = 72 P. W. R. 1919 = 52 I. C. 479

—The said Courts themselves have held in other cases that an adjudication, unless drawn up in a proper form, is not decree: A. I. R.



C. P. C. (1908) S. 2 (2) (Contd.)

(2) Decree and order distinction between. (Contd.)  
(c) "Formal Expression" (Contd.)

1921 N. 108=17 N. L. R. 66=62 I. C. 467; see also 8 N. L. R. 92=15 I. C. 935.

—And all other High Courts have held that formal expression is a necessary condition of a decree: 16 B 243; 19 C 463; 1 M. W. N. 42=13 I. C. 800; 15 Bom. L. R. 382=19 I. C. 894=37 B 480; 14 A. L. J. 8=32 I. C. 104=38 A 111; 26 I. C. 885=39 B 339; 28 I. C. 461=39 B. 421; 60 I. C. 885=45 B 627; 28 I. C. 589=39 B. 423.

—Where a preliminary point was decided but no formal preliminary decree was drawn, held no appeal lies A. I. R. 1924 Bom. 33 = 25 Bom. L. R. 826=761. C. 1014.

—A party has a right to appeal from a decision of the Court amounting to a preliminary decree but he can only appeal if the decree exists in formal shape: 14 Bom. L. R. 916=17 I. C. 637=37 B. 60.

—No particular form is necessary, but the decree should embody in a formal manner the adjudication of the right of party. Where the question sought to be adjudicated is left open, there is no decree and no appeal lies. (1912) M. W. N. 1122 = 12 M. L. T. 309 = 16 I. C. 45.

—In the administration suit, the Court of first instance decided on one of the issues a substantial question of right between the parties; and having so decided it appointed receivers of all the property in dispute. In appeal to the District Judge, the finding on the issue was sought to be challenged on the ground that it was a decree. On second appeal it was held that no appeal lay to the High Court, for there was in fact no formal decree upon the question raised in the issue. 11 Bom. L. R. 1326=34 B. 182=4 Ind. Cas. 829.

—Where an issue was determined, but no decree passed, it was held that such determination does not amount to a decree, and no appeal lies; 10 A. L. J. 78=15 I. C. 566; see also 15 I. C. 563.

—Limitation does not run for purposes of appeal until decree is drawn up: A. I. R. 1924 C. 1006 = 81 I. C. 527 = 39 C. L. J. 251.

—Where a Judge declined to draw up a preliminary decree in accordance with his findings it was held that he committed a material irregularity: 14 Bom. L. R. 916=17 I. C. 637 = 37 B. 60.

—More formal expression of an adjudication does not make it a decree, if it does not satisfy other conditions of a decree: 18 C. W. N. 604 = 18 C. L. J. 128 = 20 I. C. 1; A. I. R. 1930 N. 206 = 13 N. L. J. 83 = 26 N. L. R. 166 = 122 I. C. 441; A. I. R. 1926 B. 237 = 28 Bom. L. R. 307 = 94 I. C. 72; A. I. R. 1926 N. 75 = 89 I. C. 331; and A. I. R. 1921 N. 108 = 17 N. L. R. 66 = 62 I. C. 467.

C. P. C. (1908) S. 2 (2) (Contd.)

(2) Decree and order distinction between (Contd.)  
(c) "Formal Expression" (Contd.)

—When there is no civil suit, there is no decree and a right of appeal is not given by this section: 14 I. A. 160 = 11 M. 26; see also 12 A. 129; and if it exists, it must be given by some law: 11 M. 319 followed in 29 A. 596; 27 C. 414; 31 C. 207; 19 C. W. N. 25 = 27 I. C. 492; and 10 O. C. 353.

—But in 22 Mad. 256, it has been ruled that every suit must commence with a plaint, and no proceeding, even if capable of terminating in a decree, or an order having the force of a decree, is a suit, if it has not commenced with a plaint.

—The same High Court, however, has held in a recent case that the term "suit" embraces all contentious proceedings of an ordinary civil kind in which the Court is asked to decide the rights of the parties in question: A. I. R. 1929 M. 223 = 29 L. W. 237 = 1929 M. W. N. 62 = 115 I. C. 345 = 56 M. L. J. 387; see also 145 P. R. 1884; and 39 A. 626 in which an application under s. 22 of the Prov. Ins. Act was held to be a "suit."

—See sub-headings (8) Orders in Execution Proceedings s. 47, and (9) Orders in Restitution Proceedings s. 144. Para 20 of Sch II of the Code, s. 158 of Bengal Tenancy Act, ss 261 and 263 of the Indian Succession Act and ss. 83 and 86 of the Probate and Adm. Act

—A decree passed in appeal is really a decree in the suit, for, an appeal is only a continuation of the suit. Ind. 33 Cas. 9=30 Mad L. J. 379 = 19 Mad L. T. 268 = (1916) 1 Mad. W. N. 223

—*Semble*:—An application to set aside a sale in a proceeding which may terminate in an adjudication such as is referred to in S. 2 and as such it is a suit within O. 43 R. 1 cl. (c) 20 C. W. N. 1203=33 I. C. 581.

### (3) DECREE: PRELIMINARY AND FINAL.

—A decision finally deciding disputed questions between the parties is a final decree, I. R. 1930 N. 359 = A. I. R. 1930 N. 122=127 I. C. 887=26 N. L. R. 24.

—A decree settling all disputes in question is a final decree. A decree modified in review must be considered as the final decree. A. I. R. 1931 Cal. 323=Ind. Rul. (1931) Cal. 434=131 I. C. 258.

—*An ex parte* decree is final till it is set aside by decree of the first or Appellate Court. 60 I. C. 496; see also, 2 Oudh L. J. 151 = 28 Ind. Cas. 379; L. R. 5 All. 269=1883 A. W. N. 18; 10 Ind. Cas. 850=24 P. R. 1911=186 P. L. R. 1911=56 P. W. R. 1911; 1931 All. 333 (336) = 1931 A. L. J. 181=131 Ind. Cas. 543; 42 Mad. 209; A. I. R. 1932 Lah. 120.

C P C ( 1908 ) S. 2 ( 2 ) ( *Contd.* )( 3 ) Decree : Preliminary and Final. ( *Contd.* )

—A decision cannot be said to become final until the time for the last appeal allowed has expired, or if there has been an appeal, it has become final by the decree of the High Court. 34 I. C. 204 see also A. I. R. 1925 A. 291=23 A. L. J. 215=86 I. C. 957=47 A. 533; and A. I. R. 1927 A. 848= 25 A L J 809 = 103 I. C. 457.

—Mere form does not make a decree final : A. I. R. 1930 N. 206=I. R. 1930 N. 169=122 I. C. 441=13 N L J 83=26 N L R 166.

—Where a decree is passed for past and future mesne profits at a particular rate, though without directing enquiry, the decree is final: A. I. R. 1928 C. 804.

—Where, in a suit for possession, mesne profits are ascertained, and the Court passes a decree for past and future mesne profits, besides directing debt to deliver possession without directing inquiry, the decree is final : 22 L. W. 347 = A I R 1925 M. 1276=90 I. C. 789.

—Where a decree is passed in a pre-emption suit on condition that the suit shall stand dismissed if the purchase-money were not paid within a particular time, the decree is final : 2 U P L R 171 = 7 O L J 378 = 57 I. C. 488=23 O. C. 254.

—In a suit for accounts the appellant can prefer a single combined appeal against the preliminary and the final decrees if the dates permit him to do so. A. I. R. 1921 Mad. 406 =14 L W 389 = (1921) M W N 558 = 70 I. C. 392.

—The word "decree" in O. 9. R. 8. is governed by the definition in S. 2 (2). A decree passed on the admission of the debt, is appealable by the person aggrieved thereby. 56 I. C. 845.

—Consent decree is a "decree" within s. 2 (2) C. P. C. 66 I. C. 273 = A. I. R. 1922 C. 358 = 34 C. L. J. 96.

—Revenue Court decree is a "decree" within s. 2 (2) C. P. C. L. R. 6 A. 63=A. I. R. 1925 A. 264=85 I. C. 660.

—In a suit for damages the judgment must state the amount of damages. Appeal is premature if the amount is not stated : 110 I. C. 177=A. I. R. 1928 L. 841.

—Court should not pass a mortgage-decree against father and personal decree against son's share in the ancestral property : 64 I. C. 629=2 P. L. T. 715.

—A valid decree should not be set aside upon subsequent events : A. I. R. 1927 L. 198 =28P. L. R. 341=100 I. C. 84=8 L. 215.

—A new decree on review supersedes the original decree, even if the latter is not modified by the former, and no appeal lies from the original decree : A. I. R. 1928 C. 418=107 I. C. 751.

C. P. C. ( 1908 ) S. 2 ( 2 ) ( *Contd.* )( 3 ) Decree : Preliminary and Final. ( *Contd.* )

—Code provides only for one preliminary and one final decree. 42 Mad 296=51 I. C. 140; see also 59 M. L. J. 102.

—But the Court must pass a supplementary final decree if a portion of subject matter is not divided : 44 I. C. 671.

—Similarly there can be a second preliminary decree, and such decree is appealable: 11 A. L. J. 120=16 I. C. 372.

—As to the meaning of "Preliminary decree" see 7 P. R. 1917 = 39 I. C. 100.

—The preliminary decree ascertains what is to be done, while the final decree states the result achieved. 20 C. L. J. 476 = 19 C. W. N. 755 = 27 I. C. 317.

—Where a decision conclusively determines the rights of the parties in question, but does not finally dispose of the case, it is a preliminary decree : 3 I. C. 999 = 13 C. W. N. 787; see also, 15 Ind. Cas. 563 = 16 P. R. 1913 = 191 P. L. R. 1912 = 218 P. W. R. 1912; 19 Ind. Cas. 922 = 6 Sind L. R. 287; 35 Ind. Cas. 873 = 20 Cal. W. N. 1174 = 1 P. L. J. 406 = 1 P. L. W. 13. F. B; A. I. R. 1931 All. 386 (386) =1931 All. L. J. 508=53 All. 283 F. B.

—A 'preliminary decree' properly understood is passed only in those cases in which the Court has first to adjudicate upon the rights of the parties and has then to stay its hand for the time being until it is in a position to pass a final decree in the suit. 115 P. L. R. 1911.

—A preliminary decree must define the rights of the parties, though it does not finally dispose of the case : 62 I. C. 462 = A. I. R. 1921 N. 108 = 17 N. L. R. 66.

—A decision on preliminary issue is not a preliminary decree and is not appealable 8 N. L. R. 92 = 15 I. C. 935; see also 18 C. L. J. 78 = 21 I. C. 387.

—Preliminary issue as to jurisdiction is not preliminary decree : 23 Bom. L. R. 92 = A. I. R. 1921 B. 220= 60 I. C. 885 = 45 B. 627.

—But where a suit is disposed of on a preliminary point such disposal is a decree : 39 I. C. 791. = 1 P. L. W. 499.

—Where two issues were decided at different dates, it was held that the order deciding the first issue was not a preliminary decree and that an appeal attacking the decisions on both issues and filed within the period allowed therefore from the later date was not time-barred 7 P. R. 1917 = 39 I. C. 100.

—Where the Court took up some of the issues in bar and decided them against the debt, and directed the trial of the issues relating to the merits of the suit, held that the order deciding the issues in bar was not an adjudication determining the rights of the parties and was not a preliminary decree and that no appeal lay against the order; 20 C. L. J. 476 = 19 C. W. N. 755 = 27 I. C. 317.

## C. P. C. (1908) S. 2 (2) (Contd.)

## (3) Decree : Preliminary and Final. (Contd.)

—Finding that suit is not barred by *resjudicata* is not a preliminary decree 17 Bom. L. R. 271 = 39 Bom. 421 = 28 I. C. 46 I. see also 16 P. R. 1913 = 191 P. L. R. 1912=218 P. W. R. 1912 = 15 I. C. 563; 10 A. L. J. 78 = 15 I. C. 566; 18 C. L. J. 78 = 21 I. C. 387.

—The decision in a suit that a notice under S. 80 of the C. P. Code was necessary before the institution of the suit does not amount to a preliminary decree where the plff. alleges that he has given notice 40 I. C. 677 = 11 Bur. L. T. 95 = (1917) 3 U. B. R. 1.

—If a decision on a preliminary issue merely entitles the plff. to go on with the suit, it is not a preliminary decree. Unless the decision amounts to a preliminary decree of the nature contemplated in O. 20, Rr. 12 to 18 it is not a preliminary decree as it does not decide any of the matters in controversy in the suit. 9 Bur. L. T. 119 = 36 I. C. 431.

—A decision as to the status of a person being agriculturist within the Deccan Agr. Relief Act is not a preliminary decree : A. I. R. 1921 B. 220 = 23 Bom. L. R. 92 = 63 I. C. 885 = 45 B. 627; (impliedly overruling 7 I. C. 966 = 12 Bom. L. R. 762; and 16 I. C. 159).

—If the decision involves adjudication upon substantive rights of the parties e. g. a direction to take accounts between the parties as under s. 13 of the Deccan Agr. Relief Act, it is a preliminary decree; A. I. R. 1922 B 336 = 70 I. C. 728; A. I. R. 1924 B. 33 = 25 Bom. L. R. 826 = 76 I. C. 1014; 17 Bom. L. R. 324 = 28 I. C. 589 = 39 B. 422.

—Directions given to an Official Commissioner as to certain matters to be decided in a partnership suit is a preliminary decree : 107 I. C. 214 = A. I. R. 1928 Sind 100 = 23 S. L. R. 87.

—In a suit for possession and mesne profits, the first court decreed possession alone. Both parties appealed and the appellate court dismissed the defendant's appeal as regards possession, and remanded the case for ascertainment of profits. The first court passed a decree for mesne profits alone and appeal against the same was dismissed. The defendant preferred a further appeal to the High Court against possession also. Held that the decision as regards possession on appeal was a preliminary decree and appeal against the same was barred. 19 C. L. J. 436 = 25 I. C. 436.

—Such orders if deciding rights of the parties will be preliminary decrees under the present Code. 1915 P. C. 116 = 42 Cal 914 = 42 Ind. app. 91 = 18 All. L. J. 540 = 17 Bom. L. R. 432 = 21 Cal. L. J. 419 = 19 Cal. W. N. 449 = 29 M. L. J. 70 = 17 Mad. L. T. 312

## C P C (1908) S. 2 (2) (Contd.)

## (3) Decree : Preliminary and Final (Contd.)

= 2 Mad L. W. 377 = 1915 Mad. W. N. 485 = 28 Ind. Cas. 710 P. C.

—Issue of commission to take accounts is not a preliminary decree 23 I. C. 889 = 16 Bom. L. R. 206 = 30 Bom. 392.

—Courts have also power to pass such decree in other cases where necessary: 60 I. C. 885 = 145 B 627; see also A I R 924 C 160 = 74 I C 373 = 27 C. W N 989; A. I. R. 1928 R. 168 = 110 I C 41 = 6R 97; A I R 1923 M284 = 72 I C 868 = 46 M. 148.

—Preliminary decree cannot be passed in a suit for the specific performance 51 I. C. 442.

—As to appeal against preliminary decree see 10 C. L. J. 113 = 1 I. C. 413 = 36 C. 762.

—Where a preliminary decree is not appealed from, the decree becomes absolute: 40 Bom 321 = 18 Bom. L. R. = 38 = 33 Ind. Cas. 749.

—As to effect of appeal against preliminary decree when the passing of final decree is pending see 12 A. L. J. 876 F. B.

—Appeal from preliminary decree is maintainable, though final decree is passed: 52 I. C. 697

—As to the maintainability of an appeal against preliminary decree after passing of the final order see: 12 I. C. 664 = 10 M. L. T. 437 = 21 M. L. J. 1063 = 37 M. 29

—A decree may be partly preliminary and partly final. Thus a decree dissolving partnership is final as regards matters finally decided and preliminary as regards matters still undisposed of: I. R. 1931 M. 496 = A. I. R. 1930. M. 528 = 131 I. C. 160 = 53 M. 378

—Similarly, a direction in the final decree leaving distribution of assets undisposed of A. I. R. 1930 Mad 528 = 53 Mad 378 = 59 M. L. J. 102 = 32 Mad L. W. 329.

—A decree in a suit for possession and mesne profits can be partly final and partly preliminary. Time for execution runs at the latest from the date of the final decree of the Appellate Court. A. I. R. 1929 Cal. 383 = Ind. Rul. (1929) Cal. 676 = 118 I. C. 852

## (4) ORDERS WHICH ARE "DECREEES."

—An order striking off a party is in substance a decree, though not so in form. The aggrieved party's remedy is by appeal and not by revision. A. I. R. (1931) All 333 = (1931) A. L. J. 181 = Ind Rul (1931) All 388 = 131 I. C. 548. In a suit under s 92, an order declaring that new trustees of a temple are entitled to recover money from defendants is a decree, and appealable as such. The mere fact of judgment being headed 'order' does not make it any the less a decree. A. I. R. 1931 Mad 471 = 60 M. L. J. 167 = 33 L. W. 143 = 54 M. 337 = Ind. Rul (1931) Mad. 686 = 132 I. C. 654

## C. P. C. (1908) S. 2 (2) (Contd.)

## (6) Orders which are neither decrees nor appealable. (Contd.)

—Order merely referring the suit to Official Referee or Commissioner to take accounts or determine shares of the partners is not a decree : A I R 1924 Mad. 406 = 73 I C 903.

—Preliminary decree for taking accounts and dissolution of partnership Court finding account books to be in possession of particular partner and making order that accounts should be taken up to certain date—Such order is not decree. A I R 1929 Lah. 699 = Ind. Rul. (1930) Lah 61 = 120 I C 429.

—Decisions on mere right to sue e. g. on questions of limitation, jurisdiction, res judicata, maintainability of suit etc are not decrees : 16 Bom. L. R. 594 = 26 I. C. 885 = 39 B. 339 F. B; see also 29 I. C. 393.

—Where an order set aside an *ex parte* decree with costs, and the costs were fixed by Rubkari it was held that the Rubkari was not a decree 59 I. C. 51.

—OBITER—Order striking off objection of judgment-debtor for default is not appealable; remedy is s. 151 or O. 47 : A. I. R. 1929 A 123=26 A. L. J. 1395=112 I. C. 380.

—Decision given in default of plff. is not a decree : 23 O. C. 124=A. I. R. 1925 O. 485 = 85 I. C. 393.

—Order dismissing application to be brought upon the record af plff. or deft is not a decree 13 A. L. J. 381=28 I. C. 687=37 A. 272.

—Order permitting withdrawal of deft from suit is not a decree : 150 P. W. R. 1911 =248 P. L. R. 1911=11 I. C. 830

—An order under R. 5 of O. 22 determining the question as to who is the legal representative of a deceased party, is not a decree and is not appealable under the new Code, though it was appealable under the old Code. 13 I. C. 70.

—An order on an application by a third person to be impleaded as legal representative of the deceased plaintiff is not a "decree" A. I. R. 1925 A 431 = 23 A. L. J. 442 = 6 L. R. A. 361=88 I. C. 95=47 A. 741; see also 1905 A. W. N. 206 = 28 A. 109

—An order rejecting husband's claim to be legal representative was held not to be a decree : 17 N. L. R. 45=62 I. C. 303.

—An order dismissing an application to bring legal representative on is not a decree 2 L. L. J. 738 = 57 I. C. 137 = 1 Lah. 493.

—Order refusing to implead a person as legal representative is a decree 39 M. L. J. 218 = 12 L. W. 188 : (1920) M. W. N. 467 = 58 I. C. 498.

—If an order rejecting the claim of a person to be the legal representative of a deceased plaintiff is to have the character of a decree it must conclusively determine their rights of the parties in the suit. A. I. R.

## C. P. C. (1908) S. 2 (2) (Contd.)

## (6) Orders which are neither decrees nor appealable. (Contd.)

1924 Mad. 813=47 M. L. J. 370=35 M. L. T. 82=(1924) M. W. N. 763=80 I. C. 942.

—Whether a mere refusal to pass a final decree in terms of the preliminary decree debarring redemption amounts to decree is doubtful. A. I. R. 1928 L. 355=10 L. L. J. 198=110 I. C. 81; but see 38 C. L. J. 115=25 C. W. N. 595 = 59 I. C. 177.

—Similarly, under other Acts, the following orders have been held not to be decrees and not appealable : Order raising attachment under Insolvency proceeding Punjab Laws Act. 3 L. L. J. 338=67 I. C. 794.

—Order under Ch. VII. of the Presy. Sm. Cause Cts Act A. I. R. 1929 Mad. 69=56 M. L. J. 199 = (1929) M. W. N. 174 = 29 L. W. 537=Ind. Rul. (1929) Mad. 456 = 115 I. C. 504.

—An order on an application for leave to institute a suit under the Religious Endowments Act (XX of 1863) : 5 C. L. J. 641 = 34 C. 584.

—Order rejecting application under ss. 5 and 7 of U P Reg. V of 1909 : 10 I. C. 414.

—Order under s. 4 Reg. V of 1799 is not appealable, but such order was once treated as application for revision : 13 C. L. J. 677 = 9 I. C. 994.

## (7) ORDER IN ARBITRATION PROCEEDINGS

—Under the old Code there was a conflict of decisions as to whether an order under s. 523, and s. 526, directing that an award should be filed, or refusing to file it, was a decree : 2 A 471; 1 A 156; 16 A W N 116=18 A 414; 5 A 333; and 3 M 68 holding that such order was not a decree; while, 126 P R 1907 = 88 P W R 1907 = 50 P L R 1908; 9 M L J 10=22 M 299; 12 I C 372 = 36 M 353; and 29 I A 51 = 29 C 167 holding such order to be decree.

—But it has now been settled that order under paras 17 and 21 of Sch. II of the Code filing or refusing to file an agreement to refer to arbitration is not a decree, but it is appealable as an order under s. 104; see notes to paras 17 and 21 of Sch. II. and see also 9 O. W N 800 = 139 I C 622 = 1 R 1932 O. 574 = 6 Luck 703.

—In suit for the recovery of money the defts. claimed a set-off on account of damages for a breach of contract and the amount awarded to them by arbitrators to whom they had referred the dispute for settlement.

—The plffs. denied that there was any agreement to refer or any valid reference.

—The Sub-Judge dealt with the issues relating to the existence of an agreement to refer, the validity of the reference and the alleged set-off preliminary issue and decided them all in the plff's favour. On an appeal by the defts.



## C. P. C. (1908) S. 2 (2) (Contd.)

## (7) Orders in Arbitration Proceedings (Contd.)

—Held, that the order of the lower Court did not amount to a decree within S. 2 (2) of the C P Code, in spite of the fact that it disposed of the claim to a legal set-off advanced by the depts; and that as the decision could be attacked in an appeal against the final order in the case, no appeal was competent.

—The decision of the Court below that no agreement to refer had been entered into by or on behalf of the plffs. and that, therefore the suit was not liable to be stayed under para. 18 of Sch. ii C P Code was not one that the Court was competent to arrive at and was appealable under S. 104 (e) 62 P R 1917; 65 P W R 1917 : 39 I C 508.

—Decision on an application to file a private award, part of it being on a matter outside the scope of the declaration, is an "order." 66 P R 1915=31 I C 80=146 P W R 1915.

—Order disposing of objections against award is not a decree, and no appeal or revision lies : 1 P L R 1911=9 Ind. Cas. 385 = 12 P W R 1911.

—Order setting aside award is not a decree 8 S L R 260=28 I C 60.

## (8) Orders in Execution Proceedings.

—Every order under s 47 is not necessarily a decree. An order in proceedings under s. 47 is decree only if it determines rights or liabilities of the parties, and not if it decides merely in incidental questions. A I R 1924 Pat. 683 = 2 Pat. L R 222 = 84 I C 576; see also; 1931 A. L. J. 108=A. I. R. 1932 A. 85=129 I. C. 708; A. I. R. 1927 N. 112 = 23 N. L. R. 14=100 I. C. 691; A. I. R. 1927 A. 208=6 L. W. 43=99 I. C. 455; 15 C. L. J. 89=16 C. W. N. 736 =13 I. C. 365; 14 C. L. J. 489=12 I. C. 745.

—The words "the decree shall be deemed to include the determination of any question within S. 47 C. P. C." in sec. (2) of the Code must be limited on the words which immediately precede and unless the decision appealed from is one which in some way determines the rights of the parties with regard to all or any of the matters in controversy in the suit, it cannot be included under the definition of decree. (1929) Pat. 227.

—An order under s. 47 prescribing the order of sale of the mortgaged properties amounts to a decree, and is appealable. Ind. Rul (1931) All 196 = (1931) A. L. J. 108 = 129 I. C. 708.

—An order directing the decree-holder purchaser to pay mesne profits on setting aside the sale, is decree. A. I. R. 1930 Cal. 89 = 56 C. 550=Ind. Rul. (1930) Cal. 89=120 I. C. 807.

—A decree absolute for redemption, sale or foreclosure is a final decree : 10 I. C. 736 = 7 N. L. R. 41

## C. P. C. (1908 S. 2 (2) (Contd.)

## (8) Orders in Execution Proceedings. (Contd.)

—An order setting aside or refusing to set aside a sale under O. 21, r. 92 is appealable : 17 I. C. 884=8 N. L. R. 177.

—On a decision of question under s. 47 which is a decree, there is right of leave to appeal to Privy Council. (1918) Pat. 81.

—An order in proceedings taken by the judgment-debtor for recovery of the loss caused by a re-sale owing to the default of the prior purchaser in depositing the purchase money is a decree : 20 A. L. J. 305=L R 3 A. 117=65 I. C. 813=A. R. 1922 A. 200=44 A. 266; see also 5 M. L. J. 206=18 M. 439; 2 C. W. N. 408=25 C. 99 (see *contra* 11 A. W. N. 156=13 A. 569; and, 85 A. W. N. 1890—both of them being cases under the old Code.)

—Decision whether execution is time-barred is a decree : 2 Pat. L. R. 222=84 I. C. 576=A. I. R. 1424 Pat. 683.

—Where it was objected that execution could proceed only after payment of an additional Court fee but the objection was overruled, it was held that an appeal lay : 70 I. C. 483 = A. I. R. 1922 Pat. 59 = 3 P. L. T. 146.

—Admission of execution application is decree. A. I. R. 1922 Pat. 59 = 3 P. L. T. 146 70 I. C. 483.

—An order granting or refusing a process for the examination of witnesses or an order merely determining a point of law arising incidentally or otherwise in the course of execution proceedings and not refusing or granting relief is not a decree and is therefore not appealable. But an order finally negating the rights of the decree-holder to proceed against the land of the judgment-debtor comes within and is appealable. 56 I. C. 173.

—On an application for execution of a money decree by attachment and sale of certain land belonging to the judgment debtor, notice was issued to the Collector asking whether he desired to intervene under S. 72 of the C. P. Code, but the Collector refused to intervene. The Court held that under the circumstances it was useless to send the record to the Collector and that the decree-holder should seek some other remedy for the realization of the decretal money. *Held*, (1) that the question whether the appellant was entitled to have the provisions of S. 72 of the C. P. Code carried out for his benefit was one within S. 47 of the Code, and the order was a decree within S. 2 of the Code 52 I. C. 356.

—Order staying or refusing to stay execution of decree is not a decree and is not appealable. A I R 1931 Rang 221 = 9 R. 354 = Ind. Rul (1931) Rang 267 = 133 I C 491. see to the same effect; A I R 1924 A 808 = 22 A L J 706 = 83 I C 1035 = 46 A. 733; A I R 1930 A. 121 = I R. 1930 A. 214 = 122 I C 182; 59 I C 523 = 45 B. 241; 20 C L J 512 *descent*



C. P. C. (1908) S. 2 (2) (Contd.)  
(8) Orders in Execution Proceedings. (Contd.)

ing from 12 B. 279 25 C W N 555 = 55 I. 228;  
29 B. 71 (But see *contra* : A I R 1930 L. 183  
= I R 1930 L. 541 = 124 I C 349; 2, S L R 24;  
and 13 C 111.

—An order for security for stay of execution though one relating to the execution of a decree is not one which determines the rights of the parties in controversy in the suit and does not come within S. 2 (2) 41 Cal. 160 = 17 C W N 1240 = 20 I C 72; see also 106 I C 890.

—Order accepting or refusing to accept security for stay of execution is not appealable as "decree" under s. 2 (2) or under s. 47 136 I C 793 = 32 P L R 806 = I R 1932 L 278 (1) = A I R 1932 L 120; see also 27 I C 72 = 17 C W N 1240 = 41 C. 160.

—An order accepting security is not appealable as to sufficiency of the security: 106 I C 866 (see *contra* 12 B. 30)

—The following matters have been held not to fall within the scope of s. 47. An order not conclusively determining the rights of parties in the matter of execution but merely deciding the mode in which execution should proceed does not amount to a decree and is not appealable, A I R 1931 All 129 = 1931 A L J 895.

—Decision merely on an issue before passing of the final order is not a decree: 37 Mad 2 = 21 M L J 1063 = 12 Ind. Cas 664 = 10 Mad L T 437.

—An order rejecting judgment debtor's objection to statement of value in sale-proclamation is not a decree 1920 Pat. 227 = 1 Pat. L T 645 = 5 Pat. L J 270 = 56 I C 452.

—Express order granting leave to apply for execution is not a decree. A I R 1929 All 390 = (1929) A L J 553 = Ind. Rul. (1929) All 465 = 115 I C 865.

—An order in execution is not appealable if it does not fall within the definition of decree in S. 2 (2): A I R 1926 A. 401 = 94 I C 1 Obiter.

—Though an order for sale may come within the definition of a decree under S. 2 read with S. 47, yet an order setting aside a sale (a transfer of property) can not be a decree 18 C W N 1299 = 22 I C 839.

—The judgment debtor applied to have the auction sale in favour of the decree holder set aside for irregularities in sale which was refused by both the Munsil and the Dt. Judge on review, however the Dt. Judge set aside the sale as being contrary to O. 34, R. 14 Held on appeal from the order that the order was not a decree and that no second appeal lay to the Chief Court 38 P L R 1915 = 6 P W R 1915 = 27 I C 589.

—No appeal lies against an order forbidding a decree holder to bid at a sale held in execution of a decree, the matter being one of administration. 15 C W N 862 P C.

C. P. C. (1908) S. 2 (2) (Contd.)  
(8) Orders in Execution Proceedings. (Contd.)

—Order refusing decree to withdraw bid is not decree 19 C. W. N. 633 = 27 Ind. Cas 805.

—An order assessing the value of the property to be sold under a decree after rejecting the application of the judgement debtor for higher value is not appealable: 14 C. L. J. 35

—Order in execution that no warrant shall issue before a certain date is not a decree 101 P. L. R. 1911 = 64 P. L. R. 1911 = 9 I. C. 823.

(9) Orders in Restitution Proceeding.

—For the purposes of S. 2 (2) there is no distinction between a decree in a proceeding under s. 144 and a decree in a suit: A. I. R. 1925 C. 102 = 84 I. C. 747 = 28 C W N 988;

The determination of a question under s. 144 is a decree and appealable as such: A I R 1925 C 102 = 84 I C 747 = 28 C W N 988; see also 19 C W N 1167 = 26 I C 890; 1914 P R 10 = 27 I C 203; and 56 C. 550.

—But a decision on an application for restitution under S. 144, C P C to be appealable as a decree under S. 2 must be decision on the merits of the application and not on a matter incidental or collateral to the application. 117 P L R 1914 = 110 P R 1913 = 22 I C 851

—*Abona fide* auction-purchaser for value is not a party to the suit within s. 2 or s. 47. C P C, and order refusing restitution against him is not a decree. A I R 1925 Lah 176 = 79 I C 57.

—Questions arising under s. 144 may also be questions falling under s. 47 A I R 1931 Cal 779 (2) = 35 C W N 105 = 53 C L J 49.

(10) ORDER DISMISSING SUIT OR APPEAL.

—But the other High Courts held that such order was appealable and amounted to a decree: 7 C W N 486 = 30 C 660 F B (overruling 23 C 115; 23 C 827; see also 8 C W N 313; 2 M 75; 16 B 23; 9 A 427; The conflict has now been set at rest by the express provision of the present Code s. 2 (2) (b) that an order of dismissal for default is not a decree; see also 18 C W N 604 = 18 C L J 128 = 20 I C 1; and the following cases 14 Ind Cas 823 = 22 M L J 284 = 1912 Mad W N 332 = 11 Mad L T 280; 47 I C 125 = 5 O L J 252; 38 I C 493 = 44 C 954 = 24 C L J 523 = 21 C W N 776; 1924 A 144 = 45 A 669 = 21 A L J 667 = 5 L R A civ; 26 = 74 I C 905 and 32 All. 373 = 7 All L J 246 = 5 Ind Cas 423.

"Order of dismissal for default" includes an order of the execution Court dismissing an objection for default. 94 I C 1 = A I R 1926 A 401; see also A I R 1932 Nag. 14 = 27 Nag. L R 339 = 135 Ind Cas 412; 27 Ind Cas 492 = 19 Cal W N 25; 29 All 596 = 1907 All W N 186.

C. P. C. ( 1908 ) S. 2 ( 2 ) ( *Contd.* )( 10 ) Orders Dismissing Suit or Appeal. ( *Contd.* )

—An order dismissing an appeal for default under O. 41, rr 17, 19, is not a decree. U B R 1897=1901. Vol. II 206 see also A I R 1923 Pat 514=4 P L T 405=1923 Pat 213=75 I C 284=2 Pat 739; and 15 C L J 334=14 I C 823=39 C 341

—But dismissal of appeal under O 41, r. 11 is a decree : A I R 1926 C 638=39 I C 909=30 C W N 334.

—Order dismissing suit for insufficient Court fees is a decree : 8 A W N 286=11 A 91, see also : 22 O C 289=54 I C 733.

—An order dismissing a suit, brought by the next friend of minor, on the ground that the suit was not in minor's interest is a decree 1 L W 875=25 I C 738.

—Order of an appellate Court dismissing suit with liberty to plff to bring a fresh suit is a decree : 37 I C 940.

—Order dismissing a pre-emption suit for non-payment within specified time is a decree 24 I C 109; see also 17 O C 14=21 I C 193.

—A decree under R 8 O 9 is not an order of dismissal for default and is therefore appealable. 16 C L J 559=15 I C 601.

—Dismissal of suit on appeal on ground of jurisdiction is a decree : 11 L W 3=54 I C 749.

—Order dismissing an application for final decree in a suit to enforce a mortgage is a decree. 137 I C 273=I R 1932 L 332=33 P L R 56=A I R 1932 L 214.

—Where in a pending suit the Court made an order striking out the name of one of the defts and dismissing the suit as against him on the ground that the plaintiff disclosed no cause of action, the order though purporting to be made under O 1 R 10 of the C P Code is a decree and is appealable as such. 42 Mad 219=36 M L J 169=25 M L T 184=9 L W 329=49 I C 835.

—A dismissal of suit in consequence of refusal of adjournment is a decree : A I R 1927 R 148=6 Bur L J 77=101 I C 618=5 R 838.

—Order dismissing suit for default of prosecution. One of plaintiffs present and applying for adjournment but application rejected. Appeal against such order is maintainable. 4 Pat L W 366=45 I C 189.

—An application for adjournment on the part of the plff. having been refused, the Court passed the following order : " As there is no evidence on the side of the plff, and some of the defts, and though other defts are ready but adduce no evidence, let the suit be dismissed." Held, that the order was a decree inasmuch as it was a final decision of the suit so far as the Court was concerned. 45 I C 200.

—An order dismissing an application by the mortgagee for a final decree for sale under O 34 R 5 (2) of the C P Code is not an order in execution of the preliminary decree but is an order in the suit itself. Such an order falls within the definition of decree in

C. P. C. ( 1908 ) S. 2 ( 2 ) ( *Contd.* )( 10 ) Orders Dismissing Suit or Appeal. ( *Contd.* )

S. 2 (2) of the C P Code and is appealable under S 98 of the Code. 35 M L J 552=8 L W 526=24 M L T 486=[1918] M W N 792=48 I C 298=42 Mad 52.

—There can be no dismissal of suit after preliminary decree : 6 P L T 152=A I R 1925 Pat 433=86 I C 785.

—Where a suit is dismissed against some defts for non-representation for which plffs. are not to blame, such dismissal is not a decree : A I R 1929 C 669=33 C W N 742=I R 1930 C 395=124 I C 75.

—Order under O 9, r. 2 dismissing a suit is not a decree : 38 A 357=14 A L J 347=33 I C 737.

—Order under s. 148 extending time for payment is not decree, nor is it appealable : 21 I C 585=11 A L J 950=35 A 582.

—Order dismissing a suit for non-prosecution is not a decree, nor is it appealable : 20 C W N 752=34 I C 186; see also:—A I R 1914 P C 66=36 All 350=12 All L J 624=16 Bom L R 395=19 Cal. L J 624=16 Bom. L R 395=19 Cal L J 626=18 Cal W N 963=27 M L J 17=16 M L T 44=1 M L W 483=1914 M W N 485=23 Ind Cas 649 P C.

—Where an appeal against an ex-parte decree is dismissed for default the decree is not superseded and an application to set aside that decree can be entertained by the Court which passed it 39 All 393=15 A L J 286=39 I C 519.

—Only such orders of dismissal for default as are treated as such by the Code itself are excluded from the definition. A I R 1924 Cal 830=51 C 715=28 C W N 795=39 C L J 399=83 I C 220.

## ( 11 ) ORDERS REJECTING PLAINT OR MEMORANDUM OF APPEAL.

—Order rejecting plaint for non-payment of extra Court-fee is a decree : 3 L L J 237 =A I R 1921 L 43=67 I C 901.

—An order rejecting memorandum of appeal for deficient Court-fees is appealable : 18 N L R 15=67 I C 225=A I R 1922 N 62; such order is a decree and not a dismissal for default : A I R 1922 Pat 281=3 P L T 117=6 P L J 625=63 I C 99; see also, 51 I C 114.

—*Quære*—Whether an order refusing to admit an appeal filed out of time is a decree 45 I C 725.

—An order rejecting an appeal, before it has been admitted, on the ground that it was presented out of time is a decree 17 C W N 807=19 I C 931.

—The Nagpur Court has held that an order rejecting memorandum of appeal on any ground is a decree : 1927 N 100=98 I C 663.

## C. P. C. (1908) S. 2 (2) (Contd.)

## (11 Orders Rejecting plaint or Memorandum of Appeal. (Contd.)

—But the Calcutta, Lahore, Madras and Allahbad High Courts have held that a rejection of an appeal under O. 41 r. 10 [2] is not a decree: 8 I C 436=9 M L T 117; 53 A W N 1808=5 A L J 109=30 A 143; A I R 1922 C 246=26 C W N 1020=35 C L J 131=62 I C 751=49 C 355; A I R 1922 L 87=67 I C 256=68 P L R 1922=3 L 30; 17 C W N 807=19 I C 931; and 15 A W N 238=18 A 101 [overruling 3 A W N 60=5 A 380]

—And where the order did not finally dispose of the appeal it was held not to be a decree: 59 C 388=I R 1932 C 483=A I R 1932 C 482=138 I C 643.

## [12] ORDERS RETURNING PLAINT or MEMORANDUM OF APPEAL.

—There is no difference between the provisions of the old Code and of the present one in this respect.

—But an order merely returning the plaint for amendment within a specified period is not a decree, and it is neither appealable nor open to revision under the present Code: 11 I C 231=96 P R 1911=143 P W R 1911=216 P L R 1911

## C. P. C. SECTION 2 [3]

—A "decree-holder" within the meaning of s. [3] is a person whose name is on the record of the suit and in whose favour the decree is passed: A R 1929 Bom. 279=31 Bom. L R 320=118 Ind Cas 694.

—A "decree-holder" does not include an attaching creditor: A I R 1925 A 123=80 I C 947.

—A decree-holder need not be a party to the decree.

—It is enough if the decree confers some right enforceable under the decree upon some persons mentioned in it, held, accordingly that where a scheme-decree conferred upon the Board of Control, which was itself a creation of the decree, the right of calling upon the trustees to remit the collections, the Board might be regarded as a decree-holder. 35 L W 22 [25]=61 M L J 904=136 I C 771=I R 1932 M 307=A I R 1932 M 193=A L R 1932 M 351

—A decree-holder in a decree for sale of immovable property need not necessarily be the plff. Both plff. and deft. are "decree-holders" in such a case: A I R 1929 L 492=I R 1929 L 468=116 I C 212.

—Similarly, where the plff did not want to execute a decree for specific performance of an agreement to sell, passed in his favour, it was held that the deft, could execute in as

## C. P. C. (1908) S. 2 (3) (Contd.)

he was a "decree-holder": A I R 1923 B 26=24 Bom L R 496=67 I C 667=46 B 990; see to the same effect A I R 1932 C 579=36 C W N 172=139 I C 230=I R 1932 C 579=A L R 1932 C 797=59 C 501.

## C. P. C. SECTION 2 [4]

—"District" includes original side of High Court: 27 M L J 645=27 I C 455; but it does not in every case mean the original side: A I R 1927 C 290=45 C L J 71=190 I C 331.

—The definition of "foreign Court" does not apply to Provincial Insolvency Act: A I R 1929 M 900=57 M L J 393=30 L W 531=I R 1929 M 436=123 I C 70.

—District Court in British Cantonment in Secunderabad is a foreign Court. A L R 1933 P C 158=1933 M W N 522=37 L W 767=A I R 1933 P C 122.

—The Ceylon Court: 3 I C 190=32 M 469, and the Courts in the Native States: 21 I A 171=22 C 222 P C Are foreign Courts though the States themselves are not foreign States: 26 I C 287=16 M L T 479=27 M L J 535=1 L W 887=1915 M W N 162=39 M 24 F B; 1913 M W N 605=14 M L T 96=20 I C 704.

—As to suits on Judgments of foreign Courts see S. 13.

—As to the question of foreign Judgment operating as *res judicata* ss. 11 and 13 and see also A L R 1933 M 341.

## C. P. C. Sections 2 (7) and 2 (8).

—But neither the definition in Evid. Act, nor in Cr. P. C. nor in s. 19 Penal Code, is strictly applicable for the purposes of S 2 (8) of the C P code: 1912 M W N 473=23 M L J 50=15 I C 652 F B.

**Disqualification**—No Judge can act in any matter in which he has any pecuniary interest or any interest which, though not pecuniary, is sufficient to create a real bias—e.g., a Mamlatdar who had acted in the management of the property in dispute in a possessory case was held disqualified from trying the case.

—When an officer has, in the course of executive duties, formed an opinion and acted on it, or has sought to give effect to it as agent of a public body which has become a litigant in a case, the law will presume an interest creating a bias so as to disqualify him as a Judge 19 Bom. 608 see also 15 C L J 162=141 C 458.

## C. P. C. (1908) S. 2 (9)

—For the contents of a judgment, see O, 20, r. 4, and O 41, r. 32. A judgment under C P C is only the basis of a decree or order. The decree, which itself is formal expression of the judgment, is, and the order may or may not be, appealable, but the judgment itself gives no right of appeal. 8 N L R 92=15 I C 935.

—The judgment must give a statement of the grounds of the decision: 15 O C 78=15 I C 212; though it need not necessarily decide all the issues in question: A I R 1926 L 638 [2]=8 L L J 361=27 P L R 701=97 I C 780; 13 P W R 1911=14 I C 371.

—A written order deciding one of several issues in a case is a "Judgment" and can be pronounced by the successor of a Judge who passed the order. 14 I C 371=13 P W R 1911.

—Shorthand notes dictated by, but never approved by, the Judge, cannot be considered as part of his actual judgment. A I R 1927 Bom. 113=51 B 167=29 Bom L R 126=100 I C 941.

—A defendant did not file his written statement on the date on which he was ordered to file it, nor on the date fixed for hearing. The Munsif thereupon declared the claim of plaintiff under O 8 R 10, without going into the merits of the case or without stating the grounds of his order decreeing the claim: —Held that the Munsif's order was not a judgment, but merely an order decreeing the plaintiffs claim. Held also that the Munsif acted with material irregularity and his decision was set aside. 15 I C 212=15 O C 78. See also cl. 15 of Letters Patent as to the meaning of the word "judgment"

## Section 2 (10)

—The definition of "judgment-debtor" does not include the assignee of the judgment-debtor. 11 M L T 144=[1912] M W N 176=13 I C 659.

## Section 2 (11)

—See also cases under:—S. 50, S. 52, O 21, r. 21 and O 22, r. 3.

- [1] Alterations in law.
- [2] Who can be Legal Repr.
- [3] Persons intermeddling with estate.
- [4] Wrong Representative impleaded.
- [5] Suits against Legal Repr.

## [1] ALTERATIONS IN LAW.

—Under the old Code there was a conflict as to whether the term "legal representative" was confined to administrators, executors and heirs, when used in the body of the Code. Woodroffe J. has fully dealt with the case-law on the subject in 8 C W N 843. The present sub-section, therefore, is an entirely new definition, and clears away the doubts that existed under the old Code.

## C P C (1908) S. 2 (11) (Contd.)

## [2] WHO CAN BE LEGAL REPRESENTATIVE

—Whether an Heir-at-Law is competent to represent a portion of estate decreed to a legatee see 42 M 76=1919 M W N 107=35 M L J 632=49 I C 11=9 L W 26. Where a legatee who had applied for probate, died pending appeal after making a gift of the legacy: Held that the donees were 'legal representatives' of the legatee and entitled to be substituted as parties. 35 C W N 1023.

—On death of the judgment-debtor the person in possession of the property is legal representative of the deceased and the decree can be executed against such person. A I R 1924 Cal. 362=69 I C 179.

—Surviving co-parceners in a Hindu joint family are not "legal representatives." Mayne's Hindu Law, 8th Ed., B. 329, referred to A I R 1921 Lah 34=2 Lah 114=3 Lah L J 349=73 P L R [1921]=61 I C 628; see also 20 Bom. L R 660=42 B 504; and 31 I C 4.

—But where a suit by the manager of a joint Hindu family refers to joint family estate, it is really a suit in a representative character for all the members of the family. When he dies, the next managing member can come in as the legal representative.

A I R 1925 Mad 456=21 L W 21=86 I C 178.

—And where a father and son are coparceners, and the son dies after his undivided share is attached in execution of a decree against him alone, the father is the legal representative of the deceased son, and the decree can be executed against him: A I R 1926 A 157 [1]=23 A L J 877=L R 6 A 511 civ=89 I C 291=48 A 4.

—Where an unmarried daughter sues for the father's estate, and dies, her sister has a right to continue the suit: 38 A 111=14 A L J 8=32 I C 104. Similarly, it has been ruled by the Privy Council that on death of a Hindu plaintiff, pending the suit for declaration of invalidity of an adoption and alienation, the next presumptive reversioner has a right to continue the suit as legal representative: 38 M 406 P C.

—But it has been held that a Hindu reversioner who is thus entitled to continue a suit is not strictly a legal representative within the meaning of the sub-section: 49 I C 268.

—Where the daughter [plaintiff] died pending the suit to recover the property it was held that the reversioner was rightly added as her legal representative: 39 Mad 382=17 M L T 186=27 I C 1001; see also 28 M L J 335 [P C.]

—Widow, asserting in defence to a suit that her husband had dedicated property in question to religious purposes, acts in a representative character and on her death her husband's step-mother for whose maintain-



## C. P. C. (1908) S. 2 (11) (Contd.)

## [2] Who can be Legal Representative (Contd.)

ce also provision was made by his will becomes her legal representative since all male heirs of deceased had refused to recognise dedication. A I R 1925 Lah 2=17 P W R 1923=79 I C 670.

—Trustees are not legal representatives of their predecessors-in-office : 92 I C 520 = A I R 1926 M 540.

—Auction-purchaser in execution of decree for sale on mortgage of under proprietary tenure is not legal representative of original under-proprietor. A I R 1929 Oudh 353 = 6 O. W N 463 = Ind. Rul. [1929] Oudh 356 = 117 I C 452.

—Purchasers of equity of redemption, and not the heirs of the deceased mortgagor, are the legal representatives of the deceased : [1926] M W N 276 = 95 I C 904.

—A decree for removal of a *mahant* cannot be executed against the succeeding *mahant* who was on the death of the first in *de facto* possession but who claimed to be, appointed by the *bhik*. A I R 1924 Lah 251 = 5 Lah L J 459 = 77 I C 585.

—S, a voter in a Devasthanam circle, instituted a suit with sanction under O. 1 r. 8 for a declaration that the election of a member of a Devasthanam Committee was void, and for an injunction to restrain him from exercising the office of such member. He died pending the suit, and R, another voter, was brought on record as the legal representative of S, and the suit was revived at R's instance. Held that R, though not a legal representative could be allowed to continue the suit. 1912 M W N 105.

—Zamindar is not the legal representative of a deceased tenant : 23 I C 969 = 10 L J 86.

—Where a person is nominated to receive money after the depositor's death, he cannot receive the money if the nomination is not a Will duly executed. A I R 1921 Mad. 199 = [1921] M W N 70 = 60 I C 239.

## [3] Persons intermeddling with estate.

—Under the Hindu Law and under the British Indian Law any one who intermeddles with the property of a deceased person renders himself liable for the debts of the deceased to the extent of the property taken by him : 3 Pat L W 302 = 1918 Pat 86 = 42 I C 122.

—Intermeddling even with a portion of the estate will make him liable to the extent, at any rate, of the property taken possession of by him : 39 P L R 1914 = 22 I C 242 = 115 P R 1913.

## C. P. C. (1908) S. 2 (11) (Concl'd.)

## [3] Persons intermeddling with estate. (Concl'd.)

—An executor *de son tort* is a legal representative within S 2 [11] and is liable to be brought on the record under that section on the death of the deft 50 I C 951.

—But he is not a representative for the purposes of succession to the deceased's property.

—And the mere fact that an intermeddler is joined as party to the suit for recovery of possession cannot make a decree in that suit in any way binding on the real heir who is not a party to that suit and who later on gets a decree against the intermeddler declaring his superior right A I R 1924 All. 717 = 75 I C 114.

—The intermeddler need not be added when there is other legal representative A I R 1926 Cal. 825 = 30 C W N 565 = 96 I C 695.

—Heirs of intestate Parsi who intermeddle with his estate are his legal representatives and proper parties to suit on mortgage by the deceased Parsi. A I R 1927 Bom. 474 = 29 Bom L R 900 = 51 B 771 = 104 I C 794.

—Where a person who has wrongly converted property does not produce it, it shall be presumed as against him to be of the best description. 115 P R 1913 = 39 P L R 1914 = 22 I C 242.

—As regards the onus of proving that assets have come to the hands of the deft the plff. must in the first instance give such evidence as would *prima facie* afford reasonable grounds for an inference that the assets have, or ought to have, come to the hands of the deft.

—But when the plff. has laid this foundation for the case, it will then lie on the deft. to show that the amount of the assets is not sufficient to satisfy the plff's claim, or that they are of such a nature that plff. is not entitled to be satisfied out of them or that there never were any assets, or that they have been duly administered and disposed of in satisfaction of other claims. 3 Pat. L W 302 = 42 I C 122 = [1918] Pat 86.

—Possession by purchaser of portion of joint family property or of the interest of co-parcener in specific property is not wrongful—Co-parcener's acquiescence in such purchaser's possession disentitles him to mesne profits A I R 1924 Bom 433 = 48 B 428 = 26 Bom L R 464 = 87 I C 703.

## [4] Wrong Representative impleaded.

—As to the effect on reversioners of a decree when wrong representative is impleaded see 29 I C 6 and 15 Bom L R 41.

—*Prima facie* no decree is binding on a person who has not been represented in the suit.



C. P. C. ( 1908 ) S. 2 ( 11 ) ( *Contd.* )

[ 4 ] Wrong Representative impleaded. ( *Contd.* )

—Where during the pendency of a suit deft. died leaving a daughter as his heir, and the plff. impleaded as the legal representative a remote reversioner and in execution thereof purchased the property of the deceased deft. *held*, that the daughter who was the true heir of the deceased was not bound by the decree and the sale in execution.

—Cases where pending the suit the deft dies and some only of his legal representatives are brought on record and where after decree, the judgment debtor dies and execution is carried on against a wrong representative, distinguished. 25 Bom. 337 [ P C ]; 33 M 6; 29 M L J 698; 25 A 214 at 220 ref. 26 M 230, appr. 32 C 226 dist. 31 M L J 222 = [ 1916 ] 2 M W N 233 = 35 I C 124.

—Decree against wrong legal representatives is sometimes binding on the true representative if the decree-holder acted *bona fide* A I R 1929 Mad. 482 = 30 L W 778 = Ind. Rul. [ 1929 ] Mad. 1025 = 120 I C 65.

[ 5 ] Suits against Legal Representative.

—Where a person has been impleaded in some capacity as a representative of the deceased though not in his real representative capacity, there is sufficient representation A I R 1927 Pat 114 = [ 1926 ] Pat. 353 = 8 P L T 287 = 99 I C 865.

—Where there are two rival claimants to estate of the deceased it is open to decree-holder to choose as the legal representative, the one who appears to have *prima facie* title. A I R 1929 Mad. 482 = 30 L W 778 = Ind. Rul. ( 1929 ) Mad. 1025 = 120 I C 65; see also 29 M L J 698 = 31 I C 920.

—Where a creditor sues the person in possession of the deceased debtor's estate, the decree against such person is binding on the legal heir subsequently taking possession of the estate. A I R 1926 Nag. 476 = 9 N L J 183 = 96 I C 963; see also 36 M L J 109.

—A and N, the two life-tenants, having died intestate the reversioner under the original will became the heir to the properties, and decree passed against the daughter of N as representing estate of N did not bind the estate in his hands. 37 C L J 90 = 70 I C 886.

—Where the ostensible sole heir is impleaded the decree binds whole estate including the interest of those heirs not brought on record and not served with notice A I R 1925

C. P. C. ( 1908 ) S. 2 ( 11 ) ( *Contd.* )

[ 5 ] Suits against Legal Representative ( *Contd.* )

Oudh 330 = 12 O L J 37 = 2 O W N 34 = 28 O C 177 = 87 I C 892.

—Where a creditor of the estate ignorant of a will sued the widow in possession and the illegitimate son who would have been the legal representatives but for a will left by the debtor under which the 1st deft, was constituted executor and the plff. a legatee and obtained a decree and in execution the property in possession of the widow was purchased by a stranger, *held*, that the sale was binding against the plff. 14 M I A 605 foll. 29 M L J 698; 31 I C 920.

—A suit against the legal representatives of a deceased should not be dismissed on the mere ground that the defts. are not in possession of any portion of the assets 40 I C 407 see also A I R 1926 N 170 = 89 I C 236.

But in order to implead the legal representative of a member of a Hindu joint family it must be shown *Prima facie* that the deceased has an estate. A I R 1930 Mad 575 = Ind Rul ( 1930 ) Mad 973 = 127 I C 237.

—When during the pendency of a suit against one of two co-administrators the deft dies the plff can not implead the other as his representative 45 P W R 1917 = 38 I C 788.

—In case of a decree against a legal representative only the property of the deceased and not the property of the judgment-debtor is to be proceeded against in execution. A I R 1925 Oudh 113 = 27 O C 238 = 11 O L J 554 = 80 I C 600.

—An objection by the person, sought to be substituted as legal representative that he is not liable to satisfy decree the objection must be decided by the executing Court before an order substituting him as legal representative is made A I R ( 1923 ) Pat 149 = 3 P L T 106 = 82 I C 803.

—Judgment-debtor attaining majority is not entitled to fresh notice of execution proceeding as legal representative A I R 1925 Mad. 158 = 78 I C 12.

—Where two executors appointed under a will of a deceased Hindu, instituted a suit upon a mortgage in his favour and one of them died before the preliminary decree and the other after it, and where an application by the senior widow of the testator to bring her on record to enable her to continue the suit and obtain the final decree was dismissed. *Held* that no appeal lay against the order. 39 Mad 488 = 28 M L J 491 = 17 M L T 385 = ( 1915 ) M W N 327 = 2 L W 403 = 29 I C 142.

## C. P. C. SECTION 2 (12)

See cases under O. 20, R. 12, and s. 144

## SECTION, 2 (13)

—But owing to the new definition incorporated in the present sub-section the above decisions are no longer law. It should be noted, however, that the new definition is meant for the purposes of the Code only: 11 N L R 18-27 I C 935.

—Thus it does not extend to Lmt Act 18 M L T 532-31 I C 796.

## SECTION 2 (14).

—See cases under :-S. 2 (2)

—An order from which the liability of and rights of the parties can be fully ascertained is a final order A I R 1927 Pat 171 = 8 P L T 141 = 102 I C 106.

—As to meaning of "order" and whether an order passed against guardian under s. 34 [e] of Guardians and wards Act is executable see 41 M 241.

## SECTION. 2 [15]

## [1] Advocates

## [3] Solicitors and Attorneys

## [1] Advocates.

—An Advocate, when briefed on behalf of a party in a subordinate Court, has the implied authority of his client to settle the suit A I R 1930 Pat 158-34 C W N 453-1930 A L J 489-58 M L J 551-32 Bom L R 645-51 C L J 309-11 P L T 461-31 L W 803 = I R 1930 P C 177 = 123 I C 545 P C.

—But, Barristers in Burma not filing power of attorney from client cannot bind him by compromise entered into without his express consent : A I R 1930 R 343 = I R 1930 R 396 = 127 I C 604 = 8 R 290.

—Though an advocate cannot sue for his "honorarium", he is nevertheless liable for professional negligence : 28 I C 265-18 A L J 286-37 A 267.

—"Vakalatnama" empowering filing of compromise does not empower to enter into compromise or sign it. A I R. 1930 Oudh 112 = 7 O. W. N. 153-Ind. Rul. (1930) Oudh 299 = 125 I. C. 171.

## C. P. C. (1908.) S. 2 (15) (Contd.)

## (2) Solicitors and Attorneys:—

—Where of costs by opposite party has been provided for in the decree the solicitor can enforce it. 34 Bom. L. R. 670.

## C. P. C. 1908 S. 2 (16)

As to "rules" see S. 2 (1)

## C. P. C. 1908 S. 2 (17)

## Synopsis.

## (1) General :

## (2) Clerk of sub-Registrar :

## (3) Committee or Panchayat.

## (4) Common Manager under B. T. Act.

## (5) Court of justice.

## (6) Court of wards.

## (7) Headman.

## (8) Indian Army and staff corps.

## (9) Medical service.

## (10) Municipal Commissioner.

## (11) Municipal Council.

## (12) Municipal Engineer.

## (13) Official Assignee.

## (14) Receiver.

—(1) General—Person paid a fixed salary by Government out of commission charged to private person for services is a public servant: A I R 1928 Sind 76 = 22 S L R 63 = 105 I C 729 see also A I R 1928 N 33 = 104 I C 762.

—(2) Clerk of Sub-Registrar—see (1) General *Supra*.

—(3) Committee or Panchayat—The Cantonment Committee constituted under the Indian Cantonments Act is a "Public Officer": 12 Bom L R 615.

—But the Nagpur High Court has held contrary as to Village Sanitation Panchayat A I R 1929 Nag 70 = Ind. Rul. (1929) Nag 64 = 114 I C 288.

—A Municipal Council constituted under District Muni. Acts in not a public officer, though a body corporate can be such officer : A I R 1930 M 844 = 1930 M W N 821 = I R 1931 M 17 = 128 I C 161.

C. P. C. ( 1908 ) S. 2 (17) ( *Contd.* )

—The Sheriff of Bombay has been held to be a public officer : A I R 1927 B 521=29 Bom. L R 1071 = 104 I C 685 = 51 B 749.

—( 4 ) **Common Manager under B. T. Act**—Common manager appointed under S. 95 of Bengal Tenancy Act of 1885 is a public officer 59 C 961 (963-4)=55 C L J 8 = 138 I C 4 = I R 1932 C 401 = A I R 1932 C 275 = A L R 1932 C 1037; see also 30 C L J 279=53 I C 747; and 17 C W N 846 = 16 I C 193 = 40 C 150.

—( 5 ) **Court of Justice**:—No definition is given in this Code. In the Penal Code it is defined as follows :—

—“ The words ‘ Court of Justice ’ denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as body, when such Judge or body of Judges is acting judicially.

*Illustration.*

—“ A Panchayat acting under Regulation VII of 1816 ( 1 ) of the Madras Code having power to try and determine suits, is a Court of Justice. ”

—( 6 ) **Court of Wards**—A Collector appointed to take charge of the estate of a minor—13 Bom 343; 1 Bom. 318; compare 4 Bom. 638, see also 16 I C 445=14 Bom L R 577; and 26 I C 749 = 16 Bom L R 766; and 15 B 395;

—Or as agent for the Court of Wards under s 204, Act XIX of 1873—3 All. 20 is a public officer. But see *contra* 55 I C 515.

—( 7 ) **Headman**—A village headman is a public officer : A I R 1923 R 250 = 2 Bur L J 29 = 79 I C 818.

—( 8 ) **Indian Army and Staff Corps**—British Officer in the Indian Army is a public officer 43 Bom. 716 = 50 Ind. Cas. 683. An officer of the Indian Staff Corps is a public officer ; 24 C 102 = I C W N 138.

—( 9 ) **Medical Services**:—Officers holding commissioned rank in the Indian Subordinate Medical Service are public officers. 17 O C 99=1 O L J 127=23 I C 935; so also an Assistant Surgeon in the Indian Medical Service : 21 Bom. L R 137=50 I C 427= 43 B 368 ( but see *contra* as to. Ass. Surgeon of Station Hospital : 10 P R 1910=23 P W R 1910=65 P L R 1910 = 5 I C 802; but it is submitted the decision is doubtful. )

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C. P. C. ( 1908 ) S. 2 (17) ( *Contd.* )

—( 10 ) **Municipal Commissioner**:—see ( 1 ) General, *Supra*.

—( 11 ) **Municipal Council**:—see (3) Committee or Fanchayat, *supra*.

—( 12 ) **Municipal Engineer**:—see (1) General, *supra*.

—( 13 ) **Official Assignee**:—Official Assignee is a public Officer. A I R 1925 Bom. 344=49 B 636=27 Bom L R 545=87 I C 1011; so also the Official Assignee of the Insolvent Court : 4 Bom L R 929= 26 B 809.

—( 14 ) **Receiver**:—It is doubtful whether Receivers are public officers within the meaning of s 80. A I R 1931 Cal 175=53 C L J 31 = Ind Rul (1931) Cal. 414=130 I C 894.

—But the Official Receiver appointed under Prov Ins. Act is a public Officer : A I R 1925 A 241=22 A L J 1116=L R 6 A 106=84 I C 739=47 A 291; see also 58 I C 411=22 Bom L R 987 = 44 B 895.

—The Official Receiver of Calcutta High Court appointed to act as receiver in any particular case, is a public Officer: A I R 1931 C 61=I R 1931 C 423=130 I C 903=57 C 1127.

—Similarly, the Official Receiver of Amritsar : A I R 1930 L 708..

—A Receiver appointed under O 40 of C P C is a public Officer : A I R 1931 Cal 503 (503) = 35 C W N 61 = 58 Cal. 850 = 132 Ind. Cas 634; A I R 1931 Cal 175 = 53 Cal. L J 31 = 130 Ind. Cas 894; A I R 1930 Cal 737=34 Cal W N 671=128 Ind Cas 108; A I R 1930 Bom 11 = 122 Ind. Cas 857 = 31 Bom L R 1199.

## C. P. C. 1908 Section 2 ( 18 )

See cases under s. 2 ( 1 )

## C. P. C. 1908 Section. 2 ( 19 )

## C. P. C. 1908 Section. 2 ( 20 )

—**Mark**.—By cl. (52), s. 3, of the General Causes, Act, 1897; “sign,” with reference to a person who is unable to write his name, includes. “mark” Under the Registration Act, (III of 1877), s. 3, “signed” includes and applies to the affixing of a mark.

—As to the meaning of signature see. 46 Ind Cas 523=[1918] Pat H C C 260=3 Pat L J 493=5 Pat L W 117=19 Cr L J 747.

**C. P. C. (1908) S. 2 (20) (Contd.)**

—Use of stamp bearing the name of the party is sufficient even in cases where he is able to sign: A. I. R. 1928 M. 175=54 M. L. J. 45=27 L. W. 237=1927 M. W. N. 885=107 I. C. 804=51 M. 242.

**C. P. C. 1908 SECTION 3.**

—This section has been taken from s. 2 of the old Code with slight alteration. It thus brings into greater prominence the ruling that judges of the Lower Courts are bound to follow the concurrent decisions of the High Court to which they are immediately subordinate; unless the decision has been altered by the Full Bench of that High Court, or by the Privy Council, or by subsequent Act of the Legislature: see 10 C 82; 15 B 419; 17 B 555; 4 Pat L J 565=51 I C 496; 42 I A 155=29 I C 617=37 A 359 P. C.

—**High Court and Subordinate Courts:**—“High Court” used with reference to civil proceedings means the Highest Civil Court of Appeal in the part of British India in which the Act or Regulation containing the expression operates (s. 3 cl. 24 of the General Clauses Act 1897) It, therefore, includes the Chief Courts of the Punjab and Burmah and of the various Judicial Commissioners as well as the Chartered High Courts. And it has been held that a Collector acting under Mamlatdar's Courts Act is a Court subordinate to the High Court: 17 I C 676=14 Bom L R 947=37 B 114; but not so when he is exercising function under s. 18 of the Land Acquisition Act A I R 1930 N 271=I R 1930 N 255=123 I C 911.

—As for other subordinate Courts the enumeration in the section is not exhaustive: 1932 A L J 816=A I R 1932 A 651=140 I C 123=I R 1932 A 615=A L R 1932 A 1083.

—A Court can be said to be subordinate to another Court only if the latter Court has appellate or revisional jurisdiction or power of superintendence given to it by some statutory provision over the former Court. The mere authority to decide a reference does not necessarily make the Court making a reference subordinate to the Court deciding the same. 1932 A L J 816=140 I C 123=I R

**C. P. C. (1908) S. 3 (Contd.)**

1932 A 615=A I R 1932 A 651=A L R 1932 A 1083.

**C. P. C. 1908 SECTION 4.**

—It does apply to the Vice-Admiralty jurisdiction of the High Court. 17 Calc., 337. O. 2, R. 2 C. P. Code does not apply to proceedings in the Revenue Court under the Land Revenue Act. 38 All., 302=14 A J. J 373=33 I C 86.

—No revision lies against decree of District Judge in second appeal in rent suits under Oudh Rent Act, A I R 1924 Oudh 16=10 O L J 191=L R 5 Oudh 17=72 I C 1023

—As to the validity of attachment of soldier's pay under O 21 r. 48 see 21 Bom. L R 137=43 Bom. 368=50 Ind. Cas. 427 (428).

—For other examples see 4 I C 1150=3 S L R 162; 6 L B R 88=5 Bur. L T 155=17 I C 902; 8 O W N 1207; 8 O W N 685.

—It has been held under cl. 36 of letter Patent Madras that procedure to be adopted by High Court in case of equal division is to be governed by cl. 36 and not by s. 98 of C P C A I R 1929 Mad. 641=57 M L J 264=29 L W 823=52 M 563=Ind. Rul. (1929 Mad. 535 (F. B.))=116 I C 343 see also A I R 1921 P C 6=48 Ind. App. 181=45 Bom. 718=60 Ind. Cas. 822=19 All. L J 409=23 Bom. L R 623=33 Cal. L J 488=25 Cal. W N 605=40 M L J 519=14 M L W 7=1921 M W N 408 P C; and 47 Ind. Cas. 449=20 Bom. L R 185.

—Under s. 4, C P C it is the section of the Oudh Laws Act and not O XVIII, r. 6 of the C P C that applies to the recording of evidence in Criminal Case relating to a proceeding before the Chief Court A I R 1931 Oudh 385=8 O W N 685=32 Cr. L J 851=Ind. Rul. (1931) Oudh 270=(1931) Cr. Cas. 817=132 I C 270. It has been held in 17 I C 676=37 B 114.

—That cases coming under special or local laws are not wholly excluded from the application of the Code, but that where the rules of the special or local laws conflict with the rules of the Code the former shall prevail; see to the same effect A I R 1930 C. 53=121 I C 403=56 C 704; and A I R 1925 A 264.

## C. P. Code 1908 SECTION 6.

—The present section definitely restricts the Jurisdiction of Civil Courts within pecuniary limits defined by their Charter or Acts of Constitution.

—The section applies only to suits and not to proceedings which are not suits e. g. the proceedings before the President of the Calcutta Improvement Tribunal is not a suit : A I R 1926 C 853=31 C W N 142=94 I C 170.

—(1) Execution of Decree exceeding pecuniary Jurisdiction—

—In a suit for possession and mesne profits the Munsiff made a decree for a sum beyond his pecuniary Jurisdiction. The decree was sent for execution to another Court of equal pecuniary Jurisdiction.

—*Held*, that irrespective of the question as to whether the Munsiff's Court which made the decree was competent to do so, the equality in pecuniary jurisdiction of the two Courts was not sufficient to override the general rule that Courts of limited pecuniary jurisdiction may not entertain execution proceedings in suit in excess of their limit and the latter Court had no jurisdiction to execute the decree. 57 I C 722; see also, I P L R 1901=9 P R 1901; and cases under ss. 38 and 39.

—(2) Mesne Profits and Accounts, decree for, in excess of pecuniary Jurisdiction—The Punjab and Rangoon Courts have held that such decree cannot be passed : A I R 1929 L 107=118 I C 537 (suit for accounts—preliminary decree can be passed in excess of pecuniary limit, but not final decree; 221 P W R 1912=96 P R 1912=15 I C 773; 13 I C 312 (suit for possession by purchaser); 16 P R 1908=73 P W R 1907=146 P L R 1908 F B; (pre-emption); 94 P L R 289=46 P R 1906 (partnership accounts); 58 P R 1902 (accounts); and A I R 1924 R 354=86 I C 568 =3 Bur. L J 297=2 Rang. 408.

—But other Courts have held contrary : 7 I C 385=7 A L J 963=33 A 97 (Redemption); 107 A W N 1891=13 A 320; A I R 1925 A 376=86 I C 1055=23 A L J 216=47 A 534 (accounts); 84 A W N 1894=16 A 286 (accounts); A I R

## C. P. C. (1908) S. 6 (Contd)

1927 B 83=100 I C 109=28 Bom L R 1461=50 B 839; A I R 1925 C 1076=89 I C 726=53 C 14=42 C L J 49=29 C W N 869 F B; 39 I C 439=32 M L J 221=5 L W 580=1917 M W 367=40 M I F B; (accounts); A I R 1921 M 508=70 I C 17=14 L W 446=1921 M W N 611=41 M L J 433; 12 M L J 35=25 M 543 (accounts); 24 I C 135=1 L W 446= 15 M L T 415=27 M L J 388; 9 M 208; A I R 1921 Pat 118=6 Pat L J 54=1921 Pat H C C 69=60 I C 346=2 Pat L T 143; 41 I C 231=2 Pat L J 394 (mesne profits); A I R 1925 Sind 324=89 I C 353=18 S L R 286 (partnership accounts); 20 I C 928=9 Nag. L R 112 (ditto); 8 C P L R 86 (accounts); 9 I C 414.

—It is submitted the latter view is correct because suits for mesne profits and accounts do not admit of precise ascertainment of value at the time of the institution. whereas a Court having jurisdiction does not lose it by reason of any subsequent change in the value of the subject matter or by precise ascertainment of value in cases which do not admit of such ascertainment at the time of the institution of the suit. In a suit for damages, however, the Court cannot award damages in excess of its pecuniary jurisdiction : 91 I C 436=A I R 1926 C 596.

—(3) Pecuniary Limits of Jurisdiction—See cases under s. 15. Competency of a Court cannot be determined irrespective of its pecuniary jurisdiction : A I R 1922 Pat 188 =3 Pat L T 422=67 I C 538=1 Pat 651.

—An order of remand cannot confer jurisdiction : A I R 1929 L 534=30 P L R 244=116 I C 324=1 R 1929 L 500.

—(4) Value : Jurisdiction—See cases under s. 38 s. 39; s. 41, O 21, r. 4 and O 21, r. 5.



## C. P. C. (1908) SECTION 7

- (1) Legislative Changes.
- (2) Applicability and Scope.
- (3) Attachment before Judgment.
- (4) Execution against Immoveable Property.

## (1) Legislative Changes.

—S. 5 and Sch. II of the Code of 1882 are in effect reproduced in the present section.

—See also (3) Attachment before Judgment-*infra*.

## (2) Applicability and Scope of the Section.

—See S. 17 of the Provincial Small Cause Courts Act IX of 1887 and also Sch. II. of the same Act.

## (3) Attachment before Judgment.

—Act I. of 1926 has amended the original S. 7 of the Code of 1908 by substituting sub-clauses i to iv in clause (b) for the words "so far as they relate to injunctions and interlocutory orders."

—Prior to 1926 there was a conflict of decisions as to the interpretation of the words above referred to—one view being that Small Cause Court can attach immoveable property before judgment A I R 1925 C 1 = 40 C L J 199=28 C W N 1056 = 82 I C 109=52 C 275 F B. (approving 80 I C 300=A I R 1924 C 193 = 28 C W N 16; and overruling 70 I C 841=A I R 1923 C 176 = 49 C 994); and see also 87 I C 399=48 M L J 406=1925 M W N 169=22 L W 103=A I R 1925 M 589=48 M 488.

—But Act I of 1926 has negatived both the interpretations, and has expressly enacted that an order for attachment before judgment of *immoveable* property cannot be passed by a Small Cause Court.

—A Small Cause Court can pass an order for attachment before Judgment of *moveable* property : 53 I C 814 = 31 C L J 179 = 46 C 717; see also 82 I C 109 = A I R 1925 C 1 = 28 C W N 1056 = 40 C L J 199 = 52 C 275 F B.

—Debt secured by a hypothecation bond is not *immoveable* property within the meaning of the provisions relating to attachment of *immoveable* property. 16 I C 816

## C. P. C. (1908) S. 7 (Contd.)

—A Small Cause Court cannot attach a part of the joint family property consisting of *immoveable* : 10 N L R 17 = 23 I C 156.

## (4) Execution against Immoveable Property.

—A Small Cause Court cannot execute a decree against *immoveable* property, unless the decree has been formally transferred to the Ordinary Side : 1930 P L R 40 = I R 1929 L 249 = A I R 1929 L 398 = 114 I C 329; see also 132 I C 208; and 5 A L J 612 = 1 I C 553 = 1908 A W N 254 = 31 A 1.

—Thus where a decree of Madras Small Cause Court was transferred to the Mofussal Dist Munsif for execution it was held that the Dist Judge can hear appeal from order in execution proceedings. 49 M L J 104=1925 M W N 713 = 22 L W 455 = A I R 1925 M 1179=90 I C 509.

—A Small Cause Court cannot execute a decree against part of a joint family property consisting of *immoveable* : 10 N L R 17=23 I C 156.

—It should be noted that a decree relating to *immoveable* property is not *immoveable* property within the meaning of the Chapter relating to execution. There is nothing, therefore, in the present Code, to prevent a Small Cause Court from attaching and selling a *decree* for *immoveable* property 44 I C 252.

## C. P. C. 1908 SECTION 8.

## (1) Legislative Changes.

—Provisions of s. 154, O. 22, r. 5 and O. 37 were applicable to the Presidency Small Cause Courts under S. 8 of the code of 1882. They are not so applicable under the present section.

—The provisoes to the present section were added by S. 2 of Act I of 1919.

## (2) Presidency Small Cause Courts.

—A Judge of a Presidency Small Cause Court has jurisdiction to execute the decree of a foreign Court transmitted to it under s. 44 of C. P. C. But the Registrar of a Pres. Sm. C. Ct. has no power; under s. 13 or 35 of the Pres. Sm. C. Cts. Act, to issue processes in execution of a foreign decree : 33 M L J 539=1917 M W N 498=6 L W 361=40 I C 670.

—But S. 48 of the said Act does not extend S. 114 of the C. P. Code to Small Cause Courts A I R 1921 B 180=61 I C 567 =23 Bom. L R 383=45 B 972.

## C. P. C. 1908 S. 9

- (1) Legislative Changes.
- (2) Scope.
- (3) Concurrent Jurisdiction.
- (4) Barred Expressly, instances of.
  - (1) Assam Regulations.
  - (2) Bengal Patni Taluk Regulation VIII of 1819.
  - (3) Bengal Survey Act.
  - (4) Burma Land and Revenue Regulation.
  - (5) Canal dues.
  - (6) Cesses.
  - (6-a) Barrister, suit against.
  - (7) Court of wards.
  - (8) Criminal Procedure Code, suits barred under.
  - (9) Ecclesiastical questions.
  - (9-a) Election cases under municipal and other Acts. See municipality suits against and election cases. (*Infra*).
  - (10) Foreign state.
  - (11) Forest Act.
  - (11-a) Government suits against see cases under this section under the heading "Barred impliedly—Act of State."
  - (12) Guardian and wards Act.
  - (13) Hereditary office.
  - (14) Inams and Jaghirs.
  - (15) Income Tax Act.
  - (16) Judicial officers Protection Act suits barred under.
  - (17) Land Acquisition Act.
  - (18) Land Registration.
  - (19) Municipality suits against and election cases.
  - (20) Pensions Act XXIII of 1871.
  - (21) Probate and Administration Act.
  - (21-a) Putni Taluk (see) Bengal Panti Taluk (*Supra*).
  - (21-b) Railway Act.
  - (22) Registration Act suits under.
  - (23) Revenue matters and Revenue courts decisions, suits relating to.
  - (24) Settlement matters.
  - (24-a) Special Tribunals.
  - (24-b) Survey Act see Bengal Survey Act (*Supra*).
  - (25) U. P. Land Revenue Act (XIX) of 1873.
- (5) Barred Impliedly.
  - (a) General.
  - (b) Act of state.
  - (c) Political and Executive acts of Government.
  - (d) Illegal Contracts and Fraud.
    - (1) General.
    - (2) Champerty and maintenance
    - (3) Benami Transactions.

## C. P. C. 1908 S. 9 (Contd.)

- (4) Fraud.
  - (e) Privileged matters.
  - (f) Election cases under Municipal Acts and other Acts.
  - (g) Judges and magistrates protection Acts.
- (6) Suits Must be of civil Nature.
  - (1) General.
  - (2) Abusive language see Defamation (*infra*).
  - (3) Accounts.
  - (4) Adoption.
  - (5) Burial ground and rights, as to.
  - (6) Carriers. see cases under this Section—Barred Expressly—Railway Act.
  - (7) Caste Questions.
  - (8) Clubs.
  - (9) Compensation.
  - (10) Contractual rights, breach of.
  - (11) Contribution.
  - (12) Co-sharers.
  - (13) Costs.
  - (14) Counsel's negligence. see under this Section "Barred Impliedly Barrister suit against."
  - (15) Decree.
  - (16) Defamation.
  - (17) Distrain.
  - (18) Doctor's fees.
  - (19) Ecclesiastical questions.
  - (20) Embankments.
  - (21) False charge.
  - (22) False Evidence.
  - (23) False imprisonment.
  - (24) Ferry.
  - (25) Fishery.
  - (26-29) Fraud see Barred impliedly under this Section.
  - (30) Government servants suits against. see also cases under this Section "Barred Expressly Judicial officers"
  - (31) Hant.
  - (32) Hindu Widow.
  - (33) Idols see also No. 75 Worship right of.
  - (34) Instalment.
  - (35) Interest.
  - (36) Karnars.
  - (37) Legal representative.
  - (38) Mahomedan Law—Religious and other rights under.
  - (39) Maintenance.
  - (40) Malicious prosecution.
  - (41) Minor Children.
  - (42) Minors.
  - (43) Mortgage.
  - (44) Municipal Office see cases under Barred Expressly—municipality *supra*.

## C. P. C. 1908 S. 9 (Contd.)

- (45) Offerings right as to.
- (46) Office of Dignity.
- (47) Partition.
- (48) Partnership.
- (49) Penalty.
- (50) Political and Executive Acts see Barred Impliedly—Act of state.
- (51) Political Agent see Barred Impliedly—Act of State (*Supra*).
- (52) Possession.
- (53) Pre-emption.
- (54) Privacy.
- (55) Priest see also.
  - (1) Religious ceremonies *infra*
  - (2) Office of Dignity *supra*.
- (56) Privileged communications see "Barred Impliedly Privileged Communication."
- (57) Processions.
- (58) Registration see Concurrent Jurisdiction (*Supra*).
- (59) Religious Associations.
- (60) Religious office and ceremonies.
- (61) Remuneration for labour.
- (62) Reversioners, alienation.
- (63) Right to sue see also cases under.
  - (1) Office.
  - (2) Worship right of.
  - (3) Barred impliedly—Act of state.
- (64) Subscriptions.
- (65) Sale.
- (66) School fees.
- (67) Society.
- (68) Specific remedy.
  - (a) Public Road.
  - (b) Public nuisance.
- (69) Stamp orders as to see cases under "Concurrent Jurisdiction" (*supra*)
- (70) Torts.
- (71) User.
- (72) Voluntary associations.
- (73) Voluntary payments see also cases under "Contribution suits for" (*supra*)
- (74) Water cess.
- (75) Worship right of.
  - see also cases under
    - (1) Religious ceremonies (*supra*)
    - (2) Idol (*supra*).

## (7) Jurisdiction.

- (1) General.
- (2) Meaning of
- (3) Objections, as to
- (4) Burden of proof, as to
- (5) Absence of, effect.
- (6) Irregularity within Jurisdiction.
- (7) Erroneous decision as to
- (8) Waiver and consent of parties.

## (1) LEGISLATIVE CHANGES :—

In this Code the words "either expressly or impliedly barred" are substituted for the words "Barred by any enactment for the time being in force," used in the Code of 1882. The effect of this change is obviously to widen the scope of the section.

## C. P. C. 1908 S. 9 (Contd.)

## (2) Scope of the section.

The section deals with the jurisdiction of the Court—what civil suits the Court may try—not with the rights of parties: 20 I. C. 676=41 C 384

--The scope of this section is very wide and would include even suits cognizable by Revenue courts unless they are expressly barred by some statute. 10 A. W. N. 145=12 A. 409.

## (3) CONCURRENT AND SUMMARY REMEDIES WOULD NOT BAR CIVIL SUITS.

—The words "barred expressly" mean that though a suit is of a civil nature yet if a particular enactment expressly bars its cognizance, the civil courts can not entertain it. However the mere giving of concurrent remedy does not bar the jurisdiction of Civil Courts 14 C 646.

—So also the original side of the High Court being a "court" it can entertain a suit to set aside on the ground of fraud a decree passed by a court of concurrent jurisdiction. 7 C W N 353 = 30 C. 369.

—Similarly, where it is open to a person to enforce his remedy in one of two alternative Courts he can proceed in either of them. But having once filed the suit in one Court, and having invited the decision of that Court he cannot go to the other Court and litigate upon the same subject-matter : 35 Bom. 473 (477)=13 Bom. L. R. 900=12 Ind. Cas. 391.

—The rule, that when a statute creates a right and provides a remedy, that remedy and no other, is available, does not apply where a right was not created by the Act but exists independently of it : 22 P. R. 1917=14 P. W. R. 1917=40 I. C. 220.

—So also a Civil Court is not prevented by s. 265 of the Contract Act from trying a suit for dissolution of partnership—such suits being in fact contemplated by s. 215 C. P. C. (1882) A.W.N.1885, 18=7 A. 227 (F. B.)

—So also notwithstanding the remedies provided for third persons whose rights are affected in execution of a decree e. g. claim. Proceedings etc. his right to file suit for the same redress is not barred 1907 A. W. N. 131=4 A. L. J. 434=29 A. 463; see also:—1908 A. W. N. 122=5 A. L. J. 285.

—Court sale-Auction purchaser obtaining only symbolical possession—his. right of suit is not barred. 14 Bom. L. R. 115 = 14 I. C. 447=36 Bom. 373 F. B. see also A. I. R. 1931 241=133 I. C. 337=10 Pat. 676 F. B.

—A plaintiff may sue to enforce an award when the matter was referred to arbitration without the intervention of a Court of Justice. 20 Mad. 490.

—A suit will lie to set aside proceedings under Sch. II. C. P. C. on ground of their

C. P. C. 1908 S. 9 (Contd.)

[3] Concurrent Remedies (Contd.)

being fraudulent, fictitious and vexatious, but not to set aside award made on agreement to refer: A. I. R. 1930 B. 431-I. R. 1930 B. 401-126 I. C. 305-32 Bom. L. R. 389-54 B. 696.

—On the same principle, remedies provided by the Arbitration Act IX of 1899 do not bar ordinary civil suit. A. I. R. 1922 Lah 369 = 69 I C 585 = 3 L 296.

—So also in case of Private awards the aggrieved party can resort to his ordinary remedies A. I. R. 1924 Sind 105-17 Sind L R 15 = 80 I C 969.

—Similarly under Arbitration Act (1899) S. 14. suit to set aside award on the ground of want of jurisdiction lies. 56 I C 541 = 31 C L J 283 = 24 C W N 454.

—Award-submission challenged-suit is the proper remedy. 69 I C 568 = 47 C. 806.

—And a suit against a farmer of Abkari revenue would lie for the recovery of a sum alleged to have been illegally levied as tax under the Abkari Act 9 B. 462. Followed in 20 B. 764.

—Similarly suits for money recoverable under the Abkari Act can lie although s. 29 provides a remedy 40 I C 122 = 10 S L R 179.

—So also notwithstanding the remedy under Guardians and wards Act, ss. 12 & 25 for custody of child—suit lies. 9 M 31. Followed in 21 I C 789 = 25 M L J 661. and see to the same effect 44 I C 753 = 10 Bur L T 186.

—see also cases under “Barred expressly”

—Guardian And Wards Act infra.

—So also the decision of a Collector under s. 37 (b) of the Stamp Act (1 of 1879) that a particular instrument is not duly stamped is not conclusive. Civil Court before whom the document may come must determine the question for itself 22 Bom., 632.

—Where a person incurs debt after an order of adjudication, such debt can be sued on in ordinary Civil Court, though not proveable under s. 28 of Prov. Ins. Act: A. I. R. 1925 N. 77-80 I. C. 946 = 22 N. L. R. 118.

—The Presidency towns Insol. Act gives remedy to a person against the acts of receiver but a suit is not barred 13 Nag L R 210 = 42 Ind. Cas. 799.

—So also under Presidency Towns Insolvency Act ss. 7 & 86—Third person's property in Assignee's hands—suit by stranger lies. 13 Bom. L R 900 = 12 I C 391 = 35 B. 473.

—And no sanction of the Insolvency court is necessary. 31 I. C. 884 see also :—40 I C 220.

—So also s. 22 of the said Act does not bar a civil suit 14 I C 93 = 15 C L J 675 =

C. P. C. 1908 S. 9. (Contd.)

[3] Concurrent Remedies (Concl'd.)

17 C W N 82. see to the same effect :—  
8 C W N 473.

—Similarly where a summary remedy is provided for, a regular suit is not barred. Thus where it is provided that a party “may appeal,” it does not mean that the party is bound to appeal, so also the words, “Shall be final” does not mean that the decision cannot be impeached in a regular suit but that no second appeal lies. 22 P. R. 1917 = 14 P. W. R. 1917-40 I C 220.

—Similarly even though a remedy is provided under ss. 72 & 86 of the Presi. Towns Insolvency Act yet a stranger whose property is in Assignee's hands, can bring a regular suit. 12 I C. 391 = 35 B. 473 = 13 Bom L R 900. see to the same effect as regards the provision in the Bom. Land Revenue Code s. 85. 19 Bom L R 820 = 43 I C 995 = 42 B. 49.

—Similarly where two proceedings are open to the parties, any one or both may be resorted to 12 I C 664 = 21 M L J 1063-10 M L T 437 = 37 M. 29.

—So also, a suit lies to reverse the order of the Insolvency Court referring to the Receiver, for final adjudication, the question as to the title to certain promissory notes alleged to be held benami: 46 I. C. 335-22 C. W. N. 700.

—A suit, however, can be brought to reverse an order of the Insolvency Court disallowing a claim made to goods seized by the Official Assignee after adjudication. 40 Mad. 1173-44 I. C. 847.

—And where a stranger to the bankruptcy, whose property is wrongfully seized by the receiver, applies under s. 22 of the Insolvency Act and his application is dismissed on the merits he cannot begin again and raise the same issue in a Civil Court. 39 A. 626-43 I. C. 573. (a different view was taken in A. I. R. 1921 L 58-3 L. L. J. 233-77 P. L. R. 1921-61 I. C. 332-2 L. 147. but owing to the alteration effected by s. 4 of the Prov. Ins Act 1920, the Lahore decision is no longer law.)

—Thus, where an objection, that the house in question did not belong to the insolvent, was dismissed and the order upheld in appeal, subsequent suit in Civil Court was barred : 17 A. L. J. 374 = 49 I. C. 590 = 41 A. 378.

(4) Barred expressly instances of :—

- (1) Assam Regulations.
- (2) Bengal Putni Taluk Regulation VIII of 1819.
- (3) Bengal survey Act.
- (4) Burma Land & Rev. Regulation.
- (5) Canal dues.
- (6) Cesses.
- (6-a) Barrister suit against.



## C. P. C. 1908 S. 9 (Contd.)

## [4] Barred Expressly (Contd.)

- (7) Court of Wards.
- (8) Criminal Procedure Code suits barred under.
- (9) Ecclesiastical Questions.
- (9-a) Election cases under municipal and other Acts see municipality suits against and election cases (*Infra*)
- (10) Foreign state
- (11) Forest Act
- (11-a) Government suits against see cases under this section under the heading "Barred impliedly-Act of state"
- (12) Guardian & Wards Act.
- (13) Hereditary Office.
- (14) Inams & Jaghirs.
- (15) Income Tax Act.
- (16) Judicial Officers Protection Act suits barred under
- (17) Land Acquisition Act.
- (18) Land Registration.
- (19) Municipality suits against and election cases.
- (20) Pensions Act XXIII of 1871
- (21) Probate & Administration Act.
- (21-a) Putni Taluk see Bengal Putni Taluk (*supra*)
- (21-b) Railway Act.
- (22) Registration Act suits under.
- (23) Revenue matters & Revenue courts decisions suits relating to.
- (24) Settlement matters.
- (24-a) Special Tribunals.
- (24-b) Survey Act see Bengal survey Act (*supra*)
- (25) U. P. Land Revenue Act (XIX of 1873.)

## (1) Assam Regulations

—S. 154 of the Assam Reg. I of 1886 bars the jurisdiction of Civil Court when a suit is brought for partition of an estate excluding certain portions as *brahmutter* or *debutter* or as being held jointly by third persons; 24 C. 751—(approved and followed in 69 I. C. 814 = A. I. R. 1922 C 118 = 47 C. 354).

—So a suit for an imperfect partition of an estate in Assam is barred—23 Calc. 514.

—But the term "property" in s. 70 of the Assam Land and Revenue Regulation (1 of 1886) includes an entire estate as well as a share in respect of which revenue has been separately apportioned; so, in a case where revenue in respect of certain lands had been separately apportioned and arrears fell due in respect of the remaining portion of the taluk, and the taluk, minus those lands, was put up to sale and purchased by the plaintiffs held that the plaintiffs were entitled to main-

## C. P. C. 1908 S. 9 (Contd.)

## [4] Barred Expressly (Contd.)

tain a suit to avoid an incumbrance—3 Calc. W. N. 108 = 26 C. 194.

—So also the question of the right of a party to obtain a settlement is not excluded from the jurisdiction of the Civil Court by the provisions of s. 154 of the Assam Land and Revenue Regulation—24 Calc. 239 = 1 Calc. W. N. 94.

—And a plaintiff is entitled to maintain a suit for a declaration that his rights are not affected by an order of the Collector under s. 65 of the Assam Land and Revenue Regulation, specifying the revenue payable by the defendant and made without notice to the plaintiff—2 Calc. W. N. cclxiv. (but see 6 O. C. 59).

## (2) Bengal Putni Taluk Regulation VIII of 1819.

—A zamindar cannot sue to compel the purchaser of a *putni* in his estate, sold for arrears of rent, to furnish security for the amount of half the annual jumma, his remedy being as provided by ss. 5 and 7 of Regulation VIII of 1819—17 W. R. 470.

## (3) Beng. survey Act.

—Suit for Confirmation of possession can be treated as a suit for recovery of possession 14 Cal. W. N. 366 = 4 Ind. Cas. 547.

## (4) Burma Revenue Regulation.

—S. 53 (1) of the Upper Burma Land and Revenue Regulation provides that a Civil Court shall not have jurisdiction in any matter which a Revenue Officer is empowered under the Regulation to dispose of. A suit will not lie in a Civil Court to execute the order of a Revenue Officer, whether by restitution or otherwise. U. B. R. 1902—1903, Vol. II. Civ. Pro. 13.

—Claims to the ownership or possession of any State land are cognizable by Revenue Courts only under s. 52 (2) (ii) of the Regulation and not by Civil Courts, U. B. R. 1897—1901, Vol. II. 209.

—A suit for redemption of mortgage of State land is barred in the Civil Courts. U. B. R. 1897—1901, Vol. II. 207.

—A suit for rent of State land is not cognizable by the Civil Courts. U. B. R. 1902—1903, Vol. II. Civ. Pro. p. 1.

—But the Civil Courts can decide questions as to their own jurisdiction. Civil Courts are to be guided by the decision of Revenue authorities in deciding the question whether land is State land. U. B. R. 1897—1901, Vol. II. 211.

## (5) Canal dues.

—The Civil Court cannot entertain a suit by a proprietor to recover moneys wrongly taken from him as canal dues—30 I. A. 172 =



C. P. C. (1908) S. 9 (*Contd.*)

(4) Barred Expressly. (*Contd.*)

8 Cal. W N 121 = 25 All. 527 p c followed in  
A I R 1927 A 672.

(6) Cesses.

—Where certain farmers agreed to pay over and above the jummas such sums as would be realized under the head of zabita-batta, and were sued for these sums by the zemindar, it was held that the stipulation was illegal and opposed to s. 3, Regulation V of 1812, and the suit was dismissed—7 S D  
A Sel. 166.

—In U. P. it has been held that a suit to collect cesses not authorized by Regulation VII, 1822, is not maintainable—1 Agra 207; see  
1 All. H C 40.

—But a zamindar can sue to establish his right to a cess and to question the validity of a settlement-officer's refusal to record it  
2 All. H C 425; see also 1 A 373.

—A claim for a legal due or cess arising out of the privilege of selling Pan-on hat days is cognisable by the Civil Court 3 W R Act  
X 158.

—But a cess leviable in accordance with village custom, which is not recorded under the general or special sanction of Government, cannot be recovered in a Civil Court—  
2 All. 49.

—A cess cannot, in the absence of any contract, be levied by a Government lessee from a *jotedar*, who grazes his cattle on his own jote—  
9 W R 299.

—Where the talab beshi had been made voluntarily for several years and has been incorporated in the rent, a combined receipt being given for the two payments, the cess is not illegal and can be enforced: 25 W R 252; see also 22 C 680; and 26 C 611; and 2 C W N 543; but not otherwise 17 Cal. 131 = 16 I A 152; 17 Cal. 726; see also s. 74, Act VIII of 1885.

(6a) Barrister suit against.

—The principle that an engagement of a counsel is not a legal contract of hiring and service: (Kennedy V. Brown 32 L J Ch. P 137) applies to Barristers practising in India 51 P R 1895 F. B.; 104 A W N 1903 = 25 A 509 F. B.; 3 M 138; 49 P R 1906 = 106 P L R 1903 = 105 P W R 1906 F. B. (overruling 194 P R 1883). But see 4 L B R 55 F. B.

—So, a Barrister cannot sue for his fees 104 A W N 1903 = 25 A 509 F. B., unless the relationship of advocate and client does not exist: 4 M H C R 244. A barrister is liable for professional negligence: 28 I C 265 = 18 A L J 286 = 37 A 267.

(7) Court of Wards.

—See also (12) Guardian and Wards Act The high Court cannot restrain the Court of Wards, from interference in the giving in marriage of minor—  
5 W R Misc. 41.

C. P. C. (1908) S. 9 (*Contd.*)

(4) Barred Expressly. (*Contd.*)

—Under Bengal Court of wards Act, a suit will lie for trespass by the Court of wards on properties of the executor: 12 C W N 1065  
= 1 I C 514 = 36 C 28.

(8) Cri. Pro. Code; suits barred under.

—The general rule is that where a civil suit is brought subsequently to criminal proceedings, there shall not be any stay of the latter.  
6 Ind. Cas. 181 = 11 Cr. L. J. 291.

—Criminal proceedings are not suits; and therefore no finding of a Criminal Court can be res judicata in a civil suit:

143 A. W. N. 1881 = 4 A. 97; see s. 11 and s. 13.

—Civil Court cannot entertain any suit against an order under s. 133 of the Cr. P. Code, or against order under ss 136, 137, 139 and 142 of the same Code: see 12 Ind. Jur. 425 = 15 C. 460 F. B., and the cases therein considered; see also 11 C. 8; 12 C. 137; 6 A. L. J. 458 = 1 I. C. 896 = 31 A. 371; 8 Bom. H. C. A. C. 94; and 1 Suth W. R. 277; and 18 Suth W. R. 284.

—But a suit will lie in Civil Court if the order mentioned above is passed without jurisdiction: 4 C. L. R. 309 = 5 C. 7 F. B. see also 2 Suth W. R. 287; 8 suth W. R. 239 and  
6 N. W. P. 104.

—And a suit will also lie in Civil Court if the order in question involves question of title to property: 12 Ind. Jur. 425 = 15 C. 460 F. B.; see also 17 C. W. N. 73 = 18 I. C. 67; 17 C 562; 17 B. 293; 4 I. C. 523 = 13 C. W. N. 501; and 15 C. 564.

—Thus, where a magistrate declared certain land to be public highway, held a suit lay for declaration of title to that land: 15 C 460 = 12 Ind. Jur. 425 F. B.; but no suit can lie to close a public road: 16 W. R. 434.

—Sometimes, an act of Legislature gives power to some person for a public purpose from which an individual may receive injury; if the mode of redressing the injury is pointed out by the statute, the jurisdiction of the Court is ousted. Thus ss. 88 and 89 of Cr. P. C. debar an absconder from suing for recovery of his property: 1920 Pat. 253 = 1 Pat. L. T. 451 = 5 P. L. J. 321 = 21 Cr. L. J. 475 =  
56 I. C. 507;

—But it was held in the same case that an order of disposal under s. 524 of Cr. P. C. is not final as regard title such order can be questioned in a civil Court. Or a suit may be brought for recovery of the proceeds of the sale under such order: 9 B. 131; see also 17 Bom. L. R. 979 = 31 I. C. 498 = 40 B. 200.

—The Lahore High Court has held that a civil suit does not lie for restoration of property sold under ss. 87 and 88 Cr. P. C., even though there have been irregularities in the sale: A. I. R. 1928 L. 562 = 111 I. C. 508

C. P. C. (1908) S. 9 ( *Contd.* )

( 4 ) Barred Expressly. ( *Contd.* )

=10 L. 338; but the Allahbad High Court has held *contra* : 2 A L J 349=102 A W N 1905=27 A 572.

—It was held in A I R 1926 C. 289=90 I C 488=29 C W N 1033 that a Civil Court can entertain a suit to recover the expenses ordered by a criminal Court to be paid to a witness.

—Civil Court cannot entertain a suit to set aside an order under s. 145 of Cr. P. C. giving possession : 21 W R 79; such order is conclusive as to the question of possession at the date of the order but not before the date of the order : 3 Bom. L R 919=26 B. 353

—A civil suit lies under s. 9 of sp. Relief Act on ground of dispossession within six months but before the date of the order under s. 145 of Cr. P C : 20 W R 12; see also 3 Bom. L R 919=26 B. 353.

—Order granting maintenance under s. 488 of Cr. P C does not bar a Civil Suit for a declaration that the grantee is not entitled to maintenance : 14 C. 276; see also 2 M L T 344=30 M. 400; and 2 Weir 615 (but see *contra*. 147 A W N 1895=18 A. 29.

—Order refusing maintenance under s. 488 of Cr. P C does not bar a civil suit for maintenance : 13 C W N 150=2 I C 550=32 C. 479.

( 9 ) Ecclesiastical questions.

—Civil Courts in Lower Burma can entertain suits of a civil nature raising points of ecclesiastical law. 9 L B R 220=11 Bur. L T 161 ( F B )=49 I C 317. e. g. suits of an Ecclesiastical nature involving a claim to lands and documents. 8 Bur. L T 62=8 L B R 145=27 I C 112.

( 9-a ) Election Cases under municipal and other Act See municipality suits against & election cases ( *Infra* )

( 10 ) Foreign State.

Courts cannot interfere with the public property of a foreign sovereign, though he may have submitted to the jurisdiction of the Court for the purpose of enabling the Court to order the property to be delivered over to him—*Vasseur v. Krupp*. 9 C D. 351.

—An act of state by a foreign power cannot affect rights to property in British India —17 Bom. 600; 17 Bom. 620.

—Defendant No. 1. who was domiciled in the Native State of Cochin obtained from the Resident a certificate to collect the debts of a deceased karnavan of the plaintiff's tarwad.

—The plaintiff whose domicile was the same as that of the defendant No. 1 sued for a declaration of the right to receive the interest accrued due on certain Government promissory notes, being the property of the

C. P. C. (1908) S. 9 ( *Contd.* )

( 4 ) Barred Expressly. ( *Contd.* )

deceased karnavan : held that the suit did not lie. 16 Mad 405.

—A suit will lie on a judgment of a Court in a Native State 24 Bom., 86.

( 11 ) Forest Act.

—As to reservation of jurisdiction of the Civil Courts under Indian Forest Act see 7 Bom. L R 497=29 B. 480.

—A Munsiff cannot entertain a suit to cancel the decision of a Forest officer confirmed by a District Judge under s. 10 of the Madras Forest Act (V of 1882) and to recover a certain tank, a claim to which had been rejected under that section 12 Mad. 105 (Followed in 17 M L J 557.

( 11 a ) Government suits against.

—See Cases under this section under the heading "Barred impliedly—Act of state. As to maintainability of a suit to set aside irregular orders under the Act see 9 Bom. L R 495=31 B. 590.

—Matters exclusively within the Act are excluded from the cognisance of the Civil Courts; thus a suit for appointment of guardian does not lie : A I R 1928 N. 297 = 110 I C 46; see also 29 I C 768=8 Bur. L T 128=8 L B R 211.

( 12 ) Guardian & Wards Act.

—See also cases under "Concurrent & summary remedies." *Infra*. A civil suit for the custody of a minor will not lie in the ordinary Civil Courts 42 M. 647=37 M L J 93=6 M L T 61=9 L W 600=(1919 M W N 487 F B )=53 I C 399; ( relying on the Privy Council decision in A I R 1914 P C 41=41 I A 314=12 A L J 1155 = 16 Bom. L R 625 = 20 C L J 253 = 18 C W N 1089=27 M L J 30 = 16 M L T 165=1 M L W 520=1914 M W N 585=24 I C 290=38 M. 807 P C ). As to maintainability of fresh application for custody of minor see 29 I C 416=13 A L J 742=37 A. 515.

( 13 ) Hereditary Offices Act III of 1874.

—Under this Act no suit will lie in a Civil Court for a declaration that a person is eligible to officiate as a hereditary officer falling within the scope of the Act 2 Bom. 375; 2 Bom; 370; 13 Bom. 83; 12 Bom; 614. ( followed in 25 B 186; 24 Bom. L R 917=47 B. 95 ) so also in a suit for a declaration that plaintiffs were entitled to a share in a *Maharhi Vatan* and to participate in the profits, it was held that under Bombay Act III of 1874, the Civil Courts had no jurisdiction to make the declaration sought 25 Bom; 186.

—Similarly the Civil Court cannot go into the question of fitness in the appointment of Ghatwal 18 C W N 1036=23 Ind Cas 849.

C. P. C. (1908) S. 9 ( *Contd.* )

(4) Barred Expressly ( *Contd.* )

—But a watandar joshi can sue for his dues: A I R 1928 N 150=170 I C 911.

(14) Inams and Jaghirs.

—Suits against Government regarding Inams and jaghirs are barred. 11 B. 222; and 12 M. 98.

—S. 4 of the Bombay Vatan Act III of 1874 is not ultra vires of the Government. 21 Bom. L R 1155=54 I C 129.

—The question as to whom a jaghir should be granted upon the death of its holder is one exclusively within the cognisance of Government to be determined upon political considerations. 17 Bom; 431.

—See also in regard to inam land. 8 Mad. 249; 7 M 206; 12 M. 188; 9 Mad. 214. A suit for "maniam" lands attached to the hereditary office of village carpenter is barred by the operation of s. 3, Reg. VI of 1831—17 Mad, 302.

—Question as to heirship of vatan. See 17 Bom L. R. 725=40 B. 55=30 I C 925.

—A Civil Court has no jurisdiction to entertain a suit for a declaration of a plaintiff's status as representative vatandar. This equally with the duty of ascertaining the custom of the vatan as to service, is a duty by s. 25 of the Bombay Hereditary Offices Act ( Bombay Act III of 1874 ) imposed on the Collector and not on the Civil Court—22 Bom. 344. When a Collector's certificate under s. 10 of the Vatan Act ( Bombay Act III of 1874 ) is based on a mis-understanding of the term "vatan," it is illegal and is not binding on the Civil Court—22 Bom. 601. ( followed in 2 Bom. L R 420 )

—Suit for declaration of ownership of a certain share in Kulkarni vatan is covered by the section 42. Bom. 257=20 Bom. L. R. 325=45 I C 580.

—As to jurisdiction of Civil Court in a suit for declaration of title and possession of saranjam land see 34 Bom. 232=11 Bom. L. R. 1233=4 I C 832.

—A suit brought in relation to the management of saranjam land is *prima facie* one not included in the Pensions Act—16 Bom 596. In a suit by an Inamdar of a village against a *khot* for rent, it was held that the Court was not precluded from entertaining the suit for want of a Collector's certificate under the Pensions Act ( XXIII of 1871 ) s. 4. —18 Bom. 525.

—A suit by the grantees to contest the right of Government to resume an *inam* granted for feeding Brahmins will lie. 6 Mad. 361

—But a suit to recover income-tax levied on income outside scope of Income Tax Act is maintainable. A. I. R. 1929 Mad 179=

C. P. C. (1908) S. 9 ( *Contd.* )

(4) Barred Expressly. ( *Contd.* )

52 M. 12=55 M. L. J. 770=28 L. W. 667=Ind. Rul. (1929) Mad. 349=114 I. C. 829.

—Thus a suit to set aside an assessment made under the Act is barred by s. 39 of the Act: 19 C. W. N. 138=26 I. C. 893=42 C. 151; and it was decided in the same case that a suit for declaration of non-liability to tax is barred by s. 67 of the Act; see also 3 P. L. T. 125=62 I. C. 394=A. I. R. 1922 Pat. 361

—A Civil Court cannot question the orders of special tribunals created by special Acts for that purpose, and whose orders have been declared to be final: 10 S. L. R. 113=37 I. C. 267

(15) INCOME TAX ACT.

—As to tort committed by Government official in the course of duty—see 9 Cal W. N. 495 (497)=1 C. L. J. 355.

—Where the act is *prima facie* wrongful the burden will lie on the judge to show that he comes under the protection of the Act. 3 B. H. C. R. 47.

—And, he will not be protected for judicial acts if he wilfully and maliciously abuses his authority: 2 B. H. C. R. 384; see judicial Officers' Protection Act. A judge is protected under the Act only for judicial and not for mere executive or ministerial acts: 21 suth W. R. 391=14 B. L. R. 254

—As to legality of judgment written by judge after transfer see 30 Bom. 241 (245)=7 Bom L. R. 951.

—Thus a judge is not liable for words spoken in office 17 M. 87; see also 3 C. W. N. 539=26 C 852; but as to insulting language to a pleader see 10 M. 28 F. B.

(16) Judicial Officers Protection Act,  
Suit barred under.

—No suit will lie against a judge for acts done in course of his duties: 2 M. I. A. 293=3 Moo. P. C. 28=1. Sar 191; see also I. A. 280; 12 A. 115; 9 C. L. J. 298=13 C. W. N. 458=5 M. L. T. 367=2 I. C. 436=36 C. 433, 39 Cal 953=39 Ind. App. 163=10 All L. J. 193=14 Bom. L. R. 717=16 C. L. J. 231=16 C. W. N. 856=23 M. L. J. 32=1912 M. W. N. 760=12 M. L. T. 171=16 Ind. Cas. 501=13 C. R. L. J. 693.

(17) Land Acquisition Act.

—Where an Act of Legislature confers special powers on a person and provides a special remedy, the jurisdiction of Civil Courts is excluded in those matters: A. I. R. 1925 S. 130=78 I. C. 940=18 S. L. R. 68; see also 1911 P. R. 38=118 P. L. R. 1911=97 P. W. R. 97=9 I. C. 1000.

—Thus, a civil suit is barred on any matter falling under Land Acq. Act for which remedies have been provided by the said Act: 32 Cal. 605=32 Ind. App. 93=9 C. W. N. 454=2 All L. J. 771=7 Bom. L. R. 422=1 C. L. J. 227=8 Sar 779 P. C.

C. P. C. (1908) S. 9 (Contd.)

(4) Barred Expressly. (Contd.)

—For example, a party dissatisfied with an award under Land Acq. Act cannot file a Civil Suit, but, must apply for reference under S. 18 of the same Act: A. I. R. 1922 C. 4-65 I C 711=26 C. W N 506; see also 29 C L J 53=48 I. C. 702.

—But where on reference the lessor of the land was declared entitled to a larger proportion of the compensation money, he can file suit against the lessees to whom the excess amount had been paid and recover the amount from them. Mere failure to adduce evidence at the time of the award, or failure to deposit the amount received by him is no bar to such a suit. A. I. R. 42 Bom. 54 = 18 Bom. L. R. 826=36 I. C. 433.

—As to effect of dismissal of reference under s. 18 of Land Acq. Act for default see 10 C. W. N. 991=2 C. L. J. 359.

—Land Acquisition proceedings are Res-judicata; and, further, no appeal lies to the Privy Council as to the value of the land: 40 Cal 21=39 Ind. App. 197=16 C. W. N. 961=12 M. L. T. 195=1912 M. W. N. 781=16 C. L. J. 245=23 M. L. J. 276=14 Bom. L. R. 833=10 All. L. J. 271=16 Ind. Cas. 188=5 Bur L. J. 205=6 L. B. R. 150 P. C.

—As to the nature of Land Acq. proceedings, and as to the effect of decisions on question of title under the Act see, 4 Cal L J 256; A I R 1924 Cal 757=28 C. W. N. 295=86 Ind. Cas 1023; and A. I. R. 1922 P. C. 80=45 Mad 320=30 M. L. T. 154=35 C. L. J. 545=16 M. L. W. 1.=1922 M. W. N. 359=26 C. W. N. 713=20 A. L. J. 684=43 M. L. J. 98=67 Ind. Cas. 408=24 Bom. L. R. 963=49 I. A. 129 P. C.

#### (18) Land Registration

—Where a Collector ordered a separate registration and sub-assessment of a zamindari village under Reg XXV of 1802, s. 8, and Act I of 1876 it was held, that the Collector's order could be questioned in a Civil Court and that separate registration, as distinct from the amount of sub-assessment, was a matter of private right with which the Government had no power to interfere. 26 I. A. 16.

#### (19) Municipality, suits against, and election cases.

—Where a special tribunal or body like a municipality is created under a statute with certain authority under that statute, Civil Courts will not interfere in the exercise of that authority: 9 Bom. L. R. 417=31 B. 604; Unless the tribunal refused to function: A. I. R. 1926 M. 798=24 L. W. 510=94 I. C. 546.

—The Standing Committee of a Corporation is not a tribunal possessing powers of the Corporation: 12 M. L. T. 469=23 M. L. J. 531=16 I. C. 971=1912 M. W. N. 1162=38

M. 41

C. P. C. (1908) S. 9 (Contd.)

(4) Barred Expressly. (Contd.)

—Powers of statutory corporation should be construed strictly; what is not expressly permitted is forbidden. 21 M. L. J. 790=2 M. W. N. 95=11 I. C. 669=10 M. L. T. 168=36 M. 113; see also 1. P. L. T. 304=5 P. L. J. 347=1920 Pat. 187=57 I. C. 583.

—Where an Act expressly bars a civil Court Jurisdiction in certain matter, a civil suit can lie in other matters: A. I. R. 1927 M. 1035=26 L. W. 572=53 M. L. J. 688=39 M. L. T. 389=1927 M. W. N. 913=105 I. C. 88=51 M. 76.

—Where a municipality acts within its powers, the Civil Court cannot interfere: 12 Oudh. Cas 191 = 3 In Cas 516; unless there is fraud: 12 Ind. Cas 310. (315)=1911 2 M. W. N. 241; see also 2 A L J 222 (224)=1905 All W. N. 79; and 15 I. C. 321; or, unless there is want of good faith: A I R 1926 Mad. 204 = 22 M. L. W 719 = 93 I C 658. see also A I R 1924 L 699 = 78 I C 8; 1907 P R 58 = 1908 P L R 196 = 1907 P W R 136. It is entirely within the discretion of the Municipal Commissioners to grant or refuse a license for a market and the Courts have no jurisdiction to control such power, 20 Calc. 654; nor will a suit lie to compel a municipality to grant a license under s. 339 of Act III of 1884 : 17 C 329. No suit will lie against a Municipality for attachment and sale of moveables in realisation of fines imposed under the Municipal Act, 23 W R 222 and Civil Courts cannot interfere with the discretion of a Municipality with reference to a proposed building unless it is capricious, wanton and oppressive, 12 Bom. 490; nor with the house valuation made by a Municipality in the absence of *mala fides*, perversity or manifest error, 26 Bom 294.

—Where a municipality decides under the Bengal Municipal Act that certain works are necessary, that conclusion in the absence of *mala fides* or fraud cannot be questioned in a Civil Court, 26 Calc. 811 = 3 Calc. W N 508; and a suit to set aside an order made on an appeal under the Bengal Municipal Act against a rate of assessment to reduce the tax levied under Act will not lie. 1 Calc 409.

—A municipality can make an order prohibiting doors to project into street : 9 S L R 126 = 33 I C 675.

—The discretion of taking action or otherwise under the 3rd clause of s. 33, Bombay Act VI of 1873, is vested in the municipality, which alone can determine whether or not the removal of a building erected contrary to the provisions of s. 33 is or is not a measure likely to promote the public convenience.

—If the municipality adopt the proper procedure, no Court can review its decision on the ground that the removal of the Build-



C. P. C. (1908) S. 9 (Contd.)

(4) Barred Expressly—(Contd.)

(19) Municipality etc—(Contd.)

ding is not likely to promote public-convenience : 22 B 230.

—Calcutta Corporation denying the owner's right to compensation on the ground that the building was erected after 1863. Held, a civil suit lies for a declaration that the owner is entitled to compensation : 43 I A 243 = 20 M L T 383 = 18 Bom. L R 878 = 24 C L J 498 = 1916 M W N 544 = 21 C W N 194 = 5 L W 199 = 32 M L J 631 = 36 I C 912 = 44 C 87 P C.

—Misuse of the powers by attempting to acquire land not in furtherance of the objects of the Statute but for the purposes of exacting exemption-fee from owners is actionable in a Civil Court 47 C 500 = 47 I A 45 = 24 C W N 881 = 32 C L J 65 = 2 U P L R (P C) 98 = 18 A L J 521 = 22 Bom. L R 586 = 38 M L J 511 = 11 L W 566 (P C) = 56 I C 32 (Affirming 44 C 219 = 21 C W N 8 = 24 C L J 246 = 36 I C 749.)

—And a suit questioning a capricious and arbitrary order of a Local Board is maintainable : A I R 1921 M 92 = 40 M L J 91 = 1920 M W N 748 = 12 L W 185 = 61 I C 497 = 44 M 156. Arbitrary exercise of discretion given by the statute entitles the injured person to maintain a suit : 15 C W N 669 = 21 M L J 641 = 10 M L T 288 = 11 I C 509 P C

—A Municipal Board will not be justified in refusing to grant a license properly applied for under the bye-laws in order to secure an advantage to itself in a dispute about a question of title with another person.

—Civil Court can interfere in a suit in such a case 20 Cr. L J 705 = 17 A L J 976 = 1 U P L R (H. C) 126 = 52 I C 785.

—[Where the action of a Municipality is ultra vires the Civil Court can interfere 12 C W N 709 = 7 C L J 631 = 35 C 859; see also A I R 1926 L 461 = 93 I C 827; A I R 1926 M 798 = 24 L W 510 = 94 I C 546; A I R 1929 F 69 = 113 I C 387; A I R 1929 C 33 = 32 C W N 1055 = I R 1929 C 371 = 115 I C 515 = 56 C 580.

—Courts can interfere with the bye-laws of municipal bodies, if such bye-laws are ultra vires or repugnant to the general principles of law : 13 Bur. L T 107 = 59 I C 545.

—Where the decision of a Commissioner under s. 114 of Beng. Muni. Act was ultra vires, held the Civil Court can interfere : 12 I C 32 = 39 C 141.

—Where a tax is levied without any right, a civil suit is maintainable : 16 Bom L R 121 = 23 I C 779 = 38 B 293.

—Civil Court can entertain a suit questioning the validity of a municipal tax :  
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C. P. C. (1908) S. 9 (Contd.)

(4) Barred Expressly—(Contd.)

(19) Municipality etc—(Contd.)

A I R 1924 All 652 = 46 All 553 = 22 All L J 446 = 88 Ind Cas 212; see also A I R 1924 L 619 = 75 I C 737.

—Where an assessment was ultra vires it was held that Civil Court was justified in interfering : 14 C W N 437 = 5 I C 321 = 11 C L J 400 = 37 C 374; see also A I R 1928 C 450 = 47 C L J 315 = 32 C W N 378 = 109 I C 618.

—A corporation must ordinarily transact business at a meeting, and cases like dismissal of officers cannot be dealt with in circulation even though individual members might consent; irregular dismissal of an officer will entitle such officer to bring a suit for damages, and each member of the corporation will be liable : 33 M L J 660 = 1917 M W N 839 = 22 M L T 454 = 7 L W 85 = 43 I C 205 = 41 M 357.

—But where a servant is dismissed in lawful exercise of powers, no suit lies to question it : A I R 1929 S. 69 (82) = 113 I C 387.

—As to dismissal of an hereditary Archaka see 10 I C 548 (549) = 10 M L T 14 = 21 M L J 580 = 35 M. 631.

—Civil Court can question the appointment of a trustee by the Devasthanam Committee if it is not made reasonably and in good faith. 42 M. 668 = 26 M L T 143 = 1919 (M W N 522) = 53 I C 605.

—Where civil right is infringed by a municipality a suit for injunction is maintainable : 23 M L J 531 = 1912 M W N 1162 = 12 M L T 469 = 16 I C 971 = 38 M. 41 (43);

—See also 15 C W N 669 = 21 M L J 641 = 10 M L T 288 = 11 I C 509 P C.

—Where notice was issued to plffs., being public prostitutes, to leave certain area, it was held that a suit to restrain the Municipality from enforcing the notice is maintainable : A I R 1927 L 358 = 100 I C 1010.

—A suit for injunction against Municipality restraining demolishing plaintiff's latrine is maintainable. A I R 1927 All. 432 = 101 I C. 446.

—Leave to build Chabutra in front of applicant's house refused by Committee as title to land was with them—A suit was brought for "injunction to restrain Committee from preventing building on his land". Prayer for declaration of his title is maintainable A I R 1929 Lah 774 = Ind. Rul (1929) Lah. 419 = 115 I C 755.

—Civil Court has jurisdiction to enquire into election matters and if necessary declare the election void, as the sanctity of a nomination paper accepted by the Chairman can be questioned after the election : A I R 1926 M,



C. P. C. ( 1908 ) S. 9 (Contd.)

( 4 ) Barred Expressly—(Contd.)

( 19 ) Municipality etc—(Contd.)

319 = 24 L W 208 = 1926 M W N 572 = 92 I C 149; see also 11 A L J 349=20 I C 490=35 A 308

—Similarly under s. 51 of the Bengal Village Self Government Act : A I R 1926 C 279=90 I C 700=52 C 943

—And under Agra and Oudh Municipal Act : 20 I C 490 = 35 A 308.

—A suit against chairman rejecting election papers is maintainable : A I R 1923 M 475 = 17 L W 481 = 32 M L T 178 = 1923 M W N 266 = 45 M L J 23=73 I C 619=47 M 585

—Where the plaintiff sued for a declaration that his election as a Commissioner of Municipality which had been set aside by the District Magistrate purporting to do so under R. 40 of the Bengal Municipal Election Rules (1930) was good and valid, it was held that the suit was maintainable in Civil Court 37 C W N 122 (123) see also A L R 1933 C 440= 60 C 437; and 12 I C 311 = 10 M L T 219 = 1911 M W N 233 = 21 M L J 878 = 36 M 120.

—As to right of suit in case of misdescription in electoral roll see A I R 1922 A I = 20 A L J 1 = 65 I C 984 = 44 A. 202.

—And as to remedy for omission of the name from the register and failure to rectify see 57 I C 960 = 24 C W N 969.

—A suit for declaration that the election of the members of the Panchayat Court is void, cannot be entertained by a Civil Court, nor can it issue an injunction restraining the members from entering upon their duties. A I R 1926 Mad. 246 = 50 Mad. 91 = 23 M L W 103 = 1925 M W N 874 = 50 M L J 148 = 92 I C 790.

—As to a suit contesting nomination of a candidate under Madras Taluk Board election rules see A I R 1929 M. 607 = 57 M L J 40 = 30 L W 345 = 118 I C 289.

( 20 ) Pension Act XXIII of 1871

—Suit for declaration affecting liability of Government cannot be entertained without production of a proper certificate: 9 Bom L R 889=31 B 512; 37 Bom 91 (93)=14 Bom L R 938=17 Ind Cas 661; see also 13 A L J 460 (465)=29 I C 146=37 A 338; and 17 M L J 139=2 M L T 188=30 M 266.

—Civil Court cannot entertain a suit for declaration affecting liability of Government to pay revenue to a private person as assignee of Govt. revenue : 29 I. C. 146 = 37 A. 338.

—Similarly a suit does not lie for a declaration that a land is absolute freehold inam land not liable to resumption by Govt : 23 M L J 687.(694) = 1913 M W N 255=15 I C 871 = 12 M L T 541.

—Or as to allowance for journey for investigation : 15 C W N 470 = 13 C L J 360 = 9 I C 859 = 38 C 378 ( 386 ).

C. P. C. (1908) S. 9 (Contd.)

( 4 ) Barred Expressly—(Contd.)

( 21 ) Probate and Adm. Act.

A civil Court can entertain a suit for a declaration as to the effect of the terms of a will of which probate has been granted : 29 C L J 37 = 49 I C 128 = 23 C W N 658.

—Suit for declaration that will of which probate has been granted, is invalid and inoperative is maintainable 29 C L J 37 = 49 Ind. Cas 128 = 23 C W N 658

(21-b) Railway Act.

—See Contract Act ss. 151, 152 and 161; Railways Act 1880; and Carriers Act 1865. Civil Court cannot entertain a claim for fare and excess charges due to a Railway Company : 28 Bom. L R 443 = 94 I C 742 = A I R 1926 B. 266 = 50 B. 215.

( 23 ) Revenue Matters and Revenue Court

Decisions, Suits relating to.

—A Civil Court cannot set aside a decree of a Revenue Court on matter exclusively within the jurisdiction of the latter : A I R 1926 O 205=3 O W N 210=13 O L J 496=93 I C 62; see also 9 O L J 141=4 U P L R ( O C ) 43 = A I R 1922 O 75 = 67 I C 808; A I R 1926 O. 506 = 95 I C 585.

—For example, a decision of revenue Court in redemption proceedings of state lands : A I R 1924 O. 245 = 10 O L J 606 = L R 5 O 92 = 89 I C 698;

—Or a decision in partition proceedings under s. 233 of U P Land Revenue Act 1901 : A I R 1925 O. 671 (2)=10 W N 658=87 I C 416

—A suit barred under Tenancy Act cannot lie under s. 9 of sp. Rel. Act or s. 9 of C P Code : A I R 1931 A 663 = 132 I C 801.

—Civil Court cannot restrain persons from applying to a tribunal specially constituted for a purpose : A I R 1927 Pat. 286 = 8 P L T 477 = 103 I C 313.

—A claim for money due under Agriculturists Loans Act (1884) is cognizable by the Revenue Court. A I R 1921 All. 80=19 A L J 360 = 62 I C 544.

—A transferee of occupancy tenant cannot sue the landlord to compel him to register his name as tenant : 18 C W N 620 = 22 I C 788.

—Civil Court cannot entertain a suit as regards procedure when there is no dispute about title : 2 L L J 192 = 5 P L R 1921=2 U P L R ( L ) 156 = 58 I C 19 = 1 L. 298.

—Question whether land revenue is to be paid to a jagirdar in cash or in kind is a question under S. 48 of the Land Revenue Act, and can be decided only by Government, not by Civil Court : 110 P R 1918 = 48 I C 384.

—Similarly, the Civil Court cannot deal with the question of distribution of Govt. revenue : A I R 1929 Pat. 22=115 I C 225=I R 1929 Patna 195=9 P L T 661 = 8 Pat. 95.

C. P. C. (1908) S. 9 (Contd.)

(4) Barred Expressly—(Contd)

(23) Revenue Matters—(Contd)

If relation of landlord and tenant exists, the tenant, if forcibly dispossessed by the landlord, cannot sue in civil Court under S. 9 of Specific Relief Act. 17 C W N 1201 = 21 I C 224 F B. In a suit for possession by landlord against deft as trespasser, it was found that a portion of land was held by the deft as tenant. Held, Civil Court's jurisdiction as regards that portion is barred: A I R 1926 O. 484 = 95 I C 435.

—A Civil Court has no jurisdiction to grant a declaration as to what rights passed under a decree of a Revenue Court: A I R 1924 O 69 = 10 O L J 315 = 79 I C 784.

—Civil Courts have jurisdiction over matters not falling under exclusive jurisdiction of Revenue Courts. Thus where liability arises out of original lease and relation of landlord and tenant but a new contract was substituted by an agreement creating the relation of creditor and debtor, suit can be instituted in the Civil Court. A I R 1926, Lah. 578 = 7 Lah. 479 = 96 I C 275.

—And where a tenant claims adverse possession, he can be ejected as a trespasser through a Civil Court: A I R 1925 O 442 = 12 O L J 160 = 2 O W N 148 = 87 I C 183 = 28 O C 325.

—Similarly, a suit for ejectment and pasture rent under Mad. Estates Act lies in Civil Court: 25 M L J 578 = 1913 M W N 919 = 21 I C 532 = 14 M L T 405 = 38 M 738.

—And where a tenant, claiming ownership of a grove, sued for damages for loss caused to the trees, the suit lay in Civil Court: A I R 1923 A 134 = 76 I C 12 = 21 A L J 33 = 45 A 191.

—A Civil Court can declare the ownership of trees of a grove in plff, though the plff. is not in possession of the land: A I R 1923 A 540 = 74 I C 349 = 21 A L J 377.

—The remedy of transferee of occupancy holding illegally dispossessed by transferor or his heirs does not lie before Revenue Officer. A suit in the Civil Court is the only remedy A I R 1926 Nag. 432 = 9 N L J 123 = 96 I C 353.

—Civil Court has jurisdiction to try a suit for possession of land as occupancy tenant brought by a person dispossessed in accordance with notice issued under S. 43 of B. T. Act, and who has been unsuccessful in a suit to contest his liability in ejectment. 49 P. R. 1919 = 51 I C 443.

—Some of several cosharers can bring a civil suit for settlement of fair rent: A I R 1925 Pat. 517 = 1925 Pat. 153 = 6 P L T 849 = 88 I C 959.

C. P. C. (1908) S. 9 (Contd.)

(4) Barred Expressly—(Contd)

(23) Revenue Matters—(Contd)

—Revenue court's decision is final re nature of tenancy, but if tenancy is denied and question of title arises, between the parties, Civil Courts have jurisdiction to try and decide it: 24 O C 15 = 61 I C 290 = A I R 1921 O. 125.

—Act VI of 1870 B. C. does not bar a civil suit on question of title: 2 C L J 306; see also 18 C W N 143 = 20 I C 644.

—Decision by Revenue Court on a question of title is no bar to the same question being litigated in a Civil Court: 77 P W R 1918 = 84 P L R 1918 = 46 I C 13 = 45 P R 1918; see also A I R 1929 Pat. 22 = 9 P L T 661 = 8 Pat. 95 = I R 1929 Pat. 193 = 115 I C 225; and A I R 1926 O. 181 = 89 I C 810.

—Civil Court can interpret documents of title though result may be prejudicial to a party in a rent Court. A I R 1924 Oudh 69 = 10 O L J 315 = 79 I C 784.

—Collector's order for partition under s. 29 of Beng Estates Partition Act does not bar a civil suit: A I R 1929 Pat. 332 = 10 Pat. L T 167 = 119 I C 911 = 8 Pat. 763.

—Civil suit lies as to partition of house in Abadi; A I R 1927 O. 215 = 101 I C 910.

—A Civil Court can partition a dwelling house and a *chabutra* attached to it, as the latter is only appurtenant to a dwelling house, 7 O L J 538 = 23 O C 281 = 60 I C 433.

—An order for partition can be made by Civil Court if the plaintiff's title is not made precarious by the Revenue settlement by the revenue authorities. 33 C L J 497 = A I R 1922 Cal. 345 = 65 I C 833; see also A I R 1924 N. 275 = 20 N L R 145 = 79 I C 161.

—Suit for declaration that a land has been partitioned privately though shown as joint property in revenue papers and not capable of partition, is cognizable by a Civil Court. A I R 1926 Lah 178 = 91 I C 528.

—If a minor plaintiff has a right either to ignore or to challenge the propriety of an order passed by the Revenue Court against him in partition proceedings, such right is a substantive right and a suit for enforcement of such right is clearly a suit of a civil nature within S. 9, C P C 54 A. 646 (687) = 1932 A L J 437 = I R 1932 A 418 = 138 I C 465 = 16 R D 327 = A I R 1932 A 293 = A L R 1932 A 411 (F. B.)

—A civil suit is not barred by S. 2 of Act VII (B. C.) of 1868 for setting aside a sale, in enforcement of a certificate issued under Public Demands Recovery Act 1880, on the ground that the sale was vitiated by a material irregularity leading to substantial injury: 5 O W N 521 = 29 C 73 F. B. (Overruling 14 C 1 and 23 C. 641).

C. P. C. (1908) S. 9 (Contd.).

(4) Barred Expressly—(Contd.)

(23) Revenue Matters—(Contd.)

—A dispute between two private parties about land at disposal of Govt. can be decided by a Civil Court : 23 I C 961.

—Similarly, a Civil Court is competent, under Agra Tenancy Act s. 95, to decide dispute between rival claimants to a tenancy : 10 A L J 408 = 17 I C 376 = 35 A. 14 (17).

—And a superior holder can sue in Civil Court to recover dues from inferior holders : 19 Bom. L R 820 = 43 I C 995 = 42 B. 49.

—Right to specific relief or injunction is a civil right and civil suit lies to enforce it : A I R 1924 C 982 = 28 C W N 803 = 82 I C 405 = 51 C. 916.

—In connection with the subject under discussion we may notice certain enactments which give special jurisdiction to Revenue Courts over matters falling within those enactments. Thus s. 95 of Agra Tenancy Act : 11 A L J 1022 = 21 I C 859 = 36 A. 48.

—And s. 167 of the same Act : 12 A L J 29 = 22 I C 668 = 36 A. 55; and s. 109 of B T Act : 16 C L J 67 = 16 I C 935; and ss. 113 and 241 of U P Land Rev. Act : 3 A L J 43 = 1906 A W N 30 = 28 A. 394.

—And cl 15 of Lower Burma Towns & Village Land Act; 3 L B R 50 give special jurisdiction to Revenue Courts. Similarly, jurisdiction given by s. 36 of C P Tenancy Act to the Revenue Courts is exclusive : 5 N L R 176 = 41 C 795.

—And the same section does not bar a suit where proceedings taken for realisation of revenue are illegal : 15 Bom. L R 665 = 20 I C 526 = 37 B 542.

—Finally, apart from the question whether a matter is within exclusive jurisdiction of Revenue Court, a Civil Court can always question the proceedings of a Revenue Court on ground of fraud, irregularity, illegality etc.

—Decision of Revenue authorities can be quashed by Civil Courts if there is fundamental irregularity in the Revenue Court proceedings : A I R 1926 Cal 1064 = 53 C 561 = 98 I C 334.

—Or a suit to set aside a sale of holding under Madras Act I of 1908 : 23 I C 524 = 1 L W 414 = 15 M L T 340 = 38 M 1042.

—A suit to set aside a sale for supposed arrears of revenue is not barred by s. 33 of Act II of 1859 : 18 C W N 490 = 21 I C 953 = 18 C L J 505.

—Thus a suit lies against Collector acting in contravention of Bundelkhand Alienation of Land Act : A I R 1928 A 511 = 26 A L J 673.

—As to jurisdiction of Civil Courts to question the validity of Collector's order under Mad. Dist. Muni. Act 1884 see 21 M L J 878

C P C (1908) S. 9 (Contd.).

(4) Barred Expressly—(Contd.)

(23) Revenue Matters—(Contd.)

—It should be noted that Civil Court cannot set aside a fraudulent decree of a Revenue Court, but it can declare it void : A I R 1922 A 294 = 66 I C 559.

—And a mere fact that debts in ejectment suits are entered in Record of Rights as occupancy tenants is not a sufficient reason for holding that the decrees in these suits were without jurisdiction or were wrong in law : A I R 1924 Pat 765 = 5 P L T 535.

#### (24) Special Tribunals

—See also cases under:—(15) Income Tax Act, (23) Revenue Matters etc. A Civil Court cannot question the orders of special tribunals created by special Acts for that purpose, and whose orders have been declared to be final : 10 S L R 113 = 37 I C 267.

#### (24-a) Special Tribunals.

—Under the Co-operative Societies Act, a suit to question the election of a person as director is barred : 23 A L J 129 = A I R 1925 A 356 = 6 L R A (civ) 208 = 86 I C 585 = 47 A 374.

—Similarly, the decision of the Officer Commanding the Division under s. 103 of Cantonment House Accommodation Act is final : 10 S L R 113 = 37 I C 267.

(24-b) Survey Act see Bengal Survey Act (*supra*)

#### (5) BARRED IMPLIEDLY.

- (A) General.
- (B) Act of State.
- (C) Political and executive acts of govt.
- (D) Illegal Contracts and fraud
  - (1) General.
  - (2) Champerty and maintenance.
  - (3) Benami Transactions.
  - (4) Fraud.
- (E) Privileged matters.
- (F) Election cases under Municipal Acts and other Acts.
- (G) Judges and magistrates protection Acts.

#### (5) BARRED IMPLIEDLY—

##### (A) General.

—Where an enactment lays down a particular mode for enforcing a right, the ordinary remedy by a civil suit was held to be barred impliedly 1922 C 4 = 65 I C 711 = 26 C W N 506.

—But if the person choses a particular remedy out of the two or more open to him, he is bound by it and cannot, on his failing therein, proceed under the other : 39 A 626 = 43 Ind. Cas. 573; see also 17 All L J 787 = 1 U P L R (H C) 118 = 51 Ind. Cas. 113; 40 Mad 1173.

C. P. C. ( 1908 ) S. 9 (Contd.)

( 5 ) Barred Impliedly—(Contd.)

( A ) General—(Contd.)

—Where exclusive jurisdiction over any subject-matter is conferred by Statute on any authority, a Civil Court cannot interfere; but it can interfere in matters outside that subject matter : A I R 1922 Pat. 361 = 3 Pat. L T 125 = 62 I C 394.

—Similarly, where a Statute gives power to any person for a public purpose from which an individual may receive an injury, then if the mode of redress is also specified in the statute jurisdiction of ordinary Courts will be ousted. A I R 1928 Lah. 562 = 10 Lah. 338 = 111 I C 508.

—But the special tribunal created by Statute for a particular purpose must act judiciously.

—If the decision is reached without any enquiry and without hearing the parties then the ordinary Courts have jurisdiction to protect the rights of a subject and the decision of the special tribunal is no bar : 21 Bom. L R 27 = 49 I C 427 = 43 B. 221.

—Where the legislature has acted within its powers, no municipal court is competent to question the legality of the enactments of the legislature. A I R 1925 Mad. 837 = 49 Mad. 237 = 48 M L J 204 = 86 I C 485.

—Ordinarily a Civil Court will not interfere with the internal management of Joint Stock Companies acting within their powers :

A I R 1926 S. 295 = 97 I C 84.

Similarly, as regards the internal management of other companies : A I R 1924 Cal. 598 = 83 I C 376 = 28 C W N 479.

#### ( B ) Act of State.

—No action lies against the Secretary of State in respect of an act of State or of Sovereignty.

—No action can be based on any libel however malicious, contained in a resolution of Government 27 Bom. 189 = 5 Bom. L R 30; see also A I R 1928 C. 74 = 107 I C 360 = 54 C. 969.

—On cession of territory, only the rights conferred by new Sovereign by expressed or implied contract, subsist. 39 Bom. 625 = 19 C W N 1087 = 23 C L J 1 = 29 M L J 242 = 18 M L T 179 = 17 Bom. L R 730 = 13 A L J 953 = ( 1915 ) M W N 563 = 2 L W 731 = 30 I C 303 = 42 I A 226 ( P C ).

—British Protectorate State is semi-Sovereign. A I R 1926 P C 131 = 30 C W N 961 = 99 I C 265.

—Rights which are recognised after an Act of state can be adjudicated upon by the Civil Courts. Treaty rights are not matters for adjudication by civil courts but are useful for the guidance of the Govt. as to what rights may be recognised. The

C. P. C. ( 1908 ) S. 9 (Contd.)

( 5 ) Barred Impliedly—(Contd.)

( B ) Act of State—(Contd.)

rights which a person had under the rule of predecessors avail him nothing.

—Even if in a treaty it is stipulated that certain inhabitants should enjoy certain rights that does not entitle these inhabitants to enforce these stipulations in the Municipal Courts. The right to enforce remains only with the High Contracting parties.

—A mere statement in general terms that rights will be respected must necessarily mean rights determined by the Government Officials. A I R 1924 P C 216 = 48 Bom. 613 = 51 I A 357 = ( 1924 ) M W N 694 = 22 A L J 951 = 5 L R P C 199 = 26 Bom. L R 1143 = 40 C L J 473 = 29 C W N 317 = 21 L W 28 = 47 M L J 574 = 82 I C 779.

—British occupation does not ipso facto destroy private rights : A I R 1921 P C 212.

—British Indian Courts cannot enquire into the legality of an act of a foreign State against its own subjects in respect of property situate in its own territory. 56 B 349 ( 357 ) = 34 B L R 17 = 137 I C 483 = I R 1932 B 286 = A I R 1932 B 206 = A L R 1932 B 565; see also, A L R 1933 P C 153 = A I R 1933 P C 150.

—Guarantee by Secretary of State for India for due performance of a decree is not an act of State : 38 C 754 = 15 C W N 475 = 13 C L J 365 = 9 I C 862.

—An action for tort, authorised by a Sovereign, is not maintainable : 28 M L J 310 = 28 I C 394.

Municipal courts cannot challenge. They can only decide whether a particular Act is an Act of State 38 C. 754 = 15 C W N 475 = 13 C L J 365 = 9 I C 862.

—Municipal Court cannot question, control or interfere with the appropriation of the revenue of India by the Local Government, which would be an act of state, provided it is for the purpose of the government of India A I R 1926 Pat. 305 ( F B ) = 5 Pat. 595 = 7 P L T 695 = 96 I C 791.

—Act of State does not deal with civil rights; tort arising out of negligence of a municipality in stacking of gravel is a civil right : 39 Mad. 351 = 1915 M W N 39 = 27 Ind Cas 723, ( 2 ); ( 1908 ) Pun. Re. No. 105 = 1908 P W R 163.

—Annexation of territory is an act of State, and the Municipal Courts cannot enforce any obligation assumed under the treaty either to the ceding sovereign or to individuals : A I R 1915 P C 59 ( 62 ) = 42 I A 229 = 17 Bom. L R. 730 = 13 A L J 953 = 18 M L T 179 = 2 L W 731 = 23 C L J 1 = 19 C W N 1087 = 29 M L J 242 = 1915 M W N 563 = 30 I C 303 = 39 B. 625 P. C.



C. P. C. (1908) S. 9 (Contd.)

(5) Barred Impliedly—(Contd)

(B) Act of State—(Contd)

—When a territory is acquired by a sovereign state for the first time, that is an Act of State. Such rights as an inhabitant had under the rule of predecessors, avail him nothing. Municipal Courts cannot adjudicate upon rights existing before cession.

—Even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to these inhabitants to enforce these stipulations in the municipal Courts. A I R 1924 P C 216 = 21 M L W 28 = 1924 M W N 694 = 48 Bom. 113 = 51 I A 357 = 22 A L J 591 = 5 L R P C 199 = 26 Bom. L R 1143 = 40 C L J 473 = 29 C W N 317 = 47 M L J 574 = 82 I C 779 P. C.

—Municipal Courts cannot question the appointment of a Political Agent appointed to manage the State of a minor Chief.

—But Municipal Courts can try suit by Chief for redress of breach of trust for embezzlement by Political Agent or his subordinates with regard to property in British India : A I R 1930 Pat. 357 = I R 1930 P. 497 = 125 I C 145.

#### (C) Political and Executive acts of Govt.

—For example, withdrawal of administrative function from a non-feudatory zamindar : 39 I A 31 = 16 C W N 362 = 9 A L J 585 = 15 C L J 633 = 1912 M W N 657 = 13 I C 965 = 14 Bom. L R 812 = 39 C 615 (661) P. C. ; or a question of succession to a Native Prince : 4 M L T 27 = 12 C W N 777 = 8 C L J 1 = 35 C 777.

—Or, a dismissal of a Government servant : 35 C 669 ; 18 C W N 106 = 17 C L J 75 = 16 I C 922 ; 15 C W N 486 note = 13 C L J 357 = 9 I C 858.

—Or, a dismissal of a Ghatwal by Police 24 I C 527.

—Civil Court has jurisdiction to try a suit for possession of *ghatwali* land though it cannot restore a *ghatwali* to his service, in as much as a Civil Court cannot adjudicate on the propriety or otherwise of the dismissal of a *ghatwal* of Birbhum. A I R 1924 Pat. 616 = 3 Pat. 673 = 84 I C 405.

—A suit for damages does not lie against Secretary of State in respect of acts done by Govt.-servants in exercise of statutory powers 29 M L J 280 = 31 I C 224 = 39 M 781.

—Nor does a suit lie questioning the right of the Government to resume the subject of a Saranjam grant, A I R 1923 P C 6 = 47 Bom. 327 = 28 C W N 49 = 17 M L W 405 = 32 M L T 111 = 44 M L J 471 = 50 I A 49 = 25 Bom. L R 527 = 37 C L J 464 = 72 I C 898.

C. P. C. (1908) S. 9 (Contd.)

(5) Barred Impliedly—(Contd)

(d) Suits based on illegal Contracts and Fraud.

(1) General.

(2) Benami Transactions.

(3) Fraud.

#### (1) General.

—Agreement between husband, wife for future separation is void and no suit lies in respect of it : 14 Bom. L R 1178 = 17 I C 946 = 37 B. 280.

—Similarly, a contract to pay on failure of marriage. 37 Mad. 393 (395) = 24 M L J 310 = 18 Ind Cas 515 = 1913 M W N 200.

—A Civil Court can declare a pat marriage invalid : A I R 1926 N 488 = 95 I C 705 = 9 N L J 160 = 22 N L R 134.

—But the contract would be void, if the offence was not compoundable 18 Mad. 189 = 4 M L J 106 ; see also 26 I C 181 = 37 M 385 ; 1 P L J 48 = 3 P L W 405 = 20 C W N 760 = 33 I C 711 ; 11 C L J 131 = 5 I C 98 ; 16 C W N 854 = 15 I C 259 = 40 C. 113.

—Where illegal portion of agreement has been wholly carried into effect, the whole matter is outlawed and Court will not aid either party to retrieve, unless he is not *pari delicto*. 20 C W N 760 = 1 Pat. L J 48 = 3 Pat. L W 405 = 33 I C 711.

—As to suit for refund of money paid under an agreement not to prosecute see 19 C W N 383 = 28 I C 713 = 42 C 286 = 21 C L J 642.

—As to Hindu son's liability to pay father's *Avayaraharika* debt see 17 Bom. L R 955 = 31 I C 301 = 40 B. 126.

#### (2) Benami Transactions.

—Where a suit conducted by an agent is compromised and the agent takes a promissory note in his name, and subsequently obtains a decree on the promissory note, a suit for declaration that the plaintiff is the actual decree-holder, and that the person in whose name the decree stands was only acting as his agent, is competent and is not barred by s 9 or s 47, C P C A I R 1931 Rang 24 = Ind Rul (1931) Rang 110 = 130 I C 366.

#### (3) Fraud.

—A Civil Court can thus declare a Revenue Court decree void on ground of fraud : A I R 1929 A 232 = L R 10 A 261 Rev. = 116 I C 855.

—As to suit for setting aside a judgment on ground of fraud see 25 M L J 228 = 19 I C 579 = 13 M L T 421 = 1913 M W N 387 = 38 M 203.



C. P. C. (1908) S. 9 (Contd.)

(5) Barred Impliedly (Contd.)

(d) Illegal Contracts and Fraud—(Contd.)

(3) Fraud—(Contd.)

—There must be an allegation of actual fraud, which can be explained upon the face of a decree and not a mere irregularity: 7 A L J 74 = 4 I C 596 = 32 A 145; see also 18 C W N 681 = 23 I C 337 = 19 C L J 457 = 41 C 990.

—Every fraud by means of which a decree is procured is a fraud both upon the Court and upon the party unless the decree be one obtained by a compromise between the parties: 1912 M W N 805 = 12 M L T 186 = 23 M L J 187 = 16 I C 843.

—No suit is maintainable on the ground that the plff's case in the previous suit was false to his own knowledge: A I R 1925 M 640 = 21 L W 300 = 86 I C 498.

—And a suit to set aside a decree based on perjured evidence is not maintainable: 34 M L J 590 = 23 M L T 372 = 8 L W 103 = 45 I C 774 = 1918 M W N 514 = 41 M 743 F B. (over ruling 29 M 179).

—Nor for suppression of evidence: A I R 1922 M 404 = 77 I C 917; see also 18 C W N 447 = 22 I C 709; 16 C W N 1002 = 15 I C 893; and 30 I C 789 = 13 A L J 753 = 37 A 535.

—As to setting aside of an ex parte decree on ground of fraud see 11 I C 626 = 15 C W N 1010 = 38 C 936.

—No suit lies to set aside an ex parte decree, passed after due service of summons, on the ground of false claim and false evidence: A I R 1926 C 426 = 30 C W N 560 = 88 I C 583.

—Where a decree is passed by competent Court and the remedies open for getting it corrected are not availed of, a separate suit to rectify the decree is not maintainable 14 I C 93 = 15 C L J 675 = 17 C W N 82; see also A I R 1928 L 766 = 108 I C 55; 31 I C 13 = 19 C W N 1228 = 43 C 217 (compromise decree).

#### (E) Privileged Matters.

—Defamatory and libellous expression, when used by a party in the course of a judicial proceeding, either in the pleadings or the conduct of the suit, are not actionable—14 Bom. 97; [but see 23 C 867 and 3 L B R 265; and 17 C L J 105 = 18 I C 737 = 17 C W N 554 (563)].

#### (F) Election cases under municipal & other Acts.

See cases under this section under the heading "Barred expressly"—municipality suits against and election cases.

#### (G) Judges & Magistrates and other Officers.

See cases under this section under the

C. P. C. (1908) S. 9 (Contd.)

(5) Barred Impliedly—(Contd.)

(G) Judges & Magistrates & other Officers (Contd.)

heading "Barred expressly"—Judicial Officers Protection Act barred under.

#### (6) SUITS MUST BE OF CIVIL NATURE.

- (1) General.
- (2) Abusive language see Defamation infra.
- (2-a) Accounts.
- (3) Burial ground and rights as to.
- (4) Carriers see cases under this Sec Barred expressly Railway Act.
- (5) Caste questions.
- (6) Clubs.
- (7) Compensation.
- (8) Contractual rights breach of.
- (9) Contribution.
- (10) Cosharers.
- (11) Costs.
- (12) Decree.
- (13) Defamation.
- (14) Distraint.
- (15) Ecclesiastical questions.
- (16) Fishery.
- (17-20) Fraud see Barred impliedly under this section.
- (21) Haut.
- (22) Hindu widow.
- (23) Idols see also No. 75 worship right of.
- (24) Instalment.
- (25) Mahomedan Law Religious & other rights under.
- (26) Maintenance.
- (27) Malicious prosecution.
- (28) Minor children.
- (29) Minors.
- (30) Municipal Officer see cases under municipality.
- (31) Offering right as to.
- (32) Office of Dignity.
- (33) Partition.
- (34) Party Wall.
- (35) Political & Execution Acts see Barred impliedly Act of state.
- (36) Political Agent see Barred impliedly Act of state (supra).
- (37) Pre-emption.
- (38) Privacy.
- (39) Priest see also
  - (1) Religious ceremonies and
  - (2) Office of Dignity.
- (40) Privileged communications see "Barred impliedly Privilyed communication."
- (41) Processions.
- (42) Registration see concurrent jurisdiction supra.
- (43) Religious office & ceremonies.
- (44) Restitution of Conjugal Rights.
- (45) Reversioners Alienation.
- (46) Right to sue see also cases under

C. P. C. (1908) S. 9 (Contd.)

(6) Suits Must be of Civil Nature—(Contd.)

- (1) Office.
- (2) Worship right of.
- (3) Barred impliedly Act of state.
- (47) Subscriptions.
- (48) Sale.
- (49) Society.
- (50) Specific remedy.
  - (a) Public Road.
  - (b) Public nuisance.
- (51) Torts.
- (52) User.
- (53) Voluntary payments see also cases under "contribution suits for Supra."
- (54) Water cess.
- (55) Worship right of see also cases under.
  - (1) Religious ceremonies Supra.
  - (2) Idol Supra.

It is a well known principle of Common Law that there is no wrong without a remedy, but to constitute a wrong there ought to be a right and the right should be one which can be enforced by law. It is this right which can be said to be a Civil right & a suit to enforce that right is a suit of a Civil nature. The following are the instances showing what suits are of Civil nature and what are not. These instances are classified according to the subjects and arranged alphabetically as under :—

(1) General

--Civil Court can try suits of a civil nature under s. 9 C P C except suits of which their cognizance is expressly or impliedly barred. 9 O W N 488 (494-509)=137 I C 606=I R 1932 O 243=13 L R 246 (Rev.)=16 R D 246= A I R 1932 O 199 (F B).

—Person alleging bar must prove : 1930 M W N 945.

—Civil Court has jurisdiction to revise the decision of a Chairman in a meeting : A I R 1927 B 603 = 29 Bom. L R 1325 = 106 I C 265.

—A suit for avoiding an order of a competent Court : 54 A 646 (668) = 1932 A L J 437 = I R 1932 A 418 = 138 I C 465 = 16 R D 327=A I R 1932 A 293=A L R 1932 A 411 (FB).

—Or a suit for a declaration that the plff is entitled to sacrifice his cow in his own house : A I R 1928 All. 710=26 A L J 1001 = 110 I C 657;

—And a suit between *riva* claimants of *qabzadari* lands A I R 1928 Oudh 95=1 Luck. Cns. 677=3 Luck. 273 = L R 9 A 350 Rev. = 107 I C 326.

C. P. C. (1908) S. 9 (Contd.)

(6) Suits Must be of Civil Nature (Contd.)

(1) General—(Contd.)

—A suit for damages against licensee under Electricity Act for failure to supply energy on a proper requisition A I R 1926 Lah. 349=97 I C 537.

—A suit for fixing liability of defendant regarding revenue for which plaintiff is liable A I R 1924 Pat. 795=78 I C 188.

—Suit as to validity of votes at a meeting: A I R 1923 B 305=25 Bom. L R 689=83 I C 856=47 B 809; suit by officer of trust committee for wrongful dismissal : 41 C 19=17 C W N 1045= 20 I C 157.

—Suit for declaration that plff is the Honorary Secretary of an Association : 13 A L J 455=29 I C 53=37 A 313.

—Similarly, a right to kill one's own cattle : 5 A L J 147=64 A W N 1908 = 30 A 181; 1 O L R 496=17 O C 354=25 I C 908.

—But the right of mahars to recover carcases of dead animals is not a civil right : A I R 1922 B 410=24 Bom. L R 917=68 I C 746 =47 B 95.

—Person within jurisdiction of Court in British India can be ordered not to continue suit in foreign Court. A I R 1921 Bom. 128=45 B 550=59 I C 444=22 Bom. L R 1173.

(2) Abusive Language see Defamation (*infra*).

(2-a) Accounts.

—Account—suits, are of various kinds e.g. (1) between Principal & agent (2) In Partition suits (3) mortgage suits, &c. For the procedure to be observed in taking accounts, see 24 W R 70; 6 Calc. 754 = 8 C L R 321; 13 I A 123=14 Calc. 147; 20 Mad 313; 25 A W N 125 and 1 Lah. I J 220.

—To constitute a mutual account there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations.—*Velu Pillai v. Ghose Mahomed*, 17 Mad. 293; *Marimuthu v. Semimuthu*, 21 Ma I. 366; *Nahanihai v. Nathu Bhan*, 7 Bom. 414; *Tribhoran v. Amina*, 9 Bom. 516; *Jaman v. Nand Lal*, 15 All. 1 and 42 C 1043=31 I C 626 see also to the same effect 22 M L J 14=12 I C 673; 50 A 645=26 A L J 353=108 I C 694=19 28 A 236; 22 B 606 (609); 56 C 575=1929 C 641; 6 C L J 158 (160); 3 L L J 362=67 I C 933; 31 M 513; 23 M L J 516=17 I C 48; 132 P R 1907; 66 I C 30; 72 I C 135=1923 Pat 242 (1); 74 I C 831.

C. P. C. (1908) S. 9 (Contd.).

(6) Suits must be of Civil Nature (Contd.)

(2-A) Accounts—(Contd.)

—Oral settlement of accounts may give rise to a cause of action in cases of mutual dealings : 34 I C 431=3 L W 338, by S. 7 (f) of Court Fees Act 1870, the plaintiff in a suit for accounts must state the amount at which he values the relief sought, but he is free to fix it as he thinks proper subject to the provision of S. 11 of the same Act : Stamp.—See *Gorandas v. Dayabhai*, 9 Bom. 22, (but see 15 Bom. L. R. 1123=22 I C 71).

(3-4) Burial Ground.

—Right of burial is a civil right : A I R 1930 O. 54=6 O W N 1109 = I R 1930 O. 227=124 I C 419=5 Luck 489.

—So a relative of the deceased can bring a suit for possession of corpse and declaration of right to bury it A I R 1930 Rang. 143=7 R, 603=Ind. Rul. (1930) Rang. 103=121 I C 775.

(5) Caste.

—(a) What is—The caste is a social combination, the members of which are enlisted by birth, not by enrolment. Its rules consist partly of resolutions passed from time to time, but for the most part of usages handed down from generation to generation. The caste is not a religious body, though its usages, like all other Hindu usages, are based on religious feelings. In religious matters, strictly so-called, the members of the caste are guided by their religious preceptors and their spiritual heads. In social matters they lay down their own laws. (Quoting from 15 B. 599, 611). (Per Rangnekar J.). Caste is not a corporation of partnership—(Per Beaumont C J 56 B 242 (250)=34 B L R 343=137 I C 461=A I R 1932 B 122 = I R 1932 B 266 = A L R 1932 B 342 (F. B.); see also 7 M L T 17=20 M L J 49=5 I C 42=33 M 342.

Of course a caste, regarded as a social organism, is very different from a club, but both institutions are unincorporated aggregates of individuals, associated together for purposes other than trade, and the legal consequences which flow from that position must apply to both bodies. (Per Beaumont, C J) 56 B 242 (247)=34 B L R 343=137 I C 461 = A I R 1932 B 122 = I R 1932 B 266 = A L R 1932 B 342 (F. B.)

—A "caste question" is a question which relates to matters which affect the internal autonomy of the caste and its social relations.

—This is not an exhaustive definition, but it is good as a working rule. (Per Rangnekar, J) 56 B 242 (250-1)=34 B L R 343=137 I C 461 = A I R 1932 B 122 = I R 1932 B 266 = A L R 1932 B 342 (F. B.)

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C. P. C. (1908) S. 9 (Contd.).

(6) Suits must be of Civil Nature (Contd.)

(5) Caste—(Contd.)

—Courts will not recognise caste distinctions in a church : 39 M 1060.

—A claim to be invited to a dinner given by a particular fraternity cannot be enforced by a civil suit 3 Ind. Cas 955 [957] = 33 Mad 67=6 M L T 290 = 19 M L J 714; see also 17 Ind. Cas 527 [528] = 1912 M W N 1220.

—Where a member of a panchayat broke its rule against bigamy and the dispute was referred to arbitration it was held that it was purely caste question and no suit would lie A I R 1929 Sind 1 = 23 S L R 299 = 111 I C 425.

—As to civil disputes, however, the jurisdiction of caste panchayats is subject to the control of civil Courts 39 A 561 = 44 I A 192 = 33 M L J 103 [P C] = 15 A L J 629 = 19 Bom. L R 707 = 26 C L J 282=21 C W N 1113 = 1917 P C 203.

—A hereditary priest cannot be removed except on valid ground, as a yajman wutti is a civil right : 13 Bom. L R 1171=36 B 94=12 I C 928. Caste can acquire prescriptive rights 27 M L J 110 = 24 I C 467.

—(b) Excommunication—Caste has power to exclude a member or punish him for a caste offence; but this power must be used with due care and in conformity with the usage of the Caste 12 A L J 552 (561) = 23 I C 301; see also 7 M L T 190=5 I C 57 (1).

—Where an order expelling a Konkani Brahmin was passed in good faith, without malice and in due exercise of spiritual authority it was held that Civil Court could not interfere : A I R 1930 M 100=1929 M W N 532=I R 1930 M 430=123 I C 14; see also 19 M L J 714=6 M L T 290=3 I C 955=33 M 67; 24 B 13.

—But the Court will interfere where the decision of Caste expelling a member is not arrived at justly : A I R 1930 S 204 = I R 1930 S 225=126 I C 49; see also 12 A L J 552; 31 C L J 247=56 I C 556=47 C 623.

—As to defamatory words imputing no loss of caste see 28 M L J 58 = 26 I C 460.

—Where the caste proceedings expelling a person amount defamatory of that person there is a good cause of action A I R 1917 P C 203=44 I A 192=15 A L J 629=19 Bom L R 707=26 C L J 282=21 C W N 1113=33 M L J 103=22 M L T 132=6 L W 494=1917 M W N 817=2 P L W 125=40 I C 641=39 A 561 P C; see also 1912 M W N 1220.

—(c) Caste Property and Accounts—Civil Court can deal with caste so far as relates to its property in accordance with the ordinary principle of English Law of property applicable to British India. 56 B 242=34 B L R

C. P. C. (1908) S. 9 (Contd.).

(6) Suits must be of Civil Nature—(Contd.)

(5) Caste—(Contd.).

343=137. I C 461=A I R 1932 B 122=I R 1932 B 266 = A L R 1932 B 342 (F B).

—Court will not interfere with internal administration of a caste but it has jurisdiction over matters relating to caste property : A I R 1926 B 69=27 Bom. L R 1503=92 I C 549=50 B. 124.

—As to setting aside of sale, on payment of money by member, of caste property sold in execution of decree see 19 Bom. L R 650=42 B 556=42 I C 9.

—The right to inspect account books kept in connection with caste funds and properties is not in any sense a caste-privilege. It is a legal right enforceable in Court of Law except in cases where caste usages restrict such right 56 B 242=34 B L R 343=137 I C 461 = A I R 1932 B 122=I R 1932 B 266=A L R 1932 B 342 (F B); see also 4 I C 569=11 Bom. L R 1267.

(6-11) Counsel's negligence see cases.

—Under this section Barred impliedly Barrister suit against.

(12-14) Decree.

*Mistake*—Judgment by Competent Court can be assailed in subsequent suit on any ground of mistake, but not if the suit is a mere colour for a fresh suit on matters already competently settled by law : A I R 1915 P C 99 = 37 All. 485 = 42 Ind. appl. 171 = 13 All. L J 937 = 17 Bom. L R 754=23 C L J 55 = 20 C W N 35 = 29 M L J 165 = 18 M L T 173 = 2 M L W 671 = 1915 M W N 736 = 30 Ind. Cas 849 P. C.

—Similarly, a suit will to rectify a decree grounded on mistake and to recover money paid under that decree 3 Pat L J 465; see also 31 I C 13 = 43 C 217 = 19 C W N 1228 and the cases cited there, see 8 C W N 473.

—And as to fair comment in a newspaper libel see 36 Cal. 907 (915)=13 C W N 1165=3 Ind. Cas 831; and 15 Bom L R 130 = 19 Ind. Cas. 98.

(15-16) Ecclesiastical Questions.

—No civil suit lies as to matters falling within the competence of Buddhist ecclesiastical authorities in Uppur Burma : A I R 1929 R 77 = I R 1929 R 108=114 I C 540=6 R 783

C. P. C. (1908) S. 9 (Contd.).

(6) Suits must be of Civil Nature—(Contd.)

(15-16) Ecclesiastical Questions—(Contd.)

—As to fishery rights on change in the course of the river see 2 C L J 569=32 C 1141 (1144); 9 C W N 934=33 C 15 (19); 33 C 1349; and 15 C W N 972=11 I C 180=39 C 53 (57).

—And as regards the right to follow river, see 42 Cal. 489 (511)=41 Ind. App. 221=12 All L J 1193=16 Bom. L R 901=20 C L J 385=16 M L T 319=1 L W 733=1914 M W N 654=25 Ind. Cas 467=18 C W N 1217 P C; and 12 C W N 559 (561).

(17-20) Fraud.

—See cases under this section—Barred Impliedly—Fraud.

(30) Government Servants, suits against.

—See also "Secretary of State"—*infra*.

—No suit will lie against Govt. servants acting within their authority : 3 O L J 501 = 19 O C 324=36 I C 746.

—Such suits are barred on ground of public policy, but Courts will be cautious in extending this principle too far 16 S L R 150=84 I C 58=A I R 1921 S 92.

(21) Houts.

—A civil suit lies for damages, though not for injunction, against use of illegal means to attract traders by intimidation and physical compulsion by a rival owner of a new market: 24 C W N 800=58 I C 870=47 C 1079.

(22) Hindu Widow.

See cases under "Reversioner" *Infra*

(23) Idols

See (74) Worship Rights *Infra*

(24) Instalment

—A debtor cannot sue to compel his creditor to accept instalment, even though the creditor deliberately evades such instalment 9 M 55 See also 39 M 80.

(25) Mahomedan Law, religious and other rights under

—A suit was brought for the possession of what was alleged to be a hereditary office. Held that the office was not religious office as it was not recognised by Mahomedan Law nor was it in any way connected with Islam and that a claim in regard there to is not a suit of a civil nature cognisable by a Civil Court. 17 M L T 256 = 28 I C 459.

—Civil Court can entertain a suit to



C. P. C. (1908) S. 9 (Contd.).

(6) Suits Must be of Civil nature. (Contd.)

(25) Mahomedan Law.—(Contd.)

establish a claim to performance of Urus and management of offerings A I R 1926 Bom. 161 = 50 B 148 = 28 Bom L R 60 = 93 I C 127.

—See Also 21 Bom L R 329=51 I C 18=43 B 412; and A I R 1926 M 487=50 M L J 442=93 I C 625.

(26-27) Maintenance.

—A suit for maintenance will lie notwithstanding an order of magistrate refusing maintenance 32 C 479=13 C W N 150=2 I C 550

—Thus a suit for declaration as to paternity of the child lay notwithstanding an order for maintenance against father by Criminal Court A I R 1922 U B 20=4 U B R 120=1 Bur L J 82=70 I C 897.

—And a widow having an independent income, sufficient for her needs, cannot claim maintenance, so long as she has got such income : 4 C L J 74; see also 10 Bom L R 770 = 1 I C 466=33 B 50; and 28 M L J 260=28 I C 200=38 M 153 (155).

—Hindu widow's Remarriage Act s. 2 Applicability of 35 A 466=11 A L J 678=20 I C 335.

—But the wife loses her right by unchastity 19 Mad. 6; see also 23 M L J 289=16 I C 389; 12 Bom. L R 196=5 I C 960=34 B 278 (286); 7 A L J 80=5 I C 521=32 A 155 (159).

—A daughter-in-law has no legal claim for maintenance against self-acquired property of her father-in-law, unless such property is in the hands of the father-in-law's heirs, provided the deceased husband had not separated from his father 23 Bom., 608; see also 5 W R 225; and 24 M L J 106 = 13 M L T 97 = 18 I C 34 = 1913 M W N 40 = 37 M 396 (402).

—As to what amounts to malicious prosecution see 25 M L J 1 = 21 I C 703 = 37 M 181 (183).

—And whether proceedings taken for prevention of offence amounts to one see 18 I C 737 = 17 C L J 105 = 17 C W N 554 (557).

—Where a complaint was made in the Police Court against plff. for criminal breach of trust, and the magistrate referred the matter to the Police for enquiry under s. 202 of Cr. P. C. and after such enquiry refused to issue process : Held that a suit for malicious prosecution does not lie : 15 C W N 917 = 11 I C 311 = 38 C 880 (888).

—In a suit for damages for malicious prosecution it is for the plff. to prove innocence 19 I C 24 = 17 C W N 434 (437); see also 19 I C 665 = 24 M L J 515 = 36 M 375 (377).

(28) Minor Children.

—A father can maintain a suit to recover

C. P. C. (1908) S. 9 (Contd.).

(6) Suits must be of Civil Nature (Contd.)

(28) Minor Children.—(Contd.)

possession of his minor children illegally detained by a stranger : 25 B 574=3 Bom. L R 167. (followed in 40 B 600).

—But under s. 9 of Guardians and Wards Act, ordinary civil Courts cannot entertain a suit for custody of a minor 42 Mad. 647 (F B) = 37 M L J 93=26 M L T 61=1919 M W N 487=53 I C 399=9 L W 600.

(29) Minors.

—In 18 M 415=5 M L J 164 it was held that a contract by a guardian of Hindu minor for sale of his land was binding on the minor. It proceeded on the general ground that the English doctrine that specific performance cannot be decreed against a minor does not hold in this country; but the Privy Council has certainly laid down the contrary in 14 I A 89=11 Ind. Jur. 315=5 Sar P C J 16=11 B 551 P C; and 13 I C 331=16 C W N 74=1912 M W N 22=9 A L J 33=15 C L J 69=14 Bom. L R 5=21 M L J 1156=11 M L T 8=39 I A 1=39 C 232 P. C.

—An agreement entered into by the guardian of a Hindu minor for sale of immovable property belonging to the minor cannot be specifically enforced against the minor even though the proposed sale is for a necessary purpose : 54 M L J 412=27 M L W 322=108 I C 282 = A I R 1928 M 407 (dissenting from 5 M L J 164=18 M 415).

—But, in so far and only so far, as the contract by the guardian embodies the personal Hindu Law liability of the minor, it is enforceable against the minor, and in so far as it goes beyond that, it comes under the general rule that a guardian cannot bind his ward by a personal covenant : 49 I C 872=1919 M W N 148=25 M L T 23=9 L W 229=36 M L J 29=42 M 185 F. B.

—For a full discussion of the case-law on the subject see 54 M L J 412=108 I C 282 = A I R 1928 M 407.

—Nor can he sue by his next friend for possession where the deft claims to be in possession as the minor's guardian. He should proceed under the Guardians and Wards Act:

A I R 1925 N 328=21 N L R 75=89 I C 55.  
—and no money should be advanced without making all reasonable inquiries about such necessities 1897 A W N 220=20 A 135 (followed in 20 A L J 886 = A I R 1922 A 526=69 I C 683=45 A 77).

(30) Municipal Offices.

—See cases under this Section (4) Barred Expressly—(19) Municipality.



C. P. C. (1908) S. 9 (Contd).

(6) Suits must be of Civil Nature (Contd)

(31) Offerings, rights as to

—Thus a claim by an archaka of a temple against his co-archaka to recover what might have been received as voluntary contribution, if he had not been kept out of office, is maintainable: 17 M L J 493; see also 54 I C 721 = 1919 M W N 707 = 10 L W 305 = 26 M L T 259.

—A Suit mainly with respect to the right to offerings is maintainable, though it incidentally involved the question as to right to worship: 76 I C 629 = A I R 1925 B 209.

—Where the plaintiff, a female heir, prayed that she should be allowed to take a turn at the worship in the temple so that her full share in the offerings might be secured to her. *Held* that such a suit is maintainable. A I R 1923 All. 425 = 45 A. 437 = 71 I C 1026.

—A suit for a definite amount due to plff. as a co-sharer in the offerings of a temple (birt), realised by the deft. is maintainable 26 P R 1919 = 70 P L R 1919 = 51 I C 236; See also A I R 1921 B 297 = 23 Bom. L R 125 = 60 I C 924 = 45 B 683; and see 4 C L J 469.

—But no suit will lie to recover offerings not connected with any office A I R 1923 M 851 = 110 I C 782; see also 49 I C 800; for example, dues paid by baqqal and shopkeepers to chowdhries of Bazars: 1907 A W N 228 = 4 A L J 715 = 29 A 683.

—A long and uninterrupted usage or agreement to share voluntary offering would give a cause of action 19 C W N 208 = 27 I C 400 = 20 C L J 183 = 42 C 455 (470, 476)

—Agreement for consideration by a Gayawal to pay part of his earnings from certain ceremonies to an Acharya is not void. 3 P L W 161 = 1 Pat L J 539 = 38 I C 116.

—Arrangement among the Maha Brahmans regulating method in which offerings shall be collected or divided which does not control or restrict discretion of those by whom the offerings or gifts to be made is valid. 20 O C 265 = 42 I C 794.

—Where there was an agreement among the members of a Maha Brahman family to divide the offerings received from their clients, and one of the clients gave exclusively to the deft. it was held that the offering was not to be divided notwithstanding the agreement. 35 All 412 = 11 A L J 563 = 19 I C 990.

(32-33) Office of Dignity

—Thus a claim for religious honours. A I R 1929 Mad. 493 = 29 L W 604 = (1929) M W N 341 = Ind. Rul. (1929) Mad. 901 = 119 I C 149; see 1913 M W N 289 = 13 M L T 340 = 19 I C 257; and 11 L L J 161 & 1 Lah L J 161 = 51 I C 905 = 97 P W R 1919.

—Or a claim for honours as Gurikar 1921 M W N 395 = 41 M L J 287 = 63 I C 115.

C. P. C. (1908) S. 9 (Contd).

(6) Suits must be of Civil Nature—(Contd)

(32-33) Office of Dignity—(Contd)

—Or to be carried in a palki A I R 1921 B 140 = 23 Bom. L R 75 = 60 I C 907 = 45 B 590; 6 W R P C 39 = 3 M I A 198. Or to act as khatib: 17 M L J 421.

—Or for honorary lecturership in University 41 C 518. Or for a declaration of title to a stamom: 1911 M W N 353 = 10 I C 110. Or for rights usually described in Berar as manpan: 3 N L R 131.

—The ruling in 32 M 291 should be confined in its operation to cases where receipt of honours has become an indissoluble part of the *ritual* to be performed by the recipient as an office holder and the extinction of the principle should be carefully guarded against. (1913) M W N 289 = 13 M L T 340 = 19 I C 257.

—An award which deals partly with a dispute about *manpan* can be filed. 37 Bom. 442 = 15 Bom. L R 362 = 19 I C 882.

—The plaintiffs brought a suit claiming that they alone were entitled to exercise haks known as Rejai and Kadri and to receive income or emoluments in connection with the exercise of those haks. *Held*, that the Civil Court had no jurisdiction to try the suit as it was one of mere dignity and not any office in the nature of property or civil right: and that voluntary offerings made by the worshippers or votaries did not change the real character of the suit which was one for mere dignity: 14 Bom. L R 573 = 16 I C 338.

—If there is a recognised office to which remuneration is attached for performance of services the Court has jurisdiction to entertain a suit relating to it, and there is no distinction for that purpose between fees and voluntary offerings. A I R 1931 Bom. 273 = 33 Bom. L R 479 = Ind. Rul (1931) Bom. 328 = 132 I C 440; see also 16 B 281; and 3 I C 419 = 11 C L J 304 = 14 C W N 497 = 37 C 263.

—Civil Courts have jurisdiction to determine the order of precedence in the distribution of honours in a temple and to protect by an injunction, persons having a right to the 1st honours from such right being infringed by others who are entitled to the same honours subsequently.

—Where a long established usage in a temple has determined the rights of particular persons to receive the 1st thirteenth such usage will be followed by Civil Courts even though it may be an innovation on any prescribed rule of the Hindu Sastras unless the text of the latter is of such coercive authority that it cannot be disobeyed. 15 I C 409.

—Whether receipt of offerings amounts to possession of office see 27 M L J 100 = 42 Cal. 244 = 41 I A 257 = 12 A L J 1176 = 16 Bom.

C. P. C. (1908) S. 9 (Contd.).

(6) Suits must be of Civil Nature (Contd.)

(32-33) Office of Dignity—(Contd.)

L R 845 = 20 C L J 360 = 18 C W N 1029 = 16 M L T 210 = 1 M L W 549 = 1914 M W N 636 = 24 I C 501 = 1914 P C 72. As to transferability of the office of Archakaship see 26 M L J 315 = 1 L W 276 = 1914 M W N 286 = 23 I C 72 = 38 M 850 and that of a purohit see 1 L W 389 = (1914) M W N 379 = 26 M L J 482 = 24 I C 204; also 26 M L J 315 = 23 I C 72. = (1914) M W N 286 = 1 L W 276 = 38 M 850. Removal of a person from office without notice is bad  
30 M L J 274.

(34) Party Wall.

—A suit will lie at the instance of one of two tenants in common of a party-wall for the removal of a newly erected portion of it 19 Mad., 38, followed in 13 A. L. J. 473 = 30 I C 33.

35 Political and Executive Acts.

—See (5) Barred Impliedly—Act of State—*Supra*.

(36-38) Political Agent.

—See (5) Barred Impliedly—Act of State—*Supra*.

—Where the Wazibularz is silent a right of Pre-emption can be presumed under s. 7 of Oudh Laws Act. 33 I C 775 = 3 O L J 7.

—Pre-emption—Amendment of plaint 25 Ind Cas 439 = 1914 P. R. 62 = 1914 P. L. R. 255 = 1914 P W R 161.

(39) Priest

—See also under this heading—Religious Ceremonies, and Office of Dignity—*Supra*.

—A right like that of hereditary Priest is not recognised in law and cannot be enforced in a Court of law unless a custom to that effect is proved : 4 Pat. L J 53 = 49 I C 383.

—Suit by priest for voluntary gifts made to another by *jajman* is not tenable either against the *jajman* or the other priest A I R 1929 Pat 103 = 10 P. L. T 117 = 8 Pat. 677 = Ind. Rul. (1925) Pat 289 = 116 I C 513.

—But a suit lies for a share of income earned as Hindu priest on river banks A I R 1924 O 252 = 27 O C 114 = 10 O L J 595 = 78 I C 256.

—And the Maha Brahmins have legal right to receive dues at funerals and a mortgage of such right is not void 15 A L J 41 = 37 I C 661 = 39 A 196.

—Members of a family may agree amongst themselves that whoever amongst them may earn anything by officiating as a priest, the income is to be divided amongst them. But such an agreement cannot be

C. P. C. (1908) S. 9 (Contd.).

(6) Suits must be of Civil Nature—(Contd.)

(39) Priest—(Contd.)

obligatory upon the parties and their successors for all time and in spite of the wishes of the members who may desire to terminate it. 13 C L J 449 = 10 I C 41 = 16 C W N 347

—As to injunction against interference in the hereditary office of a Hindu priest see 22 Bom. L R 1202.

—And as to claim to Yajman Vritti see 12 I C 928 = 36 B 94 = 13 Bom L R 1171.

(40) Privileged Communication.

—See cases under this Section (5) Barred Impliedly—Privileged Communication—*Supra*

(41) Procession.

—The right of every citizen to pass through public streets in procession is a Civil right 6 M. 203, 5 M 304, 26 M. 376 foll. 30 M. 185, 26 M. 554, not foll. 29 M L J 91 = 17 M L T 453 = 29 I C 248 ; see also 12 Bom. L R 586 = 71 C 663 = 34 B 571 (574).

—Thus, where certain Mahomedans obstructed a procession idol, it was held that there was a right of suit for an injunction 12 N L R 130.

—And such right of suit exists without allegation or proof of special damage : 36 M L J 79 = 25 M L T 39 = 9 L W 208 = 1919 M W N 46 = 49 I C 533 = 42 M 271 F B.

—But the right is subject to magisterial order safeguarding obstructions to thoroughfare or breach of public peace : 20 M L J 119 = 8 M L T 114 = 5 I C 902 ; see also A I R 1925 O 656 = 2 O W N 589 = 89 I C 269 ; and A I R 1930 M 701 = 53 M L J 703 = 1930 M W N 520 = 31 M L W 845 = 125 I C 554 = 53 M 761.

—Thus a procession cannot by frequent stoppages in a highway block the passage in an unreasonable manner : A I R 1921 A 146 = 19 A L J 740 = 63 I C 984 = 43 A 692.

—And the playing of music in a public street cannot be claimed as of right : 20 Bom. L R 667 = 46 I C 740 = 42 B 438.

—Though the Privy Council has held that persons have right to religious procession with its "appropriate observances" : A I R 1925 P C 36 = 23 A L J 179 = 48 M L J 23 = 27 Bom L R 170 = 21 L W 239 = 6 P L T 115 = 52 I A 61 = 29 C W N 486 = 2 O W N 53 = 86 I C 236 = 3 Pat. L R 300 = 47 A 151 P C.

(42) Registration.

—See under this section—(3) Concurrent Jurisdiction.

(43) Religious Office and Ceremonies

(a) Ceremonies and rituals, suits as to

C. P. C. (1908) S. 9 (Contd.).

(6) Suits must be of Civil Nature—(Contd.)

(43) Religious Office and Ceremonies—(Contd.)

- (b) Dancing Girls
- (c) Honours, suits relating to
- (d) Injunction
- (e) Marriage
- (f) Office, rights as to
- (g) Ordinary Civil Rights
- (h) Procession
- (i) Remuneration, claims relating to
- (j) Worship, right of, suits as to

(a) Ceremonies and Rituals, suits as to:—

—Court will not interfere with questions of religious rites or ceremonies: A I R 1929 M 526=I R 1930 M 74=1929 M W N 300=120 I C 874.

—Unless decision on such questions is necessary to decide rights to property A I R 1921 B 338=24 Bom. L R 1060=84 I C 759.

—Thus a right to perform certain pageants not connected with a temple or a shrine is not of a civil nature 7 A L J 529=6 I C 223=32 A 527 (540); see also 14 M L J 171=28 M 23 (25); nor a right to receive *dan* by offering *Kusha* on a river bank A I R 1921 A 374=59 I C 659=43 A 159.

—Determination of the question of orthodoxy is not within the province of Civil Courts. 10 Bur L T 194=37 I C 780; see also 1915 M W N 281=28 I C 604 (610); and 16 M L J 150 (157).

(b) Dancing Girls—

—But a temple dancing woman can sue the trustees to permit her to undergo certain customary ceremony so as to enable her to enter on the duties of her office, though such right of suit does not extend to the adoptee of such woman where the adoption is made with a criminal intent 19 M 127 see also A I R 1927 L 663=103 I C 767; and 111 I C 349= A I R 1928 C 537=55 C 712.

(c) Honours, suits relating to:—

—Thus a claim which refers merely to a religious honour which consists of receiving *theertham* and *prasadam* in a Hindu temple is *prima facie* not one of a civil nature unless such honour is attached as an emolument to a religious office 7 L W 614=45 I C 959.

(d) Injunctions:—

—Similarly a suit to prohibit certain members of the Roman Catholic persuasion from mixing with other members in the church, does not lie; nor a suit by member of congregation against Bishop to continue a favour of indulgence, 39 Mad. 1056=34 Ind. Cas. 557.

—A priest can be restrained by a suit in Civil Court from using a seal bearing a word to which a special meaning has become attach-

C. P. C. (1908) S. 9 (Contd.)

(6) Suits must be of Civil Nature.—(Contd.)

(43) Religious Office and Ceremonies—(Contd.)

ed 22 M 189; see also 18 A L J 679=59 I C 873.

—Parties, wanting the religious ceremonies performed for their benefit, can choose their own priests, and no one is entitled to a declaration that he is exclusively entitled to officiate as the priest; though, if already engaged to officiate, he can obtain a declaration that he cannot be prevented from exercising his duty 16 C W N 347=13 C L J 449=10 I C 41; see also 17 I C 138.

—The last two cases are distinguishable: In 3 B 232 the Court would not force a *Joshi* on unwilling *yajamanas*. In 21 B 821 the *yajamanas* were employing and willing to employ the *plff* but the *defts* obstructed him in the performance of his duties. Where a priest was being obstructed by the *deft* in officiating held a suit for injunction lies, but the *plff's* acquiescence was bar to the granting of relief A I R 1921 Bom. 209=45 B 234=59 I C 271.

—(f) Office, rights as to:—Mr. Justice Mitter in A I R 1927 C 783 (785)=54 C 614. Has expressed an opinion that there is a conflict of decisions as to whether an office to which no fees or emoluments are attached is an office within the meaning of s. 9 C P C.

—In 5 M L J 209=19 M 62 and 14 M L J 171=28 M 23. The Madras High Court has, it is said, held that such office is not an office within the meaning of s. 9 C. P. C. The Calcutta High Court, on the other hand, has held to the contrary 15 C 159; and 4 C W N 79=27 C 30; and 14 C W N 1057=12 C L J 74; and A I R 1927 C 783=54 C 614.

—The decisions had mainly turned on the question that Civil Court had no jurisdiction to interfere with the internal autonomy of caste and not that the suit did not lie because no fees were attached to the offices in question.

—The hereditary right to appoint a *Swamijar* is enforceable. 33 C W N 382=29 L W 414=1929 M W N 161=56 M L J 121= A I R 1929 P C 53=113 I C 476 P C.

—Similarly, a body of *Brahmins* can sue for a declaration as to their right to recite *vedas* in a temple A I R 1927 M 131=98 I C 229

—And irrespective of the fact whether a *gajawal gadi* is an office or a business, the person entitled to it can sue for possession of the *gadi* and its books and for a declaration as to his right to the *gadi* 3 Pat. L W 136=2 P L J 705=1918 Pat. 50=42 I C 478.

—So also, a *vatandar barber* can sue for a declaration of his right to officiate on ceremonial occasion: 22 Bom L R 410=57 I C 135.

—An office must have some duties attach-

## C. P. C. (1908) S. 9 (Contd.)

## (6) Suits must be of Civil Nature (Contd.)

## (43) Religious Office &amp; Ceremonies—(Contd.)

ed to it which the office-holder will be under a legal obligation to perform and the non-performance of which will be visited with penalties. Where, in a suit for a declaration of a plaintiff's right to conduct an *utsavam* in a temple it appeared that the fund for conducting the *utsavam* was under the control of the trustees of the temple and that the plaintiff was under no obligation to perform any particular function and that all that he claimed was that the temple authorities were under an obligation to give him votive offerings and to confer upon him the usual honours; *held* that the suit was one for mere honours and not for an office and was not maintainable. 1932 M W N 1090.

—A Kulkarni receiving voluntary payments at village fairs and having functions to perform voluntarily there is no office. 132 I C 440=33 Bom L R 479=A I R 1931 B 273.

—Specific duty of being present at the performance of religious ceremonies with emoluments attached must be regarded as an office. A I R 1928 Mad 377=109 I C 771.

—The right to hold a certain office in a certain place at a certain season of year confers upon the holder of that right a legal character and a suit to establish such a right is maintainable.

—But no right vests in any priest to claim to go to the house of a disciple, even when not called for, by him, for performance of religious ceremonies there and a suit does not lie for declaration that the plff. is entitled to perform all funeral ceremonies within a certain *birt*. 1 Pat. L J 381 = 35 I C 345 = 2 Pat L W 390.

—Where a duty is cast upon a man in virtue of his connection with an institution or an abstract personality and where it is primarily for the benefit of such an institution or personality his rights will be protected by law; and where the right has ceased to be beneficial to the institution or personality, the relief should be refused. 21 M L J 730 = 11 I C 175 = 10 M L T 133 = (1911) 2 M W N 202.

—(g) Ordinary civil rights:—Civil Courts can deal with and enforce the rights of *Acharyas inter se* 10 L L J 242 = 112 I C 262 = A I R 1928 L 730.

—Similarly joint rights of performance of ceremonies or joint rights to share profits can be enforced in a Civil Court by any one of the persons, *so* entitled 13 S L R 56 = 56 I C 683.

—And where the deft used a flag similar to one used by the plff so as to detract pilgrims from the plff. *Held*, the plff had a right of suit to restrain the deft 18 A L J

## C P. C. (1908) S. 9 (Contd.)

## (6) Suits Must be of Civil Nature—(Contd.)

## (43) Religious Office &amp; Ceremonies—(Contd.)

679 = 59 I C 873; see also cases under (d) Injunction *supra*. *Pujari* of deity removed for misconduct by private tribunal duly constituted under previous agreement made by *Pujari*—Civil Court can determine if he was removed on valid grounds A I R 1921 Cal. 328 = 25 C W N 201 = 62 I C 510.

—(h) Procession:—The right to conduct religious processions in public streets is a right inherent in every person, provided he does not thereby invade private property rights, or cause a public nuisance or interfere with the ordinary use of the streets by the public, and subject to such directions or prohibitions as may be issued by the Magistrates to prevent obstructions to the thoroughfare or breaches of public peace.

—Burden of proof lies on the party wanting to restrain others from lawfully using the road to show some law or custom having the force of law depriving them of the privilege 26 M 376; affirmed in 17 M L J 240=11 C W N 585=9 Bom. L R 663=30 M 185 P C; followed in 34 B 571; 32 M 527; 29 M L J 91=29 I C 248; 1917 M W N 70=37 I C 977; and see to the same effect 5 M 304; and 26 M 554; and 12 M 356.

## (i) Remuneration, claims relating to:—

—But where remuneration is merely gratuitous and not attached to the office as of right, the rightful owner of the office cannot claim as against the intruder to recover such gratuity: 2 B 470 and 49 I C 800;

—No suit lies for the recovery of a voluntary offering if that suit is based on custom 1 Pat L J 381=2 Pat L W 390=35 I C 345; see also 2 W R 69.

—And a suit by one priest for recovery of offerings made to another, on the ground that the latter unlawfully performed ceremonies within the former's *birt*, is not maintainable in the absence of an express contract whereby the deft undertook to make refund to the plff: 1 Pat L J 381=2 Pat L W 390=35 I C 345.

—A suit will not lie to declare a person entitled to certain fees voluntarily paid to the plaintiff as *chowdhrees* for the use of a market-place 7 S D A Sel. 336; 2 Agra. 271; or for procuring boats 1 All H C 291. But a suit by a sharer in a religious office against his *cosharers* (as apart from intruder), for recovery of his share of the voluntary gratuities, will lie: 27 C 30; see to the same effect 17 M L J 493; and 4 C L J 469; and 10 L L J 242=112 I C 262=A I R 1928 L 730; and 20 O C 265=42 I C 794; and 27 I C 400=20 C L J 183=19 C W N 208=42 C 455.

—A village priest can sue for damages the intruder who deprived him of his fees 11



**C. P. C. ( 1908 ) S. 9 ( Contd. )****( 6 ) Suits Must of Civil Nature (Contd)****( 43 ) Religious Office and Ceremonies—( Contd )**

**B H C 56**—followed in 3 B 232; and 3 N L R 47; and 8 N L R 133; and approved in 2 B 470; and similarly, with regard to the holders of other offices to which fees are attached as of right see 22 Bom L R 410=57 I C 135=44 B 733; and 6 B H C R 250; and 107 I C 911 = A I R 1928 N 150.

—But this is not the case in Madras 7 M 424; and 24 I C 204=26 M L J 482; and the Allahbad, Calcutta, and Patna High Courts have also held that there is no such right : see 2 Agra 80; and 12 C L J 74=14 C W N 1057=6 I C 864; and 10 W R 114=8 B L R 53 N; and 15 W R 531=8 B L R 50; and 1 P L J 381=2 P L W 390=35 I C 345; and 4 Pat L J 53=49 I C 383.

**( 44 ) Restitution of Conjugal Rights.**

—A suit for restitution of conjugal rights, lies in civil court. A I R 1924 M 49 = 74 I C 166 = 1923 M W N 499 = 18 M L W 465=45 M L J 186=46 M 791. see to the same effect:— 4 N W P 109; 8 All 78; 1 Bom. 164; 5 C L R 65; 13 All. 126; 10 Bom. 301; 19 Calc. 84.

—Ecclesiastical side—Supreme Court of Bombay Restitution of Conjugal rights. 1 B H C R Appx 18 ( 21 ) : 38 B 125; 51 B 329 = 29 Bom. L R 332 = 101 I C 403 = 1927 B 264; 2 Bom. L R 391; 17 M 235 F B. Jurisdiction—Matrimonial matters—Muslims & Parsees 6 M I A 348 in case of Muslims see 11 M I A 551 = 8 W R 2 P C 3 *Fol. L B R* (1872-92).

**( 45 ) Reversioners Alienation by Hindu widow.**

—Hindu Law—Widow's Alienation in part for necessity—Reversioner's suit to set aside—offer to pay consideration found binding—Form of decree.

—Hindu Law—Suit by near reversioner—Binding nature. 37 Mad. 275 = 13 M L T 110 = 24 M L J 62 = 17 Ind Cas 508 = 1912 M W N 1176.

—In a suit for declaration to set aside alienation by hindu widow if the plaintiff reversioners does not offer to reimburse the purchaser defendant Court has the discretion to refuse declaration. 24 I C 670 = 20 C L J 285 = 18 C W N 1303. C P C O 21, R 3

**( 46 ) Right to sue.****Synopsis.**

(1) Transferee of a mere right to sue for damages.

(2) Company's Director office of.

**C. P. C. ( 1908 ) S. 9 ( Contd. )****( 6 ) Suits Must be Civil Nature. (Contd).****( 46 ) Right to Sue—( Contd. )**

- ( 3 ) Rights not recognized by law.
- ( 4 ) Criminal Court's order for costs,
- ( 5 ) Miscellaneous.

—See also cases under : this section under:—

- ( 1 ) Office
- ( 2 ) Worship right of
- ( 3 ) Barred Impliedly-Act of state.

**( 1 ) Transferee of a mere right to sue for damages.**

—A mere right to sue for damages cannot be transferred and therefore no suit lies by transferee of such right 5 A 207, so also for mesne profits when the same are claimed as damages 9 C 695.

—But if such a transfer is by sale in execution and amounts to assignment of debt it is not bad in law although the transfer of a right to sue is a necessary incident of the transaction. 5 O L J 398 = 47 I C 634.

**( 2 ) Company's Director Office of.**

—The Director of a Company. His right to act as such is civil right and suit lies for an injunction restraining other directors from wrongfully excluding him 1924 Cal 582=51 Cal 916 = 28 C W N 803 = 82 Ind Cas 405.

—Hindu widow's Re-marriage Act—Widow re-marrying according to custom forfeits husband's estate. 14 C W N 346 (351) = 5 Ind Cas 710; and also her right to maintenance from her husband's estate 21 C W N 906 = 40 I C 783.

**( 3 ) Rights not Recognized by law.**

—No suit lies for the enforcement of a right not recognized by law. 1924 All 652 = 46 All 553 = 22 All L J 446 = 88 Ind. Cas. 212. see also the under mentioned cases:— 34 I C 263. = 20 C W N 360; 2 Lah. L J 255; 1921 All 90=19 All L J 309; 1925 Pat 544=1925 P H C C 194=88 Ind. Cas. 1035 = 4 Pat. 741. 7 P L T 74; 29 All 22; 3 All L J 637 = 1906 All W N 257.

**( 4 ) Criminal Court's order for costs.**

—A suit for expenses ordered by criminal court to be paid to a witness lies as being of civil nature 90 I C 488 = A I R 1926 C 289 = 29 C W N 1033.

**( 5 ) Miscellaneous.**

—In case of a private award a suit lies on the ground of fraud or on the ground that the Party suing had not agreed to refer the matter to arbitration 69 I C 585 = A I R 1922 L 369 = 3 Lah. 296.



C. P. C. ( 1908 ) S. 9 ( *Contd.* )

( 6 ) Suits Must be of Civil Nature ( *Contd.* )

( 63 ) Right to Sue—( *Contd.* )

—Where it was found that a custom prevailed which entitled the chamars to skins of carcasses in lieu of services & Services not performed—Appointment of another person for performance of such services Held that civil courts had no jurisdiction to entertain a suit by the chamars.

—That the non-proprietary residents of the village were not bound by the provisions of the *wajib-ul-arz* in respect of an institution which they managed for themselves as regards their own cattle 4 P L R 1912=226 P W R 1912=15 I C 108.

— ( 64 ) Subscriptions...

—See also " Voluntary payments." *infra*. Where the deft. promised to subscribe to expenses already incurred by the plaintiff for festivals, Held that the promise was without consideration & not enforceable at law 72 I C 774 = A I R 1923 M 330 = 1923 M W N 86.

—Principle applied in A I R 1929 C 369=49 C L J 278.

—Where a Hindu father promised to subscribe & the promise was one for consideration under the principle laid down in 14 C 64 the promise is enforceable at law. The English law differs as regards the definition of "consideration" from that given in the Indian Contract Act s. 2 ( d ) 44 I C 479. Note.

—The head-note of this case as given in 44 I C 79 last para is misleading.

( 65 ) Sales setting aside of.

—See also cases under C P C ( 1908 ) s. 47 under the heading " Between the parties." A sale in execution cannot be allowed on ground of mere inadequacy of price unless fraud is proved. 4 Bom. L R 249=26 B 543. Followed in : 37 C L J 145=27 C W N 587 = 74 I C 975=1923 C 538.

—A suit, to set aside a sale under the Public Demands Recovery Act is of a Civil nature. 7 C W N 433=30 C 619. Followed in: 46 M 536=44 M L J 1=71 I C 1039 ( 1041 ) = 1923 M 192.

( 68 ) Specific remedy.

—This case is doubted in 24 M L J 479=19 I C 221. Where the legislature has given powers to some person & has also laid down the procedure for redressing an injury which may result by the exercise of those powers, no suit lies in the civil courts 12 M 105. Compare : 34 M 353.

—Where public right of way is claimed on the land of a private person, such person has a right to sue any one of the public 15 C 460.

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C. P. C. ( 1908 ) S. 9 ( *Contd.* )

( 6 ) Suits Must be of Civil Nature. ( *Contd.* )

( 68 ) Specific remedy—( *Contd.* )

Followed 17 B 293 (299); 6 I C 46 and 1930 C 286 = 33 C W N 915. But See : 1917 M W N 70=37 I C 977 (978); 15 C 564 ( 574 ).

( 70 ) Torts.

—A principal is liable for the fraud of his agent even if it is not for his benefit, if the fraud is committed in the ordinary course of business 43 Cal. 511 = 20 C. W. N. 268 = 23 C L J 225=34 I C 598. See also:— 28 Mad., 479 = 14 M L J 363, and 27 All 531 ( 537 ) = 1905 All W N 77 = 2 All L J 297.

—Civil action, though malicious and without reasonable or probable cause, cannot be made basis for damages 31 C L J 495 ( F B ) = 57 I C 375—See also:—1928 Cal 1=46 C L J 455=106 Ind. Cas. 277. Penal Code S. 499—Defamation—Privilege—Malicious prosecution 38 Cal. 880=15 C W N 917=11 Ind. Cas. 311.

—Malicious prosecution—'Prosecution' what amounts to cr. P C S 202—Issuing of notice under—Propriety 37 Mad 181, (183)=25 M L J 1=21 Ind. Cas. 703; see also:—9 Ind. Cas. 137. Cr. P. Code, S. 146.

—Common carrier's—(Railway co's) Liability of—Onus of proving absence of negligence Liability of—Insurers or Bailees. see 40 Cal 716=17 Cal. L J 639=19 Ind. Cas. 245=17 C W N 633; see also—41 Cal 80=17 C W N 970=19 Ind Cas 756; see also—37 Bom 10.

—Railways Act—Liability of the Company see the following cases 39 Bom. 191=16 Bom. L R 467=25 Ind Cas 241; see also—41 Cal 576=19 C L J 142=22 Ind Cas 679=19 C W N 95

—Railways Act S. 72—Risk note—loss of 'Luggage'—Liability of Railway Company 36 Cal 819=3 Ind Cas 470=13 C W N 847; see also—35 Bom 478=13 Bom L R 345=11 Ind Cas 362; 41 Cal 308; see also—18 C W N 325=23 Ind Cas 788.

—The allegation of negligence must be strictly proved 31 Bom. 381=9 Bom L R 671=34 Ind App 115=11 C W N 721=17 M L J 347=6 C L J 5=4 All L J 461 P C see also 14 Cal W N 158=5 Ind Cas 64 P C and 17 M L J 143. And also 1925 Pat 487=3 Pat L R Civ. 84=87 Ind. Cas 739=6 Pat L T 762.

( 71 ) User.

—Practice—suit in ejectment—Decree on possessory title 41 Cal 394=25 Ind. Cas. 76.

—Possession during attachment, if possession of owner 15 Cal. W N 163=6 Ind. Cas 806: B. T. Act s. 85 ( 1 ) & ( 2 ) sub-lease, in contravention of validity who can question—Estoppel ejectment suit—Possessory title, value of 13 Cal. L J 640=10 Ind. Cas. 469.

C. P. C. (1908) S. 9 (Contd.)

(6) Suits Must be of Civil Nature. (Contd.)

(71) User—(Contd.)

—Adverse possession against Crown subject in possession—onus and Quantum of proof 33 Mad. 173 = 20 M L J 71=6 M L T 306=5 Ind. Cas. 121. Where the Court of 1st appeal finds there was abandonment of a holding no 2nd appeal lies, except as to whether the facts held proved, constitute an abandonment in law 41 P R 1919=82 P L R 1919=511 C 396; 14 Ind. Cas. 45=1912 P R 70=1912 P W R 91=1912 P L R 124.

(73) Voluntary Payments.

—Dissented from in 11 M 452; 26 M 686 F B. But Comp : 31 A 166. Followed in :—26 B 437 and 7 Pat 613=1111 C 84=A I R 1928 Pat 641

—See also :—the following cases on this point:—11 B 313; 9 C W N 865 and 28 M 493 and also 18 C W N 129=211 C 397 and also see 30 C 794.

—Cases in which payments by one for another held to be voluntary are as under : 11 W R 218 also 4 C 807 and 14 B 299 and 12 C 213; and 28 A 563 and 22 C 28 see however : 12 M I A 65 = 1 B L R P C 21 = 2 Suth P C J 145 = 10 W R P C 29 and 14 B 299. Dist : 3 A L J 819 (823) = 1906 M W N 309; 10 W R 400 (401); 11 W R 218 (220); 12 W R 28 Fol : 15 C 656 (659); 41 C 1000; 18 C W N 778; 19 M L T 374 = 3 L W 517 = 1916 M W N 391 = 34 I C 480.

(74) Water cess.

—Where water cess was recovered from a person who did not apply for water nor obtained any benefit from the water flowing on his land, a suit for it would lie 19 M 24 Dissented 29 M L J 389=30 I C 609.

—Compare the following cases:—42 M 702; 44 M 534=40 M L J 213=62 I C 337 = 1921 M 195; 12 M L J 22 (23); 51 M 266=54 M L J 361=108 I C 625=1928 M 419.

(75) Worship, right of.

—See also cases under:—

(1) Religious ceremonies supra.

(2) Idol supra.

—A suit for a declaration to carry Procession with music through public streets is of a Civil nature *Per Shah J.*—"The right to conduct religious processions in public streets is a right inherent in every person provided he does not, thereby invade the rights of property enjoyed by others or cause a public nuisance or interfere with the ordinary use of the street by the public and subject to such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to

C. P. C. (1908) S. 9 (Contd.)

(6) Suits must be of Civil Nature—(Contd.)

(75) Worship, right of—(Contd.)

the thorough-fare or breaches of the public peace.

—Further the right to carry on the worship of any deity in any manner that a person pleases subject to similar conditions is also a right inherent in every person." 22 Bom. L R. 307=44 Bom. 410=56 I. C. 419.

—A right to worship in a particular manner and with particular incidents attached to it is a right of Civil nature and the Civil Court must adjudicate upon incidents connected therewith.

—The right of a person to exclusively conduct the *Tirupallandu Mandagappadi* on the first day of the *Pagalpathu* festival in a temple, paying all the expenses therefore himself, and receiving all the honours and emoluments appurtenant to that right, is a Civil right.

*Per Kreshnang.* It is within the discretion of the trustees of a temple to make such arrangements as they think fit for the performance of any recognised ceremony therein and, if, in the *bonafide* and honest exercise of that discretion for the benefit of the temple, they arrange to give a permanent and exclusive right to any worshipper to perform any particular ceremony, the arrangement is perfectly valid provided it does not tend to the stoppage of the ceremony or to any other injurious consequence to the temple. *Per Spencer, J.*

—The maintainability of a suit depends on the nature of the right asserted in the plaint and the relief claimed by the plff. 31 M L J 758=(1916) 2 M W N 327=4 L W 562 = 36 I C 568 Compare : 1915 M W N 281.

—A right to worship, is a Civil right and a worshipper cannot be prevented from going to the temple and worship the deity. However, insignificant the emoluments may be, the plff. is entitled to seek the aid of the Court to have his right established.

Where a right has been exercised hereditarily for performing certain festivals in the temple and where such right is negated by the *Dharmakarta*, Civil suit lies for a declaration of such right 32 A 527=19 M 62; 11 M 450, ret. 28 M 23. 7 M 91, Distinguished 3 L W 512=35 I C 88, see also 44 B 410=56 I C 419.

—And a suit to establish a right to worship would lie 20 M L J 530=1910 M W N 304 = 7 Ind Cas 148=7 M L T 137.

—Every Mahomedan worshipper has the right to offer prayers and to recite the Koran in the mosque. There is nothing to prevent a worshipper from receiving at the mosque money offered to him there by others or to distribute sweetmeats. But no worshipper can claim to use the mosque as of right for such purposes. M W N 1912, 1059.

C. P. C. (1908) S. 9 (Contd.)

(6) Suits Must be of Civil Nature (Contd.)

(75) Worship, right of—(Concl'd)

—Courts should be slow to recognise, without proper evidence, claims of right which would materially interfere with the right of the trustees to regulate the worship and ceremonial of temples in the interest of the whole community. *Held* in this case that plaintiff failed to establish that he used to offer worship in front of his house as a matter of right. 10 M L T 428. (19 M L J 743, 4 M 315, 11 M L J 715 cons.)

—Right to worship an idol is not an interest in immoveable property. 4 C. 683. Where a temple is reserved for worshippers of a particular caste of persons the courts will protect their right by restraining persons of inferior or rival caste from being allowed into the temple. 63 Ind Cas 963=13 Bur L.T. 183.

—In the eye of law idols are property and the right to deal with such property must, in the event of dispute, be determined by a civil court. 21 M.L.J. 1027=10 M.L.T. 428=12 Ind Cas 537.

## (7) JURISDICTION

### Synopsis

- (1) General.
- (2) Meaning of Jurisdiction.
- (3) Objections as to Jurisdiction.
- (4) Burden of Proof, as to.
- (5) Absence of, Jurisdiction effect.
- (6) Irregularity within Jurisdiction.
- (7) Erroneous decision as to.
- (8) Waiver & consent of parties.
- (9) Miscellaneous cases.

—See also cases under ss. 6, 15, 16, 20 and 96, as to Foreign Court's jurisdiction see s. 13 as to jurisdictions of several courts see cases under the various Provincial Civil Courts Acts.

### (1) General

Jurisdiction are of several kinds e.g.

- (1) Personal
- (2) Pecuniary
- (3) As to place of suits (Territorial).
- (4) As to appeals
- (5) Special jurisdictions e.g. High Courts original and appellate jurisdictions so also Insolvency, Matrimonial, Probate, &c. 71 I.C. 705=4 PLT 147=AIR Pat. 242 (1923)=2 Pat. 335.

—There are other special jurisdictions by special laws.—

- (1) Mamlatdar's &c.
- (2) Small cause courts
- (3) Presidency small cause courts.
- (4) Revenue Courts
- (5) Several other jurisdictions created by special Acts of legislature, e.g. Criminal and Revenue &c.

C. P. C. (1908) S. 9 (Contd.)

(7) Jurisdiction (Contd.)

(1) General—(Contd.)

—In case of alternative reliefs, the court which has the power to try both, has jurisdiction 33 I.C. 768.

—Where one and the same court is invested with small cause powers and also the ordinary powers of civil court, the two are different courts in the eye of the law 37 Bom. 675=15 Bom. L. R. 773=20 I. C. 974.

—District Judge, power of—Not the court of original jurisdiction in cases of a nature cognisable by the Small Cause Court. Cr. P C 187 (7) 2 Pat. L J 1.

—The law which takes away jurisdiction must be express. A I R 1928 All 511=26 A L J 673 = L R 9 A 200 Rev. = Ind. Rul. (1929) All 426 = 115 I C 650.

—The provisions as to jurisdiction ought to be construed strictly. Hardship considerations to be put aside 47 Cal. 555 = 31 C L J 150=55 I C 747.

—Where special powers depend on a statutory provisions such provisions should be strictly complied with Revenue Courts powers of 25 I C 316=17 O C 224=1 O L J 335.

—The distinction between Jurisdiction and its exercise is that the one is an error of judgment and therefore curable in appeal or revision while in the case of want of jurisdiction it is void *ab initio* and cannot be cured 37 C L J 585 = 70 I C 784 = A I R 1924 C 154 See also : 52 I C 352 and 70 I C 432 = 41 M L J 594 = A I R 1922 M 447 = 45 M 90.

—The following are instances of court exercising power beyond the provisions of the rules & yet the decision is not null and void:—

—(1) Leave granted to withdraw a suit with liberty to bring fresh suit, 58 I C 806 = 31 C L J 482 = 24 C W N 723 = 48 C 138 (F. B.); (44 C 567 = 20 C W N 1000 = 23 C L J 489 = 31 I C 670 Overruled.)

—No hard & fast rule can be laid down as to total absence of jurisdiction and an irregularity within it. 19 C W N 1159 = 31 I C 664.

—It is only by proper procedure that an illegal exercise of jurisdiction can be remedied e.g. by an appeal or revision & not by a separate suit 5 P L T 473=77 I C 851=A I R 1924 Pat 537=1924 P H C C 142.

—It is the claim made in the plaint and not decision upon it that determines the questions of appeal 274 P W R 1912=3 P L R 1913=16 I C 865 See to the same effect. A I R 1923 L 284 = 72 I C 389.

—And for this purpose the value of the suit that should be looked to is that which the plaintiff assigns and not what the court finds. So also this value remains unchanged in all the stages of the suit 89 I C 407 = A I R 1926 N 71

**C. P. C. (1908) S. 9 (Contd.)****(7) Jurisdiction—(Contd.)****(1) General—(Contd.)**

—It is the claim and not the defence which is, or which is likely to be set up that determines the jurisdiction 45 I C 654. See to the same effect:—91 I C 561 = A I R 1926 M 37 = 22 M L W 462 = 49 M L J 554. Similarly held in:—107 I C 671 = A I R 1928 Nag. 221.

—In deciding a question of jurisdiction the plaint as framed is to be looked to and not the form it may assume in the end in the absence of fraud. A I R 1922 M 344 = 66 I C 168 = 41 M L J 297 = 1921 M W N 704 = 14 M L W 379 = 44 M 965. See to the same effect:—79 I C 161 = A I R 1924 N 275 = 20 N L R 145. See to the same effect:—88 I C 212 and 20 I C 421 = 11 A L J 542. See also to the same effect:—28 C W N 710 = A I R 1924 C 783 = 78 I C 747 = 51 C 737. See also the same principle laid down:—33 I C 288 = 43 C 144.

—Until the case is tried on merits the allegations made in the plaint should guide the court in deciding the question of jurisdiction. A I R 1922 Nag. 10 = 18 N L R 121 = 5 N L J 214 = 65 I C 532.

—Courts have no power to start proceedings *suo moto* unless expressly authorised by law to do so 1926 Pat 62 = 7 P L T 39 = 89 Ind. Cas. 992.

**(2) Meaning of.**

—Jurisdiction means the power given to courts either as original or appellate to grant reliefs or punish parties appearing or brought before it under specific provisions of law 67 I C 686 = A I R 1922 Pat 322. See to the same effect: 1927 B 272 = 29 Bom L R 361 = 101 I C 582 = 51 B 416.

—Authority given to courts to entertain and decide the matters coming before it by law constitutes jurisdiction and not decision A I R 1928 C 606 = 113 I C 570.

—It may include power to make an order 58 I C 806 = 31 C L J 482 = 24 C W N 723 = 48 C 138 (F B) see also 1925 Cal. 1258 = 42 C L J 22 = 30 C W N 41 = 89 I C 744.

**(3) Objections as to.**

—See also cases under "Waiver and Consent" *infra* *Objection Can be raised at any stage*, as where Court has no jurisdiction over the subject matter its order is wholly void, no waiver or acquiescence can cure the lack or defect of jurisdiction 38 Cal. 339; 36 Cal. 193; 17 C W N 116. Ref. 24 Cal. W N 633 = 31 C L J 272 = 56 I C 532 = 47 C 770.

—Where valuation is contested it is the duty of the court to decide it, such objection can be raised even in second appeal 56 I C 762 = 1921 Pat. H C C 105 = A I R 1921 Pat

**C P C (1908) S. 9 (Contd.)****(7) Jurisdiction—(Contd.)****(3) Objections as to—(Concl'd)**

32 = 1 P L T 390 = 2 U P L R (Pat) 123 = 5 Pat. L J 397.

—The Court can decide the question as to whether it has acted in contravention of the statute and consequently without jurisdiction 21 C W N 387 = 25 C L J 339 = 41 I C 295.

**(4) Burden of Proof as to.**

—Want of jurisdiction cannot be inferred 17 I C 621 = 8 N L R 169.

—The burden of proving want of jurisdiction is on the party alleging it. 108 I C 748 = 1928 L 121 = 29 P L R 396 = 9 L 504 (F B) so also held similarly in 1 U P L R 18 (A) = 52 I C 32. See also:—25 I C 891 = 27 M L J 233.

—Presumption is in favour of Jurisdiction unless expressly taken away 17 C W N 408 = 17 Ind Cas 490.

—So also the presumption is in favour of the highest court 17 I C 886 = 8 N L R 179.

**(5) Absence of, effect.**

—See also cases under "Waiver and consent as to" *Infra*. Absence of jurisdiction renders the action of court null & void being in contravention of law 39 Cal. 353 = 14 C L J 552 = 16 C W N 817 = 13 I C 353.

—Jurisdiction—Proceedings in contravention of law—Nullity 33 Cal 68 (71) = 2 C L J 241 = 9 C W N 1046 = 2 Cr L J 618.

**(6) Irregularity within Jurisdiction.**

—See cases under (1) General *supra* and "Waiver and consent" *supra*.

**(7) Erroneous decision as to.**

—Court having jurisdiction wrongly decided the case does not make the decision null and void. A I R 1926 Cal 1101 = 30 C W N 940 = 45 C L J 24 = 97 I C 770.

—Receiver appointed by Court—Suit by receiver in cause—Security not furnished by receiver—Dismissal of suit on that ground—Legality. 46 Cal 70 = 43 I C 804 = 22 C W N 520 = 27 C L J 395. Objection to jurisdiction—Collateral attack not allowed—Difference between erroneous orders and orders made without jurisdiction. 46 Cal 70 = 43 I C 804 = 22 C W N 520 = 27 C L J 395.

**(8) Waiver & Consent of Parties as to.**

—Jurisdiction cannot be conferred by consent or waiver—order without jurisdiction is a nullity. 2 Cal. L Jour 384 = 9 Cal W N 956. see also:—1929 Lah 534 = 30 P L R 244 = 116 Ind Cas 324.



C. P. C. ( 1908 ) S. 9 (Contd.)

( 7 ) Jurisdiction—( Contd. )

( 8 ) Waiver &amp; Consent of Parties as to—(Contd)

—The Jurisdiction which a court has, cannot be taken away by consent of parties or their pleaders. 91 I C 108 = A I R 1926 Oudh 272.

—Practice—Erroneous admission by counsel on a point of law—Effect. 7 Cal L J 152.

—Where the court has jurisdiction over the subject matter, mere defect in procedure in its exercise can be waived. 52 I C 352 see to the same effect. A. I. R. 1922 Mad. 447=45 Mad. 90=15 M. L. W. 190=41 M. L. J. 594 = 1921 M. W. N. 764=70 I. C. 432.

—A party is estopped from raising an objection to jurisdiction of the court to which it is transferred on his objection to the jurisdiction of the previous court. 9 S. L. R. 164 = 32 I. C. 629 see also : 17 I C 886 = 8 N L R 179.

—So also where a party knowing that the court had no jurisdiction and want of jurisdiction is not apparent on the face of record and if he allows court to pronounce its judgment, the party is estopped from questioning it in collateral matters in the cause. A I R 1922 Pat 322 = 67 I C 686.

—But it is otherwise if want of jurisdiction is apparent on the face of the record. A I R 1922 Pat. 322 = 67 I C 686.

—Similarly where the court had inherent jurisdiction but there was mere want of formality e. g. leave of court not obtained, judgment not held to be vitiated if parties did not object. 1 P L R 318 = A I R 1923 Pat. 562 = 5 P L T 342 = 76 I C 194—See to the same effect:—A I R 1922 Pat. 34 = 69 I C 891 = 4 Pat. L T 10=1 Pat 356.—see also 6 I C 384

—Objection to jurisdiction—Submission by accepting summons—Suit to set aside C. P. Code S 21 see 37 M L J 349=53 I C 463—What amounts to submission—Appearing without protest and not taking objection may 100 I C 951 = A I R 1927 B 135=29 Bom. L R 138—see also. C. P. C. S. 151—Inherent power of Court.

—Where the court decided the question of jurisdiction on the evidence adduced by the parties who did not object to the jurisdiction as found upon their evidence Held that there was a waiver by consent 25 M L J 360=21 I C 319=1913 M W N 800=38 M 160

—Where jurisdiction depends not on law but on facts to be ascertained during the trial e. g. the question of market value, and if the parties do not contest allegation in the plaint as to those facts, the point can be said to have been waived and cannot be raised in 2nd appeal 7 I C 950 = 12 Bom. L R 712 = 35 B 24. Similarly held in : 95 I C 406 = A I R 1926 A 650. and also in 40 I C 2 See also : 33 Bom. L R 1364 Also see : 91 P R 1917 = 36 I C 980.

C. P. C. 1908 S. 9 (Contd.)

( 7 ) Jurisdiction—(Contd)

( 8 ) Waiver &amp; Consent of Parties as to—(Contd)

—Where however the point was raised but was decided against the deft and not raised in appeal to the High Court. Held by the judicial committee before whom the point was raised, that the point could be allowed to be raised as it was found by the J. committee that the trial court had no jurisdiction on the subject matter of the suit 42 Cal. 116 = 27 M L J 459 = 16 Bom. L R 824 = 13 C W N 994 = 17 O C 242 = 16 M L T 105 = (1914) M W N 565 = 20 C L J 231 = 1 L W 619 = 25 I C 451 = 41 I A 197 ( P C ).

—Where there is total absence of jurisdiction there can be no waiver by parties 53 I C 463 = 10 M L W 293=1919 M W N 636=26 M L T 186=37 M L J 349.

—Under valuation jurisdiction of Appeal court—consent of parties of no effect Judgment a nullity 38 C 639 = 12 I C 464.

—See also : 1923 Pat. 209=4 P L T 48=7 Ind Cas 11.

—The High Court directed the memorandum of appeal to the District Judge to be returned for presentation in the High Court, but, as the memorandum of appeal was already in the High Court, it was ordered that the memorandum be treated as presented in the High Court on that date and it was ordered, in the exercise by the High Court of its discretion under s. 5, Limitation Act, that the time between the presentation of the appeal in the District Judge's Court and the order for return made by the High Court, be deducted. Each party was directed to pay his own costs. 17 C W N 116=16 I C 940=16 C L J 77.

—Practice—Court with limited pecuniary jurisdiction plaintiff filing suit of higher pecuniary value in—effect. 13 Cal. W N 493 (493, 499)=5 M L T 360=1 Ind. Cas 86=9 C L J 367. Letters patent, Cl. 12 Forum. Resjudicata Decision of court Void for want of Jurisdiction whether. 24 Cal. W N 633=47 Cal 770 = 56 Ind. Cas 532 = 31 C L J 272 : High Court Original Side Leave not obtained under Cl. 12, Letters patent Judgment inoperative. 37 Bom. 563=15 Bom. L R 672=20 I C 530.

## ( 9 ) Miscellaneous Cases

—A suit was brought at Nasik in British India to establish right to a share in the income derived from land outside British India, but received by the defendant within the jurisdiction of the Nasik court. Held, that the suit was within the jurisdiction of the Court 24 Bom. 407. Followed: 77 I C 532=(1923) L 551. Compare : 122 P R 1908.

—No appeal lies against orders made in the discretionary powers of court. 5 M L W 168=21 M L T 77=38 I C 818. See also : A I R 1927



**C. P. C. (1908) S. 9 (Contd.)****(7) Jurisdiction—(contd.)****(9) Miscellaneous Cases—(Contd.)**

Mad. 1035=53 M L J 688=26 M L W 572=39 M L T 389=105 Ind. Cas 88.

—In suits for redemption against Mortgagee and the person who redeemed the mortgage the value to be attached to the suit is the amount of mortgage and not of the property, 70 I C 311=A I R 1926 Oudh 45. See also the following cases: A I R 1922; Oudh 161=8 O L J 594=65 I C 344. Also A I R 1925 Rang. 278=4 Bur L J 104=90 I C 728. So also A I R 1925 Sind. 324=89 Ind Cas 353=18 S L R 286. See also A I R 1924 Nag. 275=20 N L R 145=79 Ind. Cas. 161; See also; A I R 1925 R. 278=4 Bur. L J 104=90 I C 728.

—An award based on an invalid reference in that, it was made without the consent of all the parties, is bad as to all and the decree based on such award is also bad 25 C L J 339=21 C W N 387=41 I C 295 see to the same effect 55 I C 747=31 C L J 150=47 C 555.

—The question whether the authorities levying tax or import have powers, can be raised in a Civil Court. A Civil Court cannot grant a declaration "that the plaintiff is entitled to hold an estate permanently and perpetually as a revenue free and untaxable." A I R 1924 All. 652=46 All. 553=22 A L J 446=88 I C 212. High court can question proceedings of a subordinate legislature. The president of such body is not immune from High court's jurisdiction A I R 1925 C 373=85 I C 14=40 C L J 515.

—Jurisdiction of British Indian Courts—Right to trusteeship—Temple in French Territory—Parties, French subjects 16 M L T 104=1 M L W 574=25 I C 80 (2). Civil and Revenue Courts—Suit by tenant for possession of land—Venue how determined C P Tenancy Act (1898) S. 35 (4) 19 I C 759 see also 9 N L R 112=201 C 928.

—Administration suit see 10 Bom. L R 519=32 B 381. Suit between lay-man and monk—Jurisdiction of Civil Court 7 Bur L T 27=23 Ind Cas 157. Limitation—Amendment of plaint—After period of limitation—Legality 33 All 616 (619)=8 All L J 636=10 Ind Cas 476.

**C. P. C. (1908) S. 10****Synopsis.**

- (1) Legislative Changes.
- (2) Applicability and scope.
- (3) Courts in Br. India and foreign courts.
- (4) Court having jurisdiction to grant relief.
- (5) Cross-suits.
- (6) Dismissal of suit see Proceed with trial.
- (7) Inherent Power.
- (8) Institution of regular suits.

**C. P. C. (1908) S. 10 (Contd.)**

- (9) Interlocutory orders pending stay.
- (10) Matter in issue.
- (11) Parties.
- (12) Power of High Court.
- (13) Previously instituted pending suit.
- (14) Proceed with trial.
- (15) Revision.
- (16) Suit, meaning of.

**(1) Legislative Changes.**

—The present section has effected following omissions and alterations as compared with the corresponding section of the old Code Viz:—(a) the words "for the same relief" appearing in the old section have been omitted, as to the effect of which see (10) *Matter in issue infra*; (b) so also, the words "except where a suit has been stayed under s. 20" and the words "whether superior or inferior" have been omitted see (2) *Applicability and scope infra* (c) the words "proceed with the trial" have been substituted for the words "try," as to the effect of which see (14) *Proceed with trial—infra* and (d) the words "litigating under the same title" are newly added see (11) *Parties—infra*.

**(2) Applicability and Scope.**

—The object of the section is to avoid conflict of judicial decisions: 29 Bom L R 382=102 I C 229=A I R 1927 B 245; see also per Mahmood J in 11 A 148 (155); for it is obviously essential that where concurrent proceedings for similar relief are taken in two different and independent Courts, no order should be passed which may lead to friction or conflict of jurisdiction A I R (1924) Pat 491=3 Pat 357=5 P L T 243=(1924) Pat 54=78 I C 620.

—And the provisions of the section leave no discretion to the Courts in respect of the stay of suits when the circumstances are such as to invoke the operation of the section 36 C W N 667=A I R 1932 C 751=I R 1932 C 692.

—S. 10, however, does not form part of the rule of *res judicata*, though the reason upon which it is based is in some respects similar in principle to the doctrine of *res judicata*: 11 A 148 (154) see also 13 Bur L T 19=57 I C 904.

—Whilst s. 10 bars only a suit, s. 11, bars the trial of both the suit and of issue involved in that suit A I R 1929 Oudh 341=4 Luck 573=7 O W N 157= Ind Rul (1929) Oudh 183=114 I C 775.

—The only jurisdiction, which the Court possesses under s. 10, is not to decide the question of *res judicata*, but, to stop the new suit if it finds the existence of the circu-

C. P. C. ( 1908 ) S. 10 ( *Contd.* )( 2 ) Applicability and Scope—( *Contd.* )

instances mentioned in the section, pending the disposal of the prior suit 42 Cal. 926=27 I C 917.

—One test of the applicability of S. 10 is whether the final decision in the previous suit would operate as *res judicata* in the subsequent suit 36 C W N 667 = A I R 1932 C 751 = 140 I C 155 = I R 1932 C 692

—And the conditions necessary for stay of suit under s. 10 are (1) the matter in issue must also be directly and substantially in issue in a previously instituted suit; (2) between the same parties; (3) in the same or any other Court in British India; and (4) having jurisdiction to grant the relief claimed. 110 I C 418.

—Thus where pending an appeal a suit is instituted on the same cause of action and between the same parties the proper course for the Court of the second action is to adjourn the action pending the decision of the appeal in the first action. A I R 1931 P C 263 = (1931) A L J 833 (P C) = 61 M L J 420 = 34 L W 565 = Ind. Rul. (1931) P C 283 = 134 I C 331 P C.

—It should be noted that mere fact that decision in a previous suit which is still pending will affect the decision of a subsequent suit is not a sufficient ground for staying the latter under the present section. 6 O L J 96 = 50 I C 212; see also 24 C L J 514 = 36 I C 641; and 114 P R 1919 = 53 I C 467.

—And where the same matter is involved in a second appeal and a suit the latter may be stayed on the analogy of s. 10. But attempt should first be made in the trial Court, then only an application for stay should be made to High Court. A I R 1931 Cal 779 (1) = 53 C L J 619 = Ind. Rul. (1931) Cal 670 = 133 I C 222.

—The section does not refer whatever to cause of action or subject-matter of the suit. 36 C W N 667 = 140 I C 135 = I R 1932 C 692 = A I R 1932 C 751.

—Where A and B agreed to bring the suit at a particular place and A acted accordingly but B brought a suit in another Court and asked for a stay of A's suit. Held, such relief cannot be granted. A I R 1928 Bom. 175 = 30 Bom. L R 546 = 110 I C 727.

—Decree passed in contravention of the provisions of s. 10 is not a nullity 42 P L R 1918 = 22 P R 1919 = 93 P W R 1918 = 46 I C 419.

—S. 10 is not the only section as to stay of suit. Suits can also be stayed under s. 151 to prevent an abuse of Courts and to render effective orders already passed. A I R 1929 Lah. 12 = 10 Lah. L J 470 = 113 I C 783; and this is so even if the case does not come under s. 10. A I R 1929 Oudh 341 = 4 Luck. 573 =

C. P. C. ( 1908 ) S. 10 ( *Contd.* )( 2 ) Applicability and Scope—( *Contd.* )

7 O W N 157 = Ind. Rul. (1929) Oudh 183 = 114 I C 775.

—Govt. of India Act 1915 s. 107 also relates to the power of Court to grant stay of suit A L R 1933 L 582.

—A suit on same cause of action was stayed pending decision of appeal on the ground of balance of convenience. A I R 1931 Lah. 65 = 31 P L R 550 = 129 I C 889.

—Pending an appeal against the order dismissing vendee's suit for possession in which the vendor's title was impeached, the vendee brought a suit against the vendor for recovery of money. On vendor asking for stay of suit till the disposal of appeal it was held that s. 10 was not applicable but that the Court had power to safeguard the interest of the vendor by reserving judgment under s. 151. C P C. I R 1931 L 369 = 131 I C 97.

—Similarly, pending an appeal before the Privy Council between the parties relating to the question of title, a suit before the Asst. Collector under s. 108 (6) Oudh Rent Act was stayed under s. 151, although s. 10 did not apply. I R 1930 O 146 = 14 R D 171 = 7 O W N 386 = 123 I C 50.

## (3) COURTS IN Br. INDIA AND FOREIGN COURTS.

—It is doubtful whether a subordinate Court in British India can restrain a party from prosecuting a suit in a foreign Court (though within the British Empire). But chartered High Courts have such power. A. I. R. 1928 Mad. 491 = 27 L. W. 418 = 109 I C 281

—British Indian Court can restrain the deft. who had filed a suit in a Native State from proceeding with his suit provided the deft. has submitted to the jurisdiction of British India Court. A I R 1927 Bom. 135 = 29 Bom. L R 188 = 100 I C 951 see also A I R 1921 B 128 = 59 I C 444 = 22 Bom. L R 1173 = 45 B 550; and 44 B 272.

—Suit in respect of property out of British India pending in appeal Defendant residing in British India—Suit for mesne profits lies in British India but should be stayed till the dispute is subsisting out of British India. A I R 1928 Nag. 56 = 23 N L R 170 = 10 N L J 232 = 106 I C 7.

## ( 4 ) COURT HAVING JURISDICTION TO GRANT RELIEF.

—These words do not refer to territorial jurisdiction : 13 Bur. L T 19 = 10 L B R 154 = 57 I C 904.

—The words "having jurisdiction" refer to the Court in which the first suit is pending and a suit under s. 10 can be stayed only when the Court trying the previously instituted suit is competent to grant the relief claimed

C. P. C. ( 1908 ) S. 10 ( *Contd.* )(4) Court having Jurisdiction to grant relief ( *Contd.* )

in that suit and also the relief claimed in the subsequent suit. 12 N L R 174 = 37 I C 510.

—The petitioners filed a suit for recovery of money, which was pending in the court of the Senior Subordinate Judge of Amritsar. The respondents asked for an order staying it as they had filed a suit on the same questions in the Court of the Munsif at Delhi. The prayer was granted.

—*Held*, that as the suits were not pending in Courts of concurrent jurisdiction in the sense that the suit to be stayed could be tried in the Court in which the first suit was instituted the order passed by the Senior Subordinate Judge was without jurisdiction. 114 P. R. 1919=53 I C 467.

—A, a merchant in Karachi sued B his Commission agent at Calcutta for account and for recovery of money in the Court at Karachi. At Calcutta the commission Agent sued his principal for a sum named or for an account; *Held*, that the suit at Calcutta should be stayed as the Court at Karachi has jurisdiction to grant the reliefs claimed. 43 Cal 144=33 I. C. 288.

—And it is evident that the section is not applicable where the previously instituted suit is pending in a court not competent to try it. 157 P.W. R. 1914=283 P. L. R. 1914=26 I. C. 282; e. g. a judge can in a suit for accounts pass a decree for a sum in excess of his pecuniary jurisdiction, but he cannot entertain a suit for accounts which is valued by the plff. at a figure above the limits of his pecuniary jurisdiction 12 N. L. R. 174=37 I. C. 510; see also 9 N. L. R. 174

—Mortgagee of an insolvent bringing a suit on the mortgage, and the receiver applying under s. 23, Provincial Insolvency Act, Court trying the mortgage suit does not cease to have jurisdiction over the suit and the proper course is to stay the mortgage suit—Application for stay should be made to the court trying suit or any other Court having power to stay. A.I.R. 1925 Mad. 1051=48 M. 730=(1925) M. W. N. 672=49 M. L. J. 203=88 I. C. 934.

—Revenue Court alone having jurisdiction to try a suit for profits, such suit cannot be stayed by prior suit for declaration of title pending in Civil Court. A.I.R. 1929 Oudh 341=4 Luck. 573=7 O. W. N. 157 = Ind. Rul. (1929) Oudh 183=114 I.C. 775.

—A civil suit for partition of a house is not barred pending suit for partition in Revenue Court. A. I. R. 1925 All. 677=47. A. 915=53 A.L. J. 585=89 I. C. 186.

—Award passed at K-Suit to set aside award in M Court—Subsequent application under s. 14, Arbitration Act at K—Application to stay proceedings at K on account of the pendency of the suit at M is not compe-

C. P. C. (1908) S. 10 ( *Contd.* )(4) Court having Jurisdiction to grant relief ( *Contd.* )

tent, M<sup>2</sup> Court having no jurisdiction to entertain application under s 14, Arbitration Act, A. I. R. 1928 Sind 169=23 S. L. R. 427=112 I. C. 318.

—District Court exercising insolvency jurisdiction under Pro. Ins. Act 1920 cannot, under the present section, stay a suit brought by the mortgagee against his mortgagor prior to the insolvency of the mortgagor : 88 I. C. 934=49 M.L.J. 203=48 M. 750=1925 M 1051.

## ( 5 ) CROSS-SUITS.

—C, being sued as agent to account for moneys given to him, instituted a separate suit claiming to recover a certain sum which he alleged was due to him from the principal over and above the amount in respect of which account was sought from him; *Held* S. 12, C. P. C. 1882 has no application to suits of this kind. 15 C. W. N. 930=11 I C 161.

—The case would, however, be different now in view of the omission from the present section the words " for the same relief " which appeared in the old section. In the case of cross-suits the reliefs sought must of necessity be different, but under the present section identity of reliefs is no longer a condition for the applicability of the section.

## ( 6 ) DISMISSAL OF SUITS

—See ( 14i ) Proceed with trial—*infra*.

## ( 7 ) INHERENT POWER

—See ( 1 ) Applicability and scope *supra*, and also cases under C. P. C. S. 151.

## ( 8 ) INSTITUTION OF REGULAR SUITS.

—The section does not bar the institution of a suit; it merely provides that, when two are pending, only one can be allowed to proceed, and the suit first filed takes priority : 22 B 640; see to the same effect 19 P L R 1900; and 27 M L J 405 = 1914 M W N 740 = 25 I C 597 and 77 I C 157 = A I R 1925 P 201.

—And where applications to carry out a prior decree in a suit by mortgagor were rejected by the High Court, the fact that applications for leave to appeal to P. C. against such rejection were pending in such High Court would not bar under S. 10 the second suit by the purchaser of the equity of redemption 21 M 18—followed in 115 I C 665 = A I R 1929 R 67 = 6 R 775.

—Where the debt. was directed to file suit in Civil Court on his raising question of title in the ejectment suit, the suit filed after expiry of time prescribed but before the conclusion of suit in Revenue Court is not entertainable A I R 1925 All. 615= 23 A L J 529 = 47 A 904 = 88 I C 684.

C P C ( 1908 ) S. 10 ( Contd. )

## ( 9 ) INTERLOCUTORY ORDERS PENDING STAY.

—Interlocutory orders can be passed despite an order staying suit 33 Bom L R 1228=64 I C 580 = A I R 1922 B 276=46 B 431.

—But a Court cannot, in a case where suit is stayed under s. 10, fix a further date for appearance unless moved 112 I C 324 = A I R 1928 L 75.

## ( 10 ) MATTER IN ISSUE

But identity of reliefs is not now necessary. If the matter in issue in the two suits is the same, the later suit must be stayed without regard to the relief sought. 12 Bur L T 203=55 I C 254; see also 18 All L J 431=42 All 409=58 Ind Cas 90; and 82 I C 539; and 13 Bom L R 109=9 I C 929.

—Thus where plff. obtained a decree in Civil Court for joint possession with debt but the debt. appealed to P. C. raising question of title, a subsequent suit by plff in Revenue Court for profits raising question of title during pendency of appeal was stayed. 58 I C 629.

—But a mortgagee's suit for personal decree and mortgagor's suit in another Court for declaration and injunction against mortgagee's selling mortgaged property do not fall within s. 10. A I R 1927 Bom. 245=29 Bom. L R 382=102 I C 229.

—And where the Court stayed proceedings in one of two suit filed under ss. 44 and 99 of the Agra Tenancy Act respectively, and decided the matter in issue in the other, s. 10 is not applicable and the other suit can be proceeded with. 15 R D 41.

—Similarly, s. 10 does not bar a suit for mesne profits during the pendency of an appeal from a decree for possession passed by another Court. 4 C P L R 27; nor a suit for mesne profits accruing subsequent to the institution of the prior suit. I R 1929 R 121 = 115 I C 665 = A I R 1929 R 67 = 6 R 775.

—Where grounds were not traversed and issue not raised in the prior suit, a subsequent suit for mesne profits pending the prior suit was held not barred A I R 1929 Mad. 785 = 30 L W 738 = 57 M L J 515 = Ind. Rul. ( 1930 ) Mad. 422 = 123 I C 6.

—A suit for arrears of pension for a subsequent period was not stayed merely because a Privy Council appeal was pending between the parties against the decision in a former suit for pension for an earlier period. 4 Pat L J 557 = (1919) Pat 284 = 51 I C 36.

—Similarly, s. 10 does not bar the trial of a suit for rent for a period subsequent to that included in the previously instituted suit for rent 24 C L J 514 = 36 I C 641.

—The section is not applicable where the suits are for distinct and different debts

C. P. C. ( 1908 ) S. 10 ( Contd. ).

## ( 10 ) Matter in Issue—( Contd. )

A I R 1923 Cal. 716 = 27 C W N 772 = 75 I C 231.

—So where matters in issue are identical in two suits, the later suit should be stayed A I R 1923 Mad. 88 = 16 L W 607 = 70 I C 5; and such matters should be directly and substantially in issue in the two suits. A I R 1927 Mad. 1199 = 106 I C 661.

—But to attract the provisions of s. 10, the entire subject-matter of the two suits must be the same. A I R 1931 Oudh 313=8 O W N 644= Ind Rul (1931) Oudh 257=132 I C 257; and not merely the main question involved 48 M L J 251=88 I C 421=A I R 1925 M 574.

—Nor merely one or some of the issues in common A I R 1927 Mad. 132 = 26 L W 241=103 I C 274; see also 1930 A L J 284=A I R 1930 A 304=122 I C 752 = A I R 1929 A 805= 51 A 1017; and 61 I C 830; and 33 P W R 1922=69 I C 111=A I R 1923 L 69; and A I R 1922 Mad. 304=31 M L T 360=15 L W 646=70 I C 682.

—Thus where former suit relates to declaration of title with regard to certain properties and latter suit is for profits in regard to one of those properties s. 10 will not apply A I R 1929 Oudh 351=4 Luck 573=7 O W N 157 = Ind Rul ( 1929 ) Oudh 183=114 I C 775.

—The main properties of the joint Hindu family was divided under an award. Some of the members of the family filed two simultaneous suits, one in respect of the property covered by the wards, and the other in respect of the property that was still joint. Held, that the two suits were separately maintainable as the sum total of the facts on which they were based were not the same 4 O L J 520 = 42 I C 413.

—Under the old Code it was held that causes of action of the two suits must also be the same. 14 Bom L R 9=13 I C 849=36 B 189.

—But the present section has no reference whatever to causes of action of the suits 36 C W N 667=A I R 1932 C 692 = 140 I C 135 = A I R 1932 C 751.

## ( 11 ) PARTIES

—See also cases under C P C S 11-Parties.

—Even if the same question or some common questions were involved in the two suits, no stay will be granted if the later suit was not between the same parties or parties under whom the parties to the earlier suit claimed litigating under the same title : 15 L W 667 = 1922 M W N 521=68 I C 167=A I R 1922 M 321.

—A suit based on a hundi was stayed pending suits on different hundis against practically the same debts and defended on the same ground, Held, the suit being on a different hundi and only one of the defendants contest-



**C P C (1908) S. 10 (Contd.)****(11) Parties—(Contd.)**

ing the right of the plaintiff it is unfair to the plaintiffs to stay proceedings in a suit like this, even if it could legally be done. 1932 P C L 441 (Civ.) = 33 P L R 787=139 I C 48 = I R 1932 L 558 = A L R 1932 L 441 (Civ.)

—After the plffs. had brought a suit against the deft, both of them were made defts, in another suit which was decided while the plff's suit against the deft, was still pending. In his defence in the first suit the deft, relied upon the plff's pleadings as deft. in the second suit.

—The plff. contended that as the trial of the second suit was without Jurisdiction by reason of S. 10 of the C P Code, his pleadings in that suit could not be relied upon by the deft. Held, that as the later suit was not between the same parties the plff's contention was untenable. 31 I C 25.

—But where deft. was sued as heir in the former suit, and he brought a subsequent suit as creditor, Held, that s. 10 applied because the deft, was claiming under the same title in both the suits. 18 A L J 145=55 I C 89=42 All 290.

**(12) POWER OF HIGH COURT.**

—High Court can order party not to proceed with a suit in another Court. 21 Bom. L R 963= 53 I C 518

—Where same matter is in issue in the suit in another court and an appeal in High Court between the same parties, the High Court can order stay of the suit. 96 I C 958=A I R 1926 L 692.

—Appeal before the District Judge—Another connected first appeal before High Court between same parties—High Court may order transfer of former before itself without any security. A I R 1926 Lah. 304=8 L L J 76 = 27 P L R 185.

**(13) PREVIOUSLY INSTITUTED PENDING SUIT.**

—To attract the provisions of s. 10 the previously instituted suit must be pending. Thus applying for or obtaining leave to appeal to P C does not amount to pendency of appeal I R 1929 R 121=115 I C 665=A I R 1929 R 67 =6 R 775.

—Where no proceedings are taken in the previous suit for redemption after the preliminary decree, the suit must be regarded as still pending and the trial of a subsequent suit for redemption by another co-mortgagor would be barred under s. 10. 28 O C 212 = 87 I C 290 = A I R 1925 O 696.

—Withdrawal of the prior suit with liberty to afresh on payment of costs bars the trial of the subsequent fresh suit so long as the costs are not paid. 3 Pat. L J 63 = A I R 1924 P 94; see to the same effect 19 C L J 529=23 I C 210

**C. P. C. (1908) S. 10 (Contd.)****(13) Previously Instituted Pending Suit—(Contd.)**

—Onus is on the deft. to produce before the Court such documents as will satisfy the court that S. 10 is applicable. 3 Pat. L W 327= 39 I C 908.

—The original application prayed for the stay of a suit pending the disposal of an appeal which the petitioner had preferred to the District Judge and the rule issued on the application was with reference to that appeal. Before the application came on for final hearing that appeal had however, been dismissed, and the petitioner had preferred a second appeal to the High Court against the decree of the District Judge.

—The petitioner applied at the final hearing of the application for the extension of the scope of the rule so as to cover the second appeal preferred by the petitioner. Held, that, in the circumstances of the case, the scope of the rule ought to be amended by making it cover the second appeal. 36 C W N 667 = I R 1932 C 692 = A I R 1932 C 751.

**(14) PROCEED WITH TRIAL.**

—The section merely empowers the Court not to proceed with the trial of a suit in certain circumstances; it does not empower the Court to dismiss the suit in such circumstances. 77 I C 157 = A I R 1925 Pat. 201.

—Neither S. 10 nor S 11 C P C precludes the institution of a fresh suit for the same relief: they only bar the trial. In cases coming within S 10 the proper procedure is to stay the suit and not to dismiss it. 27 M L J 405 = (1914) M W N 740=25 I C 597.

—But when the only result of a stay would be to keep the suit pending until the sole question at issue in it is decided in the other suit and so become *res judicata*, there is nothing wrong in dismissing the subsequent suit sought to be stayed. 16 C W N 897 = 16 I C 459; see also 2 M L T 40=16 M L J 526.

**(15) REVISION.**

—There is a conflict of opinion as to whether an erroneous order under s. 10 is revisable. The Calcutta High Court has held that it is revisable: 36 I C 641; A I R 1923 C 716; and 27 I C 917 = 42 C 926; and so has the Madras: 16 L W 607 = 70 I C 5 = A I R 1923 M 88.

—and Oudh Courts: 6 O L J 96 = 50 I C 212; and 5 O W N 601 = 3 Luck 650 = A I R 1928 O 355 = 111 I C 161 F B.

—But the Allahbad: A I R 1921 A 1 = 63 I C 15 = 19 A L J 558 = 43 A 564 F B; and 17 A L J 718 = 57 I C 331 = 41 A 602; 18 A L J 431 = 58 I C 90 = 42 A 409; and A I R 1929 A 957 = 1930 A L J 235 = 121 I C 97; and the Lahore High Courts have held that such



**C. P. C. ( 1908 ) S. 10 (Contd.)****( 15 ) Revision—(Contd.)**

order is not revisable : 31 P L R 174 = I R 1931 L 1 = 128 I C 49 = A I R 1930 L 525; and 75 I C 101 = A I R 1924 L 567; and 33 P W R 1922 = 69 I C 111 = A I R 1923 L 69; and 4 L L J 425 = 67 I C 870 = A I R 1922 L 54.

—In a recent case, however, the same High Court has held that High Court can interfere in revision against an order under s. 10, if suitable grounds are disclosed 1932 P C L 441 ( Civ ) = 33 P L R 787=139 I C 48=I R 1932 L 558= A L R 1932 L 441 (Civ); see also 82 I C 234 = A I R 1925 L 144.

**( 16 ) SUIT, MEANING OF**

—The provisions of the section only apply to "suits" and no other proceedings (but see C P C s. 141); except where the Court exercises its inherent power to meet the ends of justice : 4 S L R 187 = 9 I C 707.

—Proceedings in appeal are only a continuation of the suit instituted in the first Court and deemed to be suit 18 M L T 400 = (1915) M W N 844 = 30 I C 753; see to the same effect 27 C W N 772 = 75 I C 231=A I R 1923 C 716; and 15 Bom. L R 809 = 21 I C 54 = 37 B 621; and 1931 A L J 833 = 61 M L J 420 = A I R 1931 P C 263; and 53 C L J 619 = I R 1931 C 670 = A I R 1931 C 779 = 133 I C 222.

—Arbitration proceedings or proceedings to file an award, though not technically a suit and therefore not within s. 10 C P C are nevertheless litigious proceedings, are governed by the same principle of general law as are laid down in s. 10. 4 S L R 187 = 9 I C 707; see to the same effect : 23 S L R 427 = 112 I C 318 = A I R 1928 S 169; and 16 S L R 79 = 66 I C 796 = A I R 1922 S 6.

—The section does not apply to applications under s. 20 ( 2 ) C P C. 30 P L R 395 = I R 1929 L 638 = 117 I C 94 = A I R 1929 L 533.

—Nor does the section apply to execution proceedings. I R 1929 L 904 = 119 I C 488 = A I R 1929 L 694; see to the same effect 22 M 256 and cases under. C P C S. 47.

**C. P. C. (1908) S. 11****( 1 ) Legislative Changes.****( 2 ) Preliminary.**

- (A) Applicability, scope and general principles.
- (B) Res-Judicata and Estoppel, difference between.
- (C) If Section 11 exhaustive.
- (D) Evidence necessary to plead res-Judicata.

**C. P. C. ( 1908 ) S. 11 (Contd.)**

- (E) Plea of res-Judicata if can be waived and when it can be raised,

**( 3 ) Competent Court.**

- (1) General principles.
- (2) Court having no Jurisdiction.
- (3) Courts of special Jurisdiction.
  - (A) Small cause courts.
  - (B) Probate, Administration and other Proceedings.
  - (C) Mamlatdar's court's cases.
  - (D) Other courts of special Jurisdiction.
- (4) Revenue courts, decisions of.
- (5) Criminal Courts, decisions of.
- (6) Foreign courts.

**( 4 ) Directly and substantially in issue.**

- (A) Test-when can an issue be said to be directly and substantially in issue.
  - (1) General principles.
  - (2) Adoption cases.
  - (3) Suits between Landlord and Tenant e. g. Rent suits etc.
  - (4) Other suits.
- (B) Explanation IV ( might and ought )
  - (1) Plaintiff bound to set up all claims.
  - (2) Defendant bound to resist on all grounds.
  - (3) Suits between Landlord and Tenant.
  - (4) Mortgage suits.
- (C) Unnecessary issues and findings.
- (D) Incidental issues and findings.
  - (1) General principles.
  - (2) Suits between Landlord and Tenant.
  - (3) Other suits.
- (E) Not in issue.

- (1) General principles.
- (2) Suits between Landlord and Tenant.
- (3) Partition suits.
- (4) Suits by Hindu widows and Hindu reversioners.
- (5) Mortgage suits.
- (6) Other suits.

**( 5 ) Execution Proceedings**

- (1) Preliminary.
- (2) Might and Ought.
- (3) Heard and decided.
- (4) Competent Court.
- (5) Not in issue.

## C. P. C. (1908) S. 11: (Contd.)

- (6) Explanation I—see
- "Heard and finally decided—Exp. I" *infra*.
- (7) Explanation II—see
- "Competent court" *supra*.
- (8) Explanation III—see
- "Directly and substantially in issue—(A) Test—(1) General." *supra*.
- (9) Explanation IV—see
- "Directly and substantially in issue, Exp. IV Might and Ought." *supra*.
- (10) Explanation V—see
- "Heard and finally decided Exp. V." *infra*.
- (11) Explanation VI—see
- "Parties—representative suits—Exp. VI" *infra*.
- (12) Heard and finally decided.
- 1 General principles.
- 2 Abatement of Suit.
- 3 Adverse finding against a party in whose favour the decree is passed.
- 4 Ambiguous findings.
- 5 Award and decrees on award.
- 6 C. P. C. S. 331 (of 1882)=New Code O. 21, r. 99 investigation under.
- 7 Compromise and consent decrees and orders.
- 8 Cross objections dismissed no bar to appeal as to those very objections.
- 9 Decree in first suit time barred or becomes unexecutable by default of plaintiff.
- 10 Decree on oath.
- 11 Decree rights under varied or abandoned.
- 12 Dismissal affecting rights.
- 13 Dismissal for absence of both parties.
- 14 Dismissal of suit for non-production or default.
- 15 Dismissal not on merits *e. g.* (1) dismissal for non-payment of court fees (2) non-production of copy of Judgment of 1st court etc.
- 16 Dismissal of suit under S.66(S.317 old code)
- 17 Dismissal of suits as time barred.
- 18 Dismissal on a preliminary point.
- 19 Dismissal on a technical grounds *e. g.* Mis-Joinder, non-Joinder, multifariousness etc.
- 20, 21 Ex parte Decrees and orders.
- 22 Explanation I.
- 23 Explanation V. (claim made in plaint but not granted expressly is to be deemed as refused.)
- 24 Fraudulent decrees.
- 25 Inconsistent decisions.

## C. P. C. (1908) S. 11 (Contd.)

- 26 Interlocutory orders.
- 27 Issues and questions left undecided or open (1) by 1st or (2) by appeal Court.
- 28 Issues of fact.
- 29 Issues of fact and law.
- 30 Issues of law.
- 31 Judgment in rem.
- 32 Landlord and tenant suits between.
- 33 Miscellaneous proceedings orders in.
- 34 Mortgage suits.
- 35 Obiter dictum or mere opinion on necessary issues (1) by first court or (2) by appellate court.
- 36 Other suits.
- 37 Partition suits.
- 38 Plaint, rejection of.
- 39 Pre-emption suits.
- 40 Principal and agent suits between.
- 41 Reliefs, different.
- 42 Relinquishment of claim.
- 43 Remand order.
- 44 Resjudicata by implication.
- 45 Right to sue reserved by decree or by court extra Judicially.
- 46 Subject matter different.
- 47 Suit for money due under decree paid out of court.
- 48 Suit on Pro. Note 2nd on original c. a.
- 49 Suit in claim cases.
- 50 Vendor and Vendees.
- 51 Withdrawal of suits.
- (13) Parties—"Between the same parties, or between parties under whom they or any of them claim, litigating under the same title."
- (1) General principles.
- (2) Co-defendants.
- (3) Co-plaintiffs.
- (4) Explanation VI -- Representative suits.
- (5) Judgments in rem.
- (6) Litigating under the same title.
- (7) Minors, suits by and against.
- (8) Pro-forma or nominal parties.
- (9) Same parties, meaning of.
- (10) Under whom they claim.
- (11) Wrong party.
- (14) Same or different causes of action

## (1) LEGISLATIVE CHANGES

—The present section almost reproduces s. 13 of the Code of 1882 except that (a) Expl. I and Expl. II of the present section are newly added, and (b) Expl. IV of s. 13 of C. P. C. 1882 has been omitted as it was unnecessary and liable to misconstruction, and (c) Expl VI of S. 13 of the old Code has been transposed to S. 14 of the present Code and (d) the scope

C. P. C. (1908) S. 11 (Contd.)

(1) Legislative Changes—(Contd.)

of Expl. V of the old section=Expl VI of the present section has been enlarged by addition of the words "public right" in view of s. 91 which is newly added to the present Code.

(2) PRELIMINARY.

- (A) Applicability, scope and general principles.
- (B) Res. judicata and Estoppel, difference between.
- (C) If sec. 11 exhaustive.
- (D) Evidence necessary to plead resjudicata.
- (E) Plea of resjudicata if can be waived and when it can be raised.

(A) Applicability, Scope, and General Principles.

—Both s. 10 and s. 11 deal with the law of procedure : A. I. R. 1922 S. 6=16 S. L. R. 79=66 I. C. 796.

—But, whereas s. 10 bars the trial of a suit in which the matter directly and substantially in issue is pending adjudication in a previous suit, the present section bars the trial of a suit the material issue in which has already been adjudicated in a former suit : A. I. R. 1929 O. 341=4 Luck 573=7 O. W. N. 157 = I. R. 1929 O. 183=114 I. C. 775.

—As to the applicability, the section applies to all orders passed in the same suit between the same parties when the question arises in subsequent proceedings in the suit : A. I. R. 1924 M. 406 = 73 I. C. 903.

—And where applicable, it bars a suit as well as a defence concerning material issues : A. I. R. 1921 P. C. 231.

—For the application of the rule of *res judicata* it is essential that there must be a previous decree or order having the force of a decree. 9 O W N 488 (511)=137 I. C. 606=I. R. 1932 O 243=16 R. D. 246=13 L. R. 246 (Rev.)=A. I. R. 1932 O 199=A L. R. 1932 O 507 (F. B.)

—Plea of resjudicata can be successful only where the law expressly provides for it A I R 1929 All 506=(1929) A L J 653= 51 A. 805=Ind. Rul (1929) All. 865=118 I. C. 513.

—Where a Judicial decision differently interprets the law the rights of parties decided upon prior decisions nevertheless remain unaffected. A. I. R. 1928 Cal. 777 = 56 C. 723 = 33 C. W. N. 126 = Ind. Rul. (1929) Cal. 417=48 C. L. J. 327=115 I. C. 593.

—Where a plea of res judicata was disallowed by law, and the question was left open, it was held that the question can be reopened on the change of law : 85 I. C. 574=A. I. R. 1925 M. 1107.

C. P. C. (1908) S. 11 (Contd.)

(2) Preliminary—(Contd.)

(A) Applicability, Scope and General Principles—(Contd.)

—Principle of res judicata applies only to judgments and not decree. So, where two cross-suits are filed simultaneously between the same parties about the same subject-matter and one judgment is delivered in both the suits, though separate decrees are framed, appeal from one decree will not be barred merely because there has been no appeal from the other A. I. R. 1927 Lah. 289=104 I. C. 849 =8 Lah. 384 (F.B.)

—Res Judicata applies to insolvency proceedings though not under s. 11 A.L.R. 1933 M. 526.=63 M. L. J. 778=86 L. W. 699=1932 M. W. N 1201=A I R 1933 M. 9; see also 193 P. L. R. 1905=75 P R 1905 F. B. (overruling 145 P. R. 1884) and A L R 1933 C 695; and also to suits under Act 10 of 1859 : I N W 119.

—S.11 does not apply to orders passed under s. 33, Income-tax Act. A I R 1929 Mad. 453=56 M. L. J. 451=29 L. W. 476=Ind. Rul. (1929) Mad. 478=115 I. C. 814 F. B; nor to cases under s. 52 (3) of Madras Estates Land Act. A. I. R. 1922 P.C. 257=49 I A 211=45 M. 475=43 M. L. J. 323 = 27 C. W. N. 1 = 20 A. L. J. 937=36 C L J 450 = 16 L. W. 18 = 31 M. L. T. 31 = 74 I. C. 584 (P. C.); nor to proceedings under Bengal Tenancy Act, s. 105 A. I. R. 1923 Pat. 174 = 67 I. C. 710, nor to applications under s. 90 of the T. P. Act : 1905 A. W. N. 144 = 2 A. L. J. 379.

—The section does not apply where the prior suit abates and is not dismissed on merits. A. I. R. 1931 Lah. 79 = 31 P. L. R. 973 = I. R. 1931 L. 370 = 131 I. C. 98; nor does it apply to third parties : I Bom. L. R. 76=23 B. 597.

—Principle of s. 11 is not applicable to a Criminal case. Where a Criminal revision petition was dismissed a fresh petition was barred, not under s. 11, but on principles of justice, equity, and good conscience : (1915) M. W. N. 786.

—As to criminal proceedings under S. 133 of Cr. P. Code see : 19 C. W. N. 332.

—The question of res judicata has no concern with the question whether the former suit has been correctly decided : A. I. R. 1928 C. 777 = 33 C. W. N. 126 F. B.; an erroneous decision can operate as res judicata : A. I. R. 1926 N. 476=9 N. L. J. 183 = 96 I. C. 963 (see also cases under "Heard and Decided-Issues of Law-erroneous decision"); otherwise every decision will be impeached as erroneous and there will be no end of litigation : 1918 M. W. N. 580=49 I. C. 369; 82 P. R. 1918=47 I. C. 373; 24 A. 138; 15 A. 327; 10 C. 1087.

—The effect of a final order cannot be sought to be avoided by making allegations that the decision was wrong on the merits

C. P. C. (1908) S. 11 (Contd.)

(2) Preliminary—(Contd)

(A) Applicability, Scope, and General Principles—(Contd)

because full facts were not placed before the Court or that all available evidence was not let in on the former occasion. 55 M. 495 (505)=1931 M. W. N. 1235=34 L. W. 809=62 M. L. J. 302=136 I. C. 306=A. I. R. 1932 M. 86=I. R. 1932 M. 274.

—The rule of *res judicata* does not create any right or interest in the property, though it may indirectly affect the rights of persons against whom it is effective. The rule is a rule of personal estoppel and does not attach itself to property. A. I. R. 1921 Mad. 306=44 M. 514=41 M. L. J. 288=63 I. C. 205.

—Decision in a previous suit that the issue between the parties is barred by *res judicata* itself operates as *res judicata* in a subsequent suit. A. I. R. 1930 Pat. 585=9 Pat. 674=Ind. Rul. (1931) Pat. 33=128 I. C. 337.

—The plea of *res judicata* is not one of jurisdiction of the Court: A. I. R. 1930 Pat. 585=11 P. L. T. 765=128 I. C. 337=9 Pat. 674; but its effect is to take away jurisdiction: 20 B. 86.

—A judgment, order etc, set up as *res judicata*, can, however, be impeached on the ground that it was delivered by a court without jurisdiction or was obtained by fraud or collusion; it is not necessary to have the judgment previously set aside by a separate suit: A. I. R. 1929 C. 685=I. R. 1929 C. 231=114 I. C. 407; 1902 A. W. N. 38=24 A. 242; 24 W. R. 217; 29 M. L. J. 558=18 M. L. T. 402=1915 M. W. N. 829=2 L. W. 1005=30 I. C. 962.

—But where absence of jurisdiction in the Court depends on a fact in the knowledge of the party which he had an opportunity of bringing forward in the Court, and he does not bring that fact forward but allows the Court to proceed with the judgment he ought not to be permitted to impeach the jurisdiction of the Court in any collateral proceeding. A. I. R. 1922 Pat. 322=67 I. C. 686.

—A person relying on false statements and not calling evidence to support his own statements will be deemed to be as much bound by the decision as he would have been if he put forward a true case and called all the evidence that was available. A. I. R. 1927 Cal. 421=46 C. L. J. 596=31 C. W. N. 898=100 I. C. 510.

—A wrong decision as to *res judicata* is a good ground for revision if it prevented a case being heard on merits: 2 P. R. 1910=101 P. L. R. 1910=6 I. C. 735; see also 42 P. W. R. 1910 and 11 B. 488 and cases under "Heard and Decided—Issues of Law."

—As to the test of *res judicata*, it is

C. P. C. (1908) S. 11 (Contd.)

(2) Preliminary—(Contd)

(A) Applicability, Scope and General Principles—(Contd)

suggested that appealability is the test: A. I. R. 1926 C. 568=44 C. L. J. 399=30 C. W. N. 415=94 I. C. 235; and that mutuality is one; 49 I. C. 959.

—But the real test is the identity of matters in issue: 56 C. L. J. 369; A. I. R. 1930 C. 47=33 C. W. N. 876=I. R. 1930 C. 401=124 I. C. 161=57 C. 258; A. I. R. 1927 M. 273=25 L. W. 11=100 I. C. 402; 89 I. C. 282; A. I. R. 1925 O. 390=12 O. L. J. 248=2 O. W. N. 292=88 I. C. 985=29 O. C. 93; 23 M. L. J. 543; and 6 C. 715.

—It should be noted, however, that the rule of *res judicata* applies, even in absence of issue and decision, if the facts are accepted by the parties and made foundation of their claim 36 L. W. 414 (418)=A. I. R. 1932 M. 519=139 I. C. 761=I. R. 1932 M. 789=A. I. R. 1932 M. 1466.

—It has been held that identity of causes of action is not the test: A. I. R. 1929 O. 172=6 O. W. N. 191=4 Luck. 603=I. R. 1929 O. 312=116 I. C. 200 F. B; nor the identity of subject-matter: 6 C. 715 (but see 25 M. L. J. 324=1913 M. W. N. 776=5 L. W. 299=21 I. C. 219=14 M. L. T. 229).

—In order to consider whether a previous decision is *res judicata* or not the substantial effect of what has been decided in the case has to be considered 56 C. L. J. 369 (402); see also A. I. R. 1926 O. 101=12 O. L. J. 571=2 O. W. N. 872=91 I. C. 583.

—In deciding whether *res judicata* applies, the Court has to consider the array of parties the issues raised and the point or points actually decided in the previous litigation, 18 A. L. J. 150=76 I. C. 673.

—But where, what the Court had to decide in the former suit is different from what the Court has to decide in the subsequent suit the previous suit does not operate as *res judicata* A. I. R. 1931 Lah. 251.

—Different valuation of same property in suit does not take the case out of the rule of *res judicata* A. I. R. 1931 Lah. 217=32 P. L. R. 214.

—Nor can the bar of *res judicata* be got over by adding untenable claim in the later suit. A. I. R. 1926 Mad. 829=23 M. L. W. 653=51 M. L. J. 630=95 I. C. 963; see also 9 M. L. T. 89.

—Where the decision as to a claim under which defendant claimed one half of property is *res judicata* against plaintiff who could not have calculated its value in fixing the value of appeal the defendant who has no claim to that half of the property cannot include it in fixing the value of subject-matter of appeal along with his own one half



C. P. C. (1908) S. 11 (Contd.)

(2) Preliminary—(Contd.)

(A) Applicability, Scope and General Principles—(Contd.)

share of the property. A I R 1923 Oudh 93=9 O L J 531=26 O C 24=74 I C 214.

—And similar ingenious devices to avoid the doctrine will not be encouraged by the Courts : 108 P L R 1919=67 I C 755 (see also cases under (3) Competent Court Infra) Principle of *res judicata* extends to the judgment of a Court of concurrent as well as exclusive jurisdiction : A I R 1926 S. 236=94 I C 423=21 S L R 23.

—A party cannot except under certain circumstances be concluded by a decision against his adversary 25 M L J 324 = (1913) M W N 776 = 5 L W 299 = 21 I C 219=14 M L T 229.

(B) *Res Judicata and Estoppel Difference between.*

—The rule of *res judicata* resembles the law of estoppel in that both exclude contradictory evidence; and it differs in that it does not result from an act of a party as an estoppel does. *Res judicata* precludes a man averring the same thing twice in successive litigations while *estoppel* prevents him saying one thing at one time and the opposite at another. 13 Bom L R 717=36 B 214=12 I C 225.

—That is to say, *res judicata* ousts the jurisdiction of the Court, while *estoppel* shuts the mouth of a party : 13 Bom. L R 950=12 I C 535=36 B 283.

—*Res judicata* bars fresh litigation at the outset and binds parties and his representatives, *Estoppel* is a rule of evidence preventing a man who by his acts or statement has induced another to believe a thing to be true from denying the truth of that thing to the prejudice of the person misled A I R 1922 Pat. 33=1 Pat. 174 = (1922) Pat. 63=3 P L T 506=67 I C 266.

—In other respects the doctrine of *res judicata* is a part of the wider general principle of *estoppel* 59 C 985 = A I R 1932 C 889 = A I R 1932. C 1086.

(C) Section, if exhaustive

—Their Lordships of the Privy Council have observed that "the principle which prevents the same case being litigated twice is of general application, and is not limited by the specific words of the Code in this respect" 48 I A 187=60 I C 631=48 C 499 P. C.

—The following cases also hold to the same effect that s. 11 is not exhaustive : A I R 1931 P C 114=(1931) A L J 453=53 CLJ 552; 33 Bom L R 979; 53 Ind Rul (1931) P C 182; (1931) M W N 742; 61 M L J 196; 34 L W 459;

C. P. C. (1908) S. 11 (Contd.)

(2) Preliminary—(Contd.)

(C) Section, if exhaustive—(Contd.)

35 C W N 661; 58 I A 158; 132 I C 598 (P C); 9 O W N 488 (500)=137 I C 606=I R 1932 O 243=16 R D 246=13 L R 246 (Rev.)=A I R 1932 O 199=A L R 1932 O 507 (F B); A I R 1930 Bom 431=54 B 696=32 Bom L R 389=Ind Rul (1930) Bom 401=126 I C 305; A I R 1930 Cal 5=56 C 639=Ind Rul (1930) Cal 70=120 I C 710; A I R 1929 L 781=I R 1929 L 627=117 I C 83; A I R 1928 Oudh 359=3 Luck 487 =5 O W N 265=12 R D 72=112 I C 169; 12 Bom L R 837=43 B 869; A I R 1924 Cal 600=39 C L J 40=79 I C 520.

—And Walsh J. has remarked that a decision between the parties out of Court in the course of a suit is governed by the principles of *res judicata* independently of s. 11 A I R 1925 All 503=23 A L J 561 = 47 A 637 = 88 I C 768 F. B.

—The section is not exhaustive and recourse may properly be had to decisions of the English Courts for the purpose of ascertaining the general principles governing the application of the doctrine 10 R 322 (331)=59 I A 247=55 C L J 403=36 C W N 726=33 P L R 519=137 I C 328=34 B L R 1040=1932 A L J 735=63 M L J 64=36 I. W 1=9 O W N 647=I R 1932 P C 184=A I R 1932 P C 161=A L R 1932 P C 260 (P C) see to the same effect 63 M L J 778=140 I C 461=1932 M W N 1201 = 36 M L W 699.

—Section 11 is not exhaustive and application of the rule of *res judicata* depends on substance and not form A I R 1931 Bom 507=33 Bom L R 1139 = Ind Rul (1931) Bom 554 = 134 I C 970.

—The pecuniary value of the particular item under dispute is not the measure of the importance of a judicial decision. The principle preventing multiplicity of suit is of general application and not confined by specific words of the Code A I R 1922 P C 80 =45 M 320=30 M L T (P C) 154=35 C L J 545 =16 L W 1=(1922) M W N 359=26 C W N 713=20 A L J 684=43 M L J 78=24 Bom L R 963=49 I A 129=67 I C 408.

—The plea of *res judicata* may be invoked under general principles of law : A I R 1926 L 603=8 L 15=27 P L R 504=96 I C 1002.

—Thus in Land Acquisition proceedings the decision as to title and apportionment of compensation between rival claimants operates as *res judicata* in subsequent suit between parties not by reason of s. 11 but by general principles of *res judicata*. A I R 1922 P C 80=45 M 320=43 M L J 78=24 Bom L R 963=16 L W 1=(1922) M W N 359=20 A L J 684=35 C L J 545=L R 3 P C 158=30 M L T 154 = 26 C W N 713=49 I A 129 (P C)=67 I C 408.

—And s. 105 of C P C is one of the many rules that come under the heading of *res judicata* 10 N L R 28=23 I C 238.



C. P. C. (1908) S. 11 (Contd.)

(2) Preliminary—(Contd.)

(C) Section if exhaustive—(Contd.)

—But one cannot rely upon the principle of finality which forms the basis of the general law of *res judicata* apart from S. 11. A I R 1925 Cal. 1046=85 I C 979.

—And, where a case falls within S. 11, the general principles of *res judicata* cannot be applied, but must be governed by s. 11: A I R 1930 L 487=I R 1930 L 762=126 I C 570; see also A I R 1928 M 840=1928 M W N 336=28 L W 82=56 M L J 52=110 I C 554; A I R 1927 L 804=102 I C 22; A I R 1926 L 670=96 I C 910; A I R 1926 C 568=44 C L J 399=30 C W N 415=94 I C 235; 14 Bur. L R 259.

—And conversely, the section cannot be extended to cases which do not strictly fall within the section: A I R 1927 M 450=99 I C 989.

—Definite order cannot be set aside except on review by the same Judge or his successor though s. 11 does not apply A I R 1925 Lah. 507=7 Lah. L J 319=26 P L R 587=90 I C 683.

(D) Evidence Necessary to plead *Res judicata*.

—A plea of *res judicata* will not be taken notice of unless evidence of the decree or order on which it rests is produced and put on the record: 17 I A 181=18 C 216 P C; and also the judgment on which the plea rests: 9 O W N 488=137 I C 606=16 R D 246=I R 1932 O 243=13 L R 246 (Rev.)=A I R 1932 O 199= A I R 1932 O 507 (F B.)

—It is also necessary to put on record the previous proceedings: 7 Bom. L R 876=9 C W N 938=1 C L J 594=2 A L J 758=15 M L J 336=8 Sar 239=32 I A 244=33 C 116 P C; and all other documents which are necessary to bring the case within s. 11: A I R 1932 P 357=140 I C 507=I R 1932 P 318=11 P 607; and 3 Pat L W 327=39 I C 908.

—As to the proof necessary to establish the plea of *res judicata* in case of decision by implication see 18 C W N 271.

—Thus it has been held that a judgment incapable of operating as *res judicata* will be admissible in evidence to prove a right which had been set up unsuccessfully by one of the parties. 14 I C 66=136 P L R 1912=116 P W R 1912.

—And that a judgment of the Privy Council on the same question of mixed law and fact may not be *res judicata* between the same parties, the conclusion of the Privy Council itself would carry great weight. 12 I C 389=10 M L T 298=(1911) 2 M W N 328=37 Mad. 22=24 M L J 652.

—The question of bar by *res judicata* is itself a mixed question of law and fact: A I R 1930 Pat. 585=I R 1931 Pat. 33=128 I C 337=9 pat. 674.

C. P. C. (1908) S. 11 (Contd.)

(2) Preliminary—(Contd.)

(D) Evidence Necessary to plead *Res judicata*—(Contd.)

—Decision as to ownership of land is not *res judicata* in a subsequent rent suit, but it is at least a strong piece of evidence on the question as to whom the rent is payable: A I R 1925 C 1218=87 I C 753.

—And further, it has been held that the judgment must be read in the light of the pleadings: 56 C L J 369.

—See to the same effect: A I R 1930 Pat. 71=10 P L T 630=I R 1930 Pat 4=120 I C 292; A I R 1929 All 29=I R 9 A 306 Rev. =113 I C 758; 1912 M W N 172=11 M L T 201=13 I C 649; 14 C L J 220=12 I C 9; 1887 A W N 1.

—Judgment should be considered when the decree is expressed in general terms: 1919 Pat. 393=51 I C 981.

—And further, the plea in the previous suit must be construed in the same way that the Court which decided that suit construed it. 11 Bur. L T 192=42 I C 518. (1912) M W N 172=11 M L T 201=13 I C 649.

(E) Plea, when can be raised, and whether it can be waived.

—The plea of *res judicata* being a question of law may be raised at any stage of a suit. 47 I C 685.

—Where the plea of *res judicata* was raised and considered in the trial Court, it could be considered in appeal before the Privy Council even if it had not been pressed in the Court below. A I R 1931 P C 231=Ind. Rul. (1931) P C 257=61 M L J 415=34 L W 439=35 C W N 1217=8 O W N 973=133 I C 721 P C.

—But it has been held that the Court is not bound to entertain the plea when it cannot be considered and determined upon the record as it stands and renders it necessary to remand the case for further findings of fact 21 A 446=A W N 1899, 164. See also 3 P L R 1915=14 P W R 1915.

—Plea of *res judicata* is not allowable in second appeal, if not taken in written statement nor issue raised nor discussed in that light by lower Courts. A I R 1929 Mad. 775=122 I C 499.

—That is to say, the plea will be allowed for the first time in appeal, provided [a] all the necessary materials for the decision of the plea are on the record and [b] the other party is not prejudiced by its being allowed: 9 O W N 1052.

—The plea was allowed in the Court of revision, though not taken in the lower Court: 7 M L T 175=5 I C 925 but see contra: A I R 1921 M 532=13 L W 289=62 I C 480.

## C. P. C. (1908) S. 11 (Contd.)

## (2) Preliminary—(Contd.)

## (F) Plea, when can be raised, and whether it can be waived—(Contd.)

—A plea of *res judicata* depending on a finding of fact which has not been challenged in the lower appellate Court, cannot be maintained in second appeal. 46 I C 119=132 P L R 1918.

—A successful plea of *res judicata* does not affect the jurisdiction of the Court. A party can waive the plea : A I R 1929 C 163=114 I C 129=I R 1929 C 193=48 C L J 577.

—The plea of *res judicata* can be waived and the effect of waiver is the same whether it was omitted to be taken by mistake, accident or design : 1916 M W N 219=36 I C 289=31 M L J 219.

—Party not setting up the plea must be deemed to have waived it and to have intentionally invited the Court to decide the case on merits : 59 C 513.

—The maxim "Estoppel against estoppel sets the matter at large" does not apply to estoppels by record : 31 M L J 219=1916 M W N 219=36 I C 289.

## (3) COMPETENT COURT.

## Synopsis.

- (1) General Principles.
- (2) Court having no Jurisdiction.
- (3) Courts of special Jurisdiction.
  - (A) Small cause Courts.
  - (B) Probate, Administration and other Proceedings.
  - (C) Mamlatdar's Court's cases.
  - (D) Other Courts of special Jurisdiction.
- (4) Revenue Courts, decisions of.
- (5) Criminal Courts, decisions of.
- (6) Foreign Courts.

## (1) GENERAL PRINCIPLES.

## Synopsis.

- (1) Introductory
- (1-a) "Competency" relates to jurisdiction of trial Court, not of appellate Court
- (2) "Competency" relates to prior suit as well as subsequent suit.
- (3) "Competency" relates to suit, not mere particular issues.
- (4) Jurisdiction must be concurrent both as regards pecuniary limit as well as subject-matter.
- (5) Consent of parties, if can give jurisdiction.
- (6) Explanation II—Competency whether contingent on right of appeal.

संक्षेप ३१. ३१. (३) ३३

## C. P. C. (1908) S. 11 (Contd.)

## (3) Competent Court—(Contd.)

## (1) General Principles—(Contd.)

(7) Competency relates to the date of the first suit.

(8) Fraud, whether affects competency.

—(1) Introductory :—Question of "Competency of Court" is necessary for the application of the principle of *res judicata*, even as apart from s. 11 : A I R 1925 M. 1270=91 I C 497=22 L W 178=49 M. L. J. 430.

—The question of "Competency of Court" arises especially in connection with the Courts of concurrent jurisdiction, for in the case of exclusive jurisdiction it ipso facto follows that such Court's decision must be final : see cases under subheadings (3) Courts of Special Jurisdiction and (4) Revenue Courts *infra*; and that the decisions of the Courts with limited jurisdiction must always be allowed to be re-opened ; see cases under sub-heading (2) Courts without jurisdiction—*infra*. As for concurrent jurisdiction, the decisions bearing on this branch of the subject are numerous; and an examination of these decisions leads to the following general Rules :—

—(1-a) "Competency" relates to jurisdiction of trial Court, not of Appellate Court :—It is the competency of the original Court which decided the former suit that must be looked to and not that of the Appellate Court in which the suit was ultimately decided because, the result of the case depends a great deal on the trial, the appellate Court deciding the case, as a rule, on the record of the first Court : 12 C W N 359=7 C. L. J. 470=35 C 353 ; see to the same effect : A I R 1922 A. 445=76 I C 932=44 A. 712; and 7 Bom. L R 821=30 B. 220; and 9 Bur L T 183 = 35 I C 356 = 8 L B R 556; and 29 A 519=11 C W N 841 = 6 C L J 13 = 4 A. L. J 497 = 17 M L J 354 = 9 Bom. L R 757 = 2 M L T 391 = 10 O C 313 = 34 I A 125 P C; and 6 C L R 305 = 5 C 832; and 13 C L J 568; and I C P L R 92; and 23 C 413.

—The fact that an appeal lay to the Civil Court from the decision of a Revenue Court in one of the suits, and to the Commissioner in the other, cannot affect the question of *res judicata*.

—It is the competency of the Court of first instance to entertain the two suits, which regulates the application of the rule of *res judicata* 3 I C 707=6 A L J 991; see also 41 All 54=16 All L J 782=47 Ind Cas 837; and A I R 1928 Cal 758

—And the cases under sub-division—(6) Explanation II—*infra*. But note, that the "Court" referred to in s. 11 is the original Court subject to the proviso that that Court's judgment cannot be held to be final until the time of appeal has lapsed or till the appeal

C. P. C. (1908) S. 11 *Contd.*

(3) Competent Court—(*Contd.*)

(1) General Principles—(*Contd.*)

has been finally decided : 48 P R 1916=142 P W R 1916=34 I C 581.

—And it has been held that the question of *res judicata* must be decided with reference to the findings of the first Court in the former suit and not of appellate or revisional Court.

—If the latter finds what the trial Judge should have found, if he had acted correctly and legally, then such finding should be treated as the correct finding of the first Court. 1917 M W N 318=5 L W 467=37 I C 906.

(2) "Competency relates to prior suit as well as subsequent suit:

—A decree in a former suit will operate as *res judicata* in a subsequent suit between the same parties, if the Court that passed the decree had jurisdiction to try not only the former suit but also the subsequent suit: A I R 1929 L 781=I R 1929 L 627=117 I C 83; see also A I R 1928 M 840=1928 M W N 336=28 L W 82=56 M L J 52=110 I C 554; and A I R 1921 B 434=23 Bom L R 250=61 I C 276=45 B 805; and 2 U P L R (A) 59=58 I C 576; and 56 I C 932; and 186 P W R 1907=111 P R 1907; and 58 P W R 1908; and I C P L R 92; and 108 I C 623; and 9 M L J 196; and 107 I C 149; and 2 O L J 44=27 I C 537.

—Necessity for this rule is obviously to save the jurisdiction of the superior Courts to enable them to investigate questions of such value and importance that it is not safe to entrust them to the inferior Courts, even though these questions have been decided by the inferior Court in another proceeding of less value and importance.

—There is no *res judicata* where the Court which tried the former suit could not, by reason of his limited pecuniary jurisdiction, have tried the later suit A I R 1924 Oudh 147=10 O L J 376=77 I C 340; see also 76 I C 176=1924 Pat. 336.

—Where the Court which tried the previous suit was by reason of the pecuniary limits of its jurisdiction incompetent to try the subsequent suit and the judgment in the former suit was binding on the defendant only in a representative capacity there would be no question of *res judicata* 87 P R 1919=52 I C 545.

—Court having power to try suit up to Rs. 1,000 trying previous suit—Court having power upto Rs. 2,000 trying later suit for Rs. 1,000—Court trying previous suit had no jurisdiction to try later suit. Decision in the previous suit does not operate as *res judicata* in latter suit. A I R 1922 Cal 138.

—The decision of the District Court under s 16 does not bar a regular suit on the princi-

C. P. C. (1908) S. 11 (*Contd.*)

(3) Competent Court—(*Contd.*)

(1) General Principles—(*Contd.*)

ple of *res judicata* A I R 1925 Bom. 241=49 B. 442=27 Bom. L R 345=87 I C 588 P. B.

—Finding by dist. Munsif as to plff's right to use the seal of "Charmarkarta" cannot operate as *res judicata* in a subsequent suit brought in a District Court for a declaration that the plaintiff is Dharmakarta of various temples. 21 M L J 730=10 M L T 133=(1911) 2 M W N 202=11 I C 175.

—A decision of a superior Court in the second litigation, passed in accordance with an inferior Court's decision in a prior suit, cannot operate as *res judicata* in a third litigation which the original inferior Court would not be competent to try. 21 M L J 57=9 M L T 288=9 Ind. Cas. 686.

—Where the same officer is acting in two Courts, his decision in one capacity, not competent to try the later suit, is not *res judicata* A I R 1922 All. 241=66 I C 613.

—If a decree of the Court cannot operate as *res judicata* for want of jurisdiction to try subsequent suit the fact that it was based on an award cannot make it *res judicata*. 12 P L T 582.

—A decision in a former suit does not operate as *res judicata* so as to preclude the Court in the second suit from ascertaining the question of its own jurisdiction to entertain the suit 1917 M W N 318=5 L W 467=37 I C 906.

—The plea of *res judicata* should be given effect to, if the Court which decided the first suit, is a Court of jurisdiction competent to try the first suit, though unable to try the subsequent owing to the existence of another Court with preferential jurisdiction : 6 Bom. L R 77=28 B 338; see also 14 N L R 115=48 I C 268.

—(3) "Competency" relates to suit, not mere particular issues :—It has been laid down by their Lordships of the Privy Council that mere competency to try one or other of the issues is not enough.

—The Court which tried the former suit must have the jurisdiction to try the subsequent suit itself : 29 I A 196=8 Sar. 823=4 Bom. L R 793=6 C W N 825=29 C 707 P C See to the same effect : 11 L L J 98; and 1932 P C L 42=A L R 1932 L 42; and A I R 1932 A 483=1932 A L J 511=A L R 1932 A 885; and 25 A L J 564=100 I C 601=A I R 1927 A 297=L R 8 A 101 Rev=49 A 543; and 29 C L J 237=51 I C 127; and 12 C W N 359=7 C L J 470=35 C 353.

—But it should be noted that, although taking all the causes of action together, the second suit may be outside the jurisdiction of the Court which tried the first suit, still, if the specific question which forms the sub-

C. P. C. (1908) S. 11 (Contd.).

(2) Competent Court—(Contd.).

(1) General Principles—(Contd.).

ject of res judicata be within the jurisdiction of the Court which tried the first suit and was determined by that Court. the rule of res judicata will apply even though the whole suit as subsequently brought be beyond the jurisdiction of the Court which tried the first suit; 25 M L J 379 = 14 M L T 189 = 1913 M W N 690 = 21 I C 15; and see to the same effect 28 M L J 184 = 2 L W 433 = 27 I C 989; and 25 L W 11 = A I R 1927 M 273 = 100 I C 40; and 9 N L J 11 = A I R 1926 N 234 = 92 I C 913; and A I R 1928 A 714 = 50 A 306.

—(4) Jurisdiction must be concurrent both as regards pecuniary limit as well as subject matter:—The two Courts must have concurrent jurisdiction as regards pecuniary limits as well as subject matter: 9 I A 197 = 9 C 439 P C; see also 12 I A 23 = 11 C 301 P C; and 8 M 83; and 23 C 415; and 18 A W N 1894 = 16 A 183; and 3 C W N 202; and 29 M 65; and 47 I C 21; and 2 Bom. L R 415 = 24 B 456; and A I R 1926 M 829 = 23 L W 653 = 51 M L J 630 = 95 I C 968; and 13 W R 129 = 12 B L R 282 N.

—One of the elements, therefore, deciding competency of a Court is its pecuniary jurisdiction: 9 C 439 = 9 I A 197; see to the same effect: 25 A L J 564 = 100 I C 601 = A I R 1927 A 297 = L R 8 A 101 = 49 A 543; and 2 Bom. L R 415 = 24 B 456; and A I R 1922 C 138; and 23 C 693; and 21 M L J 57 = 9 M L T 288 = 99 I C 686; and 124 I C 714 = A I R 1930 A 430; and 5 L L J 494 = 73 I C 874 = A I R 1923 L 141; and 10 O L J 376 = 77 I C 340; and A I R 1930 L 501 = 126 I C 591.

—Decision in previous suit by Court which would have no pecuniary jurisdiction to try the subsequent suit cannot operate as res judicata so as to bar the subsequent suit: A I R 1930 L 501 = I R 1930 L 783 = 126 I C 591; see to the same effect: A I R 1930 A 430 = I R 1930 A 570 = 124 I C 714; 35 M L J 689; 31 P W R 1916 = 32 I C 504; and the enumerated above. But such decision is valuable evidence. 91 I C 1026 = A I R 1926 C 603.

—It has been held that the rule stated above holds good even apart from s. 11: 49 M L J 430 = 22 L W 178 = A I R 1925 M 1270 = 91 I C 497.

—Valuation put by the plff. will determine the jurisdiction: A I R 1926 C 1053 = 43 C L J 606 = 97 I C 209.

—But, as competency refers to jurisdiction of Court at the time when first suit was brought and not when subsequent suit is actually brought, a rise in the value of property in the meanwhile may affect the pecuniary jurisdiction of the Court trying the earlier suit. A I R 1928 Lah. 929 = 10 Lah. 528 = 30 P L R 620 = 113 I C 90.

C. P. C. (1908) S. 11 (Contd.).

(3) Competent Court—(Contd.).

(1) General Principles—(Contd.).

—But valuation of the same property differently, deliberately with a view to avoid jurisdiction does not take the case out of the rule of *res judicata* A I R 1931 Lah 217 = 32 P L R 214 = Ind Rul (1931) Lah 956 = 134 I C 524; see to the same effect: 25 A L J 1035 = A I R 1928 A 127 = 108 I C 462; and 1 Pat L W 418 = 39 I C 551; 10 C P L R 89, and 28 M L J 184 = 27 I C 989, and A I R 1932 C 271 = 35 C W N 1203 = 137 I C 48 = 59 C 636; and 22 O C 331 = 6 O L J 547 = 54 I C 335; and 14 M L T 189 = 25 M L J 379 = 1913 M W N 690 = 21 I C 15; and 16 N L R 91 = 42 I C 657; and 19 C W N 1280 = 21 C L J 157; and 3 I C 117; and 29 M 65; and 24 M 275; 15 M 494; and 11 C 153; and 10 C 697.

—Where the value of present suit was beyond the jurisdiction of the Court which tried the previous suits. Held, that nevertheless the principle of *res judicata* applied as the increase in value was only due to the joining together of the subject matter of the previous suits A I R 1924 All 849 = L R 5 A 580 Civ = 22 A L J 745 = 83 I C 969.

—Where the previous suit was undervalued and was filed in the Court of the District Munsif and the later suit was filed in the sub-Court with the proper valuation. Held that the later suit was not barred A I R 1931 All 21 = 1930 A L J 1254 = Ind Rul (1931) All 237 = 130 I C 13.

—In case of addition of causes of action with a view to swell the amount of valuation the Court can split up the causes and say that the second suit was barred in respect of the cause tried in the former suit: 25 M L J 379 = 14 M L T 189 = 21 I C 15 = (1913) M W N 690.

—But this principle being dangerously wide should not be taken too literally: 9 N L J 11 = 91 I C 913 = A I R 1926 N 234.

—The decision on a question of title, by a competent Court, with reference to the value of the subject-matter involved in the suit, will be res judicata, though the effect of such decision might be the determination of the title to an estate or estates the value whereof exceeds the jurisdiction of the Court of institution: 6 C L R 305 = 5 C 832.

—First suit by Melkanomdar against Kanomdar and rival Jenmi in a Munsif's Court deciding against Jenmi's title. Held, the decision operates as res judicata in a subsequent suit for redemption by the Jenmi though the suit had to be brought in sub-Court owing to the amount of rent claimed: 2 L W 433 = 27 I C 989 = 28 M L J 184.

—Dismissal of the previous suit for possession bars a subsequent suit for possession and mesne profits in a Court of superior pecuniary jurisdiction where the claim for mesne

C. P. C. (1908) S. 11 (Contd.).

(3) Competent Court—(Contd.)

(1) General Principles—(Contd.)

profits alone had swelled the claim 16 N L R 91=42 I C 657.

—It has been held by the Madras High Court that the expression "competency" refers to the value of the suit and not to territorial jurisdiction : A I R 1925 M 1167 = 87 I C 705.

—But in a recent case the Allahbad High Court has held that for the purposes of res judicata it is necessary that the two Courts must have concurrent territorial jurisdiction 1932 A L J 984=A I R 1932 A 660.

Secondly as to subject matter—the two Courts must have concurrent territorial jurisdiction which depends entirely upon the subject matter in dispute. 1932 A L J 984=A I R 1932 A 660.

—In deciding whether the former Court had power to try the subsequent suit, the Courts must look to the suit as it could have been framed but for the option given in the C. P. C. as to the joinder of causes of action : 42 I C 657=16 N L R 91.

—The word "Jurisdiction", means competency to entertain the suit with reference to its subject-matter and to the powers of the Court.

—A fresh suit, on a cause of action which has arisen since the decree was passed in the former suit and which is not affected by it, is not barred. P L R 1900 p. 431=39 P R 1900.

—If the joinder of other claims in second suit takes the case out of the jurisdiction of the Court which tried the former suit the prior decision is a bar so far as the original claim was concerned. A I R 1928 All 714 = 50 A 306=113 I C 745.

—Where incompetency to try arises only by inclusion of matters other than subject-matter of first suit the decision in first suit operates as *res judicata* 36 L W 414=A I R 1932 M 519 = 139 I C 761=A I R 1932 M 789 = A L R 1932 M 1466.

—For exhaustive illustrations of this principle see cases under sub-divisions

(3) Courts of Special Jurisdiction and

(4) Revenue Courts' Decisions.

(5) Consent of parties if can give jurisdiction

Whereas the undermentioned holding contra : 2 C W N 297=25 C 571; and 28 C 78; and 186 P W R 1907=111 P R 1907; and 24 M 444; and 9 I C 183; and 17 M 278.

—Explanation II, newly added to the Code of 1908, has now definitely settled the point that the competency of Court for the purpose of s. 11 is to be determined irrespective of any provision as to right of appeal from the

C. P. C. (1908) S. 11 (Contd.).

(3) Competent Court—(Contd.)

(1) General principles—(Contd.)

decision of such Court : A I R 1927 A 189 = L R 8 A 33 = 99 I C 299; 47 I C 837 = 41 A 54; and the decisions holding the second view under the old Code would now be good law.

—But Expl. II does not bar a suit brought under C P C when a previous suit on the same was brought and decided under the old Code which permitted no second appeal. 29 M L J 535 = 31 I C 214 See also : 11 P L R 1911 = 97 P R 1910 = 14 I C 117.

(7) Competency relates to the date of the first suit:—The competency must be judged as at date of prior suit and not as date of institution of subsequent suit. 59 C 636 (639) = 35 C W N 1203=137 I C 46=A I R 1932 C 271= I R 1932 C 261=A L R 1932 C 739. See also: 10 C 697; and 11 C 153; and 2 M L J 262 = 15 M 494; and see cases under sub-division (4) Jurisdiction must be concurrent both as regards pecuniary limit and subject-matter-supra. Increase in value of the property since the decree by the first Court does not take the decree from the operation of the rule of *res judicata* ; 35 C W N 1.

—Thus where the suit was within the jurisdiction of a Munsif and the subsequent suit by reason of increase in the value of the property was beyond his jurisdiction such subsequent suit would nevertheless be barred. 22 O C 331 = 6 O L J 547 = 54 I C 335; see also 19 C W N 1280 = 21 C L J 157 = 27 I C 954.

—A court which at the date of the institution of the first suit had jurisdiction to try the subsequent suit but was deprived of such jurisdiction before it pronounced judgment in the first suits is "Court of jurisdiction competent to try such subsequent suit" within the meaning of S. 11. 42 Mad. 702 = 37 M L J 248 = (1919) M W N 768 = 53 I C 33.

—(8) Fraud whether affects competency:—A judgment obtained by fraud or collusion cannot operate as *res judicata* : 19 O C 334 = 3 O L J 501 = 36 I C 746 ; and 4 O L J 520=42 I C 413; and L R 6 A 229; 26 C 891; see also Eyd. Act s. 44.

—And where a judgment, decree or order is set up against a party, such party is entitled to attack it on ground of fraud or collusion without bringing a separate suit for the purpose : A I R 1923 C 79 = 36 C L J 367 = 70 I C 548.

—Burden lies on the party alleging fraud, and it is not enough for him to show that the other party has told a perjured and untrue story, the fraud alleged must be actual and intentional : 21 C 612; and 37 A 535 = 30 I C 789; and 41 C 990 = 23 I C 337; and 4 Pat. L J 187 = 50 I C 451; and 38 A 7 = 30 I C 792; and



C. P. C. (1908) S. 11 (Contd.).

(3) Competent Court—(Contd.)

(1) General Principles—(Contd.)

25 Bom. L R 893 = 77 I C 206 = A I R 1924 B 100; and 31 C W N 258 = 97 I C 879 = A I R 1927 C 84; and 13 All L J 753 = 30 I C 789 = 38 A 535; and 5 Pat L J 259 = 1 Pat L T 119 = 1920 P H C C 98 = 2 U P L R 51 = 58 I C 182; and A I R 1923 Pat 242 = 4 Pat L T 147 = 71 I C 705 = 2 Pat 335.

(2) Court having no Jurisdiction.

—The Court trying the first suit must be a Court competent to try that suit. 28 Bom. L R 879 = 98 I C 341 = A I R 1926 B 481.

—Where a judgment has been delivered by a Court which had no jurisdiction to hear the case, the judgment cannot be pleaded as *res judicata*: A I R 1928 O 296 = 107 I C 895; A I R 1926 A 650 = 95 I C 406; A I R 1930 L 634; and 124 I C 472.

—Thus where the Court in the former suit had no jurisdiction in law to try the case, the former suit does not operate as a bar to the consideration of the question relating to interest. A I R 1923 Lah. 141 = 5 Lah. L J 494 = 73 I C 874.

—Decrees passed without Jurisdiction are null and void and cannot be pleaded as *res judicata*: A I R 1930 A 681 = 1930 A L J 1326 = 130 I C 801 = 52 A 868; see also 47 C 770; and A I R 1931 A 454 = 1931 A L J 240 = I R 1931 A 360 = 131 I C 248.

—(Expl. IV does not apply to such case.) Similarly, an order passed without jurisdiction cannot operate as *res judicata*: 92 I C 845 = A I R 1926 C 991.

—Where a Court had jurisdiction, but was deprived of it before delivery of judgment, the decision nevertheless operates as *res judicata*: 37 M L J 248 = 42 M 702 = 53 Ind Cas 33.

—But where a plaint was refused for want of jurisdiction, but the suit was filed again after the Court was conferred jurisdiction, held, there was no *res judicata*: A I R 1931 All 200 = L R 12 A 28 Rev. = 15 R D 160 = Ind Rul (1931) All 228 = 130 I C 4.

—A Judgment in a prior suit in the High Court instituted without leave when only part of the cause of action had arisen within the territorial limits of its original jurisdiction will not be *res judicata* in a subsequent suit in a Court having jurisdiction; the High Court not being a Court competent to deliver the judgment within the meaning of S. 44 of the Evidence Act. 15 Bom L R 672 = 37 B 563 = 20 I C 530.

—And, if the Court itself denied jurisdiction in the former suit and yet the party acquiesced, the plea of *res judicata* is not

C. P. C. (1908) S. 11 (Contd.).

(3) Competent Court—(Contd.)

(2) Court having no Jurisdiction—(Contd.)

available in the later suit: A I R 1931 A 200 = L R 12 A 28 Rev. = I R 1931 A 228 = 15 R D 160 = 130 I C 4.

—A decision in a declaratory suit cannot be rejected merely because the Court passing it had no jurisdiction. Such decision is binding until it is set aside in appeal or by any other recognized method and operates as *res judicata*. A I R 1926 Oudh 239 = 13 O L J 594 = 3 O W N 223 = 93 I C 951; see also. 52 Ind Cas 98 = 1 U P L R (J C.) 7; and A I R 1926 Cal. 1101 = 30 Cal W N 940 = 45 Cal L J 24 = 97 Ind Cas 770.

—Decision on the proceedings for Letters of Administration does not operate as *res judicata* upon the question of relationship: 13 C L J 547; see also 3 I C 319; and 8 A L J 1063 = 11 I C 235; and 12 Bom. L R 694 = 7 I C 944 = 34 B 589.

—A widow then brought a suit for possession against the nephew executor and the sister. The latter in her written statement said that she had heard of a will under which she was entitled to the property. The widow then entered into a compromise with the nephew executor, and a decree by consent was made against the latter and an *ex parte* decree was made against the sister.

—Income-tax authorities are not "Court": 58 M L J 260 = 31 L W 738 = I R 1930 M 833 = A I R 1930 M 209 = 126 I C 273 = 53 M 420 F. B.

(3) SPECIAL OR EXCLUSIVE JURISDICTION.

(A) Small Cause Court.

—Neither award nor decree of Small Cause Court on foot thereof can operate as *res judicata* in a subsequent suit which the Small Cause Court is not competent to try. 11 P 50 (63) = 12 P L T 582 = 136 I C 577 = I R 1932 P 113 = A I R 1932 P 105 = A I R 1932 P 85.

—A decision on an issue as a Small Cause Court Judge does not bar trial of the same issue as a regular Judge. A I R 1924 Bom. 452 = 48 B 541 = 26 Bom. L R 672 = 83 I C 45.

—A judgment does not operate as *res judicata* where the Munsif in his capacity as Small Cause Court Judge is not competent to try the latter suit. A I R 1922 All 241 = 66 I C 613; see also 16 A L J 782 = 47 I C 837 = 41 A 54.

—An issue was decided by a Subordinate Judge not exercising the jurisdiction of a Small Cause Court. In a subsequent suit in a Small Cause Court the same issue arose. Held, that the Subordinate Judge's decision operated as *res judicata* as his inability to

C. P. C. (1908) S. 11 (Contd.).

(3) Competent Court—(Contd.)

(3) Special or Exclusive Jurisdiction—(Contd.)

(A) Small Cause Court—(Contd.)

try the subsequent suit arose not from incompetence, but from the existence of another Court with a preferential jurisdiction.

14 N L R 115 = 48 I C 268.

—Where the Small Cause suit was transferred to Munsif's Court and was tried along with cross-suit, it was held that the Small cause suit retained its character as such even after transfer to the Munsif and the decree passed in that suit could not operate as *res judicata*. 12 A L J 853=26 I C 56.

—A decree for money passed by a Small Cause Court does not operate as *res judicata* in a subsequent suit not of a Small Cause Court nature nor does the decision of the High Court refusing to interfere with that decree in revision A I R 1924 Cal. 487 = 28 C W N 271 = 39 C L J 532=80 I C 210.

—But the decision of Small Cause Court as regards actual subject-matter is *res judicata*, though not as regards question of title : A I R 1927 M 96 = 98 I C 176.

—And, although the decision of a Small Cause Court on a question of title to land in a suit of small cause nature is not conclusive, the Court is not precluded from trying and deciding that question : 23 C W N 647 = 52 I C 265.

—Whether a decision on a claim for arrears of rent in a suit on the original side of Munsif's Court operates as *res judicata* in a subsequent suit for arrears in the small cause side see 18 M L T 171.

(B) Probate and Administration Proceedings.

—Every matter decided in proceedings for grant of probate or letters of administration does not operate as *res judicata* in a subsequent Civil suit between the parties. The decision is final and conclusive in so far as its immediate purpose is concerned, and no suit is maintainable to qualify or take away its effect but if a matter has been decided incidentally, the decision does not operate as *res judicata*. 13 C L J 547 = 15 C W N 1021 = 10 I C 434.

—A question of status decided in proceedings under the Probate Administration Act can be gone into again in a regular suit. 1 U B R 61 = 10 I C 987.

—But the decision of a Probate Court as to genuineness of a Will and the status of the Executor is binding in all other proceedings. 43 Cal. 694 = 43 I A 91 = 14 A L J 466 = 20 C W N 738 = 18 Bom., L R 397 = 23 C L J 621 = (1916) 1 M W N 419 = 20 M L T 1 = 3 M L W 544 = 31 M L J 77 [P.C.] = 33 I C 914.

C. P. C. (1908) S. 11 (Contd.),

(3) Competent Court—(Contd.)

(3) Special or Exclusive Jurisdiction—(Contd.)

(B) Probate and Administration Proceedings—(Contd.)

—And the directions given in an administration suit, bind all parties, determine the construction to which the will gives effect and is final and conclusive. A I R 1922 P C 253 = 20 A L J 625 = 43 M L J 116 = 24 Bom., L R 937 = 16 L W 963 = 49 I A 100 = 49 C 459 = 27 C W N 174=36 C L J 57=67 I C 561. P.C.

—Where a question of relationship of parties had been decided in a previous probate proceeding, a subsequent suit between the same parties involving the same question is barred. A I R 1930 P C 22 = [1930] A L J 70 = 51 C L J 142 = 31 L W 182 = 7 O W N 119 = 34 C W N 201 = 58 M L J 171 = 32 Bom., L R 505 = 57 I A 24 = [1930] M W N 355 = Ind. Rul. [1930] P C 24 [P.C.] = 121 I C 200.

—But an adjudication as to distribution of estate is not binding. A I R 1923 Rang. 9=1 Bur. L J 59=11 L B R 331=68 I C 671.

—Where letters of administration were granted to the defendant in preference to the plaintiff, the order granting the letters of administration is not a bar to the plaintiff bringing a suit for the purpose of determining any question of inheritance or of the right to be appointed as shebait, the decree in which will supersede the grant 25 C 354.

—Decision after contest is binding in subsequent proceeding against contesting caveator. Grant of probate by a competent Court binds all contesting parties unless good cause under s. 50 to set it aside is made out. A I R 1924 Mad 578=46 M L J 383=34 M L T 141=79 I C 44.

—And, according to the Bombay High Court, contentions probate proceedings are under S. 83 of Prob. and Adm. Act "suits" and provisions of s. 11 C P C would apply 16 Bom L R 164=23 I C 221=38 B 272; and 16 Bom L R 5=23 I C 325=38 B 309 F.B.

—In an application for probate of three wills executed by the same testator on different dates the Court held that the two earlier wills were not expressly revoked by the last will, but it refrained from holding that any of the dispositions in the earlier wills was or was not superseded by the last will. In a subsequent suit based on the said wills. Held that the finding in the probate proceedings did not operate as *res judicata* in the subsequent suit on the question whether any and what dispositions in the earlier wills were superseded by what disposition in the last will, though the plaintiff who was applicant in probate proceedings would be precluded from averring that the last will revoked the earlier will. 9 I C 613=21 M L J 485=9 M L T 319=(1911) 1 M W N 199.

C. P. C. (1908) S. 11 ( *Contd.* ).

( 3 ) Competent Court—( *Contd.* )

( 3 ) Special or Exclusive Jurisdiction—( *Contd.* )

( D ) Other Courts of special Jurisdiction.

—( 1 ) **Introductory**:—The decision of a Court of special jurisdiction will be *res judicata* in a Court of general jurisdiction, provided the decision of the Court of special jurisdiction was within the jurisdiction of that Court. A I R 1932 L 623.

—But the decisions of the Courts possessed of exclusive jurisdiction have the effect of *res judicata* irrespective of the limitation that the first Court must be competent to decide the subsequent suit. 9 O W N 488=137 I C 606=I R 1932 O 243=16 R D 246=13 L R 246 (Rev.)=A I R 1932 O 199=A L R 1932 O 507 (F B). Decision in a former suit cannot be *res judicata* in a subsequent suit of a special character given to it by a special law, unless the previous suit also could fall within the class of suits to which the special law applies: 16 I C 442=14 Bom L R 579=36 B 548.

—( 2 ) **Dekhan Agriculturist Relief Act**:—Under the Act the Court is given exclusive jurisdiction over a certain class of suits, and a decision in a former suit tried by that Court will operate as *res judicata* if the suit falls within the particular class to which the Act applies: 16 I C 442=14 Bom L R 579=36 B 548.

—( 3 ) **Insolvency Proceedings**:—Decision under s. 7 of the Presidency Towns Insolvency Act is *res judicata*. A I R 1921 Mad 456=42 M L J 141=15 L W 368=1922 M W N 77=65 I 244.

—Decision of Insolvency Court on a question of fraudulent transfer cannot be reopened in a suit in Civil Court: 57 I C 612=16 N L R 201.

—Adjudication by Insolvency Court on an application under s. 22 bars a subsequent suit in Civil Court: 15 A L J 661=33 I C 798.

—The plff objected to the attachment by a receiver of certain property under S. 22 of the Prov. Ins. Act on the ground that the property attached belonged to him. The objection was dismissed and the order was upheld in appeal. Plff. then brought a suit for a declaration that the attached share belonged to him. *Held*, that the suit was barred by *res judicata*. 41 All 378=17 C L J 374=49 I C 590. see also 1921 Lah 58=2 Lah 147=3 Lah L J 233=77 Pun L R 1921=61 I C 332; 40 I C 220=22 P R 1917=14 P W R 1917.

—But where the Insolvency Court refused to entertain application to set aside a transaction several years old a subsequent suit under s. 53 T. P. Act was not barred: A I R 1922 All 443=64 I C 523.

—( 4 ) **Land Acquisition Act**:—Where a dispute as to the title to receive the compensation has been referred to the Court under the

C. P. C. (1908) S. 11 ( *Contd.* ).

( 3 ) Competent Court—( *Contd.* )

( 3 ) Special or Exclusive Jurisdiction—( *Contd.* )

( D ) Other Courts of special Jurisdiction—( *Contd.* )

Land Acquisition Act, a decree therein renders the question of title *res judicata*. A I R 1924 Cal 757=28 C W N 295=86 I C 1023; see also 2 C L J 359=10 C W N 991.

—A prior decision in land acquisition case, though between the same parties and in respect of adjacent land, is not *res judicata* if land is acquired under different notification. A I R 1928 Lah 263=112 I C 797.

—( 5 ) **Liquidation Proceedings**:—Opinion of the liquidation Judge regarding plea of set-off does not operate as *res judicata*. 53 I C 623.

—Decision of liquidating Court cannot be reopened in a Civil Court: 40 P R 1918=60 P W R 1918=45 I C 84.

—Court of competent jurisdiction adjudicating on the liquidator's claim on the strength of a promissory note, the same matter cannot be re-agitated in liquidation Court. 87 P W R 1918=86 P L R 1918=46 I C 586.

—An order passed by Court bringing the name of a person as a contributory on the list of contributories if not appealed against is final and operates as *res judicata*. 41 P L R 1915=226 P W R 1915=28 I C 95.

—( 6 ) **Specific Relief Act**:—Decision under s. 9, Specific Relief Act as to possession is *res judicata*. A I R 1928 Cal. 758=Ind. Rul. (1929) Cal. 178=114 I C 82.

—Plff. having been dispossessed brought a suit on the regular side for possession under S. 9 of Specific Relief Act and the suit was decreed. Plff. then brought a suit in the Court of Small Causes for recovery of damages by way of mesne profit on the allegation that he had been dispossessed. The Small Cause Court Judge framed only one issue and dismissed the suit holding that the plff's allegation was false: *Held* that the issue as to dispossession was *res judicata*, and the suit ought to have been tried on this basis. *Held also*, the Munsif who had tried the former suit was competent to try the present suit for damages within the meaning of S. 11 of the C P Code 15 A L J 789=39 All 717=42 I C 862.

—( 7 ) **Succession Certificate Act**:—Decisions under the Succession Certificate Act are not *res judicata*. A I R 1924 Lah 493=5 Lah 105=92 I C 138; see also 24 W R 111 and cases under sub-division ( 4 ) Special and Exclusive jurisdiction—( B ) Probate and Administration Proceedings.

#### ( 4 ) REVENUE COURTS, DECISIONS OF

##### *Synopsis*

( 1 ) Matters within exclusive jurisdiction of revenue Courts.

C. P. C. (1908) S. 11 (Contd.).

(3) Competent Court—(Contd.)

(4) Revenue Courts decisions of—(Contd.)

- (2) Matters not within the jurisdiction of revenue Courts.
- (3) Ejectment suits.
- (4) Mortgage.
- (5) Partition suits.
- (6) Pattah, decision relating to
- (7) Relationship of landlord and tenant, decision as to.
- (8) Rent suits
- (9) Status, decision on.
- (10) Title, decision on.

—(1) Matters within exclusive Jurisdiction of revenue Courts:—Decision of Revenue Court on a matter exclusively within its jurisdiction will be *res judicata* in a Civil Court. A I R 1932 L 623; see also A I R 1929 L 586 = 11 L L J 248 = 30 P L R 427 = I R 1930 L 251 = 121 I C 507; A I R 1927 A 189 = L R 8 A 33 Rev. = 99 I C 299; 14 A L J 373 = 33 I C 86 = 38 A 302.

—Revenue Court decision operates as *res judicata* when the Court is empowered by law to decide the question : 38 A 302 = 14 A L J 373 = 33 I C 86.

—Where the order of the Court of Revenue is not without jurisdiction, the Civil Court has no jurisdiction to question the correctness or validity of the order of the Revenue Court on the matter within its jurisdiction even if it made a mistake. 9 O W N 610 = 13 L R 303 (Rev.) = 16 R D 472 = 139 I C 498 = A I R 1932 O 273 = I R 1932 O 364 = A L R 1932 O 599.

—Civil Court will not disturb a decree passed by competent Revenue Court of exclusive jurisdiction. A I R 1923 All. 437 = L R 5 A 144 Rev. = 72 C 276; see also A I R 1926 O 205 = 3 O W N 210 = L R 7 A (O) 79 = 93 I C 62 = 13 O L J 496; and 41 A 203 = 49 I C 118 = 17 A L J 60.

—Civil Court cannot treat a decree of a Revenue Court as *ultra vires* because it is of opinion that the Revenue Court has exceeded its special jurisdiction. A I R 1926 Oudh 369 = 93 I C 85. A suit in Civil Court to annul a Revenue Court decree is barred. A I R 1926 Oudh 348 = 6 O W N 1214 = 93 I C 374.

—It has been held by the Madras High Court that a decision of Revenue Court in a suit exclusively triable by it does not bind the Civil Court, though the subsequent suit could not be brought in the Revenue Court as s. 189 (3) Madras Estates Land Act is not more comprehensive than s. 11 of the C. P. Code. 43 M 859 = (1920) M W N 639 = 12 L W 512 = 28 M L T 359 = 39 M L J 476 = 60 I C 700.

—Finality or correctness of the Revenue Court decision under s. 106 B T Act. cannot

C. P. C. (1908) S. 11 (Contd.).

(3) Competent Court—(Contd.)

(4) Revenue Courts decisions of—(Contd.)

be questioned in a civil suit : 18 C W N 466 = 20 I C 910.

—And an order of settlement Officer under s. 106 B T Act or decree under s. 9 of Act III of 1898 (B C) operates as *res judicata* 22 C L J 148 = 30 I C 944; see also 2 C W N 491.

—Under s. 105 B T Act the Revenue Officer has jurisdiction to decide whether or not the applicants are joint landlords : A I R 1926 C 1180 = 97 I C 702 = 30 C W N 974.

—A decision of a Revenue Court under s. 199 (3) operates as *res judicata* in a Civil Court A I R 1927 All. 717 = 25 A L J 387 = L R 8 A 122 Rev. = 49 A 606 = 101 I C 501.

—Suit in Civil Court after adverse decision in Revenue Court for same relief is barred. A I R 1923 All 527 = 77 I C 638.

—Decision by Collector as to emoluments of office under s. 13 of Mad. Hereditary Village Offices Act 1895 is *res judicata* : A I R 1930 Mad. 573 = 31 L W 537 = 58 M L J 542 = Ind. Rul. (1930) Mad. 662 = 127 I C 226.

—Order of the Land Record Officer declaring that a person who had mortgaged his village should be declared as *ex-proprietary* tenant of his *sir* land will operate as *res judicata* in a subsequent civil suit. A I R 1929 Oudh 362 = 4 Luck. 220 = 6 O W N 1310 = Ind. Rul. (1929) Oudh 277 = 115 I C 837.

—Defendants successfully pleading in Revenue Court that suit did not lie in that Court, cannot resist the suit subsequently filed in the Civil Courts on the ground that it does not lie in Civil Court. A I R 1927 All. 711 = L R 8 A 283 Rev. = 105 I C 639.

—If an objection is raised to a suit that it is barred by s. 32 of the Agra Tenancy Act, 1901,

—Prior decision in Revenue Court operates as *res judicata* so far as Revenue Courts are concerned. 2 U P L R (B R) 24.

—Where the subject-matter in the subsequent Civil suit was different from the one the former suit in Revenue Court, but the title in both suit was the same, Held the Decision of Revenue Court is *res judicata*. A I R 1924 All. 10 = L R 4 A 165 Rev. = 21 A L J 330 = 72 I C 155.

—Dispute between rival claimants once decided by Revenue Court cannot be re-opened in Civil Court—Agra Tenancy Act s. 167. A I R 1924 All. 609 = 78 I C 1008.

—The effect of a decision operating as *res judicata* is not destroyed by subsequent publication of Record of Rights. A I R 1921 Cal. 761 = 35 C L J 200 = 60 I C 389.

—In a correction of *jamabandi* case the Court did not frame specific issues for trial as provided by S. 42 of the U. P. Land Rev.



## C. P. C. (1908) S. 11 (Contd)

## (2) Competent Courts—(Contd)

## (4) Revenue Courts decisions of—(Contd)

Act, but clearly and definitely understood the issues, heard the arguments of, and cases cited by, both the parties and pronounced a decision. Held that such a decision though passed in a miscellaneous proceeding and without a formal drawing up of issues, does, under S. 44 of the U P. Land Rev. Act. operate as *res judicata* in a subsequent case, for declaration of tenure between those parties as regards the kind of tenure already determined in the *jamabandi*. 1 O L J 745=27 I C 73.

—But a Civil Court decree in a suit for profits cannot operate as *res judicata*, such suit being only triable by a Revenue Court under Tenancy Act. A I R 1922 All. 397 = 65 I C 530.

(2) Matters not within the jurisdiction of Revenue Court:—A decision of a Revenue Court on a matter within its jurisdiction will bar a subsequent suit in another Revenue Court on the same matter between the same parties 2 O L J 63 = 27 I C 525.

—Revenue Court's decision on compromise in mutation proceedings, See C P Code, O. 32, R. 7. 12 A L J 998.

—Decision passed by Revenue Court on question whether a land is an estate or not, will not be *res judicata* in a suit in a Civil Court for a declaration that the lands do not form an estate. 14 L W 251=69 I C 938.

—Plff's suit in the Revenue Court against the deft. for possession of an occupancy holding was dismissed.

—The plff. thereafter sued in the Civil Court for possession of the holding and a grove. Held, that the decision as to the holding could not operate as *res judicata* in the civil suit relating to the grove, inasmuch as the Revenue Court could not have decided the suit brought in respect of the grove. 34 I C 162.

—Proceedings relating to the amendment of *jamabandi* is of a summary nature and does not operate as *res judicata* so as to bind Revenue Courts 2 U P L R. (B R) 127.

—The Revenue Court is not a competent authority to decide finally whether any particular lands constitute an estate or not. A I R 1921 Mad. 473=14 L W 251.

—A former decision by a Revenue Court cannot operate as *res judicata* in a subsequent suit which is only triable by a Civil Court. 69 P W R 1913=196 P L R 1913=48 P R 1913=18 I C 918.

—Where a Revenue Court which is not authorised to determine a matter finally gives a decision on the matter it does not operate as *res judicata* in a suit in the Civil Court. 73 P R 1915=111 P L R 1915=64 P W R 1915=29 I C 778

## C. P. C. (1908) S. 11 (Contd).

## (2) Competent Court—(Contd)

## (4) Revenue Courts decisions of—(Contd)

—A decision of a Revenue Court deciding that the plff. as co-sharer was not entitled to maintain a suit for ejectment cannot operate as *res judicata* with reference to the question whether the plff. as a *lambardar* is entitled to maintain such a suit. 35 I C 612.

—Decision of Revenue Court on its own want of jurisdiction is not *res judicata*. A I R 1929 All. 132=L R 10 A 173 Rev.

—As there are no Revenue Courts in Burmah, there is no question of *res judicata* as to orders of revenue officers. 8 L B R 556=9 Bur L T 183=35 I C 356.

—A Certificate Officer, is not a Court. So any decision by him cannot operate as *res judicata* in the Civil Court A I R 1929 Cal 130 =112 I C 71.

—A decision of an Assistant Collector of the Second Class about a certain *Khudkhasht* being owned by one party does not bar a suit in the Court of an assistant Collector of the First Class. A I R 1924 All 466=L R 5 A 105 Rev. = 88 I C 164.

—Incidental expression of opinion by Revenue Court, is no bar in the Civil Court. 23 I C 705.

—A decision of an Assistant Collector second class does not operate as *res judicata* in a suit of the same nature instituted in the Court of the Assistant Collector first class, which the former was not competent to try. 28 C 78 not followed. 11 A L J 231=19 I C 126.

—Decision by Revenue Court as to quantity of land is not *res judicata* in Civil suit. 19 C L J 244.

—Revenue Court's judgment inter parties may be relevant but is not *res judicata*. 160 P W R 1913 = 280 P L R 1913 = 20 I C 831.

—Point incidentally decided in Settlement proceedings is not *res judicata* : 18 C W N 333.

—Decision of revenue court is not *res judicata* in a suit in Civil Court on matter within the cognisance of the latter Court. (1920) M W N 639.

—(3) Ejectment Suits:—Ejectment decree by a Rev. Court under s. 95 Agra. Ten. Act is no bar to a suit in Civil Court. 13 A L J 278 =27 I C 913=37 A 223.

—Previous suit in Revenue Court for ejectment "as tenant" does not bar a subsequent Civil suit for ejectment as trespasser: 17 A L J 646=1 U P L R (H C) 74=50 I C 734.

—In a suit for declaration that mortgage in favour of appellants was benami and void, a finding of a Revenue Court against plff's allegation in a prior ejectment suit against him operates as *res judicata*: A L R 1923 I 590.

—In a suit for ejectment by a *malguzar* in



C. P. C. (1908) S. 11 (Contd.).

(3) Competent Court—(Contd.)

(4) Revenue Courts decisions of—(Contd.)

Rev. Court, the tenant claimed possession as servant of a third person, who was added as deft. No issue as to status of the person was framed, but an ejectment decree was passed.

—Held, the decree did not bar a subsequent Civil suit by the third person claiming the land as grove : A I R 1929 A 17=L R 9 A 289 Rev. = I R 1929 A 374=115 I C 454.

—As a suit for ejectment cannot be tried by Asst. Collector of Second Class in U. P., a dismissal of suit for rent in such Court does not bar a suit for ejectment against the same party in Court of Assistant Collector of First Class. A I R 1926 All 34=89 I C 379.

—Similarly a decision of the Assistant Collector, Second Class in a suit for ejectment is no bar to the decision in an ejectment suit of the Assistant Collector, First Class A I R 1933 All 368=82 I C 790.

—(4) Mortgage Suits:—Decision in a suit under s. 44 of Agra Ten. Act, that the mortgage was satisfied does not bar a subsequent suit in Civil Court for a declaration that the mortgage still subsisted : 17 A L J 352 = 49 I C 591=41 A 369. Revenue Court's decision in redemption proceedings bars subsequent civil suit for redemption. A I R 1924 Oudh 245=10 O L J 606=L R 5 Oudh 92=80 I C 698.

—An occupancy-tenant mortgaged his occupancy holding in 1893. In 1908 he relinquished the holding. The *zemindar* brought a suit against the mortgagee in the Revenue Court for ejectment and obtained a decree. Held, that the mortgagee could not subsequently sue in Civil Court that the relinquishment was ineffective as against him. 8 A L J 940=11 I C 287.

—In 1863 H. executed a deed of conditional sale in favour of F. transferring his share in a village to him. In 1864, the question of the proprietary title to the village came for determination before the same Settlement Courts they decided that whatever rights H. had in the village, had been transferred by him to H. L. the representative of F. and that H. had also made over possession to him. The purchasers of the equity of redemption under the deed of 1863 brought the present suit for redemption. Held, that although the Settlement Courts had lost sight of the fact that under the deed of 1863 the executant had a right of equity of redemption which had not been taken away by foreclosure proceedings and which was still in existence, the decision of the Settlement Courts that H. had no right left in the property was final on the question of the existence of a right to redeem and that the present suit was barred by *res judicata*. 23 O C 270.

C. P. C. (1908) S. 11 (Contd.).

(2) Competent Court—(Contd.)

(4) Revenue Courts decisions of—(Contd.)

—(5) Partition Suits:—S. 11 of C P Code does not apply to orders passed by Rev. Officers in partition cases 5 P R (Rev.) 1914=229 P L R 1915=27 I C 417.

—Dispute settled definitely by Revenue Court in partition proceedings, cannot be re-opened in a Civil Court A I R 1926 Oudh 72=12 O L J 638=2 O W N 539=89 I C 221.

—(6) Pattah decisions relating to:—The decision as to the proper terms of a *puttah* in respect of one *fasli* is *res judicata* for subsequent *faslis* also. 13 L W 307 = 62 I C 501.

(7) Relationship of landlord and tenant, decision as to

—But where Legislature has conferred jurisdiction over the Revenue or other Court to decide questions of title or otherwise, such Court is competent for such purposes. Thus a decision under s. 105 B. T. Act by Revenue Court as to existence of relationship of landlord and tenant between the parties is *res judicata* in a subsequent suit for ejectment Pat. 3 L J 379=46 I C 125; and see cases under sub-heading (10) Title, decision on *infra*.

—A suit to eject the defendant on the ground that he was a non-occupancy tenant from year to year was dismissed by the Revenue Court as the deft was holding under a lease. Plff. next sued to cancel the lease in the Civil Courts, on the ground that the lease was given without authority. Held, that the Rev. Court had jurisdiction to go into the question of validity of the lease and that the suit was not maintainable 37 All. 41 = 12 A L J 1252 = 26 I C 731.

—(8) Rent Suits:—The doctrine of *res judicata* is not applicable to rent suits (*Obiter*). Held, even otherwise, as the two suits related to different *jots*, the doctrine was inapplicable. 72 I C 103.

—Decision of Settlement Officer prior to Act of 1898 (B C) as to the liability of land claimed to be held as rent free, to payment embodied in a record of rights does not bar a Suit for assessment of rent or same land in Civil Court 22 C L J 57.

—The earlier finding does not become final in a case where the Court that tried the prior suit for rent has no power over the claim in a subsequent suit for rent. L R 3 A 156 Rev.

—In a suit for recovery of rent of the area of a house site included in the tenant's holding, held that prior decree of a Civil Court establishing and declaring the landlords' right to get a reasonable rate of rent on the site in question operated as *res judi-*

## C. P. C. (1908) S. 11 (Contd.)

## (3) Competent Court—(Contd.)

## (4) Revenue Courts decisions of—(Contd.)

*cata*, though mere finding in the judgment of the Civil Court on the question of the land lords' right might not operate as such. 23 M L T 183 = (1918) M W N 340 = 7 L W 471 = 44 I C 663.

—A Revenue Court has jurisdiction to entertain a claim between rival claimants to a tenancy.

—A decree for rent therefore does not operate as a bar to the maintenance of a suit for declaration of a right to a tenancy against a rival claimant. 13 A L J 295 = 27 I C 914.

—A decision of a Civil Court in a suit for contribution of rent does not operate as *res judicata* in a subsequent suit in the Revenue Court for division of holding. 16 R D 281 = 13 L R 179 (Rev.)

—Finding of collector as to payment of rent is no bar to subsequent suit for determination of rent. 32 I C 706.

—The decision of a Deputy Commissioner in a proceeding held under s. 185 of U. P. Land Revenue Act or s. 158 of the Oudh Land Revenue Act, 1876, does not render the question of the amount of rent and cesses payable by an under-proprietor to the superior proprietor, *res judicata*. 12 I C 331.

—(9) Status, decision on:—Where Settlement courts have fully gone into the rival claims and dealt with and decided all points raised, it is not open in subsequent proceedings to one party to deny the status of another party as found by such Settlement Court's or to assert more than was awarded by such Settlement Courts. 39 M L J 115 = 28 M L T 334 = 25 C. W. N. 170 = 23 O. C. 291 = 18 A. L. J. 1057 = 7 O L J 439 = 57 I. C. 397 (P. C.)

—Revenue Court decision as to status of a tenant cannot be set aside in Civil Court: A. I. R. 1922 A 336 = 20 A. L. J. 606 = 77 I. C. 139 = 44 A 724.

—Decision of a Revenue Court on the status of tenant operates as *res judicata* in a subsequent civil suit: A. I. R. 1923 C. 433 = 71 I. C. 307 = 50 C. 79.

—Decision of Revenue Court in a rent suit as to status of a tenant operates as *res judicata*: A. I. R. 1921 A 348 = 58 I C 772 = 43 A 191.

—But it has been held by Oudh Court that a Revenue Court's decision regarding the status of a tenant will not bar an adjudication on the point by the Civil Court A I R 1937 Oudh 183 = 14 R D 196 = 100 I C 851.

—Revenue Court declaring a tenant to be grove-holder, the landlord cannot bring a subsequent civil suit to eject the tenant as

## C. P. C. (1908) S. 11 (Contd.)

## (3) Competent Court—(Contd.)

## (4) Revenue Courts decisions of—(Contd.)

licensee: A I R 1928 A 343 = L R 9 A 141  
Rev. = I R 1929 A 779 = 118 I C 171.

—A decision by the Revenue Court that defendant was not plaintiff's tenant does not bar a plea that a party was a rent free grantee. A I R 1924 All 479 = L R 5 A 103  
Rev. = 79 I C 587.

—A decision of Revenue Court on question whether plaintiffs were agricultural tenants or not is one within its jurisdiction A I R 1927 All 613 = L R 8 A 235 Rev = 102 I C 887.

—A decision of a Settlement Officer passed in a case relating to the amendment of *jama bandi* declaring deft's status as tenant liable to pay rent is not *res judicata* either in the Revenue Court or in the Civil Court. 14 A L J 140 = 33 I C 343.

—(10) Title, decision on:—As a rule, Revenue Courts have no jurisdiction to decide questions of title and questions as to rights of the landlords and tenants inter se: 24 A L J 1009 = 98 I C 983 = A I R 1927 A 70 = 48 A 774.

—Hence, the decision by a Revenue Court of a question of title, though such decision was necessary for the disposal of the case before it, cannot prevent the same question being again litigated between the same parties in a Civil Court 26 All 468 = 24 A W N 109; see to the same effect: 27 M L J 475 = 1 L W 641 = 27 I C 162; and 1912 P L R 186 = 155 P W R 1912 = 16 I C 886; and 1918 P L R 75 = 75 P W R 1918 = 47 I C 98; and A I R 1926 O 181 = 89 I C 810; and A I R 1930 A 611 = 1930 A L J 756 = 125 I C 23 = 52 A 823 = 11 L R A (Rev.) 207; and A I R 1931 O 21 = 129 I C 173 = 7 O W N 1106 = 11 L R A (Rev.) 385 = 6 Luck 419; and 38 I C 814 = 1916 P C 150 = 20 O C 8 = 15 A L J 113 = 109 Bom L R 202 = 26 C L J 165 = 21 C W N 582 = 32 M L J 388 = 21 M L T 102 = 1917 M W N 456 = 5 O L J 34; and 2 C L J 306; and 15 I C 239; 17 A L J 646 = 1 U P L R (H C) 74 = 50 I C 734; and 27 A 569 = 2 A L J 283 = 26 A 468 = 1904 A W N 109; and 1 Cal L J 310; and 11 Cal W N 939; and 20 Ind Cas 298 = 19 Cal L J 197 = 18 Cal W N 938; and 29 Ind Cas 122 = 19 Cal W N 636; and 34 I C 354; and 25 I C 372; and 7 M 61; and 17 M 106; and A I R 1931 Pat 215 = 10 Pat 337 = 12 Pat L T 717.

—A Civil Court can entertain a suit for a declaratory decree that plff. has acquired a proprietary title in the land notwithstanding a Revenue Court decision that plaintiff is merely the tenant of the deft. and that the decision by the latter court on the question of title is not *res judicata* in the Civil suit. 77 P W R 1918 = 45 P R 1918 = 84 P L R 1918 = 46 I C 13.

C. P. C. (1908) S. 11 (Contd.).

(3) Competent Court—(Contd.)

(4) Revenue Courts decisions of—(Contd.)

—Previous suit in Revenue Court does not bar a subsequent suit in Civil Court for a declaration of the plff's title as against strangers : A I R 1930 O 21=7 O W N 1106=14 R D 669=I R 1931 O 93=129 I C 173.

—A decision of Revenue Court on title in a suit for profits can be questioned by a Civil Court if the Revenue Court proceeds upon an entry of a certain person's name in the revenue papers as conclusive on the question of title 19 A L J 279=3 U P L R (All) 47=62 I C 684.

—Decision by a Revenue Court, in a suit for resumption of a *muafi* holding that the holders had no transferable rights and that the transferor had obtained under proprietary rights does not bar a suit in Civil Court by transferee for a declaration that he had obtained title as under proprietor A I R 1928 Oudh 344=5 O W N 487=L R 10 A 38 Rev.=12 R D 153=3 Luck 636=110 I C 357.

—Where in a suit for ejectment the deft. pleaded that he was rent-free grantees and the Court found for him, it was held in a subsequent suit by the plff for a declaration that the defts were not rent-free grantees, that a question of proprietary title was raised by the Defts. and decided in their favour by the Revenue Courts and that by not appealing to the Dt. Judge, the plff. allowed it to become final and the subsequent suit in a Civil Court was barred by *res judicata* 37 All 280=13 A L J 326=28 I C 432.

—In a suit for ejectment in the Revenue Court, the defendants to that suit pleaded title in themselves, and the Assistant Collector held that the plaintiff had failed to prove title as against them, held that the decision of the Revenue Court operated as *res judicata*, as between the parties 8 A L J 341 F B=33 A 453=10 Ind Cas 924.

—Suit by plff for correction of Record under s. 106 B T Act does not bar a suit by deft for declaration of title and recovery of possession A I R 1927 Cal 246=54 C 114=44 C L J 467=100 I C 293.

—When as between parties to the revenue suit, a Civil Court of competent jurisdiction has decided the title to the property adversely to the plaintiff, who claims profits, the Revenue Court cannot ignore that decision. 2 A L J 834= A W N 1906, 1. see also; 31 A 253=6 A L J 145=1 I C 886; and 31 A 257=6 A L J 138=1 I C 885.

—But where Legislature has conferred jurisdiction on Revenue Courts to decide questions of title in certain cases, such decision operates as *res judicata*. A I R 1928 A 343=9 L R A Rev. 141; see also 10 A L J 52=16 I C 339; and 35 A 464=11 A L J 671=

C. P. C. (1908) S. 11 (Contd.).

(3) Competent Court—(Contd.)

(4) Revenue Courts decisions of—(Contd.)

21 I C 2; and 38 A 533=14 A L J 734=35 I C 41; and 4 O L J 68=39 I C 133.

—Thus a Revenue Court decision on proprietary title under ss. 199 and 201 of Agra Ten. Act operates as *res judicata* in Civil Court. A I R 1922 A 95=66 I C 915=20 A L J 340 see to the same effect: 29 All 160=4 All L J 53=1907 All W N 6; and 32 All 8=6 A L J 917=3 Ind Cas 954=7 All L J 555=6 Ind Cas 834 and 2 A L J 334; and A I R 1922 All 95=4 U P L R (A) 113=20 All L J 340 and 1 A W N 1907; and A I R 1921 All 59=19 All L J 279=69 Ind Cas 684.

—A decision of Assistant Collector acting under s. 199 (b), Agra Tenancy Act. bars a subsequent suit to determine title between the same parties. A I R 1923 All 556=L R 5 A 26 Rev.=73 I C 460.

—A decision as to title under s. 177 of Punjab Land Revenue Act by a Revenue Court is *res judicata* in a Civil Court. 63 I C 781.

—In a rent suit by landlord under s. 148 A of B T Act a cosharer landlord who was also a party averred purchase of tenancy. Held, that the decision as to validity of the said purchase barred a subsequent suit by plaintiff for a declaration that previous decree was invalid A L R 1933 C 2=59 C 1250.

—Similarly a revenue Court decision under Chota Nagpur Tenancy Act Ss. 87, 258 and 264. 19 C W N 998=23 C L J 118=43 C 136=31 I C 691.

—But Where a Revenue Officer could have tried question of title in partition proceedings as a Civil Court, but did not try it as a Civil Court, the question was not barred by *res judicata*: 91 I C 528=A I R 1926 L 128.

—Where, after relinquishment by tenant in favour of the landlord, the latter obtained an *ex parte* decree against the mortgagee of the tenant although a suit by the mortgagee contesting the relinquishment was pending in Civil Court. Held, that the suit by the mortgagee was barred by *res judicata*. 8 A L J 940.

(5) Criminal Courts, decisions of.

—And generally, no fact found to be proved in Criminal Court shall on that account be taken to be proved in a Civil Court: 17 C W N 434=19 I C 24; see to the same effect: 6 W R Civ. Ref. 26; and 10 W R 56; and 12 W R 477; and 14 W R 339; and 2 A H C R 1870.

—But the decision of a Criminal Court would be admissible in evidence if the parties are substantially the same and the issues in the two cases are identical 41 B 1=33 I C 633=18 Bom L R 185=17 Cr. L J 133.

C. P. C. (1908) S. 11 ( *Contd.* )

( 3 ) Competent Court—( *Concl'd.* )

( 5 ) Criminal Courts, decisions of—( *Concl'd.* )

—Award of mesne profits in cases under ss. 145 and 146 Cr. P Code, involves questions of *res judicata*, and the Magistrate should leave the matter to the Civil Court 20 M L T 247.

—As to the principle of the *res-judicata* in criminal courts see 40 B 97=17 Bom L R 881=31 I C 361=16 Cr L J 761; and A I R 1927 S 10 = 97 I C 417=27 Cr L J 1105=21 S L R I.

#### ( 6 ) Foreign Courts.

—See cases under s. 13 clause (a).

### (4) DIRECTLY AND SUBSTANTIALLY IN ISSUE.

#### *Synopsis*

(A) Test-when can an issue be said to be directly and substantially in issue.

- (1) General.
- (2) Suits between Landlord and Tenant e. g. Rent suits etc.
- (3) Other suits.

(B) Explanation IV (might and ought)

- (1) Plaintiff bound to set up all claims.
- (2) Defendant bound to resist on all grounds.
- (3) Suits between Landlord and Tenant.
- (4) Mortgage suits.

(C) Unnecessary issues and findings.

(D) Incidental issues and findings.

- (1) General
- (2) Suits between Landlord and Tenant.
- (3) Other suits.

(E) Not in issue.

- (1) General.
- (2) Suits between Landlord and Tenant.
- (3) Partition suits.
- (4) Suits by Hindu widows and Hindu reversioners.
- (5) Mortgage suits.
- (6) Other suits.

( A ) Test-when can an issue be said to be directly and substantially in issue.

#### *Synopsis*

- (1) General Principles
- (2) Adoption Cases
- (3) Suits between landlord & tenant
- (4) Other suits

#### ( 1 ) GENERAL PRINCIPLES.

—( 1 ) Introductory:—Matters directly and substantially in-issue, as distinguished from

C. P. C. (1908) S. 11 ( *Contd.* ).

( 4 ) Directly and Substantially in Issue—( *Contd.* )

(A) Test-when can an issue be said to be directly and substantially in issue ( *Contd.* )

( 1 ) General Principles—( *Contd.* )

matters collaterally or incidentally in issue, may be divided into matters actually in issue ( Expl. III ) and matters constructively in issue ( Expl. IV—might and Ought ). As for the matters actually in issue, Expl. III lays down that no matter can be said to have been "directly and substantially" in issue in a suit, unless it is alleged by one party and denied or admitted either expressly or impliedly by the other (unless if it comes under Expl. IV) Every matter in respect of which relief is claimed in a suit is necessarily a matter "directly and substantially" in issue. Matter cannot be said to be a matter which is, at a stage when the Court cannot go into it. 62 M L J 177 ( 179 ) = 35 L W 66=138 I C 51=A I R 1932 M 233=I R 1932 M 498=A L R 1932 M 253

—And this is true with regard to all the facts that are necessary for such disposal. A I R 1921 Cal 750=33 C L J 186=25 C W N 106=62 I C 491.

—That is to say, a fact cannot be in issue directly when the judgment can be correct whether the fact exists or not. A I R 1931 Cal 353=34 C W N 839=Ind Rul ( 1931 ) Cal 450=131 I C 562.

—Where a decree is couched in general terms, and a question of *res judicata* arises upon it, the Court must look at all the intrinsic evidence before it and the materials of the case as a whole, including even the statements in the depositions of the witnesses 24 C 504=1 C W N 249 P C see also 13 Bom L R 162=10 I C 748.

—A summary dismissal of a suit on the ground of *res judicata* is bad if all the conditions necessary for the application of the rule are not stated in the plaint : 75 P W R 1913=194 P L R 1913=18 I C 1007.

—( 2 ) Decision on material issues is *Res Judicata*:—Where the same question is raised in both suits it operates as *res Judicata* : A L R 1933 L 235.

—It is not that the two questions should be allied, but that they should be identical. 36 I C 650. see also A I R 1923 P C 175=45 M L J 588=46 M 751=50 Ind App. 295=21 A L J 730=25 Bom L R 1275=40 C L J 20=2 Pat L R 104=33 M L T 285=L R 4 P C 180=18 M L W 903=1924 M W N 65=28 C W N 493=74 I C 492 P C and 4 I C 1017=1909 Pun W R 157.

—For exhaustive illustrations of the principle see sub-headings ( 2 ) Adoption Cases; ( 3 ) Suits Between Landlord and Tenant and ( 4 ) Other Suits *infra*. Previous decision, not deciding a material issue, cannot operate as *res judicata*. A I R 1928 Nag. 169=113 I C 225.



C P C ( 1908 ) S. 11 ( *Contd.* )

(4) Directly and Substantially in Issue—(*Contd.*)

(A) Test-when can an issue be said to be directly and substantially in issue—(*Contd.*)

(1) General Principles—(*Contd.*)

—(3) Decision need not be express, but must be necessary:—Decision which is not express, but which is necessarily implied operates as *res judicata*: 24 C W N 223=54 I C 952; for finding by necessary implication is as good as express finding. 113 I C 120=A I R 1928 Lah 888.

—(4) Issues necessary for decision:—It is not intended that the issue must have been absolutely necessary for the determination of the previous suit. It is sufficient that the Court and the parties thought so and proceeded on that assumption 25 L W 797=A I R 1927 Mad 643=103 I C 90 see also 1931 M W N 1323=A I R 1932 Mad. 207=35 M L W 35=62 M L J 141; and 30 Bom L R 902=A I R 1928 B 349; and 6 C L J 621.

—Thus where plff. excluded certain question but the deft. expressly urged in appeal to decide it; Held, that the question was necessary for the decision of the suit A I R 1924 P C 144=26 Bom L R 651=51 C 631=35 M L T 169=51 I A 293=23 A L J 76=L R 5 P C 137=29 C W N 34=20 L W 770=(1924) M W N 723=6 P L T 750=3 Pat L R Civ. 193=47 M L J 23=80 I C 827.

—Similarly where both the parties thought that a particular issue was necessary it was held that the Court must decide on it. 57 I C 524.

—And where a party himself raised an issue, which was decided in his favour by the trial Court but against him by the Appellate Court, the decision on that issue was held to be *res judicata*: I R 1929 A 776=118 I C 168.

—(5) Issue wrongly framed:—Issue Wrongly framed and decided against a party is binding only to the extent of the rights specifically asserted by the party in suit. A I R 1924 Mad. 193=18 L W 288=72 I C 798.

—(6) Issue not the basis of the decree:—Decision of the issue in the prior suit need not have been the basis of the decree. It is enough that the issue had been finally heard and determined and that it arose directly and substantially (and not incidentally or collaterally), for determination *i. e.*, that it was necessary for the determination of the suit though it may not have been ultimately made the basis of the decree. A I R 1925 Cal. 985=85 I C 953.

—So long as an issue is material in both suits, a decision on it in the previous suit will operate as *res judicata* notwithstanding the fact that the previous suit could have been decided independently of the decision

C. P. C. (1908) S. 11 ( *Contd.* ).

(4) Directly and Substantially in Issue—(*Contd.*)

(A) Test-when can an issue be said to be directly and substantially in issue—(*Contd.*)

(1) General Principles—(*Contd.*)

upon that issue. A I R 1927 Oudh 625=4 O W N 307=101 I C 522.

—Even if a particular matter be not included in a formal issue, if it is directly and substantially in issue between the parties, and if there be a decision thereon, it will operate as *res judicata*. A I R 1926 Cal. 1022=30 C W N 873=97 I C 73 see to the same effect: 39 Mad. 1202.

—(7) Logical Priority of issues not important:—Once, it used to be held that where there are two or more findings in a suit, any of which is sufficient for the disposal of the case, that one which in the logical sequence of necessary issues, should have been first found, and the finding of which would have rendered the other findings unnecessary for the making of the decree is the finding which can operate as *res judicata*. 8 A L J 409=9 I C 983; and 89 A W N 1900; and 17 A 174.

—But it has now been decided that the theory of logical priority of issues is incorrect. 32 P L R 577=Ind. Rul (1931) Lah 870=134 I C 102.

—Where a decision is based on several grounds, any of which is sufficient to dispose of the case, the decision is *res judicata* as regards all the grounds: 24 C 900 See similarly, 4 M L T 90; 13 P R 1918=122 P W R 1917=41 I C 479; and 31 M L J 97.

—A judgment operates *res judicata* as regards all the findings which are essential to sustain the judgment. A I R 1930 Pat. 71=10 P L T 630=Ind. Rul. (1930) Pat. 4=120 I C 229, see also: A I R 1926 Cal. 1003=43 C L J 501=95 I C 1011; 1913 M W N 775=21 I C 258=38 M 158; and 41 P R 1899.

—But where the decision of a ground is not the basis of the decree, that is to say, where the particular ground is not sufficient to dispose of the case, and yet judgment is given, the decision of that ground does not operate as *res judicata* as to other grounds: 16 C L J 9=16 C W N 877=15 I C 453=40 C 29 See also A I R 1925 Cal. 996=41 C L J 396=88 I C 616.

—(9) Identity of subject-matter not essential:—The expression "matter in issue" is distinct from subject-matter and object of the suit as well as the relief that may be asked for in it, and the cause of action on which it is based. The rule of *res judicata* requiring the identity of the matter in issue will apply even when the subject-matter, the object, the relief and the cause of action are different.



C. P. C. (1908) S. 11 (Contd.).

(4) Directly and Substantially in Issue—(Contd.)

(A) Test-when can an issue be said to be directly and substantially in issue—(Contd.)

(1) General Principles—(Conclld)

—Thus where a former suit between the same parties was brought on one mortgage deed, and the present suit related to another mortgage deed, and when same issues are raised in the subsequent suit it was held that the findings on the issues operated as res judicata: A I R 1933 O 475 see to the same effect A I R 1930 C 47=124 I C 161=38 C W N 876=57 C 258; and 11 A 148; and 6 C 715; and A I R 1932 N 90.

—The Lahore High Court, however, has held that where the subject-matter to be decided by Court is different in the two suits, the previous suit does not operate as res judicata. A I R 1931 Lah 254=136 I C 31.

(2) SUITS BETWEEN LANDLORD AND TENANT.

—A decree for rent operates as res judicata upon the question of the existence of the relationship of landlord and tenant between the parties, for that question is almost always material in a rent-suit: 10 I C 363. See also 34 C 922; 15 C W N 335=13 C L J 1=8 I C 660; 29 I C 415; 40 I C 659.

—Similarly, if, in a rent-suit, the whole case depends upon the question of title, either owing to the intervention of a third party or otherwise, the parties will be conclusively bound by the decision on that question: 1 C L R 35=3 C 145 F. B. See also 3 C 705 (decision on title owing to the intervention of a third party), 44 I C 129 (decision of title in suit for rent by mortgagee), and 6 C L R 305=5 C 832 (decision on title with reference to the value of the subject-matter involved in the suit for rent).

—The following cases also relate to the same principle that, if, in a rent suit, the question of title is directly and substantially in issue, the decision on that question will operate as res judicata between the parties in a subsequent suit for title, or ejectment or any other suit in which that question is material: 15 I A 97=5 Sar 211=15 C 756 (P C); 25 C 136; 14 C L J 220=12 I C 9; 19 I C 632; 18 C W N 116=20 I C 344; A I R 1925 Cal. 1004=85 I C 804.

—But when the question of title is not directly and substantially in issue in a rent suit, decision on it will not operate as res judicata. For example, where the deft. denies the relationship of landlord and tenant on the ground that although he is a tenant he is the tenant not of the plff. but of a stranger to the suit or pleads that the tenancy has terminated or alleges any further similar ground in answer to the claim for rent which

C. P. C. (1908) S. 11 (Contd.).

(4) Directly and Substantially in Issue—(Contd.)

(A) Test-when can an issue be said to be directly and substantially in issue. (Contd.)

(2) Suits between Landlord and Tenants—(Contd.)

makes the question of title only collaterally and incidentally in issue. 42 I C 785. See also 30 C L J 13=51 I C 356; 24 C 569; 6 C W N 66.

—And where a rent suit was dismissed on the ground that no relationship of landlord and tenant existed between the parties, but it was found that the plff. had title to the land in question, it was held in a subsequent suit for ejectment that the findings in favour of the plff's title could not operate res judicata as the decree in rent suit was passed in spite of those findings. 49 I C 248.

—Similarly as to suits other than rent-suits. Thus a decision in the previous suit, that the tract in dispute was covered by the lease of one of the two tenants, and not that of the other, is binding on the landlord, who was a party to the previous suit: A I R 1924 Cal. 128=76 I C 917=38 C L J 291.

—It has, sometimes, been asserted that the decision in a rent suit operates as res judicata on one point alone viz, the relationship of landlord and tenant: A I R 1924 Cal. 460=72 I C 655.

—But this is not true. A decision on any matter in a previous rent-suit is conclusive in a subsequent suit if that matter is directly and substantially in issue in both the suits. What is necessary to see is whether the decision in the former rent suit was given on an incidental point or on a question that went to the very root of the case.

—Thus a rent-decree, passed on the basis that the deft. was sub-tenant, bars subsequent suit by the deft. on the contention that he is the landlord: A I R 1923 All. 113=72 I C 1024.

—In a suit for enhancement of rent the question of the rate of rent is necessarily a material issue 59 I C 752 (Cal.) See also 2 I C 11.

—If in a rent suit, a Kabuliyat has been held to be valid and effective as against the tenant, a subsequent suit by the tenant for the declaration that the Kabuliyat is null and void is barred: 47 I C 8.

—Propriety of patta is a material issue in a rent suit: 37 Mad. 70=23 M L J 543=12 M L T 500=(1913) M W N 1=17 I C 445 (F B.)

—Where three questions were material in a rent suit, namely, the jama payable, the land in arrears and the jama for the period in question, decision on them was held to operate as res judicata: 17 C L J 71=17 C W N 76=16 I C 22.

## C. P. C. (1908) S. 11 (Contd.)

## (4) Directly and Substantially in Issue—(Contd.)

(A) Test—when can an issue be said to be directly and substantially in issue—(Contd.)

## (2) Suits between landlord and tenant—(Contd.)

—Decision in a rent suit upon the question as to incidents of the tenancy will operate as *res judicata*. Thus a decision, that *raikumat* was payable implied that it was payable under a custom, and hence it operated as *res judicata* : 15 IC 837.

—A material issue in a rent suit, heard and decided, operates as *res judicata* between the parties. 16 CLJ 89 = 10 IC 382.

—But a decision on the question of tenancy in a suit for enforcement of easement cannot be *res judicata* as to that question in a subsequent suit for ejectment or rent. A I R 1925 Cal. 985 = 85 IC 953.

—On the question whether a decision in a previous rent suit, as to the rate of rent payable annually, operates as *res judicata* in a suit for the rent of subsequent years, there is a conflict of opinion. There are cases suggesting that such decision does not operate as *res judicata*.

—Thus it has been held that an adjudication as to the amount of rent annually payable is not conclusive except where the previous suit was based on a contract between the parties and the question of the rate of rent under the contract was a material issue in the previous suit : 51 IC 56 See, similarly, 57 IC 48, and 6 IC 860.

—The balance of authority, however, points to the other direction. Thus it has been held that a decision as to rate of rent operates as *res judicata* in a subsequent suit for rent, provided the matter was adjudicated upon for all times to come : A I R 1926 Cal. 650 = 43 CLJ 146 = 30 CWN 593 = 94 IC 837.

—Decision as to rent for one year bars the question as to rent for subsequent years : A I R (1925) Mad. 378 = 82 IC 990.

—Where the question as to the amount of rent annually payable is put in issue and is finally decided, the decision operates as *res judicata*. 42 IC 583. See, similarly, 41 IC 584; 16 CLJ 41 = 16 IC 447; 22 WR 282.

—Decision as to annual rent payable is final unless it is shown that the rent has been subsequently changed : 40 IC 460.

—Prior suit for fair and equitable rent was dismissed with a finding as to the rate of rent. Held, the finding was conclusive between the parties : 33 IC 159.

—In an ejectment suit, where Court passes a decree for rent only the finding as to title need not be incorporated in the decree. A I R 1929 Bom. 32 = 30 Bom. L R 1602 = Ind. Rul. (1929) Bom 224 = 114 IC 272.

## C. P. C. (1908) S. 11 (Contd.)

## (4) Directly and Substantially in Issue—(Contd.)

(A) Test—when can an issue be said to be directly and substantially in issue. (Contd.)

## (2) Suits between Landlord and Tenant—(Contd.)

—The real test in rent suit is whether what was decided in the previous suit related to the question of the general liability of the defendants to pay the rent or did it relate to the amount of rent payable by the defendants for a particular period. In the former case the decision does, in the latter case it does not. operate as *res judicata* A I R 1930 Pat. 585 = 9 Pat. 674 = Ind. Rul. (1931) Pat 33 = 128 IC 337.

## (3) OTHER SUITS.

—Where the question whether A, B, and C were brothers was directly and substantially in issue in the former suit and all the other requisites of *Res judicata* were present, the plffs in the subsequent suit were barred from propounding the same pedigree-table : A I R 1933 L 1188.

—Suit to establish title to land—subsequent suit for refund of the purchase price—not barred. A L R 1933 L 64.

—Where the issue as to possession was directly and substantially in issue in the former suit under s. 9 of Specific Relief Act, the decision in that suit was held to operate as *res judicata*. A L R 1933 C 616.

—Where a document was held in a former suit to have no effectual binding power over the estate in question and as between the parties, a subsequent suit to enforce that document was barred. M W N 1912, 73, P C = 9 A L J 165 = 15 CLJ 180 = 14 Bom. L R 177 = 16 C W N 603 = 14 Ind. Cas. 463.

—An *ex parte* decree against plff, based on mutual and common accounts of the parties bars a subsequent suit by plaintiff based on an account due from defendant. A I R 1927 All 799 = 25 A L J 711 = 103 IC 365.

—In a suit to establish right to part of the property comprised in a *sale-deed*, the *sale-deed* was declared as fictitious and nominal. A subsequent suit for possession of some other part of the property in the *sale-deed* is barred : A I R 1923 All 613 = 45 A 515 = 21 A L J 421 = 76 IC 370.

—Where the validity of a mortgage was material in a suit on pro-note, executed on account of interest due on the mortgage. It was held that the finding that no undue influence was practised and that the consideration was proved operates as *res judicata* in the later suit. A I R 1924 Lah. 702 = 75 IC 1048.

—Suit by members of a *thavazhi* for a declaration that the suit property belonged to their *thavazhi*, it was held that the deci-

## C. P. C. ( 1908 ) S. 11 ( Contd. )

## ( 4 ) Directly and Substantially In Issue—(Contd.)

(A) Test—when can an issue be said to be directly and substantially in issue ( Contd. )

## ( 4 ) Other Suits—( Contd. )

sion in a prior suit against the thavazhi conformed as it was by the High Court on appeal, as regards the same property, operated as res judicata A I R 1923 Mad 153 = 31 M L T 389 = 16 L W 768 = 74 I C 27.

—In a suit for ejectment the defendants pleaded *ius tertii* and that they were mortgagees from real owner. The suit was dismissed on the ground that mortgage was by plaintiff's predecessor and not third persons. Held, this finding was res judicata, and defendants could not plead otherwise in a redemption suit by plaintiffs. 12 L W 277 = 60 I C 397.

—Where in a suit challenging alienation of a shop by the *granthi* of the Darbar Sahib it was held that the properties were *waqf* and attached to the *granthi* and could not be alienated. Held that this finding is not relevant in a subsequent suit by the successor to the office challenging the alienation by his predecessor in title. 64 P W R 1920 = 1 Lah. 540 = 59 I C 734.

—An order by Court bringing the name of a person as a contributory on the list of contributories if not appealed against is final 41 P L R 1915 = 227 P W R 1915 = 28 I C 95.

—Suit by puisne mortgagee, against prior mortgagee for redemption and against mortgagor for possession. A subsequent suit for possession against mortgagor alone is barred: 124 P L R 1914 = 12 P R 1914 = 22 I C 896.

—Remedy exhausted by a prior decree—Prior mortgagee dispossessed by subsequent mortgagee—Decree obtained for possession—Suit by a subsequent mortgagee for redemption. 11 A L J 937 = 22 I C 70.

—In a prior suit for invalidation of patta granted by the plaintiff it was found that the plaintiff was not a Karnam. A subsequent suit by plaintiff for declaration of his right as hereditary Karnam is barred. 8 Ind. Cas. 427 = 9 M L T 107.

—Suit by karnavan for possession on the basis of the prior decree is not barred. 21 M L J 87 = 6 I C 268.

—In the prior suit the question was whether the will executed by the widow was in accordance with her husband's wish. Decision on this issue will operate as res judicata in a subsequent suit on the will between the parties 40 C 145 (B).

—In the judgment in the suit under the Religious and Charitable Endowment Act and that of the Court of appeal the question of the plaintiff being the "grand chela" of

## C. P. C. ( 1908 ) S. 11 ( Contd. )

## (4) Directly and Substantially in Issue—(Contd.)

(A) Test—when can an issue be said to be directly and substantially in issue—(Contd.)

## ( 4 ) Other Suits—(Contd.)

Mathu Das was directly and substantially in issue, the fact having been alleged by the plaintiff and denied by the opposite party. Both the Courts definitely found that the plaintiff was the "grand chela" of Mathu Das.

—The question was material in so far as the plaintiff had no right to take proceedings under the Religious and Charitable Endowment Act, unless he established that he had such an interest in the "math" as entitled him to sue. 1932 A L J 615 = 138 I C 406 = I R 1932 A 40 = A I R 1932 A 603 ( 605 ) = A L R 1932 A 931.

—Where a son sued to set aside a sale-deed executed by his father and the suit was dismissed on the ground that the sale was real and that the defendant took possession under the sale, a subsequent suit to set aside the same sale, on the ground that new cause of action arose on the father's death, was barred, the finding on the question of possession being res judicata and the cause of action the same. 28 I C 873.

—Where the pro-note was the subject matter of the former suit and no set off was formally claimed in the previous suit and the defendant's liability for the sums now in suit could only have been asserted and tried if there had been a formal set off it was held that it cannot be said with certainty that liability for the particular sums now in dispute was directly in issue in the other suit. A I R 1923 Lah. 146 = 84 I C 382.

—Judgment in prior suit deciding character of possession of a party to suit is res judicata between same parties or their representatives. A I R 1923 Mad. 88 ( 2 ) = 16 L W 514 = 31 M L T 298 = ( 1922 ) M W N 676 = 43 M L J 737 = 46 M 525 = 70 I C 994.

—Where a suit to set aside an alienation by Hindu manager was dismissed on the ground that alienation was a mortgage and the suit ought to have been one in redemption. Held that the decision that the alienation was mortgage operated as res judicata against the alienee in the subsequent suit for redemption. 34 M L J 431 = 23 M L T 291 = 7 L W 482 = ( 1918 ) M W N 334 = 45 I C 975.

—Where in the previous suit by the plaintiff under O XXI r. 63, B was added as defendant and after setting out the sale by the latter to the plaintiff, the plaintiff asked for a declaration that the properties belonged to plaintiff and were not liable for the decree in execution of which they were attached it was held that it cannot be said that the question was not in issue between the plaintiff

C. P. C. (1908) S. 11 (Contd.).

(4) Directly and Substantially in Issue—(Contd.)

(A) Test—when can an issue be said to be directly and substantially in issue. (Concl'd)

(4) Other Suits—(Concl'd.)

and B merely by reason of the fact that B admitted plaintiff's claim, which was disputed successfully by the attaching creditor, and that the decision of the question against the plaintiff in the previous suit was *res judicata*. A I R 1925 Mad. 319 = 20 L W 979 = 85 I C 689.

—Prior decision relating to a document will bar a subsequent suit to enforce that document. 15 C L J 180 = 14 Bom. L R 177 = 16 C W N 603 = 9 A L J 165 = (1912) M W N 73 = 11 M L T 73 = 14 I C 463 (P C).

—Previous suit between mortgagor and mortgagee deciding title. Held the matter was *res judicata*, 28 M L J 184 = 27 I C 989.

#### (B) MIGHT AND OUGHT-EXPLANATION IV

##### Synopsis

- (1) General
- (2) Plaintiff when bound to set up all claims.
- (3) Defendant when bound to resist on all ground.
- (4) The principle applied to suits between landlord and tenant.
- (5) The principle applied to mortgage suits.

##### (1) GENERAL

—A subsequent suit against one of the defendants based on the same cause of action, is not maintainable even if the plaintiff had alternative claims arising out of that cause of action. A I R 1931 Mad. 268.

—It should be noted, however, that Explanation IV, s. 11 cannot be given effect to bar a suit, unless all the requisite conditions laid down in the body of the section are also fulfilled. A I R 1930 Mad 264 = Ind Rul (1930) Mad 955 = 127 I C 139.

—And also, that the application of the rule of constructive *res judicata* in practice depends upon the particular facts of each case

20 C 79 P C; see also 56 I C 193.

—Whether a particular matter should have been made a ground of defence or attack must depend upon the particular facts of each case. A I R 1928 Oudh 411 = 50 W N 653 = 112 I C 266.

—Any ground of attack or defence which is deemed to have been directly and substantially in issue in a suit must also be deemed to have been heard and finally decided adversely to the party who failed to raise it 13 L W 307 = 62 I C 501; see also 111 I C 127; and 6 C W N 889; and 56 I C 193; and A I R 1925 C 427 = 40 C L J 507 = 29 C W N 253 = 85 I C 123;

C P C (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd.)

(B) Might and Ought—Explanation IV. (Contd.)

(1) General—(Concl'd.)

and A I R 1925 P C 55 = 52 I A 100 = 47 A 158 P C; and 20 A 110 (confirmed on appeal by P C in 24 A 429); and 25 B 189; 37 M 70 = 17 I C 445; and 76 I C 612 = A I R 1923 R 239 = 1 R 363; and 35 C 979; and 1 I C 66 = 13 C W N 513; and 12 P R 1915; and 11 L L J 97.

—In 24 C 711; and 28 C 17 It had been held that a matter may be deemed to have been in issue directly and substantially under Expl IV but it cannot be deemed to have been heard and finally decided under the same Expl. This view, however, has been rejected by the same High Court in later cases, and other High Courts have always stuck to the opposite view, see cases cited above. The only way in which a matter at issue between the parties can be held to be *res judicata* when it has not been actually decided by the Court is under s. 11, Explanation IV, of the C P Code. On a summons for directions under rr. 130 and 131 of the Bombay High Court Rules (Original Side), it is not necessary to decide whether the Court which is to try the suit has jurisdiction to try the suit as between the defendant and the third party. Hence the mere fact that on such summons for directions, the liability between the third party and the defendant is directed to be tried at the trial does not necessarily make the question of the trial Court's jurisdiction *res judicata*. A I R 1921 Bom. 195 = 45 B 24 = 59 I C 28.

—Explanation IV to s. 11 would not apply to a point which the Court may or may not decide in its discretion. A I R 1927 Mad. 120 = 24 L W 812 = 99 I C 525.

—It also does not apply to a case where the parties had in a previous suit, put forward all the grounds of attack and defence which were embodied in clear and distinct issues, but the Court not only did not decide them but expressed the exclusion of them from decision. 70 P R 1918 = 11 P L R 1918 = 71 P W R 1918 = 44 I C 859; see also A I R 1931 O 157 = 8 O W N 179 = 14 O L J 233 = 132 I C 767.

—The principle of *res judicata* in s. 11 Explanation IV applies to interlocutory proceedings in the same suit. A I R 1930 Bom 431 = 54 Bom. 696 = 32 Bom. L R 389 = Ind. Rul. (1930) Bom. 401 = 126 I C 305.

#### (2) PLAINTIFF WHEN BOUND TO SET UP ALL CLAIMS.

—(1) Introductory:—Plea, which ought to have been raised in the first suit but not so raised, is *res judicata*: A I R 1927 Rang. 333 = 6 Bur. L J 26 = 10 I C 327. See to the same effect: A I R 1927 M 120 = 24 L W 812 = 99 I



## C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd.)

(B) Might and Ought-Explanation IV—(Contd.)

(2) Plaintiff when bound to set up all Claims—(Contd.)

C 525; A I R 1923 All. 115 = 79 I C 486; A I R 1923 Bom. 145=24 Bom. L R 1281=70 I C 103; 156 P L R 1914; and 3 W R 39.

—A ground of attack which must have been but was not referred to in plaint cannot be the basis of another suit. A I R 1925 P C 55 = 48 M L J 64 = 52 I A 100 = 6 L R P C 50 = 12 O L J 117 = 2 O W N 25 = 47 All. 158 = 27 O C 334 = 27 Bom. L R 725=29 C W N 749 = 23 A L J 739 = 22 L W 58 (P C)=91 I C 280.

—Relief which ought to have been claimed in the prior suit, but not so claimed, cannot be claimed in a subsequent suit : A I R 1925 P C 280 = 24 A L J 33 = (1926) M W N 49 = 5 Pat. 135 = 7 P L T 97 = 28 Bom. L R 1126 = 30 C W N 482 = 52 I A 418 = 42 C L J 592 = 50 M L J 1 (P C) = 91 I C 1033 see also 104 I C 892 = A I R 1928 M 58.

—(2) Alternative Claims :—Where alternative claims are available to the plff. both must be pleaded, unless they are incompatible. Omission to plead one will bar a subsequent suit on that ground : A I R 1931 Mad. 268. See also : 4 P R 1899; and 15 I C 817; and 15 Bom. L R 266 = 19 I C 558 = 37 B 224.

—A suit by a Hindu son to avoid a sale in execution of a decree against his father on the ground that the debt was tainted with immorality is barred by a similar previous suit on the ground that the property was joint family property : A I R 1923 All 231 = 65 I C 511.

—Where the plff. sues only for a declaration, though he is out of possession, and the suit is dismissed on merits, he cannot bring a subsequent suit for possession : 77 I C 756 = A I R 1923 All 554. See also 4 N L J 192=21 N L R 124=A I R 1922 Nag. 129=65 I C 194; 26 M L J 125; and 63 P R 1896, (but see 1 W R 252; and 8 C 483)

—First suit on contract. On failing to prove the agreement, a second suit to recover the same money as compensation for services rendered is barred : 5 Bur L T 95 = 15 I C 374.

—Where a person failed to assert in the alternative a claim to share and his claim for the whole is dismissed he or his heirs are precluded from claiming the share A I R 1924 Mad 711=34 M L T 147=(1924) M W N 569 =47 M L J 20=78 I C 1055.

—First suit for possession of certain lands on the ground that they appertained to the jote purchased by the plff. Subsequent suit for the possession of the same lands on the ground that they appertained to another jote

## C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd.)

(B) Might and ought Expl. IV—(Contd.)

(2) Plaintiff when bound to set up all claims—(Contd.)

which the plff had purchased is barred : 43 I C 221.

—The plff must set up all the capacities under which he becomes entitled to the right claimed: A I R 1931 B 114=129 I C 737=33 Bom L R 1473 ; see also 54 I C 200.

—Thus, a prior suit as donee from the deceased father having been dismissed on merits, the plff was barred from bringing a subsequent suit as heir of the deceased father: A I R 1923 R 122 = 72 I C 14 = 2 Bur L J 34 = 11 L B R 451.

—Previous claim as *kittima* operates as a bar to a subsequent suit on the claim as *apatitha*. A I R 1928 Rang. 9 = 5 R 565 = 105 I C 586.

—Plff. suing to recover property on the allegation of being a reversioner to the last male owner must include the alternative ground of being a reversioner of the female holder : A I R 1926 M 234 = 23 L W 13=1926 M W N 126=49 M L J 701 = 91 I C 660.

—Suit against adopted son of donee as reversionary heirs of donee bars a subsequent suit as collaterals of minor 20 I C 890 = 86 P R 1913 = 324 P L R 1913 = 213 P W R 1913.

—If, in a partition proceeding independent lots have been given to different parties without any consent it must be assumed under s. 233 (k) of U P Land Revenue Act 1901 that none of the parties wanted to raise a question of title and a party who subsequently wants a larger share is barred by Expl IV to s. 11 C P C : 1931 A L J 307 = 133 I C 468 = I R 1931 A 676=A I R 1931 A 462.

—In a partition suit a decree was passed allotting certain share to a party. Subsequent suit by him claiming a larger share is barred 9 O W N 1052 (1058).

—A subsequent suit brought against a defendant, who was one of the defendants in a previous suit based on the same cause of action which was dismissed, is not maintainable. Even if plaintiff had alternative claims arising out of same cause of action, he might and ought to have set up his alternative claims. A I R 1931 Mad 268=135 I C 13.

—First suit on title by purchase, subsequent suit on title by inheritance is barred. A I R 1931 Lah. 217 = 32 P. L. R. 214=Ind. Rul. (1931) Lah. 956 = 134 I C 524. See also : A I R 1923 Mad 257=1922 M W N 846 = 17 L W 188 = 32 M L T 82=46 M 135 = 72 I C 207.

—First suit based on title on strength of gift; second suit basing claim on title by



C. P. C. (1908) S. 11 (Contd.).

(4) Directly and Substantially is Issue—(Contd.)

(B) Might and ought Expl. IV—(Contd.)

(2) Plaintiff when bound to set up all claims—(Contd.)

inheritance is barred, if the title by inheritance existed on the date of the first suit: A I R 1923 Rang. 122=2 Bur L J 34=11 B L R 451=72 I C 14. See also 15 W R 168; and 12 W R 55. A prior suit for possession bars a subsequent suit for possession on different title: 43 I C 221.

—A Hindu brother suing the widow for the property of the deceased by right of survivorship, cannot subsequently dispute the title of the widow as the legal representative of her husband in other proceedings: A I R 1925 M 218=79 I C 891.

—A donor instituted a suit for a declaration that the deed of gift which she had executed was invalid and inoperative. The Court held against her and upheld the validity of the gift deed. She thereupon applied for an amendment of the plaint by allowing her to raise an alternative case to the effect that, even if the deed of gift was valid and operative, she had been in adverse possession of the property gifted for more than 12 years ever since the date of the gift deed and that therefore the title of the donee had become extinguished under S. 28 of the Limitation Act.

—The amendment was, however, refused, and the suit was dismissed. Held, that, although adverse possession was not a subject-matter of decision in that suit, the question of the donor's adverse possession for 12 years prior to the date of that suit was a matter within Expl IV to S. 11—a matter which might and ought to have been raised in that suit, and that the dismissal of that suit was a bar to a subsequent plea by the donor that she had been for 12 years in adverse possession prior to the date of that suit. Held, however, that the dismissal of the donor's suit was no bar to a plea by her that she was in adverse possession for less than 12 years prior to the date of that suit. The dismissal of the suit means no more than that the donor had not been in adverse possession for 12 years prior to that suit. It does not mean that her possession thereafter ceased to be adverse 36 C W N 965.

—Coutts-Trotter and Seshgiri Aiyar JJ. have remarked that observations in 26 M 760, as to suits by reversioner would seem to be opposed to the decision in 11 B L R 158 of the Privy Council: (1916) 1 M W N 286=34 I C 456.

—Claim of adverse possession—a matter which might and ought to have been raised—not put forward in a previous suit—

C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd.)

(B) Might and ought Expl. IV—(Contd.)

(2) Plaintiff when bound to set up all claims—(Contd.)

barred in subsequent suit A L R 1933 C 219=60 C 8=36 C W N 965=A I R 1933 C 246.

—Suit for share of inheritance—Omission to set up claim for unpaid dower—Subsequent suit for dower, not barred. 19 O C 171.

—In a prior pre-emption suit, the liability which should have been determined was not done. Held, that a subsequent suit for determination of such liability was not maintainable: A L R 1933 L 816.

—Plea not directly relevant for the decision of the question raised in the suit need not be raised and in such a case there is no bar of constructive *res judicata*. A I R 1925 Mad 226=(1924) M W N 666=21 L W 204.

—Where it is not certain that a matter, if proved, would have affected the result of the suit, it cannot be said that the matter ought to have been made a ground of attack within S. 11 Expln. 4 C P C. 46 I C 929.

—Plea, which the plff could have raised in the alternative, but which he was not bound to raise, does not bar a fresh suit if not raised. A I R 1921 Lah. 17=3 Lah L J 215=63 I C 717 See also: A I R 1927 Nag. 322=103 I C 888.

—A debt, who has a claim for set off is not bound to put it forward in answer to the suit against him and his failure to do so cannot take away his right to sue for the amount subsequently. 28 M L J 513=29 I C 34.

—(3) Inconsistent Pleas or Multifariousness:—Where evidence in support of one ground is such as might be destructive of the other ground, the two grounds need not be set up in the same suit. A I R 1921 Pat 326=2 P L T 285=60 I C 393.

—The rule that the plff. must join all the grounds of attack is subject to the limitation that the said grounds must not be incongruous and that the evidence to support one of the grounds ought not to be destructive of the alternative ground which could have been made in the previous suit—suit on claim by purchase, subsequent on basis of joint ownership: A I R 1931 Bom. 187=33 Bom. L R 204=Ind. Rul. 1931 B 286=130 I C 606.

—Matters which are so dissimilar that their union might lead to confusion should not be joined as grounds of attack. A I R 1930 Lah 487=Ind Rul (1930) Lah 762=126 I C 570.

—The question as to whether a plaintiff can or cannot bring a second suit depends upon whether (1) he could have based his

C. P. C. (1908) S. 11 (*Contd.*).

(4) Directly and Substantially in Issue—(*Contd.*)

(B) Might and ought Expl. IV—(*Contd.*)

(2) Plaintiff when bound to set up all claims—(*Contd.*)

former suit upon the same cause of action, and (2) whether he ought to have so based it. In the first case he can escape from the operation of s. 11 and from O. II. r. 2, if he can show that he was, when he instituted the first suit, actually unaware of his second cause of action. In the second case he can similarly escape from the operation of those sections if he can show that he could not unite his two causes of action in a single suit without inconsistency and confusion.

71 I C 1009.

—Dissimilar matters, if their union does not lead to confusion, "ought to be united as grounds or attack or defence." A widow purported to charge land which she held for her widow's estate with payment of a debt: and afterwards surrendered her estate to the next heir or reversioner on condition that he should pay all her debts.

—A creditor then sued both the widow and the reversioner, the cause of action against the latter being that in his hands was the property chargeable. The suit was dismissed as against him, but decreed against the widow. After the widow's death, the creditor sued the reversioner for the balance of the widow's debt on the ground that he had agreed on taking the surrender of the estate from her to become responsible for her debts. The Privy Council held that this "might and ought to have been made ground of attack" in the former suit, and must accordingly be deemed to have been directly and substantially in issue in the former suit, and therefore, that the suit was barred 20 Cal.

79=19 I A 234.

—All grounds of attack or defence which can be joined without embarrassment must be put forward (1916). 1 M W N 286 = 34 I C 456.

—A party disputing a will on the ground that the properties willed belonged to the undivided Hindu family, which was found against, can bring a subsequent suit seeking a declaration that the will gave only a life estate to the widow, and that he was the reversioner, because it is not necessary that a plaintiff should put forward alternative inconsistent claims M W N 1913, 322=13 M L T 305=24 M L J 418=18 Ind Cas 973.

—A suit for the specific performance of a contract of sale was brought against the vendor and subsequent vendees. The subsequent vendees claimed that they had a preferential claim for pre-emption. The Court thought that such a claim was out of place in that suit and passed a decree directing the execution by the

C. P. C. (1908) S. 11 (*Contd.*).

(4) Directly and Substantially in Issue—(*Contd.*)

(B) Might and ought Expl. IV—(*Contd.*)

2) Plaintiff when bound to set up all claims—(*Contd.*)

subsequent vendees of a sale deed in favour of the plaintiffs in that suit. On their failing to do so, the Court got a sale deed executed on their behalf in favour of the plaintiffs. The subsequent vendees sued the plaintiffs in the prior suit for pre-emption. Held, that the suit was maintainable. As the pre-emption accrues only on the sale taking place, it cannot be said that the question of the right of pre-emption was by implication decided against the present appellants A I R 1932 A 694 (695)=139 I C 714 = I R 1932 A 583.

—(4) One or different causes of action :— Causes of action arising out of the same title; One cause of action decided in an independent suit; Second suit on the other cause of action is barred. A I R 1928 Nag. 112=106 I C 861.

—Different causes of action no res judicata 8 B 174 F. B Same cause of action is the test. 34 M 97=20 M L J 535=8 M L T 60= (1910) M W N 213=6 I C 233.

—Suit for partition of inheritance does not bar a suit for share of gifted property 121 P L R 1917=87 P W R 1917=40 I C 255.

—Where a partition suit is dismissed on compromise, a subsequent suit for partition is maintainable if the parties fail to carry out the terms of the compromise : 37 All 155=13 A L J 98=27 I C 694; see also 142 A W N 1906 =28 A 627; and 56 I C 610.

—The preponderance of opinion is that when there has been an inadvertent omission to partition some of the joint family property a subsequent suit may be brought for partitioning the same. The property which has not been partitioned must remain joint family property, and as such susceptible to partition at a future date, at the very least by a member of the family who was not the original plaintiff in the partition suit : 138 I C 186=15 N L J 15= I R 1932 N 74=A I R 1932 N 92=A L R 1932 N 104.

—A prior suit for partition under a partition deed and a Will was dismissed. Subsequent suit after the death of his father for partition of joint family property is not barred because the cause of action is different and there was no obligation to sue in the alternative for a partition of the property as joint family property A I R 1923 Bom 467=25 Bom L R 797=77 I C 92.

—Suit for partition of some properties. Other properties not known to plaintiff Subsequent suit for partition of omitted properties is not barred A I R 1927 Mad 213=38 M L T 82=98 I C 538.

C. P. C. ( 1908 ) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd.)

(B) Might and ought Expl. IV—(Contd.)

(2) Plaintiff when bound to set up all claims—(Contd.)

—Suit for partition of one of the two lands. Partition of the other land suggested but point not raised. Subsequent suit to recover share in the other is not barred A I R 1929 Bom 323 = 31 Bom L R 640 = Ind Rul (1929) Bom 555 = 119 I C 779.

—Where the relief claimed in a subsequent suit is the same as that in a former suit the claim will be barred, though the averment of the facts which conferred title upon the plff. and the evidence which would be given might be different in the two cases : 1919 M W N 677.

—Where the plff. in a suit to redeem a mortgage set up a title as a karnavan of a particular tarwad and in a subsequent suit for the same relief, his title as successor of that tarwad which had become extinct; Held, that the rule of *res judicata* would apply as the joinder of the two titles in the former suit would not have caused any embarrassment in the trial. (1919) M W N 677.

—Dismissal of suit for redemption—subsequent suit in ejectment, no bar. 13 B 326

—Failure in redemption suit—Second suit in ejectment. No bar. 35 B 507 = 13 Bom. L R 895 = 12 I C 387.

—First suit for possession Subsequent suit for redemption is maintainable, because a claim for possession of property as owner and as mortgagee are essentially different matters, and their union is calculated to lead to confusion. 20 C 139 see to the same effect 90 C 235.

—In prior suits for redemption or for trespass, right of sp. performance though available, need not be raised : A I R (1930) Mad. 539 = Ind. Rul. (1930) Mad. 942 = 127 I C 126.

—First suit under the Deccan Agriculturists' Relief Act XVIII of (1879), s. 10 A, for a declaration that a sale was in reality a mortgage Second suit for specific performance of an agreement to re-sell is not barred. A I R 1922 Bom. 29 = 24 Bom. L R 236 = 46 B 803 = 66 I C 815.

—An alternative cause of action for an alternative relief is not a matter which should be made a ground of attack within the meaning of Expl. IV : A I R 1926 Oudh. 545 = 96 I C 71

—Plff. in a suit for pre-emption against one of the vendees, got possession of the whole property, the other vendee sued the plff. and the first vendee and recovered possession of his share, plff. not claiming refund of half price. Subsequent suit for such half price lies:

C. P. C. ( 1908 ) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd.)

(B) Might and ought Expl. IV—(Contd.)

(2) Plaintiff when bound to set up all claims—(Contd.)

A I R 1929 Lah. 294 = Ind. Rul. 1929 Lah. 661 = 117 I C 229.

—Plff. in a per-emption suit, need not plead alternatively that he is the sole owner of the property. A I R 1926 Oudh 545 = 96 I C 71.

—A suit for pre-emption was decreed against one of the alienees only and formal possession was given to the pre-emptor.

—Other alienees objected to the pre-emptor's application for mutation, and their objections were allowed to the extent of their own share, pre-emptor can sue for possession of property released in favour of the alienees or in the alternative for a proportionate refund of pre-emption money : A I R 1922 All. 475.

—Where plff's suit for possession was dismissed and the debt was granted a decree for pre-emption, and the plff. appealed only against the dismissal. Held that the decree for pre-emption stood as it was, and as the question of title was directly and substantially in issue in the pre-emption case it was *res judicata*, and therefore, the decree in favour of the plaintiffs given by the lower appellate Court is invalid. 3 Lah. L J 473 = 74 I C 583.

—Suit under S. 9 of the S. Rel. Act, for possession of lands with crops—Decree for possession alone Subsequent suit for mesne profits, is not barred. 2 L W 157.

—In a suit for possession of immoveable property mesne profits were not asked for. Subsequent suit for those mesne profits is maintainable: A I R 1924 Bom. 368 = 26 Bom. L R 288 = 80 I C 259.

—Mesne profits asked for in a suit for possession, but decree silent as to mesne profits. Subsequent suit for mesne profits is not barred A I R 1929 Cal 566 = 33 C W N 943 = Ind. Rul (1930) Cal 385 = 124 I C 65.

—When the decree for possession and past and future mesne profits is silent about future mesne profits a fresh suit for future mesne profits is not barred. (1915) 11 U B R 81 = 31 I C 103.

—Where the first suit was based on the allegation of dispossession in respect of a certain plot, a subsequent suit for allotment of a plot of land in lieu of maintenance is not barred. A I R 1929 Lah 872 = 11 Lah 99 = Ind Rul (1930) Lah 236 = 121 I C 428.

—Alienee from members of a joint family is not bound to enforce his remedy in the suit by another alienee against him : A I R 1927 Mad 61 = 97 I C 783.

C. P. C. ( 1908 ) S. 11 ( *Contd.* )

(4) Directly and Substantially in Issue—(*Contd.*)

(B) Might and ought Expl. IV—(*Contd.*)

( 2 ) Plaintiff when bound to set up all claims—(*Contd.*)

—Suit against father and J the present deft. for a declaration that certain properties were held by them on trust for the plffs. Suit was referred to arbitrators. Father died. Later, the plff applied for an amendment of the plaint for a declaration the properties in question were acquired by the father, that he died possessed thereof, and that the plffs. as heirs were entitled to possession.

—The arbitrators decided that they had no jurisdiction to do so as the only matter referred to them had been the question of trust. Thereafter the plffs. applied to the Court but the application was refused. And the plffs brought the present suit. *Held* that the suit was not barred as the plff were suing under a different title as also that the plff's attempt to raise that point was refused by the former Court. 31 Cal L J 163=55 I C 767; see also A I R 1917 P C 111=16 A L J 271=20 Bom L R 553=27 C L J 303=22 C W N 505=34 M L J 361=23 M L T 147 = 7 Mad L W 315=1918 M W N 295=4 P L W 249 = 44 Ind Cas 304 P. C.; and A I R 1923 M 212 = 16 M L W 314=43 M L J 293=1922 M W N 597=69 I C 465; and A I R 1926 M 774=1926 M W N 399=24 M L W 367=96 I C 993=51 M L J. 99.

—Previous suit for a particular right does not bar a subsequent suit for general right. A I R 1930 Mad 701=(1930) M W N 520=31 L W 845=58 M L J 703 = Ind Rul ( 1930 ) Mad 810=53 M W 761=125 I C 554.

—Mr. Justice Rattigan has pointed out the conflict of authority as to whether in a suit for possession a plff is bound to support his claim by bringing forward every title which he has or claims to have in respect of the property in question : 37 I C 119.

—Where a suit is compromised, but, later, the deft successfully sues to set aside the compromise, the plff can sue, on the original cause of action : A I R 1928 Lah 489=29 P L R 254=110 I C 550.

—In which the former suit for sale of land as on mortgage was held not to bar a subsequent suit by the same plff against the same deft to recover the land as on usufructuary mortgage from deft in wrongful possession, because the rights in dispute in the two suits were different (followed in, 29 M 153 F B; 2 N L R 94 Appr. in 15 M L J 374).

—Where a suit to set aside a sale on the ground of non-receipt of consideration with a finding that consideration was partly paid, a subsequent suit for balance purchase money is not barred. A I R 1925 All 486=47 A 561=23 A L J 461=87 I C 257.

—Failure or infructuous termination of a suit for registration of sale-deed under s. 77

C. P. C. ( 1908 ) S. 11 ( *Contd.* )

(4) Directly and Substantially in Issue—(*Contd.*)

(B) Might and ought Expl. IV—(*Contd.*)

( 2 ) Plaintiff when bound to set up all claims—(*Contd.*)

of Regis. Act does not bar a subsequent suit by purchaser for specific performance of original contract and for recovery of possession of property contracted to be sold. 54 A 68=(1931) A L J 1092=136 I C 561 = I R 1932 A 209 = A I R 1932 A 96.

—First suit that the land was not shamilat was dismissed and the land was allotted to the defts. Subsequent suit that the defts had no right to share in the shamilat is not barred : 13 I C 445=24 P W R 1912=134 P L R 1912.

—Acquisition of easement—*Res judicata*—Easements Act, 1882 s. 13, 9 Ind Cas 813.

—(5) Subject-matter different—Expl. IV will apply only to cases where the subject-matter of the two suits is one : 21 O C 1=4 O L J 648=44 I C 368; see also 24 C 83 and 24 C 711 and 20 C L J 183.

—The doctrine of constructive *res judicata* will not be extended beyond the subject matter of the particular litigation, 16 C L J 394 = 17 I C 927.

—Where subject-matter is not the same in both the suits, doctrine of constructive *res judicata* does not apply. A I R 1929 Cal. 201 = Ind. Rul. ( 1929 ) Cal. 493 = 116 I C 637.

—In a prior suit for partition a house was not included. Court ordering in 1910 that the house on possession being taken should be divided half and half Plaintiff sued in 1922 to recover a half portion of the house recovered from the debtor. *Held*, that the suit was not barred by *res judicata*. The house was not included in the plaint in the previous suit. It was a subsequent acquisition. A I R 1928 Bom. 365=30 Bom. L R 912=113 I C 173.

—In the case of a plaintiff with two independent titles one as assignee and the other as sub-mortgagee, the dismissal of one suit does not bar a later suit based on the other title, A I R 1931 All 73 = ( 1930 ) A L J 1572 = Ind. Rul. ( 1931 ) All 222 = 129 I C 734.

—Prior suit about disposing power of a testator does not bar a subsequent suit about the estate taken by the widow's legatee : 13 M L T 305 = 24 M L J 418 = 1913 M W N 322 = 18 I C 973.

—Cosharer suing for possession on allegation of partition, and failing can bring a subsequent suit for partition. A I R 1921 L B 13 = 11 L B R 1 = 64 I C 174.

—( 6 ) Knowledge of Plff.—For Expl IV to apply the claim must have been within the knowledge of the person, making it during the previous proceedings. A decree for possession of trees was executed. The judgment-debtor subsequently found that there were excess trees in possession of the decree-



C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd.)

(B) Might and ought Expl. IV—(Contd.)

(2) Plaintiff when bound to set up all claims—(Contd.)

holder, The former consequently brought a regular suit for the recovery of the excess trees.

—It was alleged that the judgment debtor was not aware of the fact till the execution proceedings had closed and the time for an appeal from or a review of the final order in execution was past : *Held*, that the suit was not barred. (1910) I U B R 66 = 10 I C 991.

—Plea which ought to have been urged not raised in the first Court—Allegation of ignorance at the time is a sufficient ground for raising the same plea in subsequent suit. A L R 1933 M 117.

—Plff. can bring a subsequent suit for possession based on a claim of title of which he had no knowledge, and which, therefore, he could not put forth as a ground of attack in a prior suit. 94 P R 1916 = 37 I C 119.

—Suing on false cause of action when in fact a true cause exists and of which the plff. is aware he is presumed in law to have abandoned the true cause of action : 54 I C 200.

—(7) Where no relief is asked for or granted:—Where a suit, claiming relief against several debts alternatively, is decreed against some debts only, who prefer an appeal, and the appeal is allowed, subsequent suit against other debts for the same relief is not barred: 42 I C 548.

—Suit against different debts on alternative causes of action Omission to claim relief against added debts bars a subsequent suit against them (Per. Crouch A J C Contra): 10 S L R 29 = 36 I C 92.

—Where no relief is asked for or granted as against particular person in the former suit, though he was a party there is no *res judicata* : 25 B 589 see also 39 C 527 and 34 A 599.

—Where a court refuses to grant a relief on the ground that no such relief was claimed, such refusal does not bar a subsequent suit for the relief. 40 L J 354 = 41 I C 80. see also 1926 Mad W N 94 = 23 Mad L W 415 = 93 Ind Cas 1: Court refusing to adjudicate upon claim and suggesting a fresh suit—Effect of. 14 B 31.

—A reversioner to the estate of a deceased who brought a suit to set aside an alienation by the widow of the deceased and wrongly described the extent of the property claimed and on a decree being passed acquiesced in that decree is barred from bringing a fresh suit for the property. 27 I C 808.

—In a suit for sp. performance and possession the judgment did not refer to the

C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd.)

(B) Might and ought Expl. IV (Contd.)

(2) Plaintiff when bound to set up all claims—(Contd.)

latter relief. Decision on that relief was unnecessary. *Held*, it is not *res judicata* : A I R 1925 Bom 181=27 Bom L R 42=86 I C 137.

—(8) Where the present plff was debt in former suit :—The matter is *res judicata* if the plea now taken could have been taken by their respective fathers and grandfathers whose names were shown in the plaint. A I R 1924 Lah 26=43 P L R 1922=69 I C 783.

—The debt in a former suit had omitted to plead absence of sale. Fresh suit by him to recover property from pre-emptor is barred. (1930) A L J 601=14 R D 281=Ind Rul (1931) All 333=130 I C 717.

—Where a guarantor, as a debt in the previous suit, omitted to raise the point that the instrument of guarantee did not fully represent the actual agreement arrived at between guarantor and the lender, he was estopped from bringing a fresh suit on that point. 59 C 985=A I R 1932 C 889=A L R 1932 C 1086=141 I C 50.

—A debtor need not claim set off under O. 8 r. 6 in a suit against him, and a suit by him subsequently on the claim is not barred by *res judicata* : 74 P R 1919=52 I C 850.

—An *ex parte* decree was passed against a debtor. A subsequent suit by him for refund of money, recovered from him under the above decree, on the ground that the money had already been paid to the agent of the creditor was held barred. A I R 1923 Mad 551=17 L W 448=44 M L J 495=(1923) M W N 285=72 I C 770.

—Suit for money; Reduction of plaintiff's claim not claimed bars subsequent suit therefor. A I R 1925 Oudh 719=87 I C 1017.

—In a suit for specific performance of contract the debt ought to plead, if at all, that the agreement was void. He cannot bring a separate suit on that plea A I R 1922 Nag. 81=66 I C 850.

—In a suit for the price of the jewels sold the debt omitted to plead part payment. *Held*, he cannot bring a separate suit for recovery of the amount paid, though the High Court could pass a decree to that effect. 33 I C 623.

—In a suit for recovery of water the debt did not allege that the water—course belonged to the Govt. He cannot bring a separate suit on that ground : 27 I C 999.

—There was an agreement to maintain the debt in consideration of the debt executing will in plff's favour. Prior suit on agreement by debt for arrears of maintenance and decree therein. Present suit by plffs to set aside the agreement. *Held*, the plff cannot



C. P. C. 1908 S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd.)

(B) Might and ought Expl IV—(Contd.)

(2) Plaintiff when bound to set up all claims—(Contd.)

rely on events prior to the former suit as they were res judicata : 15 I C 186=(1912) M W N 182

—Claim to maintenance could not have been made a ground of defence in a prior suit for partition. 17 C W N 341=18 I C 764.

—In the previous suit by the husband for dissolution of conjugal rights the wife did not defend but her relatives pleaded impotency of husband. The suit was, however, decreed. Subsequent suit by wife for dissolution of marriage on the ground of impotency and that husband had charged her with adultery is barred (1930) A L J 1569=Ind Rul (1931) All 287=130 I C 495.

—Where a prior suit for possession on the basis of a gift is decreed, a subsequent suit questioning the donor's right to make the gift does not lie: A I R 1927 Oudh 234=1 Luck Cas 78=101 I C 812.

—(9) Where the ground was necessary for the complete and final disposal of the case :—Thus in a partition proceeding independent lots were given to different parties without consent. A party subsequently wanting a larger share is barred by Expl IV. A I R 1931 All 462=15 R D 322=Ind Rul (1931) All 676=(1931) A L J 307=133 I C 468.

—If the matter be such as should have been dealt with in partition proceedings a separate suit does not lie on that matter : A I R 1922 Bom 119=46 B 327=23 Bom L. R. 1171 = 64 I C 995. See to the same effect : 13 A L J 548; and L R I A 44; and 20 A 81.

—A cosharer not objecting to the entry in the Khewatin in the prior partition case cannot subsequently file a suit in Civil Court for having the previous arrangement modified : A I R 1931A 29=1930 A L J 1281=130 I C 382.

—A cosharer holding under an irredeemable mortgage should raise his title in the partition proceedings, because he cannot raise it in a Civil Court after the partition proceedings have become complete and final. A I R 1926 Oudh 509=1 Luck 210=13 O L J 260=96 I C 75.

—A suit for partition being dismissed for default a fresh suit is maintainable. A I R 1924 All 905=46 A 820=22 A L J 749=L R 5 A 541 Civ. = 80 I C 933.

—A suit for exclusive possession of certain property was dismissed on the ground that, on plaintiff's own statement, the property was part and parcel of an undivided mahal. A fresh suit on the same cause of action for a declaration of ownership, and for joint possession if the plaintiff was entitled to that

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C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd.)

(B) Might and ought Expl IV—(Contd.)

(2) plaintiff when bound to set up all claims—(Contd.)

is barred partly by S. 11 and partly by O II, rr. 1 and 2. 11 Ind Cas 87.

—Plaintiff in a suit to set aside alienations obtained a decree in respect of one item against one defendant. He failed to include a prayer to set aside a gift deed. Subsequently he sued for possession of the property gifted. Held, that his second suit was barred under s. 11, Expl. IV. A I R 1931 Bom 114=33 Bom L R 1473=Ind Rul (1931) Bom 209=129 I C 737.

—In a suit for recovery of share by an heir against a Mohommedan Widow, who was in possession in lieu of dower, the widow omitted to claim interest on dower. Held, in a subsequent suit against her representative, claim to such interest is barred. A I R 1930 P C 177=34 C W N 653=(1930) A L J 873 = Ind Rul (1930) P C 334 (P C)=126 I C 430.

—Plea not raised for fear of being fatal to the suit cannot be raised in a subsequent suit : A. I. R. 1924 Lah 83=5 Lah L J 251=24 P W R 1923 = 72 I C 91.

—Party suppressing facts in previous suit cannot use them in a subsequent suit to the prejudice of other persons. A I R 1926 L ah. 603=8 Lah. 15=27 P L R 504=96 I. C. 1002.

—In a suit for possession the plff. must establish his title in that very suit by urging and proving all that would go to establish his title; he cannot reserve one or more of such grounds for a future suit : 54 I. C. 200.

—Plea of Khana damd, not raised in previous suit, cannot be raised in a subsequent suit. 166 P. L. R. 1914.

—Plea of custom not raised in the prior suit cannot be raised in the subsequent suit : A I R 1923 Oudh 242=10 O L J 132=74 I. C. 549.

—Where in a previous suit between the same parties the plff. obtained an *ex parte* decree against the deft. under the terms of a bond, and the plff. again sued the deft. on the same bond claiming compound interest which was disallowed in prior suit; Held that the plff. could not sue for compound interest again and the deft. could not raise the defence of undue influence, want of consideration and weakness of intellect—both matters being *res judicata*. 12 P. R. 1915=226 P. L. R. 1914=128 P W R 1914=24 I. C. 931.

—Where a *patnidar* has been made a party to a reference under the land acquisition proceedings and omits to make a claim at the time of the apportionment of the compensation, a subsequent suit to recover a portion of the compensation in a civil court is not sustainable. 32 I C 922.

C. P. C. (1908) S. 11 (Contd.).

(4) Directly and Substantially in Issue—(Contd.)

(B) Might and ought Expl. IV—(Contd.)

(2) Plaintiff when bound to set up all claims—(Concl.)

—Where there was no proper appointment of a guardian *ad litem* and therefore, the minor was not properly represented in the former suit, the decree passed in the suit does not operate as *res judicata*. A I R 1928 All 447=26 A L J 777 = Ind Rul (1931) All 279=114 I. C. 743.

—Plea that minor was not properly represented in a previous suit though not taken by guardian is *res judicata* where it might and ought to have been taken. A I R 1924 Mad 608=47 M 476=19 L W 410=34 M L T 295=46 M. I. J. 291=77 I. C. 628.

—Prior suit for damages for non-delivery - Dismissal - Bars a suit for delivery of goods. A I R 1924 All 849 = 22 A L J 745 = L R 5 A 580 Civ = 83 I. C. 969.

—Same question—Two distinct applications—Final decision in later suit operates as bar See. 24 I. C. 243.

—“Might and ought” Companies Act. 23 M. L. J. 215=16 I. C. 70=40 Cal. I. (P. C.)

—The non-contesting of a mere petition to transfer decree to another court cannot be held to operate as constructive *res judicata* against an objector under s. 50 C. P. C. A L R 1933 M 485.

### (3) DEFENDANT WHEN BOUND TO RESIST ON ALL GROUNDS.

—Principles applicable to plaintiff equally apply to defendant. For a case to come under the bar of constructive *res judicata*, it is not only necessary that the debt could have raised the present defence in reply to the former suit, but it must also be shown that he was bound to do so: A L R 1933 L 912.

—A question, which ought to have been raised by way of defence to the former suit, must be treated as having been directly and substantially in issue in that suit: 31 C 79. See to the same effect: Ind. Rul. 1929 Lah. 693 = 11 Lah. L J 97 = 117 I C 805.

—Defendant in possession must resist claim on all possible grounds. A I R 1926 Lah. 162 = 7 Lah. 40 = 27 P L R 209 = 94 I C 27.

—In a suit, against the defendant and his father the question of non-transferability, which could have been raised, was not raised in that suit.

—The defendant's father did not contest that suit. *Held*, that the fact that the defendant's father allowed the judgment to go by default would not prevent the matter from being *res judicata* against him, and his son, having inherited the property, is bound by the judgment though *ex parte*. 9 Ind. Cas. 363.

C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd.)

(B) Might and ought Expl. IV—(Contd.)

(3) Defendant when Bound to Resist on all grounds—(Contd.)

—Suit as to a lease of the right to receive offerings was decreed. In a subsequent suit for another period the defence that the right was not transferable was barred, mere fact that the suit was for a different period making no difference: A I R 1928 All. 721 = 113 I C 242 = 26 A L J 185=50 A 394.

—Where the debt did not appear in the previous suit and the defences presently raised were available to him at that time, it was held that the mere fact that the previous decisions were *ex parte* would not be sufficient to exclude these defences from the rule of *res judicata*. A L R 1933 L 1149. (relying on 24 I C 931; and 11 L L J 97).

—Plff. in a former suit omitted to claim relief against two properties. Debt did not appear. Plff got the plaint amended, and a preliminary decree was passed. The debt received notice of the preliminary decree but did not object to the passing of the final decree. In a subsequent suit to enforce the charge. *Held*, the defendant was not entitled to raise the plea as it was barred by *res judicata*. 12 A L J 751= 25 I C 284.

—Defence, which cannot lawfully be raised in a particular case, is not *res judicata* in a subsequent suit: A I R 1925 Oudh 719=87 I C 1017 See also: A I R 1927 All 505 = 103 I C 379=25 A L J 582=L R 8 A 225 Rev.=49 A 918.

—Defendant having a cross demand against plaintiff but failing to have it tried—Plaintiff giving some credit in respect of it and decree passed on that footing—Defendant's claim is not *res judicata*. A I R 1925 Mad 830 = 49 M L J 14 = (1925) M W N 228 = 90 I C 465.

—Debt is not bound to put forward a counter claim or plead an equitable set-off. A I R 1926 Mad 1020 = 24 L W 282 = 97 I C 488.

—If the effect of the decisions in a former suit is necessarily inconsistent with the defence that ought to have been raised but has not been raised, that defence must be deemed to have been finally decided against the person who ought to have raised it. A I R 1923 Rang 239 = 1 R 363 = 2 Bur L J 109 = 76 I C 612.

—One of the co-defts raising a defence which conflicts with the interest of the other. The latter must contest the same, otherwise a decision on it will operate as *res judicata* in a subsequent suit: A I R 1928 Oudh. 155 = 1 Luck. C 733 = 108 I C 817.

—“Might and ought to have been raised” - Partition suit—Issue between co-defts, left undecided. See 20 C W N 1177.

—Where a suit is dismissed on a preliminary point and the debt did not disclose his

C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd)

(B) Might and ought Expl. IV—(Contd)

(3) Defendant when Bound to Resist on all ground—(Contd)

defence on merits, he can raise it in a subsequent suit : 42 I C 508.

(4) The Principle of Expl. IV as applied to suits between landlord and tenant.

—Plff. brought a suit claiming proprietary and cultivating rights in certain land. The deft denied plff's title only to cultivating rights, even though the settlement officer had recorded that land as "sir" : Held, the plea as to settlement entry was *res judicata* 14 N L J 171 = 136 I C 884 = I R 1932 N 44 = A I R 1932 N 36 (38) = A L R 1932 N 78.

—In a previous suit by landlord as against trespassers the defts proved their possession as tenants. Held a subsequent suit as against tenants with due notice is *res judicata*. A I R 1930 Cal 588 = 51 C L J 571 = Ind Rul (1931) Cal 16 = 128 I C 96.

—In a suit for possession of a share of jote the purchaser of a portion of the tenancy is made deft. The latter is not bound to plead under tenancy which he might have. 9 Ind Cas 585.

—Claim as to proprietary rights does not affect under-proprietary rights : 17 I C 334.

—In which the deft. was barred from claiming a set-off for a sum paid on account of previous arrears of rent as he ought to have put in the defence in a former suit for rent. But see 116 I C 637 = A I R 1929 C 201 in which the decision in 24 C 711 has been approved of.

—*Ex parte* decree in prior suits in which no issue was raised as to the rate of rent and there was no decision as to such rate cannot operate as *res judicata* in favour of the landlords. 65 I. C. 581 (Cal.)

—Even if a deft. omits, in a previous rent suit, to raise a defence under S. 29 B. T. Act, he can raise it in a subsequent suit for rent as there can be no estoppel against a Statute : 65 I. C. 581.

—In a suit under S. 9 of the sp. Relief Act. mesne profits are not claimable and hence a subsequent suit for such profits is not barred: 1915 M. W. N. 170 = 30 M. L. J. 326 = 2 L. W. 157 = 28 I. C. 1.

—In a suit for ejectment, the defendants contended they were not under-*raiya*s but occupancy *raiya*s and plaintiffs had unsuccessfully sought to eject the defendants as trespassers. The status of the defendants was however left open in that suit. Held, that the decision as to the status of the defendants ought to have been decided in

C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd)

(B) Might and ought Expl. IV—(Contd)

(4) The Principle of Expl. IV as applied to suits between landlord and tenant—(Contd)

the previous suit and that the later suit was barred by *res judicata* A I R 1930 Cal 690 = 34 C W N 442 = Ind Rul (1931) Cal 222 = 129 I C 574.

—First suit for the ejectment on the allegation that the defendant's interest (under-*raiya*) was an encumbrance which he had annulled by a notice under s. 167 of the Bengal Tenancy Act. Subsequent suit to eject the defendant as a trespasser with an alternative plea that, even if the defendant's under-*raiya* be admitted to be valid, he can be evicted on notice under s. 49 which had been given. Held, that the plaintiff's claim to eject the defendant as a trespasser ought to have been made a ground of attack in the former suit, and so the suit was *res judicata* 11 Ind Cas 127.

—First suit for possession as landlord does not bar a subsequent suit as reversioner because the causes of action are different : 1919 M W N 287 = 52 I C 813.

—Where a plaintiff (who had purchased the property from the defendants and leased it again to them) first sued the defendants for rent and obtained a decree therefor in spite of their contention that the sale in his favour and the lease were nominal and subsequently sued the defendants for recovery of possession of the land, and where the defendants again raised the plea that the sale was nominal. Held, that the decision in the prior suit was not *res judicata* and that the defendants were entitled to set up the nominal character of the sale in the second suit. 1 L W 821 = 25 I C 615.

—A suit by tenant, claiming to be the owner, was dismissed with a finding that the landlord was the owner. Plea of permanent tenancy, by the tenant, in a suit by landlord for possession, is not *res judicata*, as the claims in the two suits are based on wholly different titles: 13 L 195 (203) = 132 I C 657 = 33 P L R 302 = A I R 1931 L 610.

—Where a document creating the relationship of landlord and tenant has been once construed that construction is *res judicata* for all time, and if such a deed was not produced in the prior suit the decision, in default of that construction will be constructive *res judicata* as to the rate of rent 4 Pat. L W 47 = (1918) Pat 218 = 43 I C 753.

—The decision of the question as to the proper terms of a *puttah* in respect of one *fasli* is *res judicata* for subsequent *fasli*es also. 13 L W 307 = 62 I C 501.

—Decision in a previous rent suit whether *ex parte* or not operates as *res judicata* in a

C. P. C. ( 1908 ) S. 11 (Contd.)

( 4 ) Directly and Substantially in Issue—(Contd.)

( B ) Might and ought Expl. IV—(Contd.)

( 4 ) The Principle of Expl. IV as applied to suits between landlord and tenant—(Concl'd)

subsequent rent suit even for a different period if any question which arises in the suit or which if objections were taken by a party ought to have been decided has been decided thereby A I R 1925 Cal 427=40 C L J 507=29 C W N 253=85 I C 123; see also A I R 1921 All 348=43 A 191; and A I R 1926 Cal 114=87 I C 672; and A I R 1930 O 335=7 O W N 507=127 I C 241; and 5 I C 708=14 C W N 339; and 22 I C 383=18 C W N 33; and 4 C W N 43; and 20 C 505; and 16 C L J 124; and 29 I C 694=43 Cal 170=20 C W N 48.

#### ( 5 ) EXPL. IV, AS APPLIED TO MORTGAGE SUITS.

##### *Synopsis*

- ( 1 ) Claim for personal decree.
- ( 2 ) Claim for possession.
- ( 3 ) Claim for pre-emption.
- ( 4 ) Joint-family property.
- ( 5 ) Mortgagee suing mortgagor and puisne mortgagee.
- ( 6 ) Paramount title, plea of.
- ( 7 ) Pleas which a mortgagee is bound to set up in redemption or mortgage suits.
- ( 8 ) Pleas which a mortgagor is bound to set up in redemption or mortgage suits.
- ( 9 ) Property not included in the mortgage.
- ( 10 ) Puisne mortgagee suing mortgagor and prior mortgagee.
- ( 11 ) Redemption and accounts.
- ( 12 ) Redemption and ejectment.
- ( 13 ) Redemption and Mesne profits.
- ( 14 ) Several suits for redemption of the same property.
- ( 15 ) Sub-mortgagee's claim.
- ( 16 ) Suit by or against legal representative.
- ( 17 ) Suit by or against purchaser.
- ( 18 ) Suits for redemption of several mortgages.
- ( 19 ) Two mortgages in favour of the same person—suit on one of them only.
- ( 20 ) Miscellaneous.

##### ( 1 ) Claim for personal decree.

—A mortgagee omitting to claim personal decree cannot afterwards sue therefor : 3 P L T 709=66 I C 945=A I R 1922 Pat. 450=1 Pat. 506

—Where it was decided in a former suit that the plff had a right to obtain personal decree, and in an application for a personal decree under O. 34 r 6 the plea as to bar of

C. P. C. ( 1908 ) S. 11 (Contd.)

( 4 ) Directly and Substantially in Issue—(Contd.)

( B ) Might and ought Expl. IV—( Contd )

( 5 ) Mortgage Suits—(Contd.)

( 1 ) Claim for personal decree—( Concl'd )

limitation was raised it was held that such plea could not be raised because of the bar of res judicata 7 O W N 774=I R 1930 O 417=A I R 1930 O 378=126 I C 689 ( F B ).

...Where a party depositing money to release the property from Court sale, applied to reserve his rights under hypothecation bond relating to property, and the application was rejected, Held, a subsequent suit to recover the money lies 81 I C 301=A I R 1922 Lah. 358.

##### ( 2 ) Claim for Possession.

—First suit for possession on the basis of mortgage. Second suit for possession by the plff on the ground of invalid lease is res judicata 37 B 224 = 15 Bom L R 266 = 19 I C 558.

—The plff purchased the mortgagee's interest and sued for possession, but, as the mortgage was void ab initio, the suit was dismissed. The plff, thereupon sued to recover a sum of money from the estate of the deceased mortgagor or in alternative a small sum from the decree-holder against representative of the deceased mortgagee. Held the suit is not barred by res judicata, for the claim for possession was not really a claim on the mortgage, but a claim by virtue of the purchase by the plff of the mortgagee's rights : 18 Bom L R 773=36 I C 564=40 B 614.

—Where the plff brought a suit against a reversioner and his mortgagee for possession of the property on the ground that it belonged to him. Mortgagee pleaded that plff had no right to question the transfer made in his favour; but no specific issue was framed to that effect. He then brought a suit against plff for sale upon his mortgage and pleaded that plff was estopped from denying his title as mortgagee. Held, he ought to have raised the question of estoppel in previous suit, and not having done so his present claim was barred by res judicata 8 A L J 358=10 I C 961

—Plff. purchased a plot of land previously mortgaged to deft. and obtained a decree for redemption. In execution of the decree, on deft's objection it was decided that plff. had purchased plot A only. In a subsequent suit for possession of plot B on the strength of the same sale. Held, that the suit was barred by res-judicata. 10 I C 453.

—A cosharer selling the property to the mortgagee, another cosharer suing to recover her share, the mortgagee omitting to set up the plea of the mortgage. Held the mortgagee's suit for recovery of possession of



C. P. C. (1908) S. 11 ( *Contd.* ).

(4) Directly and Substantially in Issue—( *Contd.* )

(B) Might and ought Expl. IV—( *Contd.* )

(5) Mortgage Suits—( *Contd.* )

(2) Claim for Possession—( *Contd.* )

the property as mortgagee is barred A I R 1928 All 714 = 50 A 309 = 113 I C 745.

—Prior mortgage of entire share with possession. Second mortgage of two-third share Suit for sale on second mortgage Prior mortgagee party No prayer for possession of one-third Second suit for possession is *Res judicata*. 8 A L J 352 = 10 I C 925.

( 3 ) Claim for Pre-emption

—Foreclosure suit—Failure to advance a claim to pre-empt as a defence to the mortgage suit—Effect. See 21 I. C. 287

—Property subject to mortgages—Covenant by vendor to discharge previous—mortgages—Pre-emption suit—*Res Judicata*. 17 I C 318

( 4 ) Joint-family Property

—Where a mortgage-deed was found to be valid and binding on the whole family it was held that the deft. could not re-open the question of validity and binding character of the deed by setting up a plea which might and ought to have been set up in the former suit. A L R 1933 M 709.

—A son sue to recover possession of mortgaged property. There had previously been a suit brought on foot of the mortgage against his father and a final decree for foreclosure in that suit. The son alleged that the foreclosure decree was not binding because his father failed to plead the invalidity of the registration of the mortgage deed in that suit. *Held* that the father represented the son in the earlier suit, and that, as the father would be debarred from raising the plea regarding the invalidity of the registration, the son was also barred. 138 I C 161 = 15 N L J 1 = I R 1932 N 80 = A I R 1932 N 90.

—A mortgagee instituted a suit for sale of the property based on his mortgage executed by the mother of the plaintiff, impleading him and the mother on the ground that she had after the mortgage gifted the property to him. In that suit it was found that the mother of the plaintiff had full rights in the property and that she was competent to mortgage. A decree for sale was passed and the decree holder purchased the property. Subsequent to the purchase the plaintiff sued to recover a share of the property on the ground that his mother was not competent to mortgage it and that the defendant in execution of his decree had purchased only the life-interest of his (plaintiff's) mother which

C. P. C. (1908) S. 11 ( *Contd.* ).

( 4 ) Directly and Substantially in Issue—( *Contd.* )

(B) Might and ought Expl. IV—( *Contd.* )

(5) Mortgage Suits—( *Contd.* )

(4) Joint-family Property—( *Contd.* )

terminated with her death. *Held* that the suit was barred by *res judicata* 10 I. C. 29.

—In a suit to enforce a mortgage against the father of a joint Hindu Family—sons were not made parties. The sons in a subsequent suit to set aside the decree cannot plead that father was not competent to mortgage, as the property was under Collector's management, 53 I. C. 776.

( 5 ) Mortgagee suing mortgagor and puisne mortgagee

—First suit by mortgagee for redemption against sub-mortgagee who was also purchaser of equity of redemption. Second suit by purchaser for redemption is not barred by *res judicata*. 102 P R 1914 = 213 P L R 1914 = 135 P W R 1914 = 24 I. C. 636.

—A, a mortgagee sued the mortgagors and B, a prior charge-holder on the property. The decree provided that the mortgagors should pay certain amount of money to A and further a charge to which B did not object was created in favour of A on some of the property. B is not debarred from enforcing his charge which was prior to A's. A I R 1929 Mad 379 = 56 M L J 295 = 29 L W 609 = Ind. Rul. ( 1929 ) Mad. 686 = 117 I. C. 302.

—Prior and subsequent mortgages—Suit for sale by prior mortgagee against mortgagor and puisne mortgagee—Decree in Form 7, Appendix D, C. P. C. Rights of puisne mortgagee—Fresh suit by him, if maintainable. 42 Mad. 90 See also A I R 1924 O 56 = 10 O L J 305 = 79 I. C. 654.

—Mortgage suit by prior mortgagee—Puisne mortgagee party—Decree and order absolute—First suit by puisne mortgagee. 1918 M W N 902 = 49 I. C. 466. See also A I R 1922 Lah. 358 = 81 I. C. 301.

( 6 ) Paramount title, plea of

—Deft. having equity of redemption and the paramount title will not be allowed to plead the latter, and so the latter cannot be *res judicata*: 58 C 1222 = 35 C W N 510 = Ind. Rul. (1931) Cal. 892 = 134 I. C. 892, see also 78 I C 118 = A I R 1924 N 408; and 33 C W N 659 = I R 1930 C 215 = 122 I C 215 = A I R 1929 C 672.

—Party claiming a paramount title is not bound to set it up in a mortgage suit but where he invites the Court to decide the question of his priority and a definite attack is made on his claim to priority his failure to



C. P. C. (1908) S. 11 (Contd.).

(4) Directly and Substantially in Issue—(Contd.)

(B) Might and ought Expl. IV—(Contd.)

(5) Mortgage Suits—(Contd.)

(6) Paramount title, plea of—(Contd.)

plead may operate as a bar to his asserting it in a subsequent litigation. A I R 1931 Pat 64 = 11 P L T 898 = Ind Rul (1931) Pat 164 = 10 Pat 234 = 130 I C 257.

—Mortgage suit—Person joined as defendant failing to set up paramount title—Effect—6 N L R 156, see also A I R 1920 P. C. 81 = 47 Cal. 662 = 25 C W N 417 = 38 M L J 424 = 1920 M W N 308 = 11 M L W 518 = 22 Bom. L R 557 = 55 I C 959 = 47 I A 11 = 18 A L J 401 = 28 M L T 425 P C ; and A I R 1929 O 88 = 110 I C 79 = 5 O W N 210 = 3 Luck 472.

—But if a defendant in a mortgage suit sets up a paramount title and without objection goes to trial upon that issue, neither party can afterwards say that the issue, was irrelevant. A I R 1929 Pat. 678 = 10 P L T 645 = Ind. Rul. (1930) Pat. 129 = 121 I C 353.

—A executed a mortgage by conditional sale in favour of B and then a simple mortgage. B sued on the simple mortgage and obtained a simple money decree in execution of which he purchased a portion of the equity of redemption of the properties mentioned in the deed of conditional sale. B then sued to enforce the conditional sale for the full amount without abatement. He obtained a decree and the mortgagor paid up the amount due. B then sued for a declaration that he was the full owner of the properties of which he had purchased the equity of redemption. Held, that as B had deliberately agreed to return the property free of all incumbrances on being paid a certain sum and as that sum had been paid the suit was barred by equitable estoppel. It would not make any difference even if the debt was in a position to know that the plff. had a title under which he could have retained full proprietary rights over a portion of the property concerned 17 A L J 988 = U P L R (H C) 130 = 52 I C 690.

—A second mortgagee claiming paramount title as to a portion of the property cannot raise that question in a suit on prior mortgage, and hence a subsequent suit by him on that question is not *res judicata* 40 All 584 = 16 A L J 639 = 46 I C 559.

—In a suit by mortgagee for sale, a person claiming adversely both to the mortgagor and mortgagee may be joined but such person is not bound to raise the question relating to the paramount title A I R 1927 Mad 945 = 106 I C 574.

—A person claiming adversely to the mortgagor and mortgagee is not a necessary party to a mortgage suit but if he is made

C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd.)

(B) Might and ought Expl. IV—(Contd.)

(5) Mortgage Suits—(Contd.)

(6) Paramount title, plea of—(Contd.)

a party, the Court has discretion whether to adjudicate on his title or not and therefore, if such party fails to assert his title he is not barred by s. 11, Expl. IV from doing so in a subsequent suit A I R 1927 Mad 301 = 52 M L J 52 = 25 L W 238 = 38 M L T 20 = 99 I C 468.

(7) Pleas which a mortgagee is bound to set up in redemption suits or mortgage suits.

—First suit by mortgagor for possession and redemption from the mortgagee as usufructuary mortgagee, though he was a simple mortgagee, does not bar a subsequent suit by the mortgagee for his mortgage money. A I R 1925 Lah 516 = 87 I C 237.

—Mortgagee obtaining decree nisi for foreclosure, but failing to apply for decree, absolute, the mortgagor can bring a subsequent suit to redeem : 16 Bom L R 687 = 39 B 41.

—Prior mortgagee omitting to establish his priority cannot bring a subsequent suit for it. A I R 1929 Pat. 678 = 10 P L T 645 = Ind Rul (1930) Pat. 129 = 121 I C 353.

—In a suit for possession the mortgagee from the ostensible owner, though a party to the suit, omitted to deny plff's title and a decree was passed in plff's favour. In a subsequent suit for sale by the mortgagee. Held, that the mortgagee was barred by *res judicata* from disputing the title of the plff. 8 A L J 358 = 10 I C 961. Affirmed in appeal by the P C in 34 I C 673 = 3 L W 454 = 1916 M W N 142 = 20 C W N 265.

—Certain lands were mortgaged, and subsequently further charges were created on them. Mortgagee obtained decree for possession on the mortgage and the amount due. In a subsequent suit for redemption the question of the amount due was *res judicata*, and the mortgagee was not entitled to interest for the period he was out of possession, nor could he claim payment of further charges as those deeds did not give a right to possession : 60 P W R 1917 = 39 I C 250.

—Suit for money by mortgagee—Subsequent suit for sale—Bar. See 36 All 264 = 12 A L J 374 = 23 I C 429.

(8) Pleas which a mortgagor is bound to raise in redemption or mortgage suit.

—The dismissal of a suit for redemption brought on the foot of a specific mortgage is no bar to a subsequent suit on a promise to allow redemption by the mortgagee. 8 Bur L T 101 = 27 I C 732.

C. P. C. (1908) S 11 (Contd.).

(4) Directly and Substantially in Issue—(Contd)

(B) Might and ought Expl. IV—(Contd)

(5) Mortgage Suits—(Contd.)

(8) Pleas which a mortgagor is bound to raise in redemption or mortgage suit—(Concl'd)

—Where the plff. had twofold character, as purchaser of equity of redemption, and as a settlement holder from the superior landlord. He did not take the latter defence. The decree is operative against him and he would not be allowed to challenge it in a separate suit A I R 1924 Cal 188 = 38 C L J 183 = 76 I C 517.

—Mortgagee of a proprietary interest brought a suit and obtained decree, and the interest was sold in execution. The Revenue Court rejected the mutation application by the mtgee. Original mortgagor cannot plead non-saleable interest in the suit by mortgagee for possession he having failed to raise that plea in the mortgage suit: 16 A L J 557 = 46 I C 897.

—A suit against a Hindu widow on a mortgage executed by her husband is different from one based on a mortgage executed by her alone. In the first case no question of legal necessity arises at all. That question can arise only in the second case and it can be finally decided only in the presence of the reversioner. But the reversioner when made party to such a suit is not bound to set up the plea and he, not being entitled to redeem the mortgage, can claim to have that question tried in a separate suit when he succeeds to the estate.

—Where, however, the mortgagee, in a mortgage suit, distinctly raised an issue, as to whether the mortgagor-widow was the sole and absolute owner of the mortgaged property, and the issue was decided in favour of the mortgagee, it was held, in a subsequent suit for possession by the reversioner after the death of the mortgagor-widow, that the issue was *res judicata* as against the reversioners who were also party to the former suit, in which they ought to have raised a defence to the issue: 19 C L J 155 = 17 C W N 877 = 19 I C 686 = 41 C 69.

(9) Property not included in mortgage.

—Where Properties not covered by mortgage are included in suit and obtained delivery of in execution of decree, the Mortgagee cannot sue on the ground that properties were not included in the mortgage. A I R 1925 Mad 1148 = 87 I C 711.

(10) Puisse Mortgagee suing mortgagor and Prior Mortgagee.

—In a suit by a puisne mortgagee the prior mortgagees need not be made parties and

C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd)

(B) Might and ought Expl IV—(Contd)

(5) Mortgage Suits—(Contd)

(10) Puisse Mortgagee suing mortgagor and Prior Mortgagee—(Contd)

questions relating to their mortgages need not be determined. Where the puisne mortgagee admitted the prior mortgage the prior mortgagee can institute a suit on his mortgage, even though the decree in the puisne mortgagee's suit did not specifically reserve the prior mortgagee's rights. (1912) M W N 41 = 13 I C 182.

—But when the prior mortgagee is impleaded in a suit on second mortgage and is aware of the fact that the plff. is seeking to sell the property without the burden of the prior mortgage upon it, and omits in that suit to set up his encumbrance, then a suit on foot of the prior encumbrance is barred by the rule of *res judicata*. 10 A L J 244 = 34 A 599 = 16 I C 8 see also 19 C W N 942; and 19 C W N 947.

—It should be noted, however, that question of *res judicata* cannot arise even where the prior mortgagee is made party to suit by puisne mortgagee unless such prior mortgagee's right is attacked and adjudicated upon adversely with reference to the prior mortgage. A I R 1930 All 163 = Ind Rul (1930) All 459 = 124 I C 27.

—Where the subsequent mortgagee as plff. does not claim any relief derogatory to the prior mortgagee, the latter is not bound to set up his prior mortgage, and his subsequent suit will not be barred, 1 Pat L T 629 = 58 I C 33 See also: Ind Rul 1929 A 740 = 117 I C 820; A I R 1930 A 163 = Ind Rul 1930 A 459 = 124 I C 27.

—Where a decree in the suit on the subsequent mortgage does not make mention of the prior mortgage the prior mortgagee is not barred from bringing a suit on the mortgage. 35 A 111 = 11 A L J 57 = 18 I C 21.

—Second mortgagee filed a suit on his mortgage impleading prior mortgagee as a party and specifically stating in plaint that prior mortgagee was not entitled to priority. —Prior mortgagee did not appear in that suit, and the property was in execution of the decree, sold and, subsequently, the prior mortgagee instituted a suit on his prior mortgage. Held, that he was barred from re-opening the question of priority. Ind Rul. (1929) All 740 = 117 I C 820.

—When a subsequent mortgagee who had discharged a mortgage prior in date to the suit mortgage fails to put forth his claims in the suit he cannot bring a subsequent suit to enforce his rights. 39 Cal 527 = 14 Bom L R 280 = 16 C W N 505 = 15 C L J 411 = 22 M L J 468 = 9 A L J 332 = 39 I A 68 = 11 M L T 265 = (1912) M W N 367 = 14 I C 496 (P C)

C. P. C. ( 1908 ) S. 11 ( *Contd.* )

(4) Directly and Substantially in Issue—(*Contd.*)

(B) Might and ought Expl. IV—(*Contd.*)

(5) Mortgage Suits—(*Contd.*)

(10) Puisne Mortgagee suing mortgagor and Prior Mortgagee—(*Contd.*)

—In a foreclosure suit the prior mortgagee who had entered into possession as purchaser and who was joined as deft. omitted to plead that he could be redeemed. Held, the prior mortgagee could nevertheless insist upon being redeemed in a subsequent suit by the puisne mortgagee for possession of the mortgaged property.

A L R 1933 N 53

—A vendor sued his purchaser for the recovery of the unpaid sale consideration. The purchaser was a prior mortgagee of the property purchased by him under certain mortgage deeds and deeds of further charge executed in his favour by the vendor. He, however, omitted to set up his claim to priority in the vendor's suit. The vendor's suit was decreed and the property was sold in execution of that decree and was purchased by a third party. In a suit subsequently instituted by the purchaser, *inter alia*, for a declaration that the property purchased by the third party was subject to the prior charge in a respect of the mortgage deeds and the deeds of further charge, held that the purchaser's claim to priority was barred under S. 11, Expl. IV. The suit was for a decree for sale. The vendor in claiming a decree for the unpaid purchase money did not recognise any prior charge of the purchaser. The decree for sale claimed by the vendor was on the footing of her having the first and the only charge on the property. If the purchaser had a prior charge and the decree for sale as claimed by her could not be properly passed without the sale being made subject to the purchaser's charge it was clearly his duty to set up the prior charge in defence to the claim of the vendor for sale of the property. 9 O W N 557 = 139 I C 358 = A I R 1932 O 268 = I R 1932 C 360 = A L R 1932 O 580

—Where a first mortgagee of property sued without making the second mortgagee a party got a decree and purchased and got possession in execution and when subsequently the second mortgagee sued on his mortgage impleading the first who was *ex parte* after filing written statement and against whom no relief except for an account was asked for. Held, that the decree for the second mortgagee was not *res judicata* as against the first mortgagee as the Court never intended and never did give any relief as against him; and that there was no question of merger so as to give the second mortgagee a priority simply because of his not having been joined as a party in the suit. 18 C W N 1013 = 24 I C 42.

—Where the subsequent mortgagee, in a suit by him, admitted the prior mortgage

C. P. C. ( 1908 ) S. 11 ( *Contd.* )

(4) Directly and Substantially in Issue—(*Contd.*)

(B) Might and ought Expl. IV—(*Contd.*)

(5) Mortgage Suits—(*Contd.*)

(10) Puisne Mortgagee suing mortgagor and Prior Mortgagee—(*Contd.*)

and prayed for its redemption, but no relief was granted, and the prior mortgagee, who a party to the former suit, brought a subsequent suit on prior the mortgage it was held that the claim of the prior mortgagee having been admitted in the former suit there was no occasion for him to appear and prove his claim and the suit is therefore not barred by *res judicata*. 11 A L J 57 = 35 A 111 = 18 Ind Cas 21.

—The holder of three prior mortgages over the same property, who, in answer to a suit brought by subsequent mortgages over that property, had pleaded his rights under one of the mortgages, was barred from afterwards bringing a suit upon one of the remaining mortgages.

—Prior mortgagee, who is impleaded in a suit on subsequent mortgage is bound to set up his rights under the prior mortgage: 20 All. 110 ( Affirmed in 24 A 429 P. C. ) See to the same effect : 31 C 428; 8 C W N 385; 26 I C 860; A I R 1923 Pat. 290 = 4 Pat. L T 108 = 1923 Pat. 118 = 1 Pat. L R 238 = 71 I C 948 = 2 Pat. 435; 1 C L J 337; A I R 1924 A 927 = 75 I C 108; 2 A L J 574; 10 A L J 149 = 15 I C 611; I R 1929 A 740 = 117 I C 820.

—The puisne mortgagee sued for sale joining as a party the first mortgagee who did not appear. A decree was made, but, as the puisne mortgagee had not attacked the first mortgage or sought to postpone it. The decree in the former suit was not *res judicata* under S. 11 against the first mortgagee. 38 M L J 424 = ( 1920 ) M W N 308 = 11 L W 518 = 55 I C 959 = 22 Bom. L R 557 = 47 Cal. 662 = 18 A L J 401 = 47 I A 11 ( P. C. )

subsequently sue for redemption of the prior mortgage : 1897 A W N 100.

—Mortgage suit by second mtgee. for sale does not affect mtgor's right to redeem : 4 L W 184 = 36 I C 551.

—Puisne mortgagee made party having also prior mortgage—Failure to set up prior mortgage—Bar See C. P. Code, O 34, R 1 26 I C 673.

—Prior Suit in ejectment by purchaser from prior mortgagee does not bar a suit by the subsequent mortgagee for redemption.

A I R 1921 Nag. 69 = 17 N L R 33.

—A puisne mortgagee is not bound to set up his right of redemption in a suit against him for ejectment 54 I C 276.

—Subsequent incumbrancer in a mortgage suit is not bound to set up a prior title. A I R 1929 Pat. 678 = 10 P L T 645 = Ind. Rul. ( 1930 ) Pat. 129 = 121 I C 353.

## C. P. C. ( 1908 ) S. 11—(Contd)

## (4) Directly and Substantially in Issue—(Contd)

## (B) Might and ought Expl. IV—(Contd)

## (5) Mortgage Suits—(Contd)

## (10) Puisse Mortgagee suing mortgagor and Prior Mortgagee—(Contd)

—Where, in a suit on second mortgage, the mortgage was held invalid, failure to fall back on the original consideration does not bar a subsequent suit on prior mortgage A I R 1927 Nag. 83 = 98 I C 695.

—Mortgage suit—Redemption—Subsequent mortgagee made a party—Not redeeming within time fixed—Suit by subsequent mortgagee is not *Res judicata*. 15 I C 15.

—Prior mortgagee who is also *puisse* mortgagee impleaded in suit by *mesne* mortgagee as subsequent mortgagee—No contest as to prior mortgage—Prior mortgagee's rights are not barred by *res judicata*. A I R 1929 Oudh 463 = 4 Luck. 250 = 6 O W N 1 = Ind. Rul. ( 1929 ) Oudh 273 = 115 I C 833.

## ( 11 ) Redemption and Accounts

—In a suit by mortgagee for sale, omission by mortgagor to counter claim bars a subsequent suit by mortgagor for such claim. Per *Sadasiva Iyer*. The principle of *res judicata* is wider than S. 11 C P Code. Where a mortgage has become fully ripened so that the rights and liabilities of the parties can be dealt with in a suit whether for sale or foreclosure or redemption, all questions relating to the taking of accounts as between mortgagor and mortgagee ought to be decided in one and the same and the very first suit. No Second suit could be brought by either party on any claim arising out of the transaction of mortgage. 12 L W 173 = 60 I C 226 See also 12 O C 152 = 2 I C 834; and 5 C L J 192 = 34 C 223; and 14 C W N 1001 = 6 I C 336.

## (12) Redemption and Ejectment

—First suit for redemption does not bar a subsequent suit for ejectment 35 B 507; see also 56 I C 193.

## ( 13 ) Redemption and Mesne Profits

—The mortgagor being not bound to claim a settlement of accounts in the passing of the final decree, can bring a suit claiming *mesne* profits between the date of payment of money under preliminary decree and the date of the suit : 23 M L T 158 = ( 1918 ) M W N 207 = 7 L W 269 = 44 I C 251 see also 8 O C 302 ; and 25 B 115 ; and 26 B 661 : 21 A 425 F B.

—A mortgagor suing for redemption must bring into account all moneys due to either party in connection with the mortgage up to the day fixed under r. 7. but not any items of later date. Thus *Mesne* profits accruing after the date of payment made according to

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## C. P. C. ( 1908 ) S. 11 (Contd)

## (4) Directly and Substantially in Issue—(Contd)

## (B) Might and ought Expl. IV—(Contd)

## (5) Mortgage Suits—(Contd)

## (13) Redemption and Mesne Profits—(Contd)

a decree passed under O. XXXIV, r. 7, can be the subject of a separate suit. A. I. R. 1926 Oudh 113 = 2 O W N 826 = 91 I. C. 258.

—Redemption suit—*Mesne* profits left open—Later suit for *mesne* profits is not barred. Ind. Rul. (1930) Pat 414 = 124 I. C. 94.

—Suit for redemption and *mesne* profits—Claim for *mesne* profits dismissed owing to mortgagors failure to prove amount—Subsequent suit for *mesne* profits alone from date of earlier suit till date of possession is not barred. A I R 1931 Pat. 13 = Ind. Rul. ( 1930 ) Pat. 414 = 124 I. C. 94.

—*Mesne* profits from the date subsequent to the decree when the money is paid into Court by the mortgagor cannot be had in the redemption suit itself. Where in a redemption suit, a claim for *mesne* profits is withdrawn a subsequent suit for *mesne* profits from the date of payment after the decree up to the date of delivery of possession is not barred by O. XXIII, r. 1 or O. VI, r. 1 or s. 11 of the Civil Procedure Code. A I R 1926 Cal. 178 = 85 I. C. 547.

## (14) Several suits for redemption of the same property

—Where a suit for redemption is dismissed for non-payment of mortgage-money before the suit, a second suit for redemption on full payment is not barred; 1899 A W N 50 = 21 All. 251. see also ( 1909 ) Pun L R 135 = 4 I. C. 939 ; and 18 Ind. Cas. 326 ; and A I R 1926 A 20 = 23 A L J 888 = 92 I C 260 = 48 A 17 ; and A I R 1927 Lah 9 = 98 I C 650 = 7 Lah 420 = 27 P. L. R. 659 ; and 9 Ind. Cas. 158 ; and 30 Ind. Cas. 104 = 1915 Pun W R 166 = 1915 Pun Re 58 = 1916 Pun L R 58.

—But the Madras High Court and the Oudh J. C. Court have held contrary : 25 M 300 F B ; see also 39 M 896 ; and 49 M 691 ; and A I R 1925 O 696 ; and A I R 1921 O 139 ; and A I R 1930 O 465 ; and 5 O L J 698 ; and A I R 1924 O 245 ; and 3 O C 371 ; and see 3 S L R 17 and 6 S L R 140

—Where mortgagor in redemption suit obtains a decree  *nisi*, and nothing further is done a second suit for redemption would not be barred even though the suit is under Deccan Agriculturists Relief Act. A I R 1923 Bom. 287 = 25 Bom. L R 211 = 72 I. C. 315.

—Prior suit for sale before T. P. Act—Decree unexecuted—Subsequent suit for redemption not barred. A. I. R. 1930 Bom. 401 = 32 Bom. L R 933 = Ind. Rul. (1930) Bom. 450 = 126 I C 882.

—The dismissal of a previous suit for redemption upon an alleged mortgage is no bar



C. P. C. ( 1908 ) S. 11 ( *Contd* )

( 4 ) Directly and Substantially in Issue—(*Contd*)

( B ) Might and ought Expl. IV—(*Contd*)

( 5 ) Mortgage Suits—(*Contd*)

(14) Several suits for redemption of the same property—(*Concl'd*)

to another suit for redemption on another mortgage in respect of the same properties, 8 A L J 47 = 9 I C 53 = 33 A. 302.

—Where a declaratory suit is dismissed as premature, a subsequent suit for redemption is maintainable : 19 I. C 393.

—A prior suit by Mtgee. to remain in possession till his debt is satisfied does not bar a subsequent suit for redemption : 33 I C 59 = 19 C W N 1132.

( 15 ) Sub-mortgagee's Claim.

—First suit as purchaser from mortgagee does not bar a subsequent suit as sub-mortgagee : I R 1931 A 222 = 1930 A L J 1572 = A I R 1931 A 73 = 129 I C 734.

—Omission by sub-mortgagee to claim amount due on sub-mortgage does not bar fresh suit. A I R 1929 Oudh 455 = 6 O W N 851 = Ind. Rul. ( 1930 ) Oudh 209 = 124 I C 353.

—Sub-mortgagee wrongly suing an assignee of mortgagee His subsequent suit as sub-mortgagee will be barred by Explanation IV. A I R 1929 All 400 = Ind. Rul ( 1929 ) All 594 = 116 I C 738.

( 16 ) Suit by or against Legal Representatives

—On the death of one of the two executors, the mortgagee sued the other executor as well as the former's brothers as legal representative and sale was effected *ex parte*. In a suit by the purchaser to recover the property it was held that the legal representative was not barred from raising the question of the mortgage. 20 C W N 675 = 23 C L J 587 = 35 I. C. 294.

—But where the persons who were joined as parties not only as representatives of the mortgagor but also in their own right, omitted to plead their nonliability, they were barred by *res judicata* from raising the question in a separate suit : 55 I C 30.

—Plaintiffs brought a suit for sale on foot of their mortgages of 1879 and 1883. They held another mortgage of 1814. In suit for sale on foot of this mortgage, they put up the mortgaged property to sale and themselves became purchasers thereof. The sons and grandsons of the mortgagor, who were defendants to the present suit, brought a suit to set aside the auction-sale in respect of their two thirds share in the property. The mortgagees in that suit set up a usufructuary mortgage in their favour made in June, 1879. A decree was made in favour of these sons and grandsons conditional upon their paying

C. P. C. ( 1908 ) S. 11 ( *Contd* )

(4) Directly and Substantially in Issue—(*Contd*)

(B) Might and ought Expl. IV—(*Contd*)

(5) Mortgage Suits—(*Contd*)

(16) Suits by or against Legal Representatives—(*Concl'd*)

the amount due under the usufructuary mortgage. The mortgagees did not in that suit set up their rights under mortgages of 1879 and 1883 which were the subject-matter of the present suit; *held*, that the plaintiffs were debarred from maintaining the suit 8 A L J 936.

( 17 ) Suit by or against Purchaser

—Person, who is a purchaser of a portion prior to and of a portion subsequent to a mortgage, can bring a suit raising his prior title, if the mortgagee has impleaded him only as subsequent purchaser without impugning his prior purchase. A I R 1929 Pat. 333 = 9 Pat. 118 = Ind. Rul. ( 1929 ) Pat. 653 = 119 I. C. 829.

—Where in a suit on a mortgage, certain persons who had purchased the mortgage property in execution of a simple money decree, and who happened to be also the heirs and legal representatives of the mortgagor, were made parties as such heirs and failed to plead their purchase, *held*, that they cannot subsequently claim to redeem the properties by a separate suit subsequently. A I R 1922 All 463 = 20 A L J 641 = 73 I. C. 920.

(18) Suits for redemption of Several mortgages.

—In a previous suit the plaintiff claiming as the legal representative of a deceased mortgagor sued substantially the same defendants to redeem a usufructuary mortgage alleged to have been executed in 1856 over 50 cawnies of land. The defendants denied the genuineness of the mortgage and pleaded that 14 out of the 50 cawnies had been usufructuarily mortgaged to them in 1853, and they claimed that those 14 cawnies, as well as the remaining 36, had been sold to them subsequently. The suit was dismissed on the ground that the mortgage sued on had not been proved. In 1897, plaintiff brought the present suit to redeem the 14 cawnies on the footing of the mortgage of 1853, which had been pleaded by the defendants in the previous suit. *Held*, that the suit was not barred 26 Mad 760; see also 29 M 153 F B; and A I R 1930 M 264.

( 19 ) Two mortgages in favour of the same person—suit on one of them only.

—One view is that where a person holding two different mortgages on the same property



C. P. C. ( 1908 ) S. 11 ( *Contd* )

(4) Directly and Substantially in Issue—( *Contd* )

(B) Might and ought Expl. IV—( *Contd* )

(5) Mortgage Suits—( *Contd* )

(19) Two mortgages in favour of the same person—  
suit on one of them only—( *Conclud* )

from the same person, sued on the second mortgage without impleading the first mortgage and obtained a decree, his subsequent suit on the first mtg. is barred. 39 Bom 138 = 17 Bom L R 144 = 27 I C 1005.

—Similarly, where a mortgagee holding two mortgages brings a suit on first mortgage without disclosing the second and an order for unconditioned sale is passed, he cannot sue a second time for sale of the property on his second mortgage 4 S L R 82 = 8 I C 216; see also A I R 1921 B 282 = 45 B 55 = 59 I C 347 = 22 Bom L R 1093, but see 13 B 45.

—On the other hand, it is held that a person holding two mortgages on the same property suing on the prior mortgage without mentioning the puisne mortgage, he cannot bring a subsequent suit against the property on the puisne mortgage. 6 O. L. J. 482 = 53 I. C 753.

—And that a mortgagee should set up all the mortgages he holds in answer to a suit by the sons of the mortgagor judgment debtor to set aside the auction sale in respect of their share in the property; otherwise he will be barred by S. 11 Expl. IV 8 A. L. J. 936 = 11 I. C. 257. see also 38 M 927; and 31 M. 530; and 2 Pat. L. J. 118.

—Holder of two independent mortgages over the same property can obtain a decree for sale on each of them, subject to the restriction that he cannot sell the property twice over, nor sell it under the second decree subject to the first, and subject to any covenant between the parties : 25 C. W. N. 129.

—A mortgagee holding a separate money-bond is not bound to enforce the money bond along with the mortgage, or even refer to its existence in his plaint seeking to enforce the mortgage. A. I. R. 1925 Mad. 991 = 86 I. C. 481.

—Where there are two mortgages over the same property a suit on one only is no bar to suit for accounts. A. I. R. 1930 Rang. 197 = Ind Rul. (1930) Rang. 381 = 127 I. C. 477.

—But in case of mortgages executed after 1st April 1930, S. 67 A of T. P. Act enacts that a mortgagee holding more than one mortgage must sue on all the mortgages, unless there is an agreement to the contrary. In view of this enactment, therefore, the above conflict loses its importance see O 34 rules 1 and 12.

( 20 ) Miscellaneous,

—In a prior suit to set aside sale, omission

C. P. C. ( 1908 ) S. 11 ( *Contd* )

( 4 ) Directly and Substantially in Issue—( *Contd* )

( B ) Might and ought Expl. IV—( *Contd* )

( 5 ) Mortgage Suits—( *Contd* )

(20) Miscellaneous—( *Conclud* )

to plead as to the invalidity of the mortgage bars a subsequent suit on that question : A. I. R. 1930 Lah. 654 = 31 P. L. R. 123 = Ind Rul. ( 1930 ) Lah. 862 = 127 I. C. 366.

—Person suing the mortgagor, who has only mortgagee rights cannot subsequently sue the owner. 71 I. C 390 = 14 L. W. 563.

—A executed a usufructuary mortgage-deed in favour of the plffs. Later he executed another mortgage-deed. He then sued for cancellation of the latter deed, and his claim was decreed. The plaintiffs brought the present suit for recovery of the property on the basis of the usufructuary mortgage deed, *Held*, that the present suit was barred by Expl. IV to s. 11. 14 O. C. 117 = 11 Ind. Cas 346.

#### ( 4 ) DIRECTLY AND SUBSTANTIALLY IN ISSUE. ( *Contd* )

#### ( c ) UNNECESSARY ISSUES AND FINDINGS.

—Decision on issue which is not necessary to dispose of the case, and on which the decree is not based, does not operate as *res judicata* : 13 L 524 = 136 I C 265 = I R 1932 L 217 = 33 P L R 46 = A I R 1932 L 179 (180).

—See to the same effect : A I R 1930 O 124 = 4 Luck 404 = 6 O W N 1320 = I R 1930 O 114 = 122 I C 610; A I R 1926 R 71 = 4 Bur L J 250 = 93 I C 197; A I R 1926 C 163 = 42 C L J 560 = 92 I C 931; A I R 1924 O 205 = 10 O L J 404 = 79 I C 666; A I R 1923 A 435 = 21 A L J 393 = L R 4 A 532 = 74 I C 656 = 45 A 466; 55 I C 322 = 44 B 221; 1911 M W N 188 = 9 M L T 450 = 9 I C 787; 120 P L R 1911; 50 P R 1899; 24 C 900; 13 C 17; and A L R 1933 L 181.

—Portions dealing with matters not necessary for disposal of suit are not *res judicata* A I R 1921 Cal 202 = 48 C 1059 = 25 C W N 990 = 66 I C 705; see also 19 O C 69 = 3 O L J 677 = 36 I C 643.

—Where the decree could be sustained independently of the findings on a particular point and there is no decision against a party in a former litigation on that point the finding cannot become *res judicata* A I R 1921 Lah 296 = 4 Lah L J 376; see also 1930 A L J 1309 = 130 I C 194.

—Where the Court passed an order that the suit abated, and with regard to the application for appointing a receiver it remarked that it was doubtful whether the suit for that purpose also was not abated, the Appellate Court held that the remark was not necessary for the passing of the order regarding abatement of suit concerning the scheme relating to a trust property. The

## C. P. C. (1908) S. 11 (Contd)

## (4) Directly and Substantially in Issue—(Contd)

## (C) Unnecessary Issue in Findings—(Contd)

remark, therefore, was no *res judicata* to the application for a Receiver. A I R 1926 Mad 162=48 M 688=49 M L J 324=22 L W 130=(1925) M W N 569=91 I C 109.

—Where in a suit for possession on the ground of survivorship it was alleged that one of the defts, had no right by reason of a custom excluding daughters from inheritance, and a finding was had on the issue relating to that plea. *Held*, that this finding could not be set up as *res judicata* in as much as the plea of custom in the previous suit was altogether out of its scope. 4 O L J 75=39 I C 248.

—When a finding is recorded only to avoid a possible remand and it is not the basis of the judgment the point is not *res judicata*. A I R 1924 Mad 893=47 M L J 532=20 L W 526=(1924) M W N 856=82 I C 485.

—The incidental decision on a question of title in a suit for rent of a small cause nature is not *res judicata* when the same question arises in a subsequent suit on title : 2 A 97. See also 3-M 192 ; 218 A W N 1907=4 A L J 517 ; L R 4 A 285 ; 1925 M 357=80 I C 724 ; 15 Bom L R 773 =20 I C 974.

—Unnecessary finding in judgment, not embodied in, nor necessary for, the decree is not *res judicata* : 1895 A W N 47=17 A 174. See also 33 I C 620.

—Finding as to *res judicata* can not operate as *res judicata*, if decree is passed in spite of it, such a finding not being necessary for its decision. A I R 1926 Cal 672 =43 C L J 116=94 I C 844.

—Matter in issue in subsequent suit—not necessary for decision in previous suit—*obiter dicta*—not *res judicata*. A L R 1933 L 400.

—But a question raised at the instance of a party and decided by the Court as necessary though in fact not necessary operates as *res judicata*. A I R 1921 Cal 368=33 C L J 317=63 I C 161; see also A I R 1931 C 353=34 C W N 839=131 I C 562; and 118 I C 168; and A I R 1930 C 810=129 I C 310=57 C 872.

—Court deciding points at invitation of parties—Matters so decided operate as *res judicata* although only one of such points is sufficient for disposal of suit. A I R 1930 Cal 810=57 C 872=Ind Rul (1931) Cal 150=129 I C 310.

—Point not properly raised by plaintiff, but Parties without protest choosing to join issue and leading evidence upon—Decision on the point by the Court of final appeal in such a case is *res judicata* between the parties. 62 M L J 221=35 L W 222=36 C W N 365 = 1932 M W N 284=34 B L R 508=136 I C 412=55

## C. P. C. (1908) S. 11 (Contd).

## (4) Directly and Substantially in Issue—(Contd)

## (C) Unnecessary Issues and Findings.—(Contd)

C L J 411=A I R 1932 P C 50=I R 1932 P C 108=A L R 1932 P C 109 (P C).

—A suit by a Mahomedan widow for the recovery of a moiety of certain property from her husband's brother was based upon (1) title of her husband to the moiety claimed and (2) a gift of such moiety to her by him. A decision adverse to the widow on the question of the alleged gift would have rendered a decision on the question of title unnecessary. But both the Courts below found in favour of the widow on both the points. In his second appeal to the High Court the brother challenged the decision upon both points. The High Court held against him on the question of title and in his favour on the question of the alleged gift and in the result dismissed the widow's suit because a decision on issue, though immaterial, operates as *res judicata* where a party invites a decision on that issue. 33 P L R 261=139 I C 676=I R 1932 L 604=1932 P C L 933 (Civ.)=A I R 1932 L 421=A L R 1932 L 933 (Civ.).

—Where the decision of an issue is not absolutely necessary, but if the parties join battle on it, the decision on such issue will operate as *res judicata*. 59 C 1250=A I R 1932 C 894=A L R 1933 C 2=141 I C 56

—Whether a finding given on evidence but not specially covered by prayer operates as *res judicata* see. 18 I C 102.

—If a Court has chosen to decide more than what logically may be necessary, for the purposes of the suit its finding may none the less be *res judicata*. A I R 1930; Lah. 690 = 31 P L R 406 = Ind. Rul. (1930) Lah. 704 = 126 I C 176.

—Where in a prior suit the Court had merely to decide the factum of a person's death at the date of suit, it went further and expressed an opinion that the person was dead at a particular date, the decision as to the date of death does not bar a subsequent suit on that question. A I R 1923 All. 495 = 45 A 466 = 21 A L J 393 = L R 4 A 532 = 74 I C 656.

—A brought a suit against B for profits of a certain plot on the allegation that the same had been assigned to him by C and D. The Court dismissed the suit on the finding that the profits had not been assigned to A by C and D. *Held*, that a further finding as to the enjoyment of profits by C and D was not a finding on which the decision of the case turned and hence could not operate as *res judicata*. 11 Ind. Cas. 89.

—Where a particular finding is sufficient by itself for the disposal of the case, and there are other findings as well which are not

C. P. C. (1908) S. 11 (Contd.).

(4) Directly and Substantially in Issue—(Contd.)  
(C) Unnecessary Issues and Findings—(Contd.)

necessary for the decision of the case the former finding is the only finding which operates as *res judicata* especially when it is found that the judgment has been appealed from and that the Appellate Court had taken into consideration that finding alone. 5 O L J 647 = 48 I C 386 see also 19 C L J 34 = 21 I C 979.

—But when the decision is based on several findings each of the findings is *res judicata*. It cannot be said that the finding which is recorded first should operate as *res judicata* and not the subsequent finding. 36 C W N 72 (76) = 137 I C 696 = I R 1932 C 365 = A I R 1932 C 385.

—Findings on vague issues do not operate as *res judicata*: A I R 1925 All. 794 = 85 I C 690 see also 55 I C 938.

—The decision in a previously decided case on an issue which did not arise at all cannot operate as *res judicata* in any subsequent suit. 141 P L R 1917 = 43 I C 754.

—Observation not arising out of the issues which were before the Court for decision, is not *res judicata*. A I R 1924 All. 884 = L R 5 A 697 Civ. = 47 All. 17 = 22 A L J 866 = 84 I C 631.

—Where a decree is passed in spite of a finding, such finding does not operate as *res judicata*: 33 M L J 754.

—A decision on an issue not based on the pleadings of parties cannot be *res judicata*. 75 P W R 1913 = 194 P L R 1913 = 18 I C 1007.

—A decision, not necessary for the due disposal of the suit, is not *res judicata* between co-defendants. 50 I C 802.

—A finding not necessary to the determination of the suit is not one against which a party could have appealed. It is not a matter directly and substantially in issue which was heard and finally decided and is not *res judicata* in a subsequent suit. A I R 1923 Lah. 248 = 73 I C 854.

—A finding on an issue not necessary to the determination of a suit cannot operate as *res judicata*. So also decision on a point from which appeal could not be filed does not operate as *res judicata*. A I R 1930 Lah. 149 = 30 P L R 744 = Ind. Rul. (1930) Lah. 155 = 129 I C 795.

—A judgment-debtor has no right to appeal against an order dismissing an application for the execution of a decree by reason of the decree-holder having failed to fulfil the condition, *viz.* execution and registration of a lease in favour of the judgment-debtor. In order to give the judgment-debtor a right of appeal, it must be one that would operate as *res judicata*. 53 I C 558.

C. P. C. (1908) S. 11 (Contd.)

(4) DIRECTLY AND SUBSTANTIALLY  
IN ISSUE. (Contd.)

(D) INCIDENTAL ISSUES AND FINDINGS.

(1) General Principles

—For a matter to be in issue under S. 11 C P C it is not necessary that an issue should be framed on it, but is sufficient if a decision about is necessary for the decree. Where, therefore, a finding has been arrived at on a matter which is not necessary for the disposal of the suit and is not made the basis of the decree which is given in spite of it, the matter cannot be said to have been substantially in issue between the parties and consequently the finding cannot operate as *res judicata* in a subsequent suit. 25 M L T 66 = 9 L W 84 = (1919) M W N 34 = 52 I. C. 258. see to the same effect: 12 I A 23 = 11 C 301 (on appeal from 6 C 406); and 96 I. C. 625.

—Judgment is not conclusive on matters brought incidentally during trial A I R 1931 Cal. 353 = 34 C W N 839 = Ind. Rul. (1931) Cal. 450 = 131 I. C. 562.

—But if the issue, though collateral, were necessary for the disposal of the case, decision on it will operate as *res judicata*: (1930) A L J 1309 = Ind. Rul. (1931) All. 242 = 130 I. C. 194.

—And a finding on incidental issue may operate as *res judicata* if has been raised and clearly decided in the former suit: A I R 1921 Mad. 644 = 41 M I J 437 = 14 L W 702 = (1921) M W N 754 = 69 I. C. 570.

(2) Incidental Issues and Findings in suits.  
between Landlord and tenant.

—The question of title incidentally gone through in a rent suit does not operate as *res judicata*: 63 I. C. 762; see to the same effect—79 I C 621 = A I R 1924 N 422; and 2 I C 160; and 68 I C 472 = A I R 1923 C 327; and 54 P R 1904; and 1 C W N 509 = 24 C 569; and 3 C W N 266 = 26 C 428; and 6 C W N 66; and 8 C 470; and 34 I C 123.

—In a suit for rent the deft. set up a title to the land in himself and denied the relationship of landlord and tenant. Court dismissed the suit, holding that the plff. had failed to establish that the deft. was his tenant in a subsequent suit by plff. *Held* that decision on title was not necessary for the decision of the previous rent suit, and so did not operate as *res judicata*. 50 I. C. 598.

—Decision under s. 149 (3) Bengal Tenancy Act, does not decide finally substantial rights of parties. Incidental decision on question of title does not operate as *res judicata*. A I R 1927 Cal. 431 = 100 I C 427.

## C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd.)

(D) Incidental Issues and Findings.—(Contd.)

(2) Suits between landlord and tenant—(Concl'd)

—Tenant asserting landlordship of another and the latter denies, he can be impleaded as party, but decision as to title between him and plaintiff is no bar to his suit against co-defendant. A I R 1925 All. 574=85 I C 302.

—Decision in previous rent suit with reference to title is not *res judicata* in a subsequent declaratory suit. It is immaterial whether the third party under whom the defendants claimed to have held the land in previous suit was made a party, or not. A I R 1930 Cal. 579 = 57 C 371=Ind. Rul. (1930) Cal. 891 = 127 I C 763.

—Where in previous suit for rent defendant sets up title through another person not party and suit dismissed, the decision does not bar issue of liability in subsequent suit on same cause of action, impleading the person through whom the person alleged to claim. A I R 1923 Cal. 327 = 68 I C 472 see also 27 I C 273; and 40 I C 530 = 1 P L W 634; and 51 I C 356 = 30 C L J 13; and 52 I C 813 = (1919) M W N 287.

—Where the main issue in a rent suit was the existence of the relationship of landlord and tenant the decision as to the length of the deft's occupation was held not to be *res judicata* in a subsequent suit for ejectment in which the defence is adverse possession : 59 I C 316.

—Title to the land comprised in the patta is not directly and substantially in issue in a suit for rent, a decree for rent not necessarily involving the decision that a proper patta had been tendered : 10 I C 75.

—An incidental finding as to the boundary of a plot of land is not *res judicata* as regards the question of the title in a subsequent suit between the same parties. 32 I C 738. See also 34 I C 259 also 34 I C 125.

—Where in a suit for rent the tenant pleads payment in good faith to a third person who is therefore made a party to the suit and the suit is decided against him. Held that such a decision does not preclude the latter from establishing his title in a Civil Court, since the object of suit is not to avoid decision of Revenue Court. A I R 1924 All. 270=L R 4 A 138 Rev. = 71 I C 1017.

(3) Other Suits—Incidental issues and findings.

—The question whether a person should be admitted as the legal representative of deceased plaintiff to continue a suit is really a matter collateral to the suit, and the Code does not provide for an appeal against an order deciding the question. 25 M L J 279 = (1913) M W N 673=14 M L T 176 = 20 I C 950.

## C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd.)

(D) Incidental Issues and Findings.—(Concl'd)

(3) Other Suits—(Concl'd)

—The decision in a prior suit, is not *res judicata* in the subsequent suit as against the deft, if there was no real contest in the prior suit with regard to the title of the deft's, predecessors. 50 I C 727.

—In a proceeding for grant of Letters of Administration, finding as to applicant's title to whole or part is no bar to another suit on same question. A. I. R. 1923 Rang. 9 = 11 L. B. R. 331 = 1 Bur. L. J. 59 = 68 I C 671.

(4) DIRECTLY AND SUBSTANTIALLY IN ISSUE. (Contd.)

(E) NOT IN ISSUE.

## Synopsis.

- (1) General Principles.
- (2) Suits between landlord and tenant.
- (3) Partition Suits.
- (4) Suits by Hindu widows and reversioners.
- (5) Mortgage Suits.
- (6) Other Suits.

(1) General Principles.

—The leading case on this branch of the subject is *Barrs V. Jackson*, 1 Y. and C, Ch. Cas 586. For the bar under S. 11 to apply issue need not be raised specifically, provided it is necessary for the final disposal of the case : 27 M. L. J. 529 = 16 M L T 432 = 26 I C 817 (F. B.).

—Where the plea of fraud was not alleged in the former suit it cannot be held to have been adjudicated upon so as to be *res judicata*: 1930 M. W. N. 729 = I R. 1931 M. 39 = 128 I. C. 455.

—The rule of *res judicata* is inapplicable to matters in respect of which no controversy was raised and no express decision arrived at. 9 O W N 488 (512)=137 I C 606 = 16 R D 246 = I R 1932 O 243=13 L R A 246 (Rev.) = A I R 1932 O 199 = A L R. 1932 O 507 (F. B.).

—But where facts are accepted by both parties and incorporated in and made foundation of decree and judgment are *res judicata* notwithstanding absence of issue or of decision, thereon. 36 L W 414 (418)=A I R 1932 M 519=139 I C 761=I R 1932 M 789=A L R 1932 M 1466.

—Judgment confessed without any pleadings in the former suit—question not put in issue in the former suit can be re-agitated : 117 I C 295 = I R 1929 M 679 = A I R 1929 M 694.



C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd.)

(E) Not in Issue—(Contd.)

(1) General Principles—(Concl'd)

—As to decision of issue improperly raised after remand—See 10 C W N 1065, P C = 8 Bom. L R 722 = 16 M L J 440 = 3 A L J 695 = 4 C L J 405 = 1 M L T 265 = 9 O C 377 = 28 A 727 = 33 I A 156.

—Where the debts were exempted from liability in the former suit, and they had, therefore no right of appeal, the decree in that suit cannot operate as *res judicata*. 1 A L J 363 = 27 A 59 See also 1926 Lah. 202 = 27 P L R 194 = 93 I C 921.

(2) "Not in Issue"—Suits between Landlord and Tenant.

—Previous decree awarding rent at a certain rate for the suit period is not *res judicata* as to the different period : 43 C L J 135 = 95 I C 130 = A I R 1926 C 698; see to the same effect : 77 I C 334 = A I R 1922 Pat. 213; and A I R 1931 Cal. 788 = 58 Cal. 1040 = 134 I C 1042; and 3 O W N 313 = 98 I C 77 = A I R 1927 O 32; and 9 C L J 343 = 2 I C 828 = 36 C 604; and A I R 1930 Pat. 585 = 9 Pat. 674 = 11 Pat. L T 765 = 128 I C 337; and A I R 1927 M 842 = 53 M L J 440 = 103 I C 311; and 4 C W N 43; and 1931 M W N 813; and 4 C W N 161; and 43 I C 753 = 4 Pat. L W 47 = 1918 P H C C 218; and 34 Bom. L R 447 = A I R 1932 Bom. 222. And this principle equally applies to consent decrees. 21 M L J 449.

—But where it is proved, under Bengal Cess Act, that two years fall under the same re-valuation, the amount of cess operates as *res judicata*, though not otherwise : A I R 1927 Pat 58.

—A decree for rent for specific year or years does not operate as *res judicata* for rent for subsequent years, unless the rent sued for is in respect of land held under an oral or written contract for a term of years. 39 I C 576.

—A decree was given for rent at a certain rate. There was no subsequent change. Held, the previous decree was *res judicata*. 16 I C 590.

—A judgment in a suit for rent deciding the annual jama does not operate as *res judicata* on the same question in a subsequent suit for rent but is good evidence as to the rate of rent. 47 I C 173.

—A decree for rent without judgment is a strong piece of evidence but does not operate as *res judicata* as to rate of rent. A I R 1925 Cal. 1116 = 85 I C 770.

—Where the amount mentioned in the *patta* was taken as the basis of the amount of the rent payable in kind, it cannot operate as

C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd.)

(E) Not in Issue—(Contd.)

(2) "Not in Issue"—Suits between Landlord and Tenant—(Contd.)

*res judicata* in subsequent suit claiming the market value of the rent payable in kind. 41 I C 833.

—Where an order for remand directed the Lower Court to ascertain the rate of rent payable for the years in suit, held, that the decision of the rate of rent by the Lower Court did not operate as *res judicata* as regards the rate of rent for subsequent years. (1918) Pat. 238 = 3 Pat. L J 372 = 45 I C 316.

—Dismissal of a suit for rent of a particular year does not bar a subsequent suit for rent for a different period. 22 I C 7.

—A dismissal of a suit for enhancement of rent is no bar to a fresh suit in a subsequent year. 31 I C 866.

—If in a case under s. 105, B. T. Act, the only point decided was the amount of additional rent to be allowed for the excess area, it does not constitute *res judicata* as to the rate of rent. A I R 1923 Cal. 282 = 68 I C 298.

—Decision of the Settlement Officer under s. 104, Bengal Tenancy Act enhancing rent under s. 30 (b), when no question was raised as to portion of land being an undivided share, does not bar a subsequent suit for recovery of rent with a claim for enhancement. A I R 1930 Cal 238 = 33 C W N 1156 = Ind Rul (1930) Cal, 676 = 126 I C 132.

—Dismissal of a former suit for rent does not bar a subsequent suit for fixing fair rent under Bengal Tenancy Act, s. 105 : A I R 1923 Cal 333 = 37 C L J 314 = 72 I C 1013.

—The decision that rent was payable as Bhauli rent, does not bar a subsequent suit for the rent of the subsequent years at the cash rent system. A I R 1924 Pat. 371 = 1 Pat L R 109 = 72 I C 138.

—Dismissal of suit for resumption of rent free grant on the ground that the land was not resumable does not bar a fresh suit to assess rent, as no rent or revenue was assessed in the former suit : 29 I C 678.

—In a suit for rent the deft. questioned the propriety of the *patta*. In a previous rent suit between the same parties the issue was whether the plff. tendered the *pattas* to the deft. and whether the *pattas* so tendered were proper, and it was decided in the affirmative, Held :—Per Sankaran Nair, J., (Munro, J. dissenting).—That the decision in the prior suit was not *res judicata*. (1) The title to the land comprised in the *patta* was not directly and substantially in issue in the previous suit for rent, a decree for rent not necessarily involving the decision that a proper *patta* had been tendered. (2)



C. P. C. (1908) S. 11 (Contd.).

(4) Directly and Substantially in Issue—(Contd.)

(E) Not in Issue—(Contd.)

(2) "Not in Issue"—Suits between Landlord and Tenant—(Contd.)

There was no clear finding as to the ownership of the land entered in the patta in the previous suit. (3) Explanation (2) to S. 11, does not dispense with the necessity of a finding upon the issue by the judge in the previous suit.—35 M 216 = 21 M L J 344 = 10 I C 75 = 10 M L T 533.

—*Ex parte* decrees in prior suits in which no issue was raised as to the rate of rent and there was no decision with regard to such rate, do not operate as *res judicata* on that point. 65 I C 581.

—An *ex parte* decree in a rent suit, allowing the plff's claim at the rate of rent alleged in the plaint, does not operate as *res judicata* unless there was a prayer in the plaint for a declaration as to the rate of rent as part of the substantive relief claimed. 45 I C 416.

—An *ex parte* decree in a suit for rent in which the relationship of landlord and tenant was neither raised nor decided cannot operate as *res judicata* upon the question of relationship. The effect of an *ex parte* decree does not depend on the question whether the decree has or has not been executed. 24 I C 739.

—Where, in a rent suit, the deft. pleaded that the rate claimed was higher but no issue was framed to that effect, and an *ex parte* decree was passed, held that the Decree does not operate as *res judicata* on the question of rate of rent. A I R 1929 Mad. 673 = Ind Rul (1929) Mad. 817 = 118 I C. 497.

—In the previous suit for ejectment on the allegation that he himself was a raiyat and the defendant an under raiyat, the claim failed, because it was found that the defendant had a "protected interest." Held that the decision of the question of *status* was not barred by *res judicata*, as it was not directly and substantially in issue in previous suit. 31 C L J 507 = 57 I C 344.

—Where a tenant set up lakhiraj title in a rent suit, and no express issue was framed on the point, but evidence was taken and decision was given, such decision operates as *res judicata*. 20 I C 700.

—Prior suit for ejectment dismissed on the ground that defts. were not tenants, subsequent suit is maintainable. 51 I C 307. During the continuance of a prior lease parties entered into a fresh lease by which the tenant agreed to pay higher rent if he erected additional buildings. The landlord sued the tenant in ejectment for non-payment of the higher rent and the suit was dismissed on the ground that no additional buildings having been erected, the tenant was not liable to pay the higher

C. P. C. (1908) S. 11 (Contd.).

(4) Directly and Substantially in Issue—(Contd.)

(E) Not in Issue—(Contd.)

(2) "Not in Issue"—Suits between Landlord and Tenant—(Contd.)

rent. The landlord brought a second suit to eject the tenant on the ground that the second lease never came into effect at all and that the tenant was in effect a trespasser after the determination of the first lease by the grant of second lease. Held, that the decision in the prior suit was not *res judicata*. 257 P L R 1914 = 146 P W R 1914 = 25 I C 357.

—It was held, in a rent suit, that the plff. was bound to include in the suit the entire area recorded in the Record of Rights as forming the holding. The plff. amended the plaint accordingly but under protest. Subsequently he brought a suit for declaration that the plots in question did not form part of the deft's holding and that the entry in a Record of Rights was wrong. Held, that the suit was not barred by *res judicata*. (1918) Pat. 21 = 3 Pat. L W 360 = 42 I C 425.

—Though one and the same person may be an occupancy raiyat and a raiyat at a fixed rent, yet the decision as to status is no bar to the consideration of the question as to fixity of rent. A I R 1926 Cal. 887 = 94 I C 310.

—Decision in a jamabandi case, that the plffs. were non-occupancy tenants, does not bar a subsequent suit for determination of the tenure. 33 I C 556.

—Prior suit to declare that the land was the exclusive property of the plff and not shamilat does not bar a second suit for possession on the ground that the defts are not khewatdars : 24 P W R 1912 = 134 P L R 1912 = 13 I C 445.

—Question of title to land not in issue in prior suit cannot operate as *res judicata*. 24 I C 801.

—A decision as between the co-sharers that the sir and *khulkhast* of a particular co-sharer yielded profits at a certain rate in the years in suit does not operate as *res judicata* in respect of other years. 5 O L J 67 = 45 I C 218.

—Decision of a Rent Court on a question of tenancy in a previous suit for rent is not *res judicata* in a subsequent suit in the Civil Courts for a declaration of title. A I R 1924 All 163 = 21 A L J 476 = L R 4 A 428 = L R 5 A 47 Rev.

—Decision as to amount of rent in prior suit, does not operate as *res judicata* in subsequent suit, on the question of the relationship of landlord and tenant. 25 I C 204.

—Dismissal of a rent suit on the ground that the plff had failed to prove the deft to be a tenant at will was held not to bar a subsequent suit for recovery of rent for the

C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd)

(E) Not in Issue.—(Contd)

(2) "Not in Issue"—Suits between Landlord and Tenant—(Contd.)

same period against the defendant as expropriatory tenant. 15 I C 189=15 O C 45.

—Rent suit—Prior suit for Khas possession Alluvion and Diluvion see. 41 Cal 683 (P C).

(3) Partition—suits.

—Suit for partition of survey numbers not included in previous partition suit is not barred if plaintiff had no knowledge of their existence and information regarding them was withheld through mistake or fraud by defendant. A I R 1931 Sind 27=Ind Rul (1931) Sind 40=130 I C 552.

—When what was substantially in issue between the parties in the second suit did not necessarily call for decision and had not in fact been decided in the first suit is not res judicata. 36 Bom 127=13 Bom L R 1034=12 I C 711.

—Question of title having not been raised nor determined in the former partition proceeding cannot be res judicata. 42 All 309.

—The objection raising the question of title under s 11 cannot be availed of after the *tarz taqsim* is prepared. And so a suit instituted to set aside a sale which took place subsequent to the preparation of the *tarz taqsim* cannot be barred by *res judicata* because the question of title was not raised in the partition proceedings nor can such a suit be barred under s. 233 (c) provided the suit does not disturb the partition or union of *mahals*. A I R 1929 All 463 = L R 10 A 295 Rev. = Ind Rul (1929) All 813=118 I C 45.

—Suit for possession on title by survivorship was dismissed with a finding as to separation. But a subsequent suit for partition of a village is not barred because the finding that A and B were divided in status was enough to dispose of the plaintiff's case in the prior suit and it is only that issue that could operate as *res judicata*. The right to the village in question was not substantially and directly in issue in the previous suit and therefore the finding thereon does not operate as *res judicata*. 21 C L J 296 = 28 I C 580.

(4) Suits by Hindu widows and reversioners.

—First suit by reversioner for a declaration that he was the next reversioner, on the occasion of a gift by the widow does not bar a subsequent suit for possession of the property. A I R 1922 All 401=70 I C 635.

—Where a Hindu widow and her alleged adopted son sued in the alternative and one

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C. P. C. (1908) S. 11 (Contd)

(4) Directly and Substantially in Issue—(Contd)

(E) Not in Issue.—(Contd)

(4) Suits by Hindu widows and reversioners—(Contd)

of them, in the circumstances of the case, was bound to succeed, an adjudication in favour of both the plaintiffs did not bar a subsequent suit by the defendant to set aside the alleged adoption, because in that suit there was no issue with reference to the question of adoption. 13 M L J 359. Suit for maintenance varying claim,—fresh not barred. 29 I C 25.

(5) Mortgage Suits

—Issue as to mortgagor's title raised and decided against mortgagor's legal representatives does not bar the representative's subsequent suit for declaration of their own title to the property. A I R 1926 Rang. 191=5 Bur L J 114=98 I C 164.

—The plea of *res judicata* in respect of a paramount title cannot be set up against a person who happens to be a party in a mortgage suit in a different capacity unless the paramount title has been expressly the subject of controversy and there has been an actual decision in respect of it. A I R 1930 Oudh 97 = 7 O W N 25=Ind. Rul. (1930) Oudh 53=121 I C 277.

—Where the only matter in issue was the validity of the mortgage, any decision as to amount or other question cannot operate as *res judicata* in a subsequent suit : A I R 1923 O 139 = 9 O L J 612 = 74 I C 346.

—Where, in a suit by the second mortgagee for the sale of mortgaged property, the first mortgagee asserts his lien and is referred to a separate suit for enforcing it this does not bar such separate suit for the first mortgagee cannot resist the claim of the second mortgagee to bring the property to sale subject to the mortgage. 2 A 582.

—Mere obiter dictum as to the validity of a mortgage would not be *res judicata* if the validity of the mortgage was not a matter in issue in the previous litigation. 4 Pat L J 682 = (1919) Pat 343 = 52 I C 338.

—Statement by mortgagee's Pleader that the sons may be discharged and a simple money decree passed against the father does not operate as *res judicata* in a subsequent suit by the sons for a declaration that the joint family property was not liable to attachment and sale in execution of the simple money decree passed against the father. A I R 1927 Oudh 15 = 3 O W N 862 = 98 I C 300.

—Where the plaintiff sued for his share of a certain amount deposited in Court on account of a mortgage decree in favour of two other persons, on the ground that he had purchased the whole rights of one of them,

C. P. C. (1908) S. 11 (Contd.).

(4) Directly and Substantially in Issue—(Contd.)

(E) Not in Issue—(Contd.)

(5) Mortgage Suits—(Concl'd)

it was held that he was not debarred from suing on the same ground for his share in sums that were subsequently deposited to the account of his vendor, and that the decree in first suit would be *res judicata* only so far as it decided about the grounds on which he claimed a share in the amounts deposited. A I R 1925 Oudh 303 = 28 O C 2 = 84 I C 263.

—Where a suit to redeem an invalid mortgage was dismissed, it was no bar to a subsequent suit to redeem different mortgage, which subsequently sprang into existence by the operation of the statute of limitation. A I R 1930 Mad. 264 = Ind. Rul. (1930) Mad. 955 = 127 I C 139. Case-law on the subject is fully discussed in the last mentioned case.

#### (6) Other Suits.

—Dismissal of a suit to enforce one of the clauses in an agreement does not bar a subsequent suit to enforce another clause: 1932 P C L (21-28) (Civ.) = A L R 1932 L 21 (Civ.)

—Where finding as to breach of contract was necessary for decision in a suit but was not substantially in issue, a subsequent suit by vendor for damages for breach of contract was held not barred by *res judicata*: A I R 1930 C 5 = 120 I C 710 = I R 1930 C 70 = 56 C 639.

—Decision that will was "wholly valid" does not bar question as to validity of its provisions regarding succession to the shebaitship, when the only question in the previous case was about the extent of bequest that operated under the will. A I R 1925 Cal. 225 = 40 C L J 561 = 29 C W N 17 = 85 I C 875.

—Suit as to specific provision in a will is not barred by a former suit disputing the validity of the will. A I R 1928 Lah. 967 = 10 Lah. 389 = 30 P L R 562 = 113 I C 298.

—First suit by wife for protecting her right of maintenance does not bar a subsequent suit by her for recovery of property after husband's death. 1912 M W N 380 = 15 I C 357.

—The decision in a previous suit that certain alienations were not binding on the plaintiff will not be *res judicata* in a subsequent suit between plaintiff and the alienee. A mere assertion by the plaintiff in the former suit that the transfers were nominal cannot, in the absence of an issue on that point, be treated as evidence on that question. M W N 1912, 380 = 15 Ind. Cas. 357

—Non-ancestral land Daughter-of collateral Prior suit questioning alienation. Matter not put in issue or decided does not operate as *res judicata*. 35 I C 542.

C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Contd.)

(E) Not in Issue—(Contd.)

(6) Other Suits—(Contd.)

—A chance remark in a previous judgment does not operate as *res judicata*. 56 P R 1916 = 160 P L R 1916 = 35 I C 542.

—Where the main question was whether plff. was a coparcener with a certain person, a decision that the pedigree set up by the plff. was not proved is not *res judicata* in a subsequent suit. 12 O L J 105 = 86 I C 686 = A I R 1925 O 386.

—Decision on the question of revocation in probate proceedings does not bar a subsequent suit where the question is how far dispositions in the prior wills were affected by the third will. 21 M L J 485 = 9 M L T 319 = (1911) 1 M W N 189 = 9 I C 613.

—In an application for Letters of Administration the Court has merely to decide whether the applicant is an heir to the whole or part of the estate of the deceased and whether he is a fit person to whom Letters should be granted. Such a decision does not operate as *res judicata* in a subsequent suit for possession of the property as heir by the defeated applicant. 49 P R 1918 = 46 P L R 1918 = 34 P W R 1918 = 43 I C 723.

—Where the groves in later suit are different from the grove which formed the subject of the previous litigation it was held that the subsequent suit was not barred. A I R 1924 All. 922 = L R 5 A 406 Civ. = 85 I C 76.

—First suit by plff. against deft for injunction restraining him from building on the disputed land. The suit was dismissed on the ground that the land was the deft's own. Second suit by deft against plff. for an injunction as to flowing of water on the disputed land; plff. pleaded easement. The suit was dismissed on ground of easement Plaintiffs appealed against the decree dismissing the first suit and there was no appeal from the decree in the other suit. It was held that the consideration of the issue as to ownership of the land was not barred, since that question ceased to be substantially in issue in the second suit by reason of the finding on the question of the easement right. A I R 1923 All. 15 = 20 A L J 784 = 76 I C 613.

—In the former suit A sued B claiming to let out water on his land through a particular opening. In the second suit B claimed a prescriptive right to a flow of water from A's land to his own. Held, the issues in the two suits were different and the second suit was maintainable. A I R 1923 Pat. 65 = 4 P L T 81 = 69 I C 947 = 1922 Pat. 305 = 2 Pat. 110.

—A finding in a former ejectment suit that the parties were cosharers does not bar a subsequent suit to prevent the defts from

C. P. C. (1908) S. 11 (Contd.)

(4) Directly and Substantially in Issue—(Concl'd)

(E) Not in Issue—(Concl'd)

(6) Other Suits—(Concl'd)

obstructing joint user : A I R 1927 Lah. 505 = 8 Lah. 308 = 28 P L R 432 = 103 I C 494.

—Former suit for recovery of immoveable property does not bar a subsequent suit for mesne profits : 15 N L R 101.

—The dismissal of a suit under S. 9 of the Sp. Rel. Act does not preclude the plff. from recovering the land in a regular suit on the ground of prior possession without title. 11 N L R 31 = 27 I C 977.

—Where the former suit was confined by Statute to the question of possession a subsequent proceeding in which the question of title is raised is not barred. A I R 1925 All. 200 = L R 5 A 132 Rev. = 78 I C 115.

—Where the decree in the former suit was not based upon the decision as to ownership such decision does not operate as res judicata : A I R 1923 N 139 = 82 I C 516.

—In a dispute about land both parties put forward certain measurements, and both agreed to a particular measuring rod. Owing to that rod the plff got more than he was entitled. Held that a subsequent suit as to the question of the length of the rod was not barred by res judicata : A I R 1922 C 311 = 71 I C 378 = 38 C L J 17 = 27 C W N 280.

—The decision in a previous suit that certain alienations were not binding on the plaintiff will not constitute the question *e. g.* whether such alienations were *bogus* transactions, *res judicata* in a subsequent suit between the plaintiff and the alienee. A mere assertion by the plaintiff in the former suit that the transfers were nominal cannot, in the absence of an issue on that point, be treated as evidence on that question. M W N 1912, 380 = 15 Ind. Cas. 357.

—Where the main point at issue was as to the necessity of a mortgage, and it was not necessary to go into the question of adoption, though a decision was given on it, Held, that it is doubtful whether the decision on adoption can act as res judicata : A I R 1923 L 523 = 6 L L J 39 = 75 I C 317.

—Former suit as to right to sell does not affect a subsequent suit as to right to mortgage : A I R 1926 O 139 = 2 O W N 944 = 91 I C 1021.

## (5) EXECUTION PROCEEDINGS.

### *Synopsis*

(1) Applicability of res Judicata to Execution Proceedings.

(1) General.

(2) There must be an express order.

(3) Prior order must be in force.

C. P. C. (1908) S. 11 (Contd.)

(5) Execution Proceedings—(Contd.)

(4) Superior Court's order superseding first order.

(5) Stay of execution, effect of.

(6) Attachment order when to be attacked.

(7) Estoppel.

(8) Decision as to question of procedure.

(9) Decision as to executability of decree.

(10) Decision as to construction of decree.

(2) Between the same Parties.

(3) "Competent Court"

(4) "Directly and Substantially in issue"

(5) Heard and finally decided

(1) General.

(2) Dismissal for default.

(3) Dismissal not on merits.

(4) Dismissal on merits.

(5) fraudulent order.

(6) Interlocutory orders.

(7) Erroneous decision.

(8) Reliefs different.

(9) Miscellaneous.

(6) Might and Ought.

(7) Ex Parte Orders.

(8) Plea of limitation in execution Procedure.

(9) Separate suit.

(10) Special Acts.

(1) Applicability of Res Judicata to Execution Proceedings.

—(1) General :—Execution proceedings not being "suit" the specific provisions of s. 11 C P C do not apply to such proceedings, but the principle underlying the section applies if all the conditions of res judicata are satisfied : 24 Bom L R 1291 = 76 I C 148 = A I R 1923 B 36; see to the same effect 15 A L J 415; and A L R 1933 N 164; and 33 Bom L R 781 = A I R 1931 B 446; and 4 U B R 132 = 70 I C 530 = A I R 1923 R 119; and 16 I C 238; and I R 1930 O 177 = 123 I C 881 = 7 O W N 363 = A I R 1930 O 305; and 112 I C 534 = A I R 1928 A 527 = 51 A 346; 10 L L J 474 = 113 I C 778 = A I R 1929 L 121; and 36 C W N 367; and 3 I C 47 = 14 C W N 114; and 109 P R 1913 = 108 P W R 1913 = 19 I C 481; and I R 1932 P 318 = 140 I C 507 = A I R 1932 P 357 = 11 P 607; and 5 P L T 7 = 74 I C 781 = A I R 1924 Pat 265 = 2 Pat 771; and U B R 1907 C P C 1 = 14 Bur L R 35; and 1930 M W N 729 = 32 L W 615 = A I R 1931 M 381; and 47 A 86.

—Objection once decided cannot be again raised in execution of the same decree. A I R 1927 Lah 179 = 99 I C 1006.

—Thus a question of the validity of the transfer of the decree was held to be *res*



C. P. C. (1908) S. 11 (Contd.).

(5) Execution Proceedings—(Contd)

(1) Applicability of Res Judicata to Execution Proceedings—(Contd)

*judicata.* A I R 1925 All 117=47 A 86=22 A L J 928=5 L R A Civ. 744 = 80 I C 722.

—Where at one stage of an execution proceeding an order is made disallowing the objections of the judgment-debtor, the order is binding in all subsequent stages of the same execution. 64 I C 724.

—But failure to appeal is not always fatal. Thus a widow of a judgment-debtor was brought on record as his legal representative. She did not appeal against the order but contended that the property was gifted to her by her husband : *Held*, that the fact that she did not appeal against the order, did not bar her contention. A I R 1931 Mad 303=33 L W 359=(1931) M W N 48=69 M L J 628=Ind Rul (1931) Mad 562=131 I C 610.

—The rule of *res judicata* implies that the decision on particular facts is binding and conclusive only as to its immediate and direct object, and not for any other purpose for which those facts may come in question subsequently between the parties subject to the qualification that the immediate subject of the decision should not be attempted to be withdrawn from its operation so as to defeat its direct object. Thus where a mortgagee who was entitled to possession of the mortgaged properties sued for possession thereof. His suit was dismissed on the ground that the properties were not transferable under the terms of the *sanad* under which they were granted to the mortgagor, but he was given a money decree for his claim.

—In execution of that decree the mortgagor objected to the attachment on the ground that under the terms of the *sanad* the properties were not transferable, and pleaded that the matter was *res judicata*. *Held*, overruling the plea, that so long as the mortgagee did not seek to avoid the operation of the prior decree by attempting to sell the mortgaged properties, he was entitled to ask for an adjudication on the question whether, under the terms of the *sanad*, the properties sought to be attached were inalienable, though his plea could only be supported by argument calculated to prove that the prior decision was erroneous. 39 All 379=15 A L J 369=39 I C 902.

—A question purely of a clerical or arithmetical error must be distinguished from objection to actual execution of decree. A I R 1933 N 164.

—(2) There must be an express order :—The binding force of an order in execution depends not on s. 11 but on general principles of law; and for such principle to apply there must be an express order determining

C. P. C. (1908) S. 11 (Contd)

(5) Execution Proceedings—(Contd)

(1) Applicability of Res Judicata to Execution Proceedings—(Contd)

rights of the parties : A L R 1933 N 231 (Following 6 A 269 P C.)

—If an executing Court expressly decides a point *inter partes* that decision becomes final according to the general principles of law, though the question whether the law of *res judicata* applies would be irrelevant. A I R 1922 All. 413 = 44 A 159=19 A L J 954=65 I C 377.

—(3) Prior order must be in force :—To be *res Judicata*, the prior order must be in force at the time of the subsequent proceedings : 13 Bom. L R 230=10 I C 811=35 B 245.

—Where a prior order under O. XXI, r. 23 for execution is vacated by a subsequent order of dismissal of execution application under r. 57 there is no *res judicata*. 2 L W 1055=31 I C 293.

—(4) Superior Court's order superseding first order :—Where a final decree in a mortgage suit has been passed after notice to the judgment-debtors, it is binding on the parties at every subsequent stage of the execution proceedings unless set aside on appeal 45. I C 657 see also 1 Pat. L R 145 = 73 I C 359; and 5 Pat. L J 639.

—But the order of a lower court cannot operate as *res judicata* against the decree-holder proceeding in execution on the strength of a superior court's order passed later in virtue of an appeal from an order prior in date to the 1st mentioned order. 35 B 245 = 13 Bom. L R 230 = 10 I C 811.

—Thus a fresh objection to an application in execution proceedings is not barred where the application has been remitted by superior Court overruling former objection. A I R 1924 All. 804 = L R 5 A 565 Civ. = 82 I C 65.

—(5) Stay of execution, effect of :—The rule of *res judicata* will not cease to apply merely because the execution was stayed pending an appeal and the decree of the lower Court was confirmed on appeal. A I B 1931 Bom. 451=33 Bom L R 797 = Ind. Rul (1931) Bom. 398=133 I C 750.

—(6) Attachment order when to be attacked :—Where an order of attachment is made after the judgment-debtor had been given an opportunity to appear and show cause against the order, it is conclusive. But where such order is intended to be attacked on the ground that certain pleas were not taken originally, the propriety of the order can be questioned only in subsequent proceedings other than those in which it was passed. 35 M L J 312 = (1918) M W N 143 = 44 I C 4.

—Where an order releasing property from attachment is not appealed against the order becomes final and fresh application for the



C. P. C. (1908) S. 11 ( *Contd.* ).

( 5 ) Execution Proceedings—( *Contd.* )

( 1 ) Applicability of *Res Judicata* to Execution Proceedings—( *Conclud.* )

attachment of the same property does not lie  
A I R 1927 Lah. 852=28 P L R 607=9 Lah L  
J 193=100 I C 23.

—( 7 ) Estoppel:—Mere symbolical possession given to decree-holder will estop the judgment-debtor from pleading adverse possession, even in cases where actual possession should have been given : 26 P L R 546=89 I C 596=A I R 1926 L 35.

—( 8 ) Decision as to question of Procedure:—Where substantive rights are decided in an order passed in execution proceedings, such decision is *res judicata* in subsequent execution applications. But when the decision on the prior application was one on a question of procedure, as it then stood, it does not operate as *res-judicata* when that procedure itself is changed by the statute law, 39 Mad. 923=30 M L J 460=18 M L T 313=(1915) M W N 769=30 I C 707.

—( 9 ) Decision as to executability of decree:—Where on an application for execution, it was decided that the decree as it stood was not executable. *Held*, that the order was binding on the decree holder as *res judicata* and no further application for execution would lie unless the decree had been made absolute and executable. 12 L W 34=59 I C 161.

—Notice under O XXI, r. 16 given to the judgment-debtor of the application for execution, judgment-debtor failing to file any objection as to its executability before the decree was transferred for execution, is not prevented from raising an objection to the right of the transferee, of decree to execute the decree before the transferee Court A I R 1927 Pat. 170=8 Pat L T 163=101 I C 616

—( 10 ) Decision as to construction of decree:—Construction of decree by executing Court when necessary for disposing of the execution application is binding A I R 1929 Lah 437 = 30 P L R 323 = Ind. Rul. (1929) Lah 751= 118 I C 399; see to the same effect : 11 I A 37 = 6 A 269; and 6 C L R 215; and 6 C 203; and 16 M L T 399; and 95 I C 31; and 20 M 289.

—But where a decree by trial Court merges in the High Court's decree, interpretation by trial Court of its own decree while executing it is not *res judicata* during execution of High Court decree. A L R 1933 L 229 = A I R 1933 L 352.

( 2 ) Between the Same Parties.

—A privity exists between an execution-creditor and a purchaser at a Court sale, the latter representing the former in so far as he had a right to bring the property to sale in execution of his decree. Thus, when the plea

C. P. C. ( 1908 ) S. 11 ( *Contd.* )

( 5 ) Execution Proceedings—( *Contd.* )

( 2 ) Between the Same Parties—( *Conclud.* )

of estoppel is available to a decree-holder, it is likewise available to the purchaser at the execution-sale, as his representative or as one claiming under him 18 Mad 13, followed in. 39 M 570.

—But if in execution of a decree at the instance of an attaching creditor, a decision is arrived at in favour of or against the decree-holder it cannot operate as *res judicata* if the matter arises directly between the decree-holder and the judgment-debtor : A L R 1933 P 166.

—An order passed on a claim, put in by a person in respect of property attached in execution of a decree, adversely to the claimant, will not affect his right to put forth his title in defence to an action for recovery of possession by a third party, even though the claimant did not institute a suit within one year after the disallowance of his claim when the attachment was raised within three months after the passing of the order on the claim petition. In such a suit, the plff being no party to the claim proceedings, cannot claim the benefit of the order on the claim petition passed adversely to the defendant. 16 I C 529=(1913) M W N 54.

—A legal representative of a deceased judgment-debtor who has allowed proceedings to proceed against him for some time, and has paid part of the decretal debt is estopped from pleading that the decree is incapable of execution against him. 31 Calc 822, followed in 2 C L J 499; and 3 Pat L J 454=46 I C 473; see also 109 I C 866=A I R 1928 M 203.

( 3 ) " Competent Court "

—Execution Court has no jurisdiction to entertain a second application of objection to the attachment and sale, when one has failed though grounds are different. A I R 1929 Lah 470=Ind Rul (1929) Lah 704=117 I C 816; see also A I R 1931 Lah 6=130 Ind Cas 406=32 Pun L R 413.

—Court in which suit was filed passing decree after losing territorial jurisdiction. Order directing execution by another Court acquiring such territorial jurisdiction but subordinate to another District Judge is not *res judicata*. A I R 1928 Mad 746=28 L W 885 = Ind Rul (1929) Mad 289=114 I C 545.

—The judgment-debtor applied to set aside attachment of his property on the ground that the land was service inam. Civil Court dismissed the petition. In a subsequent suit by the judgment-debtor, in Revenue Court it was held that the land was service inam, under s. 13 of Hereditary Village Officers Act 3 of 1895.

C. P. C. (1908) S. 11 (Contd.).

(5) Execution Proceedings—(Contd.)

(3) "Competent Court"—(Concl'd)

In subsequent execution proceeding against the same land, the judgment-debtor again raised the objection that the land was service inam having regard to the decision of the Revenue Court. Held, the executing Court could not re-open the question whether the land was service inam. Held, further, that the decision of the Revenue Court under Act 3 of 1895, though final and binding on Civil Court ordinarily, it was not open to the latter to recognise and give effect to their decision so long as the decision of a Civil Court (holding the land not to be service inam) remained in force and had to be acted upon. A L R 1933 M 841.

(4) "Directly and Substantially in issue"

—Decision that certain properties are liable to sale is *Res-judicata* in a subsequent stage. 45 I C 699.

—Where, on a suit for a declaration that a transfer by a Judgment-debtor was during the pendency of an attachment by the decree-holder and the property is liable to satisfy the decree of the plff. it is found that the alienation was void as against the decree-holder and the property was liable to satisfy the decree, it is not open to the transferee on an application for execution against him to raise the same defence and to plead that the transfer in his favour is valid and that the properties are not liable to attachment. 58 I C 711.

—Where, in execution of a decree for maintenance, the court decides after notice to the judgment-debtor that certain properties are liable to be sold in execution, the order is *res-judicata* in a subsequent application for execution of the maintenance decree. 10 I C 632.

—Decision as to mesne profits at one stage of the proceedings is binding on the parties : 29 C L J 245 = 51 I C 98

—Decision that order on application to set aside execution sale is under s. 47 is binding. A I R 1924 Bom 495 = 26 Bom. L R 817 = 48 B 638 = 83 I C 155.

—Decision that notice under O. XXI, r. 66 is not necessary to a party bars a plea of want of notice even after sale. A I R 1924 Pat. 628 = (1924) Pat. 209 = 7 P L T 353 = 92 I C 326.

—A party will not be precluded from defending his action under r. 89 even though he desisted from his action under r. 58 of O XXI. A I R 1927 Mad 327 = 25 L W 106 = 38 M L T 30 = (1927) M W N 53 = 99 I C 893.

—Rejection of application to set aside execution sale on ground of fraud bars the

C. P. C. (1908) S. 11 (Contd.)

(5) Execution Proceedings—(Contd.)

(4) "Directly and Substantially in issue—(Contd.)

same plea being raised in subsequent suit by auction-purchaser for possession. 38 I C 47

—In a suit against a Hindu widow, by the executors of the husband, the parties agreed to a compromise on the terms of which a decree was passed. In execution proceedings, the widow objected to the attachment of the house she was residing in, but the objection was overruled and execution was allowed to proceed. The Chief Court held that the widow had no right to live in the house and confirmed the execution proceedings. On a suit by the widow for declaration that she was entitled to live during her lifetime in the house in suit and for maintenance : Held, that the decision in the previous execution proceedings between the same parties made the question *res judicata*; also that the widow was in possession of the house as a trespasser and that she was not entitled to claim maintenance unless and until she had given possession of the house and accounted for the profits in the meantime. 69 P L R 1915 = 17 P W R 1915 = 26 I C 430.

—But a subsequent execution petition for different relief but based on the same question of fact as prior execution petition is not maintainable. A I R 1929 M 404.

—An order refusing an application in execution proceedings for substitution under O XXII does not operate as *res judicata* as against an application for execution under O XXI. r. 1 A I R 1925 Oudh 417 = 2 O W N 352 = 10 O L J 538 = 29 O C 98 = 88 I C 1016.

—The mere fact that the petition in the suit itself, to have the property sold in a particular order is disallowed, is no bar to the executing Court making a fresh order in the course of the execution. A I R 1924 Mad 509 = 19 L W 23 = (1924) M W N 134 = 46 M L J 32 = 83 I C 918.

—Dismissal of application by judgment-debtor under O 21, r. 2 does not bar decree-holder from applying for certifying payment : A I R 1925 Pat 822 = 89 I C 195.

—The subsequent mortgagee obtained a decree for sale against the mortgagor alone. Later on, the prior mortgagee obtained a decree against both the mortgagor and the subsequent mortgagee. On execution of the former decree, the prior mortgagee applied under O. 21 r. 62 for a declaration of his mortgage encumbrance. The application was dismissed. Held, the point was not *res judicata* between the prior and subsequent mortgagees : 3 O L J 529 = 37 I C 78.

—Where the prior execution proceedings related to a portion of the plaintiff's claim which had been decreed and the later suit was in respect of a liability which was not

C. P. C. (1908) S. 11 (Contd.).

(5) Execution Proceedings—(Contd)

(4) "Directly and Substantially in issue—(Concl'd)

decided in the earlier suit. *Held*, that the decision was not *res judicata*. A I R 1931 All 65 = Ind. Rul. (1931) All. 328 = 130 I C 712.

—Dismissal of suit for future mesne profits on the ground that a prior decree awarded the same does not bar a subsequent application for execution of the decree. 38 Mad. 199.

—A claim in execution to a house which had been attached was dismissed and the claimant sued the decree-holders to establish her title to it. It appeared that the house had been previously attached in execution of another decree obtained against the same judgment-debtor and his father (since deceased), that the present plaintiff had then preferred a claim which was allowed, that the judgment-debtor had taken no steps to have the order allowing the claim set aside, and that a suit filed by the decree-holder with that object had been dismissed. *Held*, that the plaintiff's claim was not *res judicata*. 15 Mad. 477.

—Decision in proceedings between decree-holder and judgment-debtor raising question of validity of attachment of immoveable property is *res judicata* against purchaser of attached property from judgment-debtor during the pendency of those proceedings, in the absence of proof of fraud or collusion between decree-holder and judgment-debtor in connection with those proceedings. 55 M 495 = 1931 M W N 1235 = 34 L W 809 = 62 M L J 302 = 136 I C 306 = A I R 1932 M 86 = I R 1932 M 274.

(5) Heard and finally decided

—(1) **General**:—A question at issue between the parties once heard and finally decided, binds the parties at subsequent stages of the same suit, under general principles of law though not under s. 11. 48 C 499 = 48 I A 187 = 19 A L J 366 = 40 M L J 423 = 29 M L T 336 = (1921) M W N 313 = 33 C L J 405 = 3 U P L R (P C) 17 = 23 Bom. L R 648 = 25 C W N 915 = 14 L W 221 (P C) = 60 I C 631

—Earlier order not deciding the point raised in the latter application is not *res judicata*. A I R 1924 Mad. 145 = 18 L W 652 = (1923) M W N 835 = 33 M L T 64 = 76 I C 761.

—Where an objection to the maintainability of an application for execution on the ground of limitation was raised, but not decided, it is competent to the judgment-debtor to raise the same objection in a later application. 44 I C 220.

—Point raised at one stage of execution proceedings and decided against J. D. after

C. P. C. (1908) S. 11 (Contd.)

(5) Execution Proceedings—(Contd)

(5) Heard and finally decided—(Contd)

notice—He cannot object at a later stage. A I R 1926 All 71 = 48 All. 201 = 24 A L J 91 = L R 6 A 606; Civ. = 90 I C 83.

—Where the Court decided after due notice upon the judgment-debtors that the execution was in order and that it should proceed—*Held*, that the order is binding upon the judgment-debtors. A I R 1923 Pat. 180 = 4 P L T 204 = 68 I C 337.

—But so long as an application for execution is pending the judgment-debtor can at any time show that it is barred by limitation and the Court has to dismiss it under s. 3 of Lmt. Act. 1920 Pat. 109 = 53 I C 85.

—Where the notice does not show what properties are to be proceeded against there is no *res judicata*: 163 A W N 1907 = 4 A L J 400; see also A I R 1929 R 172.

—A notice to legal representative to show cause why the decree should not be executed does not bar an objection that the property does not belong to J. D. 28 L W 885 = A I R 1928 M 746.

—A decision in the course of execution proceedings on a question which properly arises for consideration is final and binding between the parties. The binding character of the order is not affected by the circumstance that as to some of the parties it was based on agreement and as to the others on an adjudication by the Court. 55 I C 189 = 47 Cal. 446 = 24 C W N 269.

—Where the Sub-Judge awarded interest on the mesne profits, but no final orders were passed, the decree holder being ordered to furnish some information. An appeal was filed against the order to the High Court, which was dismissed as premature, but the Judges in the High Court discussed certain matters of principle decided by the Court below. The decree-holder having asked for interest, *held*, (1) that the interest could not be granted, (2) that the High Court having come to the conclusion that the appeal was premature, the further observations were made *obiter*. 14 A L J 1171 = 37 I C 674.

—Where the executing Court decided that no property of the judgment-debtor can be attached, that decision is final and the decree-holder cannot attach properties other than those attached in the previous proceedings and re-open the question of liability. 4 Pat. L W 279 = 44 I C 654.

—Where the Court ordered attachment of property and issue of notice as to sale proclamation despite objection by judgment-debtor but did not expressly order sale it was held the order would not operate as *res judicata* on the question of the decree-holder's

C. P. C. (1908) S. 11 (Contd.)

(5) Execution Proceedings—(Contd.)

(5) Heard and finally decided—(Contd.)

right to execution by sale of those properties.

41 I C 73 = 45 Cal. 530.

—Point as to whether anything is still due under a decree not raised and decided by an appealable or judicial order in an execution proceeding—Mere order passed on an application to bid at the same execution proceedings is not *res judicata*. A I R 1929 Mad. 903=Ind. Rul. (1930) Mad. 289 = 122 I C 161.

—Where an objection that Judgment-debtor was an agriculturist was dismissed in execution it was held that the same was not *res judicata* in an objection case under. C P C O 21, r. 99, 110 I C 337.

—If the questions involved in a suit are tried and decided in favour of the deft., no matter how numerous they may be, the estoppel of the judgment will apply to each point so settled in the same decree; 19 C L J 34 = 21 I C 979.

—Decision that former execution petition was invalid is *res judicata*. A I R 1921 Mad. 315 = 40 M L J 556 = 13 L W 529=(1921) M W N 344 = 63 I C 189.

—Objection to application for execution once dismissed operates as *res judicata*. A I R 1930 Oudh 65 = 6 O W N 1064 = Ind. Rul. (1930) Oudh 253 = 124 I C 445. Order of satisfaction of decree bars fresh execution application unless set aside. A I R 1926 Lah. 518 = 94 I C 172.

—(2) Dismissal for default :—Where objections to execution proceedings are dismissed on default of the objectors, same objections to a subsequent application for execution of the same decree by the same objectors are barred by *res judicata*. A L R 1933 L 838 (relying on 2 Pat 759; and 48 A 201; and 48 B 638; and 38 A 289; and A L R 1933 L 812; and I Luck 171; and 8 R 302; and 92 I C 254); and see to the same effect 55 C L J 184=A L R 1932 C 382=36 C W N 367 = A I R 1932 C 569; and A I R 1932 L 643; and A L R 1933 A 711; and 15 A W N 1895.

—Dismissal of an execution case for default does not bar an objection in the subsequent execution case that the objector was not liable for the debt even though the objection was not raised formerly: A I R 1925 Pat. 588 = 6 P L T 507 = (1925) Pat. 160 = 90 I C 276.

—Where an application for execution is dismissed for default, the decree-holder can apply to execute the decree again without setting aside the prior order. But the case is different if the prior order of dismissal was on the merits. (1918) Pat. 265 = 5 Pat. L W 208 = 47 I C 154 = 4 Pat. L J 330.

—Mere non attendance of the non-applicant to appear for settling terms does not estop

C. P. C. (1908) S. 11 (Contd.).

(5) Execution Proceedings—(Contd.)

(5) Heard and finally decided—(Contd.)

him from contending that the property was not liable to attachment in execution. A I R 1924 Mad 1 = 46 M 768 = 45 M L J 346 = (1923) M W N 571 = 18 L W 757 = 74 I C 155 F. B.

—A *darkhast* disposed of for default of appearance as the plaintiff's Pleader was absent cannot be said to have been heard and decided on merits. It does not operate as *res judicata*. A I R 1929 Bom. 217 = 31 Bom. L R 400 = Ind. Rul. (1929) Bom. 476 = 118 I C 700.

—But the conclusive character of an adjudication in a former execution proceedings as to a party's right to execute the decree cannot be affected by subsequent dismissal of that application for default. 64 I C 209=24 O C 213=A I R 1921 O 54.

—And a dismissal for default of an execution application has not the effect of vacating a prior order in execution which has become *res judicata* between the parties. 3 L W 339=(1916) 2 M W N 64=33 I C 443.

—Where an application for ascertainment of mesne profits is dismissed for default, a fresh petition, if the point was not pressed in the suit, is not *res judicata*. A I R 1924 Mad 473=46 M L J 46=19 L W 69=33 M L T 261=(1924) M W N 115=79 I C 635; but see 37 I C 997.

—Party not appearing to settle terms will not be precluded from pleading subsequently that the property was not liable to attachment : A I R 1924 Mad 1=46 M 768=(1923) M W N 571= 18 L W 757 = 45 M L J 346=74 I C 155. But see A I R 1922 N 320=21 N L R 23=88 I C 831.

—(3) Dismissal not on merits :—Where an objection petition in an execution proceeding is dismissed for non-prosecution there is no adjudication on the merits and hence it cannot be *res judicata*. A I R 1923 Cal 287=67 I C 663.

—Previous objection in execution dismissed as premature—Subsequent suit in respect of the same plots is not barred and it should be treated as proceedings under s. 47. A I R 1928 Oudh 38=4 O W N 1015=106 I C 133

—Rejection of application under O IX, r. 13 does not bar a suit to set aside decree as fraudulent and also of proving non-service of summons incidentally. A I R 1924 Pat 241=(1923) Pat 336=5 P L T 37=75 I C 343.

—(4) Dismissal on merits :—An objection for attachment was dismissed. The Judgment-debtor then filed another objection on the same grounds adding a reference to s. 60 of the C P Code: *Heid*, that the dismissal of the previous objection was a bar to the second objection and that the same principles



C. P. C. (1908) S. 11 (Contd.).

(5) Execution Proceedings—(Contd.)

(5) Heard and finally decided—(Contd.)

applied to objections preferred under s. 47, C P Code A I R 1931 Lah 6 = Ind Rul (1931) Lah 278=32 P L R 413=130 I C 406; following A I R 1924 L 470.

—A decree-holder consented to the appointment of Receiver of judgment debtor's property but shortly after such appointment he applied for Receiver's discharge. His application was dismissed. It was held that this decision operated as bar to the trial of a second application for Receiver's discharge. The binding force of such a judgment depends not upon sec. 11 but upon general principles of law. A I R 1924 P C 202=47 M L J 286=5 P L T 491=20 L W 45=35 M L T 182 = 22 A L J 968=L R 5 P C 175=26 Bom L R 1153=40 C L J 431=29 C W N 413=3 Pat L R 180 Civ. (P C)=81 I C 576.

—Where an application for amendment of decree is dismissed on merits a subsequent application for amendment is barred: 27 I C 300.

—Where an objection to execution was dismissed on the ground that the objector had no *locus standi* to raise it in execution: Held, that the order operated as *res judicata*. Ind Rul (1931) All 623=133 I C 303.

—Decree-holder applied for partial execution but subsequently applied for amendment for executing the entire decree. The judgment debtor objected to the amendment but his objection was overruled. No appeal was made by the judgment-debtor—Decision is *res judicata*. A I R 1926 Cal 1019 = 53 C 582=43 C L J 596=96 I C 562.

—An objection to attachment being dismissed on merits bars a fresh objection: A I R 1927 L 827=26 P L R 151=105 I C 693.

—(5) **Fraudulent Order** :—An order obtained collusively or fraudulently does not operate *res judicata*: 18 L W 453 = 76 I C 845 = A I R 1924 M 189.

—(6) **Interlocutory Orders** :—An order passed in execution as to the nature of the land sought to be sold is not final and cannot operate as *res judicata*, in a later suit for declaration. A I R 1931 Oudh 62 = 7 O W N 1162 = 14 R D 706 = Ind Rul (1931) Oudh 131 = L R 12 A (O) 6 = 130 I C 115.

—An order of the execution Court to the effect that certain property sought to be sold is ancestral, operates as *res judicata* between the parties A I R 1931 All 218 = (1931) A L J 103 = 130 I C 839.

—Orders rejecting judgment debtor's application to deposit expenses of re-sale and allowing decree-holder's application for striking off execution proceedings do not to preclude judgment-debtor from applying to

C. P. C. (1908) S. 11 (Contd.).

(5) Execution Proceedings—(Contd.)

(5) Heard and finally decided—(Contd.)

the Court to direct a re-sale in accordance with the mandatory provisions of O. 21, r. 86, 138 I C 103 = 1932 A L J 501=I R 1932 A 371 = A I R 1932 A 392 = A L R 1932 A 817.

—Order regarding nature of property is *res judicata*. A I R 1931 All 218 = (1931) A L J 103 = 130 I C 839.

—An order passed in execution proceeding as to the nature of land which is sought to be sold is not a final one and the same cannot operate as *res judicata*. A I R 1931 Oudh 62 = 7 O W N 1162 = Ind Rul (1931) Oudh 131 = 130 I C 115.

—An order passed in the course of an execution proceedings, which is not appealable is final between the parties, not under S. 13 of the C P C of 1882, but upon general principles of law, as an interlocutory order in the suit. 16 I C 338 = 14 Bom L R 573.

—Where in an application praying for a final decree for sale and for certain reliefs connected with execution, it was held that as owing to the failure to bring on record the representatives of a certain party, the mortgaged properties could not be brought to sale, there was no use in granting a final decree and the application was dismissed. Held, that this finding that execution could not issue for the sale of the mortgaged properties was *res judicata*. A I R 1921 Mad 461 = 14 L W 18 = 62 I C 856; but see A I R 1924 A 804 = 82 I C 65.

—Where a sale certificate was given in respect of lands not included in the decree and an application by the defendant under O. XXI r. 90 to set aside the sale was rejected on the ground that it was too late. It was held, in a suit by the auction purchaser for possession of the property that the defendant was not barred by *res judicata* from raising the contention that the sale was invalid. 14 L W 424 = (1921) M W N 536 = 41 M L J 261 = 70 I C 303.

—(7) **Erroneous Decision** :—A decision upon a pure question of law, even though erroneous, may under certain circumstances operate as *res judicata*: 19 C L J 34 = 21 I C 979.

—An erroneous order for execution of a decree passed after notice to the judgment-debtor cannot, although unreversed, be treated as valid against him, where the service of the notice has not been made in accordance with law and there is nothing to show that the judgment-debtor became aware of the execution proceeding. 32 I C 744.

—An erroneous decision that an attachment was subsisting is *res-judicata* in further proceedings in the same matter seeking to *revive* the former proceedings in



## C. P. C. (1908) S. 11 (Contd.).

## (5) Execution Proceedings—(Contd.)

## (5) Heard and finally decided—(Concl'd)

execution. 24 M L J 545 = 36 Mad. 553 = 14 I C 264.

—Previous application and order erroneously made but not appealed from.—At next application defendant cannot plead previous application was not in accordance with law. A I R 1921 Bom. 260 = 45 B 952=23 Bom. L R 308 = 61 I C 159 see also A I R 1928 C 861 = 32 C W N 1107.

—Judgment-debtor not challenging, by way of appeal, review or revision, a wrong order of an executing Court ordering issue of notice after a lapse of twelve years, is precluded from challenging the order at any subsequent stage of the execution proceedings. A I R 1925 Nag 82 = 22 N L R -67 = 80 I C 905.

—Where a decision lays down what the law is and is found to be erroneous, it cannot have the force of *res judicata* in a subsequent proceeding for a different relief. A decision cannot alter the law of the land. 16 C W N 621 = 14 Ind. Cas. 124 = 16 C L J 154 = 39 C 848. see also 11 C L J 461; and 13 C L J 119.

—Subsequent execution petition for different relief but based on the same question of fact as prior execution petition is not maintainable : A I R 1929 M 404.

—(9) Miscellaneous :—Decision under O XXI, r. 66 is not *res judicata* in a later suit or proceeding : A I R 1924 All. 480 = L R 5 A Civ. 218 = 78 I C 582 see also A I R 1925 Pat 500=88 I C 332 = 6 P L T 843 = 4 Pat 731.

## (6) Might and Ought.

—For a discussion as to the applicability of the rule of constructive *res judicata* to execution proceedings see 1931 A L J 653=A I R 1931 A 689.

—Modern view is that the rule of constructive *res judicata* applies to execution proceedings : A L R 1933 M 463; and A I R 1930 R 213 = 8 R 302; and A L R 1933 L 812, and A L R 1933 M. 368. But see A L R 1933 A 819; and A I R 1930 A 628 = 52 A 217; and A L R 1933 N 231; and A L R 1933 N 164; and 1 Pat 593 and 17 C 57; and 40 M 780; and 27 I C 950; and 11 B 537; and 14 B 206.

—Objection open to a party in execution proceedings but not taken by him, cannot be taken at any subsequent stage of the same proceedings. A I R 1926 Nag. 164=89 I C 1009 see also 10 L W 566 = 53 I C 862 and A I R 1923 L 560.

—The fact that the decree-holder does not choose to proceed with the execution and the case is struck off does not entitle any party to re-open the question upon which

## C. P. C. (1908) S. 11 (Contd.)

## (5) Execution Proceedings—(Contd.)

## (6) Might and Ought—(Contd.)

there has been a previous adjudication on general principles though not under s. 11. A I R 1923 Nag. 1=7 N L J 163 = 68 I C 239.

—Per *Deva Doss J.*—The principle of constructive *res judicata* applies to orders in execution. An objection that the property sought to be proceeded against did not belong to the judgment debtor can be raised by the legal representative and is not barred on the ground of constructive *res judicata*. A I R 1928 Mad. 746 = 28 L W 885 = Ind. Rul. (1929) Mad. 289 = 114 I C 545.

—Where the judgment-debtor did not raise any objection as to the powers of the decree-holder's agent to execute the decree, which, if raised, would have been a complete bar to the previous execution applications proceeding at all. Held, that the judgment-debtor was not entitled to raise this point in the subsequent application, the objection being *res judicata* against him, as there was an implied decision that the power of attorney in favour of the agent was good in the previous execution application : A L R 1933 L 812.

—Omission to object in prior execution proceedings to executability of the decree precludes J. D. from objecting that the decree is inexecutable when a subsequent application for execution is made though the subsequent application relates to different items of property. A I R 1923 Mad. 649 = 45 M L J 71 = 17 L W 566 = (1923) M W N 299=72 I C 397 (2).

—Mere part payment and taking time does not prevent the judgment-debtor from contending in a subsequent application that the decree is a nullity under international law. A I R 1931 All 689 = (1931) A L J 653; see also 8 A L J 844 = 11 I C 980.

—Execution application time barred—notice ordered to be issued by the Court—no proper service effected—no *res judicata* on the question of limitation. A L R 1933 M 368.

—Party sought to be affected by the bar of *res judicata* should have notice of the point likely to be decided against him and opportunity of putting forward his contentions against such a decision A I R 1924 Mad 1=46 M 768=(1923) M W N 571 = 45 M L J 346 = 18 L W 757 (F B) = 74 I C 155. see also 9 I C 213; and 36 B 368; and 15 C W N 661.

—When notice is served on certain persons to show cause why they should not be brought on the record as legal representatives of a judgment-debtor, it is not their duty to put forward all the defences open to them in their individual capacity. It is only when execution is sought against them in their individual capacity that they are bound to

C. P. C. ( 1908 ) S. 11 ( *Contd.* )

( 5 ) Execution Proceedings—( *Contd.* )

( 6 ) Might and Ought—( *Contd.* )

resist the attempt by putting forward all their personal defences. 40 Mad. 1016 = 38 I C 627.

—An order passed against a judgment-debtor in execution proceedings without notice to him and without giving him an opportunity to contest the order is not *res judicata* in subsequent proceedings. 26 M L J 83=(1914) M W N 157=21 I C 782 = 14 M L T 530.

—An order in execution proceedings could not be held to be *res judicata* against the judgment-debtor when there was nothing to show that it was passed after notice to him and after giving him an opportunity to contest it. 26 M L J 83=(1914) M W N 157=21 I C 782=14 M L T 530.

—Settlement of sale proclamation after notice—Court cannot go behind, in subsequent proceedings. A I R 1923 Pat 134=(1923) Pat 76=1 Pat L R 53=72 I C 860.

—Ground of want of attachment available at the time of notice of settlement of proclamation must be urged otherwise operates as *res judicata* if not so urged. A I R 1930 Mad 414=Ind Rul (1930) Mad 63=120 I C 863.

—Judgment-debtors having notice to appear and that the issue then to be decided is the question of limitation. Their failure to oppose the application precludes them afterwards from questioning the decision. A I R 1922 All 100=66 I C 751.

—Where in a previous application for execution of a decree by the transferee of the decree, arrest was claimed, but there was no occasion to issue a notice to the judgment-debtor to show cause as required by O 21, R 22 C P C the judgment-debtor had no opportunity of raising any objection as to the interest. *Held*, that the judgment-debtor was not debarred from contending in a subsequent application for execution of the decree that he was liable for the amount claimed. 34 I C 144.

—Notice of the application properly served on the judgment-debtors. Judgment-debtor failing to appear and show cause against execution. Order *ex parte* made by the Court directing execution. Question of the executability of the decree should, according to the law of constructive *res judicata*, be regarded as having been decided by the Court in favour of the decree-holder. A I R 1927 Mad 813=26 L W 481=39 M L T 34=103 I C 825.

—Where a judgment-debtor objects to attachment but omits to substantiate his case under s 60 (c), C P C he cannot subsequently plead that the property is not sale-

C. P. C. ( 1908 ) S. 11 ( *Contd.* )

( 5 ) Execution Proceedings—( *Contd.* )

( 6 ) Might and Ought—( *Contd.* )

able under s. 60 (c). A I R 1931 Bom 446=Ind Rul (1931) Bom 442=33 Bom L R 781=133 I C 858.

—Executing Court is to decide objection as to executability irrespective of the value of property. 101 P R 1915=191 P W R 1915 = 32 I C 43.

—Plea that the decree is not capable of execution, if not raised at the time of previous execution application is barred. A I R 1922 All 27=44 All 350=20 A L J 170 = 65 I C 799; see also A I R 1927 Lah 780=99 I C 870.

—Agreement for sale of property by judgment-debtor—Notice of previous petition for execution by attachment and sale reaching judgment-debtor subsequently—Promisee is not prevented from asserting his rights in execution. A I R 1921 Mad 30=44 M 232=40 M L J 65=(1921) M W N 53=62 I C 121; see also 34 A 518=10 A L J 140=16 Ind Cas 677.

—Judgment-debtor can plead at a later stage non-executability though not previously pleaded where assignee of decree-holder was *benamidar* of judgment-debtor. A I R 1924 Mad 189=18 M L W 453=75 I C 845.

—If a tenant judgment-debtor omits to raise an objection as to the non-transferability of a holding in an execution proceeding in which the holding is attached, he is estopped from raising it in a subsequent execution proceeding in execution of the same decree. 47 I C 790; see also A I R 1931 B 446=133 I C 858=33 Bom L R 781; and 34 C 199 = 5 C L J 294=11 C W N 513.

—Implicit decision that a previous execution petition was not barred by the 12 years rule, cannot for ever remove the operation of s. 48 out of the way of all future execution petitions. A I R 1927 Mad 842=53 M L J 440 =103 I C 311.

—Even in an application for transfer of a decree the judgment-debtor can and ought to plead limitation. If he fails the point is barred. A I R 1924 Mad 673=47 M L J 4 = 19 L W 650=(1924) M W N 527=47 M 641 =80 I C 103; see also A I R 1928 Mad 746=28 M L W 885; A I R 1928 Mad 1052; and A I R 1929 Mad 404; and A I R 1931 Mad 381 = 123 I C 455=1930 M W N 729 = 32 M L W 615; and A I R 1931 Bom 446=33 Bom L R 781 = 133 I C 858; and 1 Ind Cas 284.

—Execution proceedings—First application to execute the decree barred by time—Second application to execute the decree—Second application to be treated on its own merits—No bar of time. 21 Bom L R 344=50 I C 972.

—Execution of mortgage-decree pending—Purchaser of equity of redemption joined as judgment-debtor without objection from judgment-debtor—Judgment-debtor cannot

**C. P. C. (1908) S. 11 (Contd.)****(5) Execution Proceedings—(Contd.)****(6) Might and Ought—(Contd.)**

object on ground that purchase was *benami* for decree-holder. A I R 1929 Mad 404 = Ind Rul (1930) Mad 375=122 I C 519.

—During continuance of lease granted by Collector in execution of decree under Sch. III, Civil Procedure Code, judgment-debtor mortgaging leased property. In suit on mortgage no defence raised that mortgage was prohibited. Such defence cannot be allowed to be raised in execution of decree passed in mortgage suit. A I R 1931 All 38=(1930) A L J 1594=133 I C 314.

—The fact that an order absolute is not made before execution is taken of a mortgage decree is not an objection available to the judgment debtor when an order for execution has already been made after notice to him and the same has not been set aside. 26 M L J 255=15 M L T 246=(1914) M W N 622=23 I C 390.

—Where a claimant should necessarily in execution proceedings have raised all the defences open to him, he should be barred from raising these contentions in subsequent proceedings. A I R 1932 S 116 (119)=26 S L R 91 = A L R 1932 S. 81.

—Fresh suit relating to execution is barred under s. 47 between the same parties in the former suit : Ind. Rul. 1931 Bom. 209= A. I. R. 1931 Bom. 114=129 I. C. 737=32 Bom L. R. 1473.

—Omission to take objection in a previous darkhast that it was not maintainable on the ground that a receiver had been appointed in respect of the decree bars the raising of the same in the subsequent darkhast. A I R 1929 Bom. 279=31. Bom L R 320=Ind. Rul. (1929) Bom 470 = 118 I. C. 694.

—Where the beneficial owner of the decree applied under O. 21. R. 16. C. P. Code, notice was issued to the judgment-debtor who did not raise any objection. *Held*, he was precluded from questioning the title of the former to execute the decree. 38 All 289=14 A L J 370=35 I. C. 234.

—Where a person on his own application was added as a party respondent to an appeal, and on the case being remanded under s. 562, practically took no steps to defend it, *held* that he could not afterwards plead by way of objection to execution of the decree, matters which ought to have formed part of his defence to the suit, 14 All. 64. But omission to object to attachment before judgment does not bar an objection after decree in execution. 10 I C 305.

—And it has been held by the Allahbad High Court that where objection to the attachment of a garnishee debt before judgment on the ground that nothing was due to

**C. P. C. (1908) S. 11 (Contd.)****(5) Execution Proceedings—(Contd.)****(6) Might and Ought—(Contd.)**

the judgment-debtor was taken at the time of attachment and dismissed, the objector is not precluded, by any constructive rule of *res judicata*, from pressing the objection again. A L R 1933 A 773.

—Where in a proceeding to set aside an execution sale, the applicants set up the case that the person whose property purported to have been sold and whose legal representatives they were, had died before the decree and did not put forward the case upon which they later on sued to set aside the sale, *viz*, that the judgment debtor died after the decree but before attachment. *Held*, per *Richardson J.*—That the suit was barred by the rule of *res judicata*. 23 C W N 608=29 C L J 411=51 I C 972.

—Decree against dead man—legal 'representatives brought on record in execution not pleading abatement does not bar his subsequent suit that decree is nullity. A I R 1923 Mad, 212 = 16 L W 314 = 43 M L J 293 = (1922) M W N 597 = 69 I C 465.

—Though a relief may not have been granted by the decree, yet if in execution proceedings a Court holds that a party is entitled to such relief under the decree it is not open to the parties to contend that no such relief has been awarded and the matter is *res judicata*. 26 M L J 255 = 15 M L T 246 = (1914) M W N 662 = 23 I C 390.

—Surety ordered to be arrested but asking time for settlement cannot later plead his non-liability to decree-holder under the decree. A I R 1930 Lah. 80 = Ind. Rul. (1931) Lah. 209 = 129 I C 689.

—Omission by judgment-debtor to challenge liability not affecting decree-holder's position—No question of estoppel arises. A I R 1925 Lah. 552 = 7 Lah. L J 343=26 P L R 634 = 91 I C 772.

—Where a judgment-debtor did not take exception to the amount set forth as being due on the decree in an application for execution, *held*, that he was not prevented by the rule of *res judicata* from afterwards raising the question. 37 All 589 = 13 A L J 828 = 30 I C 523.

—Where the previous application was for restitution of a sum of money recovered in execution and the subsequent application was for interest due on the said sum. *Held*, that neither S. 11, Expl. 4 nor O. 2. R. 2, C P Code, was a bar to the maintainability of the latter application and that interest was recoverable. 40 Mad 780 = 51 W 267 = 38 I C 806.

—Plea decided impliedly in suit cannot be raised again in execution proceedings. A I R 1923 Bom. 36 = 24 Bom. L R 1291=76 I C 148.

C. P. C. (1908) S. 11 (Contd.).

(5) Execution Proceedings—(Contd)

(6) Might and Ought—(Contd)

—Where several successive applications for execution of a decree are allowed by the court without any objection being taken by the judgment-debtor regarding the validity of the decree, it is not open to him in a subsequent execution proceeding in respect of the same decree to contend that there is in fact no decree which can be executed. 4 Pat. L J 213 = (1919) Pat. 121 = 48 I C 245.

—Decree-holder should not be allowed to put in an application stating that a certain sum was due under a decree and asking for the arrest of a judgment-debtor under that application and when that amount is paid up to put in another application for a further amount. A I R 1929 Rang. 182 = Ind. Rul (1929) Rang. 203 = 119 I C 223.

—Execution sale held and confirmed without objection by judgment-debtor after notice—Non-transferability of property cannot be pleaded by J. D. or his alienee with notice of sale. A I R 1926 Mad. 12 = 49 M L J 401 = 91 I C 443.

—Objection as to amount in decree though not raised in previous proceedings can be raised in subsequent proceeding. A I R 1929 Mad. 903 = Ind. Rul. (1930) Mad. 289 = 122 I C 161.

—Waiver of objection by judgment-debtor creates *res judicata*. A I R 1928 Mad. 203 = 27 L W 20 = (1928) M W N 67 = 109 I C 866.

—A decree-holder who has once applied to execute the decree as a rent decree seeking to bring the tenure to sale is not debarred from executing it as a money decree if the decree is ultimately held to be a money-decree. 1 Pat. L W 582 = 39 I C 737.

—In execution proceedings between the parties certain Khoti lands were sold and purchased by the debts. at a Court-sale. The plff then sued to recover possession of the lands alleging that the lands being occupancy lands could not be sold under S. 9 of the Khoti settlement Act. *Held*, that as the execution sale decided inferentially between the plff. and the debt. that the lands sold were not occupancy lands, the plff. could not be allowed to re-open and investigate the same question of fact a second time. 40 Bom. 675 = 18 Bom. L R 786 = 37 I C 22.

—A judgment-debtor who puts forward objections in the execution department is not always bound to put forward all possible objections once and for all. If he omits any, the matters which he omits and which were never raised or decided cannot always be treated as *res-judicata* against him. 32 I C 754 = 2 O L J 611.

—Execution proceedings—settlement of terms of proclamation—Omission of judgment-

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(5) Execution Proceedings—(Contd)

(6) Might and Ought—(Contd)

debtor to appear even after notice-order not appealable and binding in subsequent proceedings *See*. 22 I C 780.

—Though the institution of a suit for partition, whether resulting in consequential judgment or not effects severance in status, where the preliminary decree for partition in a subsequent suit proceeds on a clear finding that the family was still joint till the institution of the latter suit it is not open to the plaintiffs to go behind the preliminary decree and claim during final decree proceedings that there had been separation prior to the latter suit. A I R 1930 Pat. 260 = Ind Rul (1930) Pat 612 = 126 I C 372.

—Failure to object at one stage of execution proceedings does not bar objection at later stage. A I R 1924 Mad. 518 = 32 M L T 118 = 70 I C 329.

—A first application for the execution of a decree was not made in accordance with law within three years of the passing of the decree. On a second application for execution made within three years of the first, the Court directed a writ of attachment to issue. The order sheet showed that the order for attachment was made after service of notice upon the judgment-debtor, but the execution case was dismissed for default. On a third application for execution made within three years of the second; the judgment-debtors appeared and contended that the execution was barred. *Held*, that as long as the order for attachment passed on the second application for execution stood, the judgment-debtors could not contend that the execution of the decree was barred unless they established that the order was made without notice to them. 21 C W N 945 = 26 C L J 109 = 37 I C 66.

—Omission to object to execution application being not in accordance with law operates as *res judicata*. A I R 1928 Cal. 861 = 32 C W N 1107 = Ind Rul. (1929) Cal. 625 = 118 I C 337.

—An order of restoration of execution under O. IX, r. 4, passed with notice and not objected to cannot be questioned later on the ground that O. IX, r. 4 did not apply. A I R 1923 All. 600 = 77 I C 871.

—Where a preliminary decree under O. XXXIV, r. 4 is, as such, incapable of execution unless made absolute under O. XXXIV, r. 5 but the judgment-debtor fails to raise such objection at the first application for execution he cannot raise it later on. A I R 1925 Lah. 640 = 7 Lah. L J 397 = 26 P L R 784 = 92 I C 254.

—Failure of judgment-debtor to raise the plea in a previous execution application,



## C. P. C. (1908) S. 11 (Contd.).

## (5) Execution Proceedings—(Contd)

## (6) Might and Ought—(Concl'd)

precludes him for raising it at a later stage. A I R 1922 Oudh 117 = 25 O C 13 = 68 I C 267.

—The fact that execution has been ordered as regards a certain sum does not operate as *res judicata* with regard to the amount due under the decree. A I R 1929 Rang 172 = Ind Rul (1930) Rang 40 = 120 I C 664.

—Where a decree was assigned and an application was made to the Court to recognise the assignment and transmit the decree for execution to another Court, omission of judgment-debtor to object at that stage does not preclude him from objecting to the execution of the decree in the manner proposed by the decree-holder at a later stage. A I R 1923 Mad 487 (1) = 32 M L T (H C) 157 = 17 L W 319 = 73 I C 213.

—Where, in execution of a decree, the payment of a debt was alleged and brought to the notice of the Court by the judgment-debtor within 90 days of the alleged payment and the Court going into objection found against the judgment-debtor: *Held*, that a suit by the judgment-debtor for a declaration that he had paid the amount alleged by him was barred by *res judicata*. 14 I C 751 = 141 P L R 1912 = 92 P W R 1912 = 91 P R 1912.

—In execution of a decree in favour of D against J. certain persons alleging that D was benamidar and that they were the real owners applied for execution and notices were issued to J in answer to which he did not appear in Court. No notice was, however, served on D. A subsequent application for arrest of J was allowed to be passed *ex parte* after notice, though the application itself was dismissed for non-payment of process fees. On further application for execution: *Held* that the order of arrest was *res judicata* and that J cannot go behind it 12 A L J 206 = 23 I C 286.

—The tests to be applied in determining whether a party ought to have challenged the decree on the ground of fraud in the previous suit are, (1) whether the party who seeks to reopen the matter in controversy could have with reasonable diligence raised the matter in the prior suit (2) whether he had a fair opportunity to obtain an adjudication upon the matter and (3) whether the question was one which formed the proper subject of litigation in the previous suit. 19 C L J 41.

## (7) Ex parte Orders.

—An *ex parte* order in execution may operate as *res judicata*. The test to be applied is whether a person allowed the order to be passed against him when he had

## C. P. C. (1908) S. 11 (Contd.).

## (5) Execution Proceedings—(Contd)

## (7) Ex parte Orders—(Concl'd)

an opportunity to contest the validity of that order: 1916 M W N 64 = 3 L W 339 = 33 I C 443. Order passed *ex parte* after affixture of notice. *See* 26 M L J 189 = 37 Mad 462.

—An *Ex-parte* order without notice admitting a previous application as not time-barred does not bar the judgment-debtor from showing that it was barred. 18 C W N 1288 = 27 I C 225; see also 20 C L J 15 = 24 I C 80.

—Where without notice to judgment-debtor the Court returned an execution application for amending it by reducing the amount. *Held* that the order was a judicial adjudication and that the decree-holder was not entitled to a larger amount. Absence of notice to debtor is immaterial except when the order is passed against him, in which case, the *ex parte* order cannot bind the party who had no opportunity to contest the same. 37 Mad 314 = 24 M L J 26 = 18 I C 607.

—Where an *ex parte* order is made against a party who had no opportunity to be heard, the order is liable to be revoked at his instance, and the Court has inherent power to give direction for the purpose. 24 C L J 523 = 21 C W N 776 = 44 Cal 954 = 38 I C 493.

## (8) Plea of limitation.

—Order overruling J. D's plea of limitation operates as *res judicata* 9 O W N 513 = 137 I C 603 (1) = I R 1932 O 253 (1) = A I R 1932 O 246 = A J R 1932 O 443; see to the same effect: 8 I A 123 = 8 C 51 P C; and 6 B 54; and 13 A 564; and 24 A 282; and 9 C 65. But there is no *res judicata* unless the objection of the J D was disallowed on merits: 5 C W N 80 = 28 C 122.

—Where notice was issued to the judgment-debtor and the judgment-debtor did not raise the plea that execution of the decree was barred. *Held*, that the decision is *res judicata*. 113 I C 92.

—Where execution is ordered after notice to J D the latter cannot subsequently raise the plea of limitation: 67 I C 56.

—Where on application for execution which in fact was barred by time the Court ordered execution, the order though erroneously made is never the less valid unless set aside on appeal. 44 Bom. 227 = 22 Bom. L R 76 = 55 I C 329.

—Order allowing execution to issue operates as *res judicata* on the question of limitation—Subsequent dismissal of execution application does not imply that the order has become ineffective. A I R 1928 Mad 1052 = Ind Rul (1929) Mad. 555 = 116 I C 363.

—An order allowing execution of a barred decree to proceed after due notice to the



## C. P. C. ( 1908 ) S. 11 (Contd.)

## ( 5 ) Execution Proceedings—(Contd.)

## ( 8 ) Plea of limitation—(Contd.)

judgment-debtor precludes him from objecting to execution on the ground of limitation in a subsequent application. 3 Pat L W 13 = 41 I C 675.

—Order on application for transfer of decree for execution that execution should proceed after notice under O. 21, r. 22 and transferring the decree for execution to another Court. Plea in application for execution in Court of transfer that first application for execution was barred by limitation is not maintainable. 11 P 430 = A I R 1931 P 422=134 I C 425=12 P L T 701.

—Failure to plead bar of limitation when execution was proceeded with, bars the plea at a subsequent stage. A I R 1926 Oudh 291=1 Luck 171 = 13 O L J 111 = 3 O W N 241 = 93 I C 833.

—Where the plea of limitation was raised *inter alia* in the defence to an execution application and the application was granted the plea was barred although the judgment did not expressly refer to it. A I R 1921 P C 23=48 I A 45 = 19 A L J 168=23 Bom. L R 701=13 C L J 218=25 C W N 581=40 M L J 197=13 L W 290=(1921) M W N 51=29 M L T 345 (P C)=59 I C 880.

—Plea that a previous execution was time-barred and that therefore the subsequent application was not valid should be raised at the earliest opportunity. A I R 1926 Mad 77=(1926) M W N 33=91 I C 1017.

—Point of limitation must be raised at early stage. 33 Bom. L R 781 = 133 I C 858 = I R 1931 B 442 = A I R 1931 B 446.

—Point cannot be raised after sale. A I R 1921 Cal. 606 = 34 C L J 163 = 64 I C 594.

—A question of limitation which goes to the root of the proceedings, which, if successfully raised, would result in the application for execution being dismissed, is clearly one which should be raised when it is first open to the judgment-debtor to raise that contention; and, if not raised, the judgment debtor is for ever barred from raising it. A I R 1932 S. 116 ( 119, 121 ) = 26 S L R 91 = A L R 1932 S 82.

—An objection that a decree was barred by limitation cannot be taken, if it was not taken in a previous execution proceeding when it should and could have been raised, provided the judgment-debtor had been properly served with notice of execution in the previous proceeding. 3 Pat. L W 218=45 I C 404.

—Ground of limitation either decided affirmatively in favour of the decree-holder or not raised at all by the judgment-debtor, cannot be raised by judgment-debtor at a subsequent period. A I R 1927 Oudh 488 = 1 Luck Cas. 543 = 105 I C 545.

## C. P. C. ( 1908 ) S. 11 (Contd.)

## ( 5 ) Execution Proceedings—(Contd.)

## ( 8 ) Plea of limitation—(Contd.)

—Dismissal of an application for execution as out of time does not prevent the executing plaintiff from filing another *darkhast* and seeking to bring it within limitation on new grounds. A I R 1922 Bom., 238=24 Bom. L R 97 = 46 Bom 467 = 66 I C 940.

—Where the judgment-debtor's plea of limitation is dismissed in absence of both decree-holder and judgment-debtor there is no *res judicata*: 11 P 607 (611-2)=A I R 1932 P 357=I R 1932 P 318 = 140 I C 507 = A L R 1932 P 624.

—Where the judgment-debtor praying for time to put in objections, and adjournment was granted, but the Judgment-debtor failed to appear on the 4th January 1908, the date fixed for hearing and an order was passed by the Court that—"Decree-holder is to take further steps on or before the 7th January, 1908," but on the 7th January, the application was dismissed for default. *Held*, that the order passed on the 4th January necessarily implied an adjudication that the decree was at the time capable of execution and it is no longer open to the judgment-debtor to re-open the matter that the previous application was made beyond the time. 17 C W N 113 = 15 C L J 453 = 10 I C 359.

—Where plea of limitation raised but application for execution dismissed for default the plea that previous proceedings were time-barred cannot be raised. A I R 1924 Pat 122=2 Pat 759=2 Pat L R 163 = 74 I C 130.

—A decision that an application is or is not barred by limitation is conclusive in subsequent execution proceedings even though the application is later on dismissed for default or is struck off for non-prosecution: A I R 1928 C 804.

—Decision that application for execution is not time-barred is binding in all subsequent stages of the execution. 53 I C 85.

—But the J. D. is not precluded from raising an objection on an execution application that a previous application was barred by limitation when there is nothing to show that the matter was heard and decided on the last occasion. 14 Bom. L R 264 = 14 I C 977.

—An order delivering possession of property on an execution application is an adjudication that the application is in time and judgment-debtor cannot question the legality of that order in proceedings on a subsequent execution. 54 I C 924.

—Execution application wrongly rejected—Decision not appealed against—It cannot save limitation. A I R 1923 Nag. 236 = 8 N L J 91 = 72 I C 473.

C. P. C. ( 1908 ) S. 11 ( Contd )

( 5 ) Execution Proceedings—(Concl'd)

( 8 ) Plea of limitation—(Contd)

—An order made in execution proceedings without notice to the judgment-debtor does not estop the latter from subsequently contending that the application on which the order was made was barred by time. 54 I C 933; see also 13 O C 90 = 6 Ind Cas 746; and 15 M L J 243; and 56 Ind. Cas. 801 = 31 C L J 382.

—Execution ordered out of time—Barred decree after notice to judgment-debtor—Plea of limitation, if can be raised by judgment-debtor at later stage of same execution proceedings—Plea if open in subsequent execution of decree. See 3 Pat. L. W. 13 = 41 I. C. 675.

—Intermediate execution application ordered on notice to the judgment-debtor, he cannot on a subsequent execution application plead that the intermediate application was timebarred and, therefore, the subsequent application was also barred. 22 Bom L R 1389 = 45 B 453 = 59 I. C. 747.

—In order that a decree whose execution is time-barred may be executed, It is necessary to establish that notice requiring the judgment-debtor to show cause why the decree should not be executed as against him has been served on him and that he has thus been in a position to raise the plea of limitation, that the Court has expressly decided by a final order the question of limitation in favour of the decree-holder and that there has been an executive order of adjudication. 18 O C 374 = 33 I C 663.

—Notice of the application was offered to the judgment-debtor but he refused to sign it. No steps were taken to serve the notice according to the provisions of O. V, rr. 17 and 19. The Court, however, considered it as sufficient notice. Held, that the notice was not properly served and the judgment-debtor was not precluded from pleading bar of limitation in subsequent application. A I R 1929 Lah. 334 = Ind. Rul. (1929) Lah. 865 = 30 P L R 38 = 119 I C 321.

—Notice under O. XXI. r. 22 issued with special mention of limitation—Execution dismissed for default—Property sold in later execution—Ground of limitation can be raised, A I R 1928 Pat. 471 = 7 Pat. 465 = 9 Pat L T 805 = 112 I. C. 265.

—Judgment-debtor not a party to prior proceedings is not precluded from showing that the said proceedings were barred by limitation. A I R 1923 Cal. 322 = 67 I C 879 see also (1910) Pun. L R 100 = 139 Pun. W R 1910 = 8 I C 547; and A I R 1922 N 156 = 65 I C 241 = 4 N L J 262; and A I R 1924 A 910 = 5 L R A (civ.) 239 = 78 I C 373; and A I R 1929 Oudh 455 = 6 O W N 851; and 7 O L J 362 = 2 U P L R O 118 = 57 I C 526 = 8 O L J 191; and 19 O C 39 = 35 I C 434; and 59 I C 3 = 32 C L J

C. P. C. ( 1908 ) S. 11 (Contd)

( 5 ) Execution Proceedings—(Contd)

( 8 ) Plea of limitation—(Concl'd)

75; and A I R 1914 P C 67 = 41 C 972 = 41 Ind. App. 110 = 12 A L J 774 = 16 Bom. L R 400 = 19 C L J 484 = 18 C W N 817 = 27 M L J 80 = 16 M L T 6 = 1 M L W 1050 = 1914 M W N 462 = 23 I C 637.

( 9 ) Separate Suit.

—Order allowing legal representative to execute decree. Appeal lies but separate suit is barred. A I R 1926 Mad. 536 = 92 I C 377

—Executing Court's decision as to title of one of prival claimants is *res judicata* and bar suit for possession by one of the claimants on the ground of his subsequent purchase from the Municipality. A I R 1927 Lah. 112 = 26 P L R 171 = 7 Lah. L J 198 = 92 I C 131.

—Sale to tenant of proprietary right set aside and possession given to landlord in execution—Suit thereafter by tenant for occupancy rights not barred. A I R 1922 Lah. 44 = 4 Lah. L J 400 = 67 I C 485.

—But see 21 A 356 where the cause of action merges in the judgment, execution is the only remedy, fresh suit is barred. 34 M L J 167 = 44 I C 110.

—If execution proceedings are still going on, it is not material whether the party dissatisfied by an order in execution applies expressly under S. 47, or purports to bring a regular suit provided the court is the same. 10 I C 991 = 1 U B R 66 (1910).

—But a Hypothecation bond executed to stay execution can be enforced by suit only—Such suit is not barred by any decision in previous execution proceedings. A I R 1931 All. 65 = ( 1930 ) A L J 913 = Ind. Rul (1931) All. 328 = 130 I C 712.

—The plff. brought a suit on the basis of a decree for possession which had become time-barred for the purposes of execution. Held, that the plff having obtained a decree, and that decree not being enforceable by execution, an action was maintainable on the decree. 14 A L J 102 = 32 I C 634.

—An order passed in execution proceeding as to the nature of land which is sought to be sold is not final—Separate suit lies. A I R 1931 Oudh 62 = 7 O W N 1162 = Ind. Rul (1931) Oudh 131 = 130 I C 115.

( 10 ) Special Acts.

—See Chota Nagpur Encumbered Estates Act Ss. 12, 12-A.

( 6 ) EXPLANATION I

—See cases under " C P C s. 11 " " Heard & finally decided "—Expl I.

## C. P. C. (1908) S. 11 (Contd.)

## (7) EXPLANATION II

—See cases under C P C s. 11 "Competent Court."

## (8) EXPLANATION III

—See cases under "C P C s. 11 "Directly and substantially in issue-(A) Test-(1) General."

## (9) EXPLANATION IV

—See cases under--C P C s. 11 "Directly and substantially in issue, "might & ought Expl IV."

## (10) EXPLANATION V

—See cases under--C P C s. 11 "Heard & finally decided expl V."

## (11) EXPLANATION VI

—See cases under C P C s. 11 "Parties Representative suits expl VI."

## (12) HEARD AND FINALLY DECIDED.

*Synopsis*

- (1) General Principles.
- (2) Abatement of suit or appeal.
- (3) Adverse finding against a party in whose favour the decree is passed.
- (4) Ambiguous findings.
- (5) Award and decrees on award.
- (6) Compromise and consent decrees and orders.
- (7) Connected cases—appeal.
- (8) Cross objections dismissed no bar to appeal as to those very objections.
- (9) Decree in first suit time barred or becomes unexecutable by default of plaintiff.
- (10) Decree on Oath.
- (11) Decree rights under varied or abandoned.
- (12) Dismissal affecting rights.
- (13) Dismissal for absence of both parties.
- (14) Dismissal of suit for non-prosecution or default.
- (15) Dismissal not on merits (1) dismissal for non-payment of court fees (2) non-production of copy of Judgment of 1st court etc
- (16-17) Dismissal of suits as time barred.
- (18) Dismissal on a preliminary point.
- (19) Dismissal on technical ground e. g. Mis-Joinder, non-Joinder, multifariousness etc.
- (19-a) Erroneous decision see Issue of law infra.

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## C. P. C. (1908) S. 11 (Contd.)

## (12) Heard and finally Decided—(Contd.)

- (20,21) Ex parte Decrees and orders.
- (22) Explanation I.
- (23) Explanation V (claim made in plaint but not granted expressly is to be deemed as refused.)
- (24) Fraudulent decrees.
- (25) Inconsistent decisions.
- (26) Interlocutory orders.
- (27) Issues and questions left undecided or open (1) by 1st or (2) by appeal Court.
- (28) Issues of fact.
- (29) Issues of fact and law.
- (30) Issues of law.
- (31) Judgment in rem.
- (32) Landlord and tenant suits between.
- (33) Miscellaneous proceedings orders in.
- (34) Mortgage suits.
- (35) Obiter dictum or mere opinion on necessary issues (1) by first court or (2) by appellate Court.
- (36) Other suits.
- (37) Partition suits.
- (38) Plaint rejection of.
- (38-a) Plaint return of.
- (39) Pre-emption suits.
- (40) Principal and agent suits between.
- (41) Reliefs different.
- (42) Relinquishment of claim.
- (43) Remand order.
- (44) Resjudicata by implication.
- (45) Right to sue reserved by decree or by Court extra Judicially.
- (46) Subject matter different.
- (47) Suit for money due under decree paid out of court and not recovered under S. 258 P. C.
- (48) Suit on Pro. Note 2nd on original c. a.
- (49) Suit under S. 283 C. P. C. of 1882.
- (50) Vendor and Vendees.
- (51) Withdrawal of suits or appeals.

## (1) General Principles

—Unless the case falls under Expl. IV to S. 11, a matter in issue in the former suit must have been heard and finally decided by a competent Court so as to be res judicata in a subsequent suit : A I R 1921 P C 11 = 48 I A 187 = 19 A L J 366 = 25 C W N 915 = 33 C L J 405 = 40 M L J 423 = 60 I C 631 = 14 L W 221 = 1921 M W N 313 = 48 C 499 P C; see to the same effect A I R 1926 O 613 = 3 O W N 771 = 13 O L J 813 = 99 I C 211; and A I R 1931 O 157 = 8 O W N 179; and A I R 1931 A 99 = 1930 A L J 1524 = I R 1931 A 246 = 130 I C 198 = 52 A 901; and 14 P R 1883 N; and 3 M H C 84; and 9 W R 300.

—And such finding will be res judicata even though the suit in which it was made was an unnecessary suit : A I R 1925 L 160 = 78 I C 3.

C. P. C. (1908) S. 11 (Contd.)

(12) Heard and finally Decided—(Contd.)

(1) General Principles—(Contd.)

—Similarly, objections raised and finally decided in appeal cannot be re-agitated by way of cross-objections. 22 A L J 365=78 I C 677 = A I R 1924 A 867.

—The decision need not be express, it is enough if it is necessarily implied: A I R 1928 L 888=113 I C 120; see also 24 M L T 205 =1918 M W N 567 = 8 L W 206 = 48 I C 905.

—Finding in previous suit based on oral admission recorded in judgment operates as res judicata. A L R 1933 M 883.

—Appeal affects the finality of a decree (1931) A L J 833 (P C) = 61 M L J 420 = 34 L W 565 = Ind Rul (1931) P C 283 = 134 I C 331 P C.

—A decision in a previous suit is not *res judicata* in a subsequent suit when appeal from the former is pending. A I R 1931 Lah 161 = 12 Lah. 497.

—But a decision of a trial Court, appealed against, but appeal being not prosecuted, is res judicata: A I R 1931 S 170.

—When, however, an appeal is filed and admitted the matters decided by the lower court cease to be res judicata, and if the appeal is disposed of on some other ground, the finding of the lower court is not res judicata concerning matters not covered by the appellate judgment: 27 M L T 54 = 56 I C 199.

—Dismissal of an application, *forma pauperis*, for leave to appeal, is not res judicata: A I R 1930 L 501 = 126 I C 591 = I R 1930 L 783.

—Where a decree is suppressed in appeal or otherwise, and if it is reversed or superseded by a separate suit, the prior decision will not operate as res judicata: 32 P W R 1916 = 33 I C 890.

—Where order of lower Appellate Court was set aside and the whole case sent back for fresh trial, it was held that the decision of the lower Court not appealed against, does not operate as *res judicata*. A I R 1923 All 456 = 76 I C 473.

—Issues not raised or finally decided cannot operate as res judicata: A I R 1931 A 93 = 1930 A L J 1524 = I R 1931 A 246 = 130 I C 198.

—Decision in a previous suit is not *res judicata* if there is no contest, no issue and no finding between the parties although they were ranged on opposite sides. A I R 1924 Nag. 124 = 76 I C 635.

—Nor would a matter decided behind the back of the judgment-debtor without notice to him create *res judicata*. A I R 1930 All 699 = (1930) A L J 1400 = Ind Rul (1931) All 79 = 128 I C 607.

C. P. C. (1908) S. 11 (Contd.)

(12) Heard and Finally Decided—(Contd.)

(1) General Principles—(Contd.)

—Similarly there is no res judicata as to a decision on assumed facts: 30 Bom. L R 1089 = 113 I C 384 = A I R 1929 B 116.

—And a decision in a suit on cause of action, having no existence in law, cannot operate as *res judicata*. A I R 1921 Lah. 123 = 3 U P L R (Lah) 49 = 3 Lah. L J 211 = 61 I C 375.

—Alternative finding does not operate as res judicata: 14 I C 161.

—Decision on matters not consistent with the judgment does not operate as res judicata: A I R 1931 C 353 = 34 C W N 839 = I R 1931 C 450 = 131 I C 562.

—Decision on a plea of *jus tertii* does not operate as res judicata since it is generally raised merely as defence. A I R 1927 Mad 844 = 50 M 877 = 26 L W 115 = 53 M L J 864 = 104 I C 468.

—Where the state of things obtaining at the time of the previous decision alters, such decision does not operate as res judicata. 35 C W N 46 = Ind. Rul. (1931) Cal. 397 = 132 I C 81.

—Rejection of memo of appeal presented by an unauthorised Vakil is not *res judicata*. A I R 1930 All 112 = (1930) A L J 394 = Ind. Rul. (1930) All. 162 = 121 I C 546.

—Order *ultra vires* does not operate as *res judicata* in same proceeding. A I R 1925 Pat. 807 = 4 Pat. 440 = 7 P L T 456 = 93 I C 257.

—Objection to preliminary decree taken at the passing of the final decree bars a suit to set aside decree as a nullity. A L R 1933 N 3 (2) = 28 N L R 286 = 15 N L J 28 = 141 I C 479 = A I R 1933 N 36.

—Decision on question as to fraud alleged to set aside a decree is res judicata in a suit to set aside the same decree: A I R 1921 Pat. 12 = 60 I C 124 = 6 Pat. L J 1 = 1921 Pat. 3.

—Where the question of alleged fraud has been in effect adjudicated upon, an attempt to reopen the case cannot be allowed. A I R 1923 Rang 82 = 1 Bur L J 129 = 74 I C 278. see also A I R 1922 M 404 = 16 M L W 132 = 1922 M W N 463 = 69 I C 12; and A I R 1922 A 167 = 20 A L J 254 = 66 I C 81; and A I R 1924 B 100 = 25 Bom L R 893 = 77 I C 206; and 19 I C 579 = 38 M 203 = 1913 M W N 387 = 13 M L T 421 = 25 M L J 228; and 22 O C 60 = 1 U P L R (O) 70 = 22 I C 101; and 31 I C 196 = 98 P R 1915 = 179 P W R 1915; and 4 P L T 35 = 76 I C 136; and 4 P L J 187 = 50 I C 451; and 56 I C 606 = 1 P L T 206.

—An order regarding liability to pay particular items of costs as mentioned in decree, if not appealed from, operates as *res judicata*. A I R 1922 Lah. 361 = 12 P W R 1923.



## C. P. C. (1908) S. 11 (Contd.)

## (12) Heard and finally decided—(Contd.)

## (1) General Principles—(Concl'd)

—Where the suit was brought to enforce a document, which was held in a former suit to have no effectual binding power the suit was barred by *res judicata*. M W N 1912, 73, P C = 9 A L J 165 = 15 C L J 180 = 14 Bom. L R. 177 = 16 C W N 603 = 14 Ind. Cas. 463.

—A former suit between the parties to recover possession of certain *bhag* lands was dismissed on the ground that the present defendants No. 1, 3, 4 and 5 (who were plaintiffs in the first suit) had not made out their right to sue. An issue was also raised and decided that the present plaintiff No. 1 (who was a defendant in the first suit) being a daughter of the original *bhagdar* was by custom excluded from inheritance. The plaintiff No. 1 brought the present suit against defendant Nos. 1 to 5 to recover possession of the *bhag* land as the daughter of the original *bhagdar*. Held, that the bar of *res judicata* was not applicable, for though no doubt the issue as to the custom of exclusion of females from inheritance was heard and decided it was not finally decided because it was not necessary for the decision which the court came to dismissing the suit; and the plaintiff No. 1 had no opportunity of appealing against the Court's finding on that issue.

22 Bom. L R. 64 = 55 I C 322 = 44 Bom. 321.

—Where issues were not framed and application for correction of the *jamabandi* was not decided on the evidence, held that the order is not *res judicata*. 13 R D 856.

—Judicial order made in one stage of a suit is binding. 34 C L J 415 = 70 I C 6.

## (2) Abatement of Suit or appeal.

—Where an appeal is not decided on the merits but abates, so that the appeal becomes infructuous and the decision of the trial court becomes conclusive, the latter will operate as *res judicata* as regards questions decided by it assuming that other conditions of the rule exist. 1932 A L J 615 = 138 I C 406 = I R 1932 A 401 = A I R 1932 A 603 = A L R 1932 A 931.

—Where a party applies to file an award, and it is registered as a suit, abatement of such suit on account of plff. not joining the deceased def't's representative does not bar a subsequent suit to recover the money due under the award. A I R 1925 Bom. 418 = 27 Bom. L R 652 = 89 I C 68.

—Where an order of abatement of suit reversed in appeal, an order under Land Acquisition Act relying on such abatement is not *res judicata*. A I R 1929 Lah 1 = 10 Lah 447 = Ind. Rul (1929) Lah 222 = 114 I C 62.

—As to the effect of abatement of appeal in connected case see 7—(a) Connected Cases Appeal *infra*

## C. P. C. (1908) S. 11 (Contd.)

## (12) Heard and finally decided—(Contd.)

## (3) Adverse finding against a party in whose favour the decree is passed.

—Where one or more issues are decided against a party but the decree as a whole is favourable to such party, the adverse findings do not operate as *res judicata*: A I R 1924 M 469 = 19 L W 377 = 34 M L T 62 = 1924 M W N 246 = 84 I C 622 = 46 M L J 198 = 47 M 453; see to the same effect A L R 1933 M 561; and A I R 1923 A 15 = 20 A L J 784 = 76 I C 618; and 9 L W 84 = 1919 M W N 34 = 25 M L T 66 = 52 I C 258; and 9 I C 1030; 49 I C 513; and A I R 1932 M 207 = 137 I C 616 = I R 1932 M 413 = 1931 M W N 1323 = 35 L W 35 = 62 M L J 141 = A L R 1932 M 390 = 55 M 483; and 139 I C 197 = 36 L W 388 = 1932 M W N 1169 = A L R 1932 M 1310 = A I R 1932 M 541; and 16 C L J 9 = 15 I C 453 = 16 C W N 877 = 40 C 29; and 7 M 145. But there are decisions holding *contra* see A I R 1926 Pat 87 = 7 P L T 150 = 1925 P H C C 338 = 90 I C 622; and A I R 1924 M 626 = 19 L W 513 = 34 M L T 175 = 1924 M W N 466 = 46 M L J 515 = 84 I C 799; and A I R 1922 M 514 = 16 L W 802 = 1922 M W N 763 = 31 M L T 430 (Per Sadasive Aiyar J.); and 36 M L J 641 = 25 M L T 88 = 1919 M W N 7 = 9 L W 180 = 52 I C 34; and 40 I C 771; and 14 Bom L R 1142 = 17 I C 866 = 37 B 172; and 10 W R 465.

—In 6 Calc. 319, the first suit was Landlord *vs.* Tenant, for enhancement of rent. The defence was (a) no notice; (b) the tenure is not enhanceable. The finding of the Court was for the defendant on (a) and for the plaintiff on (b), and the suit was dismissed on the question of notice. The landlord brought another suit for enhancement of rent after the notice, and the defendant was held to be precluded by the finding in the former suit from raising the defence that his tenure was not enhanceable. The decision is not now followed, for, though the question of enhancement was put directly in issue and was heard and determined in the former suit. It was not directly and substantially in issue, inasmuch as the decree was not based on the finding as to enhancement but was made in spite of it. 18 Calc. 647. Followed in 17 A 174 and 44 B 321 = 55 I C 322. To the same effect See 4 M 134 and 7 M 145. Also in 18 B 597 and 23 B 296.

—Similarly it has been held that where a suit for ejectment has been dismissed for want of notice, a subsequent suit for the same relief with notice is not barred even though a decision as to the def't's status forms part of the dismissal order in the previous suit: A I R 1924 Nag. 333 = 78 I C 147.

—Where an ejectment suit is dismissed on the ground of absence of notice, but the Court records of finding that the permanent tenancy alleged by the def't. is not proved,



C. P. C. ( 1908 ) S. 11 ( *Contd.* )

( 12 ) Heard and finally Decided—( *Contd.* )

( 3 ) Adverse findings against a party in whose favour the decree is passed—( *Contd.* )

the decision as to nature of tenancy is not res judicata. A I R 1923 Cal. 297 = 67 I C 271.

—And where an ejectment suit was dismissed on the ground of insufficiency of the notice to quit, with a finding that the tenant was a lessee from year to year, that finding is not res judicata in a subsequent suit for ejectment. 31 M L J 311 = 20 M L T 228 = (1916) 2 M W N 133 = 35 I C 421. But see *contra*, 40 Bom. 662 = 18 Bom. L R 712 = 36 I C 74.

—A finding cannot be conclusive against a party if the decree is not based upon it but is made in spite of it. A I R 1929 All. 910 = (1929) A L J 1100 = Ind. Rul. (1930) All. 86 = 121 I C 102.

—Plaintiffs in previous suit abandoned their rights to claim a mortgage decree against the defendants. Defendants against whom the suit had been dismissed had no right of appeal upon the finding as to the nature of the debts. Held, that the question was not finally decided and could be reargued. A I R 1925 Mad. 52 = (1924) M W N 807 = 20 L W 783 = 47 M L J 487 = 82 I C 438.

—Where the predecessor in title of J. had sued the predecessor in title of M for delivery of a *Kabuliyat* alleging that Rs. 49 was a fair and equitable rent and the Court in that suit after finding that the rent was not so high as alleged, dismissed the suit in accordance with the Full Bench decision in 10 W R. 14 (F. B.) and in order to exercise its discretion properly in the matter of costs also found that the real rent was only Rs. 30 per annum, and where J. sued M in the present suit claiming rent at the rate of Rs. 30 per annum maintaining that the amount of rent payable by M. was *res judicata*. Held, that as the previous suit was dismissed not upon the finding that the proper rent was Rs. 30 per annum, and as the successful deft. could not have appealed against the finding that the rent was Rs. 30 per annum the so-called decision that the rent was Rs. 30 per annum did not operate as *res judicata*. 2 Pat. L J 159 = 1 Pat. L W 221 = 38 I C 211.

—The plff. an Inamdar, first sued the deft. to recover possession of land and also arrears of assessment at the enhanced rate alleging that the deft. was a tenant at will and not a permanent tenant. The Court decided that the deft. was a tenant from year to year and not a permanent tenant, that the plff. was not entitled to recover possession as he had not given a legal notice to quit and that he was entitled to recover arrears of assessment at the enhanced rate. The plff. filed another suit to recover possession of land after giving the deft. a proper notice

C. P. C. ( 1908 ) S. 11 ( *Contd.* )

( 12 ) Heard and finally Decided—( *Contd.* )

( 3 ) Adverse findings against a party in whose favour the decree is passed—( *Contd.* )

to quit and claimed that the nature of the deft's tenure was *res judicata* in virtue of the express finding in the first suit. Held, that the finding was not res judicata : 21 Bom L R 363 = 51 I C 109 = 43 B 568.

—An adverse finding against the defendants in whose favour a decree is passed is not *res judicata* but will lay *onus* on them of displacing the finding. A I R 1922 P C 241 = 48 C 460 = 14 L W 265 = 30 M L T 279 = 48 I A 49 ( P C ) = 64 I C 231.

—Where in a suit to declare an adoption invalid, it was found that the adoption was made without authority, but that the suit was time-barred, it was held that the adopted son had no right to appeal against the above finding, nor did the finding operate as *res judicata*. 17 M L T 85 = 2 L W 101 = 27 I C 861.

—Where a point is incidentally decided against a party, but the case is ultimately decided in his favour, he is not entitled to appeal against that decision and the finding on that point does not operate as *res judicata* in a subsequent suit. 30 I C 592 = 20 L J 386.

—No appeal lies from a decree merely on the ground that certain observations made in the judgment of the Court below are unfavourable to the person in whose favour the decree is passed. 44 I C 723.

—The Madras High Court has held that a party who has been aggrieved by a finding in the decree when the decree is favourable to him has no right of appeal unless the finding is necessarily implied in the decree itself and has prejudiced the party wishing to appeal. Such a finding would not operate as *res judicata*, when the decree itself is based on independent grounds and were not implied in the decree. 37 Mad. 25 = 21 M L J 947 = 10 M L T 291 = (1911) 2 M W N 303 = 12 I C 167.

—And the Patna High Court has held that filing of another suit to contest an adverse finding will not prevent an appeal against such finding : A I R 1930 Pat. 521 = 11 P L T 183 = 1 R 1930 Pat. 617 = 126 I C 377.

( 4 ) *Ambiguous findings.*

—A judgment in a matter of *res judicata* must stand by itself. It decides what it purports to decide, no more and no less. If there is any ambiguity as to what it decided which cannot be cleared up without further evidence, then it will not be a clear finding and therefore not a case of *res judicata* at all. A I R 1923 Mad. 514 = 32 M L T 146 = 44 M L J 443 = 47 L W 322 = 72 I C 582 see also 14 M L J 379.

C. P. C. (1908) S. 11 (Contd.)

(12) Heard and finally Decided—(Contd.)

(4) Ambiguous findings—(Contd.)

—Thus a sentence in a judgment that a woman was suspected of being a woman of a bad character does not amount to a clear and distinct finding as to her bad character and cannot be relied upon as *res judicata*. 137 I C 296=33 P L R 96=1 R 1932 L 333 = A I R 1932 L 232.

—In a suit for possession plaintiff based his claim very clearly on his proprietary title as purchaser under the sale-deed. The defendants in their written statement did not contest the nature of the deed as drawn, but pleaded however that the contract between the parties had been one of the usufructuary mortgagee, and alleged that the plaintiff had fraudulently altered its terms. The suit was decided in plaintiff's favour. Held, it was doubtful whether this decree would operate as *res judicata* on the question whether the deed was a sale or mortgage. A I R 1923 All 586 = 45 A 581 = 21 A L J 503 = L R 4 A 433 Civ = 77 I C 572.

(5) Award and Decrees on award.

—An award of arbitrators and the judgment and decree obtained on the award under C P C Sch. II operate as *res judicata* as to the questions decided by the award: 33 C 881; see to the same effect 20 M 490; and 21 B 465; and 11 B L R 20; and 19 M 290; and 7 C 727; and A I R 1930 O 389 = 7 O W N 541 = I R 1930 O 478 = 127 I C 254; and 1 S L R 236; and 9 Bom. L R 259.

—Similarly, as to award under Arbitration Act: A I R 1930 Sind 195 = Ind. Rul. (1930) Sind 36 = 121 I C 164.

—Where an award was filed in Court under Arbitration Act s. 14 and the objection to jurisdiction of arbitrator was raised but overruled a subsequent suit to set aside the award on the same ground was barred: 137 I C 847.

—The principle of finality applies also to private award unless impeached on sufficient grounds in an appropriate proceedings: A I R 1923 A 518 = 21 A L J 380 = L R 4 A 216 = 73 I C 615 = 45 A 472; and 10 C L J 41 = 14 C W N 75 = 2 I C 214 = 37 C 63; and 7 O W N 541 = 127 I C 254.

—And the foregoing holds true irrespective of whether an application to file the award was made under Sch II or not 33 C 881, or whether a decree has been passed on the award or not 38 M L J 470, or whether the award was oral or written A I R 1924 R 60, provided the subsequent suit was filed after the passing of the award: 33 M L J 177 = 6 L W 243 = 42 I C 514 = 41 M 115.

—But it should be noted that even where an award constituted *res Judicata* the parties

C. P. C. (1908) S. 11 (Contd.)

(12) Heard and finally Decided—(Contd.)

(5) Award and Decrees on award—(Contd.)

are not precluded from suing on the *original rights*, for the function of an award is merely to ascertain and define the original rights, and not to replace them: 29 Bom. L R 301 = A I R 1927 B 237.

—An award in a pending suit on which a decree is passed will operate as *res judicata* 29 A 519 P C. whether the award was passed on private reference. 26 C W N 940, or on reference through Court: 7 C 727.

—Question in later suit is not barred by previous arbitration proceedings if question was not before arbitrator—*R* owing money to *B* and *B* owing to *H*.—*R* paying money to *H*, and with *B*'s authority, *H* giving credit to *B* for the money—*H* giving letter of indemnity to *R* against losses—Letter is discharged by *B* obtaining credit for the money and losses due to *R* being unwarrantably compelled by arbitration award to pay money over again to *B* cannot be recovered against *H*—Entirely misconceived suit was not allowed to be amended before Privy Council A I R 1920 P C 121.

—Where the arbitrators did not inquire into or decide upon the existence of joint property, it was held that a subsequent suit for partition was not barred: 52 I C 503.

—Similarly, a stray remark not incorporated in operative portion of award cannot supersede previous decree. A I R 1929 All. 521 = (1929) A L J 540 = Ind. Rul. (1929) All. 713 = 117 I C 361.

—An order of abatement does not operate as *res judicata*: 27 Bom. L R 652 = 89 I C 68 = A I R 1925 B 418.

—An award can be attacked on the ground of want of jurisdiction of the arbitrators or of want of a valid contract or reference or on ground of fraud: 81 I C 1924 = A I R 1924 S 60.

—But a wrong decision by arbitrator on mixed question of law and fact is no ground for avoiding a decree which was passed in terms of award without objection: A I R 1929 All. 521 = (1929) A L J 540 = Ind. Rul. (1929) All. 713 = 117 I C 361.

—And an order setting aside an award and remitting the matter back to the umpire is a decision to the effect that there was a valid submission to arbitration and operates as *res judicata* on that point. 58 I A 381 = 35 C W N 1287 = A I R 1931 P C 289 = I R 1932 P C 8.

—A decree on an award though not strictly in accordance with the terms of reference, is *res judicata* in a subsequent suit on the same cause of action. 59 I C 89 (2) see also 9 Bom. L R 259.

—An arbitrator gave no indication in his award that it was only a preliminary stage

## C. P. C. (1908) S. 11 (Contd.)

(12) Hear and finally Decided—(Contd.)

(5) Award and Decrees on award—(Contd.)

to the final decision to be given by him. Plaintiff brought his suit impeaching award; and after the institution of the suit the arbitrator purported to give his final award and a decree was made in terms of it. It was held that the suit was not premature since the award could not be said to be merely a preliminary award, and subsequent conduct of the arbitrator could not vitiate the suit already instituted, and further that the decree passed in terms of the final award could not operate as *res judicata*. A I R 1930 All. 584 = Ind. Rul. (1930) All. 762 = 126 I C 10.

—Order refusing to file an award operates as *res judicata* in a subsequent suit to enforce the award as regards the points definitely raised and put in issue as grounds for such refusal: 18 I A 73 = 18 C 414 P C; see also A I R 1930 S 195; but not otherwise: 22 Bom. L R 1377 = 45 B 329; and 18 M 423 F B.

## (6) Compromise and consent Decrees and Orders.

—Section 11 does not apply to compromise suits as it applies in terms only to what was actually heard and finally decided. A I R 1929 Mad 96 = (1928) M W N 654 = Ind. Rul. (1929) Mad 500 = 116 I C 116.

—A consent decree does not come within the rule of *res judicata* as contained in S. 11: A I R 1926 C 672 = 43 C L J 116 = 94 I C 844; see also 1912 M W N 1071 = 17 I C 434. It, however, raises an estoppel as much as a decree passed *in invitum*: A I R 1926 C 672 = 43 C L J 116 = 94 I C 844; see to the same effect 2 O C 28; and 5 C L J 611 = 1 I C 913 = 36 C 193; and 24 C 216; and 18 L W 177 = 1923 M W N 545 = 75 I C 336 = A I R 1924 M 88; and 24 C 237; and 2 C W N 174; and 31 I C 902; and 13 Bom. L R 950 = 12 I C 535 = 36 B 283; and 126 I C 570; and 5 O W N 1081 = I R 1929 O 246 = 115 I C 294 = A I R 1929 O 63 = 4 Luck 181; and 14 N L R 35 = 43 I C 962.

—Similarly as to consent order A I R 1921 Pat. 131 = 2 P L T 628 = 6 P L J 208 = 62 I C 469; and 1 Bom. L R 394.

—An order by consent, not discharged by mutual agreement and remaining unreduced is as effective as an order of the Court made otherwise than by consent and not discharged on appeal. A I R 1929 P C 289 = 57 M L J 429 = 30 L W 606 = Ind. Rul. (1929) P C 287 (P C) = 118 I C 7.

—A compromise based on the judgment in a suit operates as *res judicata*. 13 L R 172 (Rev).

—A decree based upon a compromise in a declaratory suit for contesting an alienation by a widow, to the effect that the plaintiff is to get at once a certain portion of the property

## C. P. C. (1908) S. 11 (Contd.)

(12) Heard and finally Decided—(Contd.)

(6) Compromise and consent Decrees and Orders—(Contd.)

in dispute is a decree for possession, although the word *dakhilyabi* does not occur therein; and that a second suit for possession of the same property is barred. The only remedy left to the plaintiff is to execute the first decree. 55 P L R 1917 = 34 P W R 1917 = 41 I C 2.

—Suit for share of profits—Compromise—  
See 20 C 112.

—Where a previous petition for declaring the marriage a nullity has been dismissed by consent of parties a second petition is not competent. A I R 1928 Bom. 279 = 30 Bom. L R 523 = 110 I C 266.

—Where pre-emptor was party to suit by village landlords challenging sale to be pre-empted and sale was confirmed by a compromise decree, right of pre-emption cannot be exercised. A I R 1928 P C 190 = 10 Lah. 75 = 55 I A 266 = 48 C L J 158 = 33 C W N 90 = 30 P L R 1 = 110 I C 1.

—Compromise decree on the basis of a Commissioner's map Court in subsequent suit cannot go into the correctness or otherwise of the map. A I R 1928 Cal. 852 = 111 I C 1.

—Where an application for review of a compromise decree was dismissed on merits, whether a subsequent suit to set aside the decree on the same ground lies see 18 C W N 126 and 13 C W N 1197.

—Rent decree based on compromise—  
Terms of compromise not known—Decree is not *res judicata* as to rate of rent. A I R 1925 Cal. 1011 = 87 I C 781.

—Where in a suit on a mortgage, a compromise is arrived at which the Court refuses to recognise and the suit is dismissed for want of succession certificate. *Held* that the mortgage is not superseded by the compromise unless accepted by Court and decree passed accordingly and that a second suit on the mortgage was maintainable. 12 A L J 672 = 24 I C 93.

—Application challenging validity of a compromise decree under s. 151 dismissed. Subsequent suit for the same purpose is not barred. A I R 1926 Pat. 289 = 5 Pat. 276 = 94 I C 765.

—Plff., the widow of the testator sued to recover possession of properties from 3rd deft. and the latter set up a will and alleged he was the adopted son of the testator. Plff. denied both the will and the adoption. In a prior suit by beneficiaries claiming under the will, to which present plff. was a party, a consent decree was passed and neither the will nor the adoption was impeached. *Held*, that the decree in the prior suit neither created an estoppel nor operated as *res judicata* against plff. 11 I C 834.

C. P. C. 1908 S. 11 (Contd.)

(12) Heard and finally Decided—(Concl'd)

(6) Compromise and consent Decrees and Orders—(Concl'd)

—The withdrawal of an ejectment suit apparently under an agreement that defendant should pay an enhanced rent, does not bar a fresh ejectment suit. 14 R D 32.

—The order passed on compromise in previous probate proceeding cannot operate as a bar to an application for probate of the same Will. A I R 1924 Cal. 864 = 51 C 745 = 84 I C 154.

—A compromise decree cannot be taken to decide every point that ought to have been pleaded, as a decree on the merits must. A I R 1929 All. 243 = 51 A 575 = (1929) A L J 344 = Ind. Rul. (1929) All. 564 = 116 I C 436.

—There can be an estoppel by judgment in a consent decree only when the question raised by the subsequent suit was present to the minds of the parties and was actually dealt with by the consent decree. 27 I C 708.

—In case of compromise decree, to find out what the matter is it would not merely be enough to see what was the relief granted in the previous decree, but it would be necessary also to examine the basis on which it was granted. 14 N L R 35 = 43 I C 962.

—Even where a compromise decree is not res judicata it is admissible in evidence: 27 I C 640 and finally decided—Compromise decree—Not res judicata—but admissible in evidence. 27 I C 640.

—When a matter was not "heard and finally decided" in a suit but a decree was passed on the basis of a compromise agreement, the relief claimed in the plaint but not included in such a decree, should not be deemed to have been refused so as to bar a fresh suit for the said reliefs, if the cause of action in the succeeding suit had not arisen on the date of presentation of the plaint in the prior suit: 30 B 395; see to the same effect 35 M 75; and 27 I C 708.

—An appeal from an order, recording a compromise under O. XXIII, r. 3 filed after a decree is prepared in pursuance of that order in accordance with the provisions of r. 3, is in competent. A I R 1926 Cal. 412 = 29 C W N 928 = 87 I C 248.

—A consent decree can be set aside on any ground which would justify a cancellation of the agreement on which the decree is based. A I R 1921 B 414 = 25 Bom. L R 1137 = 85 I C 504; and 36 B 77 = 13 Bom. L R 573 = 11 I C 568; and 36 C L J 245 = 74 I C 770; and 13 Bom. L R 332 = 11 I C 356; and 34 A 143 = 9 A L J 1 = 13 I C 80; and 36 B 77 = 11 I C 568 = 13 Bom. L R 573.

—But an error of law is no ground of attack 21 M L J 709 = 35 Mad. 75 = (1911) 1 M W N 290 = 9 M L T 487 = 9 I C 875.

C. P. C. (1908) S. 11 (Contd.).

(12) Heard and finally Decided—(Cont'd)

(6) Compromise and consent Decrees and Orders—(Concl'd)

—Where under a compromise the petitioner (father) acquiesced in the retention of the custody of the minor by the respondent (mother) Held that the authority delegated by a natural guardian to any other person to retain the custody of the minor is revocable although the compromise has been embodied in a decree. A I R 1924 Mad. 45 = 18 L W 173 = (1923) M W N 668 = 73 I C 948.

(7) Connected Cases—Appeal.

—When it appears to an Appellate Court that there are two decrees arising out of two suits heard together or raising the same question between the same parties or arising out of two appeals to a subordinate Appellate Court, and only one of such decrees is brought before it in appeal and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred by the rule of res judicata, or at all, by reason of his failure to appeal from the decree which does not prejudice him: A I R 1923 A 490 = 21 A L J 465 = 74 I C 411 = 45 A 506 F B (overruling 18 A L J 40; and 7 I C 909 = 7 A L J 995 = 33 A 151; and 11 A L J 214 = 19 I C 76 = 35 A 187; and 211 A W N 1908; and 91 C 667); approving 245 A W N 1907 = 4 A L J 587 = 29 A 730; and see to the same effect 4 O W N 143 = 100 I C 450 = A I R 1927 O 106; and 131 I C 679 = A I R 1931 A 660; and 87 I C 804 = A I R 1925 A 488.

—Where plff and deft. both appeal against a decree and both appeals are tried together and single judgment passed dismissing the plff's appeal, and the plff prefers second appeal not from the decree in his own appeal but from the decree in the deft's appeal, the second appeal is maintainable: 26 A L J 258 = 113 I C 93 = A I R 1928 A 274 = 50 A 517; and see 29 A 730; and 21 I C 264; and 8 A L J 605; and A I R 1927 O 575 = 102 I C 171; and 41 A 54.

—But it would be otherwise if both the appeals were tried together but separate and independent judgments passed see 27 C W N 141 = 64 I C 574 = 34 C L J 281 = A I R 1921 C 291; and 1890 A W N 68; and 1890 A W N 183 = 12 A 578.

—If the same question is in controversy between the same parties in two distinct litigations instituted, one after the other, but simultaneously pending, the final decision in the later suit, if given earlier, operates as res judicata in the earlier suit whose final stage is reached later: A I R 1923 C 496 = 74 I C 591 = 37 C L J 184.



## C. P. C. (1908) S. 11 (Contd.)

## (12) Heard and finally decided—(Contd.)

## (7) Connected Cases—Appeal—(Contd.)

—Plff sued to recover a certain share in two houses from A and her alienee B. Suits were decreed and separate appeals preferred by A and B which were accepted by one judgment written in the appeal preferred by A. Separate decrees were, however, drawn up. Plff. preferred a second appeal and only filed copies of the judgment and decree in A's appeal along with his memo. of appeal. Held that the copy of the decree of the lower Appellate Court in the appeal preferred by B not having been filed along with the memo. of appeal and there was no appeal against that decree and the decree had consequently become final; and that the matter in dispute having become *res judicata* between plff and B who claimed under A, the plff's appeal against A could not proceed : A I R 1922 L 390 = 77 I C 541 = 3 L 215.

—Where in connected suits or appeals a single or connected judgment has been drawn up despite plea of inconsistent titles, the High Courts differ as to whether an appeal against the decree in one suit or appeal will be barred by not appealing against the other decree in the other suit or appeal. In 8 L 384 = 104 I C 849 = A I R 1927 L 289 (overruling 77 I C 541 = 1922 L 390 = 3 L 215; and 53 I C 137 = 1 Lah 83; and also impliedly overruling A I R 1921 L 346; and A I R 1921 L 255 and A I R 1921 L 271; and A I R 1927 L 98) the Lahore High Court has held that such appeal is maintainable; see also A I R 1927 L 821; and 46 I C 545.

—The Calcutta and Madras High Courts also hold that such appeal is not barred. see A I R 1931 C 353 = 34 C W N 839; and 16 C 233; and 33 C 1101, and A I R 1926 M 378; and 29 M L J 551; and 29 M 333; and 33 M L J 379.

—The Patna High Court, however, has held *contra* A I R 1924 Pat. 823. And so also the High Courts of Allahbad, and Rangoon and Chief Court of Oudh : 33 A 51 F B; 35 A 187; and 10 A 123; and 33 A 151; and 1893 A W N 190; and 18 A L J 40; and 25 I C 266; and A I R 1925 R 104; and 6 L B R 93; and A I R 1925 O 598; and A I R 1924 O 311; and 5 O C 384 and 146; and 15 O C 22; and 42 I C 424.

—Where an appeal in a connected case abates, the matters are never finally decided and there is no *res judicata* : 109 I C 564.

## (8) Cross objections dismissed, no bar to appeal as to those very objections.

—Where the cross-objections filed by one party were dismissed without going into the merits of the case on the ground of their being filed after the dismissal of the appeal and an appeal was filed on the same points

## C. P. C. (1908) S. 11 (Contd.)

## (12) Heard and finally decided—(Contd.)

## (8) Cross objections dismissed, no bar to appeal as to those very objections—(Contd.)

as the cross-objections : Held, that the appeal was not barred. A I R 1924 All. 867 = 22 A L J 365 = L R 5 A 298 Civ. = 78 I C 677.

## (9) Decree in first suit time barred or becomes unexecutable by default of plaintiff.

—Where a decree in the first suit becomes time-barred or otherwise unexecutable owing to the plff's own fault a subsequent suit will not lie : 66 I C 166; see to the same effect 18 W R 260; and 23 A 465; and 2 A H C 382; and 28 A 300; and 42 A 290.

—Prior suit for possession based on inheritance and agreement decreed—Decree allowed to be time-barred—Subsequent suit based on inheritance is barred. A I R 1927 Oudh 60 = 3 O W N Sup 287 = 99 I C 478.

## (10) Decree on oath.

—An adjudication by a Court on an oath made by one of the parties to the suit would make the matter or issue covered by the adjudication *res judicata* in a subsequent litigation between the same parties, though the subject matter of the suit is different. 13 M L T 261 = M W N 1913, 220 = 24 M L J 321 = 36 M 287 = 18 Ind. Cas. 835. see also 24 M 444; and 5 M 259; and 7 M 413.

## (11) Decree, rights under, varied or abandoned

—Finding in previous suit as regards the existence or non-existence of custom of pre-emption is binding upon the parties to that litigation. But its abandonment or variations can be proved at a subsequent stage. A I R 1926 All 420 = 94 I C 463. As to the rights under a decree which is altered or amended see 15 M 403 = 1 M L J 535.

## (12) Dismissal affecting rights.

—Where subject-matters of the two suits is the same and Court decides the previous case after both sides have given certain amount of evidence judgment being upon merits dismissing suit in plaintiff's absence judgment operates as *res judicata*. A I R 1928 Cal 271 (2).

## (13) Dismissal for absence of both parties.

—Prior suit disposed of in the absence of both parties is not *res judicata*. 1 Pat L W 375 = 39 I C 755.



## C. P. C. (1908) S. 11 (Contd.)

## (12) Heard and finally Decided—(Contd.)

## (14) Dismissal of suit for non-prosecution or default.

—(1) **General** :—Decisions arrived at in previous suit though dismissed operate as *res judicata*. A I R 1929 Cal. 449 = Ind. Rul. (1930) Cal. 243 = 122 I C 547; and this is true even if the dismissal be erroneous: 95 P R 1883.

—Objection that land of judgment-debtor could not be attached as he was agriculturist dismissed—No separate suit lies for declaration that judgment-debtor is agriculturist. A I R 1930 Lah. 628 = 31 P L R 191 = Ind. Rul. (1930) Lah. 890 = 127 I C 858.

—But no question of *res-judicata* arises in favour of either of the litigants when a suit is dismissed for default. 41 I C 905.

—(2) **Failure to produce evidence** :—Dismissal owing to failure of party to produce evidence is one on merits and operates as *res judicata*. A I R 1929 Mad 404 = Ind. Rul. (1930) Mad. 375 = 122 I C 519.

—But there is no bar to a fresh suit when the previous suit is dismissed in the defendant's absence on the failure of plaintiff to adduce evidence. 10 C W N 40. see also 10 A L J 51 = 15 I C 51.

—**Estoppel by judgment**—Judgment *inter partes*—Non-disclosure of title in a previous suit see 1 C L J 23 = 32 C 357 P C.

—(3) **Default of appearance** :—Dismissal of suit for default of appearance does not bar a subsequent suit by *res judicata*. 10 N L R 39 = 23 I C 878 see also 12 A L J 911 = 24 I C 480; and 104 P R 1883.

—Dismissal for default of an appeal does not bar fresh appeal. A I R 1923 Pat. 514 = 2 Pat. 739 = 4 P L T 405 = (1923) Pat. 213 = 75 I C 284.

—Where an application for probate by a legatee has been dismissed for default, the legatee's heirs can nevertheless plead the existence of the Will as a defence to a suit for the property which they claim as belonging to them under the Will. A I R 1925 Mad 861 = 21 L W 415 = (1925) M W N 285 = 87 I C 621. see also A I R 1930 O 29 = 6 O W N 624 = 119 I C 456 = 5 Luck 186; and 38 B 427 = 16 Bom. L R 459 = 25 Ind. Cas. 37.

—But an order dismissing a suit under O 10, r 3 on the ground of the plaintiff's default to appear in obedience of the Court's order is a decree and a subsequent suit on the same cause of action is barred under S. 11 of the C P C 1908. 13 Bom L R 658 = 11 I C 986.

—Thus a judgment by default on the question of non-transferability of holding was held to be *res judicata*. 9 I C 363.

—(4) **Dismissal under O. 17, r. 3** :—Dismissal of a suit for default of plff under O 17

## C. P. C. (1908) S. 11 (Contd.)

## (12) Heard and finally decided—(Contd.)

## (14) Dismissal of suit for non-prosecution or default—(Contd.)

r. 3 (= S. 158 C P C 1882) operates as *res judicata*. A I R 1928 C 271; see to the same effect 13 I C 172; and A I R 1929 M 404; and 12 C 563; and 34 M 97; and 10 M 272; and 9 C W N 679; and 198 P L R 1908; and 46 I C 390 = 40 A 590; and 23 W R 58; and 15 W R 573.

—(5) **Dismissal under O 9** :—A dismissal under O IX, r. 3 creates no *res judicata*. A I R 1925 Oudh 337 = 12 O L J 1 = 28 O C 8 = 85 I C 509.

—A rent suit having been dismissed for default under O 9 a subsequent suit for arrears is not barred. 12 A L J 53 = 22 I C 820.

## (15) Dismissal not on merits.

—Where the matter has not been heard and finally decided on the merits, there can be no *res judicata*. 24 M L T 311 = 1918 M W N 427 = 7 L W 557 = 45 I C 969; but see 6 O W N 281 = I R 1929 O 462 = 118 I C 766 = A I R 1929 O 275 = 4 Luck 713.

—Dismissal of suit for want of proper Court-fees is not *res judicata*. A I R 1928 Oudh 503 = 5 O W N 897 = 4 Luck 159 = Ind. Rul. (1929) Oudh 120 = 114 I C 120.

—Dismissal of prior suit for non-joinder of parties is not *res judicata*. A I R 1922 Mad. 259 = 43 M L J 572 = (1922) M W N 428 = 16 L W 26 = 73 I C 491; see also A I R 1927 A 439 = 49 A 592 = 25 A L J 437 = 101 I C 676; nor does a dismissal for mis-description of suit property does bar subsequent suit A I R 1925 Lah. 193 = 78 I C 579.

—A dismissal of an appeal for want of a copy of the first Court's judgment necessary under the Allahbad High Court rules, does not operate as *res judicata*. 19 A L J 706 = 63 I C 344.

—Where decision in former suit was no more than the statement of the legal meaning which the Court attached to the words of the Settlement Court's judgment and decree. It cannot act as *res judicata* in a subsequent suit between parties. A I R 1928 Oudh 241 = 3 Luck 392 = 5 O W N 50 = 108 I C 98.

—The filing of a prior suit in the wrong Court and undervalued is not *res judicata* for a subsequent suit properly valued and filed in the proper Court. A I R 1931 All 21 = (1930) A L J 1254 = Ind. Rul. (1931) All 237 = 130 I C 13.

—Where an application for a mendment of decree was dismissed for default, and so was an application for review of that order Held there was adjudication on the merits and a second application for the same relief not barred on principles analogous to those of O 9, r. 4, Civil P C. A L R 1933 P 165 = 12 P 179.

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C P C ( 1908 ) S. 11 (Contd.)

( 12 ) Heard and finally decided—(Contd.)

(16-17) Dismissal of suits as time-barred.

—Decision on the ground of limitation only does not operate as *res judicata*. A I R 1923 Lah. 150 = 73 I C 705 see also 1 P R 1916 = 206 P W R 1915 = 32 I C 485. As to the rule under the old Code see 13 A W N 1881.

( 13 ) Dismissal on a preliminary point.

—Suit dismissed on the ground that there is no cause of action is not a bar under the principles of *res judicata*. A I R 1929 All 844 = Ind Rul (1929) All 919 = 118 I C 711.

—Where a suit is disposed of on a preliminary issue e. g. no cause of action, the decision does not operate as *res judicata*, but where the decision on the preliminary issue cannot be arrived at without a decision on the merits e. g. in this case the validity of sale, then question as to validity of sale is barred by *res judicata* in a subsequent suit. 16 O C 178 = 20 I C 266.

—Trial Court's decision on merits is not *res judicata* in case of appeal on that decision even though such appeal is disposed of on preliminary point. 13 L 375 = 33 P L R 424 = I R 1932 L 583 = A I R 1932 L 452.

—Dismissal of a prior suit on ground of jurisdiction does not bar a subsequent suit by *res judicata*; 24 A L J 609 = 28 Bom L R 910 = 43 C L J 513 = 51 M L J 52 = 3 O W N 581 = 95 I C 566 = 48 A 313 P. C. see to the same effect 13 C L R 83; and 17 B 562; and 2 B 19; and 4 B H C 110; and 5 B 48; and 35 B 38; and 8 A 282; and 70 P R 1918.

—Where the first suit was dismissed on the ground that the plff did not ask for possession as consequential reliefs which he was bound to pray for and his suit for mere declaration would not lie, his second suit for possession is not barred 127 I C 8 = 1929 L 596.

—A suit which is dismissed on the ground that plaintiff has no right to continue the suit cannot operate as *res judicata* in favour of the sons of the plaintiff. A I R 1929 All 910 = (1929) A L J 1100 = Ind Rul (1930) All 86 = 121 I C 102.

—Order of a Revenue Court declining to give partition, on the ground that the village was impartible, is not a bar to a subsequent suit in the Civil Court to have it declared that the plaintiff had equal rights with the defendants in the village. A W N 1884, 2.

—Decision on necessary issues after dismissal of the suit is not binding A I R 1927 Rang. 156 = 6 Bur. L J 52 = 101 I C 637.

C. P. C. ( 1908 ) S. 11 (Contd.)

( 12 ) Heard and finally Decided—(Contd.)

( 19 ) Dismissal on technical grounds e. g. misjoinder, non-joinder, multifariousness etc.etc.

—Where a suit was dismissed on a preliminary point that the suit as framed was not maintainable but a finding was recorded also on the merits *held* that the decision would not operate as *res judicata* so far as the finding on the merits was concerned, because it was a decision on an unnecessary issue. 22 P W R 1918 = 44 I C 983.

—Dismissal of prior suit for non-joinder—Subsequent suit is not barred A I R 1927 Cal 794 = 46 C L J 118 = 104 I C 576 see also 27 All 254; and 1906 P L R 61 = 6 P R 1906; and 28 M 338; and A I R 1928 O 503; and A I R 1929 Lah 596; and A I R 1930 Oudh 270 = 7 Oudh W N 209 = 122 Ind Cas 769 = 5 Luck 684; and 2 P L J 313 = 39 I C 126; and 27 I C 575.

—There is no *res judicata* where the prior suit is dismissed for want of notice under s. 132, Act VI of 1882—12 Mad. 500, or where the first suit had been dismissed as defective for want of parties and as a declaratory decree could not be made—24 Cal. 616 = L R 24 I A 50 = 1 Cal W N 297; followed in 45 C 442 and 1927 C 794; or because the property sued for was wrongly described in the plaint. 9 W R 327.

( 19-a ) Erroneous Decisions.

—See under ( 30 ) Issues of Law *infra*.( 20-21 ) *Ex Parte*; Decrees and Orders.

—( 1 ) General :—Principle of *res judicata* applies to *ex parte* decrees and orders : A I R 1926 M 1144 = 24 L W 260 = 97 I C 601; see to the same effect : A I R 1929 A 346 = 119 I C 567; and A I R 1923 L 560 = 5 L L J 163 = 74 I C 577; and A I R 1924 O 419 = 11 O L J 448 = 79 I C 660; and 8 S L R 218 = 27 I C 999; and A I R 1928 C 717 = 48 C L J 184 = 32 C W N 828 = 115 I C 588; and A I R 1929 A 29 = 113 I C 758; and A I R 1929 A 761 = 122 I C 664; and A I R 1929 M 89 = 114 I C 230; and 16 C 300; and 3 C 383; and A I R 1924 S 60 = 81 I C 1024; and 33 B 479 = 11 Bom L R 345.

—But the conclusive effect of the decision must be confined to the point actually decided in the suit. 54 I C 789. see also 7 I C 126 = 14 C W N 924 = 12 C L J 185; and 49 I C 89 = 1918 M W N 683 = 8 M L W 551 = 24 M L T 424; and to the relief actually claimed in the plaint 62 M L J 177 = 35 L W 66 = 138 I C 31 = I R 1932 M 498 = A I R 1932 M 233 = A L R 1932 M 253.

—Moreover, the party sought to be affected by *res judicata* should have notice and opportunity to contest. A I R 1930 Mad 414 = Ind Rul. ( 1930 ) Mad 63 = 120 I C 863; see to the same effect A I R 1929 S 110 = 116 I C 101;

## C. P. C. ( 1908 ) S. 11 (Contd)

## ( 12 ) Heard and finally Decided—(Contd)

## ( 20-21 ) Ex Parte Decrees and Orders—(Contd)

and A I R 1921 M 532 = 62 I C 480; and 20 C L J 15 = 24 I C 80; and 18 C W N 1288 = 27 I C 225.

—And the matter which is not directly and substantially in issue is not *res judicata* against the absent party 62 M L J 177 = 35 L W 66 = 138 I C 31 = I R 1932 M 498 = A I R 1932 M 233 = A L R 1932 M 253.

—Same considerations, apply to Exparte orders in execution proceedings. A I R 1927 M 149 = 98 I C 702; and A I R 1922 P C 341; and 113 I C 92; and see under C P C s. 11 (5) Execution Proceedings—Heard & Decided. Decisions in 7 C 23; and 8 C 275 and 9 M L J 60; and 7 C 406 holding that rule of *res judicata* does not apply to exparte orders or decrees do not now represent the law. It has been held that an exparte decree which was never executed cannot bar a subsequent suit 78 P R 1883 N; but this decision is now obsolete in view of the repeal of Expl IV to S. 13 of C P C 1882.

## —( 2 ) Suits between Landlord and Tenant:—

*Exparte* decision in rent suit involving question of status and rate of rent operates as *res judicata*. A I R 1930 Oudh 335 = 14 R D 262 = Ind Rul ( 1930 ) Oudh 465 = 7 O W N 507 = 127 I C 241; see to the same effect: A I R 1925 M 378 = 82 I C 990; and A I R 1925 S 86 = 19 S L R 247 = 78 I C 806; and 12 I C 329; and A I R 1926 C 767 = 91 I C 380; and A I R 1930 O 335 = 7 O W N 507 = 127 I C 241.

—Similarly an *ex parte* decree for rent can operate as *res judicata* on the question of the relationship of landlord and tenant. A I R 1926 Cal 114 = 87 I C 672 see to the same effect A I R 1927 A 552 = 25 A L J 467 = 101 I C 516 = 49 A 658; and 17 C W N 627 = 16 I C 911; and 54 I C 763.

—An *exparte* decision as to rate of rent leaving all the points in dispute open does not operate as *res judicata* in a subsequent suit for compelling the acceptance of a *patta* as there was no adjudication therein on the question as to what the terms of the proper *patta* were. 29 M L J 362 = ( 1915 ) M W N 614 = 2 L W 650 = 30 I C 983.

—Where a tenant brings a suit to contest a notice of ejectment and claims under-proprietary rights against the landlord and produces evidence for the same and the case is decided *ex parte* in his favour, it is not open to the landlord some eight months after the decision of the said suit to issue a fresh notice of ejectment to the tenant. 16 R D 203 = 13 U D 63 = 13 L R 91 (Rev.)

—Plaintiff obtaining but not executing *ex parte* decree for confirmation of possession over certain land—Suit after lapse of some years for confirmation or possession in the

## C. P. C. ( 1908 ) S. 11 (Contd)

## ( 12 ) Heard and finally Decided—(Contd)

## ( 20-21 ) Ex Parte Decrees and Orders—(Contd)

alternative relying on previous decree—Previous decree cannot cease to have effect unless, set aside—Question of title should not again be gone into—Suit should be decreed on production of previous decree. A I R 1924 Pat 165 = 71 I C 560.

—As to how for an *exparte* decree in a suit under ss. 105 and 109 of B T Act operates as *res judicata*. see 57 I C 48.

—( 3 ) Other suits:—Where due to gross negligence of a trustee, an *ex parte* decree was passed, a subsequent suit by succeeding trustee regarding same property is not barred by *res judicata*. A I R 1931 Mad 641 = 60 M L J 590 = 33 L W 661 = Ind Rul ( 1931 ) Mad. 719 = 133 I C 207; approving 47 M L J 928.

—*Exparte* order of avoidance of alienation by insolvent on the date of the adjudication on insolvency petition does not operate as *res judicata* against the alienee. 62 M L J 177 = 35 L W 66 = 138 I C 31 = A I R 1932 M 233 = I R 1932 M 498 = A L R 1932 M 253.

—The plffs. sued to set aside certain leases granted by a Hindu widow and for declaration of their right as reversioners. Plff. and the lessees having compromised, a compromise decree was passed *ex parte* against the widow declaring the plffs. to be reversioners. Held, in a subsequent suit by the plff against a transferee from the widow subsequent to the decision, that the widow and the transferees were bound by the decision in the previous suit declaring the plff to reversioners. 12 A L J 1011 = 25 I C 224.

—Where A was summoned, entered an appearance and had an opportunity of defending the action, but neither applied for extension of time, for giving his defence or reopening the case, the judgment must be held to have been given on the merits of the case. 6 Bur. L T 160 = 7 L B R 56 = 20 I C 971.

—( 4 ) Setting aside of *Exparte* decree :—A suit to set aside an *exparte* decree on ground of fraud lies, but a dismissal of a prior application to set aside the decree will bar a subsequent suit for the same: 20 C W N 845 = 35 I C 557; but see 15 C L J 446 = 17 C W N 219 = 14 I C 845.

—A suit for declaration that a decree *ex parte* is void for fraud cannot lie if an earlier application to set aside the decree has been dismissed unless based on fresh grounds of fraud. A I R 1924 Pat 238 = 2 Pat 833 = 5 P L T 66 = 2 Pat L R 65 = 74 I C 825. see also 4 A W N 1882; and 47 P L R 1910 = 8 I C 232.

—S. 11 does not bar a suit to set aside an *exparte* decree on the ground of fraud even though a prior application under O. 9, r. 13 to set aside the same decree had been rejected

C. P. C. (1908) S. 11 (Contd.).

(12) Heard and finally Decided—(Contd)

(20-21) Ex Parte Decrees and Orders—(Concl'd)

and the plff had not appealed from such rejection : 28 C 475 P C; see to the same effect 24 C 546; and 27 C 197; and 21 A 289; and 13 C W N 493; and 5 C W N 559; and A I R 1927 R 281.

—But if the very fraud that is set up in the subsequent suit was set up in the prior application the subsequent suit will be barred by *res judicata*. 1907 A W N 191 = 4 A L J 668 = 29 A 608; see to the same effect : 7 A L J 74 = 7 I C 596 = 32 A 145; and 10 Ind Cas 780 = 4 Bur. L J 76; and 41 Ind. Cas. 677 = 2 Pat. L W 20; and A I R 1918 P C 184; and 4 Pat. L J 205 = 50 Ind Cas. 497; and 41 All. 626 = 17 All L J 797 = 1 U P L R (H C) 62 = 51 Ind Cas 125; and A I R 1921 Cal 298 = 48 Cal 298 = 63 Ind Cas 712; and A I R 1924 Bom 460 = 26 Bom L R 695 = 48 Bom 583 = 83 Ind. Cas. 34.

—Where a party seeks to set aside an *ex parte* decree on the ground that summons was not served upon him, but the Court disbelieves him and dismisses the application, a suit to set aside the decree on the same ground is barred. A I R 1924 Rang. 119 = 76 I C 794 = 1 R 500. see also A I R 1923 C 569 = 76 I C 766; and 29 A 212 = 4 A L J 51 = 1907 A W N 31.

—When an application was put in to set aside an *ex parte* decree on the ground that summons was not served, but it was dismissed on the ground of service of summons a subsequent suit to set aside the decree on the same ground will be barred. A I R 1924 Pat. 238 = 2 Pat. 833 = 74 I C 825.

—But when a subsequent suit to set aside an *ex parte* decree contained matters which could not have been raised in an application under O. IX, r. 13 which had been dismissed. *Held*, that the question of non-service of summons was not precluded by *res judicata*. A I R 1925 Cal 663 = 41 C L J 281 = 29 C W N 325 = 86 I C 779.

—Where an application to set aside *ex parte* decree on the ground of wrong information about the date by the applicant's *mukhtar* was dismissed, *held*, no suit will lie to set aside the decree on the ground of fraud A I R 1924 Pat 769 = (1924) Pat. 155 = 81 I C 1035.

#### (22) Explanation I

—(1) "Suit," meaning of :—As to the scope of Explanation I see 24 I C 243. Expl I has been newly added and is based on the Privy Council ruling in. 11 A 148.

—Whether applications for amendment of decree are proceedings in "suit" see 14 C L J 481 = 39 C 265 = 12 I C 151.

—An application in review is not a suit and the rejection does not bar a fresh suit. A I R 1930 Oudh 112 = 7 O W N 153 = Ind. Rul.

C. P. C. (1908) S. 11 (Contd.).

(12) Heard and finally Decided—(Contd)

(22) Explanation I—(Contd)

(1930) Oudh 299 = 125 I C 171 see also 40 C 541 = 18 I C 444; and 13 C W N 1197; and 01 C W N 529.

—Decision under Succession Certificate Act does not fall under S. 11 C P C A I R 1924 L 493 = 92 I C 138 = 5 L 105; see also A I R 1925 M 497 = 48 M 1.

—The application for letters of administration is not a suit properly so called, and the finding on the construction of the will being for the purpose of determining the question of the representative title of the applicants, cannot be regarded as concluding the plaintiff by *res judicata* from obtaining a construction of the will in the suit brought by her. 20 Cal. 888. see also 15 C W N 1021 = 10 I C 434; and 5 L B R 78 = 3 I C 719.

—But general principles of *Res Judicata* apply to probate proceedings : A I R 1930 P C 22 = 58 M L J 171 = 34 C W N 201 = 7 O W N 19 = 32 Bom L R 505 P C (affirming A I R 1927 C 427); see also A I R 1929 L 761.

—Thus where a question of relationship of parties has been decided in a previous probate proceedings, a subsequent suit between the same parties involving the same question is barred. A I R 1927 Cal 421 = 31 C W N 898 = 46 C L J 596 = 100 I C 510.

—Decision in proceedings for letters of administration—Claim decided against a party cannot be re-agitated in regular suit. A I R 1923 Rang. 257 = 1 R 258 = 76 I C 494.

—The Will of a Hindu testatrix addressed to her grandson directed worship of the family idols out of specific income but there was no provision for the worship after the death of the grandson. The balance of the income was to be divided between three branches of her own family. In administration proceedings taken on the death of the grandson it was decided that out of the produce of the houses belonging to the estate the worship be performed and that the surplus be paid equally to the three branches. It was held, (1) There was no gift of the whole property to the idols. (2) The burdens of performing different duties which involved ownership were cast on the grandson appointed by their Will (3) No heritable *shebaitship* was established. (4) The representatives of the three beneficiaries under the Will were entitled to the residue absolutely and in equal shares. (5) As the gift was a private trust the settlement of a scheme under s. 92, C P Code could not be ordered. (6) The order in the administration suit was binding on all the parties and operated as *res judicata*. A I R 1922 P C 253 = 20 A L J 625 = 36 C L J 57 = 49 C 459 = 27 C W N 174 = 24 Bom L R 937 = 49 I A 100



C P C (1908) S. 11 (Contd.)

(12) Heard and finally Decided—(Contd.)

(22) Explanation I—(Contd.)

= 16 L W 963 = 43 M L J 116 (P C) = 67 I C 561.

—Where a plff's claim against administrator for a share in the estate was held time-barred it operated as *res judicata* in an application to revoke the grant. 51 I C 355.

—S. 11 does not refer to a cause application, matter or other proceedings, but to a suit, and insolvency proceedings not being suit, the order of the Insolvency Court cannot operate as *res judicata*. A L R 1933 C 695.

—But general principles of *res Judicata* to apply to insolvency proceedings. 63 M L J 778 = 86 L W 699 = 1932 M W N 1201 = A L R 1933 M 526 = A I R 1933 M 9; see also 193 P L R 1905 = 75 P R 1905 F B (overruling 145 P R 1884; and 122 P L R 1903); and see 39 A 626.

—Decision of Income-Tax Commissioner is not *res Judicata* against successor in subsequent year 12 L 663 = 32 P L R 656 = 134 I C 198 = A I R 1931 L 341.

—Arbitration proceedings under paras 20 and 21 of the second Schedule are not proceedings in a suit A I R 1921 Bom 389 = 45 B 329 = 59 I C 755.

—But the general principles of *res Judicata* will apply to such proceedings. 76 I C 953 = 19 S L R 360; see also 13 S L R 193 = 56 I C 150; and 35 I C 710 = 9 Bur L T 98. As to proceedings under s. 84 T P Act see A I R 1922 Nag. 174 = 67 I C 324.

—Withdrawal of an application under s. 105 B T Act without leave does not bar a subsequent suit for enhancement of rent, for it is not a suit : 17 C W N 467 = 18 I C 130 = 40 C 428.

—(2) "Former" suit, meaning of :—Suit decided earlier though filed later is former suit within s. 11. A I R 1929 Pat 173 = 8 Pat 107 = Ind Rul (1929) Pat 375 = 117 I C 167; see to the same effect :—A I R 1923 C 496; and 96 I C 694; and 24 M 350; and 6 L B R 93; and 211 A W N 1908; and 24 I C 243; and 32 A 67; and 11 A 148; and 153 P R 1890; and A I R 1928 L 710.

—The rule of *res judicata*, so far as relates to the trial of an issue refers, "not to the date of the commencement of the litigation but to the date when the Judge is called upon to decide the issue. A I R 1927 All 189 = L R 8 A 33 Rev. = 99 I C 299.

—Same Rule will apply to appeals. Thus an appeal against a preliminary decree filed on a date subsequent to the date of the final decree is barred. A I R 1925 Cal 218 = 40 C L J 291 = 84 I C 674; see also 12 A 578.

—Where, pending a second appeal, the former suit is decided on second appeal, it operates as *res judicata*. (1919) M W N 455 = 52 I C 625.

C. P. C. (1908) S. 11 (Contd.)

(12) Heard and finally Decided—(Contd.)

(22) Explanation I—(Contd.)

—Appeal from preliminary decree pending—Final decree passed is valid. A I R 1929 All 287 = (1929) A L J 480 = 51 A 640 = Ind Rul (1929) All 1038 = 119 I C 510.

—Plea of *res judicata* can be raised in appeal if decision in prior suit is arrived at before the disposal of latter suit even in appellate stage. A I R 1929 Pat 173 = 8 Pat 107 = Ind Rul (1929) Pat 375 = 117 I C 167.

—Later of two decisions should be taken as superseding the earlier whether or not the earlier was pleaded as a bar to the trial of the suit in which the latter was given. A I R 1921 Mad 612 = 41 M L J 54 = 14 L W 85 = (1921) M W N 487 = 63 I C 730; see also 36 I C 289 = 31 M L J 219.

—If the same question is in controversy between the same parties in two distinct litigations instituted one after the other, but pending simultaneously, the final decision in the latter suit operates as *res judicata* in the earlier suit whose final stage is reached later. This rule is applicable to all the stages of a suit till it is finally terminated. 24 I C 243.

—(3) Effect of Appeal on trial Court's decision :—An appeal is only a continuation of the original proceedings and the decree passed by the Appellate Court is the decree in the suit. On the filing of an appeal, the judgment ceases to be *res judicata* and become *Sub judice*. 30 M L J 379 = 19 M L T 268 = (1916) 1 M W N 223 = 33 I C 9.

—Where there has been an appeal the matter is no longer *res judicata* but *res sub judice* and where an appeal is not finally heard and decided matters therein are not *res judicata*. A I R 1927 Lah 1 = 7 Lah 423 = 27 P L R 663 = 98 I C 584.

—But mere possibility of appeal being filed and decision upset does not affect finality. A I R 1926 Rang. 122 = 4 R 8 = 95 I C 104 see also A I R 1925 O 444 = 2 O W N 430 = 12 O L J 524 = 89 I C 282.

—And a prior decision can be taken as basis for decision even though under appeal. L R 1 A 41 Rev.

—Finding of the District Judge is final if not appealed against for the purposes of the same suit. A I R 1925 Mad. 1046 = 51 M L J 131 = 22 L W 225 = 91 I C 666.

—Where during pendency of appeal from preliminary decree in a mortgage suit an appeal from final decree was presented but was dismissed for want of prosecution : *Held*, that the Appellate Court is not, by such dismissal, debarred from granting, in the appeal before it, a relief inconsistent with the final decree. A I R 1926 All 665 = 48 A. 611 = 24 A L J 769 = 96 I C 1.



C. P. C. (1908) S. 11 (Contd.)

(12) Heard and finally Decided—(Contd.)

(22) Explanation I—(Contd.)

—Question as to personal liability for costs awarded by appellate decree is not res judicata by reason of prior order that there was no personal liability for costs awarded by trial Court's decree, where appellate decree is passed subsequent to that order and directs payment of costs afresh. 54 A 444 = 1932 A L J 226 = 137 I C 70 = I R 1932 A 277 = A I R 1932 A 288 = A L R 1932 A 26.

—(4) A decision whether can be res judicata subsequent stage of the same suit or proceeding:—Decision at one stage cannot be questioned at later stage, not upon any ground under S. 11, but upon general principles of law: 36 C W N 367 (370) = 55 C L J 184 = A I R 1932 C 569 = 141 I C 618 = A L R 1932 C 382; see also A I R 1927 C 616 = 45 C L J 462 = 103 I C 639.

—Decision in previous proceeding in the same suit though not exactly *res judicata* is binding. A I R 1926 Oudh 420 = 94 I C 313.

—The validity of an order made at one stage out of a litigation unless forthwith challenged by an appropriate proceeding in a superior tribunal is conclusive between the parties and cannot be questioned or collaterally attacked at a later stage. 34 C L J 415 = 70 I C 6.

—An adjudication by Court that a certain application is in time cannot be reconsidered when a question that it is out of time is raised at a latter stage of execution proceedings. A I R 1922 Bom. 118 = 46 B 269 = 23 Bom. L R 1013 = 63 I C 844.

—No objection raised to the executability of the decree with respect to some items contained therein. Decree executed, no objection can be raised to its executability with respect to the other items in latter application for execution. A I R 1923 Mad. 649 = 45 M L J 71 = 17 M L W 566 = (1923) M W N 299 = 72 I C 397.

—Plaintiff brought the suit for a declaration of his right to trusteeship of a trust or if plaintiff is not found to be trustee to appoint him as the trustee. At a previous stage it was held by the Court that S. 92, did not bar the suit, that the plaintiff was not appointed trustee and the case was remanded to the lower court for making the heirs of the donor parties and for appointing a proper trustee. After remand the plaintiff put in a petition to withdraw the suit. The lower Court ordered one of the defendants to be made plaintiff and gave him the conduct of the suit. *Held*, that the previous Judgment decided that S. 92 was no bar to the suit and that the plaintiff could not by withdrawing from the suit prevent the Court from making a proper appointment. 12 L W 25 = 59 I C 233.

C. P. C. (1908) S. 11 (Contd.)

(12) Heard and finally Decided—(Contd.)

(22) Explanation I—(Contd.)

—(5) Cross Suits or Connected Suits and Appeals:—Where, in both of the cross-suits between the same parties the question at issue arising out of the same transaction is the same, and one is decided before the other, the decision in the suit decided first is *res judicata* against other. 96 I C 694 (All).

—In a suit to recover a sum of money from the defendant, on account and the latter denied the claim and counter-claimed a sum of Rs. 46. The plaintiff's suit was dismissed and the defendant's counter claim decreed; plaintiff thereupon filed two appeals, one against the dismissal of the suit and the other against the decree on the counter-claim. The District Court dismissed both the appeals. The plaintiff preferred to second appeals, as in the Court below but the appeal against the decree on the counter-claim was dismissed as being out of time. *Held*, the dismissal operates as *res judicata* for plaintiff's claim. A I R 1921 Lah 271 = 4 L L J 344.

(23) Explanation V.

—(1) General Principles:—Expl V to S. 11 lays down that where a relief is claimed in the plaint but is not expressly granted by the decree such relief is deemed to have been refused. But the Explanation will not apply if the relief claimed is not substantive but merely auxiliary: 13 B 242 P C; and 29 C W N 86 = 89 I C 207 = A I R 1925 C 1195; and A I R 1921 M 21; and A I R 1931 A 657.

—And secondly, it must have been obligatory on the Court to grant the relief and not merely discretionary to grant or refuse. A I R 1931 Pat 1 = 12 P L T 127 = I R 1931 Pat 193; see also 41 M 188; and 21 A 425.

—Prayer for declaration leading up to the main relief claimed, *viz.*, of possession—Dismissal of suit on failure of main relief—Declaration cannot be deemed to have been refused within Explanation V. A I R 1925 Cal. 1195 = 29 C W N 861 = 89 I C 207.

—Where a Court expressly declares, whether rightly or wrongly, that it is not competent, in a particular suit, to grant a particular relief claimed, and directs plff. to take separate proceedings to get the relief, a subsequent suit by plff. to get the relief is not barred either by *res judicata* or by O 2 r. 2 C P Code. 160 P L R 1915 = 72 P W R 1915 = 29 I C 731.

—Abandonment of portion of claim without leave of Court—Dismissal of suit as regards that portion—Fresh suit barred. 29 C L J 11 = 40 I C 408.

—The fact that the personal remedy is asked for in the plaint and that nothing app-

C. P. C. (1908) S. 11 (Contd.)

(12) Heard and finally Decided—(Contd.)

(23) Explanation V—(Contd.)

ears about it in the decree, is not enough to say that the plaintiff is for ever after barred from asking for it. A I R 1927 Mad 779 = 53 M L J 489 = 39 M L T 22 = (1927) M W N 330 = 103 I C 528.

—Explanation V apparently has a reference to what has been adjudicated by the Court and not to the result arrived at by a compromise, in which the parties have omitted to settle a part of their dispute. A I R 1930 All 619 = Ind. Rul. (1931) All 176 = 129 I C 448.

—The special rules laid down in the explanation to that section which go beyond the ordinary doctrine of *res judicata* ought not to be applied generally in execution cases. A I R 1922 Pat. 289 = 1 Pat. 593 = 3 P L T 403 = (1922) Pat. (Sup.) 185 = 67 I C 656. Finding not embodied in decree can under Expl V operate as *res judicata* : 3 N L R 35.

—(2) Mortgage Suits :—Prior mortgage paid off by purchaser of equity of redemption—Lien of purchaser recognised in preliminary but not in final decree—Separate suit to enforce lien is not maintainable. 16 A L J 685 = 47 I C 954.

—(3) Suits between Landlord and Tenant :—Damages for occupation of property after expiry of notice to quit where such relief was sought but not granted in a previous ejectment suit between the same parties must not be granted for the period between the expiry of the notice and the passing of decree in the prior suit. A I R 1927 Pat 395 = 104 I C 190. In Marsh. 93.

—The first suit was for possession of land and was filed from 1253, the date of plaintiff's dispossession. Decree for possession, and was filed from the filing of the plaint. Second suit for was filed from 1253 to filing of plaint, held barred as *res judicata*.

(4) Claim for Mesne Profits :—But there is a conflict of opinion between the Bombay High Court and the other High Courts as to whether a plff can claim future mesne profits as of right i. e. as to whether it is discretionary with the Court to grant future mesne profits. The other High Courts have held that it is discretionary with the Court to grant or refuse future mesne profits, and hence if such mesne profits are claimed in the plaint but are not expressly granted they are not to be deemed to have been refused under Evpl. V and that therefore a subsequent suit will lie in respect of such mesne profits : see A I R 1925 P 145; and 1915 U B R 81; and A I R 1931 C 788 = 58 C 1040; and A I R 1927 A 446; and 32 C 118; and 17 C 968; and 2 N L R 91; and 21 A 425; and 24 M 681; and A I R 1931 Pat. 1; and 40A 292; and 15 M L J 462 F B (overruling 14 M 328); and 41 M 188; (over-

C. P. C. (1908) S. 11 (Contd.)

(12) Heard and finally Decided—(Contd.)

(23) Explanation V—(Contd.)

ruling 2 L W 8); and A I R 1932 A 169; and A I R 1932 A 45; and A I R 1929 C 566.

—But the Bombay High Court has taken a contrary view see 22 Bom. L R 982 = 58 I C 419; and 2 Bom. L R 781 = 25 B 115; and 19 B 532; and 10 Bom. L R 577 = 32 B 391.

—In a recent case, however, the same High Court seems to have changed grounds see 56 B 292 (297-8) = 34 B L R 447 = 138 I C 578 = I R 1932 B 413 = A I R 1932 B 222 = A L R 1932 B 585.

—The rejection of an application for the assessment of mesne profits awarded by the decree in a suit for possession of lands debars a further application for assessment, as the rejection has the effect of dismissing the suit. 29 C L J 470 = 50 I C 262.

—(5) Other Suits :—The question at issue in a prior execution petition and appeal to High Court being only about the re-opening of a partition and not as to whether there was or was not a division of particular items of property, a subsequent execution petition for division of the same items is not barred. 4 L W 101 = (1916) 2 M W N 118 = 37 I C 354.

—Prior suit was for refund of tax and declaration of right of free irrigation—Refund was decreed—Extent of land entitled to free irrigation also was declared—When a subsequent suit in respect of other lands is laid—Finding in prior suit is not incidental and second suit is barred. A I R 1927 Mad. 1131 = 38 M L T 374 = 1927 M W N 116 = 101 I C 648.

(24) Fraudulent Decrees.

—Judgment obtained by fraud or collusion does not operate as *res judicata* : A L R 1933 L 1187.

—Rule allowing vacating of judgment for fraud is not an exception to the rule of *res judicata*. 19 I C 279.

—As to setting aside a decree on ground of fraud see under this section—(3) Competent Court—(1) General Principles—Fraud if affects competency. As to burden of proof in case of setting aside a decree for fraud, see. 41 Cal 990 = 23 I C 337.

(25) Inconsistent Decisions.

—In case of conflicting decisions, later decision prevails. 1932 A L J 1063 = 139 I C 161 = I R 1932 A 542 = A I R 1932 A 520; see also 1 A L J 416; and 63 I C 730; and 36 I C 289; and A I R 1922 A 145.

—Same rule applies to execution proceedings : 13 A L J 764 = 30 I C 775 = 37 A 531. Decision in 5 W R 149.

C. P. C. (1908) S. 11 (Contd)

(12) Heard and finally Decided—(Contd)

(25) Inconsistent Decisions—(Concl'd)

—That former of the inconsistent decisions prevails does not represent the law. Of two decrees operating as *res judicata*: one as against the plaintiffs and one as against the defendants, the later must prevail as it shuts out consideration of the former. A I R 1927 All 717=49 All 606=25 A L J 387=L R 8 A 122 Rev.=101 I C 501.

—In case of conflicting decision that which is later is to prevail but where later decision does not cancel earlier decision, fruits of execution of prior decree cannot be restored to the judgment-debtor who was held entitled to prevent further execution. A I R 1924 All 310=46 A 220=22 A L J 91=L R 5 A 71 Civ.=79 I C 803.

—Last of two conflicting decrees should prevail because, it is binding between the parties and the previous decree should be regarded as pleaded and not upheld in the latter suit and must be taken as dead. A I R 1929 Cal 163=48 C L J 577=Ind Rul (1929) Cal 193=114 I C 129.

#### (26) Interlocutory Orders.

—Interlocutory judgment as a step towards final decree amounting to adjudication and not mere opinion is *res judicata*. A I R 1929 Mad 121 = 113 I C 646; see to the same effect: A I R 1921 Pat 131 = 2 Pat L T 628 = 6 Pat L J 208 = 62 I C 469; and A I R 1923 Pat 134 = 1923 Pat H C C 76 = 1 Pat L R 53 = 72 I C 860; and A I R 1924 Cal 1006=39 C L J 251=81 I C 527; and A I R 1926 O 420=94 I C 313; and A I R 1930 Lah 836=122 I C 724 = 11 Lah 470=31 Pun L R 789=12 Lah L J 297; and 126 I C 372=1930 Pat. 260.

—In other words, a decision in suit on interlocutory matter, whether appealable or not, if not appealed from, is binding upon parties in every proceeding in that suit: 40 I C 621.

—Similarly, an interlocutory order passed in execution proceedings is final whether such matter is raised again in subsequent, or in continuation of the same proceedings. A I R 1926 Oudh 291=1 Luck 171 = 13 O L J 111=3 O W N 241 = 93 I C 833.

—Per Walsh J.—Interlocutory judgment in one stage of a judicial proceeding is binding upon the parties at a subsequent stage thereof upon general principles of law. If it were not binding there would be no end to litigation. A I R 1922 All 247 = 44 A 130 = 19 A L J 923 = 65 I C 295.

—Party aggrieved may challenge by an appeal against the final order the propriety of the interlocutory orders made in the course of the proceedings. A I R 1927 Lah 232 = 100 I C 653.

C. P. C. (1908) S. 11 (Contd).

(12) Heard and finally Decided—(Contd)

(26) Interlocutory Orders—(Concl'd)

—Appellate Court can pass an order under O. XXIII r. 1 and the decision set aside in appeal cannot operate as *res judicata*. A I R 1924 All 260 = 74 I C 894.

(27) Issues and Questions left undecided or open.

—See also cases under (23) Explanation V *supra*.

—(1) Issues left undecided by trial Court:—Where a question is left undecided there is no *res judicata*: 80 I C 525=A I R 1924 I. 469; see to the same effect 3 UP L R (B R) 51; and 238 A W N 1892; and 6 P W R 1918; and 1920 Pat 241.

—Eventhough the course adopted by the Court in so leaving the question undecided was not proper: 41 I C 19; and the same holds true whether the question was left undecided expressly or otherwise: 96 I C 302; and 23 A L J 950=88 I C 822=A I R 1925 A 770=48 A 34; and 47 I C 2; or where the Court expressly reserves the issue for future decision: 47 I

—Where the question of transferability of occupancy holding was left undecided it was held that a subsequent suit on the same question was maintainable. 41 I C 19.

—Where a prior suit for share of profits was decreed and no question of right to partition was raised or decided in a subsequent suit, the question of partition was not *res judicata*. A I R 1925 P C 184=21 N L R 117=52 C 971=30 C W N 122=50 M L J 136=23 A L J 667=52 I A 294=(1925) M W N 535 (P C)=88 I C 347.

—In a suit in Revenue Court, Taluqdars V. Plff and defts, the rights of the defts were left open. Held there was no *res judicata*. A I R 1923 Oudh 101=9 O L J 540=74 I C 195.

—Question of title to sale proceeds of crop in certain field is not decided by decision of rent Court that certain person was liable for rent as tenant as to bar claim that another person grew the crop. A I R 1924 All 163=21 A L J 476=L R 4 A 428 Civ. = L R 5 A 47 Rev.

—Issue as to nature of property not decided in prior suit—Decision in that suit is not *res judicata* on that issue. A I R 1927 Mad. 1100 = 103 I C 887.

—Suit for contribution—Question left open in previous suit, no *res judicata* 71 P L R 1911 = 66 P W R 1911 = 10 Ind. Cas. 839.

—Dismissal of first suit as premature—Plea of limitation not decided upon—Question of limitation not *res judicata* 15 I C 890.

—Person willing to have scheme settled but contending that his right to certain house should be left undisturbed—Board not purporting to decide that question—Order of

C P C. (1908) S. 11 (Contd.)

(12) Heard and finally Decided—(Contd)

(27) Issues and Questions left undecided or open—(Contd)

Board embodying scheme, although assuming temple ownership of house, cannot be a decision. A I R 1929 Mad. 687 = Ind. Rul. (1929) Mad. 526 = 116 I C 142.

—Suit for ejectment by transferee of land conveyed by widow (as executrix) against widow's son to whom land was leased and widow and other three children residing with him—Suit decreed as against widow's and son's share and three children declared entitled to partition of their share—Son held estopped under s. 116, Evidence Act but his liability under s. 115 left open and application to make it clear dismissed—On vacating land son claimed title to his share as one of next-of-kin of his father—Suit held to be barred under s. 11. A I R 1930 P C 224 = 34 C W N 720 = Ind Rul (1931) P C 63 = 32 Bom. L R 1522 = 130 I C 319.

—(2) Issues left undecided by appellate Court:—Where an appellate Court in the exercise of its discretion omits to record findings on certain points raised in the case, on the ground that they were unnecessary for the decision of the case, its judgment does not in respect of those points, operate as *res judicata*. 15 I C 229 see also 53 C 837=99 I C 180; and A I R 1932 Lah 179 = 33 Pun. L R 46 = 136 Ind Cas 265; and 5 Oudh. L J 647 = 48 Ind Cas 386; and L R 5 Oudh 101; and A I R 1925 Oudh 190 = 11 Oudh L J 757 = 82 Ind Cas 691 = 1 Oudh W N 433.

—An Appellate Court's judgment takes the place of and supersedes the decision of the trial Court, so that the principle of *res judicata*, cannot apply where a question is left open and undecided by an Appellate Court although it was decided by the trial Court. 47 I C 685; see to the same effect: 34 M L J 12 = 22 C W N 121 = 42 I C 959 = 45 C 442 P C; and 7 Bur L T 249=27 I C 959; and 8 I C 87; and 8 C 631; and 10 M I A 203; and 3 C 30; and 5 C 589; 13 M 437; and 13 B 330.

—Where the High Court merely confirmed the lower Court's finding as to genuineness of the will but did not adjudicate on the validity of the will as a power to adopt, it was held that the lower court's decision on the question of adoption did not operate as *res judicata*: 13 M L W 25 = 57 I C 735; see also 4 Bom. L R 492 = 26 B 661.

—Where the appellate Court dismissed an application for possession under S 318 (old code) as barred without deciding whether that matter was within S. 244 or not, held that the order was no bar under S. 11 to a suit for possession. 9 A L J 67 = 13 I C 951.

—Suit for possession was dismissed by first appellate Court on ground of adverse possession of defendant—In second appeal

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C. P. C. (1908) S. 11 (Contd.)

(12) Heard and finally Decided—(Contd)

(27) Issues and Questions left undecided or open—(Contd)

the plea of adverse possession was not considered but suit was dismissed on ground of limitation, Second suit by plaintiff against same defendant for possession on different cause of action is not barred. A I R 1925 Cal 1195 = 29 C W N 861 = 89 I C 207.

—Lower Court deciding on title and possession—Appellate Court deciding on title alone—Decision as to possession is not *res judicata*. A I R 1925 All. 243 = L R 5 A 528 Civ. = 86 I C 295.

—Secondary relief claimed and determined by lower Court but not by Appellate Court—decision on that relief is not *res judicata*. A I R 1921 Mad 21 (F B) = 13 L W 25.

—Question of right of way left expressly open by the appellate Court—Not *res judicata*. 57 I C 852.

—Where the High Court left open the question whether an appeal lay in a mortgage suit it was held that there was no *res judicata*: 9 A L J 67 = 13 I C 951.

—(3) Refusal by Court to decide an issue:—The refusal of a Court to determine an issue which was raised does not operate as *res judicata*. It does not matter whether the Court was right or wrong in refusing to try the issue or in giving liberty to bring another suit. (1918) Pat. 152 = 4 Pat L W 299 = 45 I C 326; see also 14 C 323; and 51 P R 1891; and 11 A 187; and 10 C 856; and 24 C 616; and 7 C 381; and 8 C 631; and 21 A 505; and 5 C L J 653; and 24 M L J 12.

—Where Revenue Court refused to decide whether plaintiff was a partner, a civil suit by plaintiff claiming relief based on partnership is not barred. A I R 1923 Oudh 101 = 74 I C 195.

(28) Issues of fact.

—If relief in subsequent petition rests on same question of fact as in previous petition dismissed, petition is barred. A I R 1929 Mad. 404 = Ind. Rul. (1930) Mad. 375 = 122 I C 519.

—Question of right of way—*res judicata* see 3 Ind. Cas. 271. A question of fact, decided upon evidence or in the absence of evidence cannot be re-opened except in the very restricted terms laid down by the provisions for review of judgment. A I R 1929 Mad. 404 = Ind. Rul. (1930) Mad. 375 = 122 I C 519; see also cases under this section (4) Directly and substantially in issue—(1) General Principles.

—An erroneous decision on a question of fact, operates as *res judicata* between parties to the previous suit. A I R 1928 Cal. 717 = 48 C L J 184 = 32 C W N 828 = Ind. Rul. (1929)



C. P. C. (1908) S. 11 (Contd.).

(12) Heard and finally decided—(Contd.)

(28) Issue of fact—(Contd.)

Cal. 412 = 115 I C 588; see also cases under this section—(12) Heard and finally decided (30) Issues of Law—erroneous decisions.

(29) Issues of law and fact.

—Decision on a mixed question of law and fact operates as *res judicata* between parties. A I R 1926 Lah. 251 = 92 I C 769 see to the same effect : 87 I C 811 = A I R 1926 C 80.

—The determination of a mixed question of law and fact *e. g.* limitation, operates as *res judicata* none the less because the particular issue so determined was of a preliminary character and the suit itself for redemption was dismissed under O. 9 R. 2, C P C. 99 P W R 1913 = 156 P L R 1913 = 19 I C 399. see also L R 6 A 226; and 15 I C 911 = 15 C L J 684.

—Where matter directly and substantially in issue in former suit is a mixed question of law and fact, the decision operates as *res judicata* in subsequent suit irrespective of there being an error in point of law or point of fact. A I R 1928 Cal. 777 = 56 C 723 = 48 C L J 327 = 33 C W N 126 = Ind. Rul. (1929) Cal. 417 = 115 I C 593 see to the effect : 36 I C 268; and 31 M L J 97 = 35 I C 266.

—The question whether a Hindu can inherit to a Mahomedan father is a mixed question of law and fact : A I R 1931 S 170 see also A I R 1914 S 36.

(30) Issues of Law.

—There is a conflict of opinion as to whether a decision on a point of law will operate as *res judicata*. One set of decisions holds that it will so operate. 138 I C 161 = 15 N L J 1 = I R 1932 N 80 = A I R 1932 N 90; see also A I R 1924 Pat 265 = 2 Pat 771 = 5 P L T 7 = 74 I C 781; another set holding contrary 22 B 669; and 15 A 261.

—A third set, on the other hand, has held that a decision on a point of law will operate as *res judicata* if the cause of action in the two suits is the same. A I R 1925 A 761 = 87 I C 789; and 37 M L J 554 = 26 M L T 364 = 54 I C 202; and A I R 1928 C 717; and A I R 1931 B 570; and A I R 1932 B 209; and 31 M L J 513; and 11 M 393; and 9 I C 568; and 45 B 1260.

—As to erroneous decision on point of law see below. The Nagpur J.C. Court has in a recent case doubted the propriety of distinction between abstract question of law and concrete question of law. 138 I C 161 = 15 N L J 1 = I R 1932 N 80 = A I R 1932 N 90.

—And it has been held by the same Court that a decision on a question of law in execution operates as *res judicata*. A I R 1926 Nag. 476 = 9 N L J 183 = 96 I C 963.

C. P. C. (1908) S. 11 (Contd.).

(12) Heard and finally Decided—(Contd.)

(30) Issues of Law—(Contd.)

—And by the Calcutta High Court that a decision that prior decision on point of law was or was not *res judicata* between the parties, is conclusive between the parties. A I R 1928 Cal. 717 = 48 C L J 184 = 32 C W N 828 = Ind. Rul. (1931) Cal. 412 = 115 I C 588.

—And that a question once decided cannot be re-agitated merely because a Special Bench of the High Court has enunciated a different rule of law. A I R 1923 Cal. 629. But that a decision on a particular question of law in prior suit does not operate as *res judicata* in subsequent suit on the same question if at the time of subsequent suit the law has altered. A I R 1925 Cal. 1193 = 30 C W N 88 = 87 I C 767.

—Accepting a decision and acting in accordance with it under protest—Decision is still *res judicata*. A I R 1924 Pat. 362 = 1 P L R 145 = 73 I C 359.

—Decision inter partes as to construction of deed operates as *res judicata*. 59 I A 74 = 54 A 93 = 36 C W N 310 = 1932 A L J 245 = 62 M L J 371 = 34 B L R 510 = 136 I C 454 = 9 O W N 399 = 55 C L J 470 = 35 L W 464 = I R 1932 P C 118 = A I R 1932 P C 81 = A L R 1932 P C 190 (P. C.); see to the same effect : A I R 1932 B 257 = A L R 1932 B 224 = 137 I C 600 = I R 1932 B 309 = 34 Bom. L R 198; and A I R 1926 M 695 = 23 L W 540 = 95 I C 325; and 32 M L J 63 = 5 L W 682 = 1917 M W N 321 = 37 I C 857; and 16 M L T 399; and 9 B H C 65; and 46 Cal 870 = 29 C L J 465 = 51 I C 922.

—In connection with the question of grant the Patna High Court has in a recent case held that decision on question of law operates as *res judicata* but that there can be cases in which such decision cannot operate as *res judicata* : 13 P L T 509 = A L R 1933 P 16.

—The question of the personal liability of the mortgagor is not a substantial question of law. A I R 1926 Nag. 245 = 91 I C 200.

—Decision in a previous suit on the question whether the alleged custom was opposed to public policy is not an abstract question of law which can be reopened in a subsequent suit : A L R 1933 L 1149.

—Suit on contract plea that contract was illegal—Finding that contract was legal operates as a *res judicata*. A I R 1930 Mad 714 = 31 L W 757 = 58 M L J 613 = Ind. Rul. (1931) Mad 373 = 130 I C 453.

—A decree is not *res judicata* in respect of relief prematurely claimed in plaint and awarded by the decree 62 M L J 177 = 35 L W 66 = 138 I C 31 = I R 1932 M 498 = A I R 1932 M 233 = A L R 1932 M 253.

—An erroneous decision on a question of fact or mixed question of law and fact operates as *res judicata* : (1918) M W N 580 =



C. P. C. ( 1908 ) S. 11 (Contd)

( 12 ) Heard and finally Decided—(Contd)

( 30 ) Issues of Law—(Contd)

8 L W 473 = 49 I C 369 see also A I R 1929 M 404; and A I R 1921 M 315 = 40 M L J 556 = 13 M L W 529 = 1921 M W N 344 = 63 I C 189; and 37 A 535 = 13 A L J 753 = 30 I C 789; and A I R 1930 B 135 = 122 I C 113 = 53 B 676 = 31 Bom L R 778; and A I R 1928 Cal 717 = 48 C L J 184 = 32 C W N 828; and A I R 1926 Lah. 24 = 7 Lah. L J 553 = 26 Pun. L R 837 = 92 I C 235; and 12 O C 124 = 2 I C 297; and L R 5 O 31; and A I R 1930 Pat 71 = 10 P L T 630 = 120 I C 292; and A I R 1930 Pat 585 = 9 Pat 674 = 11 Pat L T 765 = 128 I C 337; and A I R 1930 R 294 = 128 I C 838.

—As regards erroneous decision on point of law the balance of authority is of the opinion that an erroneous decision on a point of law operates as *res judicata* see A I R 1929 C 156 = 48 C L J 590 = 115 I C 269; and 28 C 318; and I C W N 687; and 10 C 1087; and A I R 1930 Bom 135 = 53 Bom 676 = 31 Bom L R 778 = 122 I C 113; and A I R 1926 B 481 = 28 Bom L R 879 = 98 I C 341; and 8 Bom. L R 932 = 31 B 128; and 30 I C 357 = 29 M L J 219; and 26 M 104; and A I R 1923 Mad 545 = (1923) M W N 347 = 17 L W 521 = 72 I C 789; and 1 A L J 217 = 26 A 522; and 15 A 327; and 27 A 148 = A W N 1904, 197 = 1 A L J 572; and A I R 1931 All 425 = (1931) A L J 301 = Ind Rul (1931) All 446 = 131 I C 878; and A I R 1927 All 297 = 49 All 543 = 25 A L J 564 = L R 8 A 101 Rev. = 100 I C 601; and 9 O C 243; and A I R 1926 Pat 288 = 1926 Pat 113 = 94 I C 553; and 41 I C 778 = 2 Pat L W 146; and A I R 1930 Pat. 585 = 9 Pat 674 = Ind. Rul. (1931) Pat 33 = 128 I C 337; and A I R 1930 Pat 71 = 10 P L T 630 = Ind Rul (1930) Pat 4 = 120 I C 292; and A I R 1930 Lah. 654 = 31 Pun. L R 123 = 127 Ind. Cas. 366; and (1917) Pun. L Rep. 89; and A I R 1924 Nag. 422 = 79 I C 621; and A I R 1930 Rang. 294 = Ind. Rul (1931) Rang. 54 = 128 I C 838; and 19 I C 244; and 22 I C 138; and 14 C P L R 109; and 3 I C 351; and 61 I C 603; and 54 I C 303 = I U P L R (B R) 39.

—There are, however, some decisions holding that an erroneous decision on point of law cannot operate as *res judicata*: A I R 1929 Rang. 55 = 6 Rang. 691 = Ind Rul (1929) Rang. 164 = 117 I C 52 see also 17 M L J 250 = 30 M 461; and 16 C W N 621 = 39 C 848; and A I R 1925 A 761; and 22 B 669; and A I R 1922 L 329; and 18 M L J 548; and 33 M 102; and 45 A 581; and A I R 1923 L 16; and 5 M 304; and 31 I C 269; and 40 M 989 F B; and 34 M 450; and A I R 1930 L 907; and 49 A 918; and 11 M 393.

—And there are certain other decisions which hold that an erroneous decision on point of law will operate as *res judicata* only where the cause of action in the two suits is the same see 39 Cal. 848 = 16 C L J 154 = 16 C W N 621 = 14 I C 124; and A I R 1928 C 717 = 32 C W N 828 = 48 C L J 184 = 115 I C 588;

C. P. C. ( 1908 ) S. 11 (Contd)

( 12 ) Heard and finally Decided—(Contd)

( 30 ) Issues of Law—(Contd)

7 M L T 84 = 5 I C 756; and 11 C L J 461 = 61 C 554; and 15 M L J 7.

—But the Lahore High Court has, in a recent case, held that a perusal of the language of S. 11 C. P. C. shows that there is no distinction between an issue of fact and an issue of law though there are some Judgments to the effect that if the causes of action in the two suits are different an erroneous decision on a question may not operate as *res judicata*. The test of *res judicata* is identity of matters in issue and not identity of causes of action; A L R 1933 L 586.

—And the Madras High Court has held that the previous decision was erroneous in law or that it was given with respect to a different cause of action have no bearing on the question whether that decision does or does not operate as *res judicata*; A L R 1933 M 954 (Case-law on the subject discussed.)

—It has been held that where a decision is given by predecessor-in-office of Judge after fully considering the law on the subject cannot be re-opened by successor. A I R 1930 Lah. 836 = Ind Rul ( 1930 ) Lah 372 = 122 I C 724.

—And that the fact that in a previous suit the law was, wrongly applied to a particular state of facts, does not prevent the operation of the rule of *res judicata* in a subsequent suit where these facts came into issue therein. 56 I C 983 = 21 Cr. L J 276.

—And the Allahbad High Court has gone even to extent of saying that erroneous decision on point of law operates as *res judicata*, even if such decision be against a clear section of Statute A I R 1927 All. 206 = L R 8 A 77 Rev = 99 I C 528 (but see the decision of Patna High Court in A I R 1932 P 337.)

—And the Calcutta High Court has held that the question whether decision is correct or erroneous has no bearing upon its operation as *res judicata* A I R 1928 Cal. 777 = 56 C 723 = 48 C L J 327 = 33 C W N 126 = Ind Rul (1929) Cal 417 = 115 I C 593.

—Erroneous decision on a question of law does not cease to operate as *res judicata* between parties, merely because it is upset in another proceedings between different parties, by a superior Court or by legislative enactment. A I R 1926 Bom. 481 = 28 Bom L R 879 = 98 I C 341.

—Decision of Settlement Court which in deciding the question of title as between mortgagor and mortgagee lost sight of the fact that the mortgagor's right of redemption under the deed had been taken away by proper foreclosure proceedings declared the mortgagee to have acquired full proprietary

**C. P. C. (1908) S. 11 (Contd.).**

(12) Heard and finally decided—(Contd.)

(30) Issues of Law—(Contd.)

rights operates as *res judicata*. 7 O L J 524  
= 2 U P L R (J C) 163 = 23 O C 269 = 60 I C  
404.

—Erroneous decision as to custom was held to be *res judicata*, as the issue was necessary 47 I C 373 = 160 P W R 1918 = 109 P L R 1918 = 82 P R 1918; and so was an erroneous decision on a question of limitation 25 C 789 as also an erroneous decision on question of construction of deed of transfer 2 Pat L W 146 = 41 I C 778.

—In a previous suit between the parties it was decided on an issue of law that the debts were liable to pay interest on arrears of rent. In a subsequent suit on arrears of rent and interest, the claim for interest was opposed on the ground that the debts, being *thikadars* were not liable under S. 141 of Oudh Rent Act to pay interest on arrears. Held, that the matter, was *res judicata* even though the earlier decision was a wrong decision in law, 5 O L J 16 = 45 I C 252.

—As to erroneous decision on point of law in an eviction case see 13 C L J 119 = 9 Ind. Cas. 568.

—Wrong decision in a wrong suit does not operate as *res judicata*. A I R 1924 Mad 716 = 47 L J 85 = 20 L W 207 = (1924) M W N 623 = 47 M 850 = 83 I C 324.

—The Lahore High Court has held in one case that a decision based on erroneous view of law does not operate as *res judicata* in subsequent proceedings for different relief. A I R 1930 Lah. 907 = 12 Lah 52 = Ind. Rul. (1931) Lah. 92 = 129 I C 12.

—And that there is no *res judicata* when subject-matter is different 1932 P C L 33 (Rev.) = A L R 1932 L 33 (Rev.)

—And in the undermentioned cases it has been held that erroneous decision on a question of law in previous suit does not operate as *res judicata*, but rights acquired under the decree are not affected by subsequent decision. A L R 1933 M 761; see to the same effect 31 I C 269.

—But the same High Court has decided that though the former decision may be deemed to have been based on a wrong view of law, the decision arrived at, i. e., the decree given can in no way be affected by giving a different finding in a subsequent suit on the same question. 36 L W 664 = 140 I C 326 = 1932 M W N 1274 = 1 R 1932 M 854.

—A decision upholding a transfer which was forbidden by law was held not to operate as *res judicata* 13 P L T 509 = A I R 1932 P 337 (341). (but see the decisions of Bombay and Allahbad High Courts in A I R 1926 B 481; and A I R 1927 A 206).

**C. P. C. (1908) S. 11 (Contd.)**

(12) Heard and finally Decided—(Contd.)

(30) Issues of Law—(Contd.)

—Similarly, a reference under s. 617 C P C 1882 being incompetent, opinion expressed on it was held not to operate as *res judicata* in subsequent stage : 45 I C 201.

(31) Judgments in rem.

—See cases under this section—(13) Parties—(5) Judgments in rem.

(32) Landlord and Tenant, suits between.

—(1) Abatement of rent :—Where a suit by a tenant against his landlord for recovery of possession of certain property comprised in the plaintiff's *dar-mourashi* tenure is dismissed for default it does not preclude him, in a subsequent suit for rent brought by the landlord, from claiming abatement of rent owing to dispossession by the landlord. 56 I C 932.

—(2) Apportionment of rent :—After decree in a suit for declaration of his rights, the tenant filed a suit for apportionment of rent. A previous suit for rent which was dismissed operated as *res judicata*. A I R 1931 Cal. 397 = 35 C W N 46 = Ind Rul. (1931) Cal 513 = 132 I C 81.

—(3) Consent decree :—A consent decree passed for rent on basis of the admission by the deft. in the case will not be *res judicata* in a subsequent suit for rent due in respect of subsequent faslis on the question of the share which the plff. is entitled to. (1911) 1 M W N 69 = 8 I C 261 = 21 M L J 449 = 8 M L T 432.

—(4) Decision as to area :—Finding as to the area of tenancy in a previous suit, operates as *res judicata* in a subsequent suit between the same parties. A I R 1926 Cal 513 = 91 I C 738.

—Fixed parcel of land with definite boundaries demised—Question as to area decided in suit is binding. A I R 1924 Pat. 307 = 74 I C 961.

—But in a case under S. 106 B. T. Act it has been held that a decision as to area for which *bhaoli* rent is payable does not operate as *res judicata* in a suit for rent for subsequent years : 12 P L T 717 = 10 Pat. 337 = A I R 1931 Pat. 215.

—(5) Decision as to Patta :—Suit by *ryot* to set aside a distraint on the ground that tender of *patta* is not proper—Decision as regards propriety of the tender is *res judicata*. A I R 1924 Mad. 299 = 45 M L J 199 = 18 L W 169 = 33 M L T (H. C.) 34 = (1923) M W N 357 = 72 I C 683.

—But where the tenants raised the plea that the *patta* was improper as overstating

C. P. C. (1908) S. 11 (Contd.).

(12) Heard and finally Decided—(Contd.)

(32) Landlord and Tenant, suit between—(Contd.)

the extent of land it was held that the decision in a prior rent suit, in which a similar patta was tendered and was held to be proper, did not operate as *res judicata*: 21 M L J 344 (Per Munro J. dissenting.)

—(6) Decision not on merits:—Where a certificate under Bengal Public Demands Recovery Act 1895 is cancelled on the ground that bona fide claim of right was involved there is no decision on merits and no *res judicata*: 13 I C 351.

—(7) Dismissal for want of evidence:—Where a tenant's suit to contest a notice of ejectment is dismissed owing to his failure to adduce evidence the decision operates as *res judicata*. 3 O L J 236 = 34 I C 640

—(8) Ejectment:—Decree in ejectment suit against a yearly tenant giving damages for use and occupation to landlord but dismissing suit as regards possession on the ground that notice to quit had not been given by him—Subsequent suit by landlord for possession after giving notice to quit—Question as to landlord's ownership and tenant's tenure being that of an ordinary tenant is *res judicata* by reason of decision in prior suit. 34 B L R 936 = 139 I C 206 = I R 1932 B 481 = A I R 1932 B 484 = A L R 1932 B 1049.

—In an ejectment suit only two co-sharers sued. The suit was dismissed on the ground that all co-sharers had not sued. There was no appeal against that order. In the District Judge's Court later in a case of profits it was held in appeal that the other two co-sharers alluded to in the former suit were not entitled to profits from the *sir* as their names were not set down as *sirdars* with the two who were the plaintiffs in the former suit and who were the only plaintiffs in the later suit. In a fresh suit for ejectment by the plaintiff's co-sharers. Held, that the principle of *res judicata* applied. 13 R D 169.

—(9) Enhancement of Rent:—Where the Court in the previous suit definitely determines the area of the land in the defendant's possession and the annual rent payable for the same the defendant can only succeed in a subsequent suit by proving that the area and the rent have since altered. A I R 1926 Cal. 672=43 C L J 116=94 I C 844

—Where a decision has been passed on two grounds either of which is sufficient to support the decree, the decision upon each of the grounds is conclusive between the parties.

—But where the decision of a ground is not the basis of the decree, and the judgment is passed in spite of it, the decision of that ground does not operate as *res judicata* in a subsequent suit between the same parties. 16 C L J 9=15 Ind. Cas. 453=16 C W N 877.

C. P. C. (1908) S. 11 (Contd.).

(12) Heard and finally Decided—(Contd.)

(32) Landlord and Tenant, suits between—(Contd.)

—A *putnidar* brought a suit for assessment of rent in the Munsiff's Court on the ground that the tenant had encroached upon the adjoining lands of his landlord. The defence was that the lands in dispute were outside the *ganti* and comprised, within his taluk. It was held that the disputed lands were within the *ganti*. A suit was then brought on the enhancement decree in the Subordinate Judge's Court for the recovery of rent. That suit was decreed *ex parte* and the decree was enforced in execution. Held, a suit brought in the Court of the Subordinate Judge, by the representative of the tenant, for recovery of the land, on the ground of its being included in the taluk, was barred by the principle of constructive *res judicata*. 10 C L J 527=4 Ind. Cas. 442.

—(10) *Kabuliyat*:—Decision in previous suit on liability of defendant to pay interest as per *kabuliyat* is *res judicata* in subsequent rent suit. A I R 1923 Cal. 361=76 I C 444

—In a suit by the plffs. for rent on the basis of certain documents the defts. denied the relationship of landlord and tenant. The Court dismissed the suit holding that the documents relied on by plffs. had not been proved and that the plffs. were not landlords. In a subsequent suit by the plff. for declaration of their title by purchase and for possession. Held, that the suit was barred by *res judicata* in as much as the documents found to have been not proved in the previous rent suit could not be set up in the subsequent suit. 49 I C 477.

—Plea of occupancy right raised but not decided—decision is not *res judicata*. A I R 1922 P C 241=30 M L T (P C) 279=48 I A 49=48 C 460=14 L W 265=64 I C 231.

—(12) Rate of Rent:—*Ex parte* decree in rent suit is *res judicata* on the point of rate of rent A I R 1929 Cal 515 = 33 C W N 507 = Ind Rul (1929) Cal 614=117 I C 854.

—Decision as to rate of rent in regard to one fusli is *Res judicata* with regard to subsequent fusli in absence of proof of alteration. 1932 M W N 639. but see A I R 1926 C 767 = 91 I C 380, and cases under this section. (4) Directly and substantially in issue—Suits between landlord and tenant. Where the question in controversy in a previous suit between the landlord and tenant was, not the amount of rent payable for the particular years for which rent had been claimed, but the amount of Jama annually payable by the tenant to the landlord, and the Court expressly found that the plaintiff had failed to prove his allegation while the tenants (defendants) had established by affirmative evidence that the Jamas were as stated by them. Held, that there was an express adjudication by the

C. P. C. ( 1908 ) S. 11 ( *Contd* )

( 12 ) Heard and finally decided—( *Contd* )

(32) Landlord and Tenant, suit between—( *Contd* )

Court upon the question of the amount of rent annually payable and the decision in the previous suit must be deemed conclusive.

15 I C 863.

—(13) Relief not claimed:—Question in previous suit, whether certain land entered as *gabzadari* should be recorded as ordinary tenancy without rent—Subsequent suit relating to certain land recorded as *bila lagan*. There is no *res judicata*.

13 R D 114.

—Ground of decision as clearly stated in the prior judgment can alone form basis of *res judicata*. 16 M L J 35 = 29 M 42. see also A I R 1925 Cal. 530 = 78 I C 353; and A I R 1930 M 471 = 58 M L J 343 = 31 M L W, 832 = 125 Ind Cas. 247.

—(14) Right to sue for rent:—Co-sharers obtained an *ex parte* decree of rent in a previous suit. Suit was again instituted in respect of rent for subsequent years. Defendants pleaded payment to *lambardars*. Held that previous decision operates as *res judicata* as to plaintiff's right to sue for rent. A I R 1927 All. 145 = 98 I C 981.

—Where after the dismissal of a suit for rent, subsequent suit by the tenant for declaration of his rights was decreed and a suit was there-upon filed for the apportionment of rent. Held that the previous rent suit operated as *res judicata*. A I R 1931 Cal. 397 = 35 C W N 46 = Ind. Rul. (1931) Cal. 397 = 132 I C 81.

—Where the landlord's right to recover any rent from the tenant is *res judicata* between the parties, he cannot be held to be entitled to claim assessment of rent, for assessment of rent means apportionment of rent and subsequent recovery of it. If a landlord dispossesses a tenant from a portion of the tenure, he is not entitled to recover any rent from the tenant unless he restores the portion from which his tenant has been dispossessed to him and it makes no difference that at some time the tenant is found to be in possession of some more lands but not the entire tenure. 36 C W N 72 = 137 I C 696 = I R 1932 C 365 = A I R 1932 C 385.

—(15) Status, decision as to:—Where in a suit by a sitting tenant against his landlord and an alleged lessee from him the defendants plead relinquishment but the plea is rejected and the sitting tenant is restored to possession, the decision in that suit that the sitting tenant was a *shikmi* tenant is an *obiter dictum*, being in no way necessary for the decision of the suit, and does not operate as *res judicata* in a subsequent suit in which the question raised is whether that tenant was a statutory or *shikmi* tenant 16 R D 601 = 13 I

R 63 (Rev.)

C. P. C. ( 1908 ) S. 11 ( *Concld* )

( 12 ) Heard and finally decided—( *Contd* )

(32) Landlord and Tenant, suits between—( *Concld* )

—In a suit brought by an occupancy raiyat to eject an under-raiyat it was found that the former was not the sole landlord. Another suit was brought by the same plff-against the under raiyat and the alleged co-sharer landlord for a declaration of right to the full share of the holding. Held, that the suit was not barred by *res judicata* though the question whether plff. was the sole landlord was *res judicata* between him and the under raiyat.

26 I C 619.

—The dismissal, for default, of a suit for rent, in which the title of the plaintiff was also questioned by the tenant, would not bar a subsequent suit for possession of the land.

9 C 426 = 12 C L R 29.

( 33 ) Miscellaneous Proceedings, orders in

—See also under ( 5 ) Award and decrees on award and ( 22 ) Explanation I and ( 26 ) Interlocutory Orders *supra*. S. 11 does not in terms apply to proceedings which are not "suits," but decisions in such proceedings can nevertheless be *res judicata* under general principles of law. Thus a point which is finally adjudicated upon in any proceeding cannot be reopened. 2 P L T 648 = 68 I C 903.

—An order passed in the course of an insolvency proceeding can, therefore, operate as *res judicata*. A I R 1930 Pat 588 = 9 Pat 664 = Ind Rul (1931) Pat 36 = 128 I C 340.

—If there is an order of the Insolvency Court directing the dismissal of the Official Receiver's petition for ejectment of the sons of the insolvent on the ground that they could not be dispossessed by the Receiver and the subsequent petition by the Receiver for the grant of the identical relief does not state that such an order has been displaced on appeal, it is not within the competence of the Receiver to make a second petition against the sons of the insolvent for the grant of the identical relief. Such a relief would not be open to the Receiver if such relief had once been claimed by the Receiver before and refused by the Court. 1932 A L J 285 = 137 I C 785 = A I R 1932 A 353.

—Dismissal of an Official Receiver's petition under Prov. Ins. Act 1920 S. 54 in respect of a sale by insolvent on ground of sale not amounting to a fraudulent preference bars a subsequent petition by creditor under the same section (54) in respect of the same sale. 63 M L J 778 = (1932) M W N 1201 = 36 L W 699 = 140 I C 461.

—If an application for amendment of a decree has been heard and disposed of on the merits, the Court will not entertain a subsequent application for substantially the same



C. P. C. (1908) S. 11 (Contd.).

(12) Heard and finally Decided—(Contd.)

(33) Miscellaneous Proceedings, orders  
in—(Contd.)

relief. A I R 1928 Lah. 244 = 107 I C 390.  
see also 14 C L J 481 = 12 I C 151.

—Dismissal of an application to set aside  
a decree on ground of fraud bars a subsequent  
suit to set aside the same decree for fraud.  
45 I C 250.

—Once the question as to a legal repre-  
sentative is decided by a Court under O  
XXII, r. 5, it cannot be re-adjudicated upon  
in a regular suit separately. A I R 1926 All.  
439 = 48 A 422 = 24 A L J 546 = 94 I C 157.

—But the Madras High Court has held  
contrary. Thus in a previous case, an appli-  
cation by an adopted son for a succession  
certificate was dismissed by the lower Court  
on the ground that there was no valid autho-  
rity to adopt and no valid taking in adoption.  
It was held that as there was no final adjudi-  
cation on the validity of the adoption, the  
question was not *res judicata*. A I R 1925  
Mad. 497 = 48 M 1 = 93 I C 705; see also 20 I C  
950 = 14 M L T 176 = 1913 M W N 673 = 25 M  
L J 279; and 9 M L T 403.

—And the Nagpur J. C. Court, that an  
order rejecting an application to be brought  
on the record as the legal representative of a  
deceased appellant is not a decree and does  
not constitute *res judicata*. A I R 1921 Nag.  
23 = 17 N L R 45 = 62 I C 303.

—Where a legatee under a Will applies for  
grant of Letters of Administration and is  
opposed by a party as heir of the deceased,  
on the ground that the Will was mere forgery  
and the Court decides in favour of the Will  
being genuine and grants the Letters of  
Administration it is not open to that person  
to raise the question of genuineness of the  
Will in a subsequent litigation between the  
legatee and himself. A I R 1930 Oudh 29 = 6  
O W N 624 = Ind. Rul. (1929) Oudh 536 = 119  
I C 456.

—A provisional order under O 21, r. 63  
can, after the lapse of time prescribed, operate  
as *res judicata*. 5 L W 161 = 37 I C 401.

—And a Judgment in a Civil Court will  
bar a remedy by way of an application under  
the Indian Companies Act in respect of the  
same matter. 46 I C 586 = 87 P W R 1918 =  
86 P L R 1918; see also 41 P L R 1915 = 227  
P W R 1915 = 28 I C 95; and 40 P R 1918 = 60  
P W R 1918 = 45 I C 84.

—When defendants have been defeated in  
a previous suit as regards their contention  
that they are tenants in severalty the question  
is *res judicata* in a subsequent suit. A I R  
1925 Cal. 427 = 40 C L J 507 = 29 C W N 253  
= 85 I C 123.

C. P. C. (1908) S. 11 (Contd.).

(12) Heard and finally Decided—(Contd.)

(34) Mortgage suits.

—A decree for redemption once obtained  
bars a subsequent suit for redemption, al-  
though the decree be defective in so far as  
it neither fixes any definite time for the  
payment of the mortgage money nor provides  
for the consequences of non-payment. 5 O L  
J 698 = 48 I C 922 see also 12 I C 993; and 60  
C 367; and 86 C 361.

—But in the later cases it has been held  
that a decree for redemption not fixing period  
for paying mortgage money does not bar a  
second suit for redemption: A I R 1922 All.  
377 = 44 A 730 = 9 O & A L R 123 = L R 3  
A 397 = 20 A L J 631 = 69 I C 167 see to the  
same effect. A I R 1927 O 457 = 4 O W N 882  
= 105 I C 93.

—Any matter arising in a previous rede-  
mption suit which was dismissed for failure  
to pay decretal amount, and decided in that  
suit, cannot be reopened in a subsequent  
redemption suit A I R 1929 All 409 = (1929) A  
L J 761 = Ind Rul (1929) All 1053 = 119 I C 525;  
see also 2 I C 662.

—But this does not mean that subsequent  
redemption suit itself is barred: 1929 A L J  
761 = A I R 1929 A 409 see also 24 A 44; and  
46 B 348.

—Where in a suit for redemption, the  
Court passes a decree for redemption on  
payment of certain amount in default of  
which the suit was to stand dismissed and  
money is not paid. The plaintiffs can bring  
suit to redeem the same mortgage; the inter-  
pretation of the decree being that the dismis-  
sal of the former suit left the parties in the  
same position as before the suit. A I R 1922  
All 377 = 44 A 730 = 20 A L J 631 = L R 3 A  
397 = 9 O & A L R 123 = 69 I C 167.

—Non-payment of second instalment of  
money in accordance with the preliminary  
decree by plaintiff in the redemption suit,  
does not bar a fresh suit for redemption, since  
right of redemption could only be extingui-  
shed by final decree. A I R 1923 Lah. 680 =  
75 I C 919.

—Similarly, a dismissal of redemption  
suit for default does not extinguish right of  
redemption under s. 60, T P Act and does  
not bar a second suit for redemption of the  
mortgage. A I R 1929 Bom 116 = 30 Bom L R  
1089 = 113 I C 384.

—A mortgagee who has sued for and  
obtained a decree for possession under his  
mortgage from the mortgagor is barred from  
bringing a fresh suit for possession unless he  
had been dispossessed after the date of the  
former decree. 2 Lah L J 678 = 67 I C 281.

—In a mortgage suit the execution pur-  
chaser applied by petition to be joined as  
party-deft. On plff. opposing the application



C. P. C. (1908) S. 11 (Contd).

(12) Heard and finally Decided—(Contd)

(34) Mortgage suits—(Contd)

was rejected. A mortgage decree was passed and the plff then sued to eject the purchaser *Held*, that the defts were not debarred from setting up a right of redemption. 22 C W N 543 = 28 C L J 256 = 44 I C 521.

—A mortgagee cannot deny the mortgagor's title and no issue of title is necessarily involved in redemption suit. A decision therefore, in a prior suit relating to invalidity of deed of gift does not operate as *res judicata* in a subsequent redemption suit. 7 Luck 73 (90-1)=A I R 1931 O 263 = 8 O W N 809.

—Redemption suit—Possession of part of mortgaged property claimed—Subsequent suit for proportionate contribution for part owned by other party is not barred by *res judicata*. A I R 1929 All 696 = (1929) A L J 1162 = Ind Rul (1930) All 834 = 126 I C 354.

—Decree in mortgagee's suit with option of redemption not being executed a suit for redemption after the date fixed in the decree, for redemption is barred : 39 Mad 896 = 30 M L J 13 = 18 M L T 596 = 32 I C 30.

—In other words second suit is not maintainable for the same cause of action Mortgage—Second suit not maintainable for same cause. 8 A L J 599

—The dismissal of a previous suit for redemption upon an alleged mortgage is no bar to another suit for redemption on another mortgage in respect of the same properties, under the provisions of ss. 13 and 43, Civ. Pro. Code, 1882. 8 A L J 47 = 9 Ind Cas 53.

—But as to the conflict of decisions on this point see (4) Directly and Substantially in issue—(B) Might and Ought. Second suit for redemption is not barred where a prior decree for redemption does not put an end to the relationship of mortgagor and mortgagee. A I R 1931 Bom 480 = 33 Bom L R 844=Ind Rul (1931) Bom 507=134 I C 699.

—Decree for redemption providing payment of mortgage money by instalments in default of which mortgagee is to remain in possession in lieu of interest and reserving right to redeem does not bar a subsequent suit for redemption 45 B 1335=23 Bom L R 593=63 I C 902..

—Redemption suit—Decree not drawn up as per O XXXIV, r. 7—Subsequent suit for redemption is not barred. A I R 1925 Lah 31=5 Lah 371=84 I C 67.

—Dismissal of redemption suit as premature does not bar a subsequent suit for redemption. 19 I C 393=6 S L R 140

—Heard and finally decided—Suit for redemption—Decree not made absolute—Execution, time barred—Second suit—Maintainability see. 43 Bom 334 (F B)=49 I C 894;

C. P. C. (1908) S. 11 (Contd)

(12) Heard and finally Decided—(Contd)

(34) Mortgage suits—(Contd)

and 1908 P L R 169=43 P R 1907 = 101 P W R 1907; and 1908 P L R 164 = 1908 P R 93 = 1908 P W R 133; and A I R 1923 B 300 = 47 B 692 = 25 Bom L R 358 = 72 I C 556; and A I R 1927 B 32=50 B 730=28 Bom L R 1325=98 I C 943; and 29 A 481=(1907) A W N 137 = 4 A L J 447.

—Passing of final decree in redemption suit operates as *res judicata* to a fresh redemption suit on the same mortgage. A I R 1925 Oudh 696 = 28 O C 212 = 87 I C 290.

—But a final decree for sale cannot bar redemption suit. A I R 1925 Mad. 1191 = 86 I C 527.

—Where the right to redeem was in issue in a mortgage suit for sale and Court decreed the sale, a fresh suit for redemption is barred. A I R 1926 Mad. 816=49 M 691=25 L W 258 = 50 M L J 612=96 I C 607. see similarly. A I R 1922 Bom 127 = 46 B 348 = 23 Bom L R 1176 = 64 I C 1004, and 29 A 481 = (1907) A W N 137 = 4 A L J 447; and 43 B 703 = 21 Bom. L R 720 = 52 I C 466.

—*Obiter*—Decision in suit for redemption brought by mortgagor having no right then to redeem operates as *res judicata* in subsequent suit for redemption brought when the mortgagor acquires such a right. A I R 1930 Oudh 270 = 7 O W N 209 = Ind. Rul. (1930) Oudh 129 = 122 I C 769.

—But in later cases it has been held that in a suit for redemption a decree for payment of the mortgage amount by instalments was passed under the Deccan Agriculturists' Relief Act, but the decree was left unexecuted. Mortgagor or any person claiming under him by a title subsequently derived, cannot bring a suit for redemption of the property. His remedy is in execution. 20 Bom L R 164=42 B 246=44 I C 908.

—Where a plaintiff alleging as purchaser of mortgaged property, sued for redemption before expiry of redemption period the purchaser having been found fraudulent the suit was dismissed. Suit after expiry of redemption period is barred. A I R 1928 Bom 349=30 Bom L R 902=113 I C 155.

—Dismissal of a suit for wrong description of property does not bar a subsequent suit. 2 Pat L J 313 = 39 I C 126.

—In a mortgage suit by a puisne mortgagee, the prior mortgage was recited in the plaint and the District Munsif, while dismissing the suit, found the amount due on the prior mortgage. The puisne mortgagee appealed to the District Judge but did not, in his grounds of appeal, take any objection to or make any mention of the finding on the question of the prior mortgage and the decree of the District Judge was silent upon the

C. P. C. (1908) S. 11 (Contd.).

(12) Heard and finally Decided—(Contd.)

(34) Mortgage suits—(Contd.)

point. Held—That the finding about the prior mortgage by the Munsif could not be incorporated by implication into the decree of the District Judge and the finding did not operate as *res judicata* against the prior mortgagee. 21 M L J 635=9 M L T 90=9 I C 285 (1) see also 99 I C 658 = A I R 1927 M 431; and 1 C L J 337; and 57 P R 1907.

—In a former suit by mortgagor for sale prior incumbrance was mentioned in the plaint but no relief was claimed in respect of it. Held there is no *res judicata* 9 I C 285=9 M L T 90=21 M L J 635.

—First suit under the Dekhan Agriculturists Relief Act to redeem treating the alienation as mortgage—Plea taken in the body of the plaint and not in the prayer that the alienation was void beyond the alienor's life time—Dismissal of the suit on the ground that alienation amounted not to a mortgage but a lease—Second suit in ejectment—Plea that the mortgage was not binding. 15 Bom L R 266=37 B 224 = 19 I C 558.

—In a suit for redemption of mortgage and also on title, the question of title was excluded from consideration. Dismissal of this suit would not bar a subsequent suit on the strength of lease and title. 7 M L T 354=51 C 262.

—Suit on latter mortgage does not bar subsequent suit on former one. 10 L B R 360 = 69 I C 897.; see also A I R 1925 O 379=12 O L J 127=86 I C 748.

—Mortgagor suing for accounts under one mortgage—Mortgagee putting forth other mortgages—Court deciding suit only with respect to one mortgage—Decision does not bar subsequent suit on other mortgages. A I R 1925 Bom 311=27 Bom L R 488=87 I C 716.

—Mortgage suit—Failure of plaintiff to appear on the day fixed for appointing a guardian to minor defendant—Dismissal of suit for default—Fresh suit is not barred. A I R 1922 Pat 252 = (1922) Pat (Sup) 81 = 6 Pat L J 650=2 P L T 572=63 I C 570.

—Where the parties have invited the decision of the Court as to whether a claim for a personal decree under S. 90 of the T. P. Act, is within time and the issue has been substantially tried, the matter cannot be reagitated upon an application under S. 90 of the T. P. Act. 13 N L R 76 = 39 I C 854.

—Hindu widow held entitled to mortgage property as life-owner—Question is *res judicata* in subsequent suit. A I R 1925 All 417 = L R 6 A 182 Civ = 86 I C 849.

—Mortgage by Hindu father—Suit by sons for partition—Mortgagee joined as party—Court deciding that mortgagee bound whole family property and reduced rate of

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C. P. C. (1908) S. 11 (Contd.).

(12) Heard and finally Decided—(Contd.)

(34) Mortgage suits—(Contd.)

interest—Suit by mortgagee against father's share to recover the disallowed interest is barred. A I R 1929 Oudh 275=4 Luck 713 = 6 O W N 281 = Ind. Rul. (1929) Oudh 462 = 118 I C 766.

—Suit by transferee from widow for redemption—Mortgagee urging in appeal his reversionary right—Overruled for not raising it in first Court—Subsequent suit by mortgagee claiming reversionary title after widow's death. 87 P R 1913=82 P L R 1913=91 P W R (1913) = 18 I C 787.

—Mortgage land owned by widows was on their death mutated in favour of proprietary body including mortgagee—Some proprietors obtained preliminary decree in redemption suit but it was not executed—On partition land under mortgage fell to certain persons who again instituted suit for redemption—Previous suit held to operate as *res judicata* both as regards right to redeem and amount due on mortgage, although many suits could be brought for redemption of mortgage. A I R 1930 Lah. 423 = Ind Rul (1930) Lah 190 = 121 I C 180.

—After preliminary decree in a mortgage suit for sale, certain persons were brought on record as equal representatives of the deceased mortgagor. They challenged the mortgage for want of consideration and legal necessity but final decree was passed against them, the Court having refused to go behind the preliminary decree. The final decree would not operate as *res judicata* in a separate suit brought by them for declaration that the decree was not binding. A I R 1929 All. 252 = (1929) A L J 425 = Ind Rul (1929) All 382 = 115 I C 462.

—Where decree directing the mortgagee to take away mortgage-money deposited by the mortgagor and to deliver property was passed in previous suit and where plaintiff applied for delivery of property and gifted it to the plaintiff but his application for delivery was dismissed it was held that subsequent suit for redemption by the plaintiff is barred. A I R 1925 All 484 = L R 6 A 241 Civ. = 85 I C 480.

—Mortgage of land and subsequent sale thereof to mortgagee—Sale in contravention of law—Adverse possession by mortgagee after sale—Mortgagor obtaining possession but mortgagee regaining it on basis of prescriptive title—Suit for redemption by mortgagor is barred. A I R 1930 Bom 135 = 53 B 676 = 31 Bom L R 778=Ind Rul (1930) Bom. 113 = 122 I C 113.

—Where decision of a collateral issue in the previous suit was by no means unnecessary for the purposes of that case the same question cannot subsequently be agitated in

C. P. C. (1908) S. 11 (Contd.).

(12) Heard and finally Decided—(Contd.)

(34) Mortgage suits—(Contd.)

a later suit. (1930) A L J 1309 = Ind Rul (1931) All 242 = 130 I C 194.

—There must be complete and final settlement of accounts between mortgagor and mortgagee in redemption suit, but a separate suit for mesne profits from the date of decree to date of possession is not barred: 31 B 527 = 9 Bom L R 958 and 1925 R 13 = 2 R 382 = 84 I C 395.

—When appeal has been made against an order refusing to extend time for payment of the mortgage money and dismissed, the same point cannot be raised again as a ground in an appeal against the final decree. 14 N L R 25 = 42 I C 392.

—One of three co-mortgagors selling his share but in a redemption suit alleging sale to be not genuine but withdrawing the plea.

—Decree passed in co-mortgagors' favour—Suit by transferee's representatives for partition is not barred as the question of validity of transfer was not finally decided. A I R 1929 Mad. 291 = Ind. Rul. (1929) Mad. 521 = 116 I C 137.

—Nine out of 15 properties mortgaged were purchased by mortgagee, 4 by A and 2 still in mortgagor's possession—A suing for redemption making mortgagor and mortgagee defendants—Court taking account of liability for redemption and deciding that certain sum was payable by properties in mortgagor's possession—Decision is binding on mortgagor in his subsequent redemption suit. A I R 1929 All 814 = (1929) A L J 908 = Ind. Rul. (1929) All, 945 = 119 I C 97.

—If in a mortgage suit the intention of Court is only to declare and maintain a relationship of mortgagor and mortgagee between the parties and also to fix the amount of the mortgage money due from the mortgagor to the mortgagee and to declare the mortgagor's right to recover possession on payment of that sum of money, then the matter as to when and how the mortgagor may recover possession of the mortgaged property, or the mortgagee may foreclose or sell in default, and thus in either case the mortgage be extinguished, must be held not to have been finally heard and decided. A I R 1930 Oudh 465 = 7 O W N 902 = Ind. Rul. (1931) Oudh 123 = 130 I C 75.

(35) Obiter dictum or mere opinion on necessary issues.

—An obiter dictum or a mere remark which is not the bases of a decree does not operate as res judicata I R 1929 L 251 = 114 I C 331 = A I R 1929 L 225; see to the same effect 11 Bom L R 366 = 6 M L T 200 = 3 I C 124; and 2 O L J 113 = 28 I C 217; and 21 W

C. P. C. (1908) S. 11 (Contd.).

(12) Heard and finally Decided—(Contd.)

(35) Obiter dictum or mere opinion on necessary issues—(Contd.)

R 189; and 84 I C 631 = A I R 1924 A 884; and 14 M 312; and 1929 A L J 540 = A I R 1929 A 521; and 21 W R 30; and 2 A 843; and 73 P R 1915 = 29 I C 778; and 50 P R 1899; and 56 P R 1916 = 35 I C 542; and 4 Pat L J 682 = 1919 P H C C 343 = 52 I C 338; and 124 I C 472; and A I R 1930 L 634; and 20 A L J 784 = 76 I C 618 = A I R 1923 A 15; and 94 P L R 1910 = 8 I C 495; and A I R 1932 L 21 and 36 C W N 238; and 13 Bom L R 1061 = 12 I C 813; and 1917 M W N 327 = 40 I C 820.

—Thus a mere suggestion by Court, to take a proceeding contemplated by a certain enactment is not *res judicata* on the question as to whether that particular enactment applies. A I R 1921 Mad. 126 = 13 L W 37 = (1921) M W N 181 = 61 I C 979.

—Similarly, observations in a judgment relating to a different matter though connected cannot bind a third party and the judgment itself cannot be evidence against him. A I R 1930 Mad. 751 = (1930) M W N 396 = Ind. Rul. (1931) Mad. 314 = 129 I C 650.

—A decree in a rent-suit enhancing rent and holding tenancy to be permanent. Dismissal on review. Observations as to nature of tenancy are not *res judicata*. A I R 1927 P C. 102 = 8 Lah. 573 = 54 I A 178 = 52 M L J 663 = 29 Bom. L R 870 = 31 C W N 677 = (1927) M W N 481 = 39 M L T 161 = 25 A L J 959 = 28 P L R 658 = 26 L W 634 (P. C.) = 101 I C 355.

—In a former suit for partition by a Khoja son against his father and other brothers the first court held that the son could claim partition and that the property was ancestral. The appeal Court held that the plaintiff had no right to claim partition against his father and also remarked that the other question was not necessary for the decision of the case but that it was advisable to express an opinion on the other question and concluded by saying that the property was not proved to be ancestral. In a subsequent suit by the father, held that the second question was not *res judicata*. 13 Bom L R 1061.

(36) Other suits.

—An adverse decision as to plaintiff's right to impeach a transfer which was then not a valid transfer but only one of *spes successionis* is not *res judicata* as regards his subsequent suit to impeach the same transfer after the limited owner's death. A I R 1921 Lah 133 = 3 Lah L J 211 = 61 I C 375.

—A plea of discharge which the plaintiff failed to prove in a prior suit brought by the defendant against plaintiff to recover *wararam*

C. P. C. (1908) S. 11 (Contd.).

(12) Heard and finally Decided—(Contd.)

(36) Other suits—(Conclud.)

will not constitute *res judicata* in a subsequent suit by plaintiff for the return of a loan advanced to defendant. M W N 1912, 172=11 M L T 201=13 Ind Cas 649.

(37) Partition suits.

—Where a declaration as to plff's title to the land in dispute was given, but as to the plff's claim for possession it was directed that he should bring a partition suit against his co-sharers, it was held in such partition suit that the question of plff's title operated as *res judicata* as between the parties. 87 I C 811 = A I R 1926 C 80.

—Where a plea that the deceased was separate was embodied in the judgment it was held to constitute *res judicata*. A I R 1925 Mad 1179=49 M L J 104=22 L W 455 = (1925) M W N 713=90 I C 509.

—Where a decree had directed a partition to be made, but actual partition was not carried out, a second suit for partition is not barred by *res judicata*. 14 Bom L R 1198=37 Bom 307=17 I C 955.

—But a decision in partition proceedings is binding even though the partition had not been ultimately carried through. 1 U P L R (B R) 39=54 I C 303.

—And a decree in prior partition suit bars a fresh suit to re-open the partition. 1918 P H C 134.

—Where a suit was allowed to be withdrawn with liberty to bring a fresh suit without the consent of other plaintiffs it was held that such an order was without jurisdiction, and suit must be deemed not to be withdrawn. Fresh suit for partition is not barred by previous suit, cause of action being a recurring one. A I R 1922 Pat. 489=1 Pat. 228.

—First suit for partition—Second suit for possession of certain items on the basis of partition already effected—Whether barred. See (1918) M W N 638 = 24 M L T 434.

—First suit for partition of some items of family properties—A subsequent suit for other items is not maintainable even if properties lay in different jurisdictions. A I R 1923 Mad 584 = 44 M L J 652 = (1923) M W N 294 = 17 L W 740 = 72 I C 430.

—But where the plff. was not aware of the existence of certain survey number due to the fraud of the defendant non-inclusion of it in a prior suit for partition does not bar a subsequent suit. A I R 1931 Sind 27 = Ind. Rul. (1931) Sind 40 = 130 I C 552.

—And where the properties are left out with consent of the parties second suit for partition is not barred : A. I R 1928 C 459 =

C. P. C. (1908) S. 11 (Contd.).

(12) Heard and finally Decided—(Contd.)

(37) Partition suits—(Conclud.)

32 C W N 1023 = 110 I C 60; and A I R 1929 B 323 = 31 Bom L R 640.

—Previous unexecuted decree does not bar fresh suit for partition. 77 P R 1915=164 P W R 1915 = 31 I C 205.

—A compromise decree for partition, was not executed and became barred by time. The plff. now brought a fresh suit for partition: *Held*, that a joint tenant can apply to the Court for partition so long as the joint tenancy exists, and therefore the plff's present suit to enforce partition was not barred by the previous decree, though no suit would be maintainable to enforce that decree. *Held also*, that the present suit was not barred by the previous decree because that decree was conditional on payment of money to the deft. 77 P R 1915 = 164 P W R 1915 = 31 I C 205.

—A suit for declaration that an alienation in favour of the defendant is invalid was dismissed for default. Subsequent suit for partition and possession of a share is not barred. 39 M L J 412 = 12 L W 431 = 60 I C 201.

—A decree was obtained by son declaring alienation by father not binding on him and for recovery of his share after father's death—Alienance subsequently suing for general partition—Matter is *res judicata* as regards properties sold, but the alienance can get other properties as substitute. A I R 1926 Mad. 241 = 49 M 483 = 19 M L J 679 = (1925) M W N 844 = 91 I C 868.

—K, a Hindu widow, sued the heir of her husband's brother to recover by partition her husband's share in certain lands but failed. Later the plaintiff claiming through K's husband, sued defendant to recover possession of the house in which K resided during her lifetime. In both the suits it was alleged that the brothers had already separated as regards houses. *Held*, that the suit was not barred by *res judicata*, for what was substantially in issue between the parties in the second suit, did not necessarily call for decision and had not in fact been decided in the first suit. 13 B L R 1034 = 36 B L T 127 = 12 Ind. Cas. 711.

(38) & (38-a) Plaint, rejection or return of

—See also cases under C P C O 7, ff. 11 and 13. Order returning plaint as disclosing no cause of action under O 7 is not *res judicata*. (1920) M W N 616.

(39) Pre-emption suits.

—After a contract for sale of a mahal to strangers the mahal was sold to vendees



## C. P. C. (1908) S. 11 (Contd.)

## (12) Heard and finally Decided—(Contd.)

## (39) Pre-emption suits—(Contd.)

having preferential pre-emption right, and having notice of the previous contract. The suit brought by the strangers for specific performance was referred to arbitrator who directed that a right to pre-emption was no defence and that specific performance be granted. The Court passed decree on the award. The vendees brought a suit for pre-emption. Held that the right of pre-emption accrues only on the sale taking place and as the sale sought to be pre-empted was effected when the court executed it in pursuance of the decree for specific performance, it cannot be said that the question of the right of pre-emption was by implication decided before the sale. The right at that stage could not be claimed as of right : 1933 A L J 694 = A L R 1933 A 50.

## (40) Principal and Agent, suits between.

—Where amounts due in respect of certain transactions are settled in a suit between principal and agent a second suit in respect of same transactions is barred A I R 1925 Lah. 596 (2) = 7 Lah L J 420 = 26 P L R 685 = 92 I C 198.

## (41) Reliefs different.

—Where in an administration suit, a declaratory decree is passed, another suit praying that the shares declared by the previous decree be distributed is not barred by *res judicata*. A I R 1921 L B 22 = 11 L B R 60 = 64 I C 813.

—And where A, as purchaser of certain properties sued B, his vendor, and C for possession. Suit was dismissed on ground that C was entitled to the property owing to an earlier purchase, whereupon A sued C again as a reversioner impeaching the alienation to C. Held, that the former suit did not operate as a bar by *res judicata* to the latter suit. 151 P W R 1915=68 P R 1915=31 I C 159.

—On construction of the Statute governing the matter plaintiff was held entitled to collect *mamul* rates for certain years. In a subsequent suit respect of another period, question is not *res judicata* (Per Macleod C. J. *Shah*, J. dissenting and Fawcett J. doubting). A I R 1921 Bom 87 = 45 B 1260 = 23 Bom L R 749 = 64 I C 162.

## (42) Relinquishment of Portion of claim

—See also under O. 23.

—In a suit for ejectment plff. included within the boundaries described in the plaint two parcels. A and B alleged that the deft. had dispossessed him therefrom. However, before Commissioner at the local enquiry, and at the trial, the plff. relinquished

## C. P. C. (1908) S. 11 (Contd.)

## (12) Heard and finally Decided—(Contd.)

## (42) Relinquishment of Portion of claim—(Contd.)

his claim without leave of the court in respect of the parcel B and the suit was dismissed with regard to that item. Held that a subsequent suit for recovery of possession of parcel B, against the same deft. was *res judicata*. 29 C L J 11 = 40 I C 408.

## (43) Remand Order.

—Where the lower appellate Court remands case directing one of several documents in question to be admitted the successor of the Judge is passing order is not bound by it and can make a second order of remand directing that all the documents should be admitted when case comes up again before him. A I R 1929 Oudh 398 = Ind Rul (1929) Oudh 295 = 116 I C 55 see also A I R 1925 Cal 1010 = 42 C L J 224 = 90 Ind Cas 512.

—In an appeal to the High Court against a decree passed by a Lower Court on a remand of the case to that Court by an order of the High Court, the Appellate cannot challenge the propriety of the remand order. 46 I C 816.

(44) *Res judicata* by implication.

—There can be no decision by necessary implication except in respect of the matters which might and ought to have been made a ground of defence or attack. 21 O C L = 4 O L J 648 = 44 I C 368.

—If a co-sharer omits to make any objection, which he is required by law to make, it must be deemed that he had made it and that under cl. (c) of sub-s. (1) of s. 111, U P Land Revenue Act it must further be deemed that the Collector had proceeded to inquire into the merits of the objection and had decided them within the meaning of sub-s. (3) of the same section. A I R 1926 Oudh 101 = 12 O L J 571 = 2 O W N 872 = 91 I C 583.

—Plea of non-joinder not allowed to be raised in a suit on the ground that it was taken at a late stage. Plea should be considered to have been taken and to have been decided against the party taking it. A I R 1926 Cal 511 = 91 I C 683.

—Where a plaintiff sues for correction of an entry in Record of Rights of the defendant and subsequently sues for possession of property alleging that it was not the *niskar* property of the defendant but part of his *mal* property (which would have been the situation if his suit for correction of record had been decided in his favour) the decision against the plaintiff in the prior suit is bar to his subsequent suit. A I R 1929 Cal 385 = 49 C L J 285 = 33 C W N 623 = Ind Rul (1930) Cal 3 = 120 I C 147.



C. P. C. (1908) S. 11 (Contd.)

(12) Heard and finally Decided—(Contd.)

(44) Res judicata by implication—(Concl'd).

—Where the question whether the defendant executed a certain *kabuliyat* in favour of the plaintiff was a material fact in issue in a previous suit and it was decided then that the plaintiff failed to prove the same there the decision is *res judicata* concerning every thing in that *kabuliyat*. A I R 1926 Cal 1228 = 97 I C 291.

—Where a grant has been construed in a suit between the parties, the construction, though erroneous binds them in a subsequent suit relating to property not involved in the original litigation. 31 M L J 97 = 20 M L T 284 = (1916) 2 M W N 36 = 4 L W 133 = 35 I C 266.

—Appeal from portion of decree—Rest of the decree based on same reasoning—Decision on first portion is *res judicata*. The other portion alone cannot, therefore, be reviewed. A I R 1930 Mad 471 = 58 M L J 343 = Ind Rul (1930) Mad 775 = 125 I C 247.

(45) Right to sue reserved by decree or by Court extra Judicially.

—A statement in a judgment that a fresh suit may be brought will not entitle a party to bring a fresh suit if he is not otherwise entitled to do so. A I R 1931 Mad. 268 = 135 I C 13; see to the same effect : 6 Bom. L R 594 (dissenting from 11 A 187; and 5 A 595) and see 8 M 77. A mere expression of opinion by a Court that another suit would lie cannot possibly be held as binding on parties. The real remedy in such a case is to appeal against that judgment. 36 C W N 238 = A I R 1932 C 108 = 54 C L J 302 = I R 1932 C 200 = 136 I C 472.

—Similarly a mere fact that the Appellate court liberty to bring a fresh suit where the only question in the case was whether the debts were annual or permanent tenants, is not sufficient to take the second suit out of the bar of *res judicata* 6 Bom L R 594; 52 I A 100 (P C), followed. A I R 1931 Bom. 417 = 33 Bom. L R 613 = 134 I C 696.

—Where in a suit for money, the debt, pleaded discharge and the Court decreed with the consent of parties the full amount, reserving the right of the debt, to bring a separate suit for the amount paid by him as alleged held, that the reservation by agreement was not known to law and that the subsequent suit for the amount was barred by *res judicata* 18 M L T 93 = 2 L W 605 = 30 I C 260.

—Where a previous suit was decreed only against some debts, and dismissed against the rest for non-disclosure of cause of action a subsequent suit is not *res judicata*. 245 P W R 1912 = 56 P R 1912 = 251 P L R 1912 = 15 I C 930.

C. P. C. (1908) S. 11 (Contd.)

(12) Heard and finally Decided—(Contd.)

(45) Rights to sue reserved by decree or by Court extra Judicially—(Concl'd)

—In a suit by an auction purchaser for recovery of lands, the decree directed the dismissal of the suit on the ground of non-production of the sale-certificate, but reserved the right of the plaintiff to bring a fresh suit on obtaining the sale-certificate. In a second suit by the plaintiff for recovery of the same property on production of the sale-certificate, held the first suit did not operate as *res judicata*. 18 M L J 198 see also A I R 1930 L 634.

(46) Subject-matter different.

—It is not possible to contend that the decision on the question of custom given in a suit about the property situate in one village is not *res judicata* in a suit brought about property situate in a neighbouring village. A I R 1929 Lah. 769 = Ind. Rul. (1929) Lah. 944 = 119 I C 768.

—See also cases under (4) Directly and Substantially in issue under the headings (A) and (B) supra.

(48) Suit on Pro. Note on original cause of action.

—The dismissal of a suit on a promissory note is a bar to a subsequent suit on the original cause of action. Plaintiff's cause of action in such a case is one and indivisible and the fact that the transaction was recorded in his account book did not give him another or different cause of action. It is only where a promissory note is invalid owing to some inherent defect therein that the party suing is entitled to fall back on an action for money had and received to his use. 42 All. 1930 = 18 A L J 81 = 54 I C 424.

—Where a suit by liquidators on a pronote for money due on shares is dismissed on merits the matter is *res judicata* and cannot be reagitated in the liquidation Court : 86 P L R 1918 = 87 P W R 1918 = 46 I C 586.

(49) Suits in claim cases.

—See also under O. 21, r.14. Third person, whose claim based on mortgage is disallowed and whose suit for declaration of mortgage rights is dismissed cannot enforce his rights under the mortgage by a regular suit. 44 M 268 = 12 L W 725 = 28 M L T 420 = (1921) M W N 33 = 40 M L J 7 = 60 I C 780.

(50) Vendor and Purchaser.

—For a suit by the real purchaser of immoveable property for possession, a conveyance

C. P. C. (1908) S. 11 (Contd.)

(12) Heard and finally Decided—(Contd.)

(50) Vendor and Purchaser—(Conclud.)

nee from the *benamidar* is not necessary.  
24 I C 17.

—But a dismissal of a suit by purchaser to enforce a clause in agreement between him and the vendor does not bar a subsequent suit by him to enforce another clause. (1932) P C L 121 (28) (Civ.) = A L R 1932 L 21 (Civ.)

(51) *Withdrawal of suits or appeals.*

—See also under O. 23, r. 1.

—In case of withdrawal of suit there is no decision on merits and there is no *res judicata* 110 I C 818 = A I R 1928 L 710; see to the same effect 40 I C 853; and 22 I C 918; and 11 I C 831; and 16 W R 276; and 2 Bom L R 871; and 12 W R P C 43 = 13 M I A 160; and 151 A W N 1885; and 10 C 97; and A I R 1928 A 689; and 92 I C 385 = A I R 1926 M 490; and 19 P L R 1914; and 5 N L R 88 = 3 I C 61

—Thus in a previous suit part of claim which was for rendition of accounts for a certain period was withdrawn—In a subsequent suit, the issue as to rendition of accounts even for the same period could be re-agitated. A I R 1928 All 689 = (1929) A L J 229 = Ind. Rul. (1929) All. 270 = 114 I C 734.

—Similarly, persons interested in a public trust cannot be bound by the result of a prior suit, in which no decision was arrived at and withdrawn fraudulently. A I R 1928 Mad. 268 = 108 I C 199.

—When a suit is dismissed on account of formal defect in plaint but with liberty to file a fresh suit, subsequent suit on the same cause of action is not barred under O. II, r. 2 or s. 11. A I R 1930 Lah. 634 = 130 I C 572.

—And whether the leave to withdraw with permission to bring fresh suit was properly granted or not, is not a matter for the Court trying the subsequent suit to consider A I R 1922 Pat. 44 = 64 I C 337 = 1 Pat. 90; see also 9 A L J 378 = 14 I C 175; and 40 Ind. Cas. 611 = 32 M L J 434 = 1917 Mad. W. N. 234 = 21 Mad. L T 229; and 58 Ind. Cas. 806 = 31 Cal. L J 482 = 24 Cal. W N 723 = 1921 Cal. 34 = 48 Cal. 138 F. B.

(13) Parties—"Between the Same Parties or between parties under whom they or any of them claim, litigating under the same title."

#### *Synopsis.*

(1) General Principles.

(2) Co-defendants, *res judicata* between.

(1) General Principles.

(2) Condition (1)—there must be conflict of interests between the co-defts.

C. P. C. (1908) S. 11 (Contd.)

(13) Parties—*Synopsis* (Contd.)

(3) Condition (2)—necessity to decide that conflict in order to give relief to plff.

(4) Condition (3)—that the conflict was finally decided.

(3) Co-plaintiffs, *res judicata* between.

(4) Explanation VI — Representative Suits

(1) Applicability and scope.

(2) Hindu heirs and adoptees.

(3) Hindu Joint Family.

(4) Hindu joint family—Manager.

(5) Hindu widows and reversioners.

(6) Karnavan of tarwad.

(7) Landlord & tenant.

(8) Suits on behalf of community.

(9) Suits relating to private right held in Common.

(10) Suits relating to public right.

(11) Suits under S. 92 C. P. C.

(12) Trustees, executors, administrator, official receiver, auction-purchaser, mortgagor, shebait etc.

(5) Judgments in rem.

(6) Litigating under the same title.

(1) General Principles.

(2) Landlord and Tenant.

(3) Mortgage Suits.

(4) Vendor and Purchaser.

(5) Other Cases.

(7) Minors, lunatics, insolvents.

(8) Pro-forma or nominal parties

(9) Same parties, meaning of

(1) General.

(2) Administration suit.

(3) Co-sharers and heirs.

(4) Decree-holder, judgment-debtor, and auction-purchaser.

(5) Landlord and tenant.

(6) Mortgage suit.

(7) Municipal council, Local Board, Government, secretary of state, pujari.

(8) Partition suits.

(9) Partners and partnership.

(10) Pre-emption suit.

(11) Vendor and Purchaser.

(12) Other cases.

(10) Under whom they claim.

(1) General.

(2) Benamidar and real owner.

(3) Claim Cases.

(4) Father and son.

(5) Hindu widow and reversioners.

(6) *Jus tertii*.

(7) Landlord and tenant.

(8) Members of joint family.

(9) Mortgagor and mortgagee.

(10) Purchaser at execution-sale

C. P. C. (1908) S. 11 (Contd.)

(13) Parties—Synopsis—(Contd.)

- (11) Shebait, priests, vatan holder.
- (12) Transferor and transferee.
- (13) Vendor and Purchaser.

(11) Wrong Party.

(1) General Principles.

—The condition that judgments and decrees bind only the parties and their privies is based upon the maxim: *res inter alios actae alteri nocere non debet*—i. e. a matter transacted between one set of persons ought not to be allowed to adversely affect a third party—but it is only just that persons claiming through or under parties to previous proceedings should be bound by the decisions therein so far as such decisions affect the subject-matter of their claim. The expression "parties" broadly covers all persons having a right to control the proceedings, make defence, adduce evidence, cross-examine witnesses, and appeal from the decision if appealable, and who would be affected by the result of the case. Indian Courts have extended this rule to benamidar see 4 C W N 283; and 10 C 897; and 3 A 812; and 15 M 267; and 5 B L R 321. A person who is merely interested in the case is not a "party" 56 I C 386;

—The ground of privity is property not personal relation. To make a man privy to an action he must have acquired an interest in the subject-matter of the action either by inheritance, succession, or purchase from a party *subsequently* to the action, or he must hold property subordinately e. g. landlord and tenant see. A L R 1933 L 42

—And a judgment against vendor in a suit begun after the sale does not create privity in the vendee: 35 B 297; see also cases under (10) "Under whom they claim" below and (6) "Litigating under the same title" below. The expression "parties" also includes persons not claiming under the parties but represented by them 6 B 703 e. g. shareholders in a company when represented by registered officer of that Company; or persons interested in the estate of a testator or intestate when represented by executor or administrator; or members of a joint Hindu family when represented by the manager of such family; see cases under Expl. VI below.

—"Parties" cannot go behind a decree in previous suit. Ind Rul 1929 All 295 = 114 I C 871.

—Where in the previous litigation inter partes a person has been found entitled to a certain share, he cannot claim larger share in the subsequent suit: A L R 1933 O 318.

C. P. C. (1908) S. 11 (Contd.)

(13) Parties—(Contd.)

(2) Co-defendants, Res judicata between.

(1) General Principles.

—See to the same effect the following cases in which it has been held that, apart from other conditions of res judicata, three conditions must especially be satisfied so as to constitute res judicata between co-defts, viz. (1) that there was a conflict of interests between the co-defts, (2) that it was necessary to decide that conflict in order to give relief to the plff, and (3) that the question was finally decided: A I R 1931 P C 231 = I R 1931 P C 257 = 8 O W N 973 = 61 M L J 415 = 34 L W 439 = 35 C W N 1217 = 133 I C 721 P C; A L R 1932 C 739 = A I R 1932 C 271 = 137 I C 46 = 35 C W N 1203 = 59 C 636; A I R 1932 A 643 = 1932 A L J 605 = I R 1932 A 444 = A L R 1932 A 1008 = 138 I C 552; A I R 1931 S 170; A I R 1925 M 645 = 21 L W 551 = 90 I C 124; A I R 1925 R 228 = 92 I C 489 = 3 R 77; A I R 1925 A 546 = 23 A L J 453 = L R 6 A 385 = 88 I C 130 = 47 A 778; A I R 1925 C 431 = 84 I C 846 = 51 C 997; A I R 1924 A 310 = 22 A L J 91 = L R 5 A 71 civ. = 79 I C 803 = 46 A 220; A I R 1923 L 186 = 71 I C 481; 17 Bom. L R 1106 = 33 I C 423 = 40 B 210; 21 C W N 693 = 25 C L J 322 = 34 I C 929; A I R 1929 M 638 = 119 I C 167; A I R 1926 Pat. 478 = 97 I C 205 = 1926 Pat. 249; A I R 1924 N 429 = 20 N L R 197 = 80 I C 389; 33 M L J 740 = 43 I C 860; 63 I C 735; 16 Bom. L R 283 = 23 I C 944 = 38 B 438; 1913 M W N 690 = 25 M L J 879 = 14 M L T 189 = 21 I C 15; 17 C W N 128 = 18 I C 117; A I R 1928 R 315 = 6 R 575; A I R 1932 M 298 = 1932 M W N 87 = 35 L W 288 = 62 M L J 313; 40 I C 826; 7 M L T 89 = 5 I C 760 = 33 M 112; 5 C L J 611 = 1 I C 913 = 36 C 193; U B R 1907 C P C 5; 2 C P L R 52; 2 C P L R 55; 156 A W N 1895 = 18 A 65; 8 C W N 30 = 31 C 95; 1918 M W N 580 = 8 L W 473 = 49 I C 369; 30 I C 604 = 8 Bur L T 160; and A L R 1933 A 553; and A L R 1933 L 586.

—Where in a suit for partition the decree declare the shares of every one of the parties interested in property, the declaration as to the extent of the sharers of the defendants, is as binding between the co-defendants themselves as between the defendants and the plaintiff. 22 O C 300 = 6 O L J 529 = 54 I C 325.

—In a partition suit all the parties who are interested in the property are bound by the decision whether they are plaintiffs or defendants. A I R 1923 B. 203 = 25 Bom. L R 268 = 47 B 534 = 73 I C 912.

—But in a suit for ejectment where the defts did not contest between themselves as to validity of partition, there is no res judicata. A I R 1922 Mad. 404 = 77 I C 917.

—On the death of the Burmese widow of a Chinaman one of her daughters instituted

## C. P. C. (1908) S. 11 (Contd.)

## (13) Parties—(Contd.)

(2) Co-defendants, Res judicata  
between—(Contd.)

## (1) General Principles—(Contd.)

an administration suit, the purpose and object of which was to have the mother's estate directed among her children, two sons and two daughters, as her heirs. To that suit the two sons and the other daughter of the deceased lady were made party-defendants. The suit was dismissed on the ground that Chinese customary law applied and that under it the sons alone were entitled. In a subsequent suit brought by the daughter, who was a defendant in the earlier suit, against her brothers and her sister, who was the plaintiff in earlier suit claiming the same relief as was sought in the earlier suit, held that the subsequent suit was barred by the doctrine of *res judicata*, 10 R 322 (332-4) = 55 C L J 403 = 36 C W N 726 = 33 P L R 519 = 137 I C 328 = 34 B L R 1040 = 59 I A 247 = 1932 A L J 735 = 63 M L J 64 = 36 L W 1 = 9 O W N 647 = A I R 1932 P C 161 = I R 1932 P C 184 = A L R 1932 P C 260 (P C).

—But where in a previous suit there was no active controversy or conflict between the two sets of defendants, nor was there any question between them which it was necessary for the Court to adjudicate upon and there was no adjudication in fact the mere circumstance that the same point is at issue in a subsequent suit in which the same two sets of persons are arrayed as plaintiffs and defendants respectively, does not make the decision in the former suit *res judicata* between them. 231 P L R 1912 = 220 P W R 1912 = 14 I C 535.

—The question whether one of the co-defendants though the power was not a necessary party and whether he put in an appearance or not is immaterial when the above conditions are fulfilled. A I R 1931 P C 114 = (1931) A L J 453 = 35 C W N 661 = 53 C L J 552 = 33 Bom L R 979 = 58 I A 158 = 53 A 103 = Ind Rul (1931) P C 182 = (1931) M W N 742 = 61 M L J 196 = 34 L W 459 (P C) = 132 I C 598 P C.

—The non-appearance of one of the defendants in the suit and his allowing plaintiff to fight his battle as against his co-defendant does not render the rule of *res judicata* inapplicable. 1932 A L J 1063 (1065-6) = 139 I C 161 = I R 1932 A 542 = A I R 1932 A 520; see also 35 C W N 1203 = 137 I C 46 = A I R 1932 C 271 = I R 1932 C 261 = A L R 1932 C 739 = 59 C 636.

—An issue raised by a defendant which is not strictly appropriate to the pleadings in the plaint cannot be held to have been a matter substantially in issue so as to operate as *res judicata* between that defendant and another defendant who elected to remain *ex parte* after perusal of the plaint alone. A I R 1928 Mad. 630 = (1928) M W N 321 = 110 I C 596.

## C. P. C. (1908) S. 11 (Contd.)

## (13) Parties—(Contd.)

(2) Co-defendants, Res judicata  
between—(Contd.)

## (1) General Principles—(Contd.)

—Decision as to a point pleaded by one deft and supported by another deft, operates as *res judicata* between them : 90 C 125.

—The rule of *res judicata* must be applied to co-defts with caution A I R 1925 C 431 = 84 I C 846 = 51 C 997.

—Principle of constructive *res judicata* does not apply as between co-defts : A I R 1926 C 568 = 94 I C 235 = 44 C L J 399 = 30 C W N 415.

## (2) Condition (1)—There must be conflict of interests between the Co-defendants

—For a discussion of case-law on the subject see A I R 1926 S. 282 = 96 I C 406.

—Conflict of interests is necessary to create a bar of *res judicata* between defts inter se : A I R 1928 R 315 = I R 1929 R 78 = 114 I C 686 = 6 R 575; see also, A I R 1925 L 434 = 26 P L R 504 = 7 L L J 195 = 90 I C 250; A I R 1921 L 47 = 3 L L J 223 = 62 I C 665 = 2 L 88; 57 I C 594; 55 I C 932; 35 P L R 1914; P L R 1900, p. 409 = 70 P R 1900; 140 P R 1890 and A L R 1933 R 260; and A L R 1933 O 566; and 11 M 204; and 15 M 264; and 14 M 324 (overruled in 28 M 457 but later relied on in A I R 1922 M 452); and A L R 1933 M 438.

—A decision affecting the right of one defendant as against another is a decision *inter partes* so as to be *res judicata*. A I R 1929 Oudh 275 = 6 O W N 281 = 4 Luck. 713 = Ind. Rul. (1929) Oudh 462 = 118 I C 766.

—But where there is no contest between defts inter se in a prior suit and the suit is dismissed as against them and they had no opportunity of filing appeal against a finding it was held that the decision in the prior suit was not *res judicata* in a subsequent suit by one of the defts. A I R 1933 O 550 see also 18 M 374 and 5 C W N 724.

—And note that when A, who is unnecessarily made a party and who raises pleas as against his co-deft, and the co-deft praying for A's removal on ground of being unnecessary party, but Court not acting accordingly, A will not be estopped from pleading incorrectness of decision between himself and his co-deft : 33 M L J 740 = 43 I C 860.

—A widow alienated certain occupancy-rights. The reversioners sued the vendees and the widow. The widow did not plead, but, on being examined as a party, denied both sale and receipt of consideration. The vendees now sued the widow for possession. Held that as the interest of the widow and vendees were conflicting in the previous suit, the question of the payment of a conside-



C. P. C. (1908) S. 11 (Contd.)

(13) Parties—(Contd.)

(2) Co-defendants, Res judicata between—(Contd.)

(2) Condition (1)—There must be conflict of interests between the Co-defendants—(Contd.)

ration was *res judicata* by reason of decision in that suit. 16 I C 80 = 103 P R 1912 = 157 P W R 1912 = 188 P L R 1912.

—In a prior suit wherein defendant's maternal grandfather was 1st defendant and the present plaintiffs were 2nd and 3rd defendants and were impleaded as trespassers the Court found the title to the disputed property in favour of the present plaintiffs:—*Held*, that the present suit was *res judicata* 11 M L T 71 = (1911) 2 M W N 306 = 11 I C 17.

—An adjudication, in a former suit, between two co-defendants, that one of them acquired a title by adverse possession, is *res judicata*, in a subsequent suit between one of them and the successor in title of other. 29 M 515 & 1907 U B R Civ Pro. 5 and A I R 1921 L 25 = 3 L L J 295 = 67 I C 881 & 1923 L 186 = 71 I C 481 & 30 I C 604 = 8 Bur L T 160; 44 I C 471 = 7 M L W 104 = 41 M 458 = 23 M L T 70 = 34 M L J 263.

—The decision in a prior litigation on a point which was not in active controversy between parties arrayed as co-defts. cannot operate as *res-judicata* in a subsequent suit between them. 7 L W 104 = 44 I C 471.

—In order that a decision may operate as *res judicata* between co-defendants it is necessary that there should be a conflict distinctly and expressly raised between them and that the decision of that conflict should be necessary for the disposal of the suit. 2 Pat L W 108 = 41 I C 468.

—Defendant No. 1 in the suit was a tenant in a previous suit for rent by the plaintiff against another tenant of the same property the defendant pleaded that he had obtained a renewal from the 2nd defendant who was also the 2nd defendant in that suit. The 2nd defendant was *ex-parte*. It was decided that the 2nd defendant had no right to manage the property. *Held* that the point as to the 2nd defendant's right to manage was *res judicata* between plaintiff and defendant No. 2 and binding on the 1st defendant though not as *res judicata*. A I R 1925 Mad 1025 = 85 I C 562.

—Where there is no conflict of interests between co-defts there cannot be *res judicata* between them: A I R 1924 M 711 = 34 M L T 147 = 47 M L J 20 = 1924 M W N 569 = 87 I C 1055; see also A I R 1923 A 169 = 77 I C 862; 63 I C 735; A I R 1921 L 25 = 3 L L J 295 = 67 I C 881.

—Where a co-deft was not a necessary party and there was no conflict of interests, the decision was not *res judicata*: A I R 1921

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C. P. C. (1908) S. 11 (Contd.)

(13) Parties—(Contd.)

(2) Co-defendants, Res judicata between—(Contd.)

(2) Condition (1)—There must be conflict of interests between the Co-defendants—(Contd.)

L 47 = 3 L L J 223 = 72 P L R 1921 = 62 I C 665 = 2 L 88.

—A decision in a suit in which there is no issue between co-defendants cannot operate as *res judicata* between them. Ind Rul (1929) All 676 = 117 I C 100.

—Persons who were impleaded in a previous suit as *pro forma* defendants, between whom and the other defendants in the case there was no contest or issue tried could not be bound by decision as against the other defendants 35 P L R 1914 = 17 P W R 1914 = 23 I C 381.

—If a judgment operates as *res judicata* among defts. one deft. must have had a right of appeal against all the other. 143 P L R 1915 = 57 P W R 1915 = 28 I C 238.

—A defendant in a suit who had a common case with the plaintiff therein and who was a proper party to the suit not only did not enter appearance but gave evidence therein as a witness supporting her co-defendant, who was in conflict with the plaintiff, and in that way repudiated the case which the plaintiff sought to make out against her co-defendant, who was in conflict with plaintiff *Held* that the rule of *res judicata* between co-defendants, was inapplicable to the case. There should have been a conflict between the co-defendants, but it cannot be said that in fact, there was any. 59 C 636 (640) = 35 C W N 1203 = 137 I C 46 = A I R 1932 C 271 = I R 1932 C 261 = A L R 1932 C 739.

—A consent decree as between co-defts will not operate as *res judicata* if there was no conflict of interest between co-defendants A I R 1921 Cal. 632 = 35 C L J 173 = 64 I C 603.

—A landlord and tenant were both co-defendants in the prior suit. The finding as to title in that suit was one between the third party on one side and the landlord and the tenant, on the other. In spite of the judgment and the decree in that suit, it is certainly open to the landlord as against the tenant to prove that the findings in it as to title and permissive possession are wrong. 55 M 601 (604) = 62 M L J 313 = 1932 M W N 87 = 35 L W 288 = 138 I C 34 = A I R 1932 M 298 = I R 1932 M 477 = A L R 1932 M 710.

—A Suit for pre-emption was dismissed on the ground that the sale was unauthorised.

—Subsequent suit by vendee against vendor, who was co-deft in the former suit for possession or in the alternative for recovery of consideration money was held not *res*



C. P. C. (1908) S. 11 (Contd.)

(13) Parties—(Contd.)

(2) Co-defendants, *Res judicata* between—(Contd.)

(2) Condition (1)—There must be conflict of interests between the Co-defendants—(Contd.)

*judicata*. 16 I C 127=42 P R 1912 = 123 P W R 1912=154 P L R 1912.

(3) Condition (2)—Necessity to decide that conflict in order to give relief to plff.

—It is only when the determination of the question as between co-defts is necessary for the determination of the plff's claim that the decision operates as *res judicata* as between those co-defts : A I R 1922 M 452 = 1922 M W N 526 = 31 M L T 370 = 16 L W 981 = 70 I C 769; see to the same effect : A I R 1924 M 604 = 46 M L J 298 = 34 M L T 301 = 1924 M W N 204 = 78 I C 921; and A I R 1928 M 630 = 1928 M W N 321 = 110 I C 596; and A I R 1925 A 546 = 23 A L J 453 = 88 I C 130 = 47 A 778; and A I R 1925 C 431 = 84 I C 846 = 51 C 997; and A I R 1928 R 315 = 6 R 575; and A I R 1931 A 695 = 1931 A L J 314 = 133 I C 785; and 134 I C 1171 = 25 S L R 493 = A I R 1931 S 170; and 35 C W N 1203 = A I R 1932 C 271; and 61 M L J 415 = 133 I C 721 = 34 L W 439 = 35 C W N 1217 = 8 O W N 973 = A I R 1931 P C 231; and 61 M L J 196 = 58 I A 158 = 1931 A L J 453 = 33 Bom L R 979 = 53 C L J 552 = 132 I C 598 = 1931 M W N 742 = 34 L W 459 = 35 C W N 661 = A I R 1931 P C 114 = 53 A 103 P C; and 101 C 324; and 11 C L J 461 = 61 C 554; and 22 B 245; and 22 A 386; and 25 B 74; but not otherwise 20 A L J 193 = A I R 1922 A 19 = 67 I C 523 = 44 A 334; and A I R 1923 B 203 = 73 I C 912 = 25 Bom L R 268 = 47 B 534; and A I R 1924 N 168 = 79 I C 22; and 8 A L J 807 = 11 I C 936.

—The co-deft. need not have been a contesting defendant in the first suit. It is enough if he were equally interested in the issue with plaintiff. A I R 1930 Nag 3 = 26 N L R 121 = Ind Rul (1930) Nag 73 = 121 I C 41.

—Where a deft joined in representative capacity but raised question which could only be raised in personal capacity, the decision is binding on him in a subsequent suit in personal capacity. A I R 1924 Rang. 279=3 Bur. L J 54=82 I C 423.

—Despite a dismissal of the plaintiff's suit, the decision can be held to operate as *res judicata* as between co-defendants if it was final and necessary to decide on the conflict between co-defendants. Case law reviewed. A I R 1926 Cal 568 = 44 C L J 399 = 30 C W N 415 = 94 I C 235.

—And it is not necessary that the issue between the co-defendants should have been the only ground on which the court could have decided the suit. A I R 1925 A 546 = 23

C. P. C. (1908) S. 11 (Contd.)

(13) Parties—(Contd.)

(2) Co-defendants, *Res judicata* between—(Contd.)

(3) Condition (2)—Necessity to decide that conflict in order to give relief to plff—(Contd.)

A L J 453 = 88 I C 130 = L R 6 A 385 Civ. = 47 A 778.

—But a decision not necessary for the decree in former suit or a decree dismissing the suit without any decision on merits would not be *res judicata* : 2 L L J 605.

—A decision which operates as *res judicata* as between co-defts carries a right of appeal. 16 C P L R 42.

—But the words in the decree which give the reason for the decision are no part of the decree proper and do not give any right of appeal. 2 Lah L J 605.

—In a suit for redemption brought by a *jenmi* if there is a contest as to which of the defendants is entitled to get the value of the improvements, it is the duty of the Court to decide the contest and declare as to who should be given the value of improvements. A I R 1929 Mad. 638 = Ind. Rul. (1929) Mad. 919 = 119 I C 167.

—A finding in a suit by third party against mortgagor and mortgagee that amount spent for defending title could be recovered by the mortgagee at the time of redemption is *res judicata* between mortgagor and mortgagee. A I R 1926 Oudh 281 = 29 O C 336=13 O L J 303 = 3 O W N 304 = 98 I C 542.

—In a suit by the first mortgagee from a Hindu widow against second mortgagee and purchasers, the only question was as to priority. The question of legal necessity could not, therefore, be *res judicata* in a suit by second mortgagee. 12 A L J 603=24 I C 84.

—Where in a prior suit the decision as to relationship between co-defendants was necessary to decide the suit. Held that that decision was *res judicata* in the subsequent suit. A I R 1924 Nag. 142 = 78 I C 987.

—But where in prior resumption proceedings the only question was as regards the proprietors' right as against the parties, held, that the finding did not operate as *res judicata* as among the defendants in the prior proceedings as regards issues between them. 13 R D 831 = Ind. Rul. (1930) Oudh 105 = 122 I C 329.

—The plaintiffs sued to recover certain property from the defendants. In a previous suit both the present plaintiffs and the defendant's grandfather B, were co-defendants; and B pleaded therein that the present plaintiffs were trespassers, held, the finding as to plaintiff's title in that suit is *res judicata* and cannot be disputed now. 2 M W N 1911, 306 = 11 Ind. Cas. 17 = 11 M L T 71; see also 7 I C 67.

C. P. C. (1908) S. 11 ( *Contd* )

( 13 ) Parties—( *Contd* )

( 2 ) Co-defendants, *Res judicata* between—( *Contd* )

( 3 ) Condition (2)—Necessity to decide that conflict in order to give relief to plff—( *Contd* )

—But a finding against a co-defendant on a question of title does not operate as *res judicata* if it was not necessary for the disposal of the suit, was not embodied in the decree and no decree was passed against the co-defendant against whom it was given. A I R 1925 Mad. 947=86 I C 384.

—Though an unnecessary finding can be *res judicata* if embodied in the decree : 33 M L J 740 = 43 I C 860.

—In a suit by a remote reversioner a finding that an adoption was not made out was recorded. The nearer reversioners sued to avoid the alienations effected by the widow who was alleged to have made the adoption. *Held*, that the finding as to adoption in the prior suit did not operate as *res judicata*. Ind. Rul. ( 1931 ) All. 737 = ( 1931 ) A L J 314 = 133 I C 785.

—Necessary findings on an issue regarding consideration in a previous suit by reversioners against a widow's alienees, to which widow was also a party as a defendant, are *res judicata* as between the alienees and the widow, in a subsequent suit by the alienees against the widow for possession. 157 P W R 1912 = 188 P L R 1912 = 103 P R 1912 = 16 Ind. Cas. 80

—In a suit for rent by co-sharer landlords it was held that the decision in the previous suit for rent could not operate as *res judicata* against the plffs on matters which were not or could not be in issue in that suit between them as *pro forma* debts, and the principal debts 53 I C 567.

—Where one of the debts, in a suit by a co-sheebait for better management of the debutter properties, denied the debutter character of the properties, it was held, that the decision on the question of *debutter* was only incidental to the suit, and did not amount to *res judicata* A I R 1925 Cal. 996 = 41 C L J 396=88 I C 616.

—An *ex parte* decree on a bond against two joint debtors does not operate as *res judicata* as to their respective liability in a contribution suit by one against the other. 57 I C 252.

—But where on death of K his brother sued his widow's brother's children and her daughter for a quarter share in the house of the deceased. The daughter remained *ex parte*. It was decided that K was the owner. The daughter then brought the present suit against her mother's brother's children for a declaration that the house belonged to K. The debts denied this. *Held* that the former decision

C. P. C. (1908) S. 11 ( *Contd* )

( 13 ) Parties—( *Contd* )

( 2 ) Co-defendants, *Res judicata* between—( *Contd* )

( 3 ) Condition (2)—Necessity to decide that conflict in order to give relief to plff—( *Contd* )

was binding on the present debts : 1932 A L J 1063 = A L R 1933 A 70.

—A deposit of money was made by S. in the firm K. which was latter on gifted away to her two brothers D and L. First, D sued the firm in the High Court for recovery of his moiety of the deposit, L. who was a member of the firm, admitted the claim; but the other partners, debt. Nos 1 and 2 contested it, while debts. Nos. 3 to 6 pleaded that they were not partners in the firm. The Court passed a decree against L and debts. Nos. 1 and 2 only. The K. firm ended in loss and ceased to work. L then brought the present suit against debts. Nos. 1 to 6, for dissolution of the partnership and taking of accounts. The debts. Nos 3 to 6 again contended that they were not partners in the firm. *Held*, that the relief given to D in the first did not require or involve a decision of any case between the co-debts, and that therefore the co-debts were not to be bound as between each other by the decree which D obtained. 40 Bom. 210 = 17 Bom. L R 1106 = 33 I C 423.

—But where question as to validity of a mortgage was distinctly raised and decided as between debts and the decision was necessary to give appropriate relief to plff the decision was held to operate as *res judicata* as between the debts : 17 A L J 225=49 I C 808.

( 4 ) Condition (3)—that the Conflict was finally decided.

—An issue in contest *inter se* between debts in previous suit operates as *res judicata*, if among other things, it was fully adjudicated upon. A I R 1927 Nag. 369= 103 I C 701.

—And the adjudication would not any less be an adjudication because its consequence was the dismissal of the suit than it would have been if its tenor had been the other way. 10 R 322 (331-2, 333) = 55 C L J 403 = 36 C W N 726 = 35 P L R 519 = 137 I C 328 = 34 B L R 1040 = 59 I A 247 = 1932 A L J 735 = 63 M L J 64 = 36 L W 1 = 9 O W N 647 = A I R 1932 P C 161 = I R 1932 P C 184 = A L R 1932 P C 260 ( P C ).

—Except where the suit is dismissed and the findings are neither embodied nor implied in decree. A I R 1924 Mad. 858 = 47 M L J 612 = ( 1924 ) M W N 867 = 22 L W 384 = 85 I C 868.

—Mere statements by a debt are not binding on co-debts when both are resisting the plff's claim on a common ground 75 I C 823.

C. P. C. (1908) S. 11 (Contd.)

(13) parties—(Contd.)

(2) Co-defendants, Res judicata between—(Contd.)

(4) Condition (3)—that the Conflict was finally decided—(Contd.)

—And a decree passed against some of the co-defts only does not operate as res judicata against the others : 25 C L J 322 = 21 C W N 693 = 34 I C 929.

—It may also be noted that where a suit is dismissed on appeal the adjudication by trial Court in favour of the successful deft does not operate as *res judicata* as against other co-defendants. A I R 1931 Oudh 375 = 80 W N 722 see to the same effect 5 C L J 653.

—Where the liability of the co-defts. inter se is left open in prior suit there is no res judicata ; 10 I C 839.

—Thus where in a suit for partition the defendants pleaded an independent right and the suit was dismissed without a definite finding as to their right *inter se* Held, in a subsequent suit for partition as among co-defendants that the decision in the prior suit did not operate as *res judicata*. A I R 1929 Rang. 162 = 7 R 80=Ind. Rul. (1929) Rang 219 = 117 I C 587.

—Similarly, where an issue, in a partition suit, as to the share of T being subject to the Mokurari interest of the other defts was not decided, there was no res judicata. 20 C W N 1177 = 39 I C 259.

—In order to see whether the rights of partition between co-defendants amongst themselves have not been determined the nature of a partition suit should be borne in mind. A I R 1926 Sind 282=96 I C 406.

—*Obiter*—Where, in prior suit for partition certain parties were arrayed as co-defendants and decision in that suit did not decide any question of partition amongst them *inter se*, that decision does not operate as *res judicata*. A I R 1926 Cal. 548 = 44 C L J 399 = 30 C W N 415 = 94 I C 235.

—The doctrine of constructive res judicata applies as between co-defendants : 108 I C 817 = A I R 1928 O 155 = 1 Luck 733; see also 33 M L J 740 = 43 I C 860.

—Withdrawal of suit is not a final decision and there is no res judicata. 15 M L T 245 = 23 I C 392; see also 7 Ind. Cas. 892 = 12 C L J 434. and 51 M L J 652 = 1926 M W N 793 = 98 I C 442.

—And where the pecuniary value of subsequent suit is beyond jurisdiction of Court trying previous suit there is no *res judicata*. 31 P W R 1916

—*Obiter*—Decision between co-defendants collusively or fraudulently obtained is not *res judicata*. A I R 1930 Cal. 787 = 34 C W N 1129 = 53 C L J 91 = 130 I C 369.

C. P. C. (1908) S. 11 (Contd.)

(13) Parties—(Contd.)

(2) Co-defendants, Res judicata between—(Contd.)

(4) Condition (3)—that the Conflict was finally decided—(Contd.).

—A puisne mortgagee sued for sale on his mortgage making plff, prior mortgagees parties to the suit. He alleged that the prior mortgages had been discharged and in the alternative he claimed redemption of those mortgages. The mortgagor pleaded that the prior mortgages were fictitious and were not subsisting mortgages. An issue was framed by the Court and decided in favour of the prior mortgages. In a suit by the prior mortgagees for foreclosure, of the mortgage the deft. pleaded that the mortgages were fictitious and without consideration. Held, that in order to give relief to plff, in the former suit it was necessary to decide the question raised by the mortgagor and the question having been finally decided could not be raised in the present suit. 2 U P L R (H C) 46=18 A L J 126=54 I C 974. see also 17 A L J 225 = 49 I C 808.

(3) Co-plaintiffs, res judicata between.

—An issue can be res judicata as between co-plaintiffs subject to the same conditions as in the case of co-defendants. Thus a judgment in a suit cannot be *res judicata* between the co-plffs therein in respect of a point on which there was no active contest between them. (1917) M W N 14 = 38 I C 213 see also 70 I C 232 = A I R 1921 Pat 218.

—And, as between co-plaintiffs a finding to become *res-judicata* must have been essential for the purpose of giving relief to the plaintiff in the previous suit. 36 B 207 = 14 Bom L R 128 = 14 I C 466.

—So also, there is no res judicata where a joint decree does not adjudicate upon the rights of the co-plffs. *inter se*. 14 Bom. L R 854 = 17 I C 205.

—Where an order dealt with two separate, cases, two appeals are necessary, although in the trial Court, Counsel received one fee for the two cases which he therefore considered to have been consolidated. But in a proper case, the appellant may be permitted to rectify the error by putting in a properly stamped appeal. A I R 1921 Lah. 346 = 53 P L R 1921.

—A decision, in a suit by father on behalf of himself and as guardian of minor daughters, not determining rights among plffs. *inter se* does not bar a subsequent suit by daughter for recovery of her share against the father. A L R 1933 B 417.

—D and R sued one C for recovery of certain ornaments, which were alleged to

C. P. C. (1908) S. 11 (Contd.)

(13) Parties—(Contd.)

(3) Co-plaintiffs, *res judicata* between—(Contd.)

belong to the estate of M, who was the father of D and the husband of R. The claim was decreed in favour of R on ground that she was absolute owner of the property. Later on D brought a suit against R claiming that the ornaments belonged to the estate of M and praying for a declaration that he was entitled to succeed as his son and heir. Held that the plea of *res judicata* must be disallowed, in as much as, in the first suit, there was no final adjudication as between R and D. 14 Bom L R 128 = 14 I C 466.

—In a claim suit the decision will be *res judicata* as between the judgment-debtor and the claimant in regard to the whole of the property involved provided the Court passing the decree had jurisdiction covering the value of the property in suit. It does not matter whether the judgment-debtor confesses judgment or denies the claim and the fact it is decided after trial of the issues is immaterial. But it will not be *res judicata* where the judgment-debtor though *pro forma* a party has no interest of any kind in the decision; but confession of judgment is not equivalent to absence of interest. 38 P W R 1913 = 89 P L R 1913 = 84 P R 1913 = 18 I C 820.

—Findings conclusive only against claimant and not against co-judgment-debtors —Order not binding on properties not the subject matter of claim case—see 21 C W N 222 = 44 Cal 698.

—Where in the previous suit A and B were rival pre-emptors and where in the decision of the suit a certain interpretation of the *wajib-ul-arz* was adopted and in the subsequent suit where A and B appeared as plaintiff and defendant as vendee and pre-emptor, it was held that the interpretation of the *wajib-ul-arz* incorporated in the decision on previous suit was binding on them. A I R 1925 All 663 = L R 6 A 296 Civ. = 88 I C 133.

—The decree, passed in a partition suit in which for giving relief to plaintiff if a question has to be decided as between the different parties, whether as plaintiff or defendant, must be binding on all. A I R 1930 All 287 = (1929) A L J 883 = 51 A 850 = Ind. Rul (1929) All 783 = 118 I C 175.

—But not if there is no conflict between the co-plffs and no adjudication of their rights inter se: 1932 A L J 621 = 139 I C 176 = A I R 1932 A 666 = 16 R D 476 = I R 1932 A 546.

(4) Explanation VI—Representative Suits.

(1) Applicability and Scope,

—Expl VI to the present section is much wider in scope than the corresponding Ex-

C. P. C. (1908) S. 11 (Contd.)

(13) Parties—(Contd.)

(4) Explanation VI—Representative Suits—(Contd.)

(1) Applicability and Scope—(Contd.)

planation of the Code of 1882, owing to the insertion of the words "public right" This insertion has been necessitated by S. 91 which is newly added to the present Code. Some of the cases under the old Code, therefore, eg. 6 C 49 and 6 C 31 are thus rendered obsolete by the present Explanation, as to the scope and operation of which see 31 M L J 26 = 35 I C 116.

—Where the plaintiff or the defendant sues or is sued in a representative capacity, which attaches to him under the general law, the decision binds the entire body whom he represents. These are cases of administrators, trustees, shebais, mutawallis, the Official Assignee for certain purposes, a Hindu widow representing her husband's estate, a holder of *inam* lands and the like. Where a person acting in a representative capacity has no such authority under the general law, if his litigation is to be a representative one to bind others, he must get some other authority to assume such representative character. Such authority need not necessarily be express, it may be implied. Such authority, if it is to be had from the court, is ordinarily obtained in the form of an order under O 1 r 8 C P C. But it need not necessarily be in that form. And, if the suit is filed in a representative form and it is allowed to proceed in that character without objection and if a general issue is framed so as to put in issue the right of the whole class, in whom it is alleged to exist, and the evidence adduced is of a general character and the findings in the judgment are general in nature, that judgment is binding on the whole class notwithstanding that no leave under O 1 r 8 has been obtained. 59 C 636 (643-4) = 35 C W N 1203 = 137 I C 46 = A I R 1932 C 271 = I R 1932 C 261 = A I R 1922 C 739.

—Their Lordships of the Privy Council have affirmed this view by holding that Expl VI. to s. 11 C P C is not confined to cases covered by O 1 r 8, but extends to include any litigation in which apart from the rule, parties are entitled to represent interested persons other than themselves: A I R 1933 P C 210; see also A I R 1924 M 88 = 18 I W 177 = 1923 M W N 545 = 75 I C 336; and 16 M L J 415 = 29 M 553; and A I R 1928 M 77 = 27 L W 216 = 54 M L J 8 = 107 I C 625 = 51 M 128 F B; and A I R 1922 O 1 = 9 O L J 111 = 66 I C 90 = 26 O C 82 and A I R 1927 M 645 = 52 M L J 611 = 101 I C 58; and 43 M 487.

—Cases holding contrary are therefore, no longer law see 16 C P L R 161; and 8 M 496; and 14 M 57; and 23 M 28; and 49 I C 796; and 24 C 385.



C. P. C. (1908) S. 11 (Contd.)

(13) Parties—(Contd.)

(4) Explanation VI—Representative Suits—(Contd.)

(1) Applicability and Scope—(Contd.)

—Application of Expl. VI implies a community of interest claimed by certain persons in good faith on behalf of themselves and others: 77 I C 1028 = A I R 1925 O 75; see to the same effect 75 I C 626 = A I R 1923 O 185 = 10 O L J 535 = 26 O C 133; and 8 A L J 345 = 33 A 493 F B and 4 U P L R (O C) 47; Good faith implies every attempt to bring all interested persons before the Court. A I R 1927 Mad 645 = 52 M L J 641 = 101 I C 58.

—Where the previous suit was by a person on his own behalf and on behalf of plff. in the subsequent suit and was bona fide. Held that subsequent suit was barred by Expl. V, 111 P R 1882 Note (c) Fol : 111 P R 1882 Note (b) And Expl. VI applies to those persons who were not actually parties to the previous suit but are constructively held to be parties because they were interested in the right in question: A L R 1933 L 586.

—If the person made a party is interested in the relief claimed, as were the plaintiff sued on his behalf as well as on behalf of a person who refuses to join him as a plaintiff such party will be bound by the decree 25 I C 284 = 12 A L J 751.

—Where in a suit the right claimed is not in common with parties in the second suit, and the rights in two suits are based on different sale-deed the former suit does not operate as *res judicata*. A I R 1930 All 9 = (1929) A L J 741 = Ind Rul (1930) All 147 = 121 I C 387.

—Where no order was made by Court making plaintiffs representatives the plffs cannot be treated as having brought the suit in representative character. Subsequent suit by another person that prior decree is not binding on him is maintainable. A I R 1930 Cal 787 = 34 C W N 1129 = 130 I C 369.

—Unless the cause-title shows that the suit is brought in a representative capacity, the suits cannot be treated as one brought in a representative capacity. A I R 1928 Mad 145 = 54 M L J 587 = 27 L W 769 = 109 I C 199.

—Thus where a suit was filed with sanction under s. 92 C P C but was later amended without sanction and stranger defts and relief not covered by s. 92 were added, and the suit was compromised by some plffs it was held by the Privy Council that the suit was not of a representative character: 32 C W N 482 = 27 L W 339 = 55 I A 96 = 26 A L J 464 = 54 M L J 609 = 30 Bom L R 774 = 48 C L J 55 = 108 I C 361 = 1928 M W N 926 = A I R 1928 P C 16 = 9 P L T 65 = 55 C 519 P C; see also 34 C W N 1129 = 53 C L J 91 = A I R 1930 C 787.

C. P. C. (1908) S. 11 (Contd.)

(13) Parties—(Contd.)

(4) Explanation VI—Representative Suits—(Contd.)

(1) Applicability and Scope—(Contd.)

—But once a representative suit, its nature or character is not changed by addition of a claim for damages. A I R 1928 Mad 77 = 51 M 128 = 27 L W 216 = 54 M L J 8 (F B) = 107 I C 625; nor by addition of parties who were not necessary parties in the previous suit: A I R 1928 Pat 436 = 7 Pat 840 = 9 P L T 493 = Ind Rul (1929) Pat 203 = 115 I C 235.

—The words "relief claimed" mean relief which the Court is bound to grant and not one within Court's discretion A I R 1931 Pat 1 = Ind Rul (1931) Pat 193 = 130 I C 785.

(2) Hindu Heirs and Adoptees

—If in a litigation a decision, fair and square, is obtained against the adoptive mother to the effect that she possessed no authority to adopt, that decision must be considered to be binding upon the adopted son by virtue of Expl. 6. A I R 1928 Oudh 155 = 1 Luck 733 = 108 I C 817. see also 1905 A W N 270 = 28 A 241 = 2 A L J 843; A I R 1922 C 321 = 49 C 45 = 25 C W N 585 = 33 C L J 421 = 64 I C 980; and A I R 1925 A 339 = 47 A 490 = 23 A L J 254 = 6 L R A (Civ) 201 = 87 I C 294; and 6 C L J 621; and 6 C L J 490; and 55 I C 407.

—But the decision against widow in former suit does not bind adopted son or other heir, if the widow had not conducted the previous suit for the benefit of the latter:

90 C 339.

—Suit to set aside alienation by father by one son does not debar similar suit by another after born son. A I R 1924 Oudh 141 = 10 O L J 353 = 27 O C 107 = 77 I C 353.

—Per *Dawson Miller*, C J—A Hindu woman cannot in a suit on a mortgage of property executed by her self deny that she had power to alienate the property and, therefore, the question of her power to alienate it is not in issue in the suit so as to bar it from being agitated by her heirs in a subsequent suit for possession after her death. A I R 1925 Pat. 625 = 87 I C 849 = 4 Pat. 510 = 6 P L T 634 = 88 I C 141.

(3) Hindu Joint Family.

—Where a suit is brought either by or against a joint Hindu family the other members of the family must be deemed to be parties to the suit through manager. A I R 1925 All 67 = 81 I C 737; provided the findings in such suit enure to the benefit or detriment of the entire family. A I R 1929 All 775 = Ind Rul (1930) All 273 = 122 I C 673; see also

168 A W N 1891.



C. P. C. (1908) S. 11 (Contd)

(13) Parties—(Contd)

(4) Explanation VI—Representative Suits—(Contd)

(3) Hindu Joint Family—(Concl'd)

—That is to say, in absence of fraud and collusion the decree in a suit in the interest of the whole estate and for benefit of all persons operates as *res judicata* in a subsequent suit. A I R 1923 All 338=75 I C 593.

—Thus a decision in a suit for partition by one member against the rest of members of a joint Hindu family operates as *res judicata* between the different members of the family. A I R 1925 Oudh 566 = 85 I C 792.

—Where it is necessary to establish or deny a custom in a family, and where pains have been taken to bring upon the record every branch of the family, and where that custom has been the subject of contest and thoroughly threshed out in the presence of all branches of the family, the matter cannot be again raised by the descendants of those branches, even though certain branches did not take an active part in the contest but contended themselves with admitting that the custom existed. 1 Pat L J 221=2 P L W 374=36 I C 960.

—Similarly, where a mortgage decree against members of joint family was set aside against some members, and there was again a trial and a subsequent comprehensive decree against all members was passed, a suit to set aside such decree does not lie. 29 M L J 165 (P C)=30 I C 849.

—But, where, in a mortgage suit by one member, against another member, the deft. instead of pleading that the property in question was that of the whole family, pleaded that it belonged to him and two other members who were not made parties it was held that he could not be said to represent the absent members and that the finding that the property was the joint family could not operate as *res judicata* in their favour: 62 M L J 141 = A I R 1932 M 207 = 35 L W 35 = A L R 1932 M 390 = 55 M 483.

(4) Hindu Joint Family—Manager.

—See also cases under (7) Minors—suits by or against infra. The manager of a joint Hindu family can both sue and be sued in his representative capacity, and a decision fairly obtained against him is binding on the other members of the family and operates as *res judicata* in a subsequent suit. 17 Ind Cas 290. see to the same effect 9 A L J 819 = 34 A 549 = 15 I C 126; and 9 A L J 844 = 15 I C 138 = 34 A 572; and 7 A L J 945 = 7 I C 902 = 33 A 71; and 1 O L J 456 = 25 I C 849; and 19 C W N 565 = 29 I C 156; and 81 I C 737 = A I R 1925 A 67.

C. P. C. (1908) S. 11 (Contd)

(13) Parties—(Contd)

(4) Explanation VI—Representative Suits—(Contd)

(4) Hindu Joint Family—Manager—(Contd)

—Even if the father is not described as manager. A I R 1930 Mad 206 = Ind Rul (1930) Mad 292 = 122 I C 164.

—Or even if the other members are not added as party-defts. A I R 1928 P 436 = 7 P 840 = 9 P L T 493; the decision will be binding on other members if the manager was in fact acting in his representative character: 47 I C 192=35 M L J 451.

—In other words, Expl. VI requires whether or not the leading member of the family has been acting either on behalf of minors in their interest or if they are majors with the assent of the majors A I R 1927 P C 56 = 51 B 450 = 54 I A 122 = 52 M L J 472 = 25 L W 789 = 25 A L J 319 = 31 C W N 570 = (1927) M W N 352 = 4 O W N 424 = 29 Bom L R 848 = 45 C L J 504 = 8 P L T 462 (P C) = 101 I C 44.

—Where the plff did not state in his plaint that he was suing in his capacity as manager, but a member of the family who was made a pro forma deft admitted in the present suit that the plff had brought the first suit as manager and with full consent of himself. Held that the present suit was barred by *res judicata*. 13 A L J 326 = 55 I C 846 = 42 A 359.

—Managing members of a joint Hindu family can effectively represent the other members of the family in a foreclosure suit. A I R 1921 Nag. 52 = 4 N L J 4 = 62 I C 610.

—Suit for redemption instituted by the head of a joint family dismissed—Subsequent suit for redemption by other members is barred by *res judicata*. 8 O C 233.

—A decree obtained by or against the manager of a Hindu family is binding upon minor members of the family if the manager was acting in the former litigation on behalf of the minors in their interests. But where the amount due for redemption of the second mortgage was but a fraction of the earlier amount and the father, who had paid the earlier amount refused to redeem the second mortgage in the suit for foreclosure by the mortgagee it was held that the father did grave injury to the family property in ignoring the interest of the son, and that the son had a right to bring a suit for redemption of the second mortgage: A L R 1933 N 95 = 29 N L R 77; see to the same effect 51 B 450 P C.

—All Hindu co-parceners are bound by the result of a suit brought by a Hindu father for recovery of possession of joint family land. A I R 1925 Pat. 308 = 78 I C 19.

—An *ex parte* decree against the managers of a joint Hindu family business operate as

C. P. C. (1908) S. 11 (Contd.).

(13) Parties—(Contd)

(4) Explanation VI—Representative

Suits—(Contd)

(4) Hindu Joint Family—Manager—(Contd)

*res judicata* against the junior members who cannot subsequently sue for a declaration of their immunity on the ground that the contract on which the decree was given was a wagering contract. A I R 1924 Lah. 26 = 43 P L R 1922 = 69 I C 783.

(5) Hindu Widow and Reversioners.

—Decision in a suit of a Hindu widow representing her husband's estate for or against her will bind the reversioner. A I R 1925 Mad. 1270 = 49 M L J 430 = 22 L W 178 = 91 I C 497 see to the same effect: A I R 1922 M 233 = 43 M L J 95 = 70 I C 387.

—A suit by widow to recover the inheritance is a representative suit. 9 C L J 346 = 1 I C 62.

—Whether the widow represented the inheritance against her may be gathered from the nature of the defence and the issues raised tried and decided in the former suit. 18 L W 491 = 73 I C 284.

—As to compromise decrees and decisions when binding on reversioners see 45 Cal. 590 (P C). and A I R 1914 P C 44 = 18 C W N 929 = 27 M L J 149 = 1 M L W 648 = 24 I C 309 and A I R 1924 P C 66 = 22 A L J 16 = 46 M L J 172 = 1924 M W N 86 = 19 M L W 107 = 5 L R P C 19 = 26 Bom. L R 198 = 51 Ind. App. 145 = 34 M L T 20 = 47 M 181 = 39 C L J 194 = 28 C W N 1050 = 79 I C 961; and A I R 1925 O 30 = 11 O L J 452 = 82 I C 747; and 40 A 487 = 1918 P C 70 = 45 Ind App 118 = 16 A L J 825 = 20 Bom L R 1048 = 28 C L J 394 = 22 C W N 914 = 35 M L J 459 = 24 M L T 236 = 8 M L W 212 = 1918 M W N 709 = 5 P L W 294 = 47 I C 207 P C.

—Where the plaintiff's father, the then reversioner, obtained a *bona fide* compromise decree in a former revisionary suit such decree operates as *res judicata*. A L R 1933 O 276.

—A compromise of suit by collaterals against widow does not bar a subsequent suit by the widow against daughter-in-law for share of estate: 23 P L R 1918 = 45 P W R 1918 = 44 I C 92.

—That is to say, a decision in a suit by some reversioners in the interest of the whole body binds all reversioners: 57 I C 541 = 7, O. L J 342 = 23 O C 238.

—In other words a decree in favour of a reversioner in a former suit operates as *res judicata* in the subsequent suit brought by other reversioners against the same defendants if they have a right in common arising out of the same cause of action A I R 1928

Lah 371 = 110 I C 725.

C. P. C. (1908) S. 11 (Contd.).

(13) Parties—(Contd)

(4) Explanation VI—Representative

Suits—(Contd)

(5) Hindu Widow and Reversioners—(Contd)

—Suit in which a decree is obtained against a widow by a reversioner is a representative suit on behalf of all the reversioners—Decree obtained in such a suit against a reversioner binds also all the reversioners. A I R 1929 Lah 295 = 10 Lah. 613 = 30 P L R 328 = Ind. Rul. (1929) Lah 753 = 118 I C 449.

—A decision in a suit by a reversioner to contest an alienation binds all the reversioners. A I R 1925 Lah 180 = 79 I C 484.

—During the lifetime of a widow, the reversionary right is a mere possibility and a suit to contest adoption or alienation by widow is always a representative suit; and the decision in such a suit is binding on all reversioners whether it is a decree after a contest or on a bona fide compromise (1907) Pun. L R No. 120 = 37 P R 1907; see also A I R 1922 P C 356 (358) = 49 Ind. app 342 = 31 Mad L T 200 = 1 Pat 741 = 69 Ind Cas 71 = 27 Cal W N 269 = 3 Pat L T 749 = 21 All L J 18 = 16 Mad L W 956 = 37 Cal L J 356 = 44 M L J 751 = 25 Bom. L R 634 = 4 L R P C 17.

—Decision in a prior suit challenging a gift by widow of a portion of husband's property is binding on all the reversioners though the suit is brought by one A I R 1925 All 483 = 23 A L J 329 = 6 L R A 303 Civ = 47 A 505 = 87 I C 235.

—A declaratory suit by a contingent reversioner is a representative suit on behalf of all reversioners. A I R 1925 Mad 86 = 47 M L J 545 = 20 L W 552 = (1924) M W N 730 = 83 I C 140.

—But a declaratory decree obtained by one reversioner that a certain alienation by the widow was inoperative beyond her life-time cannot operate as *res judicata* in favour of another reversioner, who subsequently sues for possession of the property concerned. A I R 1921 All 237 = 43 A 558 = 19 A L J 514 = 63 I C 524.

—Where the widow was quite competent to represent the estate and from the nature of the defence put forward and the questions tried, it was abundantly clear that not only she represented the estate but the trial was fairly and honestly conducted. It was held that the result of the litigation was binding on the reversioners. A I R 1924 Mad 301 = 18 L W 491 = 73 I C 284.

—A suit by a reversioner during the lifetime of the widow is a representative one and enures for the benefit of all reversioners and is equally operative to the detriment of all. A I R 1925 Mad 1162 = 49 M L J 143 = 22 L W 170 = 1925 M W N 572 = 91 I C 546. and 3 Pat L J 404 (408, 409) = 46 Ind Cas 392;

C. P. C. (1908) S. 11 (Contd.).

(13) Parties—(Contd.)

(4) Explanation VI—Representative Suits—(Contd.)

(5) Hindu Widow and Reversioners—(Contd.)

—Decision in a suit by presumptive reversioner for declaration that the will was fraudulent, binds on actual reversioner in the following suit. A I R 1928 Oudh 236 = 9 O L J 235 = 25 O C 189 = 69 I C 730.

—Decision against immediate reversioner is binding on actual reversioner in a subsequent suit. A I R 1922 Cal 321 = 49 C 45 = 33 C L J 421 = 25 C W N 585 = 94 I C 980.

—Decision in a suit by immediate reversioner against Hindu widow binds the whole body of reversioners. A I R 1922 All 301 = 44 A 19 = 19 A L J 749 (F. B.) = 64 I C 248.

—To a representative suit brought by a presumptive reversioner the actual reversioner was made a party-defendant. But she not only did not enter appearance but colluded with her co-defendant who was in conflict with the plaintiff, and supported his defence: *Held*, that the decree passed in the suit was, nonetheless, a decree passed in a suit instituted by the presumptive reversioner in respect of a private right claimed by her in common for herself and the actual reversioner within the meaning of Expl. VI to S. 11. C P C., and was binding on the actual reversioner, there being no fraud or collusion shown. The fact that the actual reversioner was a party to the suit is immaterial, because, even if she was not, she would have been bound by the decision in the suit so long as fraud or collusion was not shown. 59 C 636 (645-6) = 35 C W N 1203 = 137 I C 46 = I R 1932 C 261 = A I R 1932 C 271 = A L R 1932 C 739.

—A decision against one reversioner in a suit which is not representative does not operate as *res judicata* against another: A I R 1921 All 237 = 19 A L J 514 = 43 A 558 = 63 I C 524.

—Thus a finding as to a pedigree produced in a former suit by plaintiffs to prove their relationship as reversioners is not *res judicata* against other reversioners not claiming under plaintiff in the former suit where plaintiffs have been held not to be reversioners in that suit. A I R 1926 All 573 = 95 I C 178.

—Widow's suit for recovery of possession of property in her own right on being dispossessed does not bar subsequent suit by reversioner. A I R 1923 Cal 204 = 35 C L J 348 = 68 I C 322.

—Some heirs of the deceased owner brought a suit impleading an alienee from the widow and another co-heir as defendants. The first Court dismissed the suit as time barred. Plaintiffs appealed making the defendant, co-heir respondent who died pending appeal but his legal representatives were not

C. P. C. (1908) S. 11 (Contd.).

(13) Parties—(Contd.)

(4) Explanation VI—Representative Suits—(Contd.)

(5) Hindu Widow and Reversioners—(Contd.)

brought on record. The Appellate Court gave the plaintiffs a decree for share claimed by them. The legal representatives instituted another suit for recovery of his share. *Held*, that there was no subsisting decision of the Munsif on the question of limitation to operate as a bar to the plaintiff's suit on the other hand the Appellate Court's finding thereon operated as a bar in plaintiff's favour by precluding the alienee from raising the plea. 35 M L J 325 = 49 I C 156.

—Dismissal of suit by certain reversioners for setting aside alienation by sonless proprietor bars another suit for the same purpose by other reversioners who had been co-defendants in previous suit. A I R 1925 Lah 89 = 5 Lah 421 = 84 I C 477.

—A reversioner setting up adverse title against widow in a foreclosure suit against her cannot afterwards sue for possession after death on the allegation that he was the reversionary heir of a pre-deceased son of the widow, to whom she had succeeded as mother: 17 C W N 877.

—In a suit against a widow to enforce a mortgage by her, if there is a finding that the debt was binding on the estate and the sale proclamation states that the debt for which the property was being sold was for necessity and the whole right of the defendant was being sold in execution then it is the most proper construction of the proceedings in the suit and execution that the whole property was intended to pass to the purchaser. The widow would in such a case sufficiently represent the estate as to attract the doctrine of *res judicata*. A I R 1926 Mad 692 = (1926) M W N 319 = 51 M L J 73 = 95 I C 691.

—A suit brought by widow in possession of the whole estate holding as widow's estate to challenge an alleged adoption is a representative suit and all persons having a common interest (namely the reversioners in his case) must be deemed to have been represented through her under s. 11. Explanation VI of the Code of Civil Procedure. A I R 1925 All 79 = 46 A 637 = 22 A L J 690 = 87 I C 938; see also 27 I C 109 = 1914 M W N 903. The decree against a Hindu widow, is binding on her daughter, if it is not tainted with fraud or collusion. (1929) A L J 518 = Ind Rul (1929) All 1022 = 119 I C 446.

—Where after the death of three brothers a compromise was entered into between two widows dividing property equally and thereupon a third person sued to obtain a declaration that the brothers formed a joint Hindu family and that on the death of the widow

C. P. C. ( 1908 ) S. 11 ( *Contd* )

( 13 ) Parties—( *Contd* )

( 4 ) Explanation VI—Representative

Suits—( *Contd* )

( 5 ) Hindu Widow and Reversioners—( *Contd* )

of one of them the reversioner was entitled to succeed to the same and the same was decreed. *Held*, that the other widow having been a party to the declaratory suit by the reversioner it is not open to her daughter to say that she was entitled to take on the death of the other widow in preference to the reversioner. 27 A L J 518 = Ind Rul (1929) All 1022=119 I C 446.

—Suit by reversioner against transferees from widow—Subsequent similar suit against transferees of other portions of estate—Defendant's failure in previous suit to plead that plaintiff was not next reversioner does not bar that plea in subsequent suit. A I R 1925 All 585=47 A 929=23 A L J 653=89 I C 374.

( 6 ) Karnavan of Tarwad.

—A decision against a Karnavan when he has litigated in good faith and in representative capacity is binding on the tarwad; 40 M L J 338 = 13 L W 584 = 62 I C 598 = A I R 1921 M 520; see to the same effect : 20 M 129 F B; and 10 M 322; and 17 M 214; and 15 M 6; and 8 M 484; and 7 M 413; and 2 M 328.

—Suit by the *karnavan* of a *tarwad* was dismissed as the last owners followed *Makkathayam* law and plaintiff was not the proper owner. This decision was *res judicata* in the subsequent suit by a junior member of the *tarwad*. A I R 1923 Mad. 514 = 44 M L J 443=17 L W 322=32 M L T (H C) 146=72 I C 582.

( 7 ) Landlord & Tenant.

—Decree against one tenant-in-common binds all other tenants similarly interested with him. 34 C L J 302 = 66 I C 433 ( 2 ); but not if the co-tenants are not similarly interested and were not party to the suit. 2 U P L R (B R) 112.

—A suit for settling the amount of Kattubadi dues from an *agraharam* is one in which all the *agraharams* are necessarily interested and the decision therein binds all *agraharams*. 38 M L J 493 = 55 I C 984 = 43 M 487.

—A suit for rent by one co-sharer landlord against tenants impleading other co-sharers as defts, bars a subsequent suit by other co sharer landlord for rent, refusing to recognise the tenant : 48 I C 536.

—B sued certain persons for ejectment in Revenue Court. Defendants pleaded that they were proprietors of half the property in dispute and the other half belonged to J and others. The Revenue Court held that B was not the proprietor. She then brought the suit

C. P. C. ( 1908 ) S. 11 ( *Contd* )

( 13 ) Parties—( *Contd* )

( 4 ) Explanation VI—Representative

Suits—( *Contd* )

( 7 ) Landlord & Tenant—( *Contd* )

in the Civil Court for declaration of title. *Held*, that the parties to the former suit did not litigate in respect of the private right claimed in common for themselves and others. In order that Expl. VI might be applicable, there must be community of interest. *Held* that the dismissal of the suit did not bar the trial of the issue as to title as regarded J and others who had not been made parties to the previous suit. 8 A L J 345 F B = 9 Ind. Cas. 819 = 33 A 493.

( 8 ) Suits on behalf of Community.

—A former suit by representatives of a community bars a subsequent suit on the same question by others : 12 A L J 643 = 24 I C 97.

—But the dismissal of a suit brought by the members of a community to assert their personal right is no bar to a subsequent suit by them as representatives of the community to establish the right of the community. 18 A L J 150=76 I C 693; see also A I R 1931 Lah. 161=12 Lah. 497=32 Pun. L. R. 910 = 135 Ind. Cas. 657

—And a decision in a former suit against some members of a community prohibiting them from taking out processions was held not to operate as *res judicata*, as the streets being public streets, the community, as members of the public, had a right to take out their idol in processions and that the former suit was a suit against the wrong doers in their individual capacity and the decision in that suit did not operate as *res judicata*. 4 A L J 333 P C = 11 C W N 585 = 5 C L J 566 = 17 M L J 240 = 9 Bom. L R 663 = 2 M L T 204 = 30 M 185=34 I A 93.

—Suit on behalf of Mahomedan community for a declaration that the property in question is *wakf* is representative within the meaning of Expl VI. 53 I C 886.

—Decision that property is not *wakf* in a suit by B against A—Subsequent suit by B against A and C for declaration that property is *wakf*—Previous is binding not only between B and A but also as between B and C. A I R 1928 Lah. 888 = 113 I C 120, see also 17 I C 445.

—If a claim that a property is *wakf* is fought out on the merits and decided in the negative the persons in possession should not be harassed by succession suit by other persons making similar claim. A I R 1922 Oudh 1 = 9 O L J 111 = 26 O C 82 = 66 I C 90.



C. P. C. (1908) S. 11 (Contd)

(13) Parties—(Contd)

(4) Explanation VI—Representative Suits—(Contd)

(9) Suits relating to private right held in Common.

—Where a number of defendants in a case have a common interest and the contest is carried on by some of them *bona fide* against the plaintiff's claim the defendants who are *ex parte* are also bound by the decision. A I R 1924 Mad 571 = 46 M L J 471 = 19 L W 484 = 34 M L T 209 = 83 I C 985.

—All the proprietors of a village K, sued all the proprietors of another village for possession of *Bangar* land and obtained a decree. On appeal by some defendants alone, the decree of the Court below was confirmed and plaintiffs obtained possession in execution. *Held*, in a subsequent suit between the same villagers about the same piece of land, that the decision about title in the previous suit was *res judicata* as regards the whole and not merely of the portion that was confirmed on appeal. The difficulty in identifying the parties in the previous suit as the predecessors in title of the parties to the present suit is no bar to the application of the doctrine of *res judicata*, for in both cases the whole body of proprietors was involved and in the absence of fraud or collusion, the decision must be presumed to be *inter partes* 18 P. L R 1914 = 19 P W R 1914 = 21 I C 972.

—But it is now a settled law that Expln. VI is not confined to cases in which the prior suit was brought with the permission of the Court under O 1, R. 8 there of. The explanation does not become inapplicable because the prior suit was for the establishment of the plff's individual right in addition to the right claimed by him in common to himself and others in so far as his claim in respect of the latter right is concerned. 31 M L J 26 = (1916) 2 M W N 258 = 35 I C 116. See also cases under the present head—(1) General Principles.

(10) Suits relating to public rights.

—Where persons litigate *bona fide* in respect of a public right claimed in common for themselves and other members of the community interested in or claiming that public right, other members of the community must be deemed to be persons claiming under them and any subsequent suit in respect of that public right is barred by *res judicata*. 36 All 424 = 12 A L J 643 = 24 I C 97.

—Where the ownership of a well and certain adjoining stripes of land were in dispute between the trustees of a mosque and a Municipality and was decided against the

C. P. C. (1908) S. 11 (Contd)

(13) Parties—(Contd)

(4) Explanation VI—Representative Suits—(Contd)

(10) Suits relating to public right—(Contd)

former, they cannot in a subsequent suit by the public set up their right to it again. A I R 1924 All 178 = 21 A L J 882 = L R 4 A 583 Civ = 46 All 110 = 79 I C 310.

—Where a representative suit relating to public pathway was dismissed on the ground that no damage was proved it was held that the deft. in a subsequent suit under S. 91 plead that the pathway was private: 1918 M W N 175 = 8 L W 377 = 44 I C 367.

—Proof by the plaintiff that he and his servants had been compelled to go by a longer route and thereby incur additional expense is sufficient special damage entitling the plaintiff to sue for removal of an obstruction of a highway. Infringement of a pathway in which plaintiff had got a right with other villagers by reason of a grant implied from long user does not require special damage to give the plaintiff a cause of action. The mere fact that the pathway is described in the plaint as a public pathway would not make any difference. 23 C W N 91 = 49 I C 79.

(11) Suits under S. 92 C P C.

—A suit under s. 92 is a suit by the plaintiffs for themselves and as representatives of the general public under s. 11, Expl VI, all persons interested in the subject-matter of such a suit would be bound by the decision in the suit. A I R 1925 Cal 187 = 80 I C 44 see to the same effect: A I R 1925 M 1070; and A I R 1929 M 614.

—A decree, therefore, passed in a suit under s. 92, is binding also on all the worshippers at the temple. A I R 1925 Mad 1070 = (1925) M W N 505.

—But where in a suit to restrain interference with plff's right to exclusive worship the decree was in effect, personal there was no *res judicata*: 11 Bur. L T 249.

—And a second suit under s. 92 by the public is not barred by a prior suit under s. 5 Religious Endowment Act, where public not made party. A I R 1921 Cal 125 = 26 C W N 504 = 63 I C 418.

—Where a suit was filed with sanction under s. 92 but later amended without sanction and stranger defts and relief not covered by s. 92 were added, the compromise effected by some plff was not binding on all as the suit had lost its representative character: A I R 1928 P C 16 = 54 M L J 609 = 32 C W N 482 = 30 Bom. L R 774 = 108 I C 361 = 55 C 519 P C see also A I R-1930-C-787.



C. P. C. (1908) S. 11 (Contd)

(13) Parties—(Contd)

(4) Explanation VI—Representative Suits—(Contd)

(12) Trustees, executors, administrators, auction-purchaser, shebait, mortgagors, official receiver etc.

—A decree obtained on behalf of the trust by co-trustee against other co-trustee for the protection of the property binds not only the trustees who are parties to the suit but also all persons interested in the trust. A I R 1924 All 504=22 A L J 641 = L R 5 A 410 Civ=46 A 631=80 I C 406.

—In a properly represented trust suit persons not parties to a previous suit cannot ask the matter to be re-opened and retried. A I R 1926 Mad 267 = 49 M L J 746 = (1926) M W N 40=91 I C 924.

—Plaintiff filed suit claiming the suit land, as his own, but in the course of the trial, he admitted that the land was trust property. Court recording admission held that it was trust property and that both parties were jointly entitled to management. Held, that although in form this was a suit between two private persons, it was in effect a right claimed by plaintiff on behalf of the trust against the defendant and the defendant was bound by decision. A I R 1929 Mad 687 = Ind Rul (1929) Mad 526=116 I C 142.

—Expl. VI was applied in 11 Mad, 191 where successive suits were brought by different trustees of certain property. see also A I R 1924 M 88=75 I C 336.

—If a deceased person's estate is represented sufficiently for an effective decree to be made against it, that decree will bind all the deceased's legal representatives in their capacity as such whether they are on the record of the proceedings or not. A I R 1928 Mad 1199=Ind Rul (1929) Mad 666 = 117 I C 138.

—The Official Assignee is not the representative of a judgment-debtor who is adjudged insolvent A I R 1925 Mad. 68=48 M L J 530=88 I C 85.

—Decision against Official Receiver not representing general body of creditors and not defending in representative capacity does not bar a suit by some creditors against insolvents. 12 S L R 61=49 I C 421.

—The official liquidator represents the debenture-holders and creditors as well as the company. 1920 P C 56 (58) = 43 Mad 550 = 47 Ind. app. 33 = 33 M L J 441 = 28 Mad. L T 23 = 1920 Mad. W N 419 = 12 Mad L W 92 = 22 Bom. L R 568 = 18 All L J 489 = 2 U P L R 118 = 56 Ind. Cas 163 P C.

—An auction-purchaser who purchases in execution of a money decree is bound as between himself and the decree-holder by any previous litigation between the decree-holder

C. P. C. (1908) S. 11 (Contd)

(13) Parties—(Contd)

(4) Explanation VI—Representative Suits—(Contd)

(12) Trustees, executors, administrators, auction-purchaser, shebait, etc.—(Contd)

and the judgment-debtor whose interests he has purchased. A I R 1922 Pat. 63 = 1 Pat. 174=3 P L T 506 = (1922) Pat. 33 = 65 I C 266.

—Decision in a suit against a person for income of certain endowment property is binding upon him in a subsequent suit by him in his personal capacity. 60 I C 74 (All.)

—A Shebait who, to knowledge of the plaintiff has been dismissed from the temple or who has been guilty of gross negligence in conduct of the case does not represent the idol and does not bind the succeeding shebait 6 Cal L J 621 (633); and 11 Ind. Cas. 280=14 Cal L J 337.

—Persons interested in equity of redemptions not made parties—Subsequent suit impleading them is barred. 65 I C 654.

(5) Judgment in rem.

—Judgments in rem properly fall within the scope of Evidence Act, section 14 of which sets out those judgments in rem which amount to conclusive proof in any subsequent suit. As to judgments in rem, see also A I R 1928 S 121 and 7 W R 338; and 14 Moo. I A. 367. Previous decision does not bind strangers unless it were judgment in rem 10 C W N 1084.

—That is to say, judgment in rem binds the whole world and not merely the parties to the proceedings.

—*Obiter*—Judgments, orders or decrees coming within s 41 Evidence Act are final for certain limited purposes on footing of their being judgments in rem, because where parties to a litigation submit a question for the decision of the Court decision on being so invited binds all parties for the future. A I R 1926 Cal 568=44 C L J 399=30 C W N 415 =94 I C 235.

—A testator died leaving two widows A and B and a collateral C. Under the will A was entitled to the whole property B sued A for Rs. 60000 as dowry debt impleading C as debt C did not appear. The suit was compromised between A and B and a deed was duly registered. C then brought a suit for a declaration that the alienation by the above deed was void and would not affect the plff's reversionary rights after the death of A. Held that the compromise-decree in the previous suit did not bind C, as the ordinary rule of res judicata did not apply to the case, and the judgment in the previous suit passed on the compromise was not a judgment in rem: 14 P R 1912 = 96 P W R 1912 = 157 P L R 1912 = 141 I C 486

## C. P. C. (1908) S. 11 (Contd)

## (13) Parties—(Contd)

## (6) Litigating under the same title.

—See also cases under this section—(4) Directly and substantially in issue—(B) Might and Ought.

## (1) General Principles.

—The expression "same title" in s. 11 means the "same capacity." The words "litigating under the same title" mean that the demand should have been made of the same quality on the second suit as in the first one. A I R 1933 O 475 see to the same effect 124 I C 161 = 33 C W N 876 = A I R 1930 C 47 = 57 C 258.

—If the parties are litigating in the same capacities it is immaterial whether the transfer attacked in one case is a mortgage and in the other case a gift i. e. whether the subject matters of the two suits are or are not the same : A I R 1933 L 43; or whether causes of action are same or not : A I R 1929 All 400 = Ind. Rul. (1929) All 594 = 116 I C 738.

—Where a plaintiff litigates not under the same title as in the former suit, the suit will not be barred, 142 P R 1892; see also 12 A L J 619 = 24 I C 25 and 14 I C 12.

—Where parties in the two suits were different, issues were different and parties who were common to the suits were litigating under different titles the former suit was not *res judicata*. A I R 1929 Pat. 173 = 8 Pat. 107 = Ind. Rul. (1929) Pat. 375 = 117 I C 167.

—When there is a difference in the personnel between the plaintiffs in a prior and a subsequent suit, the principle of *res judicata* cannot apply. A I R 1931 Lah 161 = 12 Lah 497 = 135 I C 657.

—When property is surrendered *pendente lite* between the preliminary decree and the final decree the alienee deriving his title under such surrender is bound by the terms of the preliminary decree. A I R 1925 Nag. 132 = 22 N L R 110 = 82 I C 452.

—Where plaintiff bases his title to a property in two different suits in two different capacities the subsequent suit is not barred by *res judicata*. A I R 1931 All 21 = (1930) A L J 1254 = Ind. Rul. (1931) All 237 = 130 I C 13.

—The section does not apply where a person sues in different capacities in two suits, though the cause of action is the same : A I R 1924 A 355 = L R 5 A 177 Civ. = 78 I C 402 = 46 A 230. and 1931 Lah 610 = 132 Ind. Cas. 657. and (1932) 35 Mad. L W 350 (353).

—Prior suit contested in private capacity does not bar a subsequent suit in public capacity. A I R 1926 Oudh 578 = 3 O W N 645 = 1 Luck 483 = 13 O L J 696 = 97 I C 853.

—Similarly a prior suit in individual capacity does not bar a subsequent suit in repre-

## C. P. C. (1908) S. 11 — (Contd)

## (13) Parties—(Contd)

## (6) Litigating under the same title—(Contd)

## (1) General Principles—(Contd)

sentative capacity. A I R 1924 Lah 275 = 69 I C 528; see to the same effect : A I R 1922 M 394 = 16 L W 122 = 1922 M W N 464 = 31 M L T 125 = 43 M L J 448 = 69 I C 15; and 18 A L J 150 = 76 I C 673.

—Where a party sues or is being sued or added as legal representative of a deceased person, the decision is not binding on him in personal capacity : A I R 1925 M 59 = 75 I C 623; see also 87 P R 1919 = 52 I C 545.

—Where a person sued as guardian *ad litem* of a minor claimant to certain property and subsequently set up a title by heirship to the same property, *Held* that the second suit was not barred 118 P L R 1914 = 1 P R 1914 = 22 I C 955.

—Decision against trustee litigating in his private capacity is not *res judicata* in a subsequent suit by or against him in his character of trustee 35 L W 350 (353) = 1932 M W N 321 = 137 I C 707 = I R 1932 M 435 = A I R 1932 M 589 = A L R 1932 M 468; see also 13 Bom L R 989 = 12 I C 577 = 36 B 29.

—Where a trustee fails to bring a suit for which he is permitted under s. 5 of Charitable and Religious trusts Act 1920 and an order against him is passed, he can bring a regular suit for a declaration that the property is held by him in his private capacity or in the alternative, that it is not held in trust which is governed by Act XIV of 1920. (*Mukerji J. Contra*). A I R 1929 All 506 = 51 A 805 = (1929) A L J 653 = Ind Rul (1929) All 865 = 118 I C 513.

—A decision against a person in his individual capacity does not bind his successor in the office of trustee 24 C W N 690 = 58 I C 705.

—A person was sued as trustee of an idol but he defended the suit in his personal capacity and was unsuccessful; later on he sued on the same grounds as his defence in the prior suit. The suit is barred. 60 I C 74.

—First suit in the capacity of vendees does not bar a subsequent suit in the capacity of reversioners 68 P R 1915 = 151 P W R 1915 = 31 I C 159.

## (2) Landlord and tenant.

—Prior suit for rent based on lease does not bar a subsequent suit for land and rent based on title : 22 M 323.

—A sued B for possession of certain land, alleging that he had let B into possession under a written lease, which lease had been determined. Defence, a permanent tenancy at a fixed rent. The letting relied on by the plaintiff was not proved, and the suit was dismissed. A was allowed to bring

C. P. C. ( 1908 ) S. 11 (Contd)

( 13 ) Parties—(Contd)

( 6 ) Litigating under the same title—(Contd)

( 2 ) Landlord and tenant—(Concl'd)

a second suit, claiming possession of the land as the owner thereof : 8 B 174 F B; see to the same effect : 2 N L R 94; and A I R 1921 L 17 = 3 L L J 215 = 63 I C 717; and A I R 1927 R 319 = 105 I C 361 = 5 R 527.

—Dismissal of a suit for rent by a Raiyat, in which the deft. pleaded raiyati right in himself, does not bar a subsequent suit to eject the deft. 22 I C 273.

—Similarly, where a suit for rent was dismissed on the ground that no relationship of tenancy existed, a subsequent suit on title for ejectment is maintainable : A I R 1921 C 355 = 33 C L J 334 = 61 I C 201; see to the same effect, 8 I C 715; and A I R 1924 C 460 = 72 I C 655.

—And where a suit for rent was dismissed on the tenancy not being proved, the plff. sued the deft. as trespasser for possession with mesne profits at the rate of rent claimed in the prior suit. Held that the suit was maintainable and it was not for the same thing as the first under a different name 9 W R 594.

—A lessee who claims under a title previously created by a lessor is not bound by a subsequent finding between the lessor and third parties A I R 1924 Mad 576 = 19 L W 369 = 34 M L T 160 = (1924) M W N 378 = 83 I C 965.

—A decision by a Court recovering *thakkari* arrears that rent was not paid by the sub-tenant to the tenant in proceedings for sale of the tenure to recover *thakkari* paid to the tenant is not *res judicata* in a subsequent suit by the purchaser against the sub-tenant for the recovery of the rent payable by the sub-tenant. A I R 1924 All. 910 = L R 5 A 230 Civ. = 78 I C 373.

### ( 3 ) Mortgage Suits.

—A decision against mortgagor in his capacity as mortgagor is not *res judicata* against mortgagee, the two interests being distinct. A I R 1926 Oudh 1 = 1 Luck 25 = 3 O W N 55 = 13 O L J 323 = 91 I C 1015.

—Suit for redemption as donee of mortgagor if dismissed does not bar a subsequent suit for redemption by the same plaintiff as heir of mortgagor. A I R 1927 Bom 87 = 28 Bom L R 1507 = 99 I C 814. and 9 Ind Cas 572 = 8 A L J 324 = 33 A 463.

—Decision in a suit for possession as proprietor does not bar a subsequent suit for redemption by the same plff. A I R 1929 Lah. 833 = 1 Ind Rul. (1930) Lah. 52 = 120 I C 420.

—First suit in mortgage to the extent of the consideration paid does not bar a second suit for enforcement of subrogation rights

C. P. C. ( 1908 ) S. 11 (Contd)

( 13 ) Parties—(Contd)

( 6 ) Litigating under the same title—(Contd)

( 3 ) Mortgage Suits—(Concl'd)

acquired by discharge. 24 M L J 28 = (1913) M W N 369 = 13 M L T 266 = 18 I C 610.

—Dismissal of a mortgage suit as being time-barred does not bar a subsequent suit for rent by mortgagee against mortgagor : 50 I C 765.

—A plff. first suing to denounce a mortgage by widow of her husband's immoveable property can bring a subsequent suit for redemption. 52 P L R 1917 = 172 P W R 1916 = 37 I C 447.

—Suit by the nearest reversioner was decreed against a rival claimant. The rival claimant, subsequent to the institution of the above mentioned suit redeemed a usufructuary mortgage existing on the property. The rival claimant subsequently to his redemption sued for recovery of the possession of the property. The decision in the first mentioned is *res judicata* as regards the last mentioned suit as the party redeeming had no title to redeem. A I R 1925 Oudh 607 = 2 O W N 710 = 90 I C 569.

—A son is not precluded from questioning a mortgage on the ground of want of consideration by a finding against the father that mortgage is supported by consideration, when the son does not claim through his father but by virtue of his birth as co-parcener in family. A I R 1931 Mad. 550 = ( 1931 ) M W N 263 = 34 L W 598 = 135 I C 367.

—Purchaser in execution of a mortgage decree is not affected by a decision in a suit subsequent to the mortgage, though previous to the purchase. A I R 1922 Mad 390 = 77 I C 922.

### ( 4 ) Vendor and Purchaser.

—Where the defendant appeared in the former suit as an intervenor, and plaintiff's claim was dismissed as against him, a subsequent suit by the same plaintiff against the same defendant to recover possession on the ground of purchase from the admitted owners, is not barred 24 W R 248. J and his two minor sons purchased a certain property at an auction sale. K subsequently brought a suit against J. alone for possession of a portion of the property and obtained a decree. D, one of the sons of J., later on brought the present suit against K to recover possession of the property on the basis of the sale certificate. Held, that the suit was not barred by *res judicata*. 14 Ind. Cas. 745.

—When pending a suit between the plff's vendor and the 2nd deft. about the mesne profits of a certain land, the plff. purchased the said land and it was decided therein that the 2nd deft was the owner and was not liable to account for any mesne profits to the plff's vendor and the plff. now filed the present suit to recover possession of the said land. Held,

C. P. C. (1908) S. 11 (Contd.).

(13) Parties—(Contd.)

(6) Litigating under the same title—(Contd.)

(4) Vendor and Purchaser—(Contd.)

that the decision in the prior suit was *res judicata* against the plff. and the 2nd deft. 36 Bom 189, dist. 16 M L T 158 = 1 L W 587 = 25 I C 133.

—Plff. claimed certain money on a promote and a sale-deed by which the deft had transferred his rights under the pro-note to the plff. The suit was dismissed. In a subsequent suit by plff. upon a covenant of indemnity forming part of the conveyance. *Held*, the plff. was not suing the deft. under the title which was the basis of the previous suit and that the subsequent suit was not, therefore, barred by *res judicata*. 42 I C 895.

(5) Other Suits.

—The section will apply where the litigants in the later suit occupy by succession, irrespective of the various forms of succession, the same position as the litigants in the former suit; 18 Bom. L. R. 768 = 36 I C 505 = 40 B 606.

—Thus a plff. suing on gift can bring a subsequent suit as heir: 43 I C 395.

—Plff. basing his title upon residuary interest in the property can bring a subsequent suit as owner of such property. Ind. Rul. (1929) Lah. 612 = 117 I C 68.

—Suit as reversioner does not bar a suit as owner A I R 1930 Lah. 284 = Ind. Rul. (1929) Lah. 84 = 120 I C 532.

—First suit as heir does not bar a subsequent suit as reversioner; A I R 1925 C 1195 = 29 C W N 861 = 89 I C 207.

—Where the reversioner sued the alienee and obtained decree for a moiety upon a finding that the sale was not for legal necessity, but the suit was dismissed as regards the other moiety on the ground that it had not passed to the plaintiff, and afterwards this moiety too having passed to the plaintiff he again sued the deft. for recovery of this moiety. *Held*, that the decision in the previous suit that the sale was not for legal necessity was *res judicata* as the parties were litigating under the same title on both suits, *viz.* the plff. as the owner of the reversion and the defendant as purchaser from the widow. 18 C W N 888 = 27 I C 226.

—A decree in favour of a reversioner cancelling a deed of gift by the widow is effective in respect of all the rights of the reversioners who may hold the property by virtue of the deed of gift or by way of inheritance. A I R 1928 Oudh 359 = 3 Luck. 487 = 5 O W N 265 = 12 R D 72 = 112 I C 169.

—Decision against father is not *res judicata* against son where the son is not entitled to the lands during father's lifetime and is

C. P. C. (1908) S. 11 (Contd.).

(13) Parties—(Contd.)

(6) Litigating under the same title—(Contd.)

(5) Other Suits—(Contd.)

not claiming through the father. 34 B L R 944 = A I R 1932 B 456 = 139 I C 210 = I R 1932 B 475 = A L R 1932 B 1054.

—First suit to recover property on basis of adoption does not bar a subsequent suit on basis of will: 12 A L J 441 = 25 I C 175; see to the same effect. 7 M L J 288.

—A suit by plaintiff for possession of his share after partition is not barred by the dismissal of his prior suit for recovery of specific plot of the land based on his exclusive title. A I R 1926 Mad. 1128 = 24 L W 453 = (1926) M W N 724 = 98 I C 524.

—A Hindu son suing for partition under a will can maintain a subsequent suit for partition as member of joint family: A I R 1923 B 467 = 25 Bom. L. R. 797 = 77 I C 92. and 1928 Cal 459 = 47 C L J 436 = 32 C W N 1022 = 110 I C 60.

—Where the grounds of title in the subsequent suit were not available in the first there is no *res judicata*: 21 I C 984.

—Where in a previous suit between the husband and wife it was decided that there was no divorce, on the husband's suit for restitution of conjugal rights against his wife and father-in-law the question of divorce was *res judicata*. A I R 1924 All. 815 = 78 I C 1049.

—First suit by shebait for better management of the temple against other shebait does not bar a suit by a member of the dedicator's family against other members for a declaration that the properties are debutter: A I R 1927 P C. 128 = 53 M L J 123 = 54 I A 238 = 29 Bom L R 961 = 1927 M W N 448 = 25 A L J 681 = 45 C L J 605 = 31 C W N 1063 = 101 I C 873 = 54 C 770 P C.

—A suit property was decided to belong to the common ancestor. One of the depts, with two other members of his family brought a suit for partition. *Held* that, although the two members were not parties, the decision in the former suit, that the property belonged to the common ancestor, would be *res judicata*, since the two members though not parties to previous suit were not interested in denying common ancestor's title: A I R 1929 A 500 = I R 1930 A 323 = 122 I C 867.

—A decree against a person as heir of another wrongly described as dead is not binding on such person when he actually becomes such heir and sues for recovery of possession. 37 I C 881.

—Decision as to predecessor's title arrived at after the title had vested in the successor does not bind the successor. A I R 1928 Mad 635 = 110 I C 548.

—Suit on pro-note was dismissed on the ground that it was false. Deft. then prosecuted plff. for forgery. Plff. then sued for



**C. P. C. (1908) S. 11 (Contd.).****(13) Parties—(Contd.)****(6) Litigating under the same title—(Contd.)****(5) Other Suits—(Contd.)**

damages for malicious prosecution. Held that the finding as to the genuineness of the pronote in the previous suit was not *res judicata* in the suit for malicious prosecution, inasmuch as plff. was not litigating under the same title in both the suits, 47 I C 141.

—Where a suit was filed in the Revenue Court for partition, a subsequent suit in the Civil Court for declaration of title as against strangers, is not barred. A I R 1931 Oudh 21 = 7 O WN 1106 = Ind Rul (1931) Oudh 93 = 14 R D 669 = L R 11 A 385 Rev = 129 I C 173.

—On the death of the judgment debtor pending execution, the widow was ordered to be brought on record and she did not appeal against the order. She can however, subsequently contend that property against which execution was sought was gifted to her by judgment-debtor. A I R 1931 Mad 303 = (1931) M W N 48 = 33 L W 359 = Ind. Rul. (1931) Mad 562 = 131 I C 610.

—Where previous decision was based on erroneous view of law and parties in subsequent preemption suit were not claiming under the same title, there was no *res judicata*: A I R 1923 Lah 16 = 84 I C 257.

—First suit for possession does not bar a subsequent for possession on title 16 I C 431.

—Suit by M. for possession as heir of P alleging person in possession not P's widow —Failure to establish relationship and dismissal of suit—Second suit to declare alienation by widow invalid. see 37 All 45 (P. C.) = 27 I C 892.

—Decision on a question of title in a suit under s. 9 of Sp. Rel. Act whether bar to second suit on title see. 20 O C 237.

**(7) Minors; Lunatics, Insolvents, Suits by or against.**

—See also cases under this section—(4) Explanation VI—Hindu Joint family—Manager and (10) Under whom they claim—father and son. Decree obtained against Hindu father fully representing his minor son is binding on the latter. A I R 1929 Bom. 213 = 53 B 444 = 31 Bom. L R 395 = Ind Rul (1929) Bom 488 = 118 I C 788.

—N, a minor, on attaining majority, repudiated a mortgage of his property executed by his guardian B in favour of K and himself, and mortgaged a portion of it to D. K sued N and S for a declaration that his mortgage was binding on N and obtained a decree. He then brought a suit for sale on the mortgage. It was held, (1) that D who claimed under N was entitled to repudiate the mortgage of K, (2) that the decision in the declaratory suit operated as *res judicata* in the mortgage suit and was binding on all persons claiming

**C. P. C. (1908) S. 11 (Contd.).****(13) Parties—(Contd.)****(7) Minors; Lunatics, Insolvents, Suits by or against—(Contd.)**

through him under transfers made after the suit but not on D. because the mortgagee rights of D having come into existence before the declaratory decree were not affected by it and the property could only be sold in execution of decree in K's mortgage subject to these rights: 22 A L J 155 = 78 I C 226 = A I R 1924 A 474.

—Finding as to bad character of step-mother in guardianship proceedings does not operate as *res judicata* in subsequent civil suit between step-mother and minors, because minors were not parties to prior proceedings. 137 I C 296 = 33 P L R 96 = 1 R 1932 L 333 = A I R 1932 L 232.

—Suit by minor's guardian to recover property from vendee sold in excess of that sanctioned by Court dismissed—Fresh suit by minor after majority is not barred. A I R 1926 Lah 289 = 7 Lah 129 = 27 P L R 310 = 95 I C 342.

—Alienation by grand-father—Vendee suing minor grandson for possession—Guardian *ad litem* confessing judgment—Subsequent suit for possession by minor not barred. 15 P L R 1912 = 36 P W R 1912 = 13 Ind. Cas. 20.

—Negligence of guardian *ad litem* in prior suit is a good answer to a plea of *res judicata*: 1913 M W N 690 = 25 M L J 379 = 14 M L T 189 = 21 I C 15 see to the same effect: 53 I C 412; and A I R 1927 O 354; and 26 A L J 777 = A I R 1928 A 447; and 49 I C 306 = 41 A 182; and 23 A L J 901 = 90 I C 749 = 48 A 44.

—A minor is not bound by a decree passed against him if he is able to show that his guardian was guilty of gross negligence. Thus where the guardian deliberately setting up a false plea of adoption neglected to put forward the rights of the minor under a will of which he was aware: *Held*, that the decree obtained under those circumstances against the minor would not operate as *res judicata* against him. 27 M L J 486 = 26 I C 16.

—What will be deemed to be negligence on the part of the guardian will depend upon the facts of each case. 103 P R 1917 = 155 P W R 1917 = 6 P L R 1918 = 43 I C 354.

—Thus remaining *exparte* has been held not to be negligent: 3 O L J 585 = 19 O C 119 = 36 I C 811.

—Guardian omitting to bring forward a former judgment as an answer to a plea of *res judicata* is not acting negligently as would vitiate decision against minor: 47 M L J 700 = 85 I C 812 = A I R 1925 M 258.

—A minor after attaining majority sued for a mere declaration that decree passed against him was not binding on him. He alleged gross negligence on the part of his guardian who had conducted the case on his



## C. P. C. (1908) S. 11 (Contd.)

## (13) Parties—(Contd.)

## (7) Minors Lunatics, Insolvents, Suits by or against—(Contd.)

behalf and confessed judgment. The claims were to set aside certain alienations in favour of the ancestor of the minor. *Held*, that suit was not competent for the plff could ask for other consequential reliefs. 117 P L R 1916 = 37 I C 195.

—The omission of the guardian to raise any other defence on behalf of his ward which he might and ought to have raised does not preclude the ward from raising that defence in a subsequent suit, otherwise the minor would be made to suffer for the laches of his guardian. A I R 1925 Ondh 633 = 87 I C 238.

—A compromise without the court's sanction under O 32 R 7 cannot operate as res judicata. 36 Bom. 53 = 13 Bom L R 963 = 12 Ind. Cas. 543; and 1917 P C 146 = 45 Cal. 17 = 44 Ind. app. 229 = 16 All L J 1 = 20 Bom L R 38 = 26 Cal L J 557 = 22 Cal W N 74 = 34 M L J 1 = 22 Mad L Tim 403 = 7 Mad L W 94 = 1918 Mad W N 16 = 4 Pat L W 1 = 42 Ind Cas 849 P C;

—When a decree is obtained against a minor who was represented by a person incompetent to act as guardian, as such the decree is not binding on him as res judicata. 7 O L J 164 = 2 U P L R 96 = 56 I C 299.

—Decree against minor represented by guardian *ad litem* when not binding. Lim. Act Arts 75, 132, see (1919) M W N 82 = 51 I C 724.

—Applicability of doctrine to the mother of a minor illegitimate son claimed maintenance till minor attained majority or during the life-time of plaintiffs. The decree was passed allowing maintenance till majority only. No plea was raised as to the maintenance of the minor after majority. *Held*, a second suit by the minor on attaining majority for future maintenance would not be barred. A I R 1929 Mad 545 = 29 L W 696 = 56 M L J 673 = Ind Rul (1930) Mad 142 = 121 I C 126.

—Application by guardian *ad litem* to be discharged on the ground of minor's attaining majority.—No notice to minor served.—Order that minor had attained majority is not *res judicata*. A I R 1927 Pat 271 = 6 Pat 388 = 8 P L T 730 = 102 I C 449.

—An omission to appoint a guardian-ad-litem to one of the defendants, a lunatic, does not vitiate the whole proceedings as against all parties. Where a party had not been properly represented in a suit, the decision there in will not be *res judicata* against him in a subsequent suit. A person who knows about the infirmity of title of his transferor cannot claim the benefit of S. 51 of the T. P. Act. 22 I C 673.

## C. P. C. (1908) S. 11 (Contd.)

## (13) Parties—(Contd.)

## (7) Minors Lunatics, Insolvents, Suits by or against—(Contd.)

—Suit by donor's heirs challenging gift on ground of the donor's insanity, making donor and donee defts, does not bar a subsequent suit by donor to cancel the gift on the same ground. A I R 1927 All 365 = 100 I C 527.

—A suit was brought against plff. for possession of certain property which it was alleged he had sold. The plff. pleaded that he was a man of unsound mind and the vendee had got him to execute the deed at the time when he was not in his senses. The Court decided that the plff. was not of unsound mind. The plff. brought the present suit for a declaration that the decree was not binding on him as he not being a man of sound mind, was not a "party" to the prior suit. *Held*, that the plff. not having been adjudged a person of unsound mind when the former suit was brought he was a "party" to that suit and the decision operated as *res judicata*. 13 A L J 562 = 29 I C 595.

—The decision of the Insolvency Court that the debt is time-barred is not *res judicata* as between the insolvent and the surety, 1932 A L J 868 = A I R 1932 A 610 (613).

—Decision against insolvent after insolvency is no bar as against Official Assignee who is not made a party. A I R 1924 Mad 689 = 20 L W 63 = (1924) M W N 491 = 47 M 633 = 83 I C 960.

—Suit against Receiver on allegations already found against plaintiff is barred. 22 Bom L R 1126 = 45 B 99 = 59 I C 421.

## (8) Pro forma or Nominal Party.

—Mere presence of a party on record is not sufficient to constitute *res judicata*. Record—Mere presence of party on, is not decisive of the question when plea of *res judicata* is raised. 55 M 483 (494) = 1931 M W N 1323 = 35 L W 35 = 62 M L J 141 = 137 I C 616 = A I R 1932 M 207 = I R 1932 M 413 = A L R 1932 M 390; for a finding against a person who was joined only as a *pro forma* or nominal party e. g. under O. 1, r. 10 and against whom no relief was claimed cannot operate as *res judicata* 10 L L J 239 = 110 I C 394 = A I R 1928 L 493; see to the same effect; 109 I C 287 = 7 Pat 566 = A I R 1928 Pat 603; and 14 B 408; and 25 B 74; and 17 B 341; and 25 B 589; and 1 P L R 1917 = 157 P W R 1916 = 65 P R 1916 = 35 I C 543; and 60 P R 1894; and 11 Pat L T 458 = A I R 1930 Pat 355; and 17 A L J 625 = 50 I C 740; and 31 I C 861. so also, there is no *res judicata* against a defendant who was not a necessary party to the former suit: 20 A L J 251 = 66 I C 62 = A I R 1922 A 217 = 44 A 428; see to the same effect: 45 I C 318; and 2 C W N 513 = 25 I A 151 = 25 C 833; and 3 Bom L R 179 = 25 B

C. P. C. (1908) S. 11 (Contd.).

(13) Parties—(Contd.)

(8) Pro-forma or Nominal Party—(Contd.)

589; and 2 Bom L R 511=25 B 74; and 19 C W N 1280=27 I C 954=21 C L J 157; and 8 W R 366.

—But a deft. cannot escape the bar of *res judicata* merely because he is described as *pro forma* if in fact he actively contested the suit: 21 C L J 157=19 C W N 1280=27 I C 954.

—Similarly, a person cannot avoid the bar of *res judicata* on the ground that he was called to assert his right on one property only and not on others; for he was bound to set up his right to other properties as well: 5 L W 659=1917 M W N 336=38 I C 184.

—And it may be said generally, that a person though a *pro forma* party, will be bound by the decision if he was interested in the relief claimed: 20 L W 979=85 I C 689=A I R 1925 M 319; see to the same effect 12 A L J 751=25 I C 284; and 8 M L J 139=21 M 373.

—A person, claiming to be purchaser at an execution sale of the house of one B, sued B and S alleging that he (plaintiff) had become owner of the house by virtue of the auction sale and was entitled to realise rent from S who had, however, continued to pay it to B even after the date of the said sale. In that suit an *ex parte* decree was passed in the first instance. But that was set aside on the application of B and the suit was eventually dismissed. In a subsequent suit between B and S relating to the same house, that the question of B's title was not decided in the prior suit, and that the decision therein did not operate as *res judicata* against S. S was only a *pro-forma* defendant in the prior suit; no relief was sought against him therein; and he had no right of appeal. 1932 P C L 825 (2) (828) (Civ.) = A L R 1932 I 825 (2) (Civ.)

—Similarly, where in a suit for redemption it was held that A was not a necessary party and under no obligation to make a defence, this decision did not bar a plaintiff claiming through A following the property—14 Bom. 176. But see 11 A L J 844=20 I C 372 in which F, one of three mortgagors brought a suit for redemption in 1904. He made the other mortgagors *pro forma* defendants to the suit and obtained a decree for redemption on the condition that he should pay the mortgage-money within six months, and in case of default he should be absolutely debarred to redeem the property. F failed to make the requisite deposit within the time and the decree-debarring him to redeem was made absolute. In 1910, the other mortgagors brought another suit for redemption and made F a *pro forma* defendant. *Held* that the second suit was barred by *res judicata*. see also 45 I C 300.

—Suit for arrears of rent by one co-sharer making other co-sharers *pro forma* defendants under s. 148-A, Bengal Tenancy Act—Decision as to amount of rent does not operate

C. P. C. (1908) S. 11 (Contd.).

(13) Parties—(Contd.)

(8) Pro-forma or Nominal Party—(Contd.)

as *res judicata* in similar suit brought by other co-sharers A I R 1930 Pat 355 = 11 P L T 458 = Ind Rul (1930) Pat 209 = 122 I C 529.

—The plff. sued her husband for recovery of her dower debt. The deft. contested the amount. It appeared that in a previous suit by a creditor of the husband against his wife, to which the husband was a *pro forma* deft. the validity of a deed executed by the husband and mentioning the amount of dower was questioned but up held by the Court. *Held*, that the decision did not operate as *res judicata* for the decision of the issue in this case. The burden of proving that the dower was prompt is on the wife. 41 All 562 = 17 A L J 625 = 50 I C 740

—In a previous suit, two of the present plffs. who were minors were not parties and were not adequately represented by their father, who was a plff. there whilst the third plff. was merely a *pro forma* deft. therein and took no active part in it. *Held*, that the third plff. was not bound by the result of the former suit, to which he was a *pro forma* deft. and the decree, speaking generally, appeared to have been in his favour as one of the defts. 16 Bom L R 616 = 39 Bom 29=26 I C 444. see also A I R 1929 M 213 = 56 M L J 175 = 29 M L W 125 = 52 M 275 = 115 I C 801; and 31 A 572 = 13 C W N 1182=10 C L J 318 = 6 A L J 822 = 11 Bom. L R 1225=6 M L T 279 = 19 M L J 631 = 36 Ind. App. 168 = 3 I C 864.

(9) Same Parties

(1) General

—It has been made sufficiently clear by the discussion of the case-law above that one of the conditions of *res judicata* is that the matter in dispute must have been decided between the same parties—see also 11 L L J 56; and 71 I C 808 = A I R 1923 N 177; and 11 P L R 1915=246 P W R 1915=27 I C 642; and 9 C L J 441 = 20 I C 815 = 18 C W N 954

—As to the meaning of the words "same parties" see under (1) General Principles *supra*. The words "same parties" do not necessarily mean parties arrayed on opposite side. 137 A W N 1881 = 4 A 92; see also 42 P W R 1910 and cases under (2) Co-defendants and (3) Co-plaintiffs *supra*. A party not bound by a previous proceeding between third parties cannot also take advantage of findings in his favour in those proceedings: 20 L W 798=85 I C 454 = A I R 1925 M 300.

—A judgment not *inter partes* may, however, be admissible in evidence to show that the matter in question had formerly been set up by one of the parties and failed 41 M L J 223=14 L W 128=1921 M W N 576=67 I C 971 = A I R 1921 M 248=44 M 778 F B (overruling

**C. P. C. ( 1908 ) S. 11 ( Contd )****( 13 ) Parties—(Contd)****( 9 ) Same Parties—(Contd)****( 1 ) General—(Contd)**

36 M 141 = 24 M L J 469; and 20 M L J 546 = 33 M 483; see to the same effect : A I R 1928 Pat 615 = 8 Pat 122; and 7 C L J 563; and 22 C 533; and 105 P W R 1912 = 142 P L R 1912 = 141 C 66.

—But observations in a judgment relating to a different matter, though connected, cannot bind a third party, and the judgment itself cannot be evidence against him : 32 L W 850 = 1930 M W N 396 = A I R 1930 M 751 = 59 M L J 321.

—Where the plffs. to a suit are not proved to have been parties to an earlier suit between the defendants and certain third parties the findings in the earlier suit do not operate as *res judicata*, against plffs. 50 I C 333.

—Where respondent was called upon to enter his defence and his name is not entered in the plaint nor in the original decree and was not a party to the appeal, it was held that he cannot be regarded as a party to the suit simply because he was originally directed to be made a party and was called upon to show cause. 2 U P L R (B R) 64.

—But a person who is a party to the suit but who is omitted from the formal order by oversight is barred from suing again. A I R 1930 P C 22 ( P C ) = 58 M L J 171 = ( 1930 ) A L J 70 = 51 C L J 142 = 31 L W 182; 7 O W N 119 = 34 C W N 201 = 32 B L R 505 = (1930) M W N 355 = 57 I A 24 = Ind Rul (1930) P C 24 ( P C ) = 121 I C 200.

—Where some new parties are added to a subsequent suit in addition to all the parties to the prior suit, the decision in the previous suit is not *res judicata*. A I R 1927 Lah 259 = 100 I C 849.

—Thus where the prior suit was between A and B and the subsequent suit was between A on the one hand and B and other persons interested in the result of the suit on the other hand. It was held : that the parties in the two suits not being same, the subsequent suit was not barred. A I R 1927 Lah 900 = 9 Lah L J 270 = 28 P L R 683 = 103 I C 858.

—Similarly, it has been held that *res judicata* against some of the defts. is not *res judicata* against all. 33 A 493 = 8 A L J 345 = 9 I C 819.

—But it should be noted that parties which are common to the two suits cannot escape the bar of *res judicata* : A I R 1929 A 500; see also 9 Pat L T 493 = A I R 1928 Pat 436 = 7 Pat 840; and 12 P R 1903.

—Where the lower Court's order dismissing an application was not open to appeal, and where a fresh application for the same relief was made to the High Court by the pre-

**C. P. C. ( 1908 ) S. 11 (Contd)****( 13 ) Parties—(Contd)****( 9 ) Same Parties—(Contd)****( 1 ) General—(Contd)**

vious applicant and another and it was urged on additional grounds, it is not barred A I R 1925 Lah 309 = 7 Lah L J 6 = 86 I C 246.

—And where in a previous suit certain defendants are discharged owing to a compromise between the plaintiffs of that suit and the contesting defendants the compromise decree does not operate as *res judicata* in a subsequent suit between the plaintiffs and the aliences from the discharged defendants. A I R 1925 Oudh 650 = 2 O W N 684 = 90 I C 408.

—Decision in previous suit between same individuals but brought by plff. in another capacity is not a decision between same parties. 19 C W N 967 = 43 Cal 158 = 32 I C 701.

—As also a decision against an unnotified deft and his representatives where such notice is required by law. 1930 M W N 1187 = I R 1931 M 597 = 131 I C 171 = A I R 1931 M 192.

—And the rule of *res judicata* cannot apply to a case in which the parties occupied in the earlier litigation positions which are the reverse of their contentions in the litigation in question. 25 M L J 324 = 14 M L T 229 = ( 1913 ) M W N 776 = 5 L W 259 = 21 I C 219.

**( 2 ) Administration Suits.**

—In proceedings for Letters of Administration decision as to relationship of parties is *res judicata* between parties to proceedings and their successors : 36 C W N 583 = A I R 1932 C 631 = 141 I C 320.

—But the decision of Court prior to Deceased Brother's Widow's Marriage Act ( 7 Edw. and C 47 ) that the widow had no *locus standi* to apply for Letters of Administration to the estate of her first husband's brother whom she married in 1916 after the former's death was held not to be *res judicata* and not to debar her from presenting a fresh application in 1923 for Letters of Administration since the parties to the two application were really not the same in the legal sense. A I R 1924 Pat 621 = (1924) Pat 138 = 2 Pat L R 125 = 6 P L T 303 = 83 I C 951.

**( 3-4 ) Decree-holder, Judgment-debtor, auction-purchaser.**

—Purchaser is not estopped from questioning consideration for incumbrances though notified in proclamation. A I R 1922 All. 443 = 20 A L J 722 = 68 I C 790; see also 8 I C 846 = 9 M L T 207.

C. P. C. (1908) S. 11 (Contd)

(13) Parties—(Contd)

(9) Same Parties—(Contd)

(3-4) Decree-holder, Judgment-debtor, auction purchaser—(Contd)

—Where sale in execution was confirmed in spite of injunction to stay execution and review application was rejected ordering that regular suit was necessary, in subsequent regular suit, the question whether suit could lie was held not *res judicata* between judgment-debtor and decree-holder purchaser unless the decree-holder purchaser was party to or was heard when order made. A I R 1922 Nag. 189 = 68 I C 693.

—A declaratory suit by claimant against decree-holder and judgment-debtor was dismissed and the attached property was purchased by the stranger at auction. In a suit by the purchaser for possession it was held, (1) that a party could not set up a title at variance with what had been determined in a previous litigation although his opponent in the suit before the Court had not been a party to the previous litigation; (2) that although there was not *res judicata* as between the parties to this litigation, yet as between the parties to the previous litigation, the decree in the previous litigation was binding; (3) that the decree affirmed the right of the claimant's sons and as the purchaser purchased in execution of that decree against them, his title to the property was sufficient to entitle him to a decree. 20 I C 815 = 19 C L J 441 = 18 C W N 954.

(5) Landlord and Tenant.

—A decision in a suit between two co-tenants for division of holding is not binding on the landlord who is no party to the suit and a subsequent suit by the landholder for a declaration that one of the two co-tenants is his sole tenant is not barred by the principle of *res judicata*. 16 R D 90 = 13 U D 43 = 13 L R 15 (Rev.)

—Similarly, a decision against one tenant cannot operate as *res judicata* against co-tenants, who were not parties thereto, unless it was a representative suit. 1 Ind. Cas. 184 = 13 Cal. W N 270; and 16 Ind. Cas. 698 = 24 M L J 79 = 1913 Mad. W N 96.

—So also a previous suit between tenant and *thekadar* as to the amount of rent, does not bar a second suit between the tenant and *zamindar* himself. 2 U P L R (B R) 108 = L R I A 26 (Rev.)

—And a decision between landlord and tenant as to what villages were included in the tenure does not bind the person holding subordinate interest in the tenure: A I R 1928 Pat 615 = 8 Pat 122 = 9 P L T 627 = 113 I C 681.

—Lessee holding under-lease granted prior to suit is not bound by the decision against lessor in that suit if not party to it.

C. P. C. (1908) S. 11 (Contd)

(13) Parties—(Contd)

(9) Same Parties—(Contd)

(5) Landlord and Tenant—(Contd)

A I R 1921 Mad 708 = 41 M L J 392 = 14 L W 387 = (1921) M W N 679 = 65 I C 979.

—To affect rights of the lessees conferred by leases, it would have to be shown that all the then lessees entered into an agreement that the plots marked out should be put down for those granted under the respective leases, and in the absence of any such agreement any events happening subsequent to the grant of the lease between the lessor and the subsequent lessees will not affect the rights created before them. 24 C W N 746 (P C.)

—Plaintiff sued for a declaration that the defendants had no right of easement. The defendants were the representative tenants of the village, the villagers of which claimed the right of easement. The proprietors of the village were not parties to the suit. The defence which was based upon a grant alleged to have been made by the proprietors of the village was upheld. It was held that suit by plaintiffs against the proprietors of that village for a declaration of their *Niskar* rights and for confirmation of their possession in that right was not barred by the previous suit. A I R 1927 Cal. 97 = 43 C L J 180 = 94 I C 5.

—Where a suit was filed for determination of rent in Revenue Court, it was found that the defendants held under a third person.

—The decision in this suit cannot be *res judicata* as to another suit for possession against the third person as the suit shall not be between the same parties. A I R 1926 All. 77 = 88 I C 927.

(6) Mortgage Suits.

—Where a suit by a mortgagee to enforce his mortgage as against a purchaser of the hypotheca was dismissed on the ground that the mortgage had been paid off and where a suit was subsequently filed by the plaintiff to enforce the mortgage against a person who had purchased the hypotheca from the defendants in the previous suit but prior to the institution of that suit. It was held that the decision in the prior suit was not *res judicata* and did not bar the subsequent suit. A I R 1925 Mad 358 = 47 M L J 728 = 20 L W 740 = 84 I C 995.

—A purchaser, in execution of puisne mortgagee's decree against the mortgagor and his sons who in the suit had done nothing to affirm a first mortgage on the property and where the validity of the first mortgage was not in question in the puisne mortgagee's suit, is not debarred from challenging the validity of the first mortgage as the sons would themselves have done, in a suit by first mortgagee to enforce his mortgage, though the sale to purchaser was subject to first mortgage. A I R 1928 Mad 557 = 111 I C 909.



C. P. C. (1908) S. 11 ( *Contd.* ).

( 13 ) Parties—( *Contd.* )

( 9 ) Same Parties—( *Contd.* )

( 6 ) Mortgage Suits—( *Concl'd.* )

—A decree obtained on a mortgage executed by one of three brothers does not bar the defendants therein, who had purchased the mortgaged property from all the brothers after the mortgage, from raising subsequently a question of paramount title based on the fact that, whereas the mortgage was by one of the brothers only, their purchase was from all. 36 C W N 1138 (1143).

—But where a person was made a party to a suit on a mortgage but was dismissed from it on the ground of having repudiated his right to redeem and set up a paramount title adverse to that of the mortgagor and the mortgagee the decree in the suit though made in his absence, would operate as *res judicata* so as to preclude him from subsequently claiming a right of redemption of the mortgaged properties. 57 I C 980 following 12 C 414 P C.

—Property of a deceased mortgagor devolving upon an insolvent over whose estate a receiver has been appointed, a decree for foreclosure in favour of the mortgagee in a suit to which the receiver has not been made a party, is not *res judicata* against him, even though he has been heard on petitions and objections against the decree. A I R 1927 P C 108=52 M L J 734=54 C 595=54 I A 190=29 Bom L R 882=31 C W N 741=45 C L J 544=25 A L J 621=(1927) M W N 485=39 M L T 5=26 L W 268 (P. C.)=101 I C 442.

—Suit by mortgagee against mother in personal capacity—Second suit against her son—No bar. 2 L W 212 = 27 I C 930.

( 7 ) Municipal Council, Local Board, Govt. Secretary of State, Collector, Pujari.

—Decision against Collector in proceedings under Land Acq Act does not operate as *res judicata* against the Secretary of State: 56 B 501=34 B L R 791=I R 1932 B 571=140 I C 171=A I R 1932 B 386=A L R 1932 B 819.

—And a dismissal on the ground of limitation of a suit brought by a person against a Union Chairman and the President of the taluk Board for the cancellation of an order issued by the former forbidding the erection of warps by the plff, on a particular land on the ground that it was a public street, does not bar a subsequent action brought by the same plff, against certain private individuals, who claimed the land as their private property, for establishing his title thereto for the removal of certain koradus erected by them hereon. 1 L W 673=25 I C 434.

—But a former decision against a Municipal Council operates as *res judicata* in a

C. P. C. (1908) S. 11 ( *Contd.* ).

( 13 ) Parties—( *Contd.* )

( 9 ) Same Parties—( *Contd.* )

( 7 ) Municipal Council, Local Board, Govt. Secretary of State, Collector, Pujari—( *Concl'd.* )

subsequent suit by its Chairman—Dist. Municipalities Act 5 of 1920 Ss. 41 and 249, A L R 1933 M 761.

—A previous suit against the *pujari* of a temple for his ejectment on the ground that he was in possession of land as *bhondedar* had ceased to render services, defended by *pujari* on the ground that he was *dholidar* but decreed by Court does not bar a subsequent suit by two worshippers for declaration that the land was the property of the temple. A L R 1933 L 583.

—Where a suit for declaration that plff was entitled to the Asari Sheriff Office was dismissed it was no bar to a subsequent suit by plff against Govt. for money alleged to be due to him as person entitled to the Office: 14 L W 128 = 1921 M W N 576 = 41 M L J 223 = 67 I C 971 = 44 M 778.

( 8-9 ) Partition Suits.

—A suit to re-open decree on ground of unequal partition is not maintainable 27 M L J 76 = 16 M L T 544 = 1 L W 607 = 24 I C 294 (P C) = 41 I A 247 = (1914) M W N 948 = 21 C L J 23 = 17 Bom L R 1 = 19 C W N 531.

( 10 ) Pre-emption Suits.

—The decision in the pre-emption suit that no real sale had taken place is no bar to an adjudication upon that point in a subsequent suit by the vendee for possession against the vendor, though both the latter were co-defendants in the pre-emption suit. 42 P R 1912 = 123 P W R 1912 = 154 P L R 1912 = 16 Ind. Cas. 127. see to the same effect. 3 A 152.

( 11 ) Vendor and Purchaser.

—Setting aside a Hindu father's alienation on son depositing a certain sum does not bar a suit by the purchaser for refund of balance of purchase money: A I R 1927 All 421=100 I C 745.

—Where a person possesses an interest, acquired before the suit, in an estate, which interest is not represented by any of the parties to the suit, the decision will not be *res judicata* against him. Thus a vendee from a party will not be bound. 35 L W 429 = 1932 M W N 160 = 139 I C 329 = I R 1932 M 556 = A I R 1932 M 238.



C. P. C. ( 1908 ) S. 11 (Contd)

( 13 ) Parties—(Contd)

( 9 ) Same Parties—(Conclld)

( 12 ) Other Cases.

—Dismissal of a suit by the endorser of promissory note as against the maker and the endorser, does not bar a fresh suit against endorser. A L R 1933 M 534=1933 M W N 587.

(10) Under whom they or any of them claim.

(1) General

—The words "under whom they claim" refer to privies of the parties. Privy is created by (1) one person succeeding to the position of another e. g. assignee or grantee or by (2) holding in subordination to that other e. g. landlord and tenant. The ground of privity, therefore, is property, not personal relation. For purposes of *res judicata* the term "privity" should be restricted so as to bind a person only as regards the interest represented by the party in the former suit at the time of the suit: A I R 1931 N 183. see to the same effect 20 M L J 752 = 1910 M W N 26 = 5 I C 732 = 33 M 459.

—The test of privity is the property to which the person lays claim, and not the source of such property. 62 M L J 116 = 35 L W 73=1932 M W N 31=A I R 1932 M 198=55 M 40 (49).

—A party who is privy to a decree is bound by it: A I R 1933 L 12; see to the same effect: A I R 1925 A 574 = 85 I C 302; and 14 Bom. L R 854 = 17 I C 205; and 5 B L R 327 N; and 8 A L J 807 = 11 I C 936; and 1921 P H C 369 = 70 I C 232 = A I R 1921 Pat 218; and A I R 1925 A 246 = 83 I C 231; and 1927 M W N 743 = 108 I C 401 = A I R 1928 M 246.

—Irrespective of whether he had notice of such decree: 53 I C 143 see also 14 Bom L R 128 = 14 I C 466 = 36 B 207.

—A decision, therefore, in a former suit, unless tainted by fraud or procured by undue influence against the predecessor in title of the plaintiff will be binding on him. A I R 1922 All. 19 = 44 A 334 = 20 A L J 193=67 I C 523 see also 33 C 1001 = 10 C W N 955.

—There can be no *res judicata* where the parties in the subsequent litigation ranged on the opposite sides claim through the same person. A I R 1925 Oudh 164=78 I C 65; see to the same effect 7 C W N 482 = 30 I A 71 = 30 C 556 P C.

—The phrase "parties under whom they or any of them claim" contemplates a title not in existence at the date of the prior suit.

—Thus a person who has assigned away his interests in certain property cannot represent his assignee in a suit relating to that property instituted after the assignment. 26 P R 1893, see to the same effect 73 I C 711; and

C. P. C. ( 1908 ) S. 11 (Contd)

( 13 ) Parties—(Contd)

( 10 ) Under whom they or any of them claim—(Contd)

( 1 ) General—(Contd)

51 P R 1894; and 32 C 357; and 110 I C 548 = A I R 1928 M 635; and 79 I C 621 = A I R 1924 N 422; and 47 M L J 728 = A I R 1925 M 358=84 I C 995; and 40 M L J 65 = A I R 1921 M 30 = 44 M 232; and A I R 1932 M 238; and 9 Bur L T 88 = 32 I C 610; and 16 M L T 158=25 I C 133; and 7 W R 703; and 8 A 324.

In other words, S. 11 of the C P Code contemplates a case where a party derives title from a party to the previous litigation subsequent to the previous litigation though there is nothing to suggest that where the plff. has derived no title subsequent to the previous suit, the subsequent suit should involve the consequence of being dismissed. 23 C L J 215 = 29 I C 464.

—A donee of a house cannot be estopped as being privy in estate by a judgment obtained in an action against the donor commenced after the date of the gift. 35 B 297 = 13 Bom L R 268 = 10 I C 890. following 15 A 108.

—Resumption and re-settlement of a portion of a permanent *ganti* lease at a fixed rent. Transferee's rent suit against the settlement holder dismissed by the privy Council on the ground that the permanent rights of the tenant were not abrogated by the resumption.

—After the expiry of the settlement, the farming lease granted by the Government to the plaintiff fixed at a certain rent which was never impugned. Held that plaintiffs were entitled to the fair and equitable rent. Privy Council decision was no bar. 33 I C 420 (Cal).

—Where a Muhammadan widow was in possession of her husband's estate in lieu of dower and a suit was brought by the nephew for possession of his share and was decreed on payment of a certain sum within certain time and on his failure to pay anything, he was kept out of possession, a subsequent suit by the daughter of the deceased nephew claiming her share of the property is not barred by *res judicata*. A I R 1927 All 39 = 48 A 803 = 24 A L J 910 = 98 I C 978.

—Proceedings for partition of co-sharer village--Rate of profits allowed to out-going sharers is not *res judicata* as between parties continuing as co-sharers after partition. A I R 1925 All 246 = 83 I C 231.

—The doctrine of *lis pendens* does not apply to moveables and where at the time a pledge is made a suit was pending against the pawnor by a third party in which the pawnor's title to the goods was in question and the same was subsequently decided against the pawnor, the pledge is not precluded from again raising the question of the pawnor's

C. P. C. ( 1908 ) S. 11 (Contd)

( 13 ) Parties—(Contd)

( 10 ) Under whom they or any of them claim—(Contd)

( 1 ) General—(Concld)

title in a suit by the third party to recover the pawned goods—36 B 189 = 14 Bom L R 9 = 13 I C 849.

—A decision obtained on the merits against a person who is subsequently found to be a trespasser, does in the absence of any thing to show that the decision was obtained through fraud or collusion, bind the rightful holder of the property. 4 O L J 463 = 42 I C 57.

—Persons, who dispute the existence of a trust, can be made parties to a suit under s. 539, C. P. C. 1882, and it follows that they will be bound by the decision arrived at in that suit. The words in s. 13 "parties under whom they claim" are very wide. 8 A L J 896 = 33 A 752 = 11 I C 218.

—T and V were first cousins, G and first defendant claimed to have been adopted by T and V respectively. On the death of T, disputes arose as regards the right to succeed to the properties of T. G filed a suit against first defendant and others in which each denied the adoption of the other. That suit was eventually settled by compromise by which G and first defendant admitted each other's adoption and agreed to take the properties of T in accordance with its terms.

—Then G died and left a will by which he bequeathed his property to the last male holder, who himself died subsequently leaving property obtained by him under G's will and other property. In a suit between plaintiff and first defendant, each claiming as the nearest reversionary heir of the last male holder and entitled as such to succeed to his property to the exclusion of the other, the question was whether the trial of the fact of the adoption of the first defendant was barred by the adjudication between G and first defendant; Held that it was not. 55 M 40 = 62 M L J 116 = 35 L W 73 = 1932 M W N 31 = 139 I C 684 = I R 1932 M 767 = A I R 1932 M 198.

( 2 ) Benamidar and real owner.

A decree against a benamidar will bind the real owner : 17 A L J 66 = 36 M L J 68 = 9 L W 335 = 23 C W N 521 = 12 Bur L T 122 = 46 I A 1 = 46 C 566 P C; and A I R. 1924 L 702 = 75 I C 1048; and 18 C W N 814 = 19 C L J 193 = 27 I C 136; and 22 C W N 807 = 46 I C 104; and 3 A 812; and 18 A 69; and 10 C 697; and 15 M 267; and 22 B 672; and 19 C L J 34 = 21 I C 979; and 21 C 990; and 3 L B R 18; and 4 All L J 689 = 30 All 30 = 1907 All W N 272 and 20 Ind Cas 499; and 23 Ind Cas 762 = 19 Cal W N 361; and 54 Ind Cas 633; and 56 Ind Cas 386 and 1926 Bom 115 = 49 Bom 832 = 27 Bom L R 1240 = 91 Ind Cas 353.

C. P. C. ( 1908 ) S. 11 (Contd)

( 13 ) Parties—(Contd)

( 10 ) Under whom they or any of them claim—(Contd)

( 1 ) Benamidar and real owner—(Concld)

—But where a benamidar carries on litigation without the knowledge or authority of the real owner he cannot be said to have represented the latter for the purposes of res judicata. 36 All 446 = 12 A L J 701 = 25 I C 381.

( 3 ) Claim Cases.

—The judgment against a creditor who sought to attach the property cannot operate as *res judicata* as against the judgment-debtor in a suit brought by him against the claimant. A I R 1928 Cal 130 = 55 C 448 = 32 C W N 248 = 105 I C 647.

( 4 ) Father & Son.

—See also cases under this section—Expl VI.

—In other words, a Hindu son will not be bound by a decree against his father except where the father was acting in the interest of the joint family property in the interest of the minor members and with the consent of the adult members : 101 I C 44 = A I R 1927 P C 56 = 54 I A 122 = 51 B 450 P C; see to the same effect 55 I C 846 = 42 A 359; and 34 L W 598 = 1931 M W N 263 = A I R 1931 M 550; and 34 P L R 1911 = 33 P W R 1911 = 26 P R 1911 F B and 32 I C 121 = 25 P R 1916; and cases under Expl VI.

—Whether the father is suing or being sued in individual or representative capacity depends upon the facts of each case. Thus a plea by father in prior suit against a stranger for declaration as regards nature of property on the ground of primogeniture, bars the son in a subsequent suit for partition by the stranger from setting up the same plea again on the ground that he did not derive title through the father. 16 C W N 783 = 15 I C 657 = 17 C L J 93.

—Dismissal of suit by father to set aside alienation made by himself for non-binding purpose does not bar the sons from suing for setting aside alienation and for recovery of their share. 35 M L J 45.

—Mortgage suit. Prior and subsequent mortgages. Father impleaded as party to suit. Father in jail—No effective representation—Decree not binding on unpleaded son. 17 I C 734.

—Matter in execution res judicata against Hindu father was held to be res judicata also against the son. A I R 1930 Mad 257 = (1929) M W N 776 = Ind Rnl ( 1930 ) Mad 7 = 120 I C 375.

—Objection to attachment of house by Hindu father that he was agriculturist—

C. P. C. (1908) S. 11 (Contd)

(13) Parties—(Contd)

(10) Under whom they or any of them claim—(Contd)

(4) Father & Son—(Contd)

Objection dismissed for default—Suit by sons alleging that the house could not be attached, it being ancestral and could not be sold being of an agriculturist is maintainable. A I R 1330 All 727 = (1930) A L J 1244 = Ind Rul (1930) All 911 = 127 I C 447.

—The dismissal of a suit by the father to set aside an execution sale of the *jagir* bars a suit by the son on his succession for the same purpose. 3 Pat L W 149 = 2 Pat L J 725 = (1919) Pat 426 = 42 I C 399.

—Suit by son of a Hindu setting aside sale by father as not being for necessity, without making father party to it does not operate as *res judicata* in subsequent suit by purchaser for refund of purchase-money against father. 63 I C 240.

#### (5) Hindu Widow & Reversioners.

—A decree fairly obtained against a female restricted owner as representing the estate is binding on the reversioners unless it can be shown that there was not a fair trial of the right in the suit against female owner. And this principle applies equally to a bona fide compromise decree as to a decree on contest. 48 I C 125 = 43 B 249; see to the same effect: 2 W R P C 31 = 9 M I A 539; and 1907 A W N 115 = 29 A 451; and 11 I A 197 = 11 C 186; and 1 A 282; and 1914 M W N 903 = 27 I C 109; and 17 C W N 337 = 16 I C 437; and 1921 M 475 = 13 M L W 533 = 62 I C 752 = 1921 M W N 342; and 1 I C 180; and 2 P L J 370 = 1 P L J 476 = 39 I C 750; and 3 P L J 83 = 42 I C 95 = 3 P L W 295; and 9 A L J 778 = 14 I C 125; and 10 A L J 101 = 15 I C 297; and 10 N L R 144 = 26 I C 830; and 11 A L J 574 = 21 I C 605; and 29 A 239 = 1907 A W N 33 = 4 A L J 160 = 3 M L T 59; and 29 A 487 = 1907 A W N 151 = 4 A L J 365; and 30 A 75 = (1908) A W N 16 = 5 A L J 43; and 33 I C 687 = 31 M L J 87; and 33 I C 273 = 23 C L J 82; and 33 I C 446 and 33 A 356 = 38 Ind A 87 = 8 A L J 552 = 13 C L J 575 = 13 Bom L R 427 = 15 C W N 545 = 10 M L T 25 = (1911) 1 M W N 432 = 21 M L J 645 = 10 I C 477; and 34 A 385 = 9 A L J 375 = 14 I C 814; and 38 A 679 = 14 A L J 881 = 35 I C 683; and 40 I C 150; and 47 I C 697; and 49 I C 177 = 9 P R 1919; and 57 I C 443 = 22 Bom L R 768; and 53 I C 164 = 43 B 869 = 21 Bom L R 837; and 44 P L R 1918 = 32 P W R 1918 = 43 I C 523; and 1922 P C 356 = 49 Ind app 342 = 1 P 741 = 69 I C 71 = 31 M L T 200 = 27 C W N 269 = 3 P L T 749 = 21 A L J 18 = 16 M L W 956 = 37 C L J 356 = 44 M L J 751 = 25 Bom L R 634 = 4 L R P C 17.

—A decree passed in a suit against the widow of the deceased owner as his legal representative operates as *res judicata* as

C. P. C. (1908) S. 11 (Contd)

(13) Parties—(Contd)

(10) Under whom they or any of them claim—(Contd)

(5) Hindu Widow and Reversioners—(Contd)

against all those who claim under him 23 M L T 208 = 8 L W 19 = (1918) M W N 195 = 44 I C 852.

—Withdrawal of the appeal by the widow does not prevent the decree of the first Court obtained against the widow after a fair contest being *res judicata* against those who claim under the same title afterwards. 14 Bom L R 1142 = 37 Bom 172 = 17 I C 866.

—But a decree against a Hindu widow in a suit instituted under the Limitation Act of 1871 on the ground of limitation is not *res judicata* as against the reversioners. 40 Mad 846 = 6 L W 253 = 41 I C 546; nor does a decision against Hindu widow holding a life estate under the will of her husband bind the remainder man under the will. 22 O C 156 = 6 O L J 355 = 52 I C 845.

—And where a decree is passed against a widow and the widow dies pending appeal, and wrong representative is brought on record, the decree does not bind real reversioner. 39 Cal 925 = 16 C W N 658 = 14 Ind Cas. 299.

—And where the female owner failed to raise a plea owing to a misconception as to her *locus standi* to raise it. Held that the decree was not binding on the reversioners. 55 I C 407. As to the effect of confession of judgment by widow see. 25 I C 921.

—D, a Hindu widow, brought a suit to set aside the adoption of B. The Courts in India decided the case on the ground of estoppel only but the Privy Council on appeal decided on the merits that D had authority to adopt and that she had validly adopted B. After D's death, a person claiming to be the reversioner to the estate of her husband brought the present suit against B for possession. Held (*Richards, C. J. contra*) that the previous suit was in substance a suit for the protection of the interests of the reversioners on whom the property was to devolve after the death of D who sufficiently represented the estate. The Privy Council having decided the question of D's authority to make the adoption without any objection having been raised, the matter was finally heard and decided and the judgment was binding on the reversioner. 37 All. 496 = 13 A L J 594 = 30 I C 657. see also 40 A 593 P C.

—Where during the pendency of a suit or appeal against a widow as representing the estate, she adopts a son, the adopted son is bound by the result of the suit or appeal and a fresh suit by the adopted son is barred by *res judicata*. 15 N L R 24 = 43 I C 64.

—A judgment in a previous suit against a Hindu widow not in a representative capacity as representing her husband's estate does not

C. P. C. ( 1908 ) S. 11 (Contd)

( 13 ) Parties—(Contd)

( 10 ) Under whom they or any of them claim—(Contd)

( 5 ) Hindu Widow and Reversioners—(Contd)

operate as a bar to a suit by her daughter claiming in her own right. A I R 1933 B 233 = 35 B L R 119. see to the same effect : 21 Bom. L R 837 = 53 I C 164 = 43 B 869; and 24 I C 501 = 42 C 244 P C.

—Thus where adverse possession begins during the continuance of a widow's life estate and runs its course before that life estate terminates, will be no bar to reversioners. Nor will litigation by the widow in the enjoyment of such a life estate, whether she be plff. or deft. represent the estate fully so as to give rise to a bar of *res judicata* against the reversioner if such litigation is qualified and personal to the widow or has arisen out of such acts of her own affecting the estate during her own life estate therein. 19 Bom. L R 1919 = 42 Bom. 69 = 43 I C 233.

—The failure of a widow in a suit by her to establish her right, to her husband's estate is not *res judicata* against the reversioner—Art. 141 governs his suit. 32 M L J 627 = 42 I C 228.

—Decision in suit against a Hindu widow does not bind prejudicially the reversionary heirs in subsequent suit. 22 O C 260 = 6 O L J 469 = 53 I C 761.

—Prior suit by reversioner for moiety—Subsequent suit for the rest. See 18 C W N 888 = 27 I C 226.

—In the first suit plaintiff sued as reversioner. In the subsequent suit he claimed as widow's heir—Later suit is not barred. A I R 1931 All. 21 = (1930) A L J 1254 = Ind. Rul. (1931) All. 237 = 130 I C 13.

—Dismissal of suit by Hindu widow for declaration that an execution sale was illegal as question was one under s. 47, Civil Procedure Code, does not bar a subsequent suit by reversioner for possession. A I R 1922 Bom 96 = 24 Bom. L R 249 = 46 B 726 = 67 I C 209 see also 24 I C 501 = 42 C 244 P C.

—When a female heir sued to set aside a sale held in execution of a decree for arrears of rent obtained against her, it was held that a subsequent suit brought by the reversioner for recovery of possession of the immoveable property sold was not barred, as the previous suit was for the recovery only of the limited estate of the female heir, while the subsequent suit was for the recovery of the absolute estate vested in the reversioner, 26 Cal. 285. See also 30 C 550 P C; and 17 C W N 337 = 16 I C 437.

—A decision against daughters in a suit for partition by vendee of one of the daughters, to which reversioners were not made parties, does not operate as *res judicata* against them

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C. P. C. ( 1908 ) S. 11 ( Contd )

( 13 ) Parties—(Contd)

( 10 ) Under whom they or any of them claim—(Contd)

( 5 ) Hindu Widow and Reversioners—(Contd)

as they are not bound by it. A I R 1923 All 366 = 71 I C 390.

—Where, so far as the plffs. were concerned it was held in a previous suit that they had agreed to the alienation which had been for their benefit and could not question it, that they could under no circumstances inherit any of the estate left by the widow and that should they survive, her another reversioner would be entitled to take that portion that had been alienated and that portion which had not been sold. Plaintiffs with their two younger brothers again brought a suit for a portion of the land which was not alienated after the death of the widow. It was held that the question is clearly *res judicata* as between them and the widow and her successors. A I R 1923 Lah 556 = 85 I C 202; see also 12 I C 464 = 38 C 639.

—If in a previous suit brought by a person claiming to be next reversioner on the ground of an illegal relationship it is held that there is no relationship between him and the deceased and on that finding the alienation made by the female owner was not declared as invalid against the reversioner. Subsequent suit by the same person on inheritance opening by death of last female owner, is barred. A I R 1930 Pat 71 = 10 P L T 630 = Ind Rul (1930) Pat 4 = 120 I C 292.

—As to the effect of maintenance decree against widow see 3 Pat L J 426 = 46 I C 162.

—Where a Hindu widow B who had executed a mortgage was sued for foreclosure by the mortgagee who also joined in that suit A., alleging him to be the transferee of the equity of redemption, but A having in his written statement repudiated the mortgagor's title in the property and set up exclusive title in himself was dismissed from the suit, and the mortgagee got a foreclosure decree against B, but having been resisted when taking possession by A., sued A in ejectment and A again denied the mortgagor's title and set up his own title adversely to heirs, and it was held in that suit that the mortgagor B was the sole exclusive owner of the property and that A had no title to it. *Held*, in a suit by A, brought after the death of B, to recover possession on the allegation, that he was the reversionary heir of a predeceased son of B to whom B had succeeded as mother, that the suit was barred by *res judicata* and that A could not be allowed to take up inconsistent positions. 17 C W N 877 = 19 I C 686 = 41 C 69.

—Suit by purchaser for recovery of property from first alienee—Widow made party to suit—Dismissal—Suit by reversioners for



C. P. C. (1908) S. 11 (Contd.)

(13) Parties—(Contd)

(10) Under whom they or any of them claim—(Contd)

(5) Hindu Widow and Reversioners—(Contd)

recovery of the same—Bar. See 34 M L J 319 = 42 I C 540.

(6) *Jus Tertii*.

—Where defendant sets up title in third person the decision will not operate as *res judicata* in a subsequent suit between plff and such third person; 26 L W 115=53 M L J 864= A I R 1927 M 844 = 50 M 877; see also 88 I C 927 = A I R 1926 A 77.

—But where the previous suit was between plff and the third person and in the subsequent suit the deft sets up title in such third person the Madras High Court holds that there is no *res judicata*: A I R 1921 M 248 = 44 M 778 F B (overruling 33 M 483 and 29 M L J 558); see also A I R 1925 M 1025 = 85 I C 562.

—The Calcutta High Court, however, has taken a contrary opinion: 50 C 23; but see A I R 1925 C 1218 = 87 I C 753.

—Previous suit dismissed as person through whom plaintiff claimed title was held not to be in title and title in another person—Plaintiff bringing another suit claiming through that another person—Suit is not barred A I R 1931 All 21=(1930) A L J 1254= Ind Rul (1931) All 237=130 I C 13.

(7) *Landlord & Tenant*.

—A lessor as such is not a person claiming under lessee within the meaning of s. 11 A I R 1921 Mad 306 = 44 M 514 = 41 M L J 288 = 63 I C 205.

—A previous decision in a suit by the lessee against a third person cannot operate as *res judicata* in a subsequent suit by the lesser against the same person. A I R 1927 Bom 270 = 29 Bom L R 274 = 101 I C 340.

—The decision in a previous suit between a tenant and his Zemindar thekadar does not operate as *res judicata* in a subsequent suit between the tenant and the Zamindar. 58 I C 990.

—Lower rate paid under contract with Landlord if binding on successor—Decision between previous land-holder and tenant as to rent is not *res judicata* (1918) M W N 188 = 45 I C 406.

—Decision in a suit by a *saranjmdar* to recover possession of land for non-rendering of service operates as *res judicata* in subsequent suit for the same relief and on the same cause of action by successor of previous *saranjmdar* 18 Bom L R 768 = 40 B 606 = 36 I C 505.

C. P. C. (1908) S. 11 (Contd.)

(13) Parties—(Contd)

(10) Under whom they or any of them claim—(Contd)

(8) *Members of joint family*.

—See also cases under Father and son supra.

—A Hindu daughter with limited estate joining her minor son who was an unnecessary party to the suit against her cannot bind her son's interest by compromise in the suit so as to create a bar of *res judicata*. A I R 1922 All 217 = 44 A 428 = 20 A L J 251 = 66 I C 62.

—S sued his brothers F and J in 1856 for recovery of a share in the ancestral estate. By a compromise S accepted a certain area in lieu of his claims. After the death of S his sons sued for the alleged share of S and the suit was dismissed in 1860. Owing to some mistake S and his sons were entered in the Revenue Records as full proprietors of the land and as having a right to a share in the village Shamilat. In a suit by the descendants of F in 1908 for the rectification of the entry in the Revenue Records, Held, that plffs were entitled to succeed, the decision of 1860 operating as *res judicata*. 98 P L R 1915=28 P W R 1915=26 I C 388.

(9) *Mortgagor and Mortgagee*.

—A decision obtained against the mortgagee alone in respect of a question as to the proprietary title is not binding on the mortgagor. 5 O L J 121=45 I C 849.

—A mortgagor's suit for possession of mortgaged property against trespasser after dismissal of similar suit by mortgagee in default was held not barred by *res judicata*: 9 O C 33; following 8 O C 177.

—But where a suit by mortgagee for possession which was resisted by a stranger was decreed in mortgagee's favour. Subsequently the son of the mortgagor brought a suit for redemption. The stranger in the earlier suit also was a party, and raised the same plea of ownership. It was held that the mortgagee sued in the previous suit as representing the estate and in the latter suit the plaintiff mortgagor was really claiming through the mortgagee and therefore the defendant was debarred from raising the same plea which had been adjudicated upon once before. A I R 1924 Bom. 299=74 I C 285.

—As to the effect of mortgage executed during pendency of suit in which mortgagor's title is, in question See 13 I C 641.

—Findings in a mortgage suit may be said to be binding on the auction-purchaser purchasing property in execution of the mortgage-decree though he is not a party to the mortgage suit as he in a sense represents the mortgagor and the mortgagee and so claims



## C. P. C. (1908) S. 11 (Contd)

## (13) Parties—(Contd)

## (10) Under whom they or any of them claim—(Contd)

## (9) Mortgagor and Mortgagee—(Contd)

under the judgment-debtor. A I R 1929 Rang 183=Ind Rul (1929) Rang 302=119 I C 222.

—Prior suit to set aside alienation by mother—Alienee mortgaging property before suit, and mortgagee not made party to the suit—Subsequent suit by mortgagee to support alienation is not barred by *res judicata*. 40 B 679=18 Bom L R 757=36 I C 443.

—A decree was passed in a suit for redemption by one of several co-mortgagors in which the other co-mortgagors were impleaded as defts. The decree directed that if plff. failed to pay the money within 6 months, the decree would become a nullity. It did not provide for redemption by the defts. co-mortgagors, in case the plff. made default. The plff. failed to comply with the order of the Court, and subsequently some of the other co-mortgagors brought a suit for redemption. *Held*, that the suit was not barred by *res judicata* inasmuch as the plffs. in the subsequent suit were not claiming under the plff. in the previous suit. 5 O L J 43=45 I C 300; see also 11 A L J 844=20 I C 372.

—N, a minor on attaining majority repudiated a mortgage of his property executed by his guardian S. in favour of K and himself and mortgaged a portion of it to D. K. sued N and S for a declaration that his mortgage was binding on N and obtained a decree. He then brought a suit for sale on the mortgage. It was held, (1) that D who claimed under N, was entitled to repudiate the mortgage of K, (2) that the decision in the declaratory suit operated as *res judicata* in the mortgage suit and was binding on all persons claiming through him under transfers made after the suit but not on D because the mortgagee rights of D having come into existence before the declaratory decree were not affected by it and the property could only be sold in execution of decree on K's mortgage subject to these rights. A I R 1924 All. 474 = L R 5 A 77 Civ=22 A L J 155 = 78 I C 226.

## (10) Purchaser at auction-sale.

—An execution-purchaser is a party claiming under judgment-debtor for the purposes of s. 11. A L R 1933 I. 1221; see to the same effect 10 I C 722=14 O C 89; and A I R 1922 Pat 63=3 P L T 506=65 I C 266=1 Pat 174; and A I R 1926 Pat 478 = 97 I C 205; but see 13 Bom L R 307=10 I C 913=35 B 275.

—Decree-holder assignee applying but application dismissed for want of proof of assignment—Second application is barred—Assignee retransferring decree to decree-

## C. P. C. (1908) S. 11 (Contd)

## (13) Parties—(Contd)

## (10) Under whom they or any of them claim—(Contd)

## (10) Purchaser at auction-sale—(Contd)

holder—Decision binds him and his subsequent transferees if any. A I R 1926 Nag 200 = 21 N L R 159=92 I C 47.

—Debt due to judgment-debtor attached—Garnishee's objection that debt is not payable to judgment-debtor overruled—Suit by decree-holder purchaser to recover debt—Garnishee not having proceeded, when the claim was decided against him in execution, under O. XXI, r 63, the matter is *res judicata*. A I R 1923 Mad 562 = 44 M L J 588 = 17 L W 582 = 32 M L T 304 = (1923) M W N 282 = 72 I C 558.

—An auction-purchaser at a sale for arrears of revenue does not derive his title through the defaulting proprietor; but he claims under a paramount title. So a decree in a suit against the defaulting proprietor to which neither the auction-purchaser nor his predecessor in title was a party cannot operate as *res judicata* against the purchaser. 34 C 868 see to the same effect : 8 W R 222; and 12 C 82; and 9 W R 217; and 8 C W N 676; and 17 C W N 340.

—A decree for rent obtained by a proprietor of a revenue paying estate against a tenant is not *res judicata* in a suit for rent by a purchaser of the estate at a revenue sale as the purchaser does not claim under the ex-proprietor within S. 11 C P C. 24 Cal. W N 399=56 I C 390.

## (11) Shebait, Priest, ratan-holders.

—The decision in a previous suit contested by a former shebait is binding on all successive shebait. 17 C W N 964=18 I C 394. see also 42 C 440 and 35 C 691 and 39 C 887 and 11 C W N 489 and 20 W R 86; and 6 C W N 178.

—Plaintiff in subsequent suit was not described as shebait but in a previous commutation proceeding defended as shebait of the idol. The decision in the prior suit against the idol is binding in the subsequent suit. A I R 1927 Cal. 606=101 I C 758.

—Similarly, a decree against a Mahant of a Matt is *res judicata* against "grand chela," his successor. 1932 A L J 615 = 138 I C 406 = 1 R 1932 A 491 = A I R 1932 A 603 ( 605 ) = A I R 1932 A 931.

## (12) Transferor and Transferee.

—Since the transferee of a grantor of a license is not bound as such by the license under s. 59, Easements Act, it follows that the transferee is also not bound by the result of a previous litigation between the grantor and the grantee, if the claim of the grantor

## C. P. C. ( 1908 ) S. 11 (Contd)

## ( 13 ) Parties—(Contd)

( 10 ) Under whom they or any of them  
claim—(Concl'd)

## ( 12 ) Transferor and Transferee—(Concl'd)

has failed by reason of his failure to prove the ground on which he sought ejectment, A I R 1930 Oudh 203 = 7 O W N 468 = Ind. Rul. (1930) Oudh 462 = 127 I C 46, see also 45 I C 406 = 1918 M W N 188 = 7 L W 376 = 24 M L T 35.

—Where assignors who had applied to set aside the sale on the ground, among others, that the sale was held without taking the permission of the Court which appointed the receiver, had subsequently abandoned that ground, their assignee could not urge that ground again by way of defence to a suit. A I R 1923 Cal. 121 = 27 C W N 38 = 37 C L J 265 = 76 I C 241.

## (13) Vendor and Purchaser.

—In order that a previous decision against a transferor be *res judicata* as against the transferee, the transferee's title must have arisen subsequent to the commencement of the previous suit. 9 Bur L T 88 = 32 I C 610.

—Plaintiff sued the first defendant and purchasers through him for setting aside a sale in favour of first defendant. The sale-deed was held valid as between first defendant and plaintiff and the suit was dismissed. In appeal plaintiff joined the subsequent purchasers as respondents but not the defendant No. 1. It was held that the finding as to validity of sale-deed was *res judicata* as between plaintiff and defendant No. 1 and also as against the subsequent purchasers A I R 1927 P C 252 = 27 L W 1 = (1928) M W N 20 = 4 O W N 1231 = 54 M L J 88 = 47 C L J 136 = 32 C W N 281 = 30 Bom L R 220 = 6 R 29 = 26 A L J 371 = 107 I C 237.

—A previous suit in ejectment between a vendor and another person in possession instituted after the sale wherein the vendee appeared as a witness for the vendor will be *res judicata* in a subsequent suit by the vendee for ejectment of the same defendant from the land sold, the vendor in the first suit having represented the vendee and acted as the latter's agent. The vendee is estopped from contending that the vendor had no title at the time the previous suit was brought. 104 P L R 1913 = 85 P W R 1913 = 18 I C 278

## (11) Wrong Party.

—Where a decree was given against a widow and the widow died pending appeal and a wrong representative was brought on record the decree is not binding on real reversioner. 16 C W N 658 = 14 I C 299 = 39 C 925.

## C. P. C. ( 1908 ) S. 11 (Contd)

## ( 13 ) Parties—(Concl'd)

## ( 11 ) Wrong Party—(Concl'd)

—Suit against alleged legal representative does not bar a subsequent suit on the same cause of action against the real legal representatives. A I R 1928 Pat 362 = 9 P L T 807 = 108 I C 558; see also 19 C L J 19.

## ( 14 ) SAME OR DIFFERENT CAUSES OF ACTION.

—The doctrine of *res judicata*, as enunciated by the Duchess of Kingston's Case, was adopted in India long before the first Code of 1859. S 2 of that Code gave a statutory effect to the doctrine, but fell considerably short of it, in that, owing to the words "cause of action" expressly inserted in it, it only provided for bar by judgment. Despite this defect, however, the Courts in India had often acted on general principle of *res judicata*. This anomaly necessitated the omission of the words "cause of action" from the later Code with the result that *res judicata* now deals with both bar by judgment and bar of the trial of an issue by judgment on that issue, and that the identity of cause of action has been replaced by that of matter in issue as the test of *res judicata*: see A I R 1930 C 47 = 33 C W N 876 = 56 C L J 369 = 57 C 258; and A I R 1927 M 273 = 25 L W 11 = 100 I C 402; and 39 I C 282; and 29 O C 93; and 23 M L J 543.

—The rule, now, therefore, is that a final decision on any matter directly and substantially in issue in a suit is conclusive of that issue in every subsequent suit brought on any cause of action and for any purpose or object. It does not follow, however, that consideration as to cause of action is entirely eliminated. Thus a prior suit for possession as landlord does not bar a subsequent suit as reversioner 52 I C 813 = 1919 M W N 287; and a first suit for possession as proprietor does not bar a subsequent suit for redemption as mortgagor A I R 1929 L 833; so also a prior suit by principal against his agent to render accounts does bar a subsequent suit by him to recover the money found due: 7 M L J 87 = 33 M 162; similarly the plffs in a redemption suit for redeeming the whole mortgage and claiming possession of that part of which the equity of redemption is held by defts are not barred by *res judicata* in a subsequent suit from claiming contribution: 27 A L J 1162 = A I R 1929 A 696; and a former suit as reversioner does not bar a subsequent suit as widow's heir: 28 A L J 1254 = 130 I C 13 = A I R 1931 A 21.

—But these cases can be explained equally on principle of identity of matter in issue.

C. P. C. ( 1908 ) S. 11 ( *Concl'd* )( 14 ) Same or Different causes of action—( *Concl'd* )

—Cases where a judgment in a former suit bars a subsequent suit brought on a *different cause of action* are dealt with under Expl IV to the present section.

## SECTION 12

—The Special Committee in their notes on clauses have observed that 'S. 12 has been newly added owing to the transfer of certain of the provisions of the Code of 1882 to the Rules of the present Code. And a fresh suit would be barred under O. 9, r. 9 where the previous suit has been dismissed for default. Thus, omission to sue for one of several reliefs bars a fresh suit under O. 2, r. 2. Similarly, the effect of abatement of suit under O. 22, r. 9, and withdrawal of suit under O. 23, r. 1 is to bar a fresh suit. Decree against a supposed legal representative does not bar a fresh suit on the same cause of action against the real ones. A I R 1928 Pat 362=9 Pat L T 807=108 I C 558.

—As to "cause of action" see Ss. 11 and 20; and as to the words "in any Court to which the Code applies" see S. 1.

## SECTIONS 13 &amp; 14

*Synopsis.*

- ( 1 ) Applicability and Scope.
- ( 2 ) Between the same parties.
- ( 3 ) Execution of foreign court decree.
- ( 4 ) Foreign judgments, meaning and effect of.
- ( 5 ) Foreign judgments, suit on.
- ( 6-7 ) Power of British Indian Courts to go into merits.
- ( 8 ) Submission or objection to jurisdiction.
- ( 9 ) Clause-( a )
- ( 10 ) Clause-( b )
- ( 11-12 ) Clause-( d )
- ( 13 ) Clause-( f )

## ( 1 ) APPLICABILITY AND SCOPE.

—S. 11 refers to the decision with regard to the issues also. S. 13 speaks only of the matter directly adjudicated upon by the foreign judgment. The expression "matter directly adjudicated upon" in s. 13 should be held as undoubtedly to include the right set up, but limited only to the particular relief granted or refused. A I R 1928 Mad 327 = 51 M 720 = 29 L W 250 = 54 M L J 479 = 108 I C 305.

—The section is not restricted to plaintiff suing on a foreign judgment. A I R 1928 Mad 327=51 M 720=54 M L J 479=29 L W 250=108 I C 305. It applies to plaintiffs as well as de-

C. P. C. ( 1908 ) Ss. 13 & 14 ( *Cont'd* )( 1 ) Applicability and Scope—( *Concl'd* )

fendants. A I R 1928 Rang 319 = 6 R 552 = Ind Rul ( 1929 ) Rang 145=116 I C 465

—Section 13, should for purposes of actions relating to the recovery of the office of trusteeship, mean courts of the country which have jurisdiction in what may be called the domicile of the trust. A I R 1928 Mad 327=51 M 720 = 29 L W 250 = 54 M L J 479 = 108 I C 305.

## ( 2 ) BETWEEN THE SAME PARTIES.

—Considerations as to parties under S 11 also apply to cases under s. 13. Foreign judgment in which legal representatives are not brought on record cannot be given effect to against them. A I R 1927 Lah 200=8 Lah 54=102 I C 523.

—Decision in a Court of Native States between the widow and the alleged son of the deceased must be held that the widow completely represented the estate and that any decision between the parties in that suit is conclusive between them and between their successors-in-title. A I R 1922 Lah 175.

## ( 3 ) Execution of foreign Court decree.

—See also under S. 44

—Section 44, Civil Procedure Code does not override s. 13. A foreign judgment may be objected to in execution on the grounds mentioned in s. 13. A I R 1931 All 689=(1931) A L J 653 = 53 All 747 see also 41 C L J 508 = 30 C W N 785 = 89 I C 347 = A I R 1925 C 955 but see A I R 1923 M 72 = 43 M L J 700 = 69 I C 932 = 45 M 1014.

## ( 4 ) Foreign judgment, meaning and effect of

—It is only in suits on foreign judgments that the question of the effect of these judgments can properly arise. A foreign judgment as such has no force in Br. India. 37 All 1 = 12 A L J 1074 = 25 I C 193 = [Confirmed on appeal by the P. C.] See 20 C W N 1213 = (1916) 2 M W N 153 = 36 I C 710 (P C).

—A judgment of a foreign Court obtained against a defendant cannot be enforced in British India where he at the time of the commencement of the suit was not a subject of, nor resident in the country in which the judgment was obtained. A I R 1927 All 510 = 25 A L J 887 = 105 I C 186.

—Foreign judgments in connection with the land outside the jurisdiction of the Court are not binding on the British Indian Courts. A I R 1929 Lah 627 = Ind Rul (1930) Lah 898 = 119 I C 482.

—Most of the trust property situate in Pondicherry—Trust to be performed there—Decision of Pondicherry Court as to appoint-

## C. P. C. ( 1908 ) Ss. 13 &amp; 14 (Contd)

( 4 ) Foreign judgment meaning and effect  
of—(Concl'd)

ment of trustee of that property should not be disturbed. A I R 1928 Mad 327 = 51 M 720 = 29 L W 250 = 54 M L J 479 = 108 I C 305.

—Decision of a foreign Court under the authority of the state on a subject-matter of a *res* is conclusive. A I R 1928 P C 83 = 47 C L J 263 = 30 Bom. L R 753 ( P C ) = 107 I C 352.

—Foreign judgment can be final even when an appeal is pending in foreign Court—Stay of execution does not take away finality of judgment A I R 1927 Lah. 200 = 8 L 54 = 102 I C 523.

—Whether Br. Court can declare their judgment as *res judicata* in foreign Court. See 20 C W N 1213 ( P C ) = 1916 P C 136 = 2 M W N 153 = 36 I C 710 P C.

—The rate of exchange prevailing at the date of the foreign judgment sued on is the one to be taken. A I R 1923 Bom. 437 = 47 Bom. 487 = 25 Bom L R 173 = 70 I C 474.

## ( 5 ) Foreign Judgment, suit on.

—When an action is brought upon a foreign judgment the basis of that action is the implied contract raised by the fact that the parties have litigated the matter and the implication that by so doing each has impliedly agreed with the other to abide by the order or obey the decree of the *forum* before whom the action is tried. Thus the essence of the cause of action is contract. There is no implied contract to agree to perform the "grounds" of the decree or order still less is there an implied contract to perform the "statement given by the judge of the grounds." 62 M L J 566 = 35 L W 763 = 138 I C 648 = A I R 1932 M 661 = I R 1932 M 609 = A L R 1932 M 778; see also 9 Bur L T 106 = 35 I C 741.

—Foreign judgment based on a second or third review on the same grounds cannot be basis of suit in British Indian Court. A I R 1927 Lah. 200 = 8 Lah 54 = 102 I C 523.

—Since the Privy Council decision in 22 C 222 it has been the settled law that the judgments of the Courts of Native states having independent civil, criminal and fiscal jurisdiction must be regarded as foreign judgments; and suits can be brought upon them to British Courts : see also 24 B 86; and 27 M L J 535; and 19 A 450; and 36 I C 363 = 40 B 551; and 26 C 931; and 20 M 112; and 148 A W N 1890; and 7 M 105.

—A Court which entertains a suit on a foreign judgment cannot institute an enquiry into the merits of the original action or the propriety of the decision. A I R 1924 All 161 = 46 All 119 = 21 A L J 890 = L R 4 A 604 Civ. = 79 I C 332.

## C. P. C. ( 1908 ) Ss. 13 &amp; 14 (Contd)

## ( 6-7 ) Power of British Indian Court to enquire into merits.

—As the concluding portion of S. 14 of the old Code has been omitted the British Courts cannot in a suit instituted on a Foreign judgment inquire into the merits of the case except on the points specified in paras. (a) to (f) of S. 13. 13 P W R (N W F P) 1916 = 34 I C 255. Decisions under the old Code in 66 P R 1889; 102 P R 1892; 24 B 86; 21 A 17 are thus rendered obsolete :

—As regards execution, however, it is quite competent to a British Indian Court, executing a decree passed by a Court in a favoured Native State (that is, one in respect of which a notification pursuant to s. 44 of the C P Code had been issued) to go behind the decree and enquire into the question whether the Court which passed the decree had jurisdiction to do so, as a British Court ought not to execute the decree, if passed without jurisdiction. 39 Mad. 24 = 27 M L J 535 = 16 M L T 479 = (1915) M W N 162 = 1 L W 887 = 26 I C 287 (F B) S. 44 gives a discretion to the Court to refuse to execute a decree. Discretion to be exercised properly. It is not with special reference to ss. 13 and 14. A I R 1925 Mad. 788 = 21 L W 330 = 86 I C 492.

## ( 8 ) Submission or objection to Jurisdiction

—The British Courts will not recognise the judgments of the Courts of a foreign country passed in an action in *personam* against a British subject, not resident in that country at the date of the action, who has neither appeared in the suit nor submitted to the jurisdiction of the foreign Court. 63 M L J 761 (762) = 1932 M W N 1314 = 36 L W 756 = 140 I C 588.

—But where a suit is brought on a foreign judgment every presumption is made in favour of such judgment, and therefore the onus is on the defendants to prove that they had not submitted to the jurisdiction of the Foreign Court. 24 M L T 244 = 49 I C 202.

—The question whether a submission to jurisdiction is voluntary or under duress is one of fact in each case. If the submission is for saving property, it is not voluntary, even though a written statement is filed objecting to the jurisdiction and raising a defence on the merits. 27 M L J 535 = 26 I C 287 = 39 M 24 F B.

—By the fact of entering into a partnership in a foreign country, a person does not bind himself to submit to the jurisdiction of the Courts of that country, in regard to matters arising in connection with that partnership. 63 M L J 761 (763) = 1932 M W N 1314 = 36 L W 756 = 140 I C 588. see also 7 M L J 76 = 20 M 112.



C. P. C. (1908) Ss 13 & 14 (Contd.)

(8) Submission or objection to jurisdiction—(Contd.)

—But appearance for obtaining adjournment or for applying to set aside an *ex parte* decree or to dispute jurisdiction of a foreign Court amounts to submission to its jurisdiction. A I R 1926 Nag. 77 = 22 N L R 82 = 89 I C 129.

—And execution of power-of-attorney to defend suits in foreign Courts amounts to submission. Person submitting as plaintiff cannot deny jurisdiction as defendant. A I R

1926 Mad 259 = 22 L W 820 = 92 I C 491.

—Similarly, conferring power on the agent to sue is submission. 37 Mad. 163 = 24 M L J 619 = 18 I C 189.

—Objection taken in Court of First Instance but not persisted in—Appellate Court—Interference—Question—Whether can be opened afterwards. See 29 I C 453.

—Where a deft appeared under protest because "he did not want to be arrested when he went there" it was held that mere intention of avoiding an inconvenience did not make the deft's appearance involuntary : 39 M 733.

—Objection as to jurisdiction of foreign Court can be raised even in execution proceeding A I R 1925 Cal. 955 = 89 I C 347 = 41 C L J 508 = 30 C W N 785 = 98 I C 740 see also 1931 A L J 653 = A I R 1931 A 689 = 53 A 747.

(9) Clause—(a)

—A foreign judgment is subject to the same conditions as to *res judicata* as a judgment of a Court of British India and, therefore, such a judgment in order to be *res judicata* in a subsequent suit must be the judgment of the Court which is competent to try the subsequent suit. 43 I C 551 = 9 L B R 103 = 11 Bur. L T 194 see also 24 B 77.

—Whether a foreign Court is or is not a court of competent jurisdiction within the meaning of S. 13 (a) has to be determined in accordance with the principles of international law and not in accordance with the law of the country in which the foreign court is situated. 39 Mad. 733 = (1916) 1 M W N 83 = 3 L W 90 = 19 M L T 68 = 30 M L J 148 = 32 I C 597.

—Courts in British India can decide an issue relating to title to immoveable property

C. P. C. (1908) Ss. 13 & 14 (Contd.)

(9) Clause—(a)—(Contd.)

in British India, though it had been adjudicated upon by a foreign Court. A I R 1929 Lah 627 = Ind. Rul. (1929) Lah 898 = 119 I C 482.

—Title to land is to be directly determined, not merely according to the laws of the country where the land is situate, but by the Courts of that country. So an adjudication by a Pondicherry Court with respect to land in British India is not *res judicata*. A I R 1928 Mad. 327 = 54 M L J 479 = 51 M 720 = 29 L W 250 = 108 I C 305.

—A Court in British India is not competent to try a suit in a respect of property which is situated in the Native State, and the judgment of the Court in British India could not operate as *res judicata* in the Court of the Native State. 20 C W N 1213 = (1916) 2 M W N 153 (P. C.) = 36 I C 710.

(10) Clause—(b)

—Foreign judgment is not binding on the British Indian Courts if it was not decided on merits. A I R 1930 Mad 146 = Ind Rul (1930) Mad 536 = 123 I C 600.

—The true test is whether the judgment has been given as a penalty for any conduct of the defendant or whether it is based on a consideration of the truth or otherwise of the plaintiff's case. 140 I C 82 = A I R 1932 L 649 = I R 1932 L 689.

—Where a suit is brought on a foreign judgment (in this case a judgment of the Dt. Judge of Singapore) and the judgment is not one on the merits, the plff. must prove his case apart from the judgment sued upon—under S. 13 (b) and (d) of the C. P. Code. 14 P R 1919 = 49 I C 383.

—Judgment is a judgment on merit if evidence is taken although there is default. A I R 1925 Mad 788 = 21 L W 330 = 86 I C 492.

—Foreign judgment is binding on British Indian Courts if the Court passes a decree on the day postponed for settlement of the case when the defendant failed to appear and the settlement did not take place. A I R 1929 Mad 469 = 52 M 503 = 56 M L J 547 = 29 L W 575 = (1929) M W N 353 = Ind Rul (1930) Mad 47 = 120 I C 751.

—An *ex parte* decree of a foreign Court is not a decision on merits and as such not bin-



C. P. C. (1908) Ss. 13 & 14 (Contd.).  
(10) Clause—(b)—(Contd.)

ding on the British Indian Courts. A I R 1930 Mad 149 = 57 M L J 459 = 30 L W 349 = Ind Rul (1930) Mad 515 = 123 I C 579; see to the same effect : A I R 1928 M 133 = 26 L W 803 = 107 I C 810; and A I R 1928 R 319; and A I R 1927 M 265 = 50 M 261 (overruling 82 I C 425; and 92 I C 491); and see 8 M L T 287 = 7 I C 810; and 20 I C 971.

—Decision against a party due to default on his part is not judgment given on merits of the case. A I R 1927 All. 510 = 25 A L J 887 = 105 I C 186.

—Where a plff. was given liberty in an action before the High Court of Judicature in England to exhibit interrogatories and on the defts omitting to answer such interrogatories his defence was struck out and plff. allowed to sign judgment against him. *Held*, that such judgment was not a judgment "given on the merits of the case" within S.13 40 Mad. 112 = 32 M L J 35 = 21 M L T 78 = 21 C W N 358 = 15 A L J 92 = 5 L W 342 = 19 Bom L R 206 = 25 C L J 233 = 10 Bur L T 175 = 38 I C 683 = 44 I A 6 (P.C.) [Reversing 39 M 95 = 27 M L J 670 = 27 I C 386.]

—The defendant was present by his counsel who subsequently withdrew. The plaintiff's claim had been admitted by him but payment of the same had been pleaded by him. *Prima facie* the burden was on him and there was evidence which was led by the plaintiff to disprove the assertion by the defendant that he had satisfied the plaintiff's claim by payment. There was evidence on the record on which the Court could have proceeded on the merits and in the absence of a clear indication that the judgment was given by way of penalty it must be assumed that it was given, because the Court considered that the plaintiff had proved the claim on the merits, 140 I C 82 = A I R 1932 L 649 = I R 1932 L 689.

—The defendant was sued in the Courts of the Straits Settlement. Written statement was filed but at the trial the defendant's Solicitor reported no instruction. Thereupon judgment was given for the plaintiff after examining his witnesses. On this judgment a suit was laid against the defendant in the Courts in British India. *Held*, that the judg-

C. P. C. (1908) Ss. 13 & 14 (Contd.)  
(10) Clause—(b)—(Contd.)

ment of the foreign Court was given on the merits and that the same was conclusive against the defendant in the present suit 40 Mad. 112 dist. 11 L W 609 = (1920) M W N 412 = 57 I C 742. Where the deft. having failed to answer interrogatories, his defence was struck off and judgment was given against him in an English Court, *Held*, that the judgment was not on the merits and action would not lie on it. 39 Mad 95 = 27 M L J 670 = 27 I C 386.

—The deft. was sued in the Court of the King's Bench in London for damages in consequence of personal injuries sustained by the plff. arising out of the deft's negligence. The writ of summons was accepted by a solicitor and he entered appearance on behalf of the deft. The case was then set down for trial before a judge of the High Court and a special jury. The deft. however was suddenly called away from England to India on the outbreak of the war, judgment was entered against the defts, the jury awarded to the plff. damages to the sum of £ 250. In a suit brought in India on that judgment, *Held*, that it had been given between the parties "on the merits of case" 41 All 521 = 17 A L J 501 = 50 I C 780.

(11-12) Clause—(d)

—Proceedings against minor defendant without appointing guardian *ad litem* are opposed to natural justice. A I R 1927 Lah 200 = 8 Lah 54 = 102 I C 523.

—Wrong view as to legal liability of onus, whether opposed to natural justice and renders foreign judgment not given on the merits. See 41 Mad 205 = 34 M L J 295 = 45 I C 703.

(13) Clause—(f)

—A British subject who has been properly served cannot object to a judgment of the King's Bench Division on the ground of want of jurisdiction, where the contract on which the suit was based was one in which the price was payable in England. The law of limitation is a law relating to procedure, having reference only to the *lex loci* and therefore the judgment of a competent English Court cannot be objected to on the ground that if the suit had been tried in India it would have been barred by limitation. A claim that would be barred by limitation in British India cannot be said to be a claim founded on a breach of any law in force in British India. 9 Bur. L T 106 = 35 I C 741.

## CIV. PRO. CODE (1908) SEC. 15

## (1) Court competent to try

*Small Cause Court*

—A suit for damages for use and occupation of land is cognizable by a Court of Small Causes 22 Mad 149, followed in. A I R 1929 M 525.

—A suit by a manager of a temple against his predecessor in office for damages sustained by the temple owing to the negligence of the defendant is not cognizable by a Court of Small Causes. 21 Mad 245, relied on in 82 I C 1006.

—A suit by a Mahomedan to obtain a share in property distributable under the terms of a certain endowment is not cognizable by a Court of Small Causes. 14 All. 413; followed in 80 I C 571

—It is the nature of the case as laid and not the defence that determines jurisdiction—15 Bom 400, see to the same effect: 9 N L R 54; and 31 Bom L R 430 =117 I C 447=A I R 1929 B 228.

—The small Cause Court in Bombay has jurisdiction to try a suit against a non-resident foreigner, who carries on business in Bombay through a munim—Girdhar V. Kassigar, 17 Bom 662. And see 7 Calc W N 754=L R 30 I A 220=5 Bom L R 494 =13 M L J 287=26 M 544; and 29 M 239; and 30 Bom L R 1463=A I R 1929 B 14=53 B 12; A I R 1929 S. 24.

—Provincial Small Cause Court:—Under Act IX of 1887, a Small Cause Court has power to try all suits of a civil nature not excluded by the second schedule to the Act; and it is the nature of the suit as described in the plaint and not the nature of the defence that determines the question of jurisdiction—15 Bom 400; followed in 9 N L R 54; relied on in 31 Bom L R 430=A I R 1929 B 228.

—A suit for compensation on account of injury to an oil-mill will lie in a Provincial Small Cause Court—17 Calc 290; foll in 97 P R 1894; so will a suit for damages on account of the use and occupation of land—17 Calc 541; see also 22 M 149; and A I R 1929 M 389 or on account of the forcible cutting and carrying away of grass—17 C 707—overruled in 23 C 884 F B but later foll in 11 N L R 160=31 I C 5; and 50 I C 629; or to recover the cost of repairing a channel, the joint property of plaintiff and defendant 15 Mad 155; or to recover a legacy when there is no allegation that the executors are in possession of sufficient assets to pay or that they had ever assented to the payment—17 C 387 foll in 36 B 111; and 2 O C 256 or to establish a right to a standing crop on the basis of title—21 Calc 430, or for contribution—23 Calc 189; or for arrears of jodi,

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## CIV. PRO. CODE (1908) SEC. 15 (Contd)

## (1) Court competent to try (Contd)

*Small Cause Court (Contd.)*

which is rent on favourable terms—21 Mad 243, foll. in 52 M L J 706=A I R 1927 M 670;

—A suit for arrears of maintenance payable under a written agreement does not lie in a Provincial Small Cause Court. 20 Mad., 29. see also I O C 93; but see 27 I C 824.

## (2) Court of lowest grade.

*Synopsis.*

- (1) General
- (2) How determined
- (3) Territorial Jurisdiction

*(1) General*

—The trial of the suit by a Court of higher grade is merely an irregularity: 52 M L J 323=24 L W 3 67=101 I C 85=A I R 1927 M 568.

—And it may be noted that where a Judge distributes the plaints, received by him, to proper Courts, he acts ministerially. His discretion may, therefore override provisions of s. 15: 110 I C 293=A I R 1928 L 484.

*(2) How determined*

—It is the money-value of the original suit that fixes the jurisdiction of the Courts throughout the subsequent litigation in its several stages, not the value of what has been left in dispute: 13 All. 320; and cases cited; followed in 80 I C 183; and 89 I C 407; 17 Calc., 680; and 7 Mad H C 356; and 18 W R 262; and 12 All 581; foll in 12 A 579; nor is the jurisdiction lost in execution, because the interest accrued after decree has raised the amount due above the money limit. 10 Bom 200; foll in 50 B 839 and A I R 1920 B 337. See also 10 Calc., 697 (see p. 707).

—The valuation of the suit in the plaint should not be allowed to be increased—25 Mad 543 but this is no longer law see 15 Bom L R 1021=21 I C 783; and 40 M I.

—All suits for infringement of copyright brought in the mofussil must be laid in the District Judge's Court 6 Calc., 499 =7 C L R., 471; see also 13 I A 134=9 All., 191 and 16 C W N 444=13 I C 898; and 11 M 26 P C; and 1900 P L R p. 354 and 22 P L R 1902; and 9 C W N 956.

## CIV. PRO. CODE (1908) SEC. 15 (Contd)

## (2) Court of lowest grade. (Concl'd).

## (3) Territorial Jurisdiction

—So a Court had no jurisdiction, in execution of a decree to sell property over which it had no territorial jurisdiction at the time it passed the order of sale 17 Calc., 699; see also 18C 526; and 18

L W 747=76 I C 269=A I R 1924 M 144 & 33 C W N 848=A I R 1929 C 818.

—For the purpose of jurisdiction, a claim under s. 331 is a fresh suit, so that where by reason of a change in the law as to the mode of valuing suits for the purpose of jurisdiction between the date of the original suit and the claim, the Court that dealt with the original suit ceases to have jurisdiction over the subject-matter of the claim, that Court cannot try the claim 4 Mad. 220; see also 8 M 548 F B; and 13 M 520; and 44 M L J 443=72 I C 582=A I R 1923 M 514

## (3) Particular Suits, Jurisdiction as to

*Synopsis*

- (1) Account Suits
- (2) Administration suits
- (3) Adoption Suits
- (4) Appellate restrictions
- (5) Declaration Suits
- (6) Ejectment Suits
- (7) Execution of decree
- (8) Partnership Suits
- (9) Trust property and Registration

## (1) Account Suits

Where the approximate amount of the claim was stated in the plaint to be Rs. 510, that was taken to be the value of the subject-matter of the suit for purposes of jurisdiction—12 B 675; see also 18 B 40; and 18 B 100; and 15 Bom L R 1021; and the valuation of a suit for an account should not be allowed to be increased so as to oust the jurisdiction of the Court—25 Mad 543; but see 21 I C 783=15 Bom L R 1021 and 40 M 1. According to s. 8 of the Suits Valuation Act (VII of 1887); in suits for taking an account the Court fee stamp and Jurisdiction are both determined by the amount of claim as fixed by the plaintiff—19 Bom 198. See also 118 Bom, 40, and 31 Calc., 365=8 Calc. W N, 233, but see 15 Bom L R 1123=22 I C 71; and 20 B 265; and 14 C L J 489=12 I C 745.

## (2) Administration Suit

The plaintiff filed an administration suit in the Court of a Subordinate Judge of the Second Class, valuing the relief claimed at Rs. 130. The Subordinate Judge found that the property in suit

## CIV. PRO. CODE (1908) SEC. 15 (Contd)

## (3) Particular suits, Jurisdiction as to (Contd)

## (2) Administration Suits (Concl'd.)

was worth over a lakh of rupees, that the liabilities came to Rs. 5,729 and that the defendant was indebted to the estate in the sum of Rs. 15,199. He drew up a preliminary decree directing inter alia, that the defendant should pay this amount into Court within two weeks. Against this order the defendant appealed to the District Court. The District Judge returned the appeal for presentation to the High Court, on the ground that the subject-matter exceeded Rs. 5,000. Held, reversing the order of the District Judge, that the appeal lay to the District Judge 22 Bom., 963; but this decision was dissented from in 15 Bom L R 1021=21 I C 783

## (3) Adoption Suit

—But the Madras High Court holds that for the purpose of determining the jurisdiction over a suit by a reversioner to set aside an adoption, the loss which would accrue to the adopted son, should the adoption be declared invalid, is the measure of the value of the subject-matter of the suit 6 Mad., 192. followed in 75 I C 115=A I R 1924 M 84; and A I R 1928 M 1294=56 M L J 107

## (4) Appellate restrictions

—When it is discovered, at any stage in the original proceedings, that the suit ought to have been instituted in a different Court, the plaint must be returned for presentation to that Court under O. VII, r. 10. The discovery at a late stage is a matter for consideration only on appeal under s. 21, Civ. Pro. Code. Even where two Courts have concurrent jurisdiction to try the same suit, in view of the imperative wording of s. 15, Civ. Pro. Code, every suit must be instituted in the Court of the lowest grade having jurisdiction to try the same. 4 S L R 264=10 Ind Cas 980.

—S. 15 of the C. P. C. requires every suit to be instituted in the Court of the lowest grade competent to try it. Once the institution takes place, in accordance with this provision the operation of the section is exhausted. The section gives no authority to transfer a pending suit, merely because in the Course of the trial it is found that plff. is entitled only to a part of the claim which would have been cognizable by a Lower Court. 54 I C 655.

## (5) Declaration suits

—For the purposes of jurisdiction the value of a suit for a mere declaratory decree must be taken to be what it would be if the suit were one for possession of

## CIV PRO. CODE ((1908) SEC. 15 (Contd).

## (4) Particular suits jurisdiction as to (Concl'd).

## (5) Declaration Suits (Concl'd)

the property regarding which the plaintiff seeks to have his title declared 12 Mad 223 followed in 15 C W N 823=10 I C 865; and 18 L W 399=A I R 1924 M 84; and 46. M L J 377=79 I C 343=A I R 1924 M 621

## (6) Ejectment suit

—A suit to eject a tenant at fixed rates is a suit for the possession of land and the valuation of such a suit for the purpose of Court fees and of jurisdiction is the value of the subject matter of the suit, that is to say, of the tenant right, not of the land itself nor of merely one year's rent 15 All, 63 followed in 15 A 363; and 19 C L J 418=25 I C 507; but see 1 L B R 303.

## (7) Execution of decrees.

—A Dist. Judge can transfer, to his own file, execution proceedings pending in a Court subordinate to him. 1 A 180 P. B; followed in 22 B 778; and 47 A 57; but not followed in 15 C 177; see also Marsh 195=1 Hay 459.

## (8) Partnership Suits.

—In a suit for partnership dealings, the plaintiffs valued the claim at Rs. 600. The Subordinate Judge passed a decree in favour of the plaintiff for Rs. 30,830. Held, that the appeal lay to the High Court under s. 26, Act XIV of 1869. 20 Bom 265;

—Doubted in 22 B 963 but followed in 110 I C 631=9 Lah 23.

## (9) Trust Property and Registration.

—The valuation in a suit for the removal of the defendant from the management of certain trust funds, is the plaintiff's interest in the subject-matter of the suit and the plaint should bear a stamp of a value proportionate to the subject-matter of the suit. 15 B L R 167; and 10 Calc 599; and 8 Mad 516. But see 19 All 60, in which it has been held that where the plaintiffs pray that they may be appointed as trustees, such a suit cannot be estimated at a money value; and this view has been followed in later cases 21 A 200; and 14 C W N 932=7 I C 92; and 22 A L J 1038=84 I C 822=A I R 1925 A 184; and A I R 1928 L 113=8 L 730

## (4) "Shall be instituted"

—Prima facie the plff's claim determines the jurisdiction unless some other principles come into operation: 28 C W N 710=78 I C 747=A I R 1924 C 783 =51 C 737.

## CIV PRO. CODE (1908) SEC. 15 (Contd.)

## (4) "Shall be instituted" (Concl'd)

—Date of presentation to the proper Court is the date of institution of the suit: 30 Bom L R 970=113 I C 511=A I R 1928 B 421=52 B 548.

—See also cases under—(3) "Court of Lowest grade".

## (5) Valuation, effect of.

—(1) General;—By chapter 3, Act XII of 1887, the ordinary jurisdiction of Judges and Subordinate Judges extends, subject to the present section, to all original suits; that of Munsifs to all such suits in which the subject-matter in dispute does not exceed one thousand rupees; and an appeal lies to the District Judge where the amount or value of the subject-matter in dispute (in the original suit) does not exceed Rs. 5,000. Compare. 19 W R 133, 137-8. The valuation of a suit for the purposes of stamp-duty, and the valuation of the subject-matter of the suit for the purpose of determining the jurisdiction of the Court, may be different. Thus, an appeal to a District Judge against a decree in a suit for property of the value of more than Rs. 5,000 will be set aside in special appeal though the valuation for the purpose of stamp-duty may have been less than Rs. 5,000, and though the first appeal may have been heard by consent of the parties 4 C L R 491; see also 23 I C 964; and 41 P R 1910

—Questions of jurisdiction, whether with reference to the nature of the suit or the pecuniary limits of the claim, are matters to be governed by the statements contained in the plaint. The valuation of the claim, as preferred by the plaintiff, and not as set up by the plea in defence would govern the action, not only for the purposes of the original Court, but also for the purposes of appeal and throughout the litigation—10 All 524. See also 9 W R 598; and 25 W R 230; and 9 C P L R 41; and 13 A 320; and 9 S L R 164=32 I C 629.

—Sub-Judge should not return the plaint to the Court of Munsif even if it is afterwards found that the value of the subject-matter was below Rs. 5000. (1930) A L J 386=Ind Rul (1930) All 219=122 I C 187.

—A deft. who opposes a plff's claim in a Lower Court on the ground of jurisdiction is precluded from objecting to the jurisdiction of a higher Court to which the same plaint is presented as urged by him. 9 S L R 164=32 I C 629.

—For the purpose of determining the proper appellate Court, what is to be looked at is the value of the original suit, and



**CIV. PRO. CODE (1908) SEC. 15 (Concl'd)****(5) Valuation effect of. (Concl'd)**

the amount or value of the subject-matter of the suit must be taken to be the value assigned by the plaintiff in his plaint and not the value as found by the Court 13 All 320 foll. in 86 I C 183 and 89 I C 407. See also 23 Cal 536; and 31 C 365 and 24 M 471; and 101 P R 1900; and 23 I C 964.

-But when the plaintiff fixes a certain sum as the amount of his claim only approximately or tentatively, and prays that the amount of his claim may be ascertained in the course of the suit, the amount found by the Court to be due to him must be regarded as the value of the original suit for the purpose of determining the forum of appeal. 31 Cal 365-8 Cal W N 233; See also 34 C 954 F B; but see 14 C L J 489-12 I C 745

When a suit is dismissed, or the plaint returned for want of jurisdiction, the defendant is entitled to his Costs-12 Cal 271 fall in 44 A 209.

**C. P. C. 1908 S. 16***Synopsis.*

- (1) General principles & scope.
- (2) Actually & Voluntarily resides.
- (3) Carries on business or personally works for gain.
- (4) Compensation for wrong to immoveable property.
- (5) Immoveable property, right or interest in.
- (6) Local limits.
- (7) Partition suits.
- (8) Personal obedience relived by.
- (9) Property means property levied within India.
- (10) Property situate.
- (11) "Shall be instituted"
- (12) Other cases.

**(1) General principles & scope.**

-The section applies to Prov. Sm Cause Court and to High Court but not in its original civil jurisdiction. The words "with or without rent or profit" have been newly added.

-Sections 16 to 20 contain a direction to the suitor and not to the Court and do not purport to deal with the inherent or general jurisdiction of a particular Court or purport to deprive any such Court of their jurisdiction in the event of their non-compliance. Section 21, makes it clear that a non-compliance with these provisions does not render a decree passed by a Court of competent jurisdiction a mere nullity

**C. P. C. (1908) Section 16 (Concl'd.)****(1) General Principles & scope (Cont'd.)**

so as to empower the executing Court to refuse to execute it. A I R 1931 Sind 47-Ind Rul (1931) Sind 54-25 S L R 204-131 I C 182.

-see also 43 M 675; and 9 A 191; and 23 M 167.

--S. 16, shows that the object of the Code is to limit the territorial jurisdiction of the Courts in regard to the property that they are to deal with. So a Court, in execution of a decree, has no jurisdiction to sell property, over which it had no territorial jurisdiction at the time it passed the order of sale. 17 C 699 F B [F., 18 C 526]. See also A I R 1928 M 1272.

-It may be noted that S 16, does not preclude all courts, other than the court within whose local jurisdiction certain immoveable property is situated from trying any question relating to title to that property where it is merely incidental to the reliefs which the plaintiff seeks by his suit. 10 I C 267-9 M L T 372.

--Thus a suit for a declaration, that a mortgage decree in respect of properties at Patna passed by the Court at Benares is inoperative against the plaintiff is maintainable. A I R 1924 Pat 831-75 I C 469

--So also a suit for a declaration that the probate proceedings shall not affect the plaintiffs and for the administration of the estate left by the testator, does not fall under s. 16. A I R 1926 Lah 456-94 I C 1046.

--Once the Court has seisin of the case it has jurisdiction to try it to its conclusion unless there is any reason or holding that that jurisdiction has been removed. A I R 1925 Mad 117-47 M L J 448-87 I C 152.

--Non-compliance, therefore, with the provisions of Ss. 16 to 20 is not fatal to jurisdiction of Court and does not render decree passed by Court of competent jurisdiction mere nullity and executing Court cannot refuse to execute it. A I R 1931 S 47.

**(2) Actually & Voluntarily resides.****(1) General.**

A suit that the defendant should execute and register a deed of surrender of the occupancy holding, or should pay back to the plaintiffs the consideration of his promise, is triable in a Court within whose jurisdiction the defendant resides. A I R 1926 Nag 313-93 I C 103.



## C. P. C. (1908) Section 16 (Contd.)

## (2) Actually &amp; Voluntarily resides (Concl'd)

—S. 16 (f) of the Civil Procedure Code, 1908, does not apply to cases where moveable property, for the recovery of which a suit was instituted, is under attachment by a Court of a Foreign State. Independently of S. 16 (f), C P C when moveable property is under attachment in Foreign territory by the order of a Foreign Court, the Courts in British India would have no jurisdiction to entertain a suit for the recovery of such property. But if the defendant is a resident of British India and the attachment by the Foreign Court was made at his instance the jurisdiction of the domestic tribunal is not ousted, for moveables always follow the person and a decree in personam can be executed by enforcing personal obedience of the defendant. (1912) M W N 524=14 I C 279.

—In the case of *Orde v Skinner*, 3 All 91=L R 7 I A 196=7 C L R 295, Skinner at the time of suit was actually residing at Mussoorie in the district of Saharunpore. He resided there during the hot weather, and during the cold weather he travelled through the joint estate putting up sometimes at Hansi, sometimes at Delhi, and sometimes at Bilaspur in one of the houses kept at the expense of the estate. The question for decision was, did Skinner reside at Bilaspur? Their lordships held he could have more than one residence, that as he was not a mere manager, but a part owner, and had a residence. There which his predecessor contemplated to be the principal place of residence of the family and in which Skinner kept the accounts of the estate, he dwelt in it within the meaning of s. 5, Act VIII of 1859. See also L R 1 I A 387=14 B L R 60.

—In 5 Calc., 605, an insolvent was held to "reside" in Calcutta who carried on business there by means of a gomastha; and see 12 Bom., 507 but see 20 C 771 and 45 M L J 471=76 I C 752=A I R 1924 M 158.

## (3) Carries on business or personally works for Gain.

—Where business is carried on in two places, Courts in both places can entertain a suit for dissolution of partnership. A I R 1926 Mad 427=50 M L J 298 =23 L W 361=92 I C 915.

—It will be seen, however, on comparing this case with that of 3 M H C 1462

## C. P. C. (1908) Section 16 (Contd.)

## (3) Carries on business or personally works for gain (Concl'd).

cited above, that Scott and, C. J., somewhat modified his opinion; and it is settled in Madras that it is not necessary for jurisdiction that a person should personally carry on business 4 Mad., 209; foll 12 B 507 and 17 B 662; relied on in A I R 1925 S. 153; and A I R 1929 S. 24; compare 8 Calc 678. The expression "carry on business" thus includes "carry on business through an agent" whether the person is a foreigner or British subject: 76 I C 752=45 M L J 471=A I R 1924 M 158.

—The expression "carry on business" is intended to relate to business in which a man may contract debts and ought to be liable to be sued by persons having business transactions with him. 18 Bom., 294 see this case explained in 23 S L R 229 =A I R 1929 S 24.

*Government:*—Government cannot be said to carry on business or work for gain within the meaning of this section, and can only be sued where the cause of action arises 1 Hyde 37 see also 1 Mad H C 286 and 14 Calc 256 appr. in 22 C 451 and foll in 40 C 308.

## (4) Compensation for wrong to immoveable property.

—Trespass—Compensation for wrong to land—Wrongful cutting and removal of coal—Venue See 42 Cal 942.

—*Mesne profits:*—The right to mesne profits under a decree is not immoveable property 22 Mad 256 see this case discussed in 33 C W N 193=A I R 1923 C 759.

—*Standing crops:*—Standing crops are immoveable property 14 All 30 see also 11 Mad 193 and 15 All 394. But see 22 Calc 877 and 25 Calc 693=2 Calc W N 265 and 10 C L J 25 and 17 C L J 206=17 C W N 308=18 I C 253 and also 11 N L R 18 and 6 L B R 75.

## (5) Immoveable property right or interest in,

—S. 16 applies only to suits determining rights in immoveable property 16 L W 785=43 M L J 615=1922 M W N 834=72 I C 920=A I R 1923 M 109; and where applicable, the Court within whose jurisdiction such property is situate will have jurisdiction to try the suit, even though the parties are residing outside jurisdiction. 1 L W 724=23 I C 357.

## C. P. C. (1908) Section 16 (Contd.)

(5) Immoveable Property right  
or interest in (Contd.)

— A suit for declaration in respect of the title to property must be filed in the court which would have jurisdiction to try a suit for possession in respect of the same property. A I R 1922 Oudh 249=25 O C 184=69 I C 201.

—It should be noted, however, that suits which relate to immoveable property merely indirectly do not fall under the present section 16 L W 785=43 M L J 615=1922 M W N 834=72. I C 920=A I R 1923 M 109

—e. g. a suit by vendor for unpaid purchase-money is not suit for determination or enforcement of right to or interest in immoveable property or suit for specific performance of contract 11 M L W 211=55 I C 541.

—A suit for accounts of a factory for a particular year does not fall under s. 16. 32 P L R 464=A I R 1931 L 673.

—Nor a suit to invalidate a will. 72 I C 920=A I R 1923 M 109, or adoption 30 L W 691.

—Nor a suit for dissolution of partnership: 17 A L J 567=50 I C 156=41 A 513.

—A suit to follow the purchase-money of land taken up under the Land Acquisition Act, over which the plaintiff had a mortgage line, is not a suit under cl. (d) —6 Mad 344 followed in 8 M L J 38; and 9 M L T 372=10 I C 267 and A I R 1925 S 132=19 S L R 207=79 I C 30.

—Neither is a suit to enforce a contract for the purchase of land, or in the alternative for damages—19 Calc 358, followed in 26 C 204; and 33 C 1065 but see contra 5 N L R 128=3 I C 576; and 28 M 227 See also 27 M 157; and 122 P R 1908=205 P W R 1908; and A L R 1933 M 450

—A suit to enforce a contract of hypothecation pledging certain lands for payment of the amount borrowed, and providing that on non-payment in three years the lands should become the absolute property of the pledgee is for an interest in immoveable property. 2 Mad H C 51; and 3 Mad H C 92; see also 119 I C 241=1929 A L J 279=A I R 1929 A 161=51 A 494; and 9 L L J 157=28 P L R 325=A I R 1927 L 373

—So also is a suit brought to enforce payment of principal and interest both as a simple contract liability and as a debt secured by a collateral mortgage of immoveable property. 2 Mad H C 307; see also 3 I A 1=1 Calc 1 (3=25 W R 85, approved in 49 M 403; followed in 37; A 400 and 39 M 811; and 39 M 981

## CIVIL PROCEDURE CODE (1908) SEC. 16 (Contd.)

(5) Immoveable Property right  
or interest in (Contd.)

—A suit on a promissory note and also for declaration that decretal amount is a charge on a certain property mortgaged as security for payment of the amount on promissory note falls under S. 16 (d). 96 I C 752=A I R 1926 L 660

—So also a suit for a declaration that a mortgage is not binding is a suit under s. 16 (d) C P C (1914) M W N 52=23 M L J 679=17 I C 758

—It should also be noted that for the purposes of execution by attachment and sale of the mortgage debt, the mortgage is only a moveable property, though not otherwise. 50 Ind Cas 157=21 Oudh Cas 400=6 Oudh L J 49; and (1909) Pun Re No. 18=1 Ind Cas 450=22 P W R 1909; and A I R 1924 All 796=80 Ind Cas 896=46 All 917=5 L R A Civ 674=22 A L J 840; and 13 Ind Cas 91=37 Mad 51=(1911) 2 M W N 590=22 M L J 105=10 M L T 503; and 16 Ind Cas 816; but see 9 W R 170 and 10 W R 379.

—A suit for possession and for opening a water-course is a suit for an interest in immoveable property. 4 W R 107; foll. in 24 W R 300 and 16 B 353; and so is a suit to have certain lands mortgaged declared liable for the debt. 15 W R 277. So also suits to enforce right of ferry: 11 A L J 133=18 I C 282=35 A 156, or the right of *hat*: 13 C W N 596=1 I C 520=36 C 665, or suits relating to easement are suits of determining rights in immoveable property within the meaning of S. 16 C P C. 24 W R 300; and 13 C W N 451 =4 I C 116.

—A suit for the recovery of joshpan income is a suit relating to immoveable property. Therefore, where a suit is brought for the recovery of joshpan income in respect of villages some of which are situated within, and the others outside, British India, the plff. can get a decree only in respect of the income accruing from the villages situate within British India. 46 I C 782.

—Section 16 (d) includes a charge on immoveable property. 40 Bom 337 followed. A I R 1931 Sind 47=Ind Rul (1931) Sind 54=25 S L R 201=131 I C 182.

—The plff. sued her daughter-in-law in the Poona Court for a declaration that she was entitled to a maintenance allowance of a certain amount for her life, and prayed that the amount claimed should be made a charge on the deft's land in the inam village in the Bhimthadi Taluka of the Poona Dt. The deft lived in a Native State. The Lower Court held that it had no

## C. P. C. (1908) Section 16 (Contd.)

(5) Immoveable property, right  
or interest in (Conclud)

jurisdiction to try the suit. Held, that the Poona Court had jurisdiction to try the suit under S. 16 (d) of the C. P. Code.

40 Bom 337=18 Bom L R 67= 32 I C 985.

If the subject-matter of the award refers to a charge on immovable property outside the jurisdiction of the Court to which an application is made under para 20, Sch II, that prima facie ousts the jurisdiction of that Court. 51 C 361 P C, relied on. 30 M 478, distinguished. A I R 1931 Sind 47=Ind Rul (1931) Sind 51 =25 S L R 204=131 I C 182.

—Where the relief granted by the award is a declaration of proprietary title to certain immovable property, the Court, within the local limits of whose jurisdiction the subject matter of the award is not situate has no jurisdiction to file the award and the proviso to s. 16, C P C is not applicable. A L R 1933 A 483.

—Where property for partition is partly moveable within the jurisdiction of Court and partly immovable outside jurisdiction the Court may grant relief so far as the former is concerned, and decline jurisdiction as regards the latter. 4 Bom 482; 19 Mad 448; 27 Mad 157; 28 Mad 216; A I R 1926 Lah 503, relied on. 27 Mad 157, approved. A I R 1931 Sind 50=Ind Rul (1931) Sind 78=25 S L R 275=131 I C 186

## (6) Local limits

—A suit for declaring that a Will set up is a forgery and for its cancellation can be instituted under s. 20 (c) in a Court having jurisdiction over any part of the properties dealt with by the Will. A I R 1923 Mad 109=43 M L J 615=(1922) M W N 834=16 L W 785=72 I C 920.

## (7) Partition suits

—Partition suit—Property consisting both of immovable and moveable—Moveable property within jurisdiction but immovable outside—Court has no jurisdiction to grant relief in respect of immovable property. A I R 1931 Sind 50=Ind Rul (1931) Sind 58=131 I C 186.

## (8) Personal Obedience relieved by.

—The expression 'personal obedience' in the proviso to s. 16 must be interpreted with special reference to the fact that the defendants reside or work within the jurisdiction of the Court, whose order is to

## CIV PRO CODE (1908) SEC. 16 (Contd)

## (8) Personal Obedience relieved by (Conclud)

be obeyed. The obedience must be such as the defendants could render without going beyond that jurisdiction. In the case of more than one defendant, the proviso is inapplicable, unless all the defendants reside or carry on business or personally work for gain within the jurisdiction of the Court where the suit is filed, if that is not the Court within the local limits of whose jurisdiction the property is situate. I N L R 121.

A suit to recover mesne profits of land situated outside British India can be instituted in British India if the decree can be executed by personal obedience of the defendant. A I R 1922 Bom 188 =46 Bom 108=23 Bom L R 903= 68 I C 510.

—The plaintiff send in the Court at Nasik in British India to establish his right to a share in the income derived from certain grants of lands outside British India, but received by the defendant within the jurisdiction of the Nasik Court. Held, that the suit was within the jurisdiction of the Court, as it was not a suit in respect of immovable property.—24 Bom 407.

## (9) Property means property in British India.

—Courts in British India cannot entertain a suit with respect to property outside its jurisdiction. A I R 1928 Nag 295=24 N L R 95=111 I C 135.

## (10) Property situate

—Ss. 16 and 17 apply both to moveable and immovable properties the latter must situate wholly or in-part within the jurisdiction of the Court. A I R 1926 Lah 503 =27 P L R 398=96 I C 691.

—A suit to enforce a charge created on the land can be instituted in the Court where the land is situated: 29 M L J 639=2 L W 1046=18 M L T 464=31 I C 255=42 M 795 see also 32 I C 985=40 B 337

—Jurisdiction of Court enforcing charge—Property situated in Agency—Agency Court has jurisdiction. 39 Mad 795 =29 M L J 639=31 I C 255.

—Suit for rent can be brought where property is situate or where tenant resides.—But suit for ejectment can be brought only where property is situate. A I R 1923 Cal 619=27 C W N 542=77 I C 253.

## C. P. C. (1908) Section 16 (Contd.)

## (10) Property Situate (Concl'd)

—A suit for setting aside the Board's decision under the Madras Religious Endowments Act that a temple is a public temple lies only in the Court where the temple is situate. A I R. 1928 Mad 1272 =28 L W 535=55 M L J 605=Ind Rul (1929) Mad 561=116 I C 561.

Suit for declaration of plff's title to immoveable properties situate in different districts—Suit brought in one district—Lease by one of several defendants. see 21 I C 438.

Where the properties are situate in different jurisdictions, these sections do not deprive the parties of their right to bring successive suits. (1916) 1 M W N 146 =3 L W 107=32 I C 423.

Suit for administration of the estate of the deceased is cognizable by the Court in the jurisdiction of which a portion of the immoveable property is situate. A I R 1926 Lah 503=27 P L R 398=96 I C 691.

Administration suit—Property partly outside jurisdiction—Court cannot order delivery of such property to administrator but can order person in possession to account for the portion as condition to his obtaining his share if any in the estate. A I R 1921 L B 82=11 L B R 188=66 I C 530.

Where goods are consigned to the buyer by Railway delivery to the Railway Company is under S. 91 of the I C. A. delivery to the buyer and the cause of action for a suit for the price of goods arises in the place of consignment. The provision in the latter part of S. 93 I C A. applies only to the case where the goods do not reach the consignee. (1914) M W N 803=24 I C 423.

Contract made where goods are delivered for transit. See 15 I C 12.

## (11) Other Cases

—In order to entitle an applicant to get a suit instituted in the Court within whose jurisdiction the bulk of the property lies transferred to a Court within whose jurisdiction the witnesses live, the test is that he must make out a strong case of the balance of convenience. 5 A 60, foll. The practice in England is the same. 14 A L J 244=32 I C 613.

—A Small Cause Court can attach and sell a preliminary decree for foreclosure of immoveable property. 44 I C 252.

—Suit for accounts among members of joint family lies in British India though family properties are situated in a foreign jurisdiction. A I R 1923 Lah. 551=77 I C 532.

## C. P. C. (1908) Section 16 (Concl'd)

## (11) Other Cases. (Concl'd)

"Defendant" means "all the defendants". A I R 1924 Cal 443=73 I C 405.

—Nationality of parties has no effect on jurisdiction—British Courts—Determination of rights of French subjects regarding lands in British India. See 26 I C 367.

## CIV. PRO. CODE (1908) SEC. 17.

*Synopsis.*

- (1) General principles & scope of the section.
- (2) Execution Proceedings.
- (3) Jurisdiction of different Courts.
- (4) May be instituted.
- (5) Relief respecting immoveable property.

## (1) General Principles &amp; Scope.

—The present section deals with suits relating to immoveable property situated within the jurisdiction of different and Courts enables the plff to avoid multiplicity of suits by enacting that a suit in respect of such property can be brought in any one of the courts and that such Court can deal with the whole. see. A I R 1929 Oudh 341=114 Ind Cas 775=4 Luck 573=7 O W N 157; and A I R 1928 Mad 820=110 Ind Cas 672; and A I R (1926) Lah 503=96 Ind Cas 691=27 P L R 398; and 21 Ind Cas 438; and 33 Cal 1065 (1075)=4 Cal L J 238; and 5 C L J 580.

—But this does not mean that the section bars the parties from bringing successive suits 3. L W 107=1916 M W N 146=32 I C 423; and 32 C 146; and 19 M 477.

—But it should be noted that for this to apply there must be only one cause of action relating to property situated in different jurisdictions. 12 P WR 1910=59 P L R 1910=5 I C 835; and 4 O C 397; and a suit would be bad for multifariousness if the above proviso is disregarded. 21 I C 438.

There is no justification for bringing the suit in respect of the trust property elsewhere than in the Court of the district where the property is situate. Such justification cannot be found in S. 17 of C P C. 59 I A 268=7 Luck 324=36 L W 146=1932 A L J 691=137 I C 539=56 C L J 36=36 C W N 937=9 O W N 614=34 B L R 1299=63 M L J 336=A I R 1932 P C 172=I R 1932 P C 197=A L R 1932 P C (322) P C

## (2) Execution Proceedings,

Where property is entirely beyond the jurisdiction of a Court such cannot deal with it in execution proceedings 14 C L J 228=16 C W N 402=11 I C 417=39 C 104.



## CIV PRO CODE (1908) SEC 17 (Contd)

## (3) Jurisdiction of different Court (Contd)

also 21 Calc 639; 22 Calc 871 But See contra, 2 C L R 334 and 23 W R 233 and see also the Full Bench case of 17 Calc 699 in which it has been held that, if before the sale the mortgaged property is transferred by an order of Government to the jurisdiction of another Court, the sale should be set aside as without jurisdiction. This case has been followed in 18 Calc 528 and 18 L W 747-76 I C 269=A I R 1924 M 144.

## (3) Jurisdiction of different Courts.

"Court" in s. 17 means the Court to which the Code applies. 37 M L J 11-17 A L J 694-21 Bom L R 914-23 C W N 1033-30 C L J 209-10 L W 362-1919 M W N 502-26 M L T 127-46 I A 151-51 I C 185-42 M .813 P C (on appeal from 34 I C 411)

The words "a suit to obtain relief respecting immoveable property" cover suits for foreclosure, sale or redemption but the words in s. 17 "within the jurisdiction of the different Courts" must mean see also under ss. 38 39. But where and the property is partly situated within jurisdiction the Court can acquire jurisdiction to deal with the whole property in execution proceedings 6 P L T 71-80 I C 900=A I R 1925 Pat 139.

The authority given by s. 17 includes an authority to make the order for the sale of a property included in a mortgage, but situated in different districts 14 Calc 661 and the Court has the power to carry out its decree by selling the property, whether any portion of it be within the local limits of its jurisdiction or not 19 Calc 13; see within the jurisdiction of different Courts to which the Code applies. British Indian Courts have no jurisdiction to try a suit on mortgage so far as it relates to property situate outside British India. A I R 1930 P C 188-59 M L J 379=Ind Rul (1930) P C 321-57 I A 194-34 C W N 854 (P C)=126 I C 417

Award as to property outside British India cannot be filed in a Court in British India. A I R 1929 Lah 24-10 L L J 500-113 I C 899.

Civil Court Mortgage—Suit on mortgaged land in Sonthal Parganas—See 27 M L J 459 (P C)=25 I C 451.

—In a suit for partition of property situated partly within and partly without jurisdiction, the claim was withdrawn in regard to the property within jurisdiction. Held, the Court could partition the property outside—12 Mad 380; see also 16 A

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## CIV PRO CODE (1908) SEC 17 (Contd)

## (3) Jurisdiction of different Courts (Contd.)

359; and 30 A 560 F B; and 26 N L R 103 =A I R 1930 N 189; and A I R 1926 N 405 =9 N L J 97-95 I C 89.

—For the principle is that—Jurisdiction once vested cannot be taken away even though the portion of the property which gave it the jurisdiction does not belong to the plaintiff unless its inclusion was not bona fide. A I R 1930 Nag 189 =Ind Rul (1930) Nag 319-26 N L R 103-124 I C 703. see also 30 A 560.

—Thus a Court having jurisdiction to try the question as to who the successor of the waqf is can also decide as to the mutwaliship of the waqf property: 109 I C 835=A I R 1928 O 67.

—Suits for foreclosure of property partly in Calcutta and partly the Mofussil Coryton, 125 for sale of lands in different districts by establishing the judgment-debtor's rights thereto S D N W 1861, p. 581 fall within this section. As to mortgage suit see 41 Cal 972=A I R 1914 P C 67-41 Ind App 110-23 Ind Cas 637-12 All L J 774-16 Bom L R 400-19 Cal L J 484 =18 Cal W N 817-27 M L J 80-16 Mad L T 6-1 Mad L W 1050-1914 M W N 462 P C. and 8 Ind Cas 1142-37 C 907.

## (4) May be instituted.

—Suit for price of goods sold lies at the place where it was agreed to be paid. A I R 1922 Lah 36; 3 Lah L J 499-69 I C 424 or where part of cause of action arose 34 M L T 116-46 M L J 371-19 L W 499 =84 I C 691=A I R 1924 M 789.

—The word "May" suggests that it is optional for the plaintiff to sue for the whole claim in any one of the Courts where any portion of the property is situated or to bring separate suits on the same cause of action with regard to each of the properties situated within the jurisdiction of the various Courts. 162 P R 1884; and 32 I C 423; and 20 C 379; and 3 M H C R 376.

## (5) Relief respecting immoveable property.

—The section will not apply if the suit is based on different causes of action relating to property situated in different districts see cases under (1) General Principles supra. An agreement appointing arbitrator to partition joint property which includes revenue paying land cannot be filed in Court under para 17 of 2nd Schedule of the C P Code. 91 P L R 1917 =166 P W R 1917-42 I C 261.



## CIV PRO CODE (1908) SEC 18 (Contd.)

## ( 5 ) Relief respecting immoveable property (Contd.)

C. P. C. 1908. S. 18.

—The section deals with cases where boundaries of estates are uncertain owing to which jurisdiction is also uncertain. The section also deals with objection to jurisdiction on technical grounds and the insertion of the words "and unless there has been a consequent failure of Justice" is meant to discourage such objections. The rule as laid down by the section also applies to execution proceedings. see 57 I C 579=37 M L J 442=43 M 135.

—Where uncertainty as to local limits is alleged by a party any of the Courts within whose jurisdictions the property is distributed may if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and proceed to dispose of the suit. But mere omission to record statement as to uncertainty will not prejudice the decree (1) if in fact, the Judge had judicially considered the question 1 P R 1901 or (2) if, in fact, there was no reasonable uncertainty at the time of instituting the suit or (3) if, in fact, there had not resulted any failure of justice 33 C L J 497=65 I C 833=A I R 1922 C 345=49 C 37.

—As to procedure where jurisdiction of the Court is doubtful see 33 C L J 497=65 I C 833=A I R 1922 C 345=49 C 37.

—Objection to jurisdiction on ground of uncertainty of local jurisdiction must be taken in the trial Court 7 C L J 152; see also 24 C 449 and A I R 1928 Pat 324=7 Pat 216, and 1 O C 51.

C. P. C. 1903. S. 19.

—The section applies to High Court and Provincial Small Cause Court. As to execution of Privy Council decree in case of transfer of jurisdiction between three Courts see (1914) M W N 896=27 I C 88.

—"Wrong" referred to in this section means actionable wrong 25 B 230; and the section deals with actionable wrongs to person or moveable property by enacting that suits relating to such actionable wrongs may be brought either where the wrong is committed or where the diff. resides or carries on business or personally works for gain. 39 M 433.

—Under this section therefore a person may be sued at the place where he carries on business though the cause of action arose at a different place 31 C W N 174=1926 M W N 532=96 I C 887=A I R 1926 P C 88.

—By "business" is meant commercial business 53 M L J 355=39 M L T 304=26 L W 558=105 I C 576=A I R 1927 M 689=50 M 449.

## CIV. PRO. CODE (1908) SEC. 19 (Contd.)

## ( 5 ) Relief respecting immoveable property (Contd.)

—The place where the cause of action arises must be determined with reference to the terms of the original contract Section 160 of the Contract Act contemplates direction of the pawnee about the delivery of the property himself and not his assignee A I R 1922 Nag 127=65 I C 65.

—Defamation in Cochin—Action in Br. India See 28 M L J 310=28 I C 394=39 Mad 433=2 M L W 290.

—The word "resides" refers to natural persons and not to legal persons e. g. Government, company, corporation etc. In the case of legal persons, therefore, the suit can only be brought at the place where the cause of action arises : 105 I C 576=53 M L J 355=26 L W 558=A I R 1927 M 689=50 M 449.

C. P. C. 1908. S. 20.

*Synopsis.*

- (1) General principles & scope.
- (2 & 3) Actually & voluntarily resides.
- (4) Carries on business.
- (5) Cause of action.
- (6) Consent & Waiver by parties.
- (7) Defendants residing without Jurisdiction.
- (8) Domicile and its effect on place of suit.
- (9) Ex. I defendants residing in more than one place.
- (10) Ex. II Corporation Company or firm.
- (11) Extra-territorial Jurisdiction.
- (12) Leave of the Court.
- (13) Local limits.
- (14) Particular suits, Cause of action in:-
  - (1) Account suits.
  - (2) Administration suits.
  - (3) Contract by Correspondence.
  - (4) Contract suits.
  - (5) Divorce suits.
  - (6) Grant of a probate or letters of administration.
  - (7) Injunction suits for.
  - (8) Partnerships suits.
  - (9) Representative suit.
  - (10) Suit for legacy.
  - (11) Suit for restitution of conjugal rights.
  - (12) Suits for torts.
  - (13) Suit on a foreign decree.
  - (14) Suits on Negotiable instruments
  - (15) Suits to set aside a decree or a plaint.
  - (16) Trade Mark.
  - (16-a) Revision.
- (15) Personally works for gain.
- (16) Plaintiffs right to select Court.
- (17) Transaction by V. P. P.
- (18) Miscellaneous.

## C. P. C. (1908) SECTION 20 (Contd)

## (1) General principles &amp; scope.

—The section applies to Provincial Small Cause Court and to High Court; but it does not apply to the Original Side of the High Court, which is governed by its Charter, and under it the words "cause of action" mean the whole cause of action and not a material part of it. Thus, in a case on contract, it includes both the contract and the breach. 15 Bom 93; approved in 11 C W N 663 and relied on in 79 I C 30 and A I R 1930 C 258-56 C 979; and see the cases cited in 8 Clac 483.

—If, however, only part of the cause of action arises in Calcutta, then the suit can be brought on the Original Side of the High Court, if leave has been first obtained—11 Bom 649; followed in 53 M L J 25 and 79 I C 30; see also 14 Calc 256; and 1 B 23 followed in 29 M 239; and see 21 B 126.

—S 20, like the preceding section deals with venue as respect personal actions: 25 M L J 661; and 19 M 477.

—The opening words of the section—"subject to the limitations aforesaid"—suggest that provisions of S. 20 are subject to those of Ss. 15 to 19. see 7 C W N 402-30 C 453; and 34 M L W 277-A I R 1931 M 705.

—Under the section the plff. is provided with a choice of various alternatives as regards place of suing. He may sue in the Court of the place where the debt (a) resides or (b) carries on business or (c) personally works for gain or where the cause of action arises wholly or in part, irrespective of the residence of the debt. If there are more than one debt, then, if all the debts reside or carry on business or personally work for gain at a place, the Court of such place will have Jurisdiction, as also the Court of the place where the cause of action arises wholly or in part. If all the debts do not reside etc. at the place the plff must obtain leave of the Court, unless the debts who do not reside etc. at that place acquiesce in the institution of such suit. A suit may, therefore, be instituted within the local limits of whose jurisdiction each of the defendants, where there are more than one, at the time of the commencement of the suit, actually carries on business, and secondly in the alternative, within the limits of whose jurisdiction any of the defendant at the time of the commencement of the suit, carries on business, provided that in such a case either the leave of the Court is given or a defendant who does not carry on business acquiesces in the suit being brought. A I R 1922 All 367-19 A L J 696-3 U P L R All 18-65 I C 93.

—It may be noted that Court will have no jurisdiction under the section in a

## C. P. C. (1908) SECTION 20 (Contd)

## (1) General principles &amp; scope (Contd)

case where several causes of action are joined, if it has no jurisdiction on any one of such causes: 7 M 171.

—But it may also be noted that jurisdiction once vested will not be divested by debt removing his residence beyond the jurisdiction: 88 P R 1869 or by change in the territorial Jurisdiction of the place where the cause of action had arisen: 23 L W 885-A I R 1928 M 746.

## (2-3) Actually &amp; Voluntarily resides.

—A court can entertain a suit, if the defendant resides or all the defendants reside within its jurisdiction even if the cause of action arises outside it. 30 Bom 364 (390)-8 Bom L R 56.

—As to meaning of "residence" see S. 15 & 15 C W N 399-13 C L J 221-9 I C 189-38 C 394; and 16 M L J 238-29 M 239.

—A suit may be instituted within the jurisdiction of the Court where, at the time of the institution, the defendant actually and voluntarily resides though such residence may be temporary. 14 I C 573.

—A traveller putting up at an hotel, may be said in one sense to reside there. A I R 1925 All 140-5 L R A Civ 695-87 Ind Cas 795.

—Where the creditor resided at P and the debtor had a permanent family house at P, but the loan was borrowed at B, where the debtor had a temporary residence. Court at P had jurisdiction to try the suit in respect of the loan: 24 L W 576-97 I C 1027-A I R 1926 M 1207.

—And where a person had permanent residence at M which he left in charge of his servant and went to P with the intention of living there for some months it held that the Court at P had jurisdiction over him: 11 Ind Cas 447-34 Mad 257-38 Ind App. 129-15 Cal W N 741-14 Cal L J 64-8 All L J 774-13 Bom L R 520-(1911) 2 M W N 375-21 M L J 669-10 M L T 263 P C.

—The term [residence is naturally a flexible one, but in the case of traders carrying on business it is manifestly their place where they earn a living and do their daily work. A I R 1924 All 669-22 A L J 457-L R 5 A 363 Civ.-79 I C 567.

—Where it was proved that the debt had lived and carried on business in P for forty years and there was apparently no intention of their ever returning to their original home at N, their place of residence under S. 20 of the C. P. Code is in P. and not at N; although they had an ancestral

**C. P. C. (1908) SECTION 20 (Contd)****(2) Actually & Voluntarily resides (Contd)**

abode and some ancestral land at the latter place. 112 P R 1916-38 I C 62 see to the same effect 2 Bom L R 605

—Where a place of payment is not specified either expressly or by implication, the general rule of English Law is that the debtor must seek his creditor, i. e., he must pay the debt at the place where the creditor is living. S. 49 of the Contract Act is in accordance with this rule and leaves it to the creditor to appoint a reasonable place of payment. 6 Bur L T 143-20 I C 683 see to the same effect Ind Rul (1931) Lah 431-32 P L R 737-131 I C 303 (2) and A L R 1933 B 167.

—British Indian Courts have jurisdiction over foreigners provided the latter reside in British India or hold immoveable property in British India: 25 A L J 356 =101 I C 673-A I R 1927 A 413-49 A 669

—Reading ss 20. and 21 of the Civil Procedure Code together with s. 144 of the Bengal Tenancy Act a suit for rent may be instituted in the Court within the local limits of the jurisdiction of which lies the property in respect of which a suit for possession may have been brought. Clauses (a) and (b) of s. 20 Civil Procedure Code allow a landlord to institute a suit for rent where the tenant resides. This must obviously be limited to cases where the landlord seeks a decree for money. A suit for the recovery of rents of lands situate in one District may be brought in another District where the defendant is residing. A I R 1923 Cal 619-27 C W N 542-77 I C 253

**(4) Carries on business**

—Where defendant is ordinarily resident in the Punjab but carried on business, at Quetta he can be sued in Quetta though the cause of action took place in Persia. A I R 1926 P C 88=(1926) M W N 592-31 C W N 174-96 I C 887.

—The test of carrying on business is not the continuity or intermittency of the business but the fact of owning interest in the business and receiving profits. The expression "carrying on business" occurring in S. 20 (a), Civil P. C., is used as distinct from personally working; it does not necessarily involve personal presence or personal effort. It only means having an interest in a business at that place, a voice in what is done a share in the gain or loss, and some control, if not over the actual method of working at any rate upon the existence of the business. 28 N L R 118-A I R 1932 N 114 (115)=I R 1932 N 123-140 I C 63

**C. P. C. (1908) SECTION 20 (Contd)****(4) Carries on business (Contd)**

—see to the same effect A I R 1922 All 367-19 A L J 696-3 U P L R (All) 18-65 I C 93

—Where the deft's firm having its head office at Bombay had a sub-office at Amritsar, through which the correspondence with the customers at Amritsar was conducted by the deft and it also appeared that the orders were received at Amritsar and the moneys were received and disbursed by the sub-office which in some cases also passed receipts it was held the deft was carrying on business at Amritsar and that the mere fact that the orders were not binding until accepted by head office at Bombay did not make any difference: 33 P L R 1088-A I R 1933 L 11-A L R 1933

L 256-14 L 42.

—But a deft cannot be said to carry on business at a place where he keeps no office but has agent to canvass orders and forward them without power to enter into contract or to receive moneys of on behalf of the defendants. A I R 1923 Lah 427 =73 I C 205

—Where a Life Assurance Company has agency in Madras, but the agency acts as a post office not having any discretion in the matter either to conclude contracts or to vary them or to enter into them it does not carry on business in Madras. A I R 1929 Mad. 347-56 M L J 299-29 L W 628-Ind Rul (1930) Mad 171-121 I C 155.

—The words "carry on business" refer to commercial business: A I R 1927 Mad 689-50 Mad 449-105 Ind Cas 576-53 M L J 355-39 M L T 304-26 M L W 558; and hence do not apply to Secretary of state for India A I R 1927 Mad 689-50 Mad 449 =105 Ind Cas 576-53 M L J 355-39 M L T 304-26 M L W 558

—See to the same effect 21 I C 1-40 C 308 (on appeal from 16 C W N 747-15 I C 955).

—Where business is carried on at two places, Courts at both the places have jurisdiction: A I R 1926 Mad 427-92 Ind Cas 915-50 M L J 298-23 M L W 361.

—Where a Jinning and Pressing factory was kept dormant under contract of combination with other factory owners under which jinning and pressing factory was to remain quiescent but where the owner was entitled to share in joint profits of combination he was nevertheless deemed to be carrying on business of jinning factory. 28 N L R 118-A I R 1932 N 114 (115)=I R 1932 N 123-140 I C 63.

—A suit by a principal against a commission agent who has agreed to execute an order placed with sum by corres-

## C. P. C. (1908) SECTION 20 (Contd)

## (4) Carries on business (Conclud)

pondence must be brought at the place where the commission agent carries on business or resides and not at the place from where the principal sent the order: 10 L L J 87-29 P L R 406-A I R 1928 L 297 -9 Lah 455 see to the same effect. A L R 1932 L 143. (Civ).

## (5) Cause of action

—In *Read v. Brown* (L. R., 22 Q. B. D., 128) "cause of action" is explained to mean "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved." In *Cooke v. Gill*, L. R. 8 C. P., 107, it is said that "cause of action" has been held from the earliest time to mean every fact which it is material to be proved to entitle the plaintiff to succeed—every fact which the defendant would have a right to traverse. This definition was followed in 31 Calc. p. 281-8 Calc. W. N. 207. and A L R 1933 C 657; and 1 O L J 561-26 I C 225; and 31 M L J 316-5 L W 246-37 I C 681; and 1 N L R 4 and 41 I C 233-39 A 506, and A I R 1921 Mad 664-14 L W 341-70 I C 284 and 65 I C 452-A I R 1922 Oudh 109, and 41 Ind Cas 233-39 All. 506-15 All. L J 557; and 37 Ind Cas 681-31 M L J 816-5 L W 246; and 1905 Pun Re No 1-1905 P L R 83-1905 Pun W R 11 and 3 Lower B R 56 (60) and 52 I C 929.

—In 15 I A 156-16 Calc. 98; it has been said by Lord Watson that "the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour." See also 15 I A 66-15 Calc., 422, and 25 M 736; and 38 M 247; and 25 Bom L R 1172-A I R 1924 B 141-81 I C 776; and A I R 1929 P 685; and 46 I C 913; and 34 M 97-6 I C 233 and 1 N L R 4 and 33 Bom L R 1364-A I R 1932 B 43; and 57 P R 1907; and 7 Bom L R 925.

—Meaning of the expression should be gathered from the previous legislation in India and not from definitions of the expression in English decisions. A I R 1924 R 145-I R 694 see also 51 M L J 351-49 M 369. and 33 C 367; and 2 O C 149; 36 A 564.

## C. P. C. (1908) SECTION 20 (Contd)

## (5) Cause of action (Contd)

—If cause of action did not occur within the jurisdiction of the Court it cannot entertain a suit that a decree granted by another Court does not bind plaintiff.

A I R 1924 Pat 831-75 I C 469.

—Cause of action must be antecedent to the suit and so no cause of action can be founded on any allegations made in the proceedings. A I R 1929 Cal 830-Ind Rul (1929) Cal 513-50 C L J 328-125 I C 289.

—The right to join in one suit two causes of action against a defendant cannot be exercised unless the Court to which the plaint is presented has jurisdiction over both causes of action 7 Mad., 171. followed in 8 M 62; see also A I R 1924 M 789-84 I C 691.

—Where the cause of action indubitably arises within the jurisdiction of the Court to leave under s. 20 (b) is necessary. A I R 1929 Sind 170-23 S L R 365-Ind Rul (1929) Sind 134-117 I C 150.

—And a Court once vested with jurisdiction continues to have jurisdiction over the suit even if the place where the cause of action arises ceases to be situate within its jurisdiction. A I R 1928 Mad 746-28 L W 885-Ind Rul (1929) Mad 289-114 I C 545.

—The cause of action of a plaintiff suing in ejectment cannot be affected by the title under which the defendants profess to hold possession, for it is of no importance to the plaintiff what the defendant's title may or may not be. If his right has been infringed by one act or transaction that infringement gives him a cause of action against all persons interested in the infringement 29 C. 871 foll and 6 C W N 585 dist. 20 I C 347.

—The Court within whose jurisdiction the cause of action arose even partly can entertain a suit for damages for malicious prosecution. A L R 1933 C 657.

—And Court within whose limits refusal to refer to arbitration took place has jurisdiction to entertain an application under Sch. II para 17, C P C, for such refusal is the fundamental cause of action in such cases. A L R 1934 L 117. See also 8 S L R 107-27 I C 129.

—Bona-fide voluntary assignment affords a valid cause of action to the assignee to sue his assignor and original debtor or either of them in the Court within whose jurisdiction the assignment is made. 23 S L R 137 and (1879) 5 A C 342 relied on. A L R 1933 S 218.

—Where a reversioner sues in the Godavari Court to cancel a Will by a widow in respect of properties in Godavari and Kistna it was held, that as the



## C. P. C. (1908) SECTION 20 (Contd)

## (5) Cause of action (Contd)

plaintiff was bound in such a suit to prove that he has an interest in the properties dealt with by the Will, part of the cause of action arose in all the places where the properties are situate, and where the threat of an injury to those properties arose. A I R 1923 Mad 109=16 L W 785=43 M L J 615=(1922) M W N 834=72 I C 920.

—Delivery to carrier—Cause of action where arises. see(1 914) M W N 803=24 I C 423.

—Place of suing—Banker and depositor—Cause of action—Place of business—Intention of parties see, 41 I C 890.

—Plff. sued the deft. company in the court at Feni upon two policies of life insurance. The assured sent proposal forms for the policies from some place in the Chittagong Dt. to the head office of the company at Calcutta where the policies were made out and despatched to the assured who subsequently died within the local limits of the court of Feni. Held, that in the absence of anything to show that there had been a failure of justice the trial cannot in view of S. 21 of the C P Code, be set aside as without jurisdiction. 22 C W N 517=44 I C 694.

—In a suit by the plff. in the Calicut Court claiming (1) refund of freight, (2) the price of the bundles short delivered, or (3) the amount due to him on a 'general average' account. Held, (1) that the freight having been collected in Calicut, the cause of action for its refund arose in that place; (2) that the cause of action for the price of goods short delivered arose partly in Calicut as that was the place where the goods were to be delivered according to the terms of the Charter party; and (3) that the fact that the voyage safely came to an end was part of the cause of action for general average and that having taken place at Calicut, the Calicut Court had jurisdiction to try the whole suit. 35 M L J 189=(1918) M W N 521=24 M L T 209=47 I C 708.

—A decree passed by a Bombay Court was going to be executed in Amritsar by the Bombay Court. Though a proclamation of sale was issued at Amritsar as no cause of action arose at Amritsar for a declaration that the decree was a nullity as no part of execution proceedings was taking place at Amritsar. A I R 1929 Lah 449=11 Lah L J 306=Ind Rul (1930) Lah 39=120 I C 279.

—A decree was obtained at Calcutta but the judgment-debtor sued in Manipuri Court to have the decree set aside on the ground of fraud and for an injunction to restrain the decree holder from taking out

## C P. C. (1908) SECTION 20 (Contd)

## (5) Cause of action (Contd)

execution of the decree. Held that the Court at Manipuri had no jurisdiction to entertain the suit. 36 All 564=12 A L J 955=24 I C 978.

—Discovery of the fraud is no part of the cause of action. The cause of action is the fraud. A I R 1923 Mad 272=1922 M W N 811=72 I C 982.

—Where in order to bring a suit within the jurisdiction of a Court of a particular locality, the plaintiff makes false statements knowing them to be false that is a fraud on the Court and cannot give the Court jurisdiction which it originally had not. A I R 1923 A 137=45 A 193=71 I C 411.

—Where the plaintiff alleged that on account of defendants' dishonesty or negligent conduct and dereliction of his duty as agent the plaintiffs had suffered a loss. It was held that the cause of action accrued at the place where the conduct complained of occurred. A I R 1924 Sind 22=76 I C 197.

## (6) Consent &amp; Waiver by parties.

—Objection by Deft.—Deft if acquiesces by not applying for transfer. See 18 C W N 1340=27 I C 232.

—A transfer of sarbarikari tenure is not complete and valid as against the landlord, until the landlord has given his consent to it. A landlord is not entitled to claim the mutation fee under S. 16 until he has registered the transfer. The institution of a suit for the recovery of the mutation fee does not amount to consent to the transfer. 4 Pat L J 387=52 I C 231.

## (7) Defendants residing without Jurisdiction.

—British Court in so exercising jurisdiction over foreign subject should protect his interests as if he were British subject, A I R 1926 Mad 584=50 Mad 27=50 M L J 348=1926 M W N 328=24 M L W 94=94 I C 512. see also 17 M L J 304=30 M 438.

—A Municipal Court can exercise jurisdiction over a non-resident foreigner where the cause of action arises within its jurisdiction. The question whether its decree could be enforced against him in the foreign Court is one for the consideration of the Courts of that state. 35 M L J 189=1918 M W N 521=24 M L T 209=47 I C 708.

—But a British Indian Court cannot pass a partition decree with regard to the moveable property with a deft living out of British India. 24 N L R 95=111 I C 135=A I R 1928 N 295.



**C. P. C. (1909) SECTION 20 (Contd)****(7) Defendants residing without Jurisdiction (Contd)**

—Nor can such a Court pass a decree against a foreigner which cannot be enforced against him. 23 S L R 46-101 C 438-A I R 1927 S 160.

—Where some defts lived outside jurisdiction and leave to sue is refused by Court the suit cannot go on unless the deft who is outside acquiesces. 23 Bom L R 1086-64 I C 919-A I R 1922 B 152-46 B 229. Held as regards an application under s. 20 (b) C. P. C. for leave to bring a suit against some of the defendants who resided outside the jurisdiction of the Court notice of the application to the defendants was not required to issue under the law. But in certain circumstances as where a plaintiff—assignee of a claim brings a suit in a Court contending that part of his cause of action arose within the jurisdiction of that Court by virtue of the assignment having taken place there and hence under s. 20 (c) he was entitled to bring his suit in that Court the issue of such notice was advisable. 1933 A L R L 747.

**(8) Domicile in Native States.**

—British Courts are empowered to pass judgment against a non-resident foreigner, provided that the cause of action has arisen within the jurisdiction of the Court pronouncing the judgment 25 Bom 528. In 23 Mad 458 it was argued that no foreigner is subject to jurisdiction except by residence or domicile and that the Indian Legislature had no power to legislate in conflict with this rule of international law, affirmed in 26 M 544 P C and relied on in 23 S L R 229-A I R 1929 S 24; see also 29 M 239; and 29 M 69; and 53 B 12; and 26 Bom L R 535-80 I C 482.

**(9) Ex. I. Defendants residing in more than one place.**

—Where a defendant has been residing at C for the sake of business and he intends to return to his permanent dwelling at Q ultimately he must be deemed to have his temporary residence at C and must be deemed to be residing at both the places C and Q in respect of any cause of action arising at C within the meaning Ex. (1) s. 20 of

**C. P. C. (1908) SECTION 20 (Contd)****(9) Ex. I defendants residing in more than one place (Contd)**

C P C and a suit could be instituted against him on this cause of action at both places as per s. 20 (a) 33 I C 353 and 38 I C 62 distinguished 125 I C 320 followed. A L R 1933 L 880.

—In a suit for damages for conversion of land it is open to the plaintiffs to proceed against any one or more of the joint tort-feasors as they may elect. Therefore a suit started against one of the tort-feasors, who resides in Calcutta can be properly maintained in Calcutta High Court either with previous leave of the Court or with acquiescence of other tort-feasors (defendants). A I R 1928 Cal 887-32 C W N 208-Ind Rul (1929) Cal 503-116 I C 727.

—The mere fact that the ancestral home of persons, who are really residing outside the jurisdiction, was within the jurisdiction, does not give jurisdiction. A I R 1921 All 193-19 A L J 822-64 I C 688.

—Endorsement and delivery of a negotiable instrument within the territorial limits of the jurisdiction of a court is sufficient to bring a suit on the instrument within the jurisdiction of that court even though the note was executed outside the limits of the court's jurisdiction. A person in Government service who is liable to be sent to various places and may possibly be left at one place for several years, cannot be said to have a lodging, at the place where he is stationed, for a temporary purpose only within the meaning of Explanation I to s. 17 of the Civil Procedure Code 1882. 11 I C 851-4 Bur L T 183.

**(10) Ex. II Corporation, Company or firm.**

—The words "actually and voluntarily resides" refer only to natural persons and not to legal entities such as limited companies and Government and further "business" means commercial business, not the business of Government. A I R 1930 L 818.

—Thus the whole of the Punjab Province cannot be said to be a single place for the purposes of Ex. II and so it cannot be claimed that the Punjab Government can be sued at any place within the limits of that province A I R 1930 Lah 818-Ind Rul (1930) Lah 738- 125 I C 514.

## C. P. C. (1908) SECTION 20 (Contd)

## (10) Ex. II Corporation, Company

or firm. (Contd)

—But a corporation or company may be said to reside wherever it carries on its business, irrespective of the location of its head office and if a corporation such as a bank has branch offices in fifty separate and distinct jurisdictions, it can and may be sued in any one of such jurisdictions for the enforcement of a right in respect of which a cause of action exists within the limits of each independent jurisdiction 39 Cal 104 foll. 4 Pat L J 141-(1919) Pat 155 =48 I C 943 see also A I R 1928 S 111.

—In the case of firms carrying on business in different parts of the country sometimes constituted of the same people, with omissions or with additions in different places, a Court should analyse the facts thoroughly in order to determine whether the firms or persons so carrying on business are really the same legal entity. "Carrying on business" is used in S. 20, C. P. C., as distinct from personally working; a man may carry on business in a place where he does no personal work of any kind and a firm may be carrying on business at a particular place either through an agency or through a manager or by its servants without ever having left its own town, A I R 1922 All 367=19 A L J 696=65 I C 93. Plaintiffs carrying on business at Amritsar brought a suit in the Court of Amritsar against a firm carrying on business at Bombay for damages for breach of contract made in Bombay, to sell the goods to plaintiffs. It was held that delivery of the goods by the defendants to the Railway Company in Bombay for being despatched to Amritsar would by s. 98, of the Contract Act, have operated as a delivery to the plaintiffs consequently no part of the cause of action arose at Amritsar. A I R 1922 Lah 474=67 I C 181 (1).

In the case of a suit against an Insurance Company to recover the amount of a life insurance policy the death of the assured is a part of the cause of action, because there can be no claim unless the death has taken place. 34 B L R 815=A I R 1932 B 392-I R 1932 B 566=40 I C 262=A L R 1932 B 779.

—Delivery by the seller of the goods sold to the Railway Company to be despatched to the buyer operates as delivery to the buyer under s. 91, Contract Act and a suit for breach of contract to deliver goods by the buyer would lie at the place where the goods were delivered to the Railway Company. A I R 1922 Lah 474=67 I C 888.

Where the goods under the sale-deed were made over to the Railway Company at Delhi. Held that the provisions of s. 39 of Sale

## C. P. C. (1908) SECTION 20 (Contd)

## (10) Ex. II Corporation, Company

or firm. (Contd)

of Goods Act applied and that the suit with regards to the case was within the jurisdiction of the Delhi Court. 89 I C 751 followed. 110 I C 727; 113 I C 783. 119 I C 481 referred to. 66 I C 501 not followed. A I R 1925 P C 15 distinguished. A L R 1933 L 878.

—Plaintiff firm residing at Gujranwala ordered goods from defendant firm residing at Calcutta, Latter firm consigned the goods to itself in Gujranwala. The plaintiff firm sent the balance of price to the defendant and asked the defendant firm to advice the railway to deliver goods. The goods were lost by the Railway. Plaintiff firm thereupon sued the defendant at Gujranwala for return of the price paid by him. It was held that as the goods remained throughout under the control of the defendant at Gujranwala. The failure to deliver the goods was a part of the cause of action arising at Gujranwala and, therefore, the Gujranwala Court had jurisdiction to entertain the suit. A I R 1924 Lah 349=71 I C 38.

—When a firm outside Madras draws hundis on a firm in Madras which under the contract the Madras firm has to honour and pay when presented to them in Madras, the payment cannot be considered to be made when the hundi is negotiated by the firm outside Madras but only when the payment is actually made by the firm in Madras on the hundi. Where payment was to be made only on the delivery of the railway receipts and the railway receipts were to be attached to the hundis and presented in Madras along with the hundis when payments of the hundis were demanded from them and thus the presentation of the railway receipt in Madras was a part of the performance of the contract and was a necessary condition to be performed, before money could be demanded from the Madras firm. It was held that part of cause of action arose in Madras. A I R 1924 Mad 464=47 M 403=46 M L J 82=19 L W 168=34 M L T 7=(1924) M W N 178 =76 I C 800.

(II) Extra territorial jurisdiction.

—As to cases in which the cause of action arises below low water-mark, and within three miles of it, see 2 Bom 19 followed in 31 Bom L R. 329=A I R 1929 B 226.

(12) Leave of the court.

—In a suit for money there were two sets of defendants who were partners but

C. P. C. (1908) SECTION 20 (Contd.)  
(12) Leave of the Court (Concl'd.)

long before the suit. The first set had set up business in different places in British India while the second set resided within the jurisdiction of the Court. The suit was instituted without leave to sue being first obtained but after the decision of the issue of jurisdiction against them, the plaintiffs applied for leave to sue which was refused. Held that in the circumstances of the case, the order refusing leave was not maintainable. A L R 1933 S 218.

Where in a suit for accounts against partners individually leave to sue some of the partners residing outside jurisdiction was refused it was held that no appeal lay against the order refusing leave, though the appellate Court could consider the order on the principle of S. 105 of C P Code, 4 L W 411-35 I C 74.

Leave under Letters Patent cl. 12 cannot be granted after the institution of the suit, and as it relates only to the cause of action disclosed in the plaint, it cannot confer jurisdiction in the respect of a substantially different cause of action, and the plaint cannot be amended as in an ordinary case. 15 Bom 93; and 13 B L R 91; and 11 C W N 663; and 79 I C 30; and A I R 1930 C 258-56 C 979.

(13) Local limits.

—Where there are several wrong doers and some of them only reside within jurisdiction a suit will be maintainable against them at the place where they reside: A I R 1928 C 887-32 C W N 208 or where the tort was committed: 7 Bom L R 20-29 B 368 see also 7 Ind Cas 101-33 All 24-7 All L J. 923; and 5 Ind Cas 513-7 Mad L T 42; and 58 Ind Cas 749-5 P L J 359; and 30 Cal 369-7 Cal W N 353

—Suit instituted in Court within whose jurisdiction defendant has permanent residence, is properly instituted though he resides for business elsewhere. A I R 1930 Cal 347-Ind Rul (1930) Cal 544-57 C 65-125 I C 320.

Actual contract for despatch of goods was entered in Native State—First item of performance namely the entrusting of the goods by the consignor to the consignee was performed (weighed and loaded) in British Territory British Court has jurisdiction. A I R 1931 Mad 115-Ind Rul (1931) Mad 402-(1930) M W N 816-130 I C 658

Trust-Property in Br India-Temple in French Territory—Parties in French territory—Jurisdiction of Br. Court to try suit, not negatived. See 1 L W 724-26 I C 367

C. P. C. (1908) SECTION 20 (Contd.)

(14) Particular Suits. Cause of action in.

(1) Account suits

—In the absence of proof of an agreement that account should be taken elsewhere, a suit for the taking of accounts of a partnership should be instituted in the Court within whose jurisdiction the business of the partnership was carried out. 17 A L J 1015-52 I C 655.

—See also A I R 1931 L 673-32 P L R 464.

—Where the business is carried on in more places than one, a suit may be filed in any one of such places. 50 M L J 298-23 M L W 361-92 Ind Cas 915-A I R 1926 M 427.

—Where a partnership was entered into to carry on business at a certain place, a suit for its dissolution can be brought only at the place of business and not at any other place where capital for the concern might have been subscribed. 42 P R 1916-98 P W R 1916-33 I C 953.

—The carrying on of partnership business which gives rise to a claim for accounts is sufficient to give the plaintiff a right to sue at the place where the business is carried on. The mere fact that the consolidated accounts of the business are kept at another place would not oust the jurisdiction of the Court at the former place. 1 O L J 561-26 I C 225.

—In a suit between principal and agent the cause of action arises where the contract of agency is made or where it was to be performed, and where the refusal to account takes place. A I R 1926 Sind 238-94 I C 287.

—See to the same effect. 12 Bur L T 198-55 I C 266 and 30 M 438-17 M L J 304; 33 Bom L R 1364-A I R 1932 B 42.

—In the absence of a specific provision to the contrary the place of business of the agent is the place where the money is payable. A I R 1932 Bom 42 (45)-33 Bom L R 1364-135 Ind Cas 170.

—Payment will generally be intended to be made where the accounts are settled and the balance struck. 34 Ind Cas 431-3 Mad L W 338.

—Where the intention is not clear, the rule is that the debtor must seek the creditor. 30 Bom 167-6 Bom L R 1038.

—Suit for accounts of agency is cognizable by Court having jurisdiction at the place where agency was or was not to be carried on. 11 L L J 282-A I R 1929 L 605.

—A Court having jurisdiction at the place where, in compliance with the orders of the principal, the commission agent works,

**C. P. C. (1908) SECTION 20 (Contd)****(14) Particular Suits Cause of action in (Contd.)****(1) Account suits (Contd.)**

is competent to entertain a suit for balance of accounts by the agent against his principal. A I R 1926 Lah 287=92 I C 273.

—As a rule the principal cannot, where agent carries on business elsewhere call upon him to render an account at his own place of business on the ground that the money or goods were sent to the agent from such place. A I R 1924 Lah 593=75 I C 849.

—Unless the contract clearly indicates the contrary, pakka adhatia becomes a factor entrusted with goods of his principal with wide powers and has eventually to account to his principal but the accounting must necessarily be done at the place where all the business is transacted. A I R 1924 All 530=46 A 465=22 A L J 591=L R 6 A 9 Civ.=80 I C 661.

—Where there is no evidence as to where the contract of pakka adhatia agency was entered into and also as to where any money was expressly or impliedly payable in performance of the contract of agency and the contract was to be performed in A or the performance thereof was to be completed in A the mere fact that goods to be sold were sent from B does not give B Court jurisdiction to try a suit for accounts of the agency transaction. 30 Bom L R 1391=A I R 1928 B 548.

—Defendants agent of plaintiff to sell goods at M agreeing to make payments, be accountable and to report stock at Karachi and also agreeing to sue and be sued in Karachi Courts. Karachi Courts have jurisdiction. Defendant was the plaintiff's agent for the sale of the plaintiff's goods in the District of Meerut. He had to remit sale proceeds to Karachi to render accurate and sufficient account of sales of goods every month and to submit to the plaintiff at the end of each month an accurate report of stocks of goods belonging to the plaintiff. This agreement further specifically stated that "the agent must submit at the end of each month to the company at Karachi" a certified statement detailing the property of the company and it contained the clause that all legal proceedings are to be instituted in Karachi. It was held that the clauses relating to payment accountability, reporting or jurisdiction in the agreements should be read together and the Court in Karachi had jurisdiction. A I R 1929 Sind 227=Ind Rul (1930) Sind 238=126 I C 62.

—The plaintiffs were grain dealers at S. The defendants were commission agents doing business at K. The plaintiffs sent goods to the defendants at K. They accepted the plaintiff's drafts, paid money at

**C. P. C. (1908) SECTION 20 (Contd)****(14) Particular Suits Cause of action in (Contd.)****(1) Account suits (Contd)**

their request and having sold the goods credited the amount realised to their account. Later on, the defendants at the plaintiff's request purchased goods at K, and sent them abroad according to the plaintiff's directions to various constituents. The defendants purchased goods at K, and despatched them to S, and in doing so they adopted the following procedure:—They drew money from the K, branch of a certain Bank and handed over the railway receipts to the Bank which transmitted them to the S. Branch to be handed over to the plaintiffs on payment of the price of the goods received. The defendants also used to draw hundis upon the plaintiffs. The plaintiffs instituted the suit on the following allegations:—That there were mutual dealings between the plaintiffs and the defendants and that the latter received from the plaintiff by way of loan Rs..... out of which they paid Rs..... leaving a balance of..... due to the plaintiffs. They further claimed a sum of Rs..... on account of the profits of the grain transactions. It was held that it was a suit for an account by a principal against an agent and that the Court at S had no jurisdiction to try the suit but that only the Court at K where the defendants resided and refusal to account arose had the jurisdiction. A I R 1925 Lah 387=6 Lah 153=7 Lah L J 562=26 P L R 335=88 I C 950.

—In a suit for accounts based upon an agency for collection of dues, it is the general contract of agency with liability to account and refund the balance which is the cause of action. A I R 1930 Bom 150=Ind Rul (1931) Bom 186=32 Bom L R 171=54 B 192=129 I C 586.

—Deft. residing outside jurisdiction—Accounts submitted within jurisdiction—Jurisdiction not ousted. See (1915) M W N 519=29 I C 462.

—Where a suit dealt with accounts of several shops of the plaintiff it was held that several accounts did not constitute separate causes of action, all together were to be treated as a single cause of action A I R 1922 O 124.

—Plaintiff, a cotton merchant residing at Khamgaon, in the Buldana District, sent some bales of cotton for sale in Bombay to defendants. The accounts were to be rendered and money to be paid at Khamgaon. It was held that part of the cause of action accrued in the Buldana District A I R 1924 Nag 308=78 I C 991.

—The Plff. sent some grain from Cawnpore to Jagannath and the goods had to travel through two Railways he paid the fare at a higher rate than was necessary



## C. P. C. (1908) SECTION 20 (Contd)

## (14) Particular Suits Cause of action in (Contd)

## (1) Account suits (Concl'd)

and brought a suit at Cawnpore for the recovery of the excess; Held that the cause of action arose partly at Cawnpore and the Cawnpore Court had jurisdiction to entertain suit. 13 A L J 66-26 I C 620.

## (2) Administration suits

—Under S 270 of Indian Succession Act Letters of Administration will be granted by a Court within whose jurisdiction the deceased had at the time of, his death, some property or a fixed place of residence. And grant of probate and an undertaking by grantee to administer the estate constitute cause of action in a suit to administer the estate: 16 M L J 238-29 M 239, irrespective of the fact that part of the property is situated beyond jurisdiction: 94 I C 1046-A I R 1926 L 456.

## (3) Contract by correspondence

—In case of contract by correspondence cause of action arises at the place where the letter of acceptance is posted: 57 I C 636 [See also 27 M 355 Ed.]; and 1 I C 77-6 A L J 213; and 2 C L J 66-32 C 884; and 12 S L R 93-50 I C 146; and A I R 1931 C 659-58 C 539; and also where the breach takes place A I R 1922 Lah 164-65 I C 865.

—The defendants had by wire ordered the plaintiffs to send to them at Akola certain bags of grain. The price was agreed to be paid at Khurai. The plaintiffs sent the bags by train to Akola defendant failed to pay the money. The goods were sold at a loss for which the plaintiffs brought the suit. It was held that the breach of contract occurred at Akola, and, therefore, the cause of action arose wholly at Akola and the Small Cause Court at Khurai had no jurisdiction. A I R 1924 Nag 18-79 I C 393.

—Where it appeared from the correspondence that the plaintiff had informed the defendants that he had a particular item of work to be done in Bombay and asked on what terms the defendants were prepared to do that work and the defendants seemed to have expressed their willingness to do that work on the terms given in their letters. It was held that the contract, which is a part of the cause of action, was thus formed at Yeotmal, the plaintiff's place, and the Court at Yeotmal had jurisdiction to try the suit. A I R 1923 Nag 167-72 I C 465.

—Pliffs, carrying on business in Karachi sued defts. carrying on business as commission agents in Calcutta for damages suffered through the deft's failure to carry out their instructions. It appeared that

## C. P. C. (1908) SECTION 20 (Contd)

## (14) Particular Suits Cause of action in (Contd)

## (3) Contract by correspondence (Concl'd)

the Contract of agency was effected by defts. accepting and purporting to execute plff's orders sent from Karachi to them in Calcutta. Held, that for determining jurisdiction in the case of suits arising out of contracts. Expl. III of S. 17 of Act XIV of 1882 is still a correct statement of the law and shows clearly the meaning of the words "cause of action." Held further the cause of action arose at the place where the contract was made, i. e., at Calcutta and in a case like this money was not payable in performance of the contract but as damages for breach and the Court had no jurisdiction. 6 S. L. R. 181 dist. 12 S L R 93-50 I C 146.

—Where the Contract itself does not stipulate the place of performance the promisor must under S. 49 of the Contract Act ask the promisee to appoint a reasonable place for the performance of the promise. 7 Bom L R 993.

## (4) Contract Suits

## Synopsis

- (a) General
- (b) Arbitration
- (c) Contract with Commission agent or broker
- (d) debtor and creditor
- (f) insurance
- (g) marriage
- (h) place of payment
- (i) place of performance
- (j) place of business
- (k) place where contract is made
- (l) principal and agent

## (a) General

—The cause of action in suits arising out of a contract arises at the place where the contract was made or the place where the contract was to be performed or performance completed or at the place where in performance of the contract any money to which the suits relate was expressly or impliedly payable. 7 N L J 25-83 I C 309. See also 45 P L R 1913-40 P W R 1913-18 I C 130.

—The same rule applies to contract of agency. 56 B 324 (334, 344-5)-34 B L R 236-137 I C 381-A I R 1932 B 291-I R 1932 B 245-A L R 1912 B 498.

—The cause of action may arise wholly within jurisdiction though in proving the terms of the contract it may be necessary to give evidence of some facts occurring outside jurisdiction. 56 B 324 (334-5)-34 B L R 236-137 I C 381-A I R 1932 B 291-I R 1932 B 245-A L R 1912 B 498.

—According to S. 20 (c), Civil P. C., a suit can be instituted in a Court within the local limits of whose jurisdiction the



**C. P. C. (1908) SECTION 20 (Contd)****(14) Particular Suits Cause of action in (Contd)****(4) Contract Suits (Contd)****(a) General (Contd)**

cause of action wholly or in part arises. In a suit for damages for breach of a contract the cause of action consists of the making of the contract and of its breach; so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and, not being performed, the breach occurred. The performance of a contract is part of the cause of action and a suit in respect of breach can always be filed at the place where the contract has been performed or its performance completed. The place where the documents are to be tendered or symbolical possession of the goods sold is to be given or price for the goods was to be paid is not necessarily the only place which would decide the question of jurisdiction. 26 S L R 167=139 I C 114=I R 1932 S 99=A I R 1932 S 9 (12, 13)=A L R 1932 S 248. See also 64 P L R 1919=43 P W R 1919=50 I C 139.

—The place of breach will also furnish the forum for a suit on contract, even though the place of making it be not within the forum. 27 Ind Cas 397=19 Cal W N 1197=20 Cal L J 55.

—Where a contract for sale of goods provided that delivery was to be made at a particular place and the margin money was to be paid also at that place it was held that the Court at that place had jurisdiction to try the suit based on the contract. A L R 1933 L 1157.

—But it should be noted that the place where cause of action arises in the case of contracts should not be determined according to rules of international law. The court has to see whether anything which the plaintiff has to prove as a fact in order that he may succeed arose within the jurisdiction of the Court. A I R 1931 Cal 659=58 C-539=Ind Rul (1931) Cal 769=134 I C 65.

—And the cause of action must be determined with reference to the terms of the original contract and not by subsequent negotiations thereafter. A I R 1922 Nag 127=65 I C 65.

—In a suit on a contract though the place where the contract was made is not within the jurisdiction of the Court, the Court still has jurisdiction if the place where the contract was to be performed, or where in its performance the money to which the suit relates was expressly or impliedly payable, is within the jurisdiction of the Court. 44 I C 609.

—See to the same effect. A I R 1924 Sind 64=76 I C 353 and 18 A L J 749=59 I C 359.

**C. P. C. (1908) SECTION 20 (Contd)****(14) Particular Suits Cause of action in (Contd)****(4) Contract Suits (Contd)****(a) General (Contd)**

—In case of purchase of goods at one place to be delivered at another place suit may be brought in a Court exercising jurisdiction in the place where delivery and payment were to be made. 42 All 480=18 A L J 566=56 I C 192.

—And it may be noted in this connection that ordinarily if goods are purchased, or money is borrowed, the payment for the goods or re-payment of money must be presumed to have been agreed to be made at the place and the residence of the seller or the lender as the case may be. A I R 1923 All 465=71 I C 431.

—But where the contract was made in Bengal and the goods were to be sent to Bengal and the only thing done in Azamgarh was that the goods were despatched from Azamgarh, it cannot be said that the cause of action wholly or in part arose in Azamgarh. A I R 1922 All 448=66 I C 501.

—A contract is concluded where it is accepted and the place of suit in respect of its breach is the place where it was concluded or the place where it ought to have been performed. The mere sending of a cheque from a particular place towards the contract does not give rise to a cause of action in that place. A I R 1922 Lah 164=66 I C 865. See also 12 O C 17=1 Ind Cas 325.

—Plffs. sent to debts some articles in excess of what debts had ordered and the latter returned them but the goods failed to reach the plffs. who brought this suit for the price of the same. Plffs. were residents of Kumbakonam and debts. of Mysore. Held, that the suit relating to the excess goods was one for damages and the Kumbakonam Court had no jurisdiction to try the same. 24 M L T 95=(1918) M W N 378=45 I C 779.

—In a suit upon a contract the offer is a part of the cause of action and the suit can be instituted in the court within whose jurisdiction the offer is made. In determining where the offer was made the Court should look to the place where the final offer was made and not to the place where some preliminary negotiations only had taken place. 10 L W 445=54 I C 260.

—Held, on the facts, that no part of the cause of action for the suit arose at Negapatam and that the Negapatam Court had no jurisdiction to try the case. 37 M L J 712=26 M L T 504=54 I C 550.

—Where an indent form clearly specifies that all disputes in connection with the indent are to be settled only in

## C. P. C. (1908) SECTION 20 (Contd)

## (14) Particular suits. Cause of action in (Contd)

## (4) Contract Suits (Contd)

## (a) General (Conclld)

Lahore, the Courts of that place have jurisdiction to try a dispute "in connection" with the indent. 96 P L R 1913=65 P W R 1913=18 I C 496.

—An action for the recovery of the price of goods despatched by plaintiff by railway from Delhi to the defendant at Meerut is triable at Delhi where the goods were delivered to railway, as delivery to the railway company as a carrier has the same effect as delivery to the buyer. A I R 1925 Lah 555=26 P L R 498=7 Lah L J 395=89 I C 751.

—Similarly as to Post Office see 18 A L J 749=59 I C 359.

—And as banker and depositor see 15 A L J 653.

## (b) Arbitration

—J. K. Cawnpore firm sold at Cawnpore certain goods to S and Co, a Karachi firm the goods being subject to inspection on arrival at Karachi in the presence of the seller's representative. There were other terms giving the buyers the right after such inspection to reject the goods and recover the price or accept them with an allowance. J. K. failed to consign any goods. S. and Co. went to arbitration under an arbitration clause in the contract and sought to have the award filed in the District Court at Karachi. It was held, that the Court was bound by the decision in 6 S L R 97 that as a suit would lie in Karachi at the instance of the buyers for breach of the contract part of which was to be performed by passing the goods in Karachi an application to file an award under s. 11 of the Arbitration Act lay in the District Court at Karachi. A I R 1922 Sind 32=15 S L R 74=64 I C 674.

## (c) Contract with Commission agent or broker.

—Where the Commission Agent at Karachi was ordered by plff to make some purchases but owing to the Agent's negligence the plff suffered loss it was held that the suit for compensation would lie at Karachi and not at Aligarh the plff's place 8 A L J 1160=11 I C 712.

—Place where money is payable:—As per the principles set forth in Note 18 above, the place where money is expressly or impliedly payable will be a forum of action. Commission agent-suit for recovery of price of goods entrusted—Jurisdiction see. A I R 1924 Mad 780=46 M L J 371=19 M L W 499=34 M L T 116=1924 M W N 336=84 Ind Cas 691.

## C. P. C. (1908) SECTION 20 (Contd)

## (14) Particular Suits Cause of action in (Contd)

## (4) Contract Suits (Contd)

## (c) Contract with Commission

## agent or broker. (Conclld)

—Plffs. residents of Bareilly sued the defts. commission agents doing business in Bombay, in the Bareilly Court on the allegation that the defts. made a contract with the plffs. for the sale and purchase of cotton and grain under pukka arhat system and agreed to render accounts at Bareilly. The defts. pleaded inter alia that the Bareilly Court had no Jurisdiction. The plffs gave no evidence of the contract. Held, that under the circumstances of the case, the Bombay Court had jurisdiction. 40 I C 505. (506).

—Defendants who were carrying on business at Delhi, authorised their broker to sell certain goods at a certain price. The broker agreed to sell the goods to the plffs. at Agra at a lower price. This agreement was subsequently ratified by the defendants at Delhi. Plffs. brought a suit against the defendants for damages for breach of the contract in the Agra Court. Held that the contract having been made at Delhi, the Agra Court had no jurisdiction to entertain the suit. 17 A L J 718=41 A 602=1 U P L R 120=51 I C 331.

## (d) Debtor and creditor.

—Ordinarily, where money is borrowed the repayment of the money must be presumed to have been agreed to be made at the place of residence of the lender 118 I C 898=A I R 1929 L 868; see to the same effect 71 I C 431=A I R 1923 A 465.

—For the rule is that in the absence of a contract to the contrary the borrower ought to seek out the lender for payment. A suit to recover the money from the borrower may be brought in the place where the lender resides as it is payable at that place. A I R 1926 All 477=48 A 310=24 A L J 291=92 I C 492. see to the same effect 11 O C 191; and 30 Bom 167 (171)=6 Bom L R 1038; and 9 Bom L Rep 903; and A I R 1927 P C 156=53 M L J 25=102 Ind Cas 610=54 Ind App 265=25 All L J 690=29 Bom L R 1027=45 C L J 633=1927 M W N 520=4 Oudh W N 6=5 Rang 451=31 Cal W N 998=39 Mad L T 72=25 M L W 720 P C. and 7 Bom L R 993; and 3 Ind Cas 892=3 Sind L R 81.

—But, unless it can be held that there is anything express or implied as to where money due under a bond is payable, the court must be guided by the intention of the parties in determining the place of performance and in cases where no actual intention can be referred to, recourse may be had to presumptions. 41 I C 956.

## C. P. C. (1908) SECTION 20 (Contd)

## (14) Particular Suits Cause of action in (Contd)

## (4) Contract Suits (Contd)

## (d) Debtor and creditor (Concl'd)

—But it should be noted that a promise to pay what one is already under an obligation to pay is a promise without consideration and cannot give rise to a cause of action. A promise to repay a loan at a certain place for the convenience of the creditor does not give the creditor right to sue at that place unless there was some consideration for the promise. 11 Bur L T 67-9 L B R 75-39 I C 132.

## (f) Insurance.

—A suit to recover money due on a Life Insurance Policy can be instituted in the place where the insured died; for death in such cases is part of the cause of action within the meaning of S. 20. 41 I C 392.

—For the purposes of s. 20 of the Code, the words "cause of action" in cases based on contract of insurance, do not include the loss or damage of the property insured, which is merely a cause of the cause, and is not even a proximate cause since the real cause of action is the failure to pay the money due under the contract and the primary cause of that cause is the contract itself, the destruction of the property being only a secondary cause which is purely accidental being due merely to the nature of the particular kind of contract under consideration, A I R 1924 Rang 2-1 R 231-76 I C 482.

—A member of the Punjab Mutual Hindu family Relief Fund, Lahore, died at Lyallpur. The Fund's moneys were payable on the death of the members at Lahore. The Fund also carried on business at Lyallpur through an Agent. Plff as representative of the deceased member brought a suit to recover the moneys from the Fund at Lyallpur. Held that the Lyallpur Court had jurisdiction to hear the suit against the Fund because the death of its member which was part of the cause of action occurred at Lyallpur and the deft Fund carried on its business at Lyallpur through an agent. 98 P R 1918-29 P L R 1918-45 I C 900.

## (g) Marriage.

—The law of the place where a marriage is contracted determines the validity of a marriage. 22 Cr L J 123-13 Bur L T 105-59 I C 555.

—In a suit for damages for breach of contract to marry, part of the cause of action arises at the place where the marriage is to take place though the agreement to marry is entered into at another place. 65 I C 812.

## C. P. C. (1908) SECTION 20 (Contd)

## (14) Particular Suits Cause of action in (Contd)

## (4) Contract Suits (Contd)

## (g) Marriage (Concl'd.)

—Plff. sued at Tarn Taran to recover damages for breach of a betrothal contract the defts, the parents of the girl, resided in the Sialkot Dt. Held. that as the contract of betrothal was made at Tarn Taran the cause of action arose in part at Tarn Taran, and the Court had consequently jurisdiction to entertain the suit. 93 P R 1916-37 I C 114.

## (i) Place of Performance.

A suit on contract can be instituted at the place of its performance 127 I C 466- A I R 1930 R 216. see to the same effect A L R 1933 B 191-35 B L R 168. and 7 Ind Cas 593 (595)=4 Sind L R 20; and 9 Bom L R 903 ( 909-910 ) and 12 Ind Cas 682-5 S L R 97.

—For in a suit for damages on a breach of contract the cause of action consists of the making of the contract and of its breach in a place where it ought to have been performed thus where the contract was to be completed at Karachi though made at Lyallpur suit for damages can lie in Karachi. A I R 1925 Sind 132-19 S L R 207-79 I C 39.

Where the plaintiffs, at Ranchi ordered the defendant company, at Cawnpore, to forward certain specified articles to their address at Ranchi Held that the contract was to be performed by the delivery of the goods at Ranchi, and the Court at Ranchi had jurisdiction to entertain a suit by the plaintiffs for damages for breach of the contract by the defendant.

16 C W N 325-13 I C 943.

—Place of suing—Contract for sale of goods Goods to be weighed and sorted at Karachi—Jurisdiction of Karachi Court See 12 I C 662.

—Plaintiff was employed by the defendant to sell his goods at M. The defendant was not to sell the goods in the area allotted to the plaintiff. Defendant sold goods at M. in contravention of the terms. M. Court has jurisdiction to try a suit for damages. A I R 1927 Mad 1150-103 I C 37.

—Certain contracts for goods were executed at Peshawar and both the parties had their places of business there but one of them had also a branch office in Karachi. The payment for the goods was to be made in Peshawar. Property in the goods passed under the terms of the contract to the applicants as soon as they arrived in the Karachi Harbour and the responsibility for any loss or damage to the goods was entirely theirs from that moment. It was held that the parties contemplated the performance of the contracts in Karachi, a part.

## C. P. C. (1908) SECTION 20 (Contd)

## (14) Particular Suits Cause of action in (Contd)

## (4) Contract Suits (Contd)

## (i) Place of Performance (Concl'd)

of the cause of action therefore arose in Karachi and therefore Karachi Court had jurisdiction to entertain a suit in respect of the contract A I R 1924 Sind 29=178 S L R 164=83 I C 539.

—Forum—Cause of action—Contract entered into in Ceylon Contract not to be performed in Br. India—Maintainability of suit in Indian courts see 14 I C 560.

## (h) Place of Payment.

—A suit for damages for the breach of a contract to supply goods can be brought at the place where the price is made payable under the terms of the contract A I R 1925 Nag 408=89 I C 181; see also (1908)

Pun Re. no. 36=85 P W R 1908.

—Where the primary transaction of the sale and purchase of articles took place at one place the liability of the purchaser for the price of the articles naturally arises out of that transaction. The cause of action, therefore, for a suit to recover the price accrues at that place, and is not extinguished by the execution of promissory notes in respect of the same debt at a subsequent date and at another place. A I R 1929 Oudh 91=5 O W N 1117=4 Luck 347=Ind Rul (1929) Oudh 155=114 I C 507.

A suit on a contract in which money is payable in England is cognisable by the English courts. 9 Bur L T 106=35 I C 741. —In a case where plaintiff sent goods from Sialkot to defendant at Calcutta to be sold there and the money realised from the sale was payable at Sialkot, and the plaintiffs sued for the money in Sialkot Court. It was held that the Court at Sialkot has jurisdiction to try the suit. A I R 1922 Lah 26=3 L L J 499=69 I C 424.

—In the case of a suit for recovery of the unpaid part of premium payable in respect of a lease executed by plaintiff in favour of defendants it was held that the question of jurisdiction should be decided with reference to the terms of s. 20 C P. C. that having regard to s. 49 of the Contract Act a reasonable inference could be drawn that there was an implied promise by the lessee to make the payment at plaintiff's residence and that in this view part of the cause of action accrued to the plaintiff at his residence and he could sue in a Court having jurisdiction at that place. 5 Rang 451 followed. A L R 1933 A 458.

—Where a thing is purchased at C and the property passes to the vendee, but part of the purchase-money is paid at D, to which place the article is sent, a Court at D, has jurisdiction to try suit by vendee

## C. P. C. (1908) SECTION 20 (Contd)

## (14) Particular Suits Cause of action in (Contd)

## (4) Contract Suits (Contd)

## (h) Place of Payment (Concl'd)

for return of purchase-money on the ground of breach of warranty by the vendor. A I R 1926 Cal 100=86 I C 1046.

—Contract to sell Tendu leaves was made at B Price was expressly agreed to be paid at C. It was held that Courts both at B and C had jurisdiction over suit for recovery of price of leaves supplied at B. A I R 1930 Nag 29=Ind Rul (1930) Nag 123=12 N L J 177=121 I C 667.

—Defendant selected some articles at A and ordered them to be sent to B where he promised to purchase such of them as hold be selected by his wife. The articles were accordingly sent to B and out of them, some were selected by the defendant and the others with the price for the articles selected were sent to A. After this further consignments were also sent to B. It was held that there was an implied contract to pay at A and that the Court at A had jurisdiction to try a suit for the balance of the price. A I R 1925 Ough 269=82 I C 122.

—S. a merchant at Negapatam consigned goods to M at Penang for sale on commission, the arrangement being that M, should remit the proceeds by sending to S. at Negapatam Hundials drawn on some firm in the Madras Presidency. M not having made payments as aforesaid, S. brought a suit against M, in the Court at Negapatam. Held, that M undertook to account for the sale proceeds by making payments through the agency of some person or persons in Negapatam and other places in the Madras Presidency on whom Hundials were to be drawn and that the Court at Negapatam had jurisdiction to entertain the suit as a part of the cause of action arose there. 11 L W 593=56 Ind Cas 604.

—But where payment was according to the contract to be made in one place but was made in another owing to the plaintiff's own default, advantage cannot be taken of the fact to give him a choice of jurisdiction. A I R 1921 Lah 213=17 P L R 1922=64 I C 387.

## (j) Place of Business.

—See also under carry on business supra.

## (k) Place where contract is made.

—A contract is made by acceptance of the offer 3 C L J 66=32 C 884. In suits on contracts the making of the contract is part of the cause of action. The Courts within whose jurisdiction the agreements in suit are accepted have jurisdiction. A I R 1929 Sind 227=Ind Rul (1930) Sind 238=125 I C 62



## CIV PRO CODE (1908) SEC 20 (Contd)

## (14) Particular Suits Cause of action in (Contd)

## (4) Contract Suits (Contd)

## (k) Place where contract is made, (Contd)

—See to the same effect 15 Ind Cas 12-111 P R 1912-224 P W R 1912-233 P L R 1912; and 30 Bom 364 (377)=8 Bom L R 56.

—An action therefore for breach of a contract can, at the option of the plaintiff, be brought either at the place where the contract was made or the place where the breach was committed. A I R 1932 S 9.

—If the proposal and acceptance thereof are made in different places, the place of acceptance will be the place where the contract is made. A I R 1929 S 227.

—A contract for sale of goods by sample to be approved by the plff. a resident of Allahabad, was entered into in Bombay. The goods were despatched from Bombay and on arrival at Allahabad were discovered by the plff. as not in accordance with the sample. He brought a suit for recovery of damages in the Court of Small causes at Allahabad. The Judge of the Small Cause Court return the plaint for presentation in the Court in Bombay:—Held, that delivery was an essential part of the contract and evidence ought to have been taken on the point. 39 All 368-15 A L J 342=39 I C 524.

—A suit in which plffs. claimed Rs. 14,000 from the defts. as due under a contract made and registered at Jagadhri is cognisable by the Court of the Senior Subordinate Judge of Ambala, although the contract was to be performed outside the jurisdiction of the Ambala Courts and the breach or breaches alleged in the plaint occurred also outside the Ambala District. 26 P R 1918=51 P W R 1918=114 P L R 1918=44 I C 863.

—Plff. a trader at Ludhiana sent an order by telegram to defts. residing and carrying on business at Bhamagaun to purchase cotton seeds on his behalf. Held, that the contract must be taken to have been made at Bhamagaun where defts. carried on their business and where they received plff's telegram and that the Ludhiana Court did not have jurisdiction to entertain the suit. 76 P R 1816, followed. 70 P R 1906; 36 P R 1908; 16 P W R 1908, distinguished. 53 I C 331.

—Plaintiff residing at M ordered certain goods from defendants who carried on business at S. Plaintiff sued defendant at M for damages on the allegation that the goods supplied were short in quantity and inferior in quality. Defendant objected that the cause of action having arisen at S the Court at M had no jurisdiction to hear the suit. This objection was overruled. On revision the High Court held, that

## CIV PRO CODE (1908) SEC 20 (Contd)

## (14) Particular Suits Cause of action in (Contd)

## (4) Contract Suits (Concl'd.)

## (k) Place where contract is made (Concl'd)

the cause of action arose at S. and that, therefore, the Court at M had no jurisdiction to hear the suit. 60 I C 481 (Lah).

—Where plaintiffs from Ludhiana asked defendants at Gonda for quotations and terms and the defendants by post-card sent their terms and asked the plaintiffs to wire if they wanted goods and the plaintiffs did so. It was held that the postcard was only an invitation for an offer and not a proposal within the meaning of the Contract Act. The contract was completed at Gonda where the proposal were received by the wire acceptance signified and, therefore, the suit on the contract was cognizable not by the Ludhiana Court but by the Gonda Court. A I R 1922 Lah 100=4 Lah L J 176=29 P L R 1922=65 I C 282.

—In a suit for refund of overcharge demanded from a consignee by a foreign Railway the cause of action arises in part at the place where the contract for carrying was made and so the Court at the latter place has jurisdiction to try the suit. A I R 1925 All 823=L R 6 A 395 Civ.=88 I C 575.

## (1) Principal and Agent.

—Where a person employs an agent to sell his goods in certain districts and in breach of their agreement he sold the goods in some of the districts through other agents, held in a suit for damages for breach of contract, the sale through other agents was part of the cause of action and such a suit can be filed in the district where the wrongful sale took place. 14 L W 341=70 I C 284.

—Where an agreement to pay money between a principal and his agent is to be performed without application by the principal and no place is fixed for payment, it is open to the principal to institute a suit to recover the money due on the agreement at the place where he resides, without proving any implied agreement to pay at such place. The burden in such a case is on the defendant to prove that some other place was by express or implied agreement fixed for performance. 6 S L R 181=19 I C 433.

## (5) Divorce Suits

—As to the applicability of s. 20 C P C to suits under Indian Divorce Act. See 38 B 125=20 I C 492.

—B. Dist. Judge cannot grant letters of administration, if the deceased had not at the time of his death a fixed place of abode or any property within his district. 17 Bom 689.

## (6) Injunction Suits for.

—Where the plaintiff in the case seeks (1) a declaration that the decree is in-



## CIV PRO CODE (1908) SEC 20 (Contd.)

## (14) Particular Suits Cause of action in (Contd)

## (6) Injunction Suits for. (Concl'd)

operative on the ground of fraud; and (2) an injunction for the protection of his property against attachment and sale in execution of that decree. It is clear that part of the cause of action arises at the place where the property sought to be attached is situate, and the suit is consequently cognizable by that Court. A I R 1926 Lah 277=7 P L R 517=94 I C 377.

—A suit for injunction may be filed in the Court within whose Jurisdiction pliff's rights were interfered with though the deft. does not live therein. 25 I C 104.

—A suit to restrain deft. from executing a decree is maintainable : A I R 1924 N 413=80 I C 59; and 41 I C 937=41 M 213.

## (7) Partnership suits,

—A suit for dissolution of partnership and rendering of accounts can be brought at the place where the contract of partnership is entered or where the business of partnership is carried on. 108 I C 51.

—For the cause of action in such suit arises at both the places 117 I C 824= A I R 1929 A 236 see also 50 I C 156 and 33 I C 253

—The suit can also be brought where the deft. resides even though the partnership commenced and was carried on in foreign territory. A I R 1921 Bom 460=45

B 1228=23 Bom L R 543=63 I C 959.

—The manager of a joint Hindu family acts on behalf of the family and in its interests and each individual member of the family carries on business wherever a branch of the family firm is in active existence. He is therefore, liable to be sued even in a purely personal suit at any of these places just as a partner in an ordinary partnership is liable to be sued wherever a branch of the business exists. 67 I C 69.

—Plaintiffs, living at Madras, entered into a contract with defendant, residing Bimlipatam, the terms of which were that defendant should be entitled to half a share in any of the shipments made by him at Bimlipatam on his electing to take the risk. Defendant elected at Bimlipatam. In a suit brought for losses sustained, it was held that the High Court had no jurisdiction 3 Mad H. C. 384 followed in 5 C L J 405; and 11 C W N 649 F B; and 45 M L J 153.

(8) Suits for restitution of  
Conjugal rights

—In a suit by a husband against his wife for restitution of conjugal rights,

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## CIV. PRO. CODE (1908) SEC. 20 (Contd.)

(14) Particular Suits Cause of  
action in (Contd)(8) Suits for restitution of  
Conjugal rights (Concl'd)

the cause of action arises from the wife absenting herself from the husband's residence. Therefore the Court within the local limits of whose jurisdiction the husband resides is competent to try such suit. 54 I C 120.

In suits for restitution of conjugal rights it is essential that previous to the institution of the suit there should be a demand for restitution in a proper conciliatory form. A demand accompanied by a threat of legal proceedings is not a proper demand. 12 Bur L T 120=54 I C 65.

—A suit by the husband for restitution of conjugal rights, was dismissed on the ground of cruelty to the wife, who pleaded cruelty and divorce but no specific finding was given on the question of divorce. The wife, afterwards sued for a declaration that there was a divorce or in the alternative for a decree for the dissolution of marriage on the basis of the opinions expressed in the judgment of the previous suit by the husband. Held a suit for dissolution of marriage or for declaration as to an accomplished divorce is essentially different as to cause of action from a suit for restitution of conjugal rights. The opinions expressed in the judgment of the suit for restitution of conjugal rights as to the affirmation of cruelty or the negation of divorce cannot form a cause of action in a suit for dissolution of marriage or for declaration of dissolution or for divorce. A I R 1922 Oudh 109=8 O L J 650=65 I C 457.

## (9) Suits on torts

—A subsequent aggravation of the damage caused by a tort without any act or omission on the part of the defendants does not furnish a cause of action. A I R 1930 Pat 528=Ind Rul (1930) Pat 185=11 P L T 384=122 I C 153.

—As to jurisdiction of British Courts for defamation committed in Cochín see 39 Mad 433=28 M L J 310=28 I C 394.

—In a suit for damages for death of plffs' wife through neglect of the Railway Company it was held that the contract to carry the deceased lady was a contract with herself and there was no privity between the plff. and the deft. company; and that the suit was based upon tort and upon the provisions of the Fatal Accidents Act and the cause of action i.e. the accident having arisen outside the jurisdiction of the Agra Court, that Court had no power to try the suit. Mere purchase

## CIV. PRO. CODE (1908). SEC. 20 (Contd.)

## (14) Particular Suits Cause of action in (Contd.)

## (9) Suits on torts (Concl'd)

of ticket at Agra was not sufficient. 41 All 488=17 A L J 506=50 I C 130.

## (10) Suits on Negotiable instrument

—A suit on hundi can be brought in the High Court in whose jurisdiction the hundi was endorsed and payment was made after default, because an endorsement on the hundi is a part of the cause of action: 22 S L R 305=107 I C 218=A I R 1928 S 86;

—See to the same effect. A I R 1924 Sind 4=16 S L R 293=80 Ind Cas 303.

—That is to say endorsement and delivery of a negotiable instrument within the territorial limits of the jurisdiction of a Court is sufficient to bring a suit on the instrument within the jurisdiction of that Court, even though the note was executed outside the limits of the Court's jurisdiction. 11 Ind Cas 851.

—Where a hundi drawn in Cawnpore for acceptance and payment in Calcutta is so accepted and paid in Calcutta and the plaintiff sued to recover the sum so paid it was held, that as the cause of action, would not be complete unless he proved the fact that he had accepted the hundi in Calcutta on the due date, part of the cause of action arose within the Ordinary Original Jurisdiction of the High Court of Calcutta. 47 C 583=59 I C 539.

—Bombay High Court was held to have no jurisdiction to entertain the Suit on Hundis not payable in Bombay and the fact that the consideration for them was the balance of accounts, due by the defendant, in respect of transactions effected in Bombay is no part of the cause of action. 40 Bom 473=18 Bom L R 57= 32 I C 918.

—A suit on hundi may also be brought at the place of drawing: 3 O L J 132= 34 I C 191.

—A suit on a promissory note is also properly instituted in the place where payment is to be made. 5 Pat L J 536=1 P L T 691=58 I C 265.

—But an assignment of pronote saying that payment should be made where assignee resides does not entitle assignee to sue in Court where he resides, because the residence of the plff. never decides jurisdiction: 119 I C 295=A I R 1929 C 305.

—The assignee can however sue in the Court having jurisdiction where his assignment is made *Reid v. Brown* (1888) 22 K B D 128 foll. 31 M L J 816=5 L W 246= 37 I C 681.

## CIV PRO CODE (1908) SEC 20 (Contd.)

## (14) Particular Suits Cause of action in (Contd.)

## (10) Suits on negotiable instrument (Concl'd)

—Where a promissory note payable at one place is assigned at another place the suit on the pronote can be instituted at the latter place as the cause of action arises in part at the latter place as per s. 20 of the C P C 57 P R 1900 distinguished. A L R 1933 L 1106;

—For an assignment of a claim whether voluntary or by virtue of adjudication of the person in whom that claim resides forms a part of the cause of action in a suit in respect of that claim and the Court within whose limits the said assignment takes place can entertain the suit. A I R 1926 Sind 31=20 S L R 209= 89 I C 493.

—When a pro-note was executed outside the jurisdiction of a Court and the executant also resided out of the jurisdiction of that Court, but the pro-note was delivered to the payee within the jurisdiction of the Court and it was intended that the money should be paid within that jurisdiction. Held, that the court had jurisdiction to entertain, a suit on the pro-note under s. 20 (1) (c) C P C; 2 P R 1916 =10 P W R 1916=31 I C 698

## (11) Suit to set aside a decree or a plaint or a deed.

—A Court can entertain a suit to set aside a decree, which is sent for execution within the territorial limits of such Court. 100 I C 164=A I R 1927 L 778.

—Same applies to *ex parte* decree. A I R 1928 Oudh 88=3 Luck 142=4 O W N 1103=106 I C 541.

—The proper course to set aside a decree is to get it set aside by the Court that granted the decree. A I R 1924 Pat 831=75 I C 469.

—Though not necessarily. 28 Ind Cas 337=28 M L J 410=18 M L T 135.

—As for the case under Letters Patent cl. 12 see 7 C W N 353=30 C 369 relied on in 18 C W N 271=19 C L J 29=22 I C 789; see also A I R 1930 C 258=56 C 979= 122 I C 197.

—But note that where a decree is sought to be set aside on the ground of fraud and no other relief is sought the Court that has jurisdiction to entertain the suit is the Court in the district where the fraud was committed and the decree obtained 29 All 418 ref. Where, however, the decree is threatened to be executed and there is a prayer for an injunction in addition to that relief for a declaration that decree is null and void the suit can

## CIV PRO CODE (1908) SEC 20 (Contd)

(14) Particular Suits Cause of action in (Contd)

(11) Suit to set aside a decree or a plaint or a deed (Contd)

be instituted in the district where the executions proceedings are threatened. A I R 1923 Cal 425=27 C W N 359=65 I C 318.

—A instituted a suit in Ferozepore against B, a resident of Lahore. The serving officer wrongly reported to the Court that B was evading summons, and an ex parte decree was passed against him. B, thereupon sued A in Lahore to set aside the decree on the ground of fraud. It was held, that the suit was maintainable inasmuch as, by the wrong report of the serving officer part of the cause of action arose in Lahore 7 P W R 1921=59 I C 2.

—Similarly, where a decree had been obtained fraudulently in Bengal and in execution of that decree debt had him arrested within the jurisdiction of the Agra Court a suit to set aside the decree, for an injunction to restrain the debts from executing the decree and for other reliefs lies in the Agra Court, a part of the cause action having arisen within the jurisdiction of that Court. 39 All 607=15 A L J 638=41 I C 352.

—Defts obtained a fraudulent decree in Balaspur against the plffs who were the residents of Arrah District, by suppressing summons in the District of Arrah. Plffs instituted a suit in the Court of Arrah to set aside the decree on the ground of fraud. Held, that the Arrah Court had jurisdiction to entertain the suit. 41 I C 161.

—A suit to set aside decree of Court S. on ground of fraud was brought at A. Held, the fraud having been committed within the jurisdiction of Court A the suit was maintainable even though the property affected by fraud was situate outside jurisdiction. 13 A L J 190=28 I C 502=37 A 189.

—B obtained a decree against N at Amritsar and J obtained another decree against N at Ferozepore. B applied for the execution of his decree at Amritsar and attached certain property of N situate at Amritsar. J applied for the transfer of his decree to be executed at Amritsar and after the transfer applied for rateable distribution. B objected to J's application alleging that his decree was obtained fraudulently but his objection was disallowed. Thereupon he filed a suit for declaration that J's decree was collusive and fraudulent. It was held that the cause of action for the declaration arose at Amritsar only after J's decree was transferred and hence Amritsar Court had jurisdiction to try the suit. A I R 1924 Lah 398=72 I C 392

## CIV PRO CODE (1908) SEC 20 (Contd)

(14) Particular Suits Cause of action in (Contd)

(11) Suit to set aside a decree or a plaint or a deed (Contd)

—Plaintiff, a resident in Calcutta, sued H, a resident in Bombay, but carrying on business by his gumashta in Calcutta and others resident in Bombay, to set aside a release executed in Calcutta of his interest in certain property situated in Bombay, on the allegation that it had been obtained from him on misrepresentations made by H held, that the cause of action included the effect of the release on the property in Bombay and did not wholly arise in Calcutta 13 B L R 91 applied in 25 A 48 and 11 Bom L R 245 and 1 R 661; and A I R 1923 M 272=72 I C 982

(12) Trade mark

—The Deft, a resident of Gaya published advertisements and distributed hand-bills at Muttra in the Agra Dt. advertising his medicine with the name of plff's medicine and with his registered trade-mark. The plff. brought a suit for injunction and damages in the court at Muttra. Held, that a trade-mark could be infringed by means of advertisement and that, the cause of action having arisen partly at Muttra the suit was maintainable in the Muttra court. 37 All 446=13 A L J 697=29 I C 987

(15) Personally Works for gain.

See also under (1) General Principles supra. See cases under this head under s. 15

(16-17) Transaction by V P P.

Where A at Kasganj ordered goods of B at Delhi and the goods were sent by V. P. P. and on taking delivery A found that the parcel did not contain the goods ordered, whereupon he instituted a suit at Kasganj against B for damages. It was held, that the contract, though entered into at Delhi, was not completed till delivery was made and the goods paid for at Kasganj, that until such delivery and payment was made the goods remained the property of B at Delhi and that the Kasganj Court had jurisdiction to entertain the suit 42 A 619=18 A L J 749=2 U P L R (All) 254=59 I C 359.

—Where plaintiffs residents of Ludhiana ordered oil cakes from defendants residents of Darbhanga and remitted a part of the money to Darbhanga after they got the goods purchased and alleged that the goods were of bad quality and where the plaintiffs had agreed to accept

**CIV PRO CODE (1908) SEC 20 (Concl'd)****(16-17) Transaction by V. P. P. (Concl'd)**

the railway receipts which had to be sent by V. P. P., by the defendants, the plaintiff's suit for compensation for loss was held to lie not at Ludhiana but at Darbhanga 2 Lah L J 555.

**(18) Miscellaneous**

—If a Court has no jurisdiction, its proceedings are *coram non judice*, and no question either of law or fact can be decided except that of jurisdiction. 104 P W R 1910=83 P R 1910=82 P L R 1910=7 Ind Cas 718.

—A British Indian Court will not adjudicate on questions relating to the title, or the right to the possession of immoveable property out of British India. But the Code does not forbid the institution of a suit for mesne profits of immoveable property outside British India where the decree of the Court for mesne profits can effectively be enforced by the personal obedience of the defendant within the jurisdiction. A I R 1928 Nag. 56=10 N L J 232=23 N L R 170=106 I C 7.

—Where the loan was borrowed at S, but the defendants were residents of H and the loan was also re-payable at H, the Court at S has no jurisdiction to entertain a suit for recovery of the loan. A I R 1925 P C 290=49 M L J 806=23 L W 3=43 C L J 1=24 A L J 48=27 Pat L R 1=(1926) M W N 108=53 C 88=28 Bom L R 211=53 I A 58=30 C W N 577 (P. C)=92 I C 760.

—The jurisdiction of a Court to entertain a suit on a *hatchitta* the parties to which were residents of a place within its jurisdiction at the time of the execution and the consideration for which was advanced at that place, is not ousted by the fact that in the notice of demand the debtors were called upon to pay the money at another place outside the jurisdiction. To such a case Ss. 49 and 50 of the Indian Contract Act were not applicable. The money was presumably repayable at the place where it was advanced and where both the parties resided at the time of the transaction 16 C L J 279=15 I C 885.

—Leave to sue a deft. who resides outside jurisdiction may be granted without previous notice to such deft. 11 L B R 26=64 I C 794.

—Transfer of case from *mofussil* to High Court—Jurisdiction—Letters Patent. S. 17 See 15 M L T 1=21 Ind Cas 789

**C. P. C (1908) SECTION 21***Synopsis*

- (1) Appeal
- (2) Applicability and scope of the section

**CIV PRO. CODE ((1908) SEC. 21 (Cont'd.)**

- (3) Effect of decree passed without jurisdiction
- (4) Jurisdiction, meaning of
- (5) Objection to jurisdiction
- (6) Suit whether includes execution or other proceedings
- (7) "Unless there is consequent failure of justice"
- (8) Waiver of objection to jurisdiction

**(1) Appeal.**

—Distinction must be drawn between cases of want of inherent jurisdiction in which case the order passed is a nullity and cases in which the Court having jurisdiction passes an order which it cannot pass i. e. material irregularity in the exercise of jurisdiction. Such an order can only be challenged by way of appeal. 73 I C 903=A I R 1924 M 406.

—Where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction: 17 C W N 116=16 C L J 77=16 I C 940; 15 C W N 725 dissented from in 20 C W N 967=24 C L J 235=35 I C 348; but later followed in 27 C L J 115=43 I C 758=45 C 926.

**(2) Applicability and scope of the section**

—This section has been newly added and is meant to exclude all belated objections as to the place of suing. In any case, appellate and revisional Courts are now prohibited from allowing objections on this score unless there has been a failure of justice consequent on the case having been heard in a Court which lacked jurisdiction to try it. The section does not apply to High Court on its original side. Clause 12. Letters Patent (Calcutta) is not controlled by s. 21 of Civil P C; A I R 1929 Cal 358=Ind Rul (1930) Cal 49=49 C L J 212=56 C 943=120 I C 577

—Similarly, as to Bombay see 56 B 324 (333, 348)=34 B L R 236=137 I C 381=A I R 1932 B 291=I R 1932 B 245=A L R 1932 B 498.

—Section 21, Civil Procedure Code, does not apply to the Chartered High Court in the exercise of their original jurisdiction. It does not also apply to a case where the objection is not one to the place of suing, but one which goes to the root of the whole suit, such an objection to the jurisdiction of the Court, which can be taken at any stage of the proceedings, even at the hearing of the suit and on appeal. 33 Bom L R 1364.

## CIV. PRO. CODE (1908) SEC. 21 (Contd.)

## (2) Applicability and scope of the section (Concl'd.)

—Section 21 applies only to objections as to territorial jurisdiction. It does not apply to an objection that suit is cognisable only by a Small Cause Court. A I R 1931 Oudh 411=8 O W N 1019=135 I C 889.

—It also does not apply to suit in a British India Court against a non-resident foreigner on a cause of action which arose wholly outside British territory A I R 1928 Lah 297=9 Lah 455=29 P L R 406=10 Lah L J 87=109 I C 28.

—But it can in a proper case be extended to cases which do not strictly fall within its terms. A I R 1926 Mad 421=49 M 746=50 M L J 161=95 I C 12.

—The failure to notice the provisions of s. 21 bears an analogy to a mistake or error apparent on the face of the record and is a ground for review. A I R 1929 Nag 73=12 N L J 13=25 N L R 104=Ind Nag (1929) Nag 165=116 I C 645.

## (3) Effect of decree passed without jurisdiction.

—S. 21 does not provide against the question of jurisdiction being agitated by means of an independent suit. No legal sanction can attach for a decree which rests upon an usurpation of jurisdiction. There is no provision in the Code which either expressly or by necessary implication deprives the plaintiff of his right of suit. A I R 1931 All 454=(1931) A L J 240=Ind Rul (1931) All 360=131 I C 248=53 All 560.

—All conditions under s. 21 must be fulfilled for setting aside decree. 96 I C 544.

—Thus a decree passed cannot be challenged by a separate suit if objection as to jurisdiction is waived. A I R 1929 Lah 449=11 Lah L J 306=Ind Rul (1930) Lah 39=120 I C 279.

—Judgment of a Court of incompetent jurisdiction is not res judicata. A I R 1926 All 650=95 I C 406.

—Just as S. 11 of the Suits Valuation Act 1887 bars belated objections regarding the pecuniary jurisdiction, the present section bars such objections to places of suing. On this score, both sections form exceptions to the general rule that a decree passed without jurisdiction is a nullity and can be declared void by any Court to which it is presented, and that no amount of consent or waiver could confer jurisdiction on a Court which it does not possess. Mookerjee, however, in 27 C W N 542=77 I C 253 has said that s. 21 is an exception to the well established

## C. P. C. (1908) Section 21 (Contd.)

## (3) Effect of decree passed without jurisdiction. (Concl'd.)

rule of jurisdiction (as stated above) but that this exception cannot obviously be so interpreted as to have a wider application than what is justified by its terms." In this case land situated outside jurisdiction was sold in execution of a decree obtained by landlord under s. 66 of Beng. Ten. Act. The tenant had not objected to jurisdiction, but did so when the landlord went to take possession. It was held that though the decree was validated by s. 21, the execution sale was a nullity. The Madras and Lahore High Courts have taken contrary view that if the defendant waives objection to jurisdiction it is waived under s. 21 for all purposes so far as s. 21 goes: See 37 M L J 349=53 I C 463; and 47 M L J 448=87 I C 152; and 11 L L J 306=A I R 1929 L 449=120 Ind Cas 279.

As to how far s. 21 goes see under (4) Objections to jurisdiction and (7) Waiver infra. Cases discussed under these headings show that where a Court has no inherent jurisdiction to try a case it cannot pronounce any decree, and if it does, that decree is null and void. But if there is only material irregularity in the exercise of jurisdiction the decree is not nullity and if objection to such exercise of jurisdiction is not raised at earliest opportunity, or, if raised, is overruled the decree will stand effective like any other valid decree. In other words, distinction must be drawn between cases of want of jurisdiction and the cases in which the Court having jurisdiction passes an order which it cannot. Such an order can only be challenged by way of appeal (see A I R 1924 M 406=73 I C 903), Section 21 enlarges the scope of this rule by enacting in effect that assumption of territorial jurisdiction of a Court will be deemed to fall under latter of the two categories distinguished above.

## (4) Jurisdiction

—The jurisdiction of the Court trying a remanded case depends entirely on the order of remand. A I R 1923 Mad 351=44 M L J 238=17 L W 355=(1923) M W N 194=32 M L T (H.C.) 276=72 I C 314.

—S. 38 does not make it optional to a Court to execute its own decree, or to transmit it to the Court which has territorial jurisdiction, if the original Court has lost jurisdiction over the subject-matter of the suit. A I R 1921 Mad 457=19 L W 16=46 M L J 250=(1924) M W N 38=79 I C 806.

—Unless pending cases are expressly transferred by a notification effecting a



## C. P. C. (1908) SECTION 21 (Contd.)

## (4) Jurisdiction. (Conclud.)

change in the territorial jurisdiction of a Court, the Court does not cease to have jurisdiction to decide the matter despite the change in its territorial jurisdiction. A I R 1925 Mad 117; A I R 1932 Mad 418 (F. B.) and 4 A L J 213 Relied on. A I R 1933 N 318=A L R 1933 N 373.

—Change of place of performance of contract does not necessitate fresh consideration. Place of performance of new contract determines the jurisdiction of court. 1917 M W N 779=6 L W 717=22 M L T 512=45 I C 401.

—Revenue Court—Buildings in a Mahal—Partition—No power to make a division of Buildings. See U. P. Land Rev Act Ss. 106 and 111; 27 I C 543.

## (5) Objection to Jurisdiction

## (a) General

If objection to jurisdiction of court is taken, court is bound to entertain it and give effect to it. 4 U B R 75=65 I C 68.

—Objection to jurisdiction taken in lower Court at later stage must be entertained in revision. A I R 1930 All 873= (1930) A L J 997=52 A 947=132 I C 35.

—But it should be noted that question of jurisdiction can be raised only if prejudice is proved first. A I R 1924 Pat 527=2 Pat L R 74 Civ.=80 I C 745.

—Defendant residing within the jurisdiction of another court—objection raised late—Duty of court under Order VII, Rule 10 to return plaint. See 4 S L R 264=10 I C 980

## (b) When it may be raised

—An objection as to want of jurisdiction, the validity of which is patent on the face of the proceedings, can be taken at any stage of the proceedings—12 Bom 155; 7 All 230; 7 W R 490; 4 W R Mis 21; and 2 W R Act X, 76. and A I R 1924 P C 95; 53 Cal 361=1924 Mad W N 79=7 Nag L J 62=34 Mad L Tim 62=19 Mad L W 547= 20 Nag L R 33=51 Ind App 72=22 All L J 386=46 M L J 628=26 Bom L R 586=28 Cal W N 977=5 L R P C 216=83 Ind Cas 531 P C and 36 Cal 193 (201)=1 Ind Cas 913=5 Cal L J 611; 7 Cal L J 152 and A I R 1919 P C 150=42 Mad 813=46 Ind App 151=17 All L J 694=21 Bom L R 914=30 Cal L J 209=23 Cal W N 1033=37 M L J 11= 26 Mad L T 127=10 Mad L W 362=1919 Mad W N 502=51 Ind Cas 185 P C and 33 Bom L R 1364=A I R 1932 Bom 42=135 Ind Cas 170.

—Objection as to jurisdiction, although no leave obtained as to property out of jurisdiction, can be taken for first time at

## C. p. C. (1908) SECTION 21 (Contd.)

## (5) Objection to Jurisdiction (Contd.)

## (b) When it may be raised (Contd.)

Appellate Court. A I R 1929 Cal 358=Ind Rul (1930) Cal 49=49 C L J 212=56 C 940=120 I C 577.

—Section 21 forms an exception to the general rule stated above and therefore no objection as to place of suing can be taken in appeal or revision unless such objection was taken in the Court of first instance at the earliest possible opportunity, and unless there has been a consequent failure of justice. 9 Bur L T 119=36 I C 431.

—See to the same effect A I R 1929 All 236=Ind Rul (1929) All 744=117 I C 824 and A I R 1930 Lah 1016=Ind Rul (1931) Lah 64=31 P L R 616=128 I C 496 and A I R 1931 Oudh 136=Ind Rul (1931) Oudh 107=7 O W N 1079=14 R D 664=12-9 I C 331 and A I R 1931 Lah 142=Ind Rul (1931) Lah 401=32 P L R 50=131 C 276; and A I R 1931 Oudh 136=7 O W N 1079=14 R D 664=Ind Rul (1931) Oudh 107=129 I C 331 and 1918 M W N 661=47 I C 764; and 48 I C 465; and 41 I C 161; and A I R 1921 M 455=61 I C 537.

—Appellate or Revisional Court cannot allow any objection as to the place of suing unless it was taken in the original Court, and even then, unless there was a consequent failure of justice. A I R 1928 Pat. 324=7 Pat 216=9 P L T 789=108 I C 321

see also (1918) M W N 661=47 I C 764.

—Objection to, valuation of claim and jurisdiction cannot be raised for the first time in second appeal. A I R 1930 Mad 541=Ind Rul (1930) Mad 922=126 I C 730

see also 48 I C 465 and 15 R D 158.

—Where a case was tried in 1906 in a Court which had no territorial jurisdiction over it and in appeal in 1914 the question of jurisdiction was raised: Held that S. 21 applied to the case as the provision related to the procedure of the appellate Court 87 P R 1914=234 P L R 1915=26 I C 543.

—An objection that the suit will not lie in regard to immoveable property lying in the Agency Tracts is not an objection as to the place of suing within S 21 of the C. P. Code. 42 Mad 813=51 I C 185 (P C) (reversing on appeal 34 I C 411).

—Where there has been no failure of justice from the trial of a case in a wrong Court, the plea as to want of territorial jurisdiction cannot be entertained in appeal. 26 I C 548 foll 21 P W R 1919=49 I C 441. see to the same effect 19 A L J 305=62 I C 399=A I R 1921 A 66; and A I R 1922 O 124; and A I R 1931 Lah 142=Ind Rul (1931) Lah 404=32 P L R 50=

## C. P. C. (1908) SECTION 21 (Contd)

## (5) Objection to Jurisdiction. (Concl'd)

## (b) When it may be raised (Concl'd)

131 I C 276 and 79 I C 857=A I R 1925 M 171; and 44 Ind Cas 694=22 Cal W N 517; and A I R 1922 C 345=65 Ind Cas 833=49 Cal 37=33 Cal L J 497; and 18 Ind Cas 130=45 Pun L R 1913=40 Pun W R 1913; and 37 Ind Cas 114=93 Pun Re 1916; and A I R 1922 Lah 164=65 Ind Cas 865; and A I R 1931 All 556=131 Ind Cas 603; 45 Ind Cas 401=6 Mad L W 717=22 Mad L T 512=1917 Mad W N 779; and A I R 1922 Gudh 124 and 32 P L R 874=1932 Lah 135=136 Ind Cas 17; 55 Ind Cas 442 But a debt refusing to produce evidence on merits cannot contend that there has been failure of justice on account of non-production of evidence; and objection as to place of suing cannot be raised in appeal. A I R 1930 Lah 1016=Ind Rul. (1931) Lah 64=31 P L R 616=128 I C 496.

—Similarly where there was absence of proof of failure of justice due to trial in wrong district objection was not upheld 136 I C 17=32 P L R 874=A I R 1932 L 135=I R 1932-L 193.

—An order passed by an appellate Court allowing an objection as to the place of suing should consider and decide whether there has been a failure of justice consequent on the suit having been instituted in the wrong Court, 17 A L J 1034 =42 A 74=52 I C 801.

—Objection as to jurisdiction cannot be raised in any subsequent proceeding if its absence was dependent upon a fact within the knowledge of the party A I R 1922 Pat 322=67 I C 686.

—A defendant cannot raise the question of jurisdiction when the case is transferred to the High Court pursuant to his objection. 9 S L R 164=32 I C 629.

—Objection to jurisdiction on the ground of valuation should be taken at the earliest opportunity. Nominal value put for Court fee—Real value should be put for jurisdiction. 43 Bom, 507=17 A L J 418=25 M L T 298=29 C L J 452=21 Bom L R 489=10 M L W 274=24 C W N 33=46 I A 24=36 M L J 437 (P C)=50 I C 280.

—It has been held by Bombay High Court that S. 21 does not preclude the objection about jurisdiction being raised in a fresh suit. A I R 1926 Bom 481=28 Bom L R 879=98 I C 341.

## (6) Suit whether includes execution or other proceedings.

—Principle of S. 21 applies to execution proceedings 18 I C 498 see also 43 Mad 135 (E D) and see the Full Bench

## C. P. C. (1908) SECTION 21 (Contd)

## (6) Suit whether includes execution

## or other proceedings. (Concl'd)

decision of the Madras High Court in. 43 M 675 F B.

—Ramesam J. It is not permissible to use s. 21 in execution proceedings Devadoos J. Principle applies. A I R 1928 Mad 746=28 L W 885=Ind Rul (1929) Mad 289=114 I C 545.

—Section 21 applies also to an application for setting aside an ex parte decree. A I R 1930 All 873=(1930) A L J 997=52 A 947=132 I C 35.

—But not to an execution sale held by a Court without jurisdiction. 27 C W N 542=77 I C 253=A I R 1923 C 619.

—Objection to territorial jurisdiction cannot be taken after confirmation of execution sale. 26 M L T 271=43 Mad 135=53 I C 579.

—Waiver of a right to object to jurisdiction before the passing of the final decree in a mortgage suit will not imply a waiver of the right to object in execution proceedings to a sale of the property. A I R 1927 Mad 627=50 M 882=52 M L J 605=38 M L T 351=25 L W 671=(1927) M W N 282=103 I C 245.

—And it has been held that the section has no application to cases of foreign judgments sought, under the provisions of s. 44 to be executed in British Indian Courts A I R 1925 Mad 788=21 L W 330=86 I C 492.

—Although S. 21 C. P. C. does not in terms apply to appeals, the principle underlying it is of general application so as to cover proceedings other than original suits. A I R 1933 N 319=A L R 1933 N 373. As to applicability to Insolvency proceedings See 18 C W N 1050=20 I C 370.

## (7) "Unless there is consequent failure of justice"

—See under (5) Objection to Jurisdiction (b) when can objection be taken-supra.

## (8) Waiver of objection to Jurisdiction.

—When in a cause which the Judge is competent to try the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction. 13 I A 134 followed. A L R 1933 S 265.

—An objection to jurisdiction on ground of undervaluation is capable of waiver. A I R 1920 Pat 360=57 I C 378.

—Where a Court has no jurisdiction, no consent of parties can give it jurisdiction.

## C. P. C. ( 1908 ) Section 21 (Contd.)

## ( 8 ) Waiver of objection to

## Jurisdiction (Contd.)

tion 5 Calc 489. See also 9 Bom H C 242, and 24 W R 205; and 9 Bom 266; 31 Calc 849=8 Calc W N 705. and 116 P L R 1915=29 I C 796; and 42 I C 711=45 C 519; and 21 C W N 320=44 C 595; and 13 Bom L R 158=10 I C 746; and 21 C W N 1109=41 I C 276; and A I R 1923 L 425=75 I C 590; and 33 I C 619; and 51 I C 237; similarly as to waiver : A I R 1914 P C 140; 12 I C 464; A I R 1925 P C 155; 13 C W N 835=3 I C 466; 3 I C 816=33 B 664; 4 I C 830=34 B 171; 29 Bom L R 273=A I R 1927 B 663; 56 I C 532=47 C 770; A I R 1925 C 812=52 C 559; A I R 1923 M 497; and 46 I C 929.

—But by s. 20 of the Presidency Small Cause Court Act, XV of 1882, it is provided that “when the parties to a suit which, if the amount or value of the subject-matter thereof did not exceed two thousand rupees, would be cognizable by the Small Cause Court, have entered into an agreement in writing that the Small Cause Court shall have jurisdiction to try such suit, the Court shall have jurisdiction to try the same, although the amount or value of the subject-matter thereof may exceed two thousand rupees.” A Small Cause Court has no jurisdiction to entertain suits for accounts and consent of parties cannot give a Court jurisdiction which it has not. 8 Bur L T 96=27 I C 803.

—Courts' order or judgment is a nullity, if it had no jurisdiction over the subject matter. A I R 1926 Bom 1 (F B) =50 Bom 1=27 Bom L R 1281=91 I C 847.

—Not taking objection to jurisdiction in lower Courts will not confer jurisdiction on a Court which it does not have otherwise. 3 L L J 380=76 P L R 1922. Nor can estoppel—Estoppel of defendant confer jurisdiction. 27 I C 11; nor subsequent action or conduct 5 Pat L W 199=(1918) Pat 65=45 I C 72; nor can long continued practice confer jurisdiction where there is none 4 L W 402=37 I C 436.

—Where a Court has no inherent jurisdiction to try a case it cannot pronounce any decree, and if it does, that decree is null and void. An objection as to jurisdiction can be taken at any time and in any stage of the case and cannot be waived—held with regard to a case falling under S. 21 (a) Bengal and United Provinces and Assam Civil Courts Act, XII of 1887. 4 Pat L J 202=4 Pat L W 445=45 I C 920. See also 3 A L J 474=199 A W N 1906; and 1931 A L J 240=A I R 1931 A 454=53 A 560; and 25 Ind Cas 448=64 P R 1914=244 Pun L R 1914=158 Pun W R 1914; and A I R 1921 Upp Bur 15=4 U B R 95=65 Ind Cas 68; and 29 Ind Cas 768=8 Low B R 211=8 Bur L T 128.

## C. P. C. ( 1908 ) Section 21 (Contd.)

## (8) Waiver of objection to

## Jurisdiction (Contd.)

—Proceedings by court without jurisdiction are nullity so far as strangers are concerned. 39 Mad 1031=19 M L T 93=32 I C 391.

—Thus an Agency Court has no right to sell the right to collect Kattubadi in villages situated beyond the limits of its territorial jurisdiction. A I R 1924 M 144=76 I C 269;

—But it is held that parties cannot waive question of jurisdiction but High Court may or may not interfere in a case where jurisdiction is waived. 40 All 666=16 A L J 679=46 I C 647.

—S. 21 is an exception to the well-established rule that where the Court has no inherent jurisdiction over the subject-matter of a suit its decree is a nullity even though the parties may have consented to the jurisdiction of the Court. Jurisdiction can be conferred on a Court if the parties have expressly consented to such a procedure by constituting the Judge as their arbitrator. A I R 1923 Cal 619=27 C W N 542=77 I C 253.

—Per Wallace, J.—Transfer of local jurisdiction automatically effects the transfer of all suits and proceedings arising originally from that local jurisdiction. S. 21 governs all cases of want of territorial jurisdiction. A I R 1924 Mad 697=34 M L T 275=47 M L J 192=20 L W 467=87 I C 341.

—The principle underlying s. 21 is that the objection to territorial jurisdiction is cured not merely for the purposes of the Appellate and Revisional Court, but cured entirely and for all purposes. A I R 1925 Mad 117=47 M L J 448=87 I C 152.

—So where an objection as to place of suing is not taken in the lower Appellate Court, the plea must be deemed to have been waived. A I R 1920 Mad 1019 (F B); A I R 1932 Mad 418 (F B); A I R 1925 Mad 117 and A I R 1924 Mad 697 referred to : A I R 1933 N 319=A L R 1933 N 373.

—But mere omission to apply for transfer does not amount to acquiescence : 18 C W N 1340=27 I C 232.

—In a suit brought in the High Court in the exercise of its ordinary original civil jurisdiction, for the recovery of certain jewels or payment of their value, the plaint contained no averment showing that the cause of action or part thereof arose within the local limits of the jurisdiction of the High Court but alleged that the deft. resided within the local limits of its jurisdiction. The deft. received a summons from the High Court while he was in Madras and at the time took no objection.

## C. P. C. (1908) Section 21 (Concl'd.)

## (8) Waiver of objection to Jurisdiction (Concl'd)

to the jurisdiction of the Court but merely asked that another summons should be sent to him. He did not appear at the hearing of the suit and an *ex parte* decree was passed against him. He applied to the High Court to set aside the *ex parte* decree on the ground that he had not been served with summons but his application was dismissed and the order dismissing it was confirmed on appeal. In a suit filed by him in the Sub Court of Tanjore for a declaration that the decree of the High Court was null and void for want of jurisdiction, held, that he must be deemed to have submitted to the jurisdiction of the High Court and could not therefore subsequently question its jurisdiction. The principle of S. 21 C P C is applicable to the case. 37 M L J 349-26 M L T 186- (1919) M W N 636-10 L W 293-53 I C 463

—Irregularities in initial procedure such as if objected to would lead to dismissal of suit—If Court competent to try and parties join issue on merits without objection, no subsequent objection on the ground can be allowed. A I R 1931 Cal 327-54 C W N 999-131 I C 396.

## C. P. C. (1908) S. 22.

*Synopsis*

- (1) Scope of the Section
- (2) Application for transfer
- (3) Notice
- (4) Original side of the High Court
- (5-6) Transfer when allowed

## (1) Scope of the Section

—This section embodies in more convenient form the provisions of s. 22 of the old Code and is intended also to replace s. 20 which has been wholly omitted. See 23 Bom L R 1442-100 I C 154-A I R 1927 B 79-51 B 26.

—Ss. 22 and 23 C. P. C. do not apply to a case in which the question is whether a suit should be tried by a Court subordinate to a High Court or by a High Court and such a case is not covered by the provisions of C. P. C. In the absence of a rule of law applicable to a case of this kind the aid of S. 151 can be invoked in a proper case and it is open to a High Court to exercise powers similar to those contemplated by ss. 22, and 23. 69 I C 712; 27 M L J 645, 45 C L J 71; 77 I C 408 referred to. A L R 1934 A 142.

—These two sections, again, differ from S. 24 C. P. C. in that their scope is limited to cases under ss. 16 to 20 in which the plaintiff has the choice of more Courts than one. 12 A L J 896-24 I C 318; see also A I R 1923 L 288-71 I C 268.

## C. P. C. (1908) SECTION 22 (Cont'd)

## (1) Scope of the Section (Concl'd)

—S. 24 of C. P. C. is wider in its scope than s. 22, C P C and no notice by the party applying for transfer before the application is required under s. 24 C. P. C. A L R 1933 L 745.

—Under the present section both Courts must be competent to try the suit: 118 I C 393- A I R 1929 L 175.

—As to the power of High Court to transfer suit to a Court subordinate to another High Court see under s. 23 C. P. C.

## (2) Application for Transfer

—Application under this section should be made according to the old practice by petition and affidavit: (see 8 Ind Jur 143-9 C 980), but it is not mandatory. 162 I L R 1912-14 I C 561.

—An application under s. 22 not presented at the earliest possible opportunity must be rejected: 7 L L J 93-26 P L R 465-A I R 1925 L 322-88 I C 531; see to the same effect 11 P R 1917-35 I C 616; and the provision being mandatory application must be made at or before settlement of issues: 78 I C 608-A I R 1925 L 175.

—But it is only when a suit may be brought in the one or other of two Courts, both of which have jurisdiction, that an application may be made for transfer. Where the jurisdiction of one of the Courts is denied an application cannot lie. A I R 1923 Lah 288-71 I C 268.

—see to the same effect 12 A L J 896-24 I C 318; and 21 O C 217-48 I C 105, and 1 Pat L T 277-56 I C 920.

—And where the application is merely an attempt to get an order from the Court which would enable the petitioner to evade the question of jurisdiction decided against him, the application will not be allowed. A I R 1927 Lah 183-100 I C 67.

## (3) Notice

—Notice under s. 22 is imperative: 107 I C 593; even s. 151 of the Code does not empower the Court to wholly ignore this provision. 16 P L R 1917-150 P W R 1916-11 P R 1917-35 I C 616.

## (4) Original side of the High Court

—Ss. 22 and 23 do not apply where transfer to the Original side of a High Court from a Court subordinate to another High Court is desired. The High Court has inherent jurisdiction to grant the petitioner the relief for which he asks by an order of stay what the right of a

## C. P. C. (1908) SECTION 22 (Contd.)

## (4) Original side of the High Court. (Concl'd.)

plaintiff to institute a suit in a Court in which the law permits him to sue should not be interfered with by the High Court in exercise of its extraordinary jurisdiction unless the suit is brought in bad faith for the purpose of working injustice. The mere fact that it would be more convenient to the applicant to have the action tried elsewhere is no sufficient reason to force the plaintiffs summarily out of the Court in which they are entitled to sue and to deprive them of the substantial sum expended by them on Court-fees by the application of inherent powers not utilised in practice except for the purpose of preventing or remedying grave abuse. A I R 1924 Lah 306-69 I C 772.

—Where the cause of action wholly arose within the original jurisdiction of the Madras High Court, the mere fact that both parties were residents of Punjab was held not to be a sufficient ground for stay of suit. 27 I C 455.

## (5-6) Transfer when allowed.

—In applications for transfer of suits the defendant must show that considerations of convenience outweigh the plaintiff's right as arbiter-lites; and one should rather look to the allegations of the plaintiff than that of the defendant in considering such applications. A I R 1928 Mad 15-39 M L T 401-(1927) M W N 607-106 I C 870 for it is the right of the plaintiff to choose the forum for his action, and in deciding whether the plaintiff should be deprived of that right, a very strong case must be made out by the defendant, and further in deciding whether a suit should or should not be transferred plaintiff's convenience also should be looked to. A I R 1928 Lah 159-106 I C 869 see to the same effect 8 L L J 578-27 P L R 831-A I R 1927 L 14-97 I C 390; and A I R 1924 L 249-73 I C 860; and 3 O L J 200-34 I C 686; and 21 O C 217-48 I C 105; and 167 P R 1919-54 I C 935. That is to say, defts can, by showing clear balance of advantage in the way of convenience and expense, override the plff's choice of forum 11 O L J 377-86 I C 239-A I R 1924 O 410.

—Whether sufficient grounds exist depends upon the facts of each case; mere convenience is not a sufficient ground for transfer: 69 I C 239-A I R 1921 L 304; see to the same effect 21 O C 217-48 I C 105.

—A suit can be transferred only upon two grounds viz. (a) that there will not be an impartial trial by the trying court and

## CIV. PRO. CODE (1908) SEC. 22 (Concl'd.)

## (5-6) Transfer when allowed (Concl'd.)

(2) that there is a manifest preponderance of convenience to the petitioner if the suit is transferred to the other Court. The convenience of the plffs, and their witnesses has also to be considered particularly as they have in the first instance the right to choose the venue in which they would prosecute their suit. 1 Pat L T 277-56 I C 920.

—That is, in a particular case convenience may justify transfer: 62 I C 115-A I R 1921 C 210-48 C 53.

—Although the mere convenience of the deft is no ground for transfer of a case, when plff has the choice of the forum yet where the plffs subsequently instituted cross-suit which is merely a counter-blast to the deft's previously instituted suit, it would be in the interests of justice to transfer the suit so that both the suits may be tried together: A L R 1933 L 745.

—The mere fact that the defendant resides outside and that all his evidence is available outside the jurisdiction of a court is no ground for transferring a suit from the court where it has been originally instituted. 8 S L R 43-25 I C 874.

—Where a suit for specific performance of a contract to sell immoveable property at M was filed at M and the defendants applied to have it transferred to K departure from the ordinary rule would not be justified merely because the correspondence was conducted at K, or that some of the witnesses would come from K, or again that it would be much more convenient for the defendants to have the case tried at K. A I R 1928 Lah 183.

—Where it was established that almost all the evidence would be available only at the place to which a transfer is applied for, the transfer should be allowed. Application for transfer should be made as early as possible. A I R 1924 Lah 304-69 I C 239.

—All dealings taking place at Karachi —Persons from whom goods brought and to whom goods sold residing at Karachi —Accounts relating to dealings being at Karachi—Balance of convenience held greatly in favour of case being tried at Karachi, though both parties lived at Delhi. A I R 1923 Lah. 383-72 I C 592

## C. P. C. (1908) SECTION 23.

## Synopsis.

- (1) Scope of the section
- (2) Competency of Court



## CIV PRO CODE (1908) SEC. 23. (Contd.)

- (3) Power of High Court to transfer suit to a Court subordinate to a different High Court
- (4) Subordinate, meaning of.

## (1) Scope of the section

—Under the old practice applications of this nature to a High Court were submitted through the District Court, but this has been altered under the present Code.

—S. 23 of the old C. P. Code required that a Court must be satisfied that justice is more likely to be done by the suit being instituted in some other Court before it requires the plff. to do so. In the new Code the discretion is left completely unfettered. Very strong reasons must be shown under the new, as required in the old Code for depriving a plff. of the right to bring his suit in any Court allowed by law. 13 B 178; 5 A. 60, 9 C 980, 6 C. P. 116, foll. 7 Bur L T 1=7 L B R 129=23 I C 345.

—The plaintiff has the right to chose the forum of trial, and a case can be transferred from one court to another, only when the Court is satisfied that the proceedings in the trying Court constitute an abuse of the process of the Court. 1 Pat. L T 389=50 I C 649 See also case under S. 22—(1) Scope of the section. Applications for transfer of Civil cases, are extraordinary procedure and some good cause must be shown why such a procedure should be exercised. Where it was alleged that witnesses resided in a distant place within the jurisdiction of another High Court Held not sufficient cause. 24 I C 707.

—If the suit will be more expeditiously and more economically decided in the original Court the transfer is unnecessary. 4 O W N 1114=A I R 1928 9 89.

## (2) Competency of Court.

—The Court to which a suit is transferred must be competent to try it. A L R 1933 A 333=A I R 1933 A 478 (1).

—The first hearing contemplated by the section is the hearing when the case is ready to be heard and proceeded with. Where the several defendants are residing some at Delhi and some at Calcutta and where the estate in respect of which the suit is brought is being administered by one court, and the cause of action arose wholly within the court's jurisdiction, that is the proper court to try the suit. 150 P L R 1914=65 P W R 1914=25 I C 723.

## CIV PRO CODE (1908) SEC. 23 (Contd.)

- (3) Power of High Court to transfer suit to a Court Subordinate to a different High Court.

—The Bombay and Patna High Courts have held that under sub-s (3) High Court has jurisdiction to order the transfer of a suit even to a Court, outside its appellate jurisdiction. A I R 1927 Bom 79=51 Bom 26=28 Bom L R 1442=100 I C 154; A I R 1928 Pat 640; See also 1 Pat L T 277=56 I C 920. (dissenting from Nagpur J C Courts view to the contrary in 13 N L R 81=40 I C 393).

—Thus an ex parte decree by Calcutta Court—Execution sought at Surat Court—Suit for declaring the decree null and void brought in Surat Court—Suit cannot be stayed under s. 151—Application ought to be made under s. 23 (3) for an order that the suit should be transferred to Calcutta High Court. A I R 1927 Bom 79=51 B 26=28 Bom L R 1442=100 I C 154.

—The Upper Burma and Oudh J C Courts hold that such High Court should direct the plaint to be returned for presentation to the proper Court but cannot transfer the suit for trial to a Court subordinate to another Court: U B R 1907-1909 C P C 25=4 I C 814; and 20 I C 758 (Oudh).

—A party approaching High Court after taking transfer proceedings in trial Court is not guilty of delay. A I R 1928 Mad 15=39 M L T 401=(1927) M W N 697 =105 I C 870.

## (4) Subordinate, meaning of.

—For the purposes of transfer applications the Original Side Judge is subordinate to the Appellate Side of the High Court. A I R 1923 Rang 22=1 Bur L J 194=11 L B R 446=77 I C 408.

—See to the same effect the Lahore High Court's view in. A I R 1929 L 183, not following its own ruling in 69 I C 772=A I R 1924 L 306.

—But the Calcutta High Court has held that a Judge of the Original Side not being subordinate to the High Court an application for the transfer of a suit pending before him will not lie before a Bench of the same High Court. A I R 1927 Cal 290=45 C L J 71=100 I C 331.

## C. P. C. 1908 SECTION 24.

—This section applies to H. C. and Pro. S. C. C. not in Ajmere or Merwara—Reg. I of 1877, ss. 2 and 26.

## Synopsis.

- (1) Appeal or revision.
- (2) General principles, scope and object.
- (3) Appeals transfer of.

## CIV. PRO. CODE (1908) SEC. 24 (Contd)

- (4) At any Stage.
- (5) Competent Court.
- (6) Court of Small Cause.
- (7) Court Subordinate to the District Court.
- (8) District Court.
- (9) Grounds of transfer.
- (10) Jurisdiction.
- (11) Notice.
- (12) Pending before it.
- (13) Retransfer.
- (14) Suit whether includes other proceedings.
- (15) Miscellaneous Cases.
- (16) Practice.

## (1) Appeal or revision.

—Where Small Cause suit is transferred to Munsif's Court, proceedings in the latter Court are governed by Provincial Small Cause Courts Act, and no appeal lies. A I R 1928 All 609=26 A L J 839=110 I C 493.

—Order for costs forming part of order under s. 24 of C. P. C. read with s. 15 of the Upper Burma Civil Court Regulation is not a decree (1917) 3 U B R 61=44 I C 690.

—Case transferred to Munsif appointed under s. 9 of Act II of 1896 from a Small Cause Court—Appeal lies to Sub-Judge A I R 1924 All 761=22 A L J 880=L R 5 A 725 Civ=82 I C 292.

—Munsiff vested with Small Cause powers succeeded by a Munsiff not having such powers—Pending cases must be tried as original suits—Appeal see 29 I C 996=37 A 450.

—Judge having Small Cause as well as regular jurisdiction transferring Small Cause case to regular side Appeal lies 15 Bom L R 1036=21 I C 832=38 B 190.

—As to whether transfer of order in execution of a small Cause decree is appealable see 31 A 1.

—As to revision see A W N 1882, 62.

—An order passed under this section will not be interfered with in revision; an appeal lies from the final decree 6 All 233 but this case was dissented from in. 78 I C 614.

## (1) General principles, scope and object.

—General;—The High Court or the District Court can transfer under s. 24, the proceedings of any case to any other Court of competent jurisdiction when once the Munsif is fully seized of the case. Such transfer is not invalid because it may affect some other order of the Revenue

## CIV. PRO. CODE (1908) SEC. 24 (Contd)

## (2) General principles scope

## and object (Contd)

Court. A I R 1931 All 28 (2)=14 R D 654=L R 11 A 300 Rev=53 A 52=(1930) A L J 8=Ind Rul (1931) All 639=133 I C 319.

—Under the present Code, however the scope of the section has been much widened and is practically made exhaustive 40 I C 393=13 N L R 8.

—District Court is subject to High Court Circulars if any, and a District Judge cannot transfer a case already decided by the original Judge. 24 M L T 32=(1918) M W N 291=8 L W 259=45 I C 13.

—Nor should a Dist. Judge withdraw a suit under S. 24 of the C. P. C. merely because in an analogous case a Subordinate Judge had taken what in his opinion was an erroneous view of the law. He should not also transfer a suit merely to enable himself to dispose of it on preliminary ground. 15 I C 569.

—Where the District Judge's direction to the succeeding Munsif was by means of an order which ran as follows:—"The Small Cause Court cases pending in the Court of the Munsif of Bansi will be tried by the present incumbent of the office as regular suits, as he has not got the Small Cause Court powers. The attention of the said learned Munsif be drawn to S 35 of the Small Cause Courts Act, and these cases should be dealt with as provided by the Small Cause Courts Act." The order was held not to be an order of transfer within the meaning of S. 24 C. P. C. but was merely drawing the attention of the Munsif to the fact that there was a provision in the Small Cause Courts Act in S. 35 to the effect that the successor of the Judge, Small Cause Court, should try the suit. 54 A 171 (177)=1931 A L J 953=A I R 1931 A 574 (F B).

—S. 8 (2) of the Honorary Munsif's Act 1896 excludes the operation of the present section. 4 O L J 71=39 I C 340.

—See also. 50 I C 648.

—The section does not apply to a temporary Court having no definite jurisdiction. 31 M L J 22.

—Where an appellate Court has made an order of reference under s. 566, C. P. C. 1882 the return to such order must be made to the same Court, and such Court is not competent to transfer the appeal for disposal elsewhere—5 All 315.

—But this is no longer law under the present Code 19 I C 552=9 N L R 40; 19 C W N 143=19 C L J 408=23 I C 69; 12 A L J 1094=25 I C 141; and 1914 M W N 317=23 I C 425.

## CIV. PRO. CODE (1908) SEC. 24 (Contd)

## (3) Appeals, transfer of

—Where the question involved in several appeals is the same but only some of those appeals lie of right to the Chief Court, it is competent to the Chief Court to direct that all the appeals should be heard in the Chief Court without going through the formality of presenting those appeals in the Lower Court of appeal and then transferring them to its own file. 101 P R 1912=158 P W R 1912=189 P L R 1912=151 C 845.

—An Add. Dist. Judge remanded a case under O 41, r. 25 to Sub-Judge which case was transferred to another Sub-Judge of equal competence. Held, the District Judge has power under S. 24, C. P. C., and under S. 34 of the Punjab Courts Act. It is no doubt true that proceedings on remand under O 41, r. 25, C. P. C., were proceedings in appeal, which remained pending in the Court of the Additional District Judge, but this circumstance does not affect the power of the District Judge under S. 24, C. P. C., to transfer "any suit, appeal or civil proceedings" from one Subordinate Court to another Court of equal or competent jurisdiction. Further proceedings in the Court to which a case has been remanded under O. 41, r. 25, C. P. C., is "civil business" within the meaning of S. 34 of the Punjab Courts Act, which the District Judge can by written order direct to be distributed among the Courts under his control. 140 I C 238 (240)=I R 1932 L 638.

## (4) At any stage.

—Under s. 24 District Court to which an appeal has been remanded by the High Court has power to transfer it unless the High Court's order discloses a clear intention of limiting the powers. A I R 1922 All 35=44 A 211=20 A L J 44=66 I C 317.

—Where an appellate Court remands a suit for fresh decision on the merits by the Court which first decided it, the District Judge is competent under S. 24 of the Civil Procedure Code, 1908, to transfer the suit to his own file and decide it. 19 I C 552=8 N L R 40,

## (5) Competent Court.

—As to meaning and scope of the words "competent to try or dispose of" see A L R 1933 O 207; and see also 55 M 960 (964)=1932 M W N 763=36 L W 479=139 I C 477=63 M L J 689=I R 1932 M 726=A I R 1932 M 683=A L R 1932 M 1213.

—Judgment written by judge after transfer to another district—Transfer of case by authority not competent to do so—Court to which case transferred has no jurisdiction. 80 P R 1919.

## CIV PRO CODE (1908) SEC 24 (Contd)

## (5) Competent Court (Contd.)

—An additional Judge appointed under the powers of S. 8 of the Bengal N. W. P. and Assam Civil Courts Act and not empowered by the Local Government to entertain suits under S. 92, C. P. Code or who has not been assigned by the Dist. Judge to do duties as District Judge under S. 92 is not empowered to try suits under S. 92 transferred to him under S. 24, C. P. Code 41 C 866=18 C W N 612=22 I C 951.

—The transfer of a suit valued at between Rs. 1,000 and Rs. 2,000 which was originally instituted by the plaintiff in the Court of a Subordinate Judge at Patna for recovery of some land situate within the local limits of the Barh Munsif, to the Court of a Munsif at Patna who was specially empowered by the Local Government to try suits up to the value of Rs. 2,000 within the local limits of the Patna Munsif, illegal and a without jurisdiction. Per Dawson Miller, C. J. A Court is not "competent" to try suit unless it has jurisdiction to do so. The jurisdiction of a Court depends not merely upon the nature of subject-matter of the suit but also in the case of most subordinate Courts upon the pecuniary value of the suit and in the case of all upon the local limits of their jurisdiction. 1920 Pat 274=57 I C 522.

—But it is open to the High Court or a District Judge to transfer a case pending in a subordinate Court to another Court which has pecuniary jurisdiction to try the suit although it may not at the moment possess territorial jurisdiction to try it. 1932 A L J 984=A I R 1932 A 660.

—Superior Court cannot transfer proceedings beyond jurisdiction of original Court. 32 I C 788;

—See also 12 Bom L R 354=34 B 411;

—Subject to the exception provided for in S. 24 (4) C. P. C. S. 24 clearly contemplates the transfer by a District Court of a suit from a Court of Small Causes. If it is to be said that a small cause suit can only be transferred to a Court having small cause jurisdiction, because otherwise S. 16 of the Small Cause Courts Act will be offended, then sub-clause (4) of S. 24 becomes meaningless. If the Court of transfer is itself always to be a Small Cause Court there can be no question of deeming. But there is no difficulty if "competent to try" is understood to mean "of jurisdiction competent to try." S. 24 must then be understood to constitute an enactment saying, in special circumstances, the provision of S. 16 of the Small Cause Courts Act. 55 M 960 (963-4)=1932 M W N 763=36 L W 479=63 M L J 689=I R 1932

## CIV PRO CODE (1908) SEC 24 (Contd)

## (5) Competent Court. (Contd)

M 726-139 I C 477-A I R 1932 M 683-A L R 1932 M 1213. "A Court of Small Causes" in S. 24 (4) of the C. P. Code, include Courts invested with Small Cause Court jurisdiction as well as Courts constituted under Act IX of 1887. The Legislature apparently intended that the District Court should have power to make an order of transfer trusting to the discretion of that Court, and its knowledge of local conditions, not to make an order of transfer to a Court not competent to make a proper exercise of the special powers which an order of transfer carries with it in respect of particular cases so transferred. Hence, where a suit of a Small Cause suit, instituted in the Court of a Subordinate Judge invested with the powers of a Judge of Small Cause Court, was transferred by the District Judge to the Court of a Munsif not possessing the powers of a Small Cause Court, and it was tried by him and a decree passed therein, held, that no appeal lay from such a decree. 39 All. 214-15 A L J 69-37 I C 809.

-See also 20 O C 350-43 I C 314; and under (6) Court of Small Cause infra.

## (6) Court of Small Cause.

-Where a small cause suit is transferred to a Court which is not invested with any small cause jurisdiction, the latter Court is to be deemed for the purpose of the transferred suit to be a Court of Small Causes. This is the proper meaning according to the Madras High Court and effect of the clause. 55 M 960 (965)-1932 W N 763-M 36 L W 479-63 M L J 689-I R 1932 M 726-139 I C 477-A I R 1932 M 683-A L R 1932 M 1213.

-A Court of a Small Causes therefor under S. 24 (4) of the Code of Civil Procedure includes courts vested with Small Cause Court jurisdiction as well as the Special Courts constituted under the Provincial Small Cause Courts Act. 27 O L J 461-44 I C 881.

-The other Courts are also of the same view see 120 I C 412-A I R 1930 N 133; and 135 I C 402-27 N L R 307-I R 1932 N 2-A I R 1932 N 49-A L R 1932 N 15 and 49 C L J 237-56 C 588; and 43 I C 314-20 O C 350; 69 I C 681-A I R 1923 Pat. 49-1 Pat 696; and 36 I C 881; and 26 A L J 772-A I R 1929 A 50-50; A 810; and 14 A L J 549-38 A 425; and 16 A L J 548-46 I C 893-40 A 525; and 23 M L J 373-38 M 25; and 14 A L J 705; and 31 C 1057 and 37 C 574; and 2 O C 143.

-These cases also lay down that no appeal lies from such decision. Under Madras City Civil Courts Act Ss. 3 and 5 (2) it is held that a suit pending in

## CIV. PRO. CODE (1908) SEC. 24 (Contd)

## (6) Court of Small Cause (Contd).

the small Cause Court can be transferred to the City Civil Court only when the Chief Justice of the High Court directs the City Civil Judge to try the case in his capacity of Small Cause Court Judge 32 M L J 258- (1917) M W N 288-38 I C 357. rel. on in 56 M L J 649.

-See also under the old Code 58 P R 1897.

-The Bombay High Court, however, has held that the expression "a Court of Small Causes" means a Court properly and strictly so called, and does not include a Court invested with the jurisdiction of a Court of Small Causes. 23 Bom 382. Per Baker J:- S. 24 (4) makes no reference to the Court to which a case is transferred from a Small Cause Court being invested with Small Cause powers up to any particular extent or indeed with Small Cause Court powers at all. The terms of the section appear rather to be intended to confer the powers of a Small Cause Court upon the trying Court for that particular case irrespective of the powers with which the Court is invested. Sub-S. (4) of S. 24 gives the power to transfer a suit from a Small Cause Court to a regular Court irrespective of the Small Cause Court powers of the Court to which the suit is transferred, provided the suit to be transferred is within the limits of the pecuniary jurisdiction of the Court to which the transfer is to be made. Per Nanavati, J-S. 24 (4) is intended to remove the bar laid down in S. 16 of the Provincial Small Cause Courts Act. S. 16 does not deprive the regular Courts of their jurisdiction but merely directs them not to try a "Small Cause Suit." The jurisdiction of a regular Court is defined in S. 24 of the Bombay Civil Courts Act of 1869. If a suit is within the power of the Court as so defined, then the Court is competent to try the suit. S. 16 of the Provincial Small Cause Courts Act does not take away this competency. It only directs that certain suits shall not be tried by such Courts and this bar is removed under S. 24 (4) C. P. C., when an order of transfer is made under that section. 56 B 387-34 B L R 931-139 I C 194-I R 1932 B 479-A I R 1932 B 486-A L R 1932 B 681.

-Where an Honorary Munsif acting under the U P Honorary Munsif's Act S. 8 (2) 1896 decides a suit transferred to him from a court of Small Causes he cannot be deemed to be a Court of Small Causes, and his decree is therefore appealable. 54 I C 435.

-The Small Cause Court does not cease to exist if at any time there should be no Judge to preside over it. Suits can

## CIV PRO CODE (1908) SEC 24 (Contd)

## (6) Court of Small Cause. (Concl'd)

be instituted in the Court even if there should be no Judge appointed for the time being, and suits so instituted would remain in the Courts until they are withdrawn. A I R 1925 Lah 561=26 P L R 308=88 I C 139.

## (7) Court subordinate to the District Court.

—No Court can direct any transfer from one Court to another unless both Courts are Subordinate to it. High Court should not except under most exceptional circumstances, transfer suit instituted in a Court subordinate to itself to another Court which is beyond its territorial jurisdiction even if the High Court is presumed to have such power. A I R 1924 Nag 152=75 I C 548. See also 13 N L R 81=40 I C 393; and 11 C L J 218=5 I C 771; and 40 Bcm 109=17 Bom L R 948=31 I C 331.

—A case remanded to a Dt. Judge for disposal can legally be transferred to a subordinate court by him. Powers of transfer are wider under the new Code than under the old Code. 12 A L J 1094=25 I C 141.

—The power to transfer cases under S. 24 of the C. P. Code can be delegated by the Dt. Judge to the Subordinate Judge when so delegated it must be exercised in accordance with law. It can only be exercised in cases pending in a Court subordinate to the Court exercising the power. A senior Subordinate Judge cannot transfer a case from his own Court to that of the junior Subordinate Judge as the court of the latter is not subordinate to him. 52 I C 352=1 Lah 158.

—Ganjam and Vizagapatam Agency Courts Act (1839)—Agency Rule XXII—Power of High Court to transfer a case pending in the Agents Courts to the District Court. See 23 Mad 329 (351).

—Additional District Judge—Powers—Assignment of functions by Dt. Judge under Punjab Courts Act, 75 (2) See 215 P L R 1914.

## (8) District Court.

—A District Judge can transfer a probate case for trial to a Subordinate Judge under cl. (d), sub-sec. 2, s. 23 of Act XII of 1887—25 Calc 340.

—Where the Dt. Judge to whom an appeal is remanded by the High Court transferred the same to the Sub-Judge and the suit is decided on merits without objections: Held, that the irregularity would not affect the merits. 36 C 193, foll. Under the new Code the powers of

## CIV. PRO. CODE (1908) SEC 24 (Contd)

## (8) District Court (Concl'd)

transfer are wider than under the old, and it is not clear that even under the old Code the Dt. Court cannot transfer remanded suits. 15 M L T 304=(1914) M W N 317=23 I C 425.

—S. 25 Civ Pro Code, 1882 read with ss. 33, 34 of the Punjab Courts Act, gives

## (9) Grounds of Transfer.

—Cases under this head are also treated under S. 22 and they will be relevant hear also.

—Although plff. has an undoubted right to bring his suit in any Court which has jurisdiction still if the defts. can show a clear balance of advantage in the way of convenience and expense they are entitled to have it transferred. 9 O L J 413=69 I C 717=A I R 1923 O 30.

—But the applicant under s. 24 must make out strong case for transfer—Court should not interfere unless expense and difficulties are so great as would lead to injustice. A I R 1930 Lah 944=Ind Rul (1931) Lah 315=130 I C 523. See also 29 A L J 118=65 I C 785=A I R 1922 A 62=44 A 278.

—The transfer of a suit is an extraordinary matter, and in order to justify the removal of a case against the plff's will from the Court where he lodged it there must exist some good cause. Mere convenience of the parties is not a good test. 41 All 381=17 A L J 371=50 I C 358.

--See to the same effect A I R 1925 Lah 159=106 I C 869.

—The burden always lies on the applicant to make out a strong case for transfer. Mere balance of convenience would not be a sufficient ground, unless the expense and difficulties of the trial would be so great as to lead to injustice, or the forum was deliberately chosen for the purpose of working injustice. A I R 1931 Lah 115=31 P L R 920; See also 14 A L J 242=32 I C 613; and A I R 1928 M 15.

—The fact that the defendant's evidence in regard to one of the issues is mainly in another place is not a sufficient ground for transferring the case. 167 P R 1919=54 I C 935.

—Close relationship of judge to one of the parties is a good ground for transfer. A I R 1932 S 206.

—So also a reasonable apprehension that judge will not decide case with open mind or embarrassing for the judge to arrive at a finding contrary to the one already arrived at by him is a good ground



## C. P. C. (1908) SECTION 24 (Contd.)

## (9) Grounds of Transfer, (Contd.)

for transfer. A L R 1933 O 207=10 O W N 443=A I R 1933 O 154 See also 32 P L R 388=133 I C 876.

—Where the High Court stayed proceedings in the Court of sub-Judge and owing to the order not being communicated in time, the party presented an affidavit and the Sub-Judge stated that he would not act without official instructions, whereon the party brought a certified copy of the order and the sub-Judge without heeding it issued a warrant of arrest. Held that the action of the Sub-Judge was improper and as it was likely to create an apprehension in the party that the Court was prejudiced against him, the case should be transferred from his file. A L R 1934 L 197;

—But the apprehension must be reasonable A I R 1923 Lah 564=77 I C 762.

—Judge having already expressed his opinion—Case should better be transferred to the Court. 109 I C 402 (Lah); but not always A I R 1926 Lah 345=94 I C 394.

—An expression of opinion by a Judge as to the merits of the plaintiff or of a newspaper conducted by him, is no ground for a transfer especially when that expression of opinion was elicited by the conduct of the plaintiff himself. 29 I C 29

—But the mere fact that a Judge has decided a point of law arising in a previous case is not a good ground for transferring from his court another case involving the same point. A I R 1930 Lah 176=Ind Rul (1930) Lah 559=124 I C 687 see also 78 P L R 1922=67 I C 1228=A I R 1921 L 357.

—Prejudice of Judge against party's pleader cannot be presumed to operate against the party and hence it is no ground for transfer unless it is likely to affect judicial attitude of Judge towards the party or his case. A I R 1926 M 359=91 I C 559.

—Judge personally interested in suit in his Court is a good ground for transfer. 2 L B R 281 See also 15 C L J 162=17 I C 458; and 89 I C 630=23 A L J 845=A I R 1925 A 737=47 A 934; and 16 I C 859.

—The transfer of a case should be allowed in the interests of justice when the same documents as were used in a former case and about which the Judge has expressed definite opinion, are used in it. Ind Rul (1931) Lah 844=32 P L R 388=133 I C 876.

—Applicant for transfer not engaging any Pleader—Opposite party having engaged pleaders and paid their fees—Case should be transferred to another Court in the same place and it would be unjust to

## C. P. C. (1908) SECTION 24 (Contd.)

## (9) Grounds of Transfer (Contd.)

transfer it to another place. A I R 1924 Oudh 372=11 O L J 337=27 O C 401=80 I C 826.

—Defendant having influence in the town is no ground for transfer. A I R 1927 Lah 80=98 I C 859.

—Two suits raising same issue instituted in two different Courts may be ordered to be tried together 87 I C 170=A I R 1926 C 326.

—The convenience of the parties in the conduct of litigation is certainly a relevant consideration, and it is perhaps not too much to say that it is the basis of nearly all statutory jurisdiction on the civil side. If the two suits were heard by one Judge the parties, if they acted reasonably, would agree that evidence in the one case should be treated as evidence in the other. It is not a proper ground for refusing transfer that the party opposing the application for transfer may not act in the manner in which reasonable litigants would act. 135 I C 402=27 N L R 307=A I R 1932 N 49=I R 1932 N 2=A L R 1932 N 15.

—Convenience of litigants is a valid and relevant consideration. Where, therefore all available witnesses resided in C P the High Court allowed a transfer of the suit. A I R 1922 All 65=44 All 278=20 A L J 118=65 I C 783.

—Where in a partition suit the greater part of the property is situated in B district, that is a reason why it should be advantageous to both parties to have the suit tried in that district. The mere fact that the majority of the parties reside there is not a very weighty consideration in favour of transfer. That a party has engaged a Counsel with heavy fees is a circumstance to be considered when ordering transfer. A I R 1927 Nag 219=10 N L J 67=101 I C 723.

—Application for transfer by defendant raising issue as to jurisdiction of the court in which the suit is pending is not maintainable 26 S L R 277=139 I C 496 (1)=A I R 1932 S 215=A L R 1932 S 241.

—No Court has jurisdiction to transfer a suit from one Court to another unless both Courts are subordinate to it and even a High Court has no power to compel its institution in any Court beyond its jurisdiction. This power is entirely different from that of an order returning plaint to be presented in the proper Court. 13 N L R 81=40 I C 393.

—High Court has ample jurisdiction to pass suo moto an order under S. 24 C P C and may in the interests of justice transfer case from one place to another. A L R 1933 L 1087.

## C. P. C. ( 1908 ) SECTION 24 (Contd.)

## (10) Jurisdiction.

—The Court to which a suit is transferred under S. 24 C P C is vested with territorial jurisdiction, though it had none before transfer 54 All 824 followed 1931 A L J 1061 not approved

A L R 1933 A 747.

—Where a suit is transferred from the Court of one Munsif to that of another by an order of the district Judge the Court to which the suit is transferred is vested with territorial jurisdiction by the order of transfer even when it had formerly no such jurisdiction 54 All 824 followed.

A L R 1933 A 569.

—There are other limits upon the authority of a Subordinate Court to pass a decree besides the limit of locality. 26 S L R 277=139 I C 496 (1)=A I R 1932 S 215=A L R 1932 S 241.

—See also

4 A 478.

—Where original Court finds that it has no jurisdiction to hear a suit the District Judge has no jurisdiction under s. 24 for that section contemplates only a transfer from one competent Court to another to transfer the suit. A I R 1930 Lah 195=Ind Rul (1930) Lah 606=123 I C 334.

—A transfer cannot be made from one Court to another, unless the original Court has jurisdiction such an order, if made, is void. A I R 1928 Mad 400=54 M L J 145=27 L W 609=108 I C 413.

—A District Judge cannot transfer a suit of Small Cause nature to a subordinate Court not invested with the powers of a Small Cause Court, that is not competent to try it as such, so long as the Small Cause Court capable of trying it, is in existence. 20 O C 350= 12 I C 314.

—Suit instituted in the Court having no jurisdiction cannot be transferred to a Court having jurisdiction. (1919) Pat 409= 53 I C 392.

—A decree cannot be transferred to another Court for execution for a limited purpose only. e. g. to enable the decreeholder to share in the rateable distribution of sale proceeds of a sale held by another Court. When a whole case for execution as distinguished from the decree to be executed is transferred by the District Judge under s. 24, C P C the Court to which the case is transferred has jurisdiction to execute it. 1 Pat L W 582= 39 I C 737.

—Even where the District Judge has refused to exercise the power vested in him by s. 24, High Court has jurisdiction to act under that section. The High Court's general power of superintendence over all inferior Courts is not

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## C. P. C. ( 1908 ) SECTION 24 (Contd.)

## ( 10 ) Jurisdiction. (Contd.)

limited by any course taken by the District Judge. A I R 1927 Pat 383=8 P L T 777=103 I C 456.

—See to the same effect 87 I C 170=

A I R 1926 C 325.

—Where a case is transferred to a High Court on its original side, by the Governor General in Council, under Civil P. C. s. 25, the Appellate Side of the High Court has jurisdiction to hear an appeal from the decision on the original side. A I R 1921 Mad 687=(1922) M W N 830.

—A Court which really had no territorial jurisdiction went into the case made local inspections and recorded evidence fully, when the defect was found out. The plaint was then returned to be presented to the proper Court. Held, that under s. 24, the High Court should send it for disposal to the first Court itself. A I R 1923 All 249=21 A L J 86=L R 4 A 311 Civ=73 I C 495.

—Where the new Munsif does not possess small cause powers and there is no other Court in the district with small cause powers over the area in question, the new Munsif must under S. 35 of the Provincial Small Cause Courts Act try the suit on the original side, and the District Judge would have no power at all to act under S. 24, C. P. C., so as to transfer the case to the new Munsif and make him a Court of Small Causes. He can of course, transfer the case from the Munsif's file to any other Court, but the suit would cease to be a Small Cause Court suit. 54 A 171 (182)=A I R 1931 A 574=1931 A L J 953= 136 I C 357=1 R 1932 A 181 (F. B.).

—S. 24 of the C. P. Code does not contemplate the transfer of an application for review to a Court other than that by which the judgment was pronounced. Therefore, an order transferring an application for review to a Court other than that which pronounced the judgement is illegal and the latter Court has no jurisdiction to deal with the application.

50 I C 910.

—The provisions of S. 24 C. P. Code prima facie cover the case of a transfer by a Dt. Judge of a suit after it has been remanded by the High Court for disposal by him and the transfer is not illegal because the Sub-Judge had to try it on the evidence recorded by the Dt. Judge who heard the case in the first instance. Even if the order of remand be interpreted to mean that suit should be heard on the merits by the Dt. Judge and that the Dt. Judge was not at liberty to transfer the suit to a Sub-Court, the case was not one of exercise of jurisdiction by a court

## C. P. C. (1908) SECTION 24 (Contd)

## (10) Jurisdiction (Concl'd)

which had no local or pecuniary jurisdiction over the subject-matter of litigation. The case was one of assumption of jurisdiction by a competent court in an irregular manner and the consent of the parties was sufficient to cure the irregularity. 19 C W 143=19 C L J 408=23 I C 69.

## (11) Notice.

—Where a court proceeds under S. 24 C P Code upon the motion of a party it is bound to give notice to all other parties to the case whereof a transfer is sought and to hear such of them as desire to be heard, before it can order any transfer. But where a court proceeds of its motion no notice is necessary. 13 N L R 203=42 I C 706.

—A Dt. Judge cannot upon the mere allegation of a party to a suit that a Judicial officer presiding over a court is interested in the case direct the case to be tried by a different Court without giving notice to that judicial officer and the party interested in opposing the application. 23 C L J 295=33 I C 797.

—High Court refusing to transfer case on its own motion—It is still open to transfer it on plaintiffs's application and after notice to defendant. A I R 1923 All 153=20 A L J 97=70 I C 942.

—Where an application is made by a party for the transfer of a suit, it is not legal to pass an order of transfer without issuing notice of the application to the opposite party. 10 C P L R 94. See to the same effect 18 A L J 351=58 I C 560 and A L R 1933 A 333; and A I R 1923 Oudh 240=26 O C 62=74 I C 249.

—And where transfer is made at the instance of the deft notice to plff must be personal, not through plff's pleader, I R (1932) L 668 (2).

—In the absence of a notice informing parties of the transfer of case a party may well plead that he did not know in what Court he had to appear. A I R 1923 Lah 444=84 I C 238.

—But where a party applies for transfer, the procedure as to notice becomes imperative and a transfer or withdrawal without notice will be set aside on the ground of illegality or material irregularity. A I R 1932 C 265=54 C L J 490; and 7 O L J 523=58 I C 667=23 O C 216.

—Before an appeal is made over by the Dt. judge to another Court, it should be called on for hearing, and the parties told that the case would be made over to another Court; and the order-sheet should show that it has been done 1 Pat L W 245=39 I C 45.

## C. P. C. (1908) SECTION 24 (Contd)

## (11) Notice (Concl'd).

—Appeal transferred from one Court to another—Notice of transfer to parties necessary—Absence of such notice good ground for re-hearing appeal disposed of during parties' absence. 3 Pat L J 218=4 Pat L W 75=1918 Pat 17 (F B )=43 I C 925.

—The transfer of a case, without giving notice to the opposite party, is scarcely a material error which would justify a review of the order of transfer. Where an application for transfer was not in accordance with the rules of Court, that is to say, it was not supported by affidavit but it was entertained and disposed of Held, on review, that the Judge dealing with the application was perfectly free to dispense with an affidavit. A Court is not bound to record its reasons for directing the transfer of a case from one Court to another —143 P W R 1912=162 P L R 1912=14 I C 561.

—Transfer of case without notice is an irregularity only and not a sufficient ground for interfering with order of Court of transfer in absence of proof of prejudice to the party complaining of the absence of notice. 137 I C 430=A I R 1932 C 265=I R 1932 C 302 see also 74 I C 249=A I R 1932 O 240=26 O C 62.

—Transfer of a suit without notice to parties as required by S. 24 C P C when the transfer is at the instance of parties, is a material irregularity but their Lordships did not interfere in the case as the District Court could have effected the transfer suo moto without notice. 21 M L J 829=1910 M W N 631=8 M L T 374=8 I C 7

—But the Allahabad High Court has held that it is open to revision in cases where the Court, in making the order has acted without Jurisdiction or illegally or with material irregularity 18 A L J 351=58 I C 560.

—See also A I R 1926 All 17 =23 A L J 948=L R 6 A 555 Civ=90 I C 287.

—See similarly the Lahore High Court's view A I R 1925 Lah 189=78 I C 614. and 33 P W R 1917=40 I C 111

—In transfer application with notice to the other party the applicant has a right to begin. 14 A L J 242.

## (12) Pending before it.

—Under the old Code a District Judge could not transfer a suit pending before himself to a Subordinate Court—13 Bom 654; though he was competent to transfer the execution of a decree which has been passed by his own Court to the file of the Subordinate Judge for disposal, L R 12 I A P 11=11 Calc 244.

## C. P. C. (1908) SECTION 24. (Contd.)

## (12) Pending before it (Contd.)

—Clause (a) has now been added with a view to remove this disability. 25 I C 480 (482)=1915 Pun R 3=215 P L R 1914=110 P W R 1914.

—A District Judge has the power, under S. 24 (3) to transfer a case pending before him to the Court of the Additional P W R 1912=13 I C 6.

—Per Sulaiman, A C J—Obviously S. 24 contemplates the transfer of a case from one existing Court to another. Mukherji, J. leaving question open. 54 A 171 (178-181)=A I R 1931 A 574=1931 A L J 953 (F. B.)

## (13) Re-transfer.

—The High Court in revision has authority to re-transfer a case to the original Court without the formality of first having the plaint filed in the Court to which the case is transferred. A I R 1923 All 249=21 A L J 86=L R 4 A 311 Civ=73 I C 495.

—Small Cause Court, finding question of title involved, sending case to District Judge—Latter transferring to Munsif—District Judge's order of transfer was under s. 23, Provincial Small Cause Court's Act and not under s. 24, Civil P. C.

—An appeal, therefore, lay from the decision. 64 I C 335.

—Suits instituted in Court of Munsif not invested with Small Cause power

—Transfer by Munsif to Additional Court  
Re-transfer of suit by Dt. Judge as Small Cause Court suits—Validity—Procedure—Prov. Small Cause Courts Act, S 32. See 4 Pat L J 13=49 I C 208,

—Under S. 24 (1) (b) of the C P Code, a Court has power to withdraw to its own file a transmitted execution proceeding and to dispose of it. An omission to take steps within six months, to execute a transmitted decree does not render the proceedings taken after six months infructuous and void ab initio. In such cases time is not the essence of the stipulation R 161-(a) of the Civil Rules of Practice (Mad) is not an adjunct to the C P Code, but merely a rule of convenience to ensure speedy execution of decrees. The analogy of S. 148, C P C also shows that the legislature regards such provisions as directory and not mandatory. 39 Mad 385=29 M L J 172=29 I C 119.

—Revenue case transferred to Munsif's Court—Case can be transferred to another Court under s. 24—Transfer is not invalid because it may affect some order of revenue Court A I R 1931 All 28=L R 11 A 300 Rev=14 R D 654=(1931) A L J 8.

## CIV PRO CODE (1908) SEC. 24 (Contd.)

## (14) Suit whether includes other proceedings.

—"Suit" in s. 24 includes execution proceedings and so execution petition can be transferred under it A I R 1925 All 276=47 All 57=L R 6 A 103 Civ=85 I C 746.

—S. 24 applies to execution proceedings—Competency does not refer to territorial or local or pecuniary competency—Besides territorial or local or pecuniary incompetency, there may be other kinds of incompetency so far as an executing Court is concerned. Section 24 applies to execution proceedings. Contention that s. 39 gives to the Court that passed the decree a power to transfer, whereas s. 24 gives a similar power, and no higher power to a superior Court is far-fetched and if adopted will render s. 24 so far as execution proceedings are concerned, almost useless. A I R 1926 Mad 421=49 M 746=50 M L J 161= 95 I C 12.

—S. 38 enjoins that application for execution is to be presented to the Court which passed the decree and not to the Court in which the suit was instituted. The section is not exhaustive and a decree can be executed by the Court to which it is transferred under s. 24 A I R 1925 All 276=47 All 57=L R 6 A 103 Civ=85 I C 746.

—"Suit" in s. 24 includes execution proceedings, and a Court to which execution proceedings are transferred from a Court of Small Causes is a Court of Small Causes for the purposes of such proceedings. A I R 1926 Lah 465=95 I C 243.

—But see contra 27 N L R 307=A I R 1932 N 49.

—An appeal lies from an order passed in execution of a Small Cause decree which has been transferred to a Court where it is filed on original side. 14 A L J 415=33 I C 523. see also 11 C W N 861. but see 26 I C 56=12 All L J 853.

—Transfer of small cause suit to regular side—Suit instituted in Small Cause Court—Question of title raised—Suit transferred to regular Side—Question of title deleted but suit tried by Regular Side Court without objection—Objection not raised even in grounds of appeal to High Court—It should not be raised at later stage. A I R 1929 Mad 525=Ind Rul (1929) Mad 930=119 I C 386.

—Suit for recovery of profits of immoveable property—tried as small cause suit—transferred under S. 24—revision from not competent—Provincial Small Cause Courts Act, Art 31 A L R 1933 L 389=34 P L R 262.

**C. P. C. (1908) SECTION 24 (Contd)****(14) Suit whether includes****other proceedings. (Contd)**

—If a Court of Small Causes has ceased to exist or the officer invested with Small Cause Court powers has been transferred from the district and there is no other officer possessing such powers, there would be no Court from which the District Court can under S. 24 transfer the case to an ordinary Civil Court. The contingency where no Court or officer invested with Small Cause Court powers exists is provided for in S. 35 of the Provincial Small Cause Courts Act. 54 A 171 (181)= A I R 1931 A 574=136 I C 357=I R 1922 A 181=1931 A L J 953 (F B).

—The object of s. 5 (2), Madras City Civil Court's Act, is to enable the Chief Justice to percribe generally the duties to be performed by a Judge of the City Civil Court when transferred to the Small Cause Court and not to enable him to create a City Civil Court Judge a Small Cause Judge ad hoc with reference to an individual case. Proceedings under Chap VII Small Cause Courts Act are not suits within the meaning of Act V of 1916. Though under s. 24 of the Civil P. C. the Chief Justice can transfer matters other than suits to the City Civil Court, he can only transfer them to a Court which has jurisdiction to try them. The jurisdiction to try a summary application in ejectment being exclusively vested in the Small Cause Court the Chief Justice has no power to transfer it to the City Civil Court. A I R 1927 Mad 321=25 L W 115=38 M L T (H C) 35=98 I C 317.

—High Court exercising insolvency jurisdiction cannot withdraw proceedings from Subordinate Judge's Court to itself. But a High Court Judge exercising the jurisdiction can stay suit or proceeding pending against insolvent in the District Court or Sub-Judge's Court in the Presidency. A I R 1925 Bom 543=49 B 788=27 Bom L R 1207=91 I C 160.

—Original Side of the High Court has no power to transfer insolvency proceedings from one Court to the other. The powers conferred by s. 5 of the Provincial Insolvency Act, cannot be exercised so as to give the Original Side jurisdiction from which it is expressly excluded by the terms of the Act, whether that section is read with s. 24 Civil P. C. or cl. (11) of the Letters Patent. A I R 1927 Rang 105=4 Rang 554=100 I C 265.

—High Court cannot transfer insolvency petition to Dist. Court. 38 Mad 472.

—An application to transfer an insolvency petition from the file of Subordinate Judge to the original of the High Court for trial and disposal is not maintainable.

**C. P. C. (1908) SECTION 24 (Concl'd)****(14) Suit whether includes other****proceedings (Concl'd)**

A I R 1928 Mad 1091=55 M L J 671=28 L W 369=Ind Rul (1929) Mad 272=52 M 57 =114 I C 352.

—S. 24 cannot be invoked to allow a Court other than the Court in the course of proceedings in which a perjury or forgery was committed, or a Court to which appeals ordinarily lie from that Court to entertain the question of preferring a criminal complaint under s. 476 Criminal P. C. For the word "proceeding" covers only those proceedings which were contemplated at the time of passing Civil P. C. of 1908 and not those which were established later by Criminal P. C. Amendment Act 1923. A I R 1927 All 469=49 All 469 =25 A L J 433=101 I C 247.

—Divisional Court not being Subordinate to High Court, latter cannot transfer petition for alimony to Divisional Court. 40 B 109=17 Bom L R 948=31 I C 331.

—The section does not apply to proceedings under s. 14 of Legal Practitioners Act 1 P L J 576=1917 P H C C 60=37 I C 484.

—Application to set aside ex-parte decree—Appellate Court can withdraw it 15 I C 565 (566)=8 N L R 51.

**C. P. C. (1908) SECTION 25**

—Compare s. 527 of Criminal Procedure Code for a similar provision and see 37 I C 517=40 Mad 835=5 Mad L W 349=18 Cr L J 148.

—As to what are reasonable grounds for objection see 25 Bom L R 713=84 I C 852=A I R 1924 B 90.

—Decision of the Court to which case is transferred is appealable in same manner as its other decisions. So where Governor General in Council transfers case to High Court on its Original Side, appeal lies to Appellate Side of the High Court. A I R 1921 Mad 687=(1922) M W N 830.

**C. P. C. (1908) SECTION 26.**

—The section applies to High Court and to Provincial Small Cause Court.

—Plaint essential to a suit—A "plaint" in law means "a private memorial tendered to a Court in which the person sets forth his cause of action, the exhibition of an action in writing." It does not necessarily mean "a plaint duly stamped." — 22 Mad 495, per Subramania Ayyar, J. See to the same effect 26 C W N 391=70 I C 43=A I R 1922 C 234.



## C. P. C. (1908) SECTION 26 (Concl'd)

—See to the same effect 111 I C 550=  
A I R 1929 M 480.

—Suit is instituted when the plaint was filed in Court and not on the date when it was ordered to be registered. A I R 1921 Cal 277=34 C L J 465=66 I C 923;

—In other words, date of institution of suit is date of presentation of plaint or document purporting to be plaint. 17 S L R 223=85 I C 893.

—No other manner of instituting a suit has so far been prescribed. It may, therefore, be stated as a general proposition that, unless there is a special provision to the contrary, a proceeding that does not commence with a plaint cannot be held to be a suit. 13 L 672=137 I C 266=33 P L R 508=A I R 1932 L 374=I R 1932 L 314.

—Plff's servant signing and presenting plaint and also signing Vakalatnamah is not proper presentation of the plaint if there is nothing to show that the servant was the plff's agent trading on plff's behalf: 23 Bom L R 911=68 I C 217=A I R 1922 B 113=46 B 150.

—Suit instituted in Court without jurisdiction—Second suit in proper Court is not continuation of former. A I R 1929 P C 103=Ind Rul (1929) P C 129=56 C 1048=56 I A 128=(1929) A L J 254=33 C W N 485=29 L W 682=56 M L J 614=6 O W N 473=49 C L J 462=31 Bom L R 741=(1929) M W N 546 (P C)=115 I C 713.

—The initial jurisdiction of the Court is to be determined with reference to the allegations contained in the plaint. If those allegations true or false, do not disclose a case of ejectment by a landlord against a tenant, the initial jurisdiction of the Court is settled. If after trial of the suit the finding arrived at by the Court leads to the conclusion that the relationship of landlord and tenant subsists between the parties, though it was concealed in the plaint the Court will give effect to its finding by dismissing the suit as one not cognizable by a Civil Court. 52 All 501 (F B), followed. 1933 A L R A 451.

—Presentation of plaint after the usual Court hours at the private residence of the Judge is valid, though the Judge is not obliged to do so: 19 N L R 23=65 I C 674=A I R 1922 N 167.

—But see 9 N L R 155=21 I C 602.

## C. P. C. (1908) SECTION 27.

—Suit instituted on last day of limitation—Plaint insufficiently stamped—Deficit not made up within time allowed—Suit dismissed—Dismissal of suit can be re-

## C. P. C. (1908) SECTION 27 (Concl'd)

viewed even without notice to the defendant, for at the stage when the suit was dismissed there cannot be said to be any opposite party. A I R 1922 Cal 234=26 C W N 391=69 I C 43.

—Addition of parties—Lim. Act. S. 22. See 19 C L J 5.

—When a plaint is returned for presentation to a Competent Court the suit is to be considered as instituted on the date of presentation to such proper Court. A I R 1928 B 421=52 B 548.

## C. P. C. (1908) SECTION 30.

—There is a distinction between a public highway and a village road and a suit under S. 30, C. P. C. is maintainable when a right to a village pathway is the subject matter of litigation even in the absence of special damage 17 C W N 73=13 I C 67.

—No fine will be imposed on person who fails to attend on the day for which he was summoned, if he is not subsequently required to give evidence and has not been called upon to appear on subsequent date. A I R 1929 All 850=Ind Rul (1930) All 353=(1929) A L J 1216=(1929) Cr. Cas 404=123 I C 97.

—See also under Ors. 11, 12, 13, 16 and 19.

## C. P. C. (1908) SECTION 31.

—See under Ors. 16 and 18.

## C. P. C. (1908) SECTION 32.

—Jurisdiction to impose fine vested by s. 32 has to be exercised only in the manner laid down by O XVI. A I R 1929 All 850=Ind Rul (1930) All 353=(1929) A L J 1216=(1929) Cr. Cas 404=123 I C 97. S. 32 of the C. P. Code, applies only to the case of a person who has failed to comply with a summons to attend Court issued under S. 30 and has no application to the case of a party who fails to produce documents which he has been ordered to produce. An appeal lies to the High Court from an order under O. 11, R 21. 5 Pat L J 550=58 I C 281.

## C. P. C. (1908) Section 33.

—Judgment cannot be passed without affording an opportunity to parties or their pleaders to appear. See 8 Bom L R 229=30 B 455; and 81 I C 573=A I R 1925 O 1421; and 5 L B R 46=2 I C 539; and 133 I C 95=A I R 931 R 177; and 68 I C 577=A I R 1922 C 203 and 4 L B R 256.

—Decree drawn up by the Court must be in accordance with the judgment. 82 I C 184=22 A L J 791=A I R 1924 A 818=46 A 864.

—Judgment delivered—Preparation of decree postponed pending production of Succession Certificate—As to legality of such procedure see 57 I C 650.

## C. P. C. (1908) SECTION 33 (Concl'd.)

—After the judgment has been pronounced and it has been signed and sealed, no power is left in the Court to alter it or add to it or subtract anything from it; and the judgment having been pronounced a decree must be prepared in accordance with it, and the Court cannot direct the stoppage of preparation of the decree. 11 P 532=13 P L T 304=137 I C 855=A I R 1932 P 228=I R 1932 P 195.

—Time-barred debt cannot be proved in insolvency proceedings 34 C L J 167 =66 I C 758.

—Under S. 33 of the C. P. C. Code it is imperative that a decree shall follow the judgment and it is the duty of the Court to comply with the provisions of the law and failure to prepare a decree cannot therefore deprive the parties of their right to appeal. 68 P R 1919=52 I C 503.

—A party is not required to apply to draw up decree nor is he required to apply for copy of decree until it is drawn up. Hence party's failure so to apply does not affect right to appeal. A I R 1924 Nag 271=20 N L R 131=78 I C 996 see to the same effect 23 I C 905=38 Bom 331=16 Bom L R 67.

## C. P. C. (1908) SECTION 34

—The section applies to High Court and to Provincial Small Cause Court.

*Synopsis.*

- (1) Applicability
  - (a-1) Contract rate of
  - (a-2) Mortgagee : Limitation
  - (b) Usufructuary mortgagee
  - (c) Penalty
  - (d) Rent at enhanced rate
  - (e) Decree
  - (f) Interest greater than principal—Damdupat.
  - (f-1) Pending suit
  - (g) After suit
  - (g-1) Before suit
  - (h) After decree.
  - (h-1) Future interest
  - (i) No rate specified in decree
  - (j) Execution
- (2) Court-fee duty
- (3) Interest after due date no contract
  - (a) Limitation
  - (b) Given by law
- (4) Interest allowed
  - (a) Payment, tender
  - (b) Interpretation
  - (c) Rent
- (5) Interest disallowed
  - (a) Charge
- (6) Mercantile usage
- (7) Discretion of Court

C. P. C. (1908) SECTION 34 (Cont'd)  
Applicability. (Concl'd.)

—Applicability:—Sub-section 1 of S. 34 does not control and negative the effect of O. 34 Rr. 2 and 4. 34 I A 9=34 C 150 foll. 17 C L J 221=18 I C 965; for the section does not apply to mortgage decree; 29 M. 65, 36 A 220.

—Rate of interest in the case of mortgage decree should be determined under O. 34 and not S. 34 A L R 1933 O 96=10 O W N 173=A I R 1933 O 128.

—See to the same effect. A I R 1931 Nag 161=14 N L J 109= Ind Rul (1931). Nag 146=27 N L R 312=134 I C 274 and 9 L L J 301=28 P L R 380= 103 I C 437= A I R 1927 L 445=8 L 721 and; A I R 1927 P C 1=54 C 161=25 A L J 23=4 O W N 46= 31 C W N 390=52 M L J 372=38 M L T (P C) 73=54 I A 1=29 Bom L R 752=45 C L J 279=25 L W 685=8 P L T 73 (P C)= 99 I C 686.

—So also a decree for accounts and for partition does not fall under S. 34 (2)= 27 Bom L R 226=94 I C 688=A I R 1925 B 406=49 B 282.

—Santhal Parganas Regulation does not limit the powers of a Court under s. 34, to award interest on the decretal amount until realization. A I R 1926 Pat 359=5 Pat 433=(1926) Pat 282=96 I C 627.

—The words of s. 209 of the Civ. Pro. Code, 1882, are large enough to include the case of a sum of money payable to the plaintiff out of a sum, and it may be that the Legislature considered that the power of the Court to allow interest after the fixed day was sufficiently provided or preserved by that section, the two Acts being co-temporary. Or it may be that the provisions of the Transfer of Property Act are not exhaustive and were not intended to overrule the established practice. 9 Bom L R 304=11 C W N 249=17 M L J 43=2 M L T 75=34 C 150=4 A L J 109=5 C L J 106. Plaintiff cannot claim interest unless he has given to the debt. written notice demanding it. 90 I C 58=A I R 1926 N 64.

—Interest from a person not holding under a written lease—The kadar, liability of, to pay interest. 9 I C 221.

—Contract rate when refused:—Rate allowed by mortgage-bond being excessive is not sufficient ground to refuse contract rate of interest. 60 I C 693;

—Nor would mere hardship justify a Court in disallowing contracted rate of interest, unless evidence is that the lender has taken undue advantage of his position. 60 I C 733.

—Where throughout the dealings between the parties compound interest was charged and the total amount of such exceeded one-third of the claim the Court

## C. P. C. (1908) SECTION 34 (Contd)

## Contract rate of. (Contd.).

would be justified in refusing future interest. 42 A 230=18 A L J 100=59 I C 20.

—In mortgage-deed no express stipulation to pay interest after due date—No presumption either in favour or against payment of such interest—Mortgagee however can claim damages for failure to pay debt at stipulated time—Measure of damages though prima facie the same as rate of interest stipulated, Court can reduce it if found unusual. A I R 1923 Lah 632=4 Lah 40=6 Lah L J 72=75 I C 375.

—Penalty—Interest allowed as stipulated at Re 1-8 as. per cent (compound) pendente lite is not excessive A I R 1929 N 6=113 I C 891.

—Decree—The expression "decree for the payment of money" is very general and must be construed so as to include a claim to unliquidated damages. 51 M L J 243=1926 M W N 691=97 I C 871=A I R 1926 M 1021.

—See also 24 M 265; but see 14 I C 29.

—S. 34 does not give the Court any discretion to award interest for a period prior to date fixed, in case of a decree based on a mortgage which is governed by the rule of damdupat. A I R 1931 Nag 88=13 N L J 192=Ind Rul (1931) Nag 63=130 I C 159.

—The mortgagee cannot get any interest in excess of damdupat for the period between the date of filing the suit and the date fixed for repayment in the preliminary decree. A I R 1931 Nag 88=Ind Rul (1931) Nag 63=13 N L J 192=130 I C 159.

—Where the rule of damdupat applies, the contractual obligation, as regards interest comes to an end as soon as the maximum limit of interest is reached. When that obligation has come to an end before suit is filed, the Court has discretion to award interest from the date of suit over and above the amount of interest allowed by the rule. A I R 1929 Nag 355=Ind Rul (1930) Nag 77=121 I C 45.

—Rule of damdupat applying at the date of suit—Court can allow interest from date of suit to the date fixed for payment, A I R 1925 Nag 193=78 I C 632.

—In the case of a bond purporting to be executed in adjustment of a past debt, the principal for the purpose of the rate of damdupat is the amount of such bond and not the balance of the unpaid principal actually advanced on an earlier bond. 24 Bom 305 followed in 107 I C 205=A I R 1928 N 133.

—This rule does not apply to an amount recoverable in execution—1 Bom, 73; or when the debtor has assigned his right to

## C. P. C. (1908) SECTION 34 (Contd)

## Contract rate of. (Contd.).

one who is not a Hindu 21 Bom 85; applied in 102 I C 41=A I R 1927 N 249.

—When the original creditor was a Mahomedan, the rule does not become applicable on his assigning his rights to a Hindu—21 Bom, 28. applied in. A I R 1927 N 249.

—When the rule of damdupat has been once applied in any account directed to be taken by the Court, and interest equal in amount to the principal sum has been allowed in the account, the application of such rule has the effect of preventing the allowance of any further interest not only for the period of 6 months allowed for redemption, but also subsequently without limitation of time—21 Cal 840. see also 1 Bom 577 followed in 3 B 312 and 5 S L R 245.

—Pending Suit:—In a suit for recovery of money representing depreciation in the value of goods supplied, no interest can be claimed during pendency of suit: 32 C L J 239=60 I C 288.

—But in case of mortgage contract, unless the rate is excessive and transaction unfair, interest should be allowed pendente lite: 29 C W N 118=85 I C 218=A I R 1925 C 268.

—Award of interest pending suit, though discretionary should not be refused in the absence of proper reasons: 22 N L R 49=88 I C 699=A I R 1926 N 109.

—After suit:—see under Discretion of Court infra.

—Before suit:—Court cannot grant interest prior to the institution of the suit unless so provided by contract. 32 C L J 239.

—Where Executing Court applies the same method of calculation in the matter of accumulating interest from the date of final decree onwards as had been applied in drawing up the final decree the judgment-debtors cannot object to it in the execution. A I R 1923 All 503=21 A L J 340=4 L R A Civ 195=74 I C 557.

—Where the deed clearly states that, in case of default, compound interest shall run on the amount due until satisfaction, interest at the contract rate, though high should be allowed until satisfaction. A I R 1931 Nag 91=13 N L J 213=Ind Rul (1931) Nag 65=130 I C 817.

—Defendants deliberately retaining money entitles plaintiff to interest till payment. A L R 1933 L 485.

—As to the grounds for refusing interest from date of decree to date of payment see A L R 1933 L 378.

—In a suit on a bond interest at the contract rate can be awarded till the date

## C. P. C. (1908) SECTION 34 (Contd.)

## Contract rate of. (Contd.).

of realisation provided the rate is deemed to be a reasonable one. 1 O L J 544=26 I C 177.

—Redemption suit—Mortgagee persisting in unwarrantable claim—Interest was disallowed from date of trial Court's decree. A I R 1921 P C 100=24 C W N 977=14 L W 710=7 O L J 350=23 O C 150=58 I C 891=69 I C 65 Reversing 3 O L J 746=38 I C 454.

—Where interest was charged and decreed at 24 per cent, interest after decree was not allowed: 109 I C 416=A I R 1928 L 811.

—In an action to dissolve and wind up the partnership affairs, interest should only be allowed to the plaintiffs from the date of final decree and not from the date of the plaint. A I R 1930 P C 185=(1930) A L J 868=34 C W N 737=Ind Rul (1930) P C 267=32 Bom L R 1152=59 M L J 121=52 C L J 10=32 L W 184=24 P L R 328 (P C)=124 I C 891.

—Future Interest:—The award of future interest from date of institution of suit till realisation is discretionary with the Court. Such interest disallowed on ground of the long delay in bringing the suit and in the other circumstances of the case. 1932 P C L 83 (88) (Civ.)=33 P L R 19=A I R 1932 L 312=A L R 1932 L 83 (Civ) see also A L R 1933 L 49.

—The liability, to pay future interest, under S. 34 of the C. P. Code, is not controlled by S. 141 of the Oudh Rent Act. It is within the competence of the trial Court, in a suit for arrears of rent against an under-proprietor to award future interest at such rate as it may consider reasonable. 52 I C 865=22 O C 287=6 O L J 362.

—Where a decree is silent with respect to interest from date of decree to the date of payment, the Court must be deemed to have refused such interest and a separate suit will not lie for its recovery, unless the silence was due to oversight or mistake. 37 B 326. Rel. 11 Bar L T 132=9 L B R 78=40 I C 858.

—Where decree is silent as to interest, interest should be deemed to have been refused—Trial Court awarding interest on costs—Appellate Court reducing amount of costs to be paid to defendant although it increased amount due to plaintiff—Appellate Court should be supposed to have considered it unnecessary to award interest on costs, although it did not say so expressly. A I R 1924 Mad 102=45 M L J 687=18 L W 686=33 M L T 101= (1923) M W N 753=75 I C 566.

—Court cannot under S. 151 award interest or damages in lieu of interest on decretal amount where no interest has been awarded by decree 3 Bar L J 58=82 I C 427=A I R 1924 R 275.

## C. P. C. (1908) SEC. 34 (Contd.)

## Contract rate of (Conclld.).

—Execution—Though a plff. has obtained his decree there is nothing to prevent the judgment debtor disposing of any of his property before it has been attached in execution of the decree. A I R 1932 S 164 (165)=26 S L R 158=A L R 1932 S 192.

—In claim suit objector claiming interest only in half the property, is nevertheless liable to pay full costs of successful claimant. 3 O L J 529=37 I C 78.

—Judgment debtor depositing decretal amount intending decree-holder to receive on condition of giving security during pendency of appeal—Security not given.

—Consequently money not paid—Decretal amount reduced in appeal—Decree-holder cannot claim interest from date of deposit.

—Judgment debtor cannot claim interest on surplus amount deposited. A R 1929 Lah 316=Ind Rul (1930) Lah 55=120 I C 423.

—Decree—Interest till realisation—Right of decree-holder to interest up to date of confirmation of sale in execution.

See 17 A L J 617=50 I C 772.

—Court-fee duty.—No additional Court-fee is required on account of the claim for interest until payment. It stands on the same footing as future mesne profits—17 Bom 41. but see 104 I C 391=A I R 1927 S 251.

—Interest after due date—no contract.—

—Interest may be allowed on the basis of an implied agreement to pay. 124

I C 281=A I R 1930 L 985.

—Where a lessee knowing that the lessor would not be able to put him in possession waits for three years and then institutes suit for recovery of possession, he cannot claim interest on the sum paid as premium or for amount of rent paid at the time of the lease. A I R 1930 Cal 385=57 C 114=Ind Rul (1930) Cal 559=125 I C 607.

—Auction—purchaser at Court—sale paying off in good faith prior mortgage is entitled to claim interest on the amount paid. A I R 1930 Mad 471=58 M L J 343=31 L W 832=Ind Rul (1930) Mad 775=125 I C 247.

—Mortgage by conditional sale—Mortgagor agreeing to pay interest till date of payment after which mortgagee was to become absolute owner—No provision as to interest after due date—Agreement was held to imply obligation on mortgagor's part on making default to be liable for subsequent interest at the same rate. A I R 1923 All 7=44 A 772=L R 3 A 536=20 A L J 752=77 I C 122.

—On the other hand, if a person is entitled to interest under a decree, he does not lose it by agreeing to take payment in instalments—6 W R Mis 121; and where there was an agreement to pay

**C. P. C. (1908) SECTION 34 (Contd.)****Interest after due date, no contract (Contd.).**

interest at 5 per cent and A subsequently verbally agreed to give 8 per cent. and voluntarily debited himself at 8 per cent. instead of 5, it was held 8 per cent. could not be enforced, as the agreement was a nudum pactum—11 Moo I A 129=6 W R P C 59. But see 4 C L R 29. followed in 22 M L J 166 but not followed in 40 M 233.

—Discretion of Court—Court has discretion as to the rate of interest to be awarded after institution of the suit till judgment and where the Courts below awarded 8 per cent. Privy Council refused to interfere, A I R 1922 P C 46=43 M L J 66= (1922) M W N 376=26 C W N 737=16 L W 80=36 C L J 5=24 Bom L R 971=31 M L T 129=2 P L R (P C) 1922=67 I C 423.

—Grant of interest is a matter within discretion of Court. A I R 1928 Lah 954=29 P L R 670=111 I C 354.

—Court has discretion to award interest on damages from date of the suit to date of the decree; but the Court should state its reasons. A I R 1924 Cal 637=39 C L J 77=80 I C 87.

—Discretion under s. 34 should be reasonably exercised. A I R 1921 Pat 367=2 P L T 147=62 I C 116.

—Interest need not be granted where co-sharer makes no demand for his share of profits, A I R 1923 Nag 197=19 N L R 24=73 I C 142.

Rate of interest is a matter to be decided on the facts of each case. A I R 1924 Nag 346=76 I C 131.

—Even if money carried no interest ab initio or for any reason had ceased to carry interest from and after the date of suit or some earlier date, the Court may in a proper case apply s. 34, and grant interest. A I R 1924 Nag 348=78 I C 711.

—The granting of interest, not specifically asked for in a suit for money, cannot be regarded as an inconsistent relief and a Court has discretion to award interest subsequent to suit. A I R 1921 Lah 125=2 Lah 256=107 P L R 1921=64 I C 896.

—Interest on mesne profits is within discretion of Court. High Court will not interfere. A I R 1921 Pat 430=2 Pat L T 648=68 I C 903.

—Party delaying ascertainment of damages for long time—Interest should be allowed from date of suit. A I R 1925 Bom 547=27 Bom L R 1168=94 I C 575.

—Although 24 per cent per annum is high rate. Small Cause Court has jurisdiction to grant it. A I R 1923 Cal 650=37 C L J 399=27 C W N 549=74 I C 601.

—Having regard to s. 34, C P C the Court has power to give interest after suit whether claimed specifically in the

**C. P. C. (1908) SEC. 34 (Contd.)****Discretion of court (Contd.).**

plaint or not. A I R 1931 Bom 549=55 B 657=33 Bom L R 1220.

—Interest post litem motam at 9 per cent—Legality of award. 26 I C 402.

—It is within Court's discretion to award interest on redemption money from date of suit—Court allowing interest from date of suit making interest equal to principal—Further interest from date fixed for payment to actual realization also allowed—Although plaintiff could not claim such further interest, it was held to be proper. A I R 1929 Bom 362=27 Bom L R 492=87 I C 719.

—High Courts in India being Court both of equity and of law, can award interest in cases which are not provided for by the Interest Act. It is impossible to say that equitable principles should not be applied in cases of contract. A question of equity must apply to all cases. A I R 1927 Mad 47=97 I C 453.

—High Court will not interfere with lower Court's discretion in granting interest, unless exercised unreasonably. 13 O L J 338=92 I C 679.

—Future interest being discretionary with trial Court, Appellate Court will not interfere unless discretion is improperly used. A I R 1925 Lah 308=7 Lah L J 1=86 I C 240.

—Court can award interest at contractual rate from date of institution to judgment. 96 I C 310. (Lah).

—Lower Court not considering question of interest—Appellate Court may grant it. A I R 1927 Lah 679=9 Lah L J 347=104 I C 146.

—Interest between date of suit and decree being discretionary with Court can be granted at contractual rate. A I R 1930 Lah 733=Ind Rul (1930) Lah 645=125 I C 629. See also A I R 1930 Mad 721=53 M 475=32 L W 143=123 I C 7.

—Money due to plaintiff not paid through proper channel—No stipulation for interest—Interest may be allowed by way of damages. A I R 1930 Cal 357=Ind Rul. (1930) Cal 828=34 C W N 121=57 C 953=127 I C 76.

—Compound interest at 2 per cent. should be allowed when it is stipulated. It is high but not extortionate. A I R 1931 Nag 91=Ind Rul (1931) Nag 65=13 N L R 213=130 I C 817.

—Where compound and post diem interest is clearly stated in the document, it should be allowed by the court. A I R 1931 Nag. 91=I R (1931) Nad 65=13 N L J 213=130 I C: 817.

—Where owing to the action of the plff in joining certain unnecessary parties, the suit was unnecessarily delayed the court



**C. P. C. (1908) SEC. 34 (Concl'd)****Discretion of Court (Concl'd),**

in its discretion refused to allow interest after suit, 199 P L R 1914=98 P W R 1914=25 I C 658.

—In spite of sub-s. (2), s 34 in the normal case it is highly desirable that the Judge should give his reason for disallowing future interest. A I R 1928 Nag 115=106 I C 270.

—A plff. is not entitled as of right to interest from date of suit to date of decree at the contract rate. The question is one for the discretion of the court but some reason must be assigned in every case for not allowing any interest. 28 I C 429.

—Interest—Mortgage decree—Discretion of court to reduce interest, see 36 All 220.

—Interest from date of redemption suit to date of actual redemption is discretionary. 37 B 326=17 C W N 573=13 M L T 415=(1913) M W N 428=11 A L J 432=17 C L J 474=15 Bom L R 483=25 M L J 101=40 I A 68=18 I C 909.

—Award of post plaint interest is a matter left to the discretion of the Court —practice. A L R 1933 M 391.

—Interest subsequent to suit is discretionary 34 B L R 129 (142)=A I R 1932 B 319=139 I C 796=I R 1932 B 539=A L R 1932 B 656.

—S. 34, C P C confers upon the Court the discretion to award interest on the decretal amount, but it is the practice of the Courts generally to allow interest at 6 per cent unless some special reason is shown why a higher rate should be given. A L R 1933 L 1165.

**C. P. C. (1908) SECTION 35***Synopsis*

- (1) General principle and scope.
- (2) Appeals against order as to costs.
- (3) Conduct of a third party affecting order as to cost.
- (4) Conduct of parties affecting order as to costs.
- (5) Costs in cases disposed on preliminary point.
- (6) Costs of or from legal practitioner or attorney or solicitor and how calculated.
- (7) Costs on strangers to suits.
- (8) Costs to be obtained by or against government officials.
- (9) Costs to follow the event,
- (10) Discretion of courts.
- (11) Interest on costs.
- (12) Interest shall be added to the cost.
- (13) Limitation.
- (14) Nature of Interest affecting order as to costs.
- (15) New points affecting order as to costs.

**C. P. C. (1908) SECTION 35 (Contd.)**

- (16) Parties.
- (17) Payment into Court.
- (18) Proportionate costs.
- (19) Reasons ought to be stated,
- (20) Review and Revision against order as to costs.
- (21) Separate costs,
- (22) Separate suit for costs barred.
- (23) Set off of costs.
- (24) Shall have full power.
- (25) Special suits, and proceedings, costs in how ordered.
- (1) Abatement of suits.
- (2) Account Suits.
- (3) Administration suits.
- (4) Appeals.
- (5) Arbitration.
- (6) Commission.
- (7) Contract suits & suits for breach of Covenant.
- (8) Divorce suits.
- (9) Execution.
- (10) Guardian.
- (11) Income Tax references.
- (12) Insolvency.
- (13) Interlocutory application.
- (14) Maintenance suits.
- (15) Mortgage suits.
- (16) Partition suits.
- (17) Pauper suit,
- (18) Pre-emption suit.
- (19) Receiver.
- (20) Representation suits.
- (21) Reversioner.
- (22) Suit by or against minors or the next friend or guardian.
- (23) Suit by or against trustees executors and administrators.
- (24) Suit for construction of will.
- (25) Will Probate or letters of administration of.
- (26) Winding up by a liquidator.
- (27) Subject to provisions of any law for the time being in force.
- (28) Subject to such conditions and limitations as may be prescribed.
- (29) Witnesses.
- (30) Miscellaneous.

**(1) General principles and scope.**

—This section is an exception to the general principle on which s. 35 is based, namely that the award of costs to a litigant is to secure to him the expenses incurred by him in the litigation and not to smart money by way of penalty or punishment on the opposite party. See Notes 1 and 26 to S. 35. In order that this section may apply the following conditions must exist.

A I R 1931 L 509.

—S. 35 vests the costs in the discretion of the Court, and when the Court

## C. P. C. (1908) Section 35 (Contd.)

## (1) General principles and scope (Concl'd)

directs that any costs shall not follow the event the Court shall state its reasons in writing and the principles upon which that discretion was exercised. Such discretion may be interfered with when there has been violence of any established principle, misapprehension of facts, or no real exercise of discretion, 3 U P L R All 55=64 I C 962.

—S. 35 has a wider scope and authorizes a Court to make an order, as to costs, against a person who is not a party to the litigation but the section has nothing to do with the misconduct of Advocates. Cases of contempt of Courts are not within the scope of the section. A I R 1930 All 225=(1930) A L J 402=52 A 619=Ind Rul (1930) All 685=125 I C 477 (F B).

(1) The claim or defence must be false or vexatious.

(2) It must be false or vexatious to the knowledge of the party raising it.

(3) Such claim or defence must have been disallowed or withdrawn or abandoned in whole or in part. Thus Dismissal of suit for default after warnings and on account of reprehensible conduct on part of plaintiff amounts to abandonment. A I R 1931 L 509.

—Provision under s. 35 is supplementary to s. 47; 35 C L J 156=68 I C 600.

—Guardian ad litem a party can be made to pay costs S. 35 is not restricted by O XXXII r. 11. A I R 1928 Mad 590 = (1928) M W N 318=110 I C 310.

## (2) Appeals against order as to cost.

—A right to costs is not a vested right and there is a very limited right of appeal. An order for costs is not a decree; it has to be included in a decree or may be a part of a decree. It is only appealable; if the original decree or order is appealable; and in that event an appeal on the question of costs alone will lie, if any question of principle is involved. There can be no second appeal for costs, except on a ground of Law, 1 Pat L T 403=5 Pat L J 472=57 I C 236.

—See also 9 Cal W N 584 (590) and 47 Cal 67 (70)=56 Ind Cas 334; and (1905) All W N 75; and (1912) Pun L R No 118=120 P W R 1912=14 Ind Cas 284 (2)

—And there can be no appeal from order of costs when the main order is not appealable. 44 I C 690.

—Thus no appeal will lie from a direction as to costs made in an order granting an adjournment of a case.

2 N L R 49;

## CIV PRO CODE (1908) SEC 35 (Contd.)

## (2) Appeals against order as to costs (Contd.)

—See also 2 Mad L W 519=17 Mad L T 447=29 Ind Cas 393.

—No appeal will lie against order for costs while accepting decision on main point. A I R 1930 Bom 445=32 Bom L R 406=Ind Rul (1930) Bom 430=126 I C 334.

—No appeal lies against direction as to taxation. A I R 1925 Bom 432=27 Bom L R 692=89 I C 211.

—The Privy Council is not a taxation tribunal. Where objections as to the taxation of costs were not raised before the Registrar of the High Court, they will not be considered by the Privy Council: A I R 1932 P C 13; see also A I R 1928 P C 238.

—S. 35 (2) of the C P Code does not apply where a suit is disposed of without adjudication upon the merits. Though a Court does not decide a suit on the merits of the case and merely passes an order as to costs incurred in the suit, the Court in deciding the matter as to costs, exercises a judicial discretion based upon certain principles and as such, its order is appealable. Similarly, as the order of the Court of Appeal as to costs involves matters of principle, it is subject to second appeal. 52 I C 961.

—But as is seen from the cases discussed above the order as to costs is appealable subject to ordinary restrictions and the fact that they are discretionary. A I R 1921 U B 20=4 U B R 8=63 I C 811.

—Where a Collector's award under Land Acquisition Act was upheld by lower Court and costs refused it was held that appeal lay for costs only as discretion violated well-recognised principle of law. A I R 1929 Bom 63=30 Bom L R 1622=53 B 178=Ind Rul (1929) Bom 253=114 I C 397.

—Appeal as to costs in an award under Land Acquisition Act, See 31 M 328, Costs not following the event is wrong exercise of discretion and appeal lies. 3 U P L R (A) 55=64 I C 262.

—Some order as to costs must be made—Failure to do so is appealable. A I R 1923 Oudh 155=25 O C 385=10 O L J 20=73 I C 222.

—Suit held not maintainable against existing defendant but another defendant substituted by Appellate Court—Costs not awarded order disallowing costs can be appealed against. A I R 1921 Cal 156=34 C L J 475=66 I C 903.

—As to appeal from incidental order for costs under Letters Patent s. 15 See 26 M L J 356.

—As to first appellate Court's interference in case of contravention of the

## CIV PRO CODE (1908) SEC 35 (Contd)

## (2) Appeals against order as to costs (Contd)

principle "Costs will follow events" see A L R 1933 N 100-29 N L R 8. and see 42 Bom 327=47 I C 762.

—Where costs are in the discretion of a Judge the Court of appeal will assume that the judge in the lower court exercised his discretion unless it is satisfied that he has not exercised it. Also, the Appellate Court will not interfere with an exercise of the discretion of the lower Court unless it has proceeded on a manifestly wrong ground 2 Bom L R 254 foll 22 C W N 372=44 I C 870; see also 90 I C 577; and 80 I C 39.

—Where there is a clear misapprehension of fact and law an appeal lies against an order for costs so erroneously made. 16 B 676 (F. 6 O C 52; Appr 22 B 164; R 4 C W N 90). e. g. disallowing costs to successful pff who is not guilty of any misconduct; 42 Bom 327 (332)=20 Bom L R 905=47 Ind Cas 762.

—Where the principle adopted is right there will be no interference in appeal A I R 1923 Bom 37=72 I C 993.

—Second appeal lies on question of costs if question of law or principle is involved or discretion is exercised arbitrarily. 2 Lah 332=27 P L R 391=100 I C 598.

—See to the same effect 35 C L J 156=68 I C 600.

—But the question of costs is discretionary with the Judge. Where no question of principle is involved the High Court should refuse to interfere. A I R 1931 All 126=(1931) A L J 16=Ind Rul (1931) All 183=129 I C 551. see also 45 I C 544.

—In other words, no interference will be exercised unless the order is plainly irregular or contrary to principle. 90 I C 577=A I R 1926 O 35.

—Or obviously wrong, A I R 1929 Oudh 406=6 O W N 689=Ind Rul (1929) Oudh 529=119 I C 449, or arbitrary 2 L L J 310. see also 45 Ind Cas 948=97 Pun W R 1918; 51 Ind Cas 622=53 Pun W R 1919; and 5 Pat L J 472 (480, 489)=1 Pat L T 403=57 I C 236 (239) F B. or illegal 6 O C 52. or based on erroneous principle, 17 I C 418. or if reasons are not recorded for varying the general rule 11 Bom L R 1187=4 I C 283 see also (1915) Pun L Rep No 65=22 P W R 1915=27 I C 621 (2).

—As to particulars to be observed in drawing up ground of second appeal see 8 O C 251 and 6 O C 59; and 6 O C 59.

—In a second appeal, the Court cannot interfere with an order as to costs unless the order is illegal. The Court cannot examine the reasons, and review the exercise of the discretion of the lower Court in

## CIV PRO CODE (1908) SEC 35 (Contd)

## (2) Appeals against order as to costs (Contd.)

the matter of costs even if the discretion is exercised wrongly that is not a sufficient reason for interfering in second appeal, 5 Bur L T 104=15 I C 429. see also 13 I C 201.

—A second appeal cannot be allowed merely because the Lower appellate court has directed the plaintiff to pay the defendant's costs. 83 P L R 1915=28 I C 455=62 P R 1915.

—Nor does it lie on question of costs concurrently decided. A I R 1926 All 419=93 I C 1008.

—Where the lower Appellate Court has given reasons for the award of costs the High Court will not interfere even though the reasons may be insufficient unless it is shown that grave injustice has been done to the party against whom the order is made. A L R 1933 O 525.

—Costs refused to successful party on insufficient grounds—Interference in revision See 15 I C 202.

—The usual rule is that costs should be allowed to the successful party but where no good ground exists for not following it, the higher court should rectify the error. 65 P L R 1915=27 I C 621=22 P W R 1915 See also 12 I C 813.

—A defendant cannot be asked to bear the costs of an unsuccessful co-defendant or of a co-defendant who does not contest. 12 Bom L R 621=7 I C 134; see also 13 Bom L R 1061=12 Ind Cas 813.

—The Court below had deprived the successful deft. of his costs because in its opinion he was responsible for the litigation. There was also no proof of any wrongful conduct on the part of the deft. Held, that there being no evidence of this fact, the successful deft ought to have been awarded costs. Where the Judge has given his reasons and all the circumstances are before the Court of Appeal the latter can, if satisfied that the discretion has not been judicially exercised, interfere with it and make the order which the court below ought to have made. 40 All 558=16 A L J 592=48 I C 478.

—In a pre-emption case the plaintiff's right of pre-emption was admitted and the only controversy was as to the price payable. The District Judge dissenting from the Lower Court held that the whole of the price was paid before the Sub-Registrar and that there was no proof of the return of any part of the price. He accepted the vendee's appeal as to the price, but did not set aside the first Court's decree awarding costs against him. The vendee filed a Second appeal. Held, that in the circumstances of the case the Court of

## CIV PRO CODE ((1908) SEC. 35 (Contd.)

## (2) Appeals against order as to costs (Concl'd)

Second Appeal was entitled to entertain an appeal on the question of costs. The vendee having defeated his adversary of the only point in controversy between them was entitled to recover his costs. 56 I C 971.

## (3) Conduct of a third party affecting order as to costs.

—Where the plff has to bring the suit owing to the conduct of a third party e. g. wrong discretion of a returning officer under Bengal Municipal Act 15 and 69, each party may be ordered to pay his own costs : 30 C L J 270-24 C W N 189=53 I C 741=47 C 524.

—Several defendants—Suit wholly dismissed—Each defendant should get costs based on valuation of suit and not according to his interest. A I R 1925 Bom 432=27 Bom L R 692=89 I C 211.

## (4) Conduct of parties affecting order as to costs.

—In the case of a suit where the litigation was caused by the deceased's act of executing a sale-deed in favour of the plaintiff, the costs of litigation in all the Courts should come out of the estate A I R 1921 Sind 17=Ind Rul (1931) Sind 20=25 S L R 72=129 I C 900.

—Trial Court ordering parties to bear their own costs—Only one party appealing—Such party cannot be ordered to pay costs of non-appealing party in trial Court. A I R 1929 Lah 177=30 P L R 600=Ind Rul (1929) Lah 768=118 I C 464.

—A party must produce all such material documents relating to the suit as may be in his possession, even though no application has been made for their production by the other party. Non-production would entail deprivation of costs. A I R 1929 All 134=(1929) A L J 262=112 I C 791.

—Costs created by one co-sharer encumbering his share—Other co-sharers should be relieved from such costs. A I R 1929 Cal 477=56 C 447=Ind Rul (1929) Cal 709=119 I C 21.

—Both parties making false allegations—Costs not allowed to either side. 160 P W R 1915=31 I C 862.

—Parties unnecessarily joined—Party asking for joinder should pay. A I R 1930 Mad 913=59 M L J 524=23 L W 438=Ind Rul (1931) Mad 235=129 I C 235.

—Where a plaint is rejected at an early stage courts are not justified in awarding excessive costs to the deft. especially when the parties were trying to settle the

## C. P. C. (1908) SECTION 35: (Contd.)

## (4) Conduct of parties affecting order as to costs. (Contd.)

dispute 35 P R 1914=237 P L R 1914=25 I C 435.

—The court-fee paid on part of the claim subsequently withdrawn cannot be allowed as costs. 23 I C 231.

—If the action is collusive heavy costs will be awarded. 16 P L R 1914=21 I C 944.

—A rule applied for upon an astute and intelligent perversion of fact should not be made absolute unless some strong grounds exist for doing so. Heavy costs awarded where rule was improperly obtained. 15 C L J 162=14 I C 458.

—Where a party causes unnecessary and unreasonable delay he will not be entitled to costs. A I R (1916) P C 110 (113)=44 Cal 186=43 Ind App 249=14 All L J 1103=18 Bom L R 868=24 Cal L J 487=21 Cal W N 225=31 M L J 563=20 M L T 335=(1916) 2 Mad W N 336=4 Mad L W 458=1 P L W 1=10 Bur L T 177=36 Ind Cas 420 P C; and A I R (1931) P C 289 (293)=35 Cal W N 1287=34 Mad L W 676=33 Bom L R 1536=54 Cal L J 372=134 Ind Cas 1080=8 Oudh W N 1066=61 M L J 623 P C. (Following 44 Cal 186 P. C.) and 24 Cal W N 110=30 Cal L J 417=54 Ind Cas 636; and A I R 1922 P C 361 (364)=32 M L T 15=69 Ind Cas 356=47 M L J 322=27 Cal W N 509=1923 Mad W N 388 (P C); and A I R 1922 P C 17 (19)=44 All 185=49 Ind App 60=9 Oudh L J 81=42 M L J 584=25 Oudh Cas 8=20 All L J 476=35 Cal L J 468=1922 Mad W N 378=24 Bom L R 695=30 M L Tim 220=66 Ind Cas 853=28 Cal W N 79 (P C). but see 65 I C 709

—There is a certain amount of discretion allowed to the Court with regard to the awarding of costs and the main criterion to be considered is not so much the action of the loser but the action of the party who wins the case. Even in a case where the plaintiff has been successful, the question of costs depends upon whether the plaintiff's conduct could in any sense be said to have led to or rendered necessary the litigation. 41 All 254; 53 Bom 178 referred to. A L R 1933 R 153. Plea as to jurisdiction not taken through carelessness necessitating revision—Applicant though successful should pay. A I R 1930 Lah 240=Ind Rul (1929) Lah 359=115 I C 23.

—Case not properly presented in trial Court—Appeal successful but costs in trial Court have refused. A I R 1930 Mad 218=58 M L J 210=31 L W 65=(1930) M W N 16=53 M 480=Ind Rul (1930) Mad 360=122 I C 504.

Successful appellant was ordered to bear costs because his conduct in the case



## CIV PRO CODE (1908) SEC 35 (Contd.)

## (4) Conduct of parties affecting order as to costs (Concl'd.)

did not appear to have been creditable or straight forward. A I R 1930 Mad 154=58 M L J 29=(1929) M W N 831=31 L W 97= Ind Rul (1930) Mad 604=124 I C 140.

—Evidence partly untrue—Costs should not necessarily be disallowed—Wasting of Court's time by false or unnecessary evidence justified refusal of costs. A I R 1927 Mad 474=100 I C 224.

—Where a defendant forces plff into litigation he will not be entitled to costs though successful: 1917 M W N 636=7 L W 133=21 C W N 1137=42 I C 236 P C.

—See also: 15 Mad L T 206 (214)=38 Mad 959=26 M L J 331=23 Ind Cas 581=1914 M W N 256; and A I R 1925 Oudh 301 (303)=84 Ind Cas 152.

—Litigation necessitated by conduct of defendant—Dishonest defence—Defendant must pay costs. 43 C 190=19 C W N 880=31 I C 662.

—In a suit for partition where the defendant pleads prior partition which was not proved, he may be directed to pay the costs of the suit. A I R 1931 Cal 573= Ind Rul (1931) Cal 608=35 C W N 151=132 I C 688.

—Widow claiming maintenance at a rate found to be excessive through being prevented from knowing the income of the family

—Defendant putting vexatious pleas to defeat her claim—Defendant should pay plaintiffs all costs. A I R 1928 Mad 246=54 M L J 530=28 L W 328=108 I C 712.

—Defendant raising all possible pleas unsuccessfully—Defendant through legal representative was ordered to bear costs personally. A I R 1922 Lah 229=4 Lah L J 210=60 I C 362.

## (5) Costs in cases disposed on preliminary point.

—Costs against unsuccessful party can be given in preliminary decree. A I R 1930 All 72=Ind Rul (1930) All 166=211 I C 550.

—Plaintiff's claim not contested—Costs up to preliminary decree cannot be awarded to plaintiff. A I R 1930 Pat 336=11 Pat L T 233=9 Pat 773=Ind Rul (1930) Pat 481=125 I C 129.

## (6) Costs of or from legal practitioner, or attorney or solicitor and how calculated.

—S 35 does not confer any disciplinary jurisdiction on any Court against a legal practitioner for what amounts to misconduct or other reasonable cause justifying the existence of disciplinary jurisdiction. A I R 1930 All 225=52 A 619= (1930) A L J 402=Ind Rul (1930) All 685=125 I C 477 (F B).

## CIV PRO CODE (1908) SEC 35 (Contd.)

## (6) Costs of or from legal practitioner, or attorney or solicitor and how calculated. (Concl'd.)

—High Court cannot order a legal practitioner to pay the costs of an application or suit personally except where s. 35 can be made applicable. A I R 1930 All 225=(1930) A L J 402=52 A 619=Ind Rul (1930) All 685 (F B)=125 I C 477.

—Pleader's fees are allowed only on amount decreed: 12 O L J 272=28 O C 217=88 I C 134=A I R 1925 O 432.

See also A I R 1925 Bom 355=27 Bom L R 532=87 Ind 1043 and rule 278 (b) of the rules of Practice Madras and A I R 1925 Mad 1235=49 M L J 271=22 Mad L W 208=91 Ind Cas 303 and 6 Cal L J 453 (456).

—As to solicitors lien see 10 B 248

—Solicitor has a lien for his costs on any funds or sum of money reserved for or which became payable to his client in the suit and so the court can give a charge for attorney's fees on the property of the client 81 I C 732=A I R 1924 M 793.

## (7) Costs on strangers to suits.

—When a person institutes a suit and obtains a decree and puts it in execution and the property is purchased by him finally there is a prima facie ground that he has incurred the necessary expenditure and the plaintiff claiming against him under a better title must contribute in respect of the said expenditure. A I R 1924 Oudh 218=10 O L J 481=78 I C 393.

—Third party claiming through party to suit against whom costs are awarded is liable. A I R 1930 Mad 577=(1930) M W N 153=58 M L J 318=31 L W 262=Ind Rul (1930) Mad 463=53 M 708=123 I C 47.

—Where defendants after a decree is passed against him to succeed in third party proceedings, his costs in suit as against third party should be taxed as between solicitor and client and the costs of third party proceedings should be taxed as between party and party. 21 Bom L R 808=59 I C 18.

—A plff. settled the matters in dispute in a suit with all except one of the defts against whom a decree was made and he was made liable for costs; he appealed, and upon his application at the hearing he was allowed to withdraw from the appeal and was dismissed from the suit.



## C. P. C. (1908) SEC. 35 (Contd.)

## (7) Costs on stranger to suits. (Concl'd)

with liberty to bring a suit against the plff, no order being made as to the costs of appeal. The plff. applied to execute the decree of the first Court for costs the application was resisted on the ground that the order of the Appellate Court relegated the deffs. to the position of a stranger to the suit, and that consequently there was no decree against him capable for execution. Held, that the plff. was entitled to execute the decree for costs of the Original Court as the effect of the order of the Appellate Court was not to absolve the deff, from his liability for costs under decree of the first Court. As an ordinary rule, only the parties to a litigation can be made liable for costs, but in exceptional cases a Court may make a stranger to a suit liable for costs. 7 B 484 rel. 16 I C 381.

## (8) Costs to be obtained or against government officials.

—Where in a suit on the original side of the High Court, to which the Secretary of State for India is a party, costs are awarded to him, the Govt Solicitor is entitled to have his bill of costs taxed in the ordinary way against the losing party notwithstanding the fact that the Govt. Solicitor is a salaried officer of the Govt. 40 Bom 588=18 Bom L R 118=33 I C 362.

—An unsuccessful application by an official liquidator to place certain shareholders in the list of contributories having been bona fide made in the liquidation of the company, the Court ordered that the costs of each side should be paid as a first charge out of estate. 11 All 349.

—In an unsuccessful litigation the Secretary of State is liable to pay costs like any other unsuccessful party. 5 Pat L J 321=1 Pat L T 451=(1920) Pat 253=56 I C 507=21 Cr L J 475.

—The Official Assignee is entitled to his costs of appearing in an appeal against an order of adjudication. 14 Bom 189.

## (9) Costs to follow the event.

—Successful party is generally entitled to costs. Ind Rul (1930) Nag 154=122 I C 378.

—See also 54 M L J 603=27 L W 841=110 I C 5=A I R 1928 Mad 346; And Court ought to give successful party costs such as are necessary to enable him to place his case properly before Courts. A I R 1921 Bom 71=45 Bom 1177=23 Bom L R 189=61 I C 271.

## C. P. C. (1908) SEC. 35 (Contd)

## (9) Costs to follow the event (Contd)

—In other words, though costs are in the discretion of the Court, the rule of the Privy Council is that a successful appellant is, as a rule, entitled to his costs.—1 C D 113; 15 I A 186=16 I A 173;

—For costs follow event unless reasons to contrary shown. A I R 1923 Bom 265=25 Bom L R 323=247 B 637=72 I C 659.

—See to the same effect 75 I C 64=A I R 1923 L 302; 85 I C 127=A I R 1925 C 297. and 77 I C 416=A I R 1923 L 513; and 15 Bom L R 130=19 I C 98; and A I R (1928) Mad 346=54 M L J 603=27 Mad L W 841=110 Ind cas 5. and 40 All 558 (562)=16 All L J 592=48 Ind Cas 478; and 10 Mad L W 540 (543)=(1919) Mad W N 878=53 Ind Cas 796; and 61 Ind Cas 112=2 U P L R (A) 389; and 29 P L R 507.

—Where the Lower Court, a small Cause Court, orders that costs should not follow the event for reasons not supported by the record the High Court can revise the order under the Prov Sm. Cause Courts Act. 11 N L R 189=31 I C 880.

—Where in remanding an appeal, the High Court had ordered that "the costs shall abide the result," Held, that the Lower Court was not bound to award costs to the successful party but had a discretion in the matter. Expression "to abide the result" and "to abide and follow the result" distinguished. 39 Mad 476=28 M L J 411=(1915) M W N 330=29 I C 203.

—Defendant against whom suit fails is entitled to costs A I R 1926 Mad 1084=51 M L J 446=24 L W 378=97 I C 847.

—Defendant against whom claim is not proved is entitled to costs. Defendant need not prove that plaintiff's claim was false. A I R 1926 Lah 464=27 P L R 254=97 I C 795.

—Two sets of defendants. (disputing their liability—Unsuccessful deff. must pay costs of successful deff. 11 S L R 1=42 I C 636.

—In an application by plaintiff to revenue authorities for partition of land the defendant set up exclusive title to the land and repeated it in the Civil Courts but failed. The plaintiff should be allowed the costs of the suit. A I R 1930 Lah 229=Ind Rul (1929) Lah 573=116 I C 717.

—Claim difficult in valuation—Successful plaintiff is entitled to full costs. A I R 1929 All 214=51 A 509=(1929) A L J 306=Ind Rul (1929) All 378=115 I C 458.

## C. P. C. (1908) SECTION 35 (Contd)

## (9) Costs to follow the event (Contd)

—A party succeeding on a particular issue must get his costs on that issue: 27 C L J 78=45 I C 738.

—The fact that questions of law raised are not easy of solution is not a good ground for not allowing the costs of a successful litigant. 23 M L J 638=12 M L T 547=17 I C 609.

—Nor the fact that defendant remained exparte: 86 I C 321=29 C W N 297=A I R 1925 C 569.

—Where there is a difference of opinion on the question of costs, the opinion of the senior Judge prevails under S. 36 of the Letters Patent. 18 C W N 106=17 C L J 75= 16 I C 922.

—The rule that cost should follow event may be departed from in a proper case. A I R 1926 Bom 180=28 Bom L R 126=98 I C 358.

—Thus in case of unjustifiable suit plff. should bear costs A I R 1923 Cal 691 =50 C 419=77 I C 910.

—Addition of new plaintiff for really deciding plaintiff's claim—Plaintiff who had no just claim should pay defendant's costs. A I R 1931 Cal 76=52 C L J 357=58 C 561=Ind Rul (1931) Cal 300=129 I C 860.

—Co-plaintiff not appealing made respondent cannot get costs of appeal. A I R 1923 All 119=20 A L J 980=L R 4 A 53 Civ=71 I C 424.

—Where the suit was rendered inevitable by the gross mismanagement of the trust estate by the appellant, the appellant should pay costs. A I R 1923 Pat 420=4 P L T 326=71 I C 280.

—So also selection of wrong forum 81 P R 1918=115 P W R 1918=1918 P L R 119=46 I C 490.

—As also the adoption of wrong procedure. A I R 1922 P C 17 (19)=44 All 185=49 Ind App. 60=9 Oudh L J 81=42 M L J 584=25 Oudh Cas 8=20 All L J 476 =35 Cal L J 468=1922 Mad W N 378=24 Bom L R 695=36 M L T 220=66 Ind Cas 853=28 C W N 79 P C.

—Or succeeding on a new plea in second appeal 30 Bom L R 1300=A I R 1928 B 516=52 B 640 see also A I R 1929 R 148=117 I C 589=7 R 75.

—But the mere fact that party has succeeded on technical grounds is no ground to refuse costs 48 I C 478=16 A L J 522=40 A 558; 18 C W N 106=17 C L J 75=16 I C 922; 108 L T 416 and 95 L T 145.

—Where plff fails on important matters in dispute, though succeeding on part of the claim, deft will be entitled to

## C. P. C. (1908) SECTION 35 (Contd)

## (9) Costs to follow the events (Contd)

costs 31 C W N 155=100 I C 182=A I R 1927 C 947, unless Court in its discretion allows the plff half the Costs A I R 1932 M 470=62 M L J 594.

—A party, though successful, may be refused costs if he did not present his case in the proper light to the Court of first instance 2 C L J 270=9 C W N 844; see to the same effect A I R 1927 Lah 723 (724)=104 Ind Cas 325 and A I R 1922 P C 176 (178)=20 All L J 301=24 Bom L R 571=26 Cal W N 514=35 Cal L J 417=66 Ind Cas 107=42 M L J 444=1922 Mad W N 323=15 Mad L W 635 P C; and 37 Ind Cas 105=95 P R 1916=145 P L R 1916.

—Or when the pleadings are in one way before the finding and quite the reverse after the finding. 33 All 344 (356)=15 C W N 497=8 All L J 465=13 Cal L J 519=9 Mad L J 507=13 Bom L R 404=21 M L J 637=14 Oudh Cas 133=38 Ind App 104= (1911) 2 Mad W N 242=10 I C 285 P C.

—see also A I R 1914 P C 60 (62)=38 Bom 399=12 All L J 742=16 Bom L R 366=19 Cal L J 563=18 Cal W N 844=26 M L J 647=16 Mad L J 59=1 Mad L W 762=1914 M W N 441=23 I C 645.

—It has been held by Madras High Court that when appellant is in an advantageous position, he should bear his costs. A I R 1922 P C 361=32 M L T 15=47 M L J 322=27 C W N 509=1923 M W N 388=69 I C 356.

—Costs cannot be granted against party against whom no relief is sought. A I R 1930 Mad 195=30 L W 949=58 M L J 118=Ind Rul (1930) Mad 648=124 I C 216.

—When the action involves several issues and the costs of a particular issue can be separated from the cost of the suit it is usual to allow them to the party who is successful on that issue irrespective of the ultimate result of the suit. 1918 A C 717.

—The fact that the questions of law raised in the case were not easy of solution is not a good ground for disallowing the costs of the successful litigant 12 M L T 547=23 M L J 638=17 I C 609.

—Suit overvalued—Plaintiff is entitled to costs on proper valuation. A I R 1925 Sind 275; 87 I C 1002.

—Privy Council not permitted by appellant to finally decided suit though prepared to do so. Appellant succeeding on question tried by Council costs were reserved and might even be awarded against him even if he ultimately succeeded. A I R 1921 P C 6=45 B 718=48 I A 181=19 A I J 409=23 Bom L R 623=33 C L J 488=25

## C. P. C. (1908) SECTION 35 (Contd)

## (10) Costs to follow the event (Concl'd)

G W N 605=40 M L J 519=14 L W 7=1921  
M W N 408=60 I C 822.

—Costs of printing unnecessary records will not be allowed. A I R 1919 P C 83=

76 I C 737.

—Where it is difficult to apportion costs between the parties in view of the peculiar nature of the disputes between the parties and the necessarily arbitrary manner in which most of the items had to be valued: held that equity will be equally well served by each party being ordered to bear his own costs. 21 M L J 730=10 M L T 133=(1911) 2 M W N 202=11 I C 175

—Where the debt having tendered the rent due, made an offer of performance under S. 38 of the Contract Act before a suit was instituted for its recovery, the court which decrees the suit has jurisdiction to direct the plff. to pay the debt his costs of the suit. 40 I C 614.

—Plaintiff suing for cancellation of a bond—Contract being void, defendant cannot enforce the bond—Defendant hence not entitled to costs. A I R 1922 Oudh 271=9 O L J 404=25 O C 237=69 I C 888.

## (11) Discretion of Courts.

—Award of costs is discretionary 41  
All 254=17 A L J 169=49 I C 696.

—The Court can exercise its discretion as to the awarding of costs by dis-allowing costs to the successful party where the suit was based on a state of law which since has been overruled either by an enactment of the legislature; or by the superior tribunals 62 E R 767 and 51 E R 498 foll. 43 Mad 61=37 M L J 271=26 M L T 219=10 L W 326=(1919) M W N 792=53 I C 7.

—And provision of O XXIII, r. 1 (3) do not conflict with discretion of Court under s. 35 A I R 1925 Oudh 699=2 O W N 901=91 I C 111.

—It is discretionary with the Court to awards costs where new point is raised at late stage, A L R 1933 A 1=1932 A L J 1035=A I R 1913 A 49.

—Or where plaint is amended. A L R 1933 B 295=35 B L R 569.

—But the discretion should be exercised with reference to general principles. Where a successful plaintiff is not guilty of any misconduct, neglect or omission, he is entitled to costs. The fact that the defendant has, previous to the suit admitted his liability to pay to the suit debt to the plaintiff, affords no ground for depriving the plaintiff of his costs. 27 M 341 see also 27 C L J 78=45 I C 738 and 15 Bom L R 130=19 I C 98 and 10 Bom L R 821=

33 B 334.

## C. p. C. (1908) SECTION 35 (Contd)

## (11) Discretion of Courts. (Contd.)

—Where a temple committee have acted bonafide and in due execution of their powers in instituting proceedings: the fact that the courts come to a different conclusion should not penalise either them or a new trustee in costs. But where proceedings have not been instituted in good faith the court may order the party in fault to pay the costs out of its own pocket. 5 L W 672=38 I C 695.

—Party trying to profit by his fraud—Discretion in awarding costs should be used against him. A I R 1930 Mad 707=Ind Rul (1930) Mad 455=123 I C 39.

—Costs to successful party are given as compensation for probable expenses—Complicated case—Special costs may be given. A I R 1921 Cal 185=48 C 427=25 C W N 297=32 C L J 168=60 I C 337.

—Trial Court deciding case on generally accepted rulings which were subsequently explained or dissented from—Appellate Court reversing decision should not saddle costs on respondent. A I R 1930 All 167=Ind Rul (1930) All 455=124 I C 23.

—A person wrongly or unnecessarily made party should be awarded costs A I R 1924 M 476 (478)=46 M L J 134=19 M L W 197=1924 M W N 122=78 Ind Cas 296=34 M L T 358.

—In deciding the question of costs a court is entitled to consider not merely the conduct of the parties in the actual litigation, but also the matters that led up to the litigation, 13 C L J 404=13 C W N 805=10 I C 90. see also 29 C W N 297=86 I C 321=A I R 1925 C 569.

—Where in a suit by a minor plaintiff represented by his guardian the Court granted a decree but without costs and it appeared that prior to suit the defendant expressed willingness to pay the amount if the guardian would give security, which the latter refused and the guardian was not a man of property. Held that the Court had exercised a proper discretion. A L R 1933 M 1198.

—Libel claim made—Much higher than claim awarded—Still costs are in discretion of Court. A I R 1929 Lah 129=10 Lah 816=Ind Rul (1929) Lah 708=117 I C 884.

—A solicitor bringing or defending an action in person is entitled to the same costs as if he had employed a solicitor except in respect of items which the fact of his acting directly rendered unnecessary. 27 C L J 78=45 I C 738.

—Where the Court derived no assistance from Counsel but allowed the appeal, no orders should be passed as regards costs of second appeal, Ind Rul (1931) Lah 937=32 P L R 378=134 I C 489.

**C. P. C. (1908) SEC. 35 (Contd)****(11) Discretion of Courts. (Conclud.).**

—S. 35 does not give an absolute discretion but it can be interfered with if exercised wrongly and arbitrarily. 18 M L T 460=(1915) M W N 1021=31 I C 312. See also 1 O L J 156=24 I C 673.

—Discretion exercised will not be interfered with unless proceeding upon manifestly wrong ground. A I R 1925 Oudh 699=2 O W N 901=91 I C 111.

—Lower Court using its discretion properly appellate Court should not interfere. A I R 1931 Oudh 9=7 O W N 1055=Ind Rul (1931) Oudh 85=129 I C 165. See also 42 C L J 137=90 I C 486=A I R 1925 C 1085; and A I R 1924 Oudh 110=73 I C 307.

—Nor High Court should interfere in second appeal with an order as to costs if it appears to have been made in the exercise of a sound discretion. 19 M L T 86=3 L W 109=32 I C 579.

—Ten per cent is a reasonable amount for collection charges to the Lambardar. The rate allowed by way of Hak Lambardari has nothing to do with costs of collection. It is allowed in connection with responsibilities he has to undertake in connection with the payment of land revenue. 1 O L J 156=24 I C 673.

—But omission to consider all circumstances is not sound exercise of discretion and appellate Court can interfere. A I R 1923 Bom 206=25 Bom L R 242=47 B 559=72 I C 324.

**(12) Interest on costs**

—Interest on costs cannot be allowed in execution, unless it is inserted in the decree. 3 Cal 161=L R 4 I A 137 followed in 32 C 494; and 16 C L J 517=15 I C 719.

—A Court inserting interest on costs for the first time in the decree though not provided for in the judgment is within its jurisdiction. The power to award interest on costs is discretionary and may be exercised when framing the decree. 35 I C 218.

—The terms of S. 144 C P C read with S. 35 (3) of the C P Code are wide enough to empower the Court to award a decree-holder interest on costs as on any other portion of the decree which the judgment-debtor may be liable to refund to him. 20 O C 327=43 I C 337=4 O L J 729.

—There is no such thing as a "Court rate" of interest. A rate of 6 per cent per annum which is the maximum awardable on costs may be appropriate rate of interest to allow for damages. A I R 1926 Nag 363=94 I C 971

**C. P. C. (1908) SEC. 35 (Contd)****(12) Interest on costs (Conclud)**

—Claiming very high interest—Costs were disallowed. A I R 1923 Oudh 8=9 O L J 442=69 I C 657.

—Restoration of the lower Court decree by the Privy Council was construed to mean award of interest on trial Court costs and not on that of High Court. 63 I C 709.

**(13) Interest shall be added to the cost.**

These words are newly added. They do not affect discretion of the Court. Interest should not be allowed until costs have actually been incurred. Decree for certain sum with costs and future interest from date of suit interest was payable not on costs only on the principal sum. 60 I C 345 (Lah).

**(14) Limitation.**

—Time to execute order specifying costs granted by a previous order commences from date of the latter order. 59 I C 51.

**(15) Nature of Interest affecting order as to costs.**

—S. 35 does not empower Court to order costs in the case of Jews. A I R 1930 Cal 558=57 C 1089=Ind Rul (1930) Cal 863=34 C W N 319=127 I C 559.

—Decree for costs against several defendants—Each is jointly and severally liable. A I R 1923 Pat 215= (1923) Pat 17=70 I C 782.

**(16) New points affecting order as to costs.**

—Where a point as to limitation was newly raised in application for review, the party was allowed to raise it but was ordered to pay the costs of that application. A I R 1928 P C 103=6 R 302=5 O W N 479=30 Bom L R 842=47 C L J 510=26 A L J 657=32 C W N 845=55 I A 161=28 L W 207=54 M L J 696 (P C)=109 I C 1.

—Redemption decreed—Defendant claiming costs in second appeal but point not raised in first appeal—Costs of trial Court only were granted. A I R 1925 Mad 778=48 M L J 213=21 L W 252=86 I C 793.

—Expenses incurred in procuring attendance of witnesses can be included—Question whether witnesses were summoned through Court or not is immaterial. A I R 1928 Lah 800=10 Lah L J 401=109 I C 476.

## C. P. C. (1908) SEC. 35 (Contd.)

## (17) Parties.

—Where two persons are sued in the alternative and a decree is passed against one while the suit against the other is dismissed, the Court may order the former to pay not only the costs of the plff but also that of the other deft. A I R 1928 B 91-30 Bom L R 162=109 I C 191.

—Costs must be included in the amount due on a mortgage. The decree for costs cannot be executed by itself as a personal decree against the mortgagor. A I R 1931 All 124=Ind Rul (1931) All 186=129 I C 554.

—Where decree amount was deposited in Court and decree-holder had no notice till after some time and he took out execution bona fide, held that he was entitled to costs. 35 C W N 544.

—It cannot be said that a successful assessee must lose the deposit of Rs. 100, simply because the Income-tax Officer had chosen to make an assessment. A I R 1931 All 23=(1930) A L J 1548=52 A 991=130 I C 634.

## (18-19) Proportionate Costs.

—In a claim for moral damages, it is hardly right to order proportionate costs. A I R 1929 Mad 493=29 L W 604=(1929) M W N 341=Ind Rul (1929) Mad 901=119 I C 149.

—But where claim is grossly and intentionally exaggerated deft is liable proportionally to claim decreed A I R 1925 Mad 692=46 M L J 366=(1924) M W N 373=20 L W 60=78 I C 573

—Parties should have their own costs. The institution fee should be borne proportionately by all. A I R 1923 Bom 464=77 I C 914

see to the same effect: 26 O C 196=77 I C 749=A I R 1924 Oudh 48.

—But there is no contribution if the litigation is not bona fide: 7 M L T 194=5 Ind Cas 937, (26 M 373, F), see to the same effect-1910 M W N 285=7 I C 268; and 19 P L R 1912=32 P W R 1912; and 1 Pat L J 624=58 I C 31; nor if the parties are in position of joint tort-feasors. 1 Pat L J 620=58 I C 28; see also 20 A L J 890=69 I C 688=A I R 1923 A 67=45 A 99.

—In case of joint debts there cannot be presumed any implied contract to contribute, and there is right of contribution unless there is express: 22 M L J 406=11 M L T 305=14 I C 189=1912 M W N 492; see also A I R 1923 A 67=20 A L J 890=69 I C 688=45 A 99;

—Where several defendants have different antagonistic and exclusive defences,

## C. P. C. (1908) SEC. 35 (Contd.)

## (19) Proportionate Costs (Concl'd.)

there is no contribution in the absence of special contract to the contrary. L R 3 A 557=20 A L J 890=45 A 99=A I R 1923 All 67=69 I C 688. see also 40 A 672; and 9 M L T 449=9 Ind Cas 1023; and A I R 1921 All 372=43 All 77=58 Ind Cas 324=18 All L J 872=24 P L R (A) 299.

—Except where in certain cases the debts were on equal footing: 24 O C 148=63 I C 276=A I R 1921 Oudh 128 (overruling 10 O C 108) see also 54 I C 370.

—Where all defendants contested partition suit and where directed to pay plaintiff's costs and one of the defendants paid costs. Held, that plaintiff is entitled to contribution from his co-defendants unless there are equities to defeat this course. A I R 1924 Bom 318=48 Bom 351=26 Bom L R 218=80 I C 526.

—As to coheir bearing expenses of litigation about common property see 19 C W N 1183=21 I C 716.

## (20) Reasons ought to be stated.

—Court must give reasons in writing where the practice of directing costs to follow event is departed from. A I R 1928 Oudh 224=5 O W N 35=107 I C 831.

—Reasons should be stated when granting greater or less costs than are usually granted in a particular suit. A I R 1928 Nag 171=108 I C 740.

—Reasons must be given in when costs do not follow event—Party unless guilty of misconduct is entitled to cost. A I R 1925 Bom 527=27 Bom L R 422=90 I C 685.

—Court's discretion resulting in costs following event—Reasons need not be stated—Appeal does not lie. 95 I C 446 (Nag).

—Trial Court giving good reasons for order as to costs—First Appellate Court interfering without giving reasons—High Court interfered. A I R 1923 Oudh 114=27 O C 64=9 O L J 629=74 I C 369.

—At the hearing of an appeal, the case was remanded to the lower Court. The order further directed the costs of the appeal "to abide and follow the result." After remand the case was withdrawn. Held, that "event" was nothing but the outcome or result of proceedings and that the withdrawal of the suit was an "event" within the meaning of that word in S. 35 cl. (2) of the C P Code and if the Court did not order costs it must assign reasons. Where it did not appear that the Court applied its mind as to the costs of the appeal it was a case for revision by the High Court. 24 M L T 212=(1918) M W N 561=8 L W 219=47 I C 862.



**C. P. C. (1908) SEC. 35 (Contd.)**  
**(20) Reasons ought to be stated. (Contd.)**

—There are certain well-known principles on which a successful party may be deprived of his general costs. But where the Court purports to act on those principles it is open to the Appellate Court to enquire whether on the facts these principles have been rightly applied. 24 O W N 352=58 I C 421.

—Reasons could be examined by appellate Court. 16 A L J 592=48 I C 478=40 A 558, see also 1912 M W N 366=15 I C 202.

**(21) Review and Revision against order as to costs.**

—Where in a proper case strong case is made out, High Court may review a direction as to costs: 3 P L T 67=6 P L J 284=63 I C 768; but not a direction as to taxation: 9 Bom L R 983=32 B 262; and 9 Bom L R 1014—unless the Taxing Master has proceeded on wrong principle: 27 Bom L R 1195=91 I C 153=A I R 1926 B 18=50 B 69.

—As to revision see 119 I C 466=A I R 1930 M 72; and 2 L W 346=1915 M W N 274=28 I C 637.

**(22) Separate costs.**

—Several defendants raising various defences separate costs can be awarded. 18 M L T 460=(1915) M W N 1021=31 I C 312; see also G O W N 925=A I R 1929 O 536; but not if the defences are common: A I R 1925 Mad 1235=49 Mad L J 271=22 Mad L W 208=91 Ind Cas 303; and A I R (1932) P C 13 (21)=36 Cal W N 137=8 Oudh W N 1378=35 M L W 118=62 M L J 320=59 Ind App 1=136 Ind Cas 385 P C.

**(23) Separate Suit for Costs barred.**

—Claim for costs is not independent claim—Costs from part of entire decretal amount must be realized. A I R 1925 Cal 1135=41 C L J 607=93 I C 364.

—Defendant's case proving true—Plaintiff cannot continue suit for costs only on ground that defence was not disclosed in reply notice by defendant. A I R 1930 Bom 152=32 Bom L R 200 =Ind Rul (1930) Bom 345=125 I C 441.

—Claim for damages too remote cannot be maintained nor can an independent action for costs. A I R 1922 All 143=20 A L J 205=65 I C 513 see also 11 C W N 263.

—So also a suit will lie where costs are awarded by a decree or order which is not executable A I R 1925 Mad 279=47 M L J 829=21 Mad L W 75=85 Ind Cas 991=48 Mad 482.

**C. P. C. (1908) SEC. 35 (Contd.)**

**(23) Separate suit for costs barred (Contd.)**

—On the question whether costs awarded by Court having no jurisdiction can be recovered by a separate suit decisions in 8 A 452; and 28 A 475 hold that a suit will lie; where as decision in A I R 1922 A 143 holding contra.

**(24-25) Shall have full power.**

—The Court can issue an order awarding full costs in each suit provided it proceeds upon reasonable grounds and does not infringe any principle of law applicable. 156 P L R 1916=35 I C 529.

—Decree appealed against unsuccessfully—Trial Court has jurisdiction to deal with taxation of costs under its decree. A I R 1926 Bom 367=28 Bom L R 550=95 I C 515.

—Witnesses brought at party's expense from their place of residence and served at place of suit—Court can include expenses in costs if satisfied that expenses were reasonable. A I R 1928 Lah 800=10 Lah L J 401=109 I C 476.

—Plaintiff coming to enforce a legal right with no misconduct omission or neglect on his part, is entitled to costs. A I R 1921 Lah 104=62 I C 812.

—No excessive costs should be awarded if plaint is rejected at an early stage. 35 P R 1914=25 I C 435.

—The Court has power to award costs in its discretion to a defendant out of the deceased plaintiff's estate even in a case where a suit abates by reason of the cause of action not surviving the death of plaintiff. The power of the Court to award costs in cases of abatement is not restricted to O 22 R 3 (2). In calculating the defendant's costs in such a case, the pleader's fee to be allowed is the same as in the case of a suit dismissed for default of prosecution after framing of issues, i.e., only one half of the full fee should be awarded. 43 Mad. 284=37 M L J 596=10 L W 656=54 I C 718.

**(26) Special suits and proceedings, costs in, how ordered**

**(1) Abatement of suits**

—In a suit which has abated, the Court has no power to award costs to the heirs of the deceased deft against the plaintiff. 11 M L T 202=1912 M W N 382 =22 M L J 439=15 I C 369.

**(2) Account suits.**

—It is generally true that if a suit is instituted for an account between two persons one alleging that nothing is due

## C. P. C. (1908) SEC. 35 (Contd)

## (26) Special Suits and proceedings, costs in, how ordered. (Contd)

## (2) Account suits. (Concl'd)

from him, and the balance is found to be due from that person will have to pay the costs of the suit and of the account. But the case would be wholly varied, if the case were that one party admitted a given sum to be due from him and the other had claimed a much larger sum, and the suit has proceeded only for the purpose of ascertaining whether such contested balance were really due or not. In the case, the costs would depend upon the substantial result, that is, if the balance claimed or a substantial part of it, were shown to be due, the claimant would obtain the costs of the suit; if no part of it were due he would have to pay them; and if only a small portion of it were due the Court would probably give no costs on either side. But in all these cases the Court endeavours to see what were the substantial questions and causes of litigation between the parties. Where the debt, denied plff's right to claim an account and asserted that not only was nothing due from him, but that he himself had not realised, during his possession of the estate the entire sum recoverable by him, and the result of the litigation was that the plaintiff was entitled to account and upon accounts taken if it was established that the defendant had received a considerable sum in excess of his dues and the enquiry was delayed and lengthened by reason of the obstructive attitude of the defendant who had managed to hamper the investigations by non-production of the papers. Held, that the defendant was liable for the whole costs of the suit. 30 C L J 417-24 C W N 110-54 I C 636. See also 33 C W N 614-A I R 1929 C 719.

—In accounts suit costs up to reference for account are awardable to plff. 20 C W N 368.

## (3) Administration suits

—Litigation caused by act of deceased estate should pay costs. A I R 1931 Sind 17-25 S L R 72-Ind Rul (1931) Sind 20-129 I C 900.

## (4) Appeals.

—Appeal Court reversing decision of trial Court before which applicability of s. 22 Presidency Small Cause Courts Act was immaterial can disallow costs to defendant. A I R 1924 Bom 422-26 Bom L R 382-48 B 531-80 I C 766.

—Grounds of appeal loosely drafted —Appellant though successful was ordered to pay respondents costs. A I R 1925 Oudh 561-28 O C 203-85 I C 445.

—Amount of damages reduced on appeal—Order as to costs of appeal see 14 C W N 713-6 Ind Cas 81-37 C 760.

## C. P. C. (1908) SEC. 35 (Contd)

## (26) Special suits and proceedings, costs in, how ordered (Contd)

## (4) Appeals (Concl'd)

—Order appealed from held not appealable but bad on merits—Costs disallowed A I R 1924 All 808-46 A 733-22 A L J 706-L R 5 A 482 Civ-83 I C 11035.

—Leave to appeal obtained but appeal not prosecuted—Appellant must pay costs of application for leave. A I R 1925 Bom 471-27 Bom L R 699-89 I C 213.

—The Government obtained their costs in the first Court; the opposite party appealed, not making the Government a respondent. On appeal, the decree of the first Court was reversed. Held, that the Government not having been made a party to appeal were entitled to recover their costs in the first Court. I B L R S N. Xiih.

—When an appellate Court, after setting aside the decree of the lower Court, remanded the case and the order as to costs provided "costs will abide the result" held if the result of the remand was entirely in favour of the successful party he was entitled, as a matter of course, to the costs in question, even if the decree of the lower Court, after remand did not contain any such direction 4 Cal. W N 343. but see 39 M 476 N.

—Question of costs cannot be raised newly in second appeal. A I R 1923 All 334-75 I C 527.

## (5) Arbitration.

—Where there is no sufficient provision in the award made in arbitration proceedings in a suit or if the award has not been made, the Court has power to award the costs of the arbitration as costs of a proceeding incident to the suit under S. 35 of the C. P. C. The power of Court to award the arbitrator's fee as costs is not limited to cases where an award has been made. No appeal will lie as to costs unless there has been violation of an established principle. 22 B. 164 referred to. 6 S L R 226-19 I C 611. See also 1931 A L J 1155-A I R 1932 A 183.

## (6) Commission.

—Party taking out commission succeeding to any extent is entitled to costs. A I R 1929 Cal 719-33 C W N 614 —Ind Rul (1930) Cal 220-122-1 C 220.

—But not the party failing to cite authorities showing correct practice. A I R 1926 Mad 642-(1926) M W N 465-50 M L J 428-94 I C 306.

## (7) Contract Suits and Suits for breach of Covenant.

—So also in a suit on contract of indemnity, pleader's fees reasonably paid

**G. P. C. (1908) SEC. 35 (Contd.)****(26) Special suits and proceedings, costs in, how ordered (Contd.)****(7) Contract Suits and Suits for breach of Covenant (Contd.)**

should be awarded, A I R 1921 Mad 544=13 L W 297=60 I C 164.

—In a suit for damages for breach of covenant for title plaintiff, can claim costs of litigation in which he was damaged. 38 M L J 470=57 I C 982.

—But no costs are awardable in a suit on immoral contract, A I R 1928 Sind 173=113 I C 366.

—See also A I R 1930 L 789=12 L J 71=31 P L R 477=122 I C 102.

—In a suit for damages for breach of contract and for recovery of earnest money: defendant was directed to pay costs of the suit, as she did not pay the earnest money into Court or formally tender it—11 Bom 272. But this was dissented from in 23 Bom L R 1213.

**(8) Divorce Suits.**

—As a rule, husband must pay irrespective of result, A I R 1922 All 243=66 I C 494. See to the same effect A I R 1924 Mad 150=45 M L J 327=74 Ind Cas 139=18 L W 354; and A I R 1922 All 504=44 All 745=77 Ind Cas 133 F B.

—A solicitor is thus entitled to have his costs paid out of the amount deposited by the husband to meet the costs of the wife. 20 I C 492=15 Bom L R 593=38 B 125.

—But wife admitting adultery—Decree for dissolution—wife wishing to prefer appeal

—Husband cannot as a matter of right be asked to pay her costs. 24 C L J 216=21 C W N 711=37 I C 216=44 C 35.

—And the Court still has discretion despite the rule above: 17 Cal W N Cclxii.

—Ex parte order against decree-holder to file copy of voluminous decree, judgment-debtors partly responsible for putting costs on decree holder for obtaining copy of decree, and Court partly responsible as copy of whole decree unnecessary for execution—Decree-holder not resisting order

—Costs equally divided between decree-holder and judgment debtors. A I R 1930 Cal 804=57 C 996=Ind Rul (1931) Cal 252=129 I C 780.

**(9-10) Guardian.**

—Guardians and wards Act, S. 7—Philanthropic Society unsuccessfully seeking to be made a guardian of a minor's property cannot claim costs as they are not expenses either on account of necessities or as having been incurred for the welfare of the minor or for protection of his estate. A I R 1930 Cal, 397=51 C L J 272=58 C 15=Ind Rul (930) Cal, 755=126 I C 707.

**C. P. C. (1908) SEC. 35 (Contd.)****(26) Special suits and proceedings, costs in, how ordered (Contd.)****(10) Guardian (Contd.)**

—Guardian continuing as such after minor became major is liable for costs. A I R 1929 Mad 782=(1929) M W N 545=Ind Rul (1930) Mad 549=123 I C 805.

**(11) Income Tax reference.**

—Pleader's fees—Opinion of the Taxing Master prevails unless it is wrong in principle. 23 Bom L R 854=45 B 1234=63 I C 37.

—Successful assessee is entitled to recover deposit. A I R 1931 All 23=(1930) A L J 1548=52 A 991=130 I C 634.

**(12) Insolvency.**

—Costs on petitioning creditor on setting aside adjudication order cannot be set off against debt due. A I R 1930 Bom 516=32 Bom L R 1076=Ind Rul (1931) Bom 8=128 I C 24.

**(13) Interlocutory application**

—Costs of interlocutory application ordered to be costs in cause—Party obtaining general costs is entitled to the costs of application—Judge hearing case has no jurisdiction to interfere with previous order of costs of application. A I R 1926 Bom 596=50 B 430=28 Bom L R 1283=97 I C 133.

—Costs of interlocutory application to be costs in cause—Party succeeding is entitled to costs of application unless final order expressly excludes them. A I R 1924 Bom 398=26 Bom L R 282=80 I C 263.

**(14) Maintenance suits.**

—Maintenance suits—In awarding costs Courts should see if claim was excessive or exaggerated. A I R 1930 Mad 479=59 M L J 531=32 L W 729=Ind Rul (1930) Mad 839=126 I C 597.

—In a maintenance suit by a pauper—widow where the right to maintenance is established by decree, the plaintiff alone ought, as a rule, to be given costs in proportion to the amount of her success. 10 L W 540=(1919) M W N 878=53 I C 796

**(15) Mortgage Suits.**

—In suit by mortgagee to enforce his security, the order as to costs may be to give him liberty to add his costs to his security. But there must be an order for payment of costs against mortgagor or receiver disputing validity of mortgage. A I R 1930 Bom 11=31 Bom L R 1199=Ind Rul (1930) Bom 185=122 I C 857.

—S. 35—Mortgage suit.—Personal decree for costs against party, who is not mortgagor can be granted by Court. A

C. P. C. (1908) SEC. 35. (Contd.)  
(26) Special suits and proceedings,  
costs in, how ordered. (Contd.)

(15) Mortgage Suits. (Concl'd)

I R 1931 Mad 272=33. L W 263=Ind Rul  
(1931) Mad 487=131 I C 151.

—Redemption-Mortgagee alleging  
transaction to be sale will not get costs.  
A I R 1924 Bom 172=25 Bom L R 1209  
=81 I C 673.

—A mortgagee is entitled to costs in  
suit for redemption or foreclosure unless  
he has been guilty of any misconduct;  
and the fact that he claimed more than is  
found due to him is not *per se* any sufficient  
ground for depriving him of his costs. 30  
L J 204=34 I C 690.

(16) Partition Suits,

—In 21 Cal, 904, it was held that a  
mortgagee having had the benefit of a  
partition, and having accepted and  
approved of it as part of his title was,  
though not a party to the partition suit,  
bound by the equities attaching to the  
mortgaged property as incidents of the  
partition, and was therefore liable in  
respect of a proportionate share of the  
charge for costs created by the order of  
the Court made in that suit under s 222  
and such proportionate share of those  
costs should be deducted in priority out  
of the proceeds of the sale of the mort-  
gaged property.

—Absent defendant need not be  
necessarily exempted—Antecedent conduct of  
defendant leading up to necessity for  
institution of suit should be looked into.  
A I R 1925 Cal 569=29 C W N 297=86 I C  
321.

—Partition suits according to the  
Bombay and Calcutta High Courts the  
parties to a partition suit will ordinarily  
have to bear their own costs up to the  
Preliminary decree. Such an order may be  
made even though some of the defendants  
have not appealed from the decree ordering  
costs to the plaintiff. 42 Cal 451 (453, 454)  
19 C W N 233=28 Ind Cas 446. See also 10  
Cal L J 503 (516)=3 Ind Cas 247 and 20  
Cal W N 51=21 C L J 253=27 Ind Cas 465.  
and 6 Ind Cas 109 (111)=12 Cal L J 346.  
and 34 Cal 878 (882)=5 Cal L J 642.

—In a suit for partition the defendant  
pleaded but failed to prove partition defen-  
dant could be directed to pay costs of suit.  
35 C W N 115.

—Of course the Court has always a  
discretion to saddle a party with the cost  
of the suit where he unreasonably contests  
the plaintiff's right to claim a partition A  
I R 1931 C 573=35 C W N 151. See also 10  
Cal L J 503=3 Ind Cas 217.

—Or raises any other vexatious con-  
tentions. 21 I C 746.

C. P. C. (1908) SEC. 35 (Contd.)  
(26) Special suits and proceedings, costs in,  
how ordered. (Contd.)

(16) Partition Suits (Concl'd)

—The Madras High Court on the other  
hand, has held that such costs should come  
out of the estate where neither party has  
been guilty of any unfair contention. 11 L  
W 5=54 I C 382.

—Dissenting from 34 Cal 878 and  
42 Cal 451.

(18) Pre-emption Suit.

—Pre-emption suit—Costs to be borne  
by deft. in the absence of special circum-  
stances. See 109 P W R 1915=30 I C 517.

—Pre-emptor will get costs though  
he has to pay more than the purchase  
money offered. 30 Ind Cas 517 (521)=71 P  
R 1915=13 P L R 1916=109 P W R 1915.

(19) Receiver.

—Simple order for costs against Official  
Receiver—Receiver is personally liable—Ob-  
taining of leave of Court may entitle him  
to reimbursement. A I R 1929 Mad 105=55  
M L J 873=28 L W 719; 52 M 263=Ind Rul  
(1929) Mad 345=114 I C 825.

—Official Receiver or trustee in  
bankruptcy may be ordered to pay costs.  
A I R 1929 Mad 105=Ind Rul (1929) Mad  
345=55 M L J 873=28 L W 719=52 M 263=  
114 I C 825.

(20) Representation Suits.

—The order for costs in a represent-  
ative action should clearly specify whether  
it is the representative party alone or the  
representative and the parties represented  
by him that should bear the costs. 42 Bom  
566=19 Bom L R 650=42 I C 9.

(21) Reversioner

—S 35—Suit by Reversioner Several  
alienees impleaded—Costs proportionate to  
each alienee's interest should be awarded  
against him. A I R 1925 Mad 16.

—Alienations set aside in the suit by  
reversioner—costs of plaintiff must be  
proportionate to the value of the property.  
A I R 1928 M 16.

—Costs of intervenor voluntarily com-  
ing in for future personal benefit should  
not be saddled on claimant. 24 C W N 888  
=48 C 352=59 I C 581.

(22) Suit by or against minors or the  
next friend or guardian

—Minor attaining majority but guar-  
dian continuing to represent him—Guar-  
dian is liable for costs. 1929 Mad 782 (782)=  
1929 M W N 545.

—Costs may be made payable by the  
next friend or guardian personally. The  
words "by whom" in s. 35 are wide enough  
to cover guardians and next friends A I  
R 1929 M 782.

## C. P. C. (1908) SEC. 35 (Contd.)

(26) Special suits and proceedings.  
costs in, how ordered (Contd.)(23) Suit by or against trustees  
executors and administrators

—Petition for sanction under s. 18 of the Religious Endowments act 21 Cal W N 399 (341)=39 Ind Cas 388 see also (1915) 2 Mad L W 346 (348)=(1915) Mad W N 274=28 Ind Cas 637.

—Suit brought by trustee on account of infidelity towards defendant Trustee should personally be made to bear the costs 1925 Mad 194 (199)=47 M L J 801=20 M L W 659=1925 Mad W N 90=84 I C 905.

—A trustee in bankruptcy or the official Assignee is liable for costs in the same way as any other party. 51 Ind Cas 654(655, 656)=23 C W N 431 see also 1931 Nag 143 (144)=134 I C 272.

—Although costs of a suit are discretionary with the judge, the Court of Appeal will interfere with the discretion of the Court of first instance where it is found that discretion was not exercised on correct principles. Persons who are in the position of the trustees ought to have their costs out of the trust estate when a question of legal proceedings is concerned unless they have unreasonably carried on or resisted such proceedings. The Court of first instance having come to the conclusion that the mutwallis were really trustees ought to have applied this principle in making the order as to costs 21 C W N 339=39 I C 388.

—In a scheme suit the Privy Council ordered the Trustees to bear the costs in the first instance to be recouped subsequently out of the estate 24 M L J 199 (204)=15 Bom L R 13=16 C L J 640=(1912) M W N 1106=17 I C 441=12 M L T 448 P C.

## (24) Suit for Construction of will.

—Suits for construction of will—Or by the difficulties caused by the testator himself. 3 Cal L Jour 224 (234, 235). see also 1914 P C 149 (150)=41 Cal 1007=41 Ind App. 176=16 Bom L R 787=20 Cal L J 348=18 Cal W N 873=26 M L J 653=16 M L T 217=1 Mad L W 731=1914 Mad W N 624=23 I C 713 P C

(25) Will Probate or letters of  
administration of.

—The words "costs would abide the result" do not mean costs will follow the result. The discretion ordinarily vested in subordinate Courts to decide how the costs shall be borne is not taken away by the use of the words "costs would abide the result" of an appellate court 4 C W N 343, dis. Where the language of a will is the cause of litigation the costs should

## C. P. C. (1908) SEC. 35 (Contd.)

(26) Special suits, and proceedings,  
costs in, how ordered. (Contd.)(25) Will Probate or letters of  
administration of (Contd.)

properly be borne by the estate of the testator. 24 I C 96=37 Mad 476.

—Litigation caused by vagueness of—Costs should come out of estate. A I R 1925 Sind 195=19 S L R 220=78 I C 249.

—Where a decree in a probate proceeding directs that Letters of Administration should issue jointly in the names of both parties contesting and that the costs should be paid out of the estate: Held, that this does not entitle one of the joint administrators to execute the decree against the other and that the proper course to follow would be to sell or mortgage a sufficient portion of the estate in order to discharge the debt incurred paying costs. 24 I C 214.

## (26) Winding up by a liquidator.

—Costs incurred by a liquidator, whether in a voluntary or compulsory winding up of unsuccessful litigation are payable to the party entitled out of the assets of the company in priority to the costs of the liquidation. Claims of persons having equal or prior claims should be considered. A I R 1928 Bom 252=52 Bom 477=30 Bom L R 549=110 I C 33.

(27) Subject to provisions of any law  
for the time being in force.

—In land acquisition proceedings, the necessity for coming to court arises from the desire of the public authority to acquire the land and the owner cannot be forced to pay costs merely because he is compelled to sell his land and endeavours to get the best price possible. 8 S L R 126=27 I C 326.

(28) Subject to such conditions and  
limitations as may be prescribed.

—Costs of litigation prior to reference to arbitration referred to arbitration—Court cannot deal with it. (1932) All 183 (184)=1931 All L Jour 1155.

## (30) Miscellaneous.

—Respondents lodging case, but absent at hearing appeal dismissed with costs, costs of respondents down to lodging of case should be paid. A I R 1925 P C 169=49 M L J 238=L R 6 P C 126=1925 M W N 532=22 L W 306=47 A 459=41 C L J 450=27 B L R 853=87 I C 292.

—Costs of witnesses not examined though summoned cannot be taxed. A I R 1930 Oudh 432=7 O W N 815=Ind Rul (1931) Oudh 76=128 I C 748.



## C. P. C. (1908) SEC. 35 (Contd.)

(26) Special suits, and proceedings.  
costs in, how ordered. (Concl'd.)

## (30) Miscellaneous (Contd.)

—A decree for costs should not be interpreted to imply a personal decree unless there is a specific reference to any personal order for payment of costs. A I R 1930 Oudh 167=5 Luck 595, 7=O W N 138=Ind Rul (1930) Oudh 298=125 I C 170.

—Pro forma respondents against whom no relief is sought are not entitled to costs though they were necessary parties in trial Court. A I R 1929 Mad 738=52 M 845=30 L W 254=57 M L J 374=Ind Rul (1930) Mad 295=122 I C 167.

—Diet money of plaintiffs attending Court but not produced before the Court can be charged as cost where the number of witnesses is not excessive and the line of defence is not disclosed, costs of document unnecessarily produced cannot be awarded. A I R 1929 All 873=Ind Rul (1929) All 822=118 I C 230.

—Malicious prosecution of civil suit  
—No remote damage—Subsequent action for malicious prosecution does not only remedy being compensation costs. A I R 1928 Cal 1=46 C L J 455 =106 C 277.

—Power of Small Cause Court to award costs under s. 35-A is conditional upon its having express authority from High Court so to do or having jurisdiction up to Rs. 250. A I R 1926 All 554=94 I C 790.

—Part of decree reversed—No direction as to costs of lower Court—Such costs are not a debt within Contract Act, ss. 59 and 60. A I R 1927 Cal 906=104 I C 799.

—Compensation can be awarded only after objection by the opposite party. A I R 1926 Lah 472=94 I C 78.

—Court finding reference to arbitration invalid. A I R 1928 Mad 370=54 M L J 580 =(1928) M W N 228=27 L W 803=109 I C 175.

—Jurisdiction—Objection as to successful in Appellate Court but newly raised costs may be disallowed. A I R 1929 Lah 246=Ind Rul (1929) Lah 789=118 I C 533.

—Non-resident witness whether party or not is entitled to his expenses when evidence is material and necessary. A I R 1930 Bom 24=54 B 62=31 Bom L R 1020=Ind Rul (1930) Bom 121=122 I C 121.

—The words "by whom" in s. 35 include next friends and guardians of minor plaintiffs and defendants. A I R 1929 Mad 782=(1929) M W N 545=Ind Rul (1930) Mad 549=123 I C 805.

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## C. P. C. (1908) SEC. 35 (Concl'd)

(26) Special suits, and proceedings.  
costs in how ordered (Concl'd)

## (30) Miscellaneous (Concl'd)

—An expert witness ought to be allowed special expert fees as part of the costs in the case. 10 L B R 203=13 Bur L T 62 and 136=59 I C 823.

—Vindicative proceeding—Costs disallowed. A I R 1923 M 485=17 L W 358=24 Cr L J 585=73 I C 329.

—Appellate decree silent—Trial Court decree is guide to determine costs. 10 L B R 280=13 Bur L T 173=62 I C 299.

—Travelling expenses of witness are costs. A I R 1923 Cal 315=67 I C 277.

—Reasons given not supported by facts entails interference. 11 N L R 189=31 I C 880.

—Though the judges of the Appellate Court would if sitting as a Court of first instance, have come to a different decision it is not the practice of an Appellate Court to disturb the order of the first Court as regards costs, when it affirms in substance the first Court's decree. 22 C W N 929=23 C L J 606=36 I C 655.

—Suit filed in wrong Court—Costs disallowed. 23 Bom L R 850=45 Bom 1236=63 I C 41.

—Where there are several defendants and there is no specific direction for separate costs only a single set of costs will be payable. A I R 1924 B 317=26 Bom L R 209=79 I C 704=48 B 348.

—"Appeal allowed with costs" meaning of-only cost of appellate court. See Court Fees Act, S 13. 15 I C 910.

—Scheme suit to come out of temple funds. 24 M L J 199=12 M L T 448=17 I C 441 (P C.)

—Calcutta High Court Rules App Side Rules R. 29 Ch. IX. A I R 1924 C 874=39 C L J 342=80 I C 790.

## C. P. C. (1908) SEC. 35 A

—1 Section 35A was inserted by s. 2 of the Civil Procedure (Amendment) Act, 1922 (IX of 1922, which, under section 1 (2) thereof may, with the previous sanction of the Governor General in Council, be brought into force in any Province by the Local Government on any specified date; see General Acts, Vol. VII, p. 79. It has been brought into force in Bihar and Orissa, Parts of Burma, Central Provinces, Assam, Bengal and Punjab.

—Costs awarded under s. 35—A are compensatory not penal. A I R 1931 Lah 509=Ind Rul (1931) Lah 473=131 I C 377.

—In determining the amount of compensation to be awarded under S 35-A of

**C. P. C. (1908) SEC. 35 A (Concl'd)**

the C P C, it is necessary for the Court to be satisfied that the objection taken by the person was false or vexatious to his knowledge, that the objection has been disallowed and that objection was taken to it by the other side at the earliest opportunity. A L R 1933 A 650.

—Where the plaintiff's conduct leads to an inference that he has abandoned his claim, an order for compensatory costs under s. 35-A is justified. A I R 1931 Lah 509=Ind Rul (1931) Lah 473=131 I C 377.

—A suit instituted in the Court of Small Cause subsequently transferred to the regular side. Judge trying has same powers as the Small Cause Court in awarding compensation under s. 35-A. A I R 1930 Nag 133=Ind Rul (1930) Nag 44=120 I C 412.

—Order under s. 35—A can be passed against next friend of a minor. 52 All 907 =1930 A L J 1295=Ind Rul (1931) All 17 =128 I C 225.

—An order under s. 35—A is appealable under S 104 (FF). Where a Small Cause Court grants costs as compensation under S 35 A of C P C an appeal lies to the District Judge under S 24 of the Provincial Small Cause Courts Act. A L R 1933 O 470. See to the same effect 94 I C 790=A I R 1926 A 554.

—Though such order is not appealable under the code. 36 M L J 435=1919 M W N 490=50 I C 886.

**C. P. C. (1908) SECTION 36.**

—Stay order conditional on furnishing security for mesne profits—appeal of the objectors in which stay order granted accepted though ultimately the objectors failed—auction purchaser whether entitled to mesne profits under S. 36 C P C or by way of restitution—appeal from the order allowing mesne profits whether competent see A L R 1933 L 371.

—No appeal lies from execution of orders preliminary to sue, such as, leave to sue *in forma pauperis*. 17 M L T 447.

—A subsequent order of Court in regard to particular costs is executable even though those particular costs are not shown in decree. A I R 1921 Sind 13=15 S L R 11=62 I C 507.

—So also an order under O 20, r. 11 (2)—4 Bur L J 32=85 I C 291=A I R 1925 R 189=2 R 673.

—An order directing the payment of an amount to Commissioner for work done is executable as decree and s. 47 applies to such execution. 40 C L J 180=84 I C 724=A I R 1925 C 57=52 C 269.

—Judgment obtained on admission under O. XII, r. 6. Plaintiff can enforce

**C. P. C. (1908) SEC. 36 (Concl'd)**

payment of amount awarded as an order in execution proceedings without a decree being drawn up. A I R 1926 Sind 119=20 S L R 216=92 I C 562.

**C. P. C. (1908) SECTION 37.****(1) Civil Court**

—A decree was passed by a Sub-Judge. Thereafter the estate of the judgment-debtors having passed into the management of Court of Wards, the Court of Wards was added as a party to execution proceedings. Held, that the Subordinate Judge has jurisdiction to proceed with the execution notwithstanding that after decree the Court of Wards had become a party to the execution proceedings. 38 Bom 662=16 Bom L R 527=25 I C 406.

**(2) "Ceased to exist or to have jurisdiction to execute it"**

—Court passing decree can alone except under s. 38 execute decree though losing territorial jurisdiction over property subsequently. A I R 1928 Mad 746=28 M L W 885=Ind Rul (1929) Mad 289=114 I C 545.

—And the general rule is that the decree of final Court alone can be executed: 11 L B R 163=A I R 1921 L B 37.

—As to the interpretation of the phrase "Court of first instance" the principle in clause (b) should be applied. A I R 1926 Mad 813=51 M L J 161=(1926) M W N 395=95 I C 587.

—Where the Court which passed a decree has ceased to exist, the decree should be executed by the Court which would have jurisdiction to try the suit in which the decree was passed. Where there are in fact two independent courts within the same territorial limits having concurrent jurisdiction it is open to either of such courts to execute the decree of the other. 49 I C 94.

—In other words, the power to execute a decree is vested in the Court which passed the decree but in the event of the Court ceasing to exercise jurisdiction it would be exercised by the Court which would have power at the time when the application was filed to try the suit. 49 I C 958.

—Court passing decree abolished but subsequently re-established can execute the decree provided it would have jurisdiction to try suit to which the decree relates if instituted at time of execution. A I R 1926 Pat 209=4 Pat 688=7 P L T 333 =92 I C 900.

—A court which passed a decree for sale cannot after a transfer of jurisdiction even entertain an application for the sale of the suit properties. The same will be the case in the case of a decree for posses-

## C. P. C. (1908) SEC 37 (Contd)

## (2) "Ceased to exist or to have jurisdiction to execute it" (Contd)

sion 30 M 537; 27 M 118 dist. 8 M L T 299; 26 M L J 189, foll. The validity of the original presentation of an application for execution of a decree is not affected by a subsequent order of return for correction of defects unless they are such as to prejudice the judgment-debtor substantially. An application for execution returned for correction of defects not essential to the validity of the application, but not represented after correction, is a step-in-aid of execution and valid for purposes of S. 48 of C P Code. 26 I C 413. But See 42

Mad 821 (F B)

—Territorial jurisdiction of the Court passing decree taken away between the date of the preliminary decree in mortgage suit and final decree and it passes final decree also it has power to transmit execution to Court having territorial jurisdiction but has no power to sell property. A I R 1927 Mad 627-50 M 882-52 M L J 605-38 M L T 351-25 L W 671-(1927) M W N 282-103 I C 245.

—A obtained a decree against B in the Court of the 1st Munsif of Howrah. After the decree, the local area within which the cause of action arose, and the judgment-debtor resided, was transferred to the 2nd Munsif. A then applied to the 2nd Munsif to execute his decree. Held, that the 2nd Munsif had no jurisdiction, and the 1st Munsif alone had jurisdiction to execute the decree. 25 Calc. 315. But in 5 Calc. W N 150-28 Calc., 238, in which the facts were similar, it was held that the decree could be executed by either Court. Application for transfer of a decree—Judgment-debtor's objection as regards the executability of the decree—Proper Court to decide such objection is the Court, which transfers decree, A I R 1930 Oudh 305-7 O W N 363-Ind Rul (1930) Oudh 177-123 I C 881.

—But where whole business of one Court transferred to another Court by which the decree was passed cannot be limited to the original Court. A I R 1922 Mad 10-46 M 1-42 M L J 344-15 L W 458-(1922) M W N 349-31 M L T 79-65 I C 727.

—Ss. 37 and 38 of the Code must be read in the sense that S. 37 by the use of the word "include" does not take away from the jurisdiction of the Court which passed the decree, the power to execute the decree merely because the pecuniary jurisdiction of the Court has been altered 42 Mad 821 (F B) followed. A L R 1933 C 740.

—The pecuniary jurisdiction of a Munsif was raised by an order of the Local Govt. on a certain date, but the date of

## C. P. C. (1908) SEC. 37 (Contd)

## (2) "Ceased to exist or to have jurisdiction to execute it" (Contd)

the issue of notification to that effect was long after. Between these two dates an application was made to the Munsif, which but for the order of Govt. should have been made to the sub-Judge. Held that notwithstanding the delay in issuing the notification the Munsif acquired the superior jurisdiction and was competent to dispose of the application. 2 O L J 212-30 I C 205.

—If subsequent to the passing of money decree the area in which the judgment-debtor lived transferred from the jurisdiction of one Court to another Court latter Court can execute the decree. A I R 1924 Mad 32-45 M L J 210-(1923) M W N 406-18 L W 17-73 I C 956.

—Per Chief Justice and Ayling, J.—The Court which passed the decree is a proper Court for execution within the meaning of Cl. 5 of Art. 182 of the Lim. Act, even though the property over which it had jurisdiction at the time of the decree was taken away from it and assigned to another Court at the time of the presentation of the application for execution. 37 M L J 284-26 M L T 223-11 L W 63=(1919) M W N 640-53 I C 213 (F. B.) overruling 37 M 462.

—Transfer of territorial jurisdiction after decree—Application for execution to Court passing decree—Whether saves limitation. See 31 M L J 90-20 M L T 327-35 I C 237.

—The words used in S. 37 (b) are not merely "where the Court of first instance has ceased to have jurisdiction," but they are "where the Court of first instance has ceased to have jurisdiction to execute it", that is, only when the first Court had lost jurisdiction to execute the decree will the second Court take the place of the Court which passed the decree by reason of the section. This is the particular point which was dealt with by the Full Bench in 42 M 821 (F B) and the Full Bench held that the first Court never lost its jurisdiction to execute the decree. If so, the first Court continues to be "the Court which passed a decree" within the meaning of S. 37 and the second Court cannot take its place. The decision in 50 M 892 is directly opposed to the actual Full Bench decision in 42 M 821 (F B) and cannot be regarded as good law. 55 M 801 (804-9)-62 M L J 687-35 L W 742-1932 M W N 255-137 I C 305-A I R 1932 M 418-I R 1932 M 373-A L R 1932 M 177 (F B).

—A mortgage decree was passed by Addl. Dt. Munsif of Tinnevely in respect of properties within the territorial jurisdiction of the Koilpatti Court. The Tinne-

**C. P. C. (1908) SEC. 37. (Contd)****(2) "Ceased to exist or to have jurisdiction to execute it" (Contd)**

velly Court had no local jurisdiction at all, but was established simply to aid the other courts of the District. On a question arising whether the Koilpatti Court had jurisdiction to execute the decree under S. 38 of the C. P. Code when the Addl. Court of Tinnevely had not ceased to exist. Held, that the Koilpatti Court had no such jurisdiction unless and until the decree was transferred to it for execution. An order transferring a decree for execution should not be made so as to evade the provisions of the Lim. Act, or to validate an invalid application. 42 Mad 461=36 M L J 199=10 L W 370=51 I C 102.

—Territorial jurisdiction over mortgaged property assigned after decree to another Court by District Judge while redistributing civil work—Court passing decree can execute it. A I R 1921 Pat 152=6 P L J 304=(1921) Pat 186=2 P L T 374=62 I C 487.

—Where the notification does not purport to transfer business specifically or by general description from the Court which passed the decree to the Court to which jurisdiction over the mortgaged property is transferred, the latter Court cannot execute the decree without transmission of the same from the Court which passed it. The decisions which recognise the jurisdiction of the Court acquiring territorial jurisdiction over the mortgaged property by virtue of the notification to execute the decree without transmission from the Court which passed the decree would be right if the notifications in those cases amounted to a transfer of a certain amount of business from one Court to another. 55 M 801=62 M L J 687=35 L W 742=1932 M W N 255=137 I C 305=A I R 1932 M 418=I R 1932 M 373=A L R 1932 M 177 (F B).

—In a mortgage suit a preliminary decree for nearly Rs. 2,000 was made by a Munsif with power to try suits up to the value of Rs. 2,000. The Munsif being transferred and his successor not being vested with the same power the final decree was made by the Subordinate Judge. Execution was however taken out in the Court of the Munsif who meanwhile had been empowered to try suits up to Rs. 2,000. Held, that the Munsif's Court had jurisdiction to execute the decree under S. 150 C. P. C, though not under Ss. 37 and 38 of the Code. 24 C W N 899=57 I C 879.

—Court which passed the decree—Recognition of transferee—Privy Council decree—Sending of, by High Court to lower court. See 38 Mad 832=26 M L J 185=15 M L T 143=23 I C 235.

**C. P. C. (1908) SEC. 37. (Concl'd)****(3) High court decree.**

—Where the High Court wrongly interpreted an order in Council, when it executed it, the Judicial Committee expressed its opinion as to the intention of the order, pending an appeal from the decision of the High Court. 27 M 153, P C=31 I A 64=8 Sar 621.

—In Subordinate Judge's Court—Appeal against High Court decree pending before Privy Council—Jurisdiction of Sub Court to stay execution see. (1917) Pat 285 =42 I C 835.

—Where a District Munsif was asked to execute a decree passed by High Court, held, he had no power to extend the time allowed for payment in the decree, such extension can be granted only by the Court which passed the decree. Where the decree contains a direction to the decree holder to pay Rs. 50 within a certain time, it must be read as a condition precedent to the execution of the decree. 1911. 2 M W N 240.

**C. P. C. (1908) SEC. 38***Synopsis.*

- (1) Applicability and scope of the section.
- (2) Construction of decree by executing Court
- (3) Duty of Court
- (4) Equitable execution

**(1) Applicability and Scope of the Section**

—S. 38 of the C. P. Code, 1908, is exhaustive and a decree can only be executed by the Court which passed it or by the Court to which the decree is sent for execution. (1911) 2 M W N 47=10 M L T 79=12 I C 78.

—Though the value of the property may greatly exceed the value of the decree the executing Court still has to decide the objection. 101 P R 1915=191 P W R 1915 =32 I C 43.

—The Code does not prohibit concurrent execution; 11 L B R 15=63 I C 809=A I R 1921 L B 25.

—That is to say, under s. 38 a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution and where the trial Court is not the Court to which the decree is sent for execution, section 38 prevents it from proceeding with the suit to set aside sale as a matter in execution and executing the decree. A I R 1922 Nag 189=68 I C 693.

—As to executability in case of change of territorial jurisdiction; 18 L W 17=1923 M W N 406=45 M L J 210=73 I C 956=A I R 1924 M 32.

—Jurisdiction to execute a decree can be exercised both by the Court which

## C. P. C. (1908) SEC. 38 (Contd.)

## (1) Applicability &amp; Scope of

## the Section (Contd.)

passes it as well as by the Court to which the business of the former Court has been transferred. 107 I C 195.

—Sales by Receiver—Rule as to territorial jurisdiction necessary before execution prima facie not applicable unless main purpose of appointment of Receiver is to effect sale. A I R 1930 Cal 502=34 C W N 238=51 C L J 209=57 C 964=Ind Rul (1931) Cal 17=128 I C 97

—Territorial jurisdiction is necessary to carry on execution. 35 C W N 77=52 C L J 569=132 I C 149=A I R 1931 C 312.

—Order under S. 34 (c) Guardians and wards Act directing guardian to pay a sum of money to petitioner if executable as a decree. See (1917) M W N 602.

—Although under S. 38 C. P. C. it is imperative that a decree should follow the Judgment and it is the duty of the court to have one drawn up yet an omission or neglect by the court in the performance of its duties in this respect cannot deprive an appellant of his right of appeal. 66 P R 1919=52 I C 479. See also 1 Ind Jur N. S. 189.

—An Executing Court has power to construe the decree in accordance with law. 2 Pat L T 396=65 I C 224. and according to the plain meaning of the terms of the decree. A I R 1929 Mad 105=52 Mad 263=55 M L J 873=28 M L W 719=114 I C 825.

—But if the decree is clear and unambiguous the executing Court must give effect to it even if it regards the decree as erroneous. 3 L L J 263=67 I C 740.

—If a decree is ambiguous both the judgment and the plaint can be looked into. A I R 1927 Mad 416=52 M L J 182=38 M L T (H. C.) 143=1927 M W N 202=100 I C 841.

—Where a decree is incomplete and ambiguous it is not the duty of the executing court to complete it and to give a definite meaning. 13 A L J 428=29 I C 213.

See also 34 I C 344.

—Failure to include in the decree a clause as to interest allowed in the judgment is not one of ambiguity. The remedy is to get the decree amended. A I R 1930 Cal 349=51 C L J 280=126 I C 764.

—An Executing Court can go behind a consent decree and look at the terms of the compromise in accordance with which the decree was passed, in order properly to understand what the decree was. 21 C W N 835=37 I C 916.

## C. P. C. (1908) SEC. 38 (Contd.)

## (2) Construction of decree by

## executing Court.

—A decree was against the joint family properties as well as against the separate properties of a member. On the member quitting the family the decree could be executed against his share in the family as well as the separate properties that existed at the date of decree and not against any properties acquired by him subsequently. A I R 1922 Lah 84=3 Lah 14=65 I C 731.

—Contention that decree and judgment are erroneous, not available—Order for costs—No power to ignore. 3 L W 499=34 I C 787.

## (3) Duty of Court

An executing Court cannot tamper with decrees which must be executed literally; when a decree cannot be executed literally it cannot be executed at all. Plff. obtained a decree that he was entitled to share the water flowing through a certain rajabaha equally with the deft. Subsequently the canal authorities made certain alterations, as a result of which the volume of water flowing through the rajabaha was increased and many other persons besides the plff. and the deft. became entitled to a share in the water. Held, that the decree in favour of the plff. was no longer capable of execution. 59 P W R 1918=44 I C 539.

—Relief on the ground of mistake can be given in cases of execution sales. A I R 1928 Cal 865=116 I C 634.

—Declaratory decree by appellate court—Lower court to clothe that declaration in the form of a mandatory order and give effect to it. A I R 1922 Oudh 34=9 O L J 5=66 I C 982.

—Piggott, J. (Walsh, J. dissenting)—An executing Court could not be permitted to get round the terms of a decree of (a single Judge of) the High Court which was on the face of it perfectly clear and unambiguous and the parties not having applied for review of judgment to the single Judge of the High Court or challenged the decree on this point under the Letters Patent, are not entitled to seek relief by asking the Court executing the decree to interpret it in the light of the pleadings and of the record generally so as to put a meaning upon it inconsistent with its plain and unambiguous terms. Walsh, J.—Even if the decree was erroneously drawn up in the High Court, the High Court had inherent powers, and ought to amend it in an appeal or in execution. A decree of a Court cannot operate upon a subject matter



**C. P. C. (1908) SEC. 38 (Concld)****(3) Duty of Court. (Concld)**

which was not before the Court. A decree can only operate upon the pleadings. It cannot operate upon or be construed as dealing with any matter not in the suit. The practice of construing decree, discussed. 34 I C 344.

—Court must execute the decree as it stands. 31 I C 564.

—In a suit on mortgage a Court passed an order for a preliminary decree and decided inter alia that in case proceeds of the property mortgaged should not suffice to liquidate the decretal debt with costs and interest, the debts should be held personally liable for any deficiency. The decree drawn up however, contained the words "be at liberty to apply for a personal decree" Held, that the words in the decree must be interpreted in conformity with the judgment to mean "shall be at liberty to apply for execution of the decree against the debts, personally" and that the Court on the execution side had no power to go into the question whether the debt was personally liable or not but was bound to execute the decree as it stood. 75 P W R 1916=32 I C 820.

**(4) Equitable Execution.**

—Equitable execution should not ordinarily be allowed when there is no bar to legal execution. A I R 1930 Cal 502=34 C W N 238=51 C L J 209=128 I C 97.

**C. P. C. (1908) SEC. 39***Synopsis.*

- (1) Appeal
- (2) Application for execution
- (3) Application for transfer
- (4) Concurrent Execution
- (5) Court which passed decree
- (6-7) Limitation
- (8) 'May,' on application etc
- (9) Outside British India
- (10) Outside Jurisdiction
- (11) Practice
- (12) Property outside local limits
- (13) Resides
- (14) Re-transfer
- (15) Second transfer
- (16) Value: Jurisdiction
- (17) What decrees may be executed
  - (a) General
  - (b) Declaratory decree
  - (c) Executability of decree
  - (d) Ex parte decree
  - (e) Final decree
  - (f) Maintenance decree
  - (g) Mortgage decree
  - (h) Original decree
  - (i) Partition decree
  - (j) Pre-emption decree
  - (k) Privy Council decree
  - (l) Probate proceeding
  - (m) Rent decree
  - (n) Miscellaneous.

**C. P. C. (1908) SEC. 39 (Contd)****(1) Appeal**

—An appeal lies against an order rejecting an application for the transfer of a decree. 8 Cal W N 575.

—Order in execution of decree transferred by Small Cause Court to Munsif's Court is appealable as if passed by Munsif: 103 I C 344=A I R 1927 A 740.

**(2) Application for Execution.**

See cases under O. 21, rr. 10 to 25.

**(3) Application for transfer.**

—A mere application for transfer of a decree is not application for execution.

94 I C 482=A I R 1926 A 423;

See also 16 C 745; 22 C 921.

—See, however 24 C 247; but it is nevertheless a step-in-aid of execution. A I R 1931 Cal 312=52 C L J 569=35 C W N 77 =132 I C 149, See also 2 A 284; 6 C 513; and 22 C 375;

—Though any application made to the former Court after transfer to another cannot be a step-in-aid. 2 Pat 247=A I R 1923 Pat 384=74 I C 608.

—An application for a certificate is a step-in-aid of execution. Consequently where the decree-holder having obtained his order does not carry out the order which he has obtained and the decree is not in fact sent, the Court passing the decree does not lose jurisdiction. A I R 1922 Pat 301=3 P L T 298=1 Pat 328=65 I C 332.

—Application for executing a decree and application for transferring a decree to another Court for execution are to different and distinct applications. Whether a particular application is an application for execution or for transfer of a decree is to be decided on the nature of the prayer made, and not on the choice of a particular form. An application for transfer of a decree for execution cannot become an application for execution simply because the form of the latter has been adopted. 11 P 785=13 P L T 498=A I R 1932 P 309 (311).

—Application need not be in any particular form. 11 P 785=13 P L T 498=A I R 1932 P 309 (311).

—On the transfer of a decree by the Sub-Judge to another Sub-Judge without sending it to the District Judge under r. 5 of Or. 21 C P C; and the latter Sub-Judge ordering sending of the decree to another Sub-Judge and on the execution proceedings having been taken out in the last Court, it was held that

## C. P. C. (1908) SEC. 39 (Contd)

## (3) Application for transfer. (Contd).

the procedure was not proper and that therefore the last Court had no jurisdiction to entertain the execution petition. 22 Cal 764: 49 I C 174; and 49 I C 399 referred to. A I R 1933 I 1093.

—Transfer of decree for execution to another Court is not by itself an execution of the decree. A I R 1929 All 390=(1929) A L J 553=Ind Rul (1929) All 465=115 I C 365.

—S. 39 has no application to a decree under the Presidency Small Cause Courts Act. A I R 1928 C 265.

## (4) Concurrent Execution.

—Code does not prohibit the sending of a decree for execution to two Courts at the same time A I R 1927 Rang 258=5 R 397=104 I C 133 See also 15 A L J 532=39 I C 729.

—A decree may therefore be executed in more than one Court simultaneously whatever may be the case with regard to institution of suit. A I R 1929 Bom 418=53 B 844=31 Bom L R 1105=Ind Rul (1930) Bom 219=123 I C 507.

—Where a decree of the High Court passed on the Original Side was transferred on the application of a decree holder for execution to the court of a Dt. Munsif for execution. Held, that S. 39 cl. (1) applied and that the question whether the court had jurisdiction to execute the decree sent to it does not arise. Held further, that cl. 2 of S. 39 refers only to cases where a court passing a decree sends it of its own motion to a subordinate court for execution 15 M L T 148=(1914) M W N 97=22 I C 275.

## (5) Court which passed decree

—In all cases where original Courts lost jurisdiction over subject-matter of suit between passing of decree and executing it, it should send its decree to the Court which has territorial jurisdiction. A I R 1924 Mad 457=46 M L J 250=(1924) M W N 38=19 L W 16=79 I C 806

—But a decreeing Court is not deprived of its jurisdiction by the mere act of transfer of the darkhast. A I R 1929 Bom 413=31 Bom L R 1105=53 B 844=Ind Rul (1930) Bom 219=123 I C 507.

—Court passing decree can, therefore entertain application for its execution, determine questions as to executability, but cannot order sale of properties not within its territorial jurisdiction. 52 J L J 569=132 I C 139=35 C W N 77=A I R 1931 C 312.

## C. P. C. (1908) SEC. 39 (Contd)

## (5) Court which Passed decree. (Contd)

—Sending of a certificate does not of itself put an end to the jurisdiction of the Court to execute the decree, and the sending of a certificate intimating result of each application under executive orders of High Court if any cannot do so at all. A I R 1922 Nag 210=18 N L R 178=68 I C 657.

—Where though an order for transfer of the decree was made under S. 39 C P C but there was no actual transfer of the decree as the papers were not transmitted to the transferee Court, the transferor Court has jurisdiction to execute the decree. A L R 1933 S 198.

—Where a Court transfers a decree for payment of money, on application of the decree-holder to another Court by grant of a certificate of non-satisfaction and the property is attached by transferee Court, the former Court does not lose jurisdiction to execute the decree and is competent to proceed with the execution except where the value of the property is greater than the amount of decree and decree-holder is likely to realize the whole amount of its sale, when a further order for arrest of the judgment-debtor is not justified. A I R 1930 Lah 199=Ind Rul (1930) Lah 164=121 I C 68.

—The Court to which a decree for the sale of immoveable property is transmitted for execution has no power to pass a supplementary decree. The power of passing such a decree after judicial determination of the question of the liability of the mortgagor is in the Court in which the mortgage suit was originally instituted. 33 M L J 382=(1918) M W N 4=23 M L T 257=42 I C 953.

—A Court whose decree has been sent, under S. 39 (1) (c) of the Code, for execution by the sale of immoveable property situate within its jurisdiction is competent to carry out the execution notwithstanding that the whole of the property covered by the decree is not situate within the local limits of its jurisdiction. 43 P R 1918=46 I C 9.

—Where a Court has power to execute an award as if it were decree of that Court as under Bombay Co-operative Societies Act, s 43 and rr 31 and 34 thereunder: it can also transfer it under s. 39. A I R 1922 Bom 377=24 Bom L R 909=46 B 128=64 I C 317.

—If a Court has no pecuniary jurisdiction to entertain and try an original suit it is incompetent to execute the decree in that suit. The suit, therefore, cannot be transferred to it for execution under s. 39. A I R 1922 Pat 188=3 P L T 422=(1922) Pat 229=1 Pat 651=67 I C 538.

**C. P. C. (1908) SEC. 39 (Concl'd)****( 5 ) Court which passed decree ( Contd )**

—Jurisdiction of a Court transferring decree for execution to another Court is not confined to cases in which there is no property within the jurisdiction of the Court which passed the decree sufficient to satisfy decree. 28 O C 199=85 I C 411=A I R 1925 O 481.

—Transmission for execution to another Court—application for execution in the original Court by assignee decree-holder—Courts jurisdiction to entertain the application see A L R 1933 M 537=63 M L J 788=36 L W 750=A I R 1933 M 10.

—Judgment debtor's death before a certificate of full satisfaction of decree is issued does not divest Court of transfer of its jurisdiction over the execution proceedings, are merely suspended until the judgment-creditor has obtained an order from the Court which passes the decree for inserting the name of the legal representative. A I R 1930 Sind 16=Ind Rul (1929) Sind 189=118 I C 221.

—A Court to which a decree is transferred for execution has no jurisdiction to entertain an application for bringing on the record the legal representative of a deceased decree holder. The application must be made to the Court which passed the decree. Obiter—The execution of a decree so transferred need not necessarily be stopped because the application for substitution has to go to the Court which passed the decree. 55 I C 156.

—The certificate prescribed by S. 41 from the Court of transfer is not a condition precedent to the jurisdiction of the Court which passed the decree to entertain the application. It is not also necessary that the Court which passed the decree should, after entertaining the application, stay its hand until it receives the certificate prescribed by S. 41 from the Court of transfer. 63 M L J 788= 36 L W 750=140 I C 591, but see 12 O L J 287=2 O W N 313=29 O C 84=89 I C 99=A I R 1925 O 428.

**( 6-7 ) Limitation.**

—But after the transfer of the decree for execution to another Court an execution application to the Court which passed the decree is not one made to a proper Court and hence though it may be a step in aid of execution, it cannot serve for the purpose of saving limitation under Art 182 of the Limitation Act. When once a decree is transferred to another Court for execution, it is only that Court that has session of the execution proceeding and continues to do so till it certifies according to the provisions of S. 41 of the C P

**C. P. C. (1908) SEC. 39 (Contd)****( 7 ) Limitation. ( Concl'd )**

Code. Till then the Court passing the decree has no jurisdiction to entertain execution applications unless current execution is ordered or proceedings stayed for purpose of execution in that Court 20 A 123 Followed 37 Mad 231=12 M L T 119=(1912) M W N 721=23 M L J 236=15 I C 738. (Confirmed on appeal by the P. C. see 39 Mad 640=31 M L J 300=36 I C 682= 43 I A 238) but see 36 L W 750=63 M L J 788.

—Where the limits of the jurisdiction of the old Court were altered, and an application for execution was made to the Court that passed the decree, such decree should be forwarded to the proper Court, but it has the effect of saving limitation. A I R 1931 Cal 312=52 C L J 569=Ind Rul ( 1931 ) Cal 533=58 C 832=35 C W N 77=132 I C 149.

—Court in considering application under s. 39 must go into the question of limitation. A I R 1929 Mad 199=29 L W 246=(1929) M W N 36=Ind Rul (1929) Mad 497=116 I C 113.

—Execution proceedings were started within 12 years and the robkar in transferring execution under s. 39 considered issue of limitation as not to arise on transfer, held, that the robkar did not intend to decide that objection to limitation could not be taken in transferee Court. A I R 1930 Lah 118=11 Lah L J 501=Ind Rul (1930) Lah 567=125 I C 55.

**( 8 ) "May" on application etc.**

—The word "may" used in S. 39 does not mean that it is in the discretion of the Court which passed the decree either to execute the decree or to send the application for execution to another Court, when the property, against which execution is sought, is situated outside the jurisdiction of the Court which passed the decree. The discretion given there indicates that the Court should send the application for execution to another Court where it thinks that the decree is executable in the way prayed for. 59 C 199 (201-2)=35 C W N 1096=136 I C 533=A I R 1932 C 213=I R 1932 C 213.

—Order of transmission of a decree by one Court to another is a Ministerial Act can be made exparte. A I R 1928 Rang 40=5 R 775=6 Bur L J 225=106 I C 857.

—But it has been held by Madras High Court that Order transferring decree after hearing judgment-debtor's objections is not ministerial: 1929 M W N 36=116 I C 113=29 L W 246=A I R 1929 M 497.

## C. P. C. (1908) SEC. 39 (Contd)

## (8) "May" on application etc. (Concl'd)

—Transfer of decree for a limited purpose, e. g. to enable decree-holder to share in rateable distribution of sale proceeds held by another Court is not valid. Pat L W 582.

## (9) Outside British India.

—See s. 43; and compare. 12 Bom 230.

—A British Indian Court which passes a decree cannot transmit the same for execution to a Court in a native state. It is a well-known principle of jurisprudence, that no state can legislate for the procedure to be followed in another state. An order transmitting a decree to a Native State or execution is not sanctioned by the C. P. Code, 12 Bom 230 foll. A long course of practice on a question of procedure can be departed from where want of jurisdiction is established. Where an order is passed and it is without jurisdiction, the party aggrieved is entitled when it comes to his notice to apply to vacate it, even though he has not appealed against the same. 32 M L J 487-5 L W 646-41 I C 41.

## (10) Out Jurisdiction.

—A Court which passed a decree cannot of its own motion send it for execution to any Court subordinate to it when the value of the subject matter of the suit, in which the decree was passed, exceeds the pecuniary limits of the ordinary jurisdiction of that Subordinate Court. 4 Bur L T 224-12 I C 27.

—The jurisdiction of a court is circumscribed by and co-extensive with its territorial limits. Where property sought to be attached is bona fide without the jurisdiction of the original court whose decree is sought to be enforced and is in the hands of a third party who is not amenable to or permanently residing within the jurisdiction of the executing Court the decree of the executing court must be transferred to the Court within the local limits of whose jurisdiction the property sought to be attached is for the time being. 4 Pat L J 141-(1919) Pat 155-43 I C 943.

—But a court can execute a decree for sale of the mortgaged property, is wholly out of its jurisdiction. A I R 1925 Pat 139; 6 P L T 71-80 I C 901.

—See to the same effect. 50 M L J 161-95 I C 12-A I R 1926 M 421-49 M 746.

## (11) Practice

—Executing court-Transfer of territorial jurisdiction. See 43 Mad. 135-37 M L J 442-26 M L T 271-11 L W 232-53 I C 579.

## C. P. C. (1908) SEC. 39 (Contd)

## (11) Practice (Concl'd)

—As to legality of transfer award under Arbitration Act s. 11 See A I R 1931 Nag 170-Ind Rul (1931) Nag 171-134 I C 683.

—When a petition containing two prayers viz. to transfer the decree and to hand over the decree papers to the decree holders was filed. Held that the second relief asked for was ancillary and incidental to the main prayer for the transfer of the decree. A L R 1933 S. 259.

—Issue of injunction to Court passing decree after transfer of decree for execution to Collector is futile. A I R 1929 Oudh 235-4 Luck 635-6 O W N 226-Ind Rul (1929) Oudh 375-117 I C 471

## (12) Property outside local limits.

No Court can execute a decree in which the subject-matter of the suit or of the application of the suit is property entirely outside the local limits of its jurisdiction except in cases of decrees for sale of mortgaged properties. A I R 1925 Pat 139-6 P L T 71-80 I C 901.

—Decree transmitted to Agent's Court for execution if nothing more is said, it is presumably intended that it should be executed against those properties over which the Agent's Court has jurisdiction. And not against properties situated within the jurisdiction of the transmitting Court. A I R 1924 Mad 144-18 L W 747-76 I C 269.

—Irrespective of the mode in which the decree is sought to be executed before a decree can be transferred to another Court within the jurisdiction of which judgment-debtor resides it is necessary for the decree-holder to satisfy the Court that the judgment-debtor has not sufficient property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy the decree. A I R 1929 Cal 529-33 C W N 620-56 C 1176-Ind Rul (1930) Cal 225-122 I C 289.

—Execution of money decree—Sale of property not within local limits of the Jurisdiction of the Court which passed the decree can only be held by the Court within whose local limits property is situate, and an order of attachment before judgment does not make any difference. A I R 1929 Cal 818-33 C W N 848-57 C 67-Ind Rul (1930) Cal 651-126 I C 43.

—High Court on its Original Side can appoint a Receiver by way of execution in respect of property situated outside its ordinary original jurisdiction in proper case. A I R 1930 Cal. 502-34 C W N 238-51 C L J 209-57 C 964-Ind Rul (1931) Cal 17-128 I C 97.

## C. P. C. (1908) SEC. 39 (Contd.)

## (12) Property outside local limits. (Contd.)

—Where a temporary court is established without any definite local jurisdiction execution against immoveable property in respect of a decree passed by it ought to be effected in the Court to which has been assigned local jurisdiction over the suits of such property the decree being transferred for the purpose to that Court. *Held*, that the decree holder should have applied under S. 39 C. P. C. to have the decree transferred for execution to the Court having jurisdiction over the properties sought to be attached. 37 M 462, 473, rel. 31 M L J 22-35 I C 296.

## (13-14) Re-transfer.

—Decree transferred for execution to another Court an application to the parent Court to re-transfer it to a third Court is proper. A I R 1928 Mad 493=110 I C 829.

—Decree transferred for execution to another Court, an application to re-transfer the same for execution to a third Court, or to execute itself, can be made to the Court passing the decree. A I R 1927 Nag 367=10 N L J 24=101 I C 279.

## (15) Second Transfer.

—District Munsif receiving by transfer a decree of a village Court or withdrawing execution of a decree to his own file has no jurisdiction to transfer it for execution to another District Munsif's Court. 46 M 734=32 M L T (H C) 403=18 L W 19=44 M L J 643=73 I C 792.

## (16-17) What decrees may be executed

## (a) General

—Execution of a rent decree against the tenants is limited to their right, title and interest and does not affect the holding. A I R 1926 Cal. 1219=44 C L J 167=98 I C 206.

—A decree on the face of it personal against one cannot be executed against others or the properties of others. A I R 1928 Mad 362=54 M L J 278=27 M L W 804=109 I C 557.

## (b) Declaratory decree

—An executing Court must take the decree as it stands; that a decree is in some respect difficult to execution does not render it incapable of execution. 63 I C 975.

—As to the meaning of "Decree incapable of execution" see (1917) Pat. 253 =38 I C 154.

## C. P. C. (1908) SEC. 39 (Contd.)

## (16-17) What decrees may be executed. (Contd.)

## (c) Executability of decree

—A suit for cancellation of a bond was decreed and it provided that the defendant shall be entitled to recover Rs. 5,000 from plaintiff. The latter portion is only declaratory and cannot be executed by defendant. A I R 1923 Oudh 160=77 I C 776.

—The omission to take objection to assignment or decree and to its transmission to another Court does not preclude the judgment-debtor from raising the question of executability in the executing Court. A I R 1923 Mad 487=17 M L W 319=32 M L T 157=73 I C 213.

—In a suit for declaration of a certain decree as invalid and an injunction against with-drawing monies in court, injunction was granted on the condition that plaintiff should pay interest. The injunction was finally dissolved—The order granting interest could be executed. A I R 1927 Mad 927=1927 M W N 529=39 M L T 394=104 I C 750.

—An order in execution which is the basis of subsequent proceedings, passed against a person who was then dead, is an absolute nullity and cannot be the foundation for any later orders. 161 P W R 1911 =11 I C 869.

—Decree not Specifying relief—Incapable of execution—No question of limitation till amendment. Bengal Tenancy Act, S. 184, 21 I C 615.

—Decree declaring maintenance and making it a charge on certain properties. Though the decree was declaratory in form the charge could be executed without recourse to the procedure for enforcement of mortgage. A I R 1926 Pat. 31=4 Pat. 693=6 P L T 802=88 I C 923.

## (d) Ex parte decree.

—An ex parte decree obtained in a mortgage suit was transferred but the transferee neither got his name substituted in the place of the decree-holder nor was any notice under O 21, r. 16, served either upon the decree-holder or upon the judgment debtor. On application of judgment-debtor making only the decree holder party the ex parte decree was set aside. *Held*, the transferee could not proceed with the execution before the order setting aside the the ex parte decree was set aside: 29 I C 673.

—Where an ex parte decree is set aside and fresh decree passed on merits execution proceedings under the former ex parte decree are rendered nullity. 103 P R 1916.

—Where an ex parte decree was passed against two but was executed against one.



## C. P. C. (1908) SECTION 39 (Contd.)

## (16-17) What decrees may be executed (Contd.)

## (d) Ex parte decree. (Concl'd.)

and then the decree was set aside it was held that the order directing refund by decreeholder in effect re-opened the execution proceedings. 21 C W N 571-40 I C 78.

—As to remedy of the aggrieved party against ex parte orders and orders of dismissal for default in course of execution proceedings. See 21 C W N 769.

—Objection- petition by judgment-debtor against ex parte order may be treated as an application to treat it as one to set aside the ex parte order: 37 M 462.

—As to setting aside of ex parte orders see also 0 22, r. 10.

## (e) Final decree.

—When the decree of an appellate Court affirms that of the Court below, the appellate decree is the final decree and is the only decree capable of execution. 16 I C 945.

—But the final decree based on a preliminary decree which latter decree has been itself reversed has no life in it and the executing Court is competent to determine whether the decree sought to be executed is in force or not and refuse execution if it has been suppressed. 17 C W N 868-18 C L J 209-19 I C 630.

—Final decree in mortgage suit without preliminary decree is only an irregularity: 96 I C 686-A I R 1926 C 1179.

—Execution of decree as to cost awarded in preliminary decree need not be stayed till final decree. A I R 1926 Lah. 605-96 I C 416.

## (f) Maintenance Decree.

—In execution of a maintenance decree, the decree-holder made applications for sale of certain properties, alleging that they were liable to be sold under the decree. The judgment-debtor had notice of these applications but did not object to the sale. In a subsequent application for sale, it was contended that the decree did not authorise the sale of property. Held, that the plea was untenable. 10 Ind. Cas. 632.

—But where a maintenance decree provides that the decree holder should have the right to enforce the recovery of the sums due to her by proceeding against the person and property of the defts, held, that the decree cannot be considered merely a declaratory decree, and that it can be enforced in execution. 25 I C 684-1 O L J 403.

—So also a maintenance decree holder with charge on properties can enforce the

## CIV PRO CODE (1908) SEC 39 (Contd.)

## (16-17) What decrees may be executed. (Contd.)

## (f) Maintenance Decree. (Concl'd.)

claim against other properties after exhausting the hypotheca without recourse to a fresh suit. 2 Pat 796-A I R 1924 P 262 =74 I C 867.

—Where a maintenance decree makes no provision for interest it cannot be awarded in execution. A I R 1926 Cal. 505 =53 Calc 42-94 I C 997.

—Appointment of receiver-Execution sale of mortgage decrees-Effect see (1915) M W N 245-28 I C 551.

## (g-h) Original Decree.

—Original decree fixing date for payment—Time expiring owing to appeal and stay of execution—Application to fix fresh date—Proceeding in execution—Forum. See 22 I C 368.

## (i) Partition Decree.

—Where an award and the decree based thereon for partition of immoveables makes no mention of encumbrances created thereon by one of the parties who are father and sons and the mortgagees are no party to the proceeding, the executing court is not competent to decide in execution of the decree, the respective liabilities of the parties as regards the mortgage. Such a question is a fit subject for a regular civil suit to be brought by the aggrieved party. 139 P L R 1915-59 P W R 1915-29 I C 755.

—But where a suit, originally framed for possession of certain property is treated as partition suit by an arbitrator to whom it was referred by the parties and the decree based on the award allots a certain share to plaintiff as well as to each of the defendants, every one of the latter is entitled to get his own share divided by way of execution of the decree just like plaintiff. 252 P L R 1912-16 P W R (1912)=14 I C 375.

—One B obtained a decree against S and attached her undivided share in a house which belonged jointly to S. R. and others. Subsequently S brought a suit for partition of the husband, obtained a decree on condition of her paying a sum of money to R. S. did not pay the amount specified and the decree was left unexecuted. B brought S's share to sale in execution of his decree and purchased it himself. B deposited the amount which S had been ordered to pay under the partition decree and claimed possession of her share. Held, that B was not entitled to be placed in separate possession of that portion of the house which would have passed into the possession of S. if she had executed her decree. 37 All 120-13 A L J 105-27 I C 696.

**C. P. C. (1908) SEC. 39 (Contd)****(16-17) What decrees may be executed. (Contd.)****(j) Pre-emption Decree.**

—In a suit for pre-emption a decree was passed against the shares of two, out of many debts, but the shares were not specified. In execution the court of first instance ascertained the shares of the debts against whom the decree was passed but the lower appellate Court reversed the decree. Held that the court was not entitled to go behind the decree and ascertain the shares of the judgment debtors and the decree was therefore vague and incapable of execution. 4 C 97 Foll 20 A 397, 21 A 277 ref. 13 A L J 428-29 I C 243.

—As to whether a pre-emptor decree holder loses his right by Court making payment to wrong person. 158 P L R 1914-25 I C 717.

**(k-l) Probate proceedings.**

—Cost to come out of estate—Execution by one administrator against another—Propriety 24 I C 214.

—As to how far the principle of constructive res judicata is applicable see. 13 A L J 162-27 I C 950.

**(m) Rent decree.**

—When different-holdings are included in one rent decree the decree can only be executed as a money decree and nothing but the right, title and interest, if any of the judgment debtor in the holdings can pass to a purchaser on sale of the holdings in execution of that decree. 34 Cal 298; 7 C L J 97 followed. Therefore a purchaser of the right, title and interest of a mortgagee is not entitled to Khas possession if before his suit for possession the mortgage is redeemed. 27 I C 810.

—A landlord who has got a decree for arrears of rent of an under-tenure is not restricted to executing the decree by sale of the under-tenure in the first instance, but can execute it in the ordinary manner against the judgment-debtor's person or other property, moveable or immoveable. 15 C 492 see to the same effect 9 C L R 334-7 C 748. A sale of the right, title and interest of the judgment debtors in execution of a rent decree obtained by a co-sharer landlord may pass the entire tenancy to the purchaser. 18 C W N 1308 =20 C L J 196-24 I C 259.

—A sale in execution of a rent decree, against one of several tenants cannot affect the interests of those not made parties. It does not either affect the transferee of the interest of the judgment debtors before decree 21 W R 94, 16 C L J 89, followed 13 C L J 267; 14 C L J 180 distinguished 18 C L J 271-21 I C 47.

**C. P. C. (1908) SECTION 39 (Concl'd)****(16-17) What decrees may be executed. (Concl'd.)****(n) Rent decree. (Concl'd.)**

—A landlord obtained a decree against his tenant for rent in 1904 and one for money in 1906. In execution of the second decree, he attached the tenure in respect of which the decree had been previously obtained. At the instance of the decree-holder, it was proclaimed at the time of sale that the tenure in question was subject to a judgment debt under the decree of 1904. At the sale the decree-holder purchased the tenure. Held, that the judgment debt in respect of the rent decree must be deemed to have been extinguished and that the landlord was not entitled to execute the decree 18 C L J 29-16 I C 355.

—Decree for rent in Revenue Court—extinguishing encumbrance under Madras Estates Land Act Ss 5, 125 and 132 see 35 M L J 443-48 I C 794.

**C. P. C. (1908) SECTION 40**

—“Transferee” Court loses its Jurisdiction on withdrawal of decree pending in the “Transferor” Court. A I R 1930 Lah, 508=Ind Rul (1930) Lah 740=126 I C 516

**C. P. C. (1908) SECTION 41****(1) Scope of the section**

—Certification is a very important step and a formal certificate is necessary. A I R 1924 Bom 359=26 Bom L R 345-80 I C 752.

—But in another case the same High Court has held that for certifying the fact of execution all that the section requires is that the Court to which the decree is sent for execution should inform the Court which passed the decree what has happened in execution. e. g. where a Court has both small cause powers and original jurisdiction and a decree passed under the former is executed under the latter and an entry of satisfaction is made in The Small Cause Register there is sufficient compliance with s. 41. (1923) Bom 371-76 I C 549.

—It is only when the Court to which the decree is sent has executed it or has failed to execute it and not merely on failure of an application that the Court is bound to send a certificate under s. 41. 25 Bom L R 453=(1923) Bom 396-74 I C 149.

—A decree of court A was transferred for execution to court B and the judgment-debtor took an objection that the application was barred by time. The objection was disallowed by the executing Court and the application for execution dismissed as being infructuous and the papers sent back

## C. P. C. (1908) SEC. 41 (Contd.)

## (1) Scope of the section (Concl'd.)

to the A Court with the certificate required by S. 41 C P C. Subsequently, the High Court set aside the order, allowing the objection of the judgment-debtor. The decree-holder, thereupon, made an application to the B Court to proceed with the execution. The Court sent for the record from the A Court and proceeded with the execution: Held, that the effect of the order of the High Court was to put the parties in the position in which they were before the papers were returned to the A. court and that, therefore, the B. Court was entitled to proceed from the stage at which the proceedings in execution has been stopped by the order of the Court of Appeal, the position being as if no certificate of the manner of execution had been sent under S. 4, of the Civil Procedure Code to the A Court. 58 I C 987.

—Original Court transferring its decree for execution to another Court can also bring the decree back: 28 Bom L R 381-9  
4 I C 146-A I R 1926 B 271-50 B 439.

—Rule 161 (a) of Madras Civil Rules is neither inconsistent with nor ultra vires to s. 44 C P C. 51 M L J 554-98 I C 455-A I R 1926 M 1209.

## (2) Jurisdiction of Transferee Court when ceases.

—Court to which a decree is transmitted for execution has jurisdiction to execute the decree until (1) the execution is withdrawn from it, or (2) it fully executes the decree and certifies that fact to the Court which sent the decree or executes it so far as the Court is able to execute it within its jurisdiction and certifies that fact to the Court which sent the decree or (3) it fails to execute the decree and certifies that fact to the Court which forwarded the decree. 11 P 513 (516-7)-A I R 1932 P 286-I R 1932 P 259-139 I C 843-13 P L T 623-A L R 1932 P 672.

See to the same effect: 25 Bom L R 453-74 I C 149-A I R 1923 B 396; and 85 I C 390-22 A L J 1039-A I R 1925 A 179.

—Mere striking off application for execution does not terminate jurisdiction, it is only after certifying that the transferee Court ceases to have jurisdiction to execute. A I R 1926 Pat 274-5 Pat 398-7 P L T 461-(1926) Pat 86-94 I C 36.

—The Court to which a decree has been transferred for execution is not divested of jurisdiction until it sends the certificate under s. 41 and until such certificate is sent to the Court which passed the decree has no jurisdiction to execute it. A I R 1925 Oudh 492-28 O C 169-85 I C 455.

## C. P. C. (1908) SEC. 41 (Concl'd.)

## (2) Jurisdiction of Transferee Court when ceases (Concl'd.)

—And once a transferee Court has executed a decree in full or completely failed to execute it and certifies such execution or failure to the transferring Court, as enjoined in s. 41 C P C it becomes functus officio and ceases to have jurisdiction over the execution proceeding. Any omission to send a certificate of complete satisfaction to the Court which passed the decree would not enable the Court to retain jurisdiction. 20 All 129 and 5 Pat, 398 followed. A L R 1933 L 904.

See also 80 I C 752-26 Bom L R 345.

—But the Nagpur J C Court has held that the sending of a certificate does not of itself put an end to the jurisdiction of the Court to execute the decree, and sending of a certificate of result of each application cannot do so at all. A I R 1922 Nag 210-18 N L R 178-68 I C 657.

—Transferee Court has jurisdiction to decide objections relating to anything done in the course of its proceedings even after issue of certificate. A I R 1929 Oudh 76-5 O W N 1053-4 Luck 209-Ind Rul (1929) Oudh 268-115 I C 444.

## C. P. C. (1908) SECTION 42

## Synopsis.

- (1) Appeal
- (2-4) Court passing decree, powers of
- (5) Executing Court, powers of
- (6-7) Step in aid
- (8) Small Cause Court

## (1) Appeal.

—Order in execution of Small Cause Court decree transferred for execution to the ordinary Court is appealable in the same way as orders made in execution of decrees passed by that Court: 34 C L J 477-67 I C 6-A I R 1921 C 242.

—Notwithstanding that the decree transferred, is itself not appealable: 30 Bom L R 1447-A I R 1928 B 534.

—Thus an order for the arrest of surety passed by an ordinary court in execution of small cause decree transferred to it for execution is appealable under Ss. 42 and 47 of the C P Code, in spite of the prohibition in S. 104 (h) of the Code. 20 C L J 129-19 C W N 1087-27 I C 10 followed in 14 A L J 415-33 I C 523.

—But it should be noted that in all orders in execution of decrees in suits of the nature of small causes, there is a right of only one appeal; no second appeal

## C. P. C. (1908) SECTION 42 (Contd)

## (1) Appeal (Concl'd)

lies. (1911) 2 M W N 585=12 I C 959 following. 12 I C 169.

—Where a Small Cause decree was transferred to the Regular side for execution against immoveables, appeal from order in execution was held maintainable but not second appeal. 37 M L J 303.

—A suit not exceeding Rs. 500 in value was brought in a Court exercising jurisdiction as a Court of Small Causes. That Court passed a decree and transferred it for execution to the Munsiff, who passed an order in execution, which was confirmed in appeal. Held, that s. 102 controls s. 42 in a case of this kind and no second appeal lay. 25 Calc 872;

—See to the same effect 12 A. 579; and 37 I C 673=5 L W 701=1917 M W N 93;

—and 11 C W N 861; and 89 I C 22=23 A L J 961=A I R 1926 A 161;

—and 103 I C 344=A I R 1927 A 740.

## (2-4) Court passing decree, powers of.

—See also under s. 39. Section 42 is intended to remove all questions arising out of the decree, such as those dealt with by s. 47 of the Code and the like, from the cognisance of the Court which made the transfer. A I R 1924 All 700=46 A 560=22 A L J 439=L R 5 A 380 Civ. =83 I C 848.

—But the fact that in s. 42 the Transferee Court is given the same powers in executing such decree as vested from the start in the Court which passed the decree, does not divest the parent Court of the jurisdiction which it alone enjoys of making an order of retransfer and the application for retransfer to a second Court lies to the Court which passed the decree. A I R 1926 Lah 113=89 I C 958.

—(See, however, under the sub-heading (5) infra). And if the order for transfer of a decree for execution is made but the decree is not actually sent to the Transferee Court, the Court which passed the decree retains jurisdiction to execute it. A I R 1922 Pat 301=1 Pat 328=3 Pat L T 298=65 I C 332.

## (5) Executing Court, powers of.

*Synopsis.*

- (1) General
- (2) Application for second transfer
- (3) Decree against partner

## CIV PRO CODE (1908) SEC 42 (Contd)

## (5) Executing Court powers of. (Contd.)

- (4) Entertain objections
- (5) Execute decree
- (6) Implead legal representative
- (7) Jurisdiction of, when ceases
- (8) Power of sale
- (9) Power to go behind decree

## (1) General

—Executing court should consider not only the decree but also the judgment and the pleadings. (1930) M W N 779 (F B)=A I R 1930 Mad 817=127 I C 805.

—Decree holder repeatedly making defaults in taking steps—Court cannot file case as fully satisfied though it can penalise in other ways. A I R 1925 Lah 458=7 L L J 226=26 P L R 515=89 I C 979.

—But the Court should guard against judgment-debtors abusing the law of procedure to defraud their creditors. A I R 1925 Oudh 448=12 O L J 146=2 O W N 73=28 O C 330=87 I C 21.

—And should investigate and decide questions arising in execution without the least possible delay. A I R 1925 Cal. 351=51 Cal 1014=82 I C 322.

—And should see that all parties are properly before it. A I R 1925 Patna 160=6 P L T 164=3 Pat L Rev. 242=80 I C 716.

—No order to the prejudice of a party can be passed without giving him an opportunity of being heard. A I R 1923 Pat 180=4 Pat L T 204=68 I C 337.

—In 43 A 394. S. 42 was construed in effect to mean that by going to the executing Court a litigant was entitled to obtain the same reliefs that he would be able to obtain if he had gone to the Court which passed the decree, that is to say, he is entitled to obtain in fact the same sort of relief which might have been obtained but was not in fact obtained before the Court which passed the decree. This reasoning cannot be sustained. 11 P 580=A I R 1932 P 323=13 P L T 751=A L R 1932 P 628.

—But the decree cannot be varied by the executing Court. 28 Calc 353—see also under sub-heading (9) infra.

## (2) Application for second transfer

—Per Shah J—Even an application for the transfer of the decree again to another Court must be made in the first instance to the Court to which the decree has already been transferred. A I R 1922 Bom 359=24 Bom L R 798=47 B 56=68 I C

## C. P. C. (1908) SECTION 42 (Contd)

## (5) Executing Court, Power of (Contd)

## (3) Decree against partner.

—The executing Court to which a decree has been transferred is competent to grant leave to execute it against any particular partner. A I R 1931 Lah 507(2)

=Ind Rul (1931) Lah 472=131 I C 376.

—And it has also the jurisdiction to decide whether the alleged partner is or is not a partner. 13 L 327 (332)=A I R (1931) L 736=33 P L R 598=134 I C 1026.

—In other words, the Court to which a decree or order is transferred for execution is competent to determine the question under O XXI r. 50 (2) whether a certain person is a member of a firm. A I R 1921 All 199=43 A 394=19 A L J 187=61 I C 401.

—See to the same effect A I R 1929 Lah 228=Ind Rul (1929) Lah 408=115 I C 536.

—But the Patna High Court has held contra. 11 P 580=A I R 1932 P 323=13 P L T 751=A L R 1932 P 628.

## (4) Entertain objection.

—The executing court cannot allow the objections of judgment-debtor to execution application without considering them on their merits even if the decree holder was absent. A I R 1927 Cal 935=46 C L J 116=104 I C 571.

—Where the transmitting court has made no order for execution but has merely transmitted the decree and the certificate of non-satisfaction, the executing court can entertain an objection impugning the right of the decree holder to proceed against property other than that charged in the decree. 2 O L J 18=27 I C 597.

—Although the Court to which a decree is transferred for execution has no power to entertain any objection regarding the legality or propriety of the order directing execution or the right of the person shown in the order as the person entitled to execute the decree, yet it is the duty of the executing Court, on being acquainted with facts showing that the decree is no longer in existence. A I R 1927 Rang 104=4 R 562=5 Bur L J 239=100 I C 285.

## C. P. C. (1908) SECTION 42 (Contd)

## (5) Executing Court, Powers of (Contd.)

## (4) Entertain objection (Concl'd.)

—Where money was received by the bank as agent of the decree-holder the executing Court has no power to issue prohibitory order to bank not to pay the amount to decree-holder. A I R 1923 Lah 514=75 I C 419.

## (5) Execute decree

—A Court to which a decree is transferred for execution cannot execute it in absence of regular application for execution. A I R 1924 Nag. 413=80 I C 59.

—But a transferee Court may refuse to execute a decree if on the face of it is void. A I R 1930 Rang 337=129 I C 519.

—Though as a rule the Court should allow execution unless decree-holder failed to take proper steps. A I R 1926 Mad. 272=22 M L W 815=91 I C 880.

—When a decree is transferred to a Court for execution the Court to which it is transferred has the power of attachment under O, XXI, r. 48 (1) A I R 1927 Oudh 112=1 Luck 46=13 O L J 174=91 I C 1043.

## (6) Implead legal representative.

—An application to implead legal representatives of deceased judgment-debtor may be made to and orders passed by a Court to which a decree has been transferred for execution. A I R 1931 All 320 (2)=1931 A L J 166=Ind Rul (1931) All 721=133 I C 609 following A I R 1928 P C 162; and A I R 1925 Oudh 448.

—If, however, such application is made to the transferee Court it is merely an irregularity and can be waived: 109 I C 417=A I R 1928 P C 162.

## (7) Jurisdiction of, when ceases.

—Court to which execution has been transferred will exercise all the powers of the Court of first instance and will retain its jurisdiction to execute the decree even though there has been an appeal from the decree after such transfer and it has been affirmed in appeal and the execution cannot



## C. P. C. (1908) SECTION 42 (Contd)

## (5) Executing Court, powers of. (Contd)

## (7) Jurisdiction of, when ceases. (Concl'd)

be defeated merely by the fact that no fresh order of transfer was made by the Court which transferred the decree, after such affirmation in appeal A I R 1931 Pat 27-9 Pat 829-Ind Rul (1931) Pat 90 -129 I C 138

—The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified that fact to Court which sent the decree, or has executed it so far as that Court has been able to execute it within its jurisdiction and has certified that fact to the Court which sent the decree, or until it has failed to execute the decree and has certified that fact to the Court which forwarded the decree. The mere striking off of an application on the ground of informality in the application does not terminate the jurisdiction of the Court to execute the decree, nor render it necessary for the Court to send any certificate to the Court which forwarded the decree for execution 20 All 120 but see 68 I C 657-18 N L R 178-A I R 1922 N 210.

See also cases under s. 41. Judgment debtor granting a lease of his land to decree-holder for 20 years in full satisfaction of the decree—Execution court not competent afterwards to reduce terms of lease being *functus officio*. A I R 1924 Lah 634-75 I C 870.

## (8) Power of Sale.

—Court has power to sell only the property specified in the decree 6 Pat L J 347-2 Pat L T 665-63 I C 552.

—Executing Court can determine the order in which property would be sold when the question has not been decided during trial A I R 1926 Mad 1031-1927 M W N 254-24 M L W 257-97 I C 586.

—Decree holder is merely entitled to have all the properties mortgaged to him to be sold—It is for the court to decide in which order they are to be sold A I R 1924 Pat

## C. P. C. (1908) SECTION 42 (Contd)

## (5) Executing Court, powers of. (Contd)

## (8) Power of Sale (Concl'd)

802-3 Pat 962-2 Pat L R Civ 242-1925 P H C C 62-6 P L T 392-84 I C 203 see also 20 M L T 233-36 I C 516.

—Application by a decree-holder in respect of the property which shall be proclaimed for sale is to be decided by the Execution Court and its order is final unless appealed against. A I R 1926 Oudh 193 -92 I C 29.

—But it cannot set aside a sale which has once been confirmed A I R 1927 Lah 337-100 I C 800 see also 110 I C 773.

—Sale in execution of decree against Hindu widow—To ascertain its effect, court should examine the form of the suit in which the decree was passed or even the document on which the decree was based. A I R 1925 Oudh 243-82 I C 832.

## (9) Power to go behind decree.

—The executing Court has no powers to nullify the effect of decree but to give effect to it. A I R 1922 Cal 571-26 C W N 708-70 I C 451.

—And, therefore, it cannot go into the questions beyond the scope of the decree. 6 O W N 49-114 I C 809-A I R 1930 Oudh 195 see to the same effect 100 I C 156-A I R 1927 L 894; and 99 I C 535-27 P L R 750; and 99 I C 999-27 P L R 232; and 75 I C 844-A I R 1924 L 615. or enter into the merits or demerits of the decree. A I R 1922 Bom 195-23 Bom L R 1072-46 Bom 243-69 I C 55, or question the validity of the decree. 13 O L J 510-93 I C 32. See also 103 I C 673-A I R 1927 L 651.

—It cannot order dismantling of buildings while delivering possession when the decree is silent. A I R 1927 Rang 82-5 Bur L J 201-100 I C 301. or enhance rate of interest fixed by decree. A I R 1926 Bom 368-28 Bom L R 543-95 I C 267. or alter the decree or the amount mentioned in the order for execution. Marsh 244-2 Hay 113.

## C. P. C. (1903) SEC. 42 (Contd.)

## (5) Executing Court Powers of (Contd.)

## (9) Power to go behind decree (Contd.)

—The execution court cannot dismiss an execution application on the ground that no court fee was paid before drawing up of decree where the necessity for court fee is not made out. A I R 1923 Bom 41 = 79 I C 489, nor direct something to be done contrary to the decree on the ground that literal compliance with it is impossible. 15 P W R 1922=65 I C 126.

—A Court executing a transfer decree cannot question legality or propriety of the order directing execution. A I R 1930 Lah 143=Ind Rul (1930) Lah 451=123 I C 531.

—An Executing Court cannot deal with the question whether there are grounds for setting aside the decree. A I R 1921 Bom 223=45 Bom 946, nor can it deal with matters not dealt with by the trial court even though those matters were mentioned in the plaint. A I R 1922 Bom 370=46 Bom 529=23 Bom L R 1279=87 I C 269.

—But it can relieve a person of the consequences of his default in not obeying the decree though it cannot modify the decree itself. A I R 1925 Bom 404=27 Bom L R 678=89 I C 217.

—And it is open to an executing court to determine whether the decree which it is asked to execute is a subsisting and operating decree or not, and if such a decree has been superseded and is no longer operative, the executing court can refuse execution on that ground. 18 C L J 209=17 C W N 868=19 I C 630.

—Executing Court cannot bring a decree in conformity with the judgment—Amendment of the decree should be applied for. 31 I C 564.

—And the executing Court cannot consider the validity of such an order of amendment: 70 I C 293=A I R 1922 C 136.

—The executing Court should not sit as a Court of appeal over the Court which

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## C. P. C. (1903) SECTION 42 (Contd.)

## (5) Executing Court, Powers of (Contd.)

## (9) Power to go behind decree, (Contd.)

has made the decree or the amendment; it has only to see whether the decree has been amended and if so whether the application for execution was barred by limitation or not. A I R 1929 Cal 650.

—A party to suit, who has not appealed against the decree or applied for review of judgment cannot be allowed in execution proceedings, to contend that the judgment and decree are erroneous and to ask that they should be amended or corrected, though the application may be treated as a review petition and deficient stamp allowed to be paid in the High Court. 3 L W 499=34 I C 787.

—Amendment under guise of interpretation is illegal: 1 Pat L W 620=39 I C 537.

—No addition can be made by a Court executing a decree beyond such as the decree directs other than the costs arising out of the execution proceedings. 27 I C 950.

—Executing Court cannot see if the Court which passed the decree was entitled to do so on the allegations of the plaintiff. A I R 1924 Pat 504=5 P L T 368=1924 P H C C 25=78 I C 303, nor question the jurisdiction of the Court which passed it. 7 Bom L R 659=30 B 101, nor go into the question whether the judgment-debtor was a minor or not. 95 I C 629 (Cal).

—Executing Court has no power to set aside the decree though passed against the wrong party. A I R 1925 Cal 203=49 C L J 254=84 I C 999.

—But such Court can interpret a decree by referring to judgments and pleadings. A I R 1929 Pat 746.

—As to the power of Court executing decree to refer to judgment, or award on which the judgment is based, to interpret decree—See 95 P R 1906=83 P L R 1907. A decree must be executed as made and cannot be varied by the execution Court

## CIV PRO CODE (1908) SEC. 42 (Contd)

(5) Executing Court, powers of. (Concl'd)

(9) Power to go behind decree (Concl'd).

in the light of subsequent events. This principle is applicable to the case of a consent decree. 22 C L J 561=33 I C 344.

—A penal clause in a compromise decree can be modified by Executing Court—But that in an award cannot be modified in execution. A I R 1925 Lah 180=78 I C 80.

—Court executing a consent decree can consider whether a party has forfeited his rights under it, unless the question involves in substance trying the case over again. A I R 1930 Pat 234=125 I C 123.

—Court should hear the legal objections of the judgment-debtor. 43 All 547=19 A L J 473=3 U P L R (All) 99=63 I C 264.

—A pre-decree arrangement cannot be looked into by the executing court. A I R 1927 Rang 48=5 Bur L J 142=98 I C 1056.

## (6-7) Step in Aid.

—An application made to the court passing a decree to transfer it to another court for execution is a step-in-aid of execution. 35 A 389 foll, 14 A L J 415=33 I C 523.

## (8) Small Cause Court.

—Section 42 applies to execution proceedings in the Madras Small Cause Court, whether the decree sought to be executed was passed by the Madras Small Cause Court or transferred to that Court from a Court in the mofussil but not where Madras Small Cause Court decree is transferred to a Court in mofussils A I R 1925 Mad 1179=22 L W 455=1925 M W N 713=49 M L J 104=90 I C 599.

## C. P. C. (1908) SEC. 43

—The Court of the Political Agent at Sikkim is a Court established or continued by the authority of the Governor-General in Council within the meaning of S. 43. 11 I C 442=15 C W N 992=38 C 859.

## C. P. C. (1908) SECTION 44

## Foreign Judgment:

—A British Indian Court executing a foreign decree must of necessity issue notice to judgment-debtor before ordering execution. A I R 1925 Mad 788=21 L W 330=86 I C 492.

—Section 21 has no application to cases of foreign judgment sought to be executed in British Indian Courts under s. 44. A I R 1925 Mad 788=21 L W 330=86 I C 492.

See also 12 Bom, 230 and 12 L W 887 =1915 M W N 162=27 M L J 525=26 I C 287=39 M 24 F B (on appeal from 14 M L T 96=1 913 M W N 605=20 I C 704).

—Court to which a decree of a foreign Court is transferred for execution can enquire into jurisdiction of Court passing the decree. A I R 1925 Cal 955=30 C W N 785=41 C L J 508=89 I C 347.

—A British Court executing a foreign decree has power to enquire whether the Foreign Court had jurisdiction to pass the decree. There is no difference between the old and new codes 39 Bom 34 ref. A decree pronounced in absentem in a personal action by a Court of a foreign state, the absent party not having submitted himself to its authority, is a nullity. 23 C 22 (P C) foll 40 Bom 551=18 Bom L R 486=36 I C 363.

—In other words, S. 44 merely lays down the procedure. It does not prevent any objection to the validity of the judg-

**C. P. C. (1908) SECTION 44 (Contd)**

ment on the ground of want of jurisdiction.

A I R 1931 All 689=(1931) A LJ 653.

—Words “may be executed in British India” as if they had been passed by the Courts in British India refer only to the mode of execution. A I R 1925 Mad 788  
=21 L W 330=86 I C 492

—The British Indian Court can refuse to execute a decree of the Court of a Native state on the grounds specified in Ss. 13 and 14 of C P Code: 3 L W 90=19 M L T 68=30 M L J 148=32 I C 597=39 M 733.

—Or on any other valid ground A I R 1925 Mad 788=21 L W 330=86 I C 492.

—Unless a decree produced for execution under provisions of s. 44 is conclusive, as to the matter directly thereby adjudicated, it cannot and ought not to be executed. A I R 1925 Mad 788=21 L W 330=86 I C 492.

—The principles as to the nature of the judgment of the Court of a Native State which a British Indian Court can execute are the same as the principles which govern the right to sue upon a foreign judgment in England (1908) 11 K. B. 302 and 1894 A C 670 referred to. Where the defendant voluntarily appeared in the proceedings in the Native State and decree was passed against him, it can be enforced by the British Indian Court. A L R 1933 B 470.

—The C P Code not being applicable to Agency Court, it may refuse execution of decree not passed by itself. A I R 1923 Mad 114=16 M L W 669=1922 M W N 728  
=69 I C 559.

—Limitation:—The law of limitation applicable to execution of foreign decree in British India is the British Indian Law and not foreign law. 18 Bom L R 481=36 I C 369=40 B 504; See also 11 W R 269; and 14 C 570; and 2 M 337.

**C. P. C. (1908) SEC. 45**

—For notifications see General Statutory Rules and Orders, Vol. I, pp. 618. to 621 and Arakan Hill District Laws Regulation I of 1916 Sch. I.

—Execution of British Indian decree in Foreign State:—A British Indian decree can be sent to a foreign Court for execution if such Court is “established or continued by G. G.-in-Council,” and if the C. P. Code has been extended to such Court. If these two conditions are not satisfied the British Indian decree cannot be transmitted to foreign Court for execution; 5 L W 646=41 I C 41=32 M L J 487; and 12 B 230; and 6 C W N 573=29 C 400; and 13 Bar L T 145=61 I C 704.

—Unless there are special treaty arrangements: 22 M L T 139=1917 M W N 712=33 M L J 130=42 I C 294=40 M 1069 F B.

—An order of attachment before judgment issued by British Indian Court against the partnership property lying in Dutch territory is not consistent with the supremacy of the Dutch Government and therefore the mandate issued to the British Consul there in was illegal. A I R 1929 Sind 45=Ind Rul (1929) Sind 50=23 S L R 205=114 I C 98.

—Execution of British Indian decree in Native State:—Decree of British Indian Court cannot be transmitted to a court of a Native state for execution. 32 M L J 487=5 L W 646=41 I C 41.

—An application to a British Court to transfer its decree to the Court of a Native State between which and the English Courts reciprocity prevails, in an application to take a step-in-aid of execution. The reason why the C. P. Code is silent as to the execution of decrees of British Courts by the Courts of Native States is that the Indian Legislature has no power to legislate for foreign courts. 42 Bom 420=20 Bom L R 421=46 I C 56.  
—See also. 40 Bom 504=36 I C 369.

## CIV PRO CODE (1908) SEC 45 (Conclud)

—S. 45 contemplates Courts in the Native States that are in alliance with the British Government. 23 S L R 205-114  
I C 98-A I R 1929 S 45.

Limitation:—Limitation Act art 182 (5)  
and (6) See 40 M 1369.

## C. P. C. (1908) SECTION 46

—This section has been newly added to the present Code so as to provide an emergency remedy to the decree-holder.  
See A I R 1931 R 279-9 R 561.

—Where a precept is applied for under S. 46 C. P. C., all that the Court passing the decree can do is to issue a precept to another Court specifying the property which the latter is required to attach. It is not open to the Court issuing the precept to attach such property itself. A L R 1933 A 779.

—Nor treat the application for attachment as one execution. A I R 1926 Cal 249-90 I C 527.

—But it should be noted that the Court which passed the decree is the Court which can entertain application under s. 46. A I R 1926 Sind 157-92  
I C 621.

—Even after transfer of a decree for execution, the Court which passed it retains jurisdiction for certain purposes and under s. 46 it can issue an *interim* attachment when there is ground to apprehend that the decree-holder may otherwise be deprived of the fruits of his decree. A I R 1927 Cal 581-31 C W N 653-102 I C 513.

—Two applications for attachment of different properties can proceed simultaneously in the same Court and in execution of the same decree, because this concurrent execution by the same Court is not different in principle from that provided by the new s. 46 relating to precepts by which the parent Court and the Transferee Court concurrently execute the same decree, and because besides s. 46

## CIV. PRO. CODE (1908) SEC. 46 (Conclud)

there are other sections which indicate that the present Code does not view with disfavour concurrent execution. A I R 1923 Pat 224-2 Pat 328-4 P L T 99-1923 Pat 61-71 I C 741.

—But no attachment can be effected under this section where the properties are situated outside British India 134 I C 822-32 P L R 645-A I R 1931 L 723.

—The Court to which the precept has been issued has no jurisdiction to question the validity of the precept. The Court to which it is sent has only to carry it out. The issuing Court alone can vary it and not the Court to which it is sent. A I R 1927 Cal 581-31 C W N 653-102 I C 513.

—So also a Court to which precept is issued has no power to do anything not warranted thereby. But it has inherent powers to deal with matters incidentally arisen in connexion with proceedings for attachment. The Court to which precept is sent has therefore jurisdiction to accept money or security. A I R 1926 Lah 433-8 Lah L J 164-27 P L R 757-94 I C 119.

—An objection to the jurisdiction of an executing Court to order the sale of certain immovable property attached by it under the precept of another Court based on the want of transfer of the decree to that Court for execution will not be allowed to be taken up for the first time in appeal. A decree can be simultaneously executed in more places than one Under S. 46 C P C an attachment under precept is not invalidated by the fact that the order extending the statutory period of two months during which the attachment will remain in force is passed after the expiry of the said period, provided that the application for extension of time is put in before the expiry of the said two months. In such a case the order relates back to the date of the petition and has retrospective effect. 3 L W 336-14 I C 302.



## C. P. C. (1908) S. 47 (Contd)

## Synopsis to Section 47.

- (1) Legislative Changes.
- (2) Applicability, scope and general principles of the section.
  - (1) General principles.
  - (2) Auction purchaser see Questions arising between parties or representatives—Auction purchaser *infra*.
- (3) Conditional decrees and decrees partly in favour of plaintiff and partly in favour of defendant remedies under.
- (4-5) Dead man, decree against see cases under :—Questions as to validity of decree if within the section *infra*.
- (6) Decisions of Court to grant or refuse execution of the decree on the ground of Jurisdiction or otherwise.
- (7) Decrees for possession reversed after execution, Questions as to compensation see cases under "Restitution" (*infra*).
- (8) Declaratory decrees, Remedies in execution.
- (9) Decrees or orders under other Acts.
- (10) Disputes between A P and J.D.
- (11) Hindu father Decree against, Questions as to execution against son see cases under:—Questions arising between parties & (Hindu father decree against) (*infra*).
- (12) Injunction decrees (Prohibitory or mandatory) remedies in execution.
- (13) Minor not represented decree against see cases under:—Questions relating to validity of decree. (*infra*)
- (14-15) Party to decree and representative, claiming in capacity of trustees or third persons or in their personal capacity and not as representative.
- (16) Questions as to Jurisdiction of court to pass decree. see next heading "Questions as to validity of decree."
- (17) Questions as to validity of the decree if within the section. see also cases under Fraud *Supra*.
- (18) Questions as to validity of or setting aside sale.
- (19) Questions as to wrongful execution and excess execution if within the section, see also cases under "Restitution."
- (20) Rent decrees, forfeiture clause if relieved against in execution

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## C. P. C. (1908) S 47 (Contd)

- (21) Res-Judicata, constructive see Resjudicata *infra*.
- (22) Res-Judicata orders under this section if and when see "Res-judicata" *infra*.
- (23) Surety, disputes by or against in execution.
- (24) Miscellaneous cases.
- (3) Adjustment of decree and payments under it.
  - See also cases under.
  - (1) C P C section 2 (2) and
  - (2) Section II. ( Execution proceeding.)
  - (3) C P C s. 144 (1)
  - (4) C P C s 47 Question relating to satisfaction of decree.
  - (5) C P C s. 47—Questions relating to discharge of decree.
- (4) Appeal and second appeal.
- (5) Compromise decrees.
- (6) Construction of Decree.
- (7) Court executing the decree.
- (8) Court may treat a proceeding as a suit ( para 2 of section 47 ).
- (9) Court may treat a suit as a proceeding ( para 2 of section 47 ).
- (10) Estoppel.
- (11) Fraud.
  - See cases under :—
  - (1) Mistake (*infra*).
  - (2) Legislative changes (*supra*).
  - (3) Scope & Applicability—Questions as to validity of decree. (*supra*).
- (12) Inherent powers of Court see cases under this section (2) scope (Questions relating to validity of decree).
- (13) Interlocutory orders
- (14) Jurisdiction.
- (15) Mesne profits see also cases under C. P C order 20 rule 12.
- (16) Mistake see also cases under this section " Questions relating to validity of decree."
- (17) Mortgage decree.
- (18) Order under section 47 if any where operates as res-judicata.
- (19) Partition Decree.
- (20) Penalty clause in decree.
- (21) Pre-emption Decree.
- (22) Questions arising between the parties or their representatives.
  - (1) General.
  - (2) Attaching creditor
  - (3) Auction purchaser if a party or whether a representative of Judgment debtor or decree holder.
  - (4) Benami Transactions.
  - (5) Claim in proceedings or other objections to execution.
    - (1) By parties but in different capacity e. g trustee &c.

## C. P. C. ( 1908 ) S. 47 (Contd)

- ( 2 ) By representative in personal capacity.
- ( 3 ) By persons not parties.
- ( 6 ) Decree against Hindu father remedies of son.
- ( 7 ) Decree against Karnawans of Malabar and Tarwad position of other members.
- ( 8 ) Defendants against whom suit is dismissed and defendants who are omitted from parties or against whom claim is abandoned and claim proceedings and other objections.
- ( 9 ) Disputes between auction purchaser and his transferee or judgment debtor.
- ( 10 ) Disputes between decree holder and his assignee
- ( 11 ) Disputes between rival auction purchasers.
- ( 12 ) Disputes between rival decree holders.
- ( 13 ) Executions against a person in possession of deceased judgment debtor's property but not representative—Procedure (see as to this cases under C P C s. 2 definition of legal representative denewly added.
- ( 14 ) Minors or lunatics.
  - ( 1 ) Properly represented.
  - ( 2 ) Not properly represented
- ( 15 ) Mortgagee from judgment debtor.
- ( 16 ) Official Assignee if a representative of insolvent judgment debtor.
- ( 17 ) " Parties " or representatives meaning of—whether should be arrayed on same side or not.
- ( 18 ) Remedies for persons not parties but are affected by execution.
- ( 19 ) Reversioners of Hindu widow.
- ( 20 ) Surety.
- ( 21 ) Transfree from auction purchaser and judgment debtor and between the former and transferee.
- ( 22 ) Transferee from judgment debtor.
- ( 23 ) Transferee from plaintiff
- ( 24 ) Unrecorded co sharer in Tenancy if representative, if recorded co-sharer under Bengal Tenacy Act.
- ( 25 ) Miscellaneous cases.
- ( 23 ) Questions relating to the execution of the decree. see also cases under C P C s. 47 ( Adjustment of decree and payments under it, )
- ( 24 ) Questions relating to the discharge of the decree.

## C. P. C. ( 1908 ) S. 47 (Contd)

- ( 25 ) Questions relating to the satisfaction of the decree
- ( 26 ) Questions as to whether any person is or is not a representative shall be decided by the court for the purpose of this section ( para 3 ).
- ( 27 ) Questions arising after discharge or satisfaction of decree.
- ( 28 ) Restitution or Refund when decree reversed or modified or found invalid see also cases under
  - ( 1 ) Mistake (*Supra*).
  - ( 2 ) Scope & Applicability of the section—Questions as to validity of decree (fraud).
- ( 29 ) Revision.
- ( 30 ) Separate suit lies. see also cases under this section division numbers 6 and 7. These cases must be read subject to cases under the above division.
- ( 31 ) Separate suit does not lie. see also cases under this section division numbers. 6 and 7. These cases must be read subject to cases under the above division.
- ( 32 ) Stay of execution.
- ( 33 ) Subject to any objection as to Limitation etc. ( Para 2 ).
- ( 34 ) Time barred Decree. See also separate suit lies *supra* and separate suit does not lie *supra*.
- ( 35 ) Miscellaneous Cases.

## ( 1 ) Legislative Changes.

—The objects of separately numbering the sub sections of S. 48, C P Code, is to make the several sub-sections independent of each other. 20 C W N 679 = 32 I C 524.

## ( 2 ) Scope, Applicability and General principles.

## (1) General principles.

—(a) *Scope and applicability of the Section*:—The section applies to application by decree holder for payment amount covered by the decree under execution, 139 I C 247 = 55 C L J 1 = A I R 1932 C 414 = I R 1932 C 589 = A L R 1932 C 406.

—As to applicability of S. 47 see also A L R 1933 O 230 = A I R 1933 O 146.

—A Transferee Court cannot question the legality of the order of transfer of the decree for execution. A I R 1930 Lah 143 = 123 I C 531.

—Order under S. 174, Bengal Tenancy Act does not fall under S. 47. A I R 1930 Cal 302 = Ind Rul ( 1930 ) Cal 433 = 50 C L J 532 = 34 C W N 250 = 124 I C 481.

—Person not sought to be bound by adjudication s. 47 does not apply. A I R 1998 Mad

**C. P. C. (1908) S. 47 (Contd)****(2) Scope, Applicability and General principles—(Contd)****(1) General principles—(Contd)**

276 = 1927 M W N 905 = 50 M L J 721 = 28 L W 146 = 108 I C 406.

—Position of judgment-debtor who brings a suit contesting an execution sale to decree-holder differs as regards applicability of s. 47 from position of decree-holder who sues for possession of the property he has purchased. A I R 1926 Lah 165 = 27 P L R 258 = 7 Lah 1 = 93 I C 1007.

—Section 47 is not applicable to applications for ejectment under s. 79. Agra Tenancy Act, 1926. 15 R D 248.

—S. 47 does not apply to Agency Tracts. 17 M L J 147 = 2 M L T 195 = 30 M 280. See also 36 M 126.

—Question forming basis for independent action cannot be introduced under s. 47. A I R 1922 P C 304 = 31 M L T 131 = 49 I A 220 = 43 M L J 589 = 1 Pat 581 = 24 Bom L R 1251 = 27 C W N 29 = 36 C L J 542 = 20 A L J 988 = 16 L W 905 = 4 P L T 1 = 4 L R C P 1 (P C) = 68 I C 973

—Order directing payment to receiver is a decree and can be executed. A I R 1925 Cal 57 = 40 C L J 180 = 52 C 269 = 84 I C 724.

—O XXI, r. 52, does not override s. 47. A I R 1927 All 574 = 102 I C 179.

—O. XXI r. 2 Nor does in any way limit or affect the operation of s. 47. A I R 1922 L B 31 = 1 B L J 43 = 70 I C 859.

—S. 47 applies to and application which when made was an application under the section. 31 C 385.

—As to applicability to person not party to proceedings—see 17 M L J 334 = 2 M L T 365 = 30 M 413.

—Civ. Pro. Code, Ch. XXXVII relating to reference to arbitration-applicability thereof to execution proceeding—See 8 O C 263.

—S. 47 does not apply to foreign Court decree—(1913) M W N 605 = 14 M L T 96 = 20 I C 704.

—(b) Construction of the section:—S. 47 must be liberally construed:—59 C 117 (125) = 35 C W N 877 = 138 I C 177 = A I R 1932 C 126 = I R 1932 C 427 = A L R 1932 C 450.

—S. 47 need not be strictly construed so as to exclude consideration of question which is closely connected with the subject-matter of the decree. A I R 1922 Bom 370 = 46 B 529 = 23 Bom L R 1279 = 87 I C 269.

—Execution proceedings nature of:—Applications for execution of decree are proceedings in suit. A I R 1921 Sind 61 = 17 S L R 211 = 83 I C 913.

**C. P. C. (1908) S. 47 (Contd)****(2) Scope, Applicability and General principles—(Contd)****(1) General principles—(Contd)**

—Execution proceedings against executed defendants must be treated as proceedings under s. 47. 5 O W N 242 = 109 I C 203

—For purposes of Ss. 192 and 193 of the Penal Code, execution proceedings are judicial proceedings. 22 Bom L R 1239 = 22 Cr. L J 49 = 45 Bom 668 = 59 I C 193.

—But execution proceedings subsequent to trial of the suit are not judicial proceedings—See 35 C 133.

—Order under the section when a decree? An *ex parte* order under s. 47 may be a decree by virtue of s. 2 (2) of the Code but it is not a decree in a suit. So the provisions of O. 9 r. 13 are not applicable to such an order. A I R 1931 Mad 656 = (1931) M W N 533 = 61 M L J 348 = 34 L W 360 = Ind Rul (1931) Mad 854 = 134 I C 806.

—Order under s. 47 is a decree only if question relating to rights and liabilities of parties sought to be determined is decided and not when order on incidental question of procedure is passed. A I R 1924 Pat 683 = 2 Pat L R 222 = 84 I C 576.

—Order under s. 47 should conclusively and finally determine right of parties and should not be contingent upon future events. A I R 1925 Rang 271 = 3 R 132 = 89 I C 300.

**(2) Auction—Purchaser**

—See under—Questions arising between parties or representatives—*infra*.

**(3) Conditional decrees or decrees partly in favour of plaintiff and partly in favour of defendant. remedies.**

—Consent decree on condition that if defendant deposited certain amount within certain time suit to stand dismissed or else to stand decreed—Defendant depositing amount after period fixed—Courts order declaring deposit to have retrospective effect, not being in discharge or satisfaction of decree was not appealable. A I R 1929 All 666 = (1929) A L J 968 = Ind Rul (1929) Cal 885 = 118 I C 591.

—Parties or representatives cannot raise such questions by separate suit but not even in separate suit except by way of defence when judgment debtor kept out of knowledge of execution proceedings until after suit brought by fraud of decree-holder. A I R 1929 Cal 217 = 33 C W N 165 = 56 C 467 = Ind Rul (1929) Cal 542 = 117 I C 558.

—Decree for reconveyance of property on plaintiff's payment within certain time—Payment after time without obtaining

## C. P. C. (1908) S. 47 (Contd)

## (2) Scope, Applicability and General principles—(Contd)

## (3) Conditional decrees or decrees—(Contd)

extension does not entitle plaintiff to execute. A I R 1924 Rang. 375 = 3 Bur L J 163 = 83 I C 352.

—Plaintiff to obtain money and defendant declaration of right to moveable property—Defendant cannot plead violation of his rights to resist execution against him. 63 I C 975.

## (4-5) Dead man, decree against.

—See cases under (17) Question as to validity of decree if within the section (*infra*)

## (6) Decisions of court to grant or refuse execution of the decree on the ground of jurisdiction or otherwise

—Execution not entertained for want of jurisdiction—Order is not decree nor one under s. 47. A I R 1925 Cal 679 = 41 C L J 166 = 86 I C 775.

—Question relating to execution discharge or satisfaction of the decree—Order determining that a court has jurisdiction to execute and directing execution—Not a decree. See 4 Pat L J 461 = 52 I C 461.

—Order refusing execution against firm  
—Force of decree see 35 I C 429.

## (7) Decrees for possession reversed after execution, Questions as to compensantio etc.

—See cases under "Restitution (*infra*)

## (8) Declaratory Decrees remedies in execution

—Where a decree is merely declaratory and does not direct to be done if cannot be enforced under s. 47 in execution: A I R 1928 Rang 168; 6 Rang 97 = 110 Ind Cas 41 See also 24 I C 861 = 7 S L R 192; and A I R 1925 S 318 = 93 I C 825; and 8 O C 361; and A I R 1929 N 34 = 115 I C 161; and 1912 M W N 166 = 13 I C 618; and 12 C L J 599 = 7 I C 487; and 26 I C 597 = 37 A 97; and A I R 1926 Mad 799; 94 Ind Cas 610; But where a money-decree declares a charge, such charge can be enforced in execution A I R 1929 Bom 227 = 31 Bom L R 439 = Ind Rul (1929) Bom-506 = 119 I C 186

## (9) Decrees orders under other Acts.

—The section applies to execution of orders passed in proceedings under other Acts which provide that such orders are to be considered as decrees As for example orders

## C. P. C. (1908) S. 47 (Contd)

## (2) Scope, Applicability and General principles—(Contd)

## (9) Decrees orders under other Acts—(Contd)

under Land Acquisition Act. 1906 Punj L R 103, page 322 = 53 P R 1906. so also in case of Orders under S. 173 Bengal Tenancy Act. 1928 Cal 202 = 32 Cal W N 98 = 106 Ind Cas 561; and Similarly the section applies to execution proceeding under Public Demands Recovery Acts. 33 Cal 84 = 1 Cal L J 538 = 10 Cal W N 130. (not following 6 C W N 630; and 6 C W N 246) See to the same effect, 32 Cal 691 = 1 Cal L J 360.

—Instances of orders under other Acts which are not enforceable as decrees and to which therefore s. 47 does not apply see 7 Ind Cas 387 = 15 Cal W N 78 and orders under B T Act s. 174 Proviso "Applies" withdrawal of application if a bar under s. 174 Order when appealable. 1 Ind Cas 304 = 11 Cal L J 202 = 13 C W N 591. So also orders under S. 192 Madras Estates land Act. 1928 Mad 1107 = 109 Ind Cas 722.

## (10) Disputes between judgment debtor and auction purchaser who is a stranger and when he is the decree holder himself.

—If there is question relating to the execution, arising between decree-holder and judgment-debtor, the mere fact that auction-purchaser is also interested does not make s. 47 less applicable. A I R 1928 Mad 806 = 111 I C 551.

—So a party-purchaser cannot bring suit on grounds which he could take in execution. A I R 1923 All 115 = 79 I C 486.

—For example, a decree-holder purchaser cannot sue separately for possession A I R 1925 Sind. 171 = 18 S L R 34 = 78 I C 930. see also 14 M L J 474 = 28 M 87; (but the contrary view has been taken on their point by the Full Bench of each of the High Courts of Allahabad, Patna, Bombay, and Lahore; see under suits whether barred *infra* see also the Privy Council decision in 45 I A 54 = 44 I C 855).

—So also an order restoring possession to the judgment-debtor on ground that possession was given to decree-holder under misapprehension is within s. 47. A I R 1923 Oudh 16 = 72 I C 875.

—But a dispute between decree-holder auction-purchaser and judgment-debtor, is not dispute between the judgment-debtor and decree-holder, and therefore s. 47 has no application. Ind Rul (1929) Lah 834 = 119 I C 226.

—Dispute between judgment-debtor and auction-purchaser even if latter is the repre-

C. P. C. ( 1908 ) S. 47 (Contd)

( 2 ) Scope, Applicability and General principles—(Contd)

( 10 ) Disputes between judgment debtor and auction purchaser who is a stranger and when he is the decree holder himself—(Conclud)

representative of the former, does not fall under s. 47. A I R 1930 Rang 281 = Ind Rul (1930) Rang 380 = 127 I C 849; see also A I R 1921 Mad 81=13 L W 15 = 61 I C 961

—And cases under this section under the heading "Questions between parties or their representatives." Similarly complaint by judgment-debtors that auction-purchaser had taken possession of certain property not covered by the sale does not fall under s. 47.

A I R 1921 Nag 59 = 64 I C 860.

—But it should be noted that decree-holder does not cease to be party after the auction sale. A I R 1926 Cal. 798 = 53 Cal 781 = 43 C L J 345 = 30 C W N 649 = 95 I C 494. see to the same effect 13 Bom. L R 661=35 B 452; and 97 I C 697 = A I R 1927 C 57; and 5 O W N 108 = A I R 1928 O 109 = 110 I C 83 = 3 Luck 182

—And, therefore, proceedings between judgment-debtor and representatives of decree holder auction-purchaser are under s. 47. A I R 1926 Mad 857=1926 M W N 563=51 M L J 126=23 L W 741=96 I C 657.

—Application to set aside not under O. XXI, rr 89 or 90—Decree-holder purchaser—Question is under s. 47. A I R 1924 All 698 = 22 A L J 413=L R 5 A 769 Civ=83 I C 1028. see also cases under this section under the heading "Questions between parties or their representatives."

( 11 ) Hindu father decree against, Questions as to execution against son.

—see cases under :—Questions arising between the parties &c. ( Decree against Hindu father infra ).

( 12 ) Injunction, decrees ( Prohibitory or mandatory ) remedies in execution.

—The decree in a suit directed the permanent closing of a door by the judgment-debtor, who after formally complying with the order shortly afterwards reopened it. Held, that the decree-holder could proceed by way of execution to have the door closed and no separate suit is necessary. 12 A L J 347 = 23 I C 247.

—Decree for prohibitory injunction—Enforcement of—Remedy of decree-holder—Separate suit or execution see 46 Cal 103 = 27 C L J 506 = 22 C W N 857 = 45 I C 864.

C. P. C. ( 1908 ) S. 47 (Contd)

( 2 ) Scope, Applicability and General principles—(Contd)

( 13 ) Minor not represented, Decree against.

—see cases under :—Questions as to validity of decree (infra).

(14-15) Party to decree and representative but claiming in capacity of trustees or third persons or in their personal capacity and not as representative.

—See cases under :—Questions arising between parties &c. ( claim proceedings or other objections ).

(16) Questions as to jurisdiction of Court to pass decree.

—See next heading. questions as to validity of decree infra

(17) Questions as to validity of the decree if within the section.

#### Synopsis.

- ( 1 ) General.
- ( 2 ) Dead man, decree against.
- ( 3 ) Fraud
- ( 4 ) Minors.
- ( 5 ) Questions as to jurisdiction of the Court.

—( 1 ) General :—The Court executing the decree cannot go behind it. 78 I C 853 = A I R 1924 N 419; see to the same effect 25 Mad 537; 5 All 53; 29 Calc 810; 6 Calc W N 796; 31 Calc 139.

—But agency court, not being governed by C P C can go behind decree passed by non-agency court without jurisdiction. A I R 1923 M 114 = (1922) M W N 728 = 16 M L W 669 = 69 I C 559.

—Executing Court cannot deal with the question whether decree should stand or not. A I R 1921 Bom 228 = 45 B 503 = 59 I C 715.

—Nor question the correctness of the decree. A I R 1929 Rang 275=Ind Rul (1930) Rang 165 = 122 I C 901.

Nor can it allow a new point to be raised in the execution proceedings; especially when its determination involves a re-opening of the decree and the decision of complicated questions of fact. A L R 1933 A 421.

—Court can interpret decree but cannot enquire whether original Court could pass it. A I R 1924 Pat 504 = 5 Pat L T 368 = (1924) Pat 25 = 78 I C 303.

—So also it can amend decree, but when it does pass an order to amend any decree its order comes under S. 47. A I R 1927 Lah 651=103 I C 673.



## C. P. C. (1908) S. 47 (Contd)

## (2) Scope, Applicability and General principles—(Contd)

## (17) Questions as to validity of the decree—(Contd)

—Decree *prima facie* legal objection regarding jurisdiction of Court passing it cannot be raised in execution. A I R 1929 Mad 383=Ind Rul (1929) Mad 835=119 I C 33.

—Executing Court's only duty is to execute decree according to its terms, and not to say that decree is not binding on property in the absence of certain parties. A I R 1921 Mad 85=13 L W 143 = 61 I C 759.

—Decree which on the face of it is enforceable to the fullest extent cannot in execution proceedings be challenged as being inexecutable wholly or in part on account of an agreement entered into prior to decree. A I R 1926 Rang 140=4 R 118=5 Bur L J 41 = 96 I C 773.

—Saleability of property decided in suit —Executing Court is bound to sell. A I R 1925 All 652 = 23 A L J 841 = L R 6 A 448 Civ = 47 A 900 = 89 I C 364.

—Where the plaint omits a relief for possession in a suit for specific performance of a contract of sale, or the decree is silent about it, the executing Court can grant the plaintiff the possession of the property. A I R 1931 Pat 179 = Ind Rul (1931) Pat 209 = 12 P L T 636=131 I C 529.

—Heirs of mortgagor judgment-debtor cannot challenge right of judgment-debtor to mortgage in execution. A I R 1925 Pat 625 = 4 Pat 510 = 6 P L T 634 = 87 I C 849 = 88 I C 141.

—An objection to the execution of a mortgage-decree could not be entertained in execution and the decree must be executed as it subsists. 55 I C 256.

—The executing Court can construe but cannot question validity of decree. A I R 1930 Mad 688 = 59 M L J 160 = 32 L W 100 = (1930) M W N 337 = 53 M 750 = Ind Rul. (1930) Mad 795 = 125 I C 539. See also 22 B 425 and 4 C L J 475.

—Even though the Court passing the decree has contravened some provision of law. 24 C W N 1070 = 60 I C 204.

—Or even if the decree is based on award. A I R 1921 Bom 301 = 23 Bom L R 306 = 62 I C 96.

—Plea by legal representative challenging foundation of decree cannot be entertained in execution. A I R 1924 Nag 81 = 20 N L R 24 = 78 I C 136.

—S 47 applies only where satisfaction of the decree as distinguished from the validity of the decree itself is in question. A I R 1930 All 628 = 52 A 217 = Ind Rul (1930) All 190 = 121 I C 702.

## C. P. C. (1908) S. 47 (Contd)

## (2) Scope, Applicability and General principles—(Contd)

## (17) Questions as to validity of the decree—(Contd)

—Objection to a legality of a decree can be raised in execution. A I R 1923 P 75 = 1923 Pat 184=4 Pat L T 311 = 1 Pat L R 217=2 P 538 = 72 I C 1049. see also 10 I C 536; and 35 C 202.

—But executing Court cannot investigate validity of decree provided valid and executable decree is in existence. A I R 1925 Cal 276 = 82 I C 255.

—Separate suit alone is the remedy where validity of the decree is challenged. A I R 1926 All 475 = 48 A 574 = 95 I C 147.

—Objection that decree is nullity can be taken in execution. A I R 1927 Bom 53 = 28 Bom L R 1367=98 I C 927. See also 26 P L R 474 = 88 I C 865 = A I R 1925 L 494 = 6 L 313.

—And in such a case proceeding can be treated as suit and relief granted A I R 1926 All 387 = 48 A 362 = 24 A L J 379=93 I C 376.

—It has been held by the Nagpur J C Court that executing Court can question validity of decree within certain limits where question of jurisdiction is involved A I R 1929 Nag 35 = 26 N L R 60 = Ind Rul (1930) Nag 60 = 120 I C 732. See also obiter dictum in. 103 I C 673 = A I R 1927 L 651.

—And it has been held by the Patna High Court that where the decree is not nullity but voidable the executing Court cannot go behind it. A I R 1930 Pat 480 = 11 P L T 185 = Ind Rul (1930) Pat 563 = 125 I C 787.

—The question as to a decree being nullity and not in existence for it being passed by a Court without jurisdiction or that it was passed against a dead person or against a minor not properly represented in the suit is a question which can be entertained in execution. 16 A L J 327 = 45 I C 21 = 40 A 423; and 10 L L J 319 = A I R 1928 L 829; and 31 C W N 739 = 103 I C 644 = A I R 1927 C 578; and 1924 Lah 448 = 5 Lah 54 = 78 I C 460; and 1928 Mad 1054 = 113 Ind Cas 663; and 1929 Mad 213 = 56 M L J 175 = 29 Mad L W 125 = 52 Mad 275 = 115 Ind Cas 801.

—But not the question as to the validity of the decree which can be gone into only by way of a separate suit and not in execution. 26 C W N 708 = 70 I C 451; see also 24 Ind. Cas. 195=27 M L J 25; and 1925 Pat 516 = 85 Ind. Cas. 488; and 1 Pat L W 620=39 I C 537; 60 Ind Cas 204 = 24 Cal W N 1070; and 118 P L R 1920 = 55 I C 816; and 60 P L R 1919 = 54 I C 239; and 55 Ind Cas. 256; and 33 M L J 543 = (1917) M N W 845 = 6 L W 675 = 42 I C 282; and A I R 1917 Pat 212 = 39 I C 925; and 22 Ind Cas 407 = 19 Cal. W N 903 = 18 Cal. L. J. 646; and 18 Ind Cas 48 = 68 P. R. 1913 = 44 Pun L R 1913 = 53 P. W. R. 1913;

C. P. C. (1908) S. 47 (Contd.)

(2) Scope, Applicability and General principles—(Contd.)

(17) Questions as to validity of the decree—(Contd.)

and 15 Ind Cas 436 = 7 Cal. W N 84 = 16 Cal L J 542; and 14 Ind Cas 29; and 12 Ind Cas 689 = 21 M L J 1036 = 10 Mad L T 429 = 2 W N 458; and 10 Ind Cas 536 = 14 Cal. L J 648; and 10 Ind Cas 532 = 14 Cal L Jour. 83; and 8 Ind Cas 610; and 1930 All 826 = 1930 All L J 1135; and 1929 Rang 275; and 1922 Mad 186 = 65 Ind Cas 710 = 15 M L W 301; and 1929 All 252 = 1929 All L J 425 = 115 Ind Cas 462; and 1927 Bom 156 = 29 Bom L R 244 = 101 Ind Cas 129; and 1926 Lah 547 = 8 Lah L J 310 = 97 Ind Cas 288 = 27 Pun L R 706; and 1926 Cal 109 = 30 Cal W N 86 = 89 Ind Cas 765; and 1926 Jour. 156 = 13 Oudh L J 510 = 90 Ind Cas 32; and 1925 Nag 377 = 87 Ind Cas 72; and 1925 Mad 218 = 79 I C 891; and 1925 Cal 203 = 40 Cal L J 254 = 84 Ind Cas 999; and 1924 Nag 81 = 20 Nag L R 24 = 78 Ind Cas 136; and 1923 Pat 375 = 4 Pat L T 311 = 1 Pat L R 217 = 2 Pat 638 = 1923 Pat H C C 184; and 1922 Rang 22 = 13 Bur L T 170; and 1922 Bom 31 = 46 Bom 635 = 24 Bom L R 1 = 65 Ind Cas 600 F B; and 1921 Bom 229 = 45 Bom 946 = 22 Bom L R 1193; and 11 Ind Cas 192 = 5 Sind L R 71; and 5 C L J 328; and 1905 A W N 122 = 2 A L J 460

—Final decree in mortgage suit without a preliminary decree is not without jurisdiction and cannot be challenged in execution: 96 I C 686 = A I R 1926 C 1179.

—On an application for substitution of the petitioner's name in the place of the decree holder for executing the decree, the validity of the decree cannot be questioned. 8 Bur L T 216 = 32 I C 492.

—(2) Dead man, decree against:—A decree against a dead man is a nullity and no separate suit is necessary to challenge the fact: 28 Bom L R 1367 = 98 I C 927 = A I R 1927 B 53.

—Objection can be taken that decree is a nullity as being passed against dead persons. A I R 1928 Pat 272 = 7 Pat 331 = 107 I C 848.

—The decree can even be shown to be in favour of dead person though no objection was taken at the time. A I R 1921 All 404 = 19 A L J 95 = 43 A 328 = 64 I C 927.

—For the question whether decree passed against judgment-debtor who was dead at the time of decree binds his legal representatives who were not impleaded is question within s. 47. A I R 1921 Lah 219 = 5 Lah L J 1 = 70 I C 929.

—But an unrepresented party is not party and cannot object under s. 47. A I R 1930 Pat 480 = 11 P L T 185 = Ind Rul (1930) Pat 563 = 125 I C 787.

C. P. C. (1908) S. 47 (Contd.)

(2) Scope, Applicability and General principles—(Contd.)

(17) Questions as to validity of the decree—(Contd.)

—(3) Fraud—(a) *Fraudulent Execution*:—An application to have a sale set aside on ground of fraud can be made under s. 47. 2 A L J 469 = 162 A W N 1905 = 27 A 702.

—Even after the confirmation of the sale *ibid*; and the purchaser cannot plead want of notice of fraud: 27 C W N 587 = 37 C L J 145 = 74 I C 975 = A I R 1923 C 538.

—So also an application to set aside an execution-sale was made on the ground of fraud, the fraud being that the decree had been satisfied by payment to the husband of the decree-holder on the day before the sale, but the payment was not certified and the sale was held: 10 Ind Cas 625.

—An application for setting aside a sale purported to have been signed by the appellant and her brothers. In that application, a compromise petition purporting to have been signed by all of them was presented. Subsequently the appellant presented this application for setting aside the sale. *Held*, that she is entitled in this application to show that she had no part in the former proceeding, that the compromise was obtained behind her back and in fraud of her rights, and that it was not binding upon her, without having the compromise set aside either on review or in a regular suit. 3 Ind Cas 116 = 14 C W N 823

—Fraud or force is effected by one of several judgment-debtors in preventing execution extension can be granted only as against him. A I R 1930 Sind 218 = Ind Rul (1930) Sind 222 = 125 I C 830. See also for further discussion on this point under para (d) below—"Separate suit."

—(b) *Fraudulent Decree*:—As a rule, the executing Court must execute the decree as it stands and according to its terms; it cannot go behind the decree. It follows, therefore, the question as to validity of the decree is not one in execution or about discharge or satisfaction of the decree and the only remedy is a separate suit—see under para (d) below—though the question impeaching the validity of execution sale is as we have seen in para (a) above question in execution. In case of fraudulent decree the judgment-debtor can ask for injunction restraining execution is the remedy. A I R 1924 Nag 413 = 80 I C 59.

—And in case assignment he can get it declared invalid as being fraudulent. A I R 1929 Lah 51 = Ind Rul (1929) Lah 717 = 117 I C 893.

C. P. C. (1908) S. 47 (Contd.)

(2) Scope, Applicability and General principles—(Contd.)

(17) Questions as to validity of the decree—(Contd.)

—Where the plaintiffs had no interest in the property at the time the mortgage-decree was passed by reason of the fact that they were then unborn and the property was not ancestral. *Held*, that they could not come in execution to set aside the decree. 29 I C 402. following. 5 C L J 328.

—S. 47, C P C is no bar to a suit for damages for fraudulent execution of decree. The measure of damages is the amount which the decree-holder recovered under such fraudulent execution. (1914) M W N 174 = 23 I C 405.

—(c) *Second Appeal*:—S. 311 of the Civil Procedure Code of 1882, applied, only to irregularity and made no provision for the case of fraud and a second appeal was held to lie where a sale was sought to be set aside on the ground, of fraud, the reason being that as fraud was not included within the section, the case of fraud was attracted to the general provisions of S. 244, in which case, there was a second appeal. But rule 90, of order 21 of the present Code of 1908 includes the case of fraud as well; and the result of the change in the law is to place the procedure in the case of the setting aside of sales on the same footing, whether the application is based on the ground of irregularity or of fraud. In either case there is no second appeal. 9 I C 135.

—But this applies only to cases under O. 21, r. 90 i. e. where a judgment-debtor impeaches the validity of the sale on the ground of fraud in publishing and conducting the sale, and not on ground of fraud in execution proceedings which preceded and led up to the sale. Thus an application to set aside an execution sale was made on the ground of fraud, the fraud being that the decree had been satisfied by payment to the husband of the decree-holder on the day before the sale but the payment was not certified and the sale was held: *Held* that the matter did not come within the scope of O. 21, R. 90 inasmuch as the fraud alleged was not fraud in the conduct or publication of the sale, but it came within the scope of S. 47 and that, therefore, a second appeal lay: 10 I C 625. See also 22 C L J 266=16 I C 690.

—To sum up: where the decree itself is impeached as being fraudulent, a separate suit alone is the remedy, for it is not a question in execution; but where the judgment-debtor impeaches the validity of the execution-sale only there are two courses—(1) if he impeaches on the ground of fraud in publishing and conducting of the sale

C. P. C. (1908) S. 47 (Contd.)

(2) Scope, Applicability and General principles—(Contd.)

(17) Questions as to validity of the decree—(Contd.)

under O 21 r. 91 there is no right of separate suit, (except in case of revenue sales in Madras: A I R 1927 M 1035), nor any right of second appeal. see 44 M 351; and 7 L 1; and 5 R 606; (2) if he impeaches it on the ground of fraud in execution proceedings which preceded and led up to the sale the matter falls within s. 47; no separate suit lies, but there is right of second appeal see 1924 A L J 413 = A I R 1924 A 698 = 83 I C 1028; and 47 M L J 549 = A I R 1924 M 778 = 84 I C 975.

—And that a suit for recovery of land sold through fraud but not covered by O. XXI, r. 90 is maintainable. A I R 1923 All 573 = 74 I C 351.

—But that a separate suit based on fraud in adjustment of decree does not lie. A I R 1921 Sind 159 = 16 S L R 207 (F B) = 83 I C 360; and that in case of excess execution under fraud and cheating, application under s. 47 is proper remedy and no separate suit lies, A I R 1928 Cal 776 = Ind Rul (1929) Cal. 405 = 115 I C 581.

—(4) *Minors and Lunatics*:—Minor against whom decree is passed but who was not represented can object to the execution of the decree in execution proceedings: 23 L W 311 = 1926 M W N 129 = 93 I C 356 = 50 M L J 232 = A I R 1926 M 429; so also a lunatic 19 M L T 245 = 34 I C 428; for plea of invalidity of decree on the ground of non-representation of minor (or lunatic) can be raised at any time, even in execution; 113 I C 663 = A I R 1928 M 1057.

—A minor who is not properly represented by a guardian ad litem is not a "party" within the meaning of S. 47: A I R 1926 N 267=92 I C 241. See also 3 Ind Cas. 864=13 C W N 1182 = 10 C L J 318 = 6 A L J 822=11 Bom L R 1225 = 6 Mad L T 279 = 19 M L J 631=36 Ind App. 168=31 All 572 P C.

—Infant defendant—Mother proposed guardian No consent—Appointment Decree if null. see 15 Cal L J 3=13 Ind Cas 414; Minor—suit against as major—Effect see 1905 A W N 122=2 A L J 460 and 18 Ind Cas 859 = 17 Cal W N 549 = 18 Cal L J 18. Minor—Guardian ad litem—Appointment invalid without his consent see 21 Ind Cas 288 = 35 All 487 = 40 Ind App 182 = 11 All L Jour 901=15 Bom L R 1001 = 18 C L J 384 = 16 Oudh Cases=247 25 Mad L J 492 = 1913 Mad W N 785 = 17 Cal W N 1165 = 14 Mad L T 299 P C.

—Decree against lunatic—Sale without proper representative is void. 18 C W N 1329 = 24 I C 177.

C. P. C. (1908) S. 47 (Contd.)

(2) Scope, Applicability and General principles—(Contd.)

(17) Questions as to validity of the decree—(Contd.)

—Executing Court can refuse to execute a decree which is a nullity. But mere absence of a formal order appointing a guardian *ad litem* to a lunatic does not make the decree a nullity where the lunatic has been effectively represented and described as such in the plaint. A I R 1930 Pat 480 = 11 P L T 185 = 125 I C 787.

—Minor legal representatives of judgment-debtor brought on record, but remaining unrepresented for want of proper appointment of guardian—Suit by them to set aside sale is not barred. A I R 1922 Lah 447 = 5 L L J 44 = 67 I C 547.

—Minor for whom guardian is validly appointed is party, to the decree and any action that he takes to set aside that decree or, to invalidate the proceedings taken in execution must be taken under s. 47. A I R 1927 Mad 209 = 98 I C 463.

—When attachment in execution of decree against minors and their guardian was effected by service of prohibitory order on guardian though not addressed as guardian it binds minors. A L R 1934 N 6.

—A judgment against a person who was a lunatic at the time of trial, and yet was not represented by a legal guardian, is not to be impeached in execution but should be reversed or annulled in some special proceeding taken for that purpose, 44 Cal 627 = 24 C L J 375 = 21 C W N 1104 = 35 I C 856. see also 1917 P H C C 166 = 45 I C 218.

(5) Questions as to jurisdiction of Court Passing decree:—The Court in which the suit is brought must have jurisdiction to execute the decree. 28 M 64 and I U B R 66.

—Decree passed without jurisdiction is void. Decree passed within jurisdiction but irregularly is voidable. A I R 1930 Pat 480 = 11 P L T 185 = 125 I C 787.

—A Court to which a decree has been transferred must take the decree as it stands and is not entitled to question the validity of the decree upon the ground that the decretal court had no jurisdiction, territorial, personally or pecuniary to pass it. [ 10 Bom 65; 101 I C 53 and 44 Cal 627, relied on 8 Rang. 544 = A I R 1930 Rang 337 = 129 I C 519, overruled A I R 1925 Cal 907 and A I R 1928 Lah 829, distinguished from and Caselaw discussed ] A I R 1931 Rang 252 = 9 R 480 F B see also 15 W R 219; see also A I R 1925 Cal 907 = 53 C 166 = 42 C L J 1 = 29 C W N 948 ( F B ) = 89 I C 685.

—But executing Court can question validity of decree only on the ground of

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C. P. C. (1908) S. 47 (Contd.)

(2) Scope, Applicability and General principles—(Contd.)

(17) Questions as to validity of the decree—(Contd.)

jurisdiction pecuniary territorial or personal. It cannot question an appellate decree on the ground that appeal itself was incompetent and erroneously entertained. A I R 1931 Cal 546 = 35 C W N 332 = Ind Rul (1931) Cal 784 = 134 I C 80.

—Executing Court can only refuse to execute a decree which was a nullity as being passed without jurisdiction either territorial or pecuniary or with reference to the persons before it. 110 I C 510.

—Executing Court can go into objection that decree was void as being passed after appeal had abated. 43 All 328 = 19 A L J 95 = 64 I C 927.

—The general rule is that a Court executing a decree cannot go behind the decree. It has no power to question the validity of the decree. But where the Court passing the decree was inherently incompetent and had absolutely no jurisdiction to pass it, its decree is a nullity. To such a decree S. 47 C P C does not apply for such a decree is no decree at all. In such a case the Executing Court can refuse to execute the decree. A L R 1934 O 90.

—Nullity of decree for want of jurisdiction is a question within s. 47. A I R 1929 Lah 449 = 11 Lah L J 306 = Ind Rul (1930) Lah 39 = 120 I C 279.

—But the Oudh and Nagpur J. C. Courts have held that in execution no objections to the frame of decree or the jurisdiction of the court which passed it can be taken. A I R 1927 Oudh 33 = 2 Luck 169 = 29 O C 276 = 13 O L J 320 = 3 O W N 375 = 92 I C 722 Also A I R 1926 Nag. 377 = 87 I C 72.

—And the Allahbad High Court that objection not raised in suit that mortgage of house by agriculturist is invalid cannot be raised in execution of mortgage-decree. A I R 1924 All 328 = 22 A L J 321 = L R 5 A 201 Civ = 46 A 489 ( F B ) = 84 I C 749. So also the Madras High Court that Objection as to jurisdiction to try suit cannot be raised in execution. A I R 1926 Mad 128 = 49 M L J 664 = 22 L W 567 = 91 I C 98.

—Where a person, carrying on business in firm's name during the pendency of a suit against the firm and a decree is passed, the Executing Court can enquire into the question whether the decree is a nullity. A I R 1930 Cal 327 = 51 C L J 30 = 34 C W N 36 = 126 I C 118.

C. P. C. (1908) S. 47 (Contd.)

(2) Scope, Applicability and General principles—(Contd.)

(18) Questions as to validity of or setting aside sale.

—See also under Fraud Supra.

—(a) General:—Application by decree-holder to set aside the sale. Fact that auction purchaser who is no party to suit, is interested in the result does not bar applicability of s. 47. A I R 1923 Cal 865 = Ind Rul (1929) Cal 490 = 116 I C 634.

—Question relating to legality of sale is under s. 47. A I R 1926 All 457 = 24 A L J 519 = 96 I C 137.

—Execution attacked before sale—Sale can be challenged under s. 47. A I R 1924 Pat 67 = (1923) Pat 298 = 5 P L T 61 = 83 I C 747.

—But it has been held in Lower Burma that validity of sale cannot be questioned in executing Court. A I R 1922 (L B) 22 = 10 L B R 349 = 13 Bur L T 170 = 64 I C 391.

—Bar of suit—Refund of purchase money—Executing court power to order sale set aside—Agreement alleged by decree-holder that auction purchaser agreed to accept less amount is irrelevant. 105 P W R 1913 = 172 P L R 1913 = 19 I C 439.

—Sale confirmed—remedy of judgment-debtor—S. 47 not applicable—order confirming sale cannot be challenged before executing Court. A L R 1933 L 394. unless the sale is attacked on the ground of fraud see under Fraud supra.

—Application under s. 227 (2) of the Orissa Tenancy Act for setting aside sale on the ground that the holding was purchased by the judgment-debtor himself through *benamindar* is not under s. 47. A I R 1927 Pat 177 = 6 Pat 366 = 8 P L T 186 = 101 I C 564.

—(b) Application under O. XXI, r. 90 on ground of material irregularity or fraud in publishing or conducting the sale:—Application to set aside sale under O. XXI, r. 90, and s. 12-A, Chota Nagpur Encumbered Estates Act is to be decided under s. 47. A I R 1931 Pat 97 = Ind Rul (1931) Pat 213 = 131 I C 533.

—Objection as to the defect or absence of necessary attachment of the property sold is under s. 47. A I R 1930 Mad 414 = Ind Rul (1930) Mad 63 = 120 I C 863.

—Objection as to want or defect in attachment is under s. 47. A I R 1924 Rang 124 = 1 R 533 = 77 I C 368.

—Prayers under O. XXI, r. 90, and s. 47 can be jointly made in one application. A I R 1928 Pat 272 = 7 Pat 331 = 107 I C 848

C. P. C. (1908) S. 47 (Contd.)

(2) Scope, Applicability and General principles—(Contd.)

(18) Questions as to validity of or setting aside sale—(Contd.)

—Question whether there was suppression of sale processes can only be raised under s. 47. A I R 1926 Cal 1219 = 44 C L J 167 = 98 I C 206

—Order on objection to sale proclamation on ground of mis-description of the boundaries is within s. 47 and appealable. A I R 1925 Cal 318 = 29 C W N 556 = 80 I C 861.

—Where the heirs of the recorded tenant are not impleaded as parties to the execution proceedings, a sale of the holding is invalid as against them. A I R 1923 Cal 166 = 70 I C 931.

—Modification of permission to bid in decree-holder's absence is material irregularity sale can be set aside under s. 47. A I R 1925 Oudh 381 = 12 O L J 321 = 2 O W N 297 = 87 I C 997.

—Execution sale—Confirmation—Without balance of purchase money being deposited—void or voidable see 9 I C 66 = 15 Cal W N 350.

—(c) Application under O. XXI r. 92:—An application by judgment debtor under O. XXI r. 92 to set aside a sale is to be decided under s. 47 and the decision of the executing Court is appealable 19 Cal 683 P C; A I R 1917 P C 121 followed. 1 Pat L J 232; A I R 1930 Pat 311, distinguished. A I R 1931 Pat 97 = Ind Rul (1931) Pat 213 = 12 P L T 505 = 131 I C 533.

—(d) Application under O. XXI r. 101:—Order on petition under r. 101 deciding objections to sale of property between parties is under s. 47. 31 I C 102.

—Where a property was sold in execution of an *ex parte* decree and purchased by the decree-holder and the decree was subsequently set aside under O. 9 R 13 an application under this section and not a suit is the remedy to set aside the sale 57 I C 125 = 44 Bom 702 = 22 Bom L R 403.

—(i) In contravention of the terms of the decree:—Application to set aside the sale on ground that sale was held contrary to directions in decree is one under s. 47. A I R 1928 Mad 140 = 106 I C 242.

—Sale of excess property in contravention of decree—Order on application for setting aside sale is under s. 47. 1925 All 551 = 23 A L J 558 = L R 6 A 464 Civ = 88 I C 393.

—The proper procedure to set aside a sale on the ground that it is not warranted by the terms of the decree or that it was held in contravention of the directions contained therein is as between the parties to the suit by an application under this section and not by a suit. A I R 1928 R 215.



C. P. C. (1908) S. 47—( *Contd.* )

( 2 ) Scope, Applicability and General principles—( *Contd.* )

( 18 ) Questions as to validity of or setting aside sale—( *Contd.* )

—(j-k) *Mistake*:—Where the decree-holder or the judgment-debtor seeks to set aside the sale on the ground that the decree holder's own property was sold by mistake instead of that of the judgment debtor. A I R 1928 Cal 865.

—(l) *Want of jurisdiction*:—Even where the sale is held without jurisdiction as where, at the time of the sale the judgment-debtor is dead, or the property is out side the territorial jurisdiction of the court a party seeking to set aside the sale on that ground must do so under this section. A I R 1924 All 261 = 46 All 153=21 All L J 917=4 A L R (civ.) 607 = 79 I C 532.

—(m) *Want of notice*:—Question of want of notice under O XXI, r. 66, is under s. 47. A I R 1930 Mad 489 = Ind Rul (1930) Mad 958 = 127 I C 142.

—Order on question of notice under r. 22 O XXI, is one in execution. A I R 1926 Pat 397 = 8 P L T 28 = 97 I C 798.

—An objection under O. XXI r. 22 is under s. 47. A I R 1926 Cal 539 = 91 I C 711.

—Setting aside of—application for—Limitation—Application under S. 47 on ground of non-service of notice under O 21 r. 22—Must be made within 3 years from date of sale. 54 C L J 591 = 137 I C 378 = I R 1932 C 291 (1) = A I R 1932 C 381.

—An application by judgment-debtor to set aside sale on ground of failure to comply with O XXI r. 22 and r. 66 falls under s. 47. But it is governed by Art 166 of the Limitation Act A I R 1931 All 145=(1931) A L J 119 = Ind Rul (1931) All 324 = 130 I C 708.

—On an application by one of the heirs of the judgment-debtors on the ground of want of notice under O. XXI r 22 the sale should be set aside only as regards the applicant's share and not in its entirety 47. Mad 288, followed. A I R 1931 C 555=53 C L J 46 = 35 C W N 220 = 58 C 825 = Ind Rul (1931) Cal 734 = 133 I C 670

—Objection that notice under O. XXI r. 22 was not issued is not under s. 47. A I R 1924 Pat 11 = ( 1923 ) Pat 283 = 2 Pat 916 = 4 P L T 721 = 74 I C 383.

—An objection against a sale in execution of a decree on the ground that no notice was served on the judgment-debtor under O 21 R 22, or under R 66 and an application to set it aside on that ground is one falling under the section. 15 I C 506 = 40 Cal 45.

C. P. C. (1908) S. 47—( *Contd.* ).

( 2 ) Scope, Applicability and General principles—( *Contd.* )

( 18 ) Questions as to validity of or setting aside sale—( *Contd.* )

—(n) *Want of permission to bid*:—A judgment-debtor seeking to set aside a sale of his land on the ground that the decree-holder has purchased it without permission to bid, must proceed only under this section and not by a suit : 17 I C 126.

—(o) *Want of saleable interest*:—Where the sale is in execution of a mortgage decree an objection that the judgment-debtor had no saleable interest in the property, is really an attack on the decree itself and cannot be gone into by the executing Court. A I R 1929 Rang 275 (1)

(19) *Questions as to wrongful execution and excess execution if within the section.*

—(a) *Excess execution—general*—Question of excess execution is under s. 47. A I R 1925 Cal 1258 = 42 C L J 22 = 30 C W N 41 = 89 I C 744.

—(b) *Interest*—Application under O. XXI, r. 89—Decree-holder claiming interest not mentioned in execution application through mistake—Question is under s. 47. A I R 1925 Cal 948 = 41 C L J 391.

—(c) *Mistake*—Order of dismissal of execution case made on account of mutual mistake, may by consent be re-opened. Order or proceeding can not be re-opened on the ground of unilateral mistake of fact A I R 1929 Cal 670 = 33 C W N 739 = Ind Rul (1930) Cal 399 = 124 I C 79.

—Possession of wrong property delivered—Rectification of mistake is not under s. 47. A I R 1929 Pat 391 = Ind Rul (1930) Pat 320 = 123 I C 400.

—Some property of decree holder sold through mistake instead of property of judgment-debtor—Remedy is under s. 47 and not by separate suit. A I R 1928 Cal 865= Ind Rul (1929) Cal 490 = 116 I C 634.

—Property not in suit included in decree and sold through mistake—Suit after two years from confirmation of sale does not lie—Art. 166 applies. A I R 1923 Bom 62 = 24 Bom L R 423 = 46 B 914 = 67 I C 857.

—Decree satisfied by one judgment-debtor and certified—Payment by another, under mistake—Executing Court has power to refund. A I R 1922 Pat 166 = 1 Pat 336 = (1922) Pat ( Sup. ) 53 = 3 P L T 754 = 65 I C 307.

—(d) *Possession*—Land sold in excess at Court auction—suit for recovery of the excess by co-sharer who was impleaded as *pro forma* defendant—suit, whether barred

## C. P. C. (1908) S. 47 (Contd)

## (2) Scope, Applicability and General principles—(Contd)

## (19) Questions as to wrongful execution and excess execution if within the section—(Conclld)

under S. 47 auction-purchaser, whether party to suit see. A L R 1934 L 51.

—Where in execution of a decree, land not included in, or covered by, the decree, or which is in excess of the decree are sold to, or taken possession of by, the decree-holder, the proper remedy for the judgment debtor to recover the whole or the excess land, is by an application under the section and not by a separate suit, as the matter is one in execution between the parties to the suit. 49 I C 948 (949) and A I R 1928 Lah 936 (937) = 110 I C 859; and A I R 1928 Cal 865 (866).

—Money unduly recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force; but this rule of law rests upon the ground that the original decree or judgment must be taken to be subsisting and valid, until it has been reversed or superseded by some ulterior proceeding. 2 All 61, see also 3 C L J 181; and A I R 1928 C. 776

## (20) Rent decrees, forfeiture-clause if relieved against in execution.

—Relief against forfeiture—Grant of relief in execution proceedings—See 13 Bom L R 154 = 35 B 239 = 10 I C 746.

## (21) Res-Judicata, constructive.

—See "Resjudicata" (infra).

## (22) Res-Judicata; orders under this section if &amp; when.

—See Resjudicata (infra).

## (23) Surety, disputes by or against in execution.

—See cases under Questions arising between parties etc.—surety infra.

## (24) Miscellaneous Cases.

—Application by plaintiff for payment of money deposited by petitioner when applying for setting aside ex parte decree. A I R 1928 Mad 296 = 1927 Mad W N 885 = 54 M L J 452 = 27 Mad L W 661.

—Enquiry regarding substituted share of judgment-debtor's property or accretions to his property see 45 I C 192 (2)=3 Pat L J 339.

## C. P. C. (1908) S. 47 (Contd).

## (2) Scope, Applicability and General principles—(Conclld)

## (24) Miscellaneous Cases—(Conclld)

—Partition during suit by co sharer—His decree holder can proceed against substituted share under s. 47 1 P L W 711 = 2 Pat L J 496 = (1917) Pat 205 = 40 I C 508.

—Jurisdiction of Court to extend time, extends only to proceedings anterior to decree. A I R 1924 Oudh 179 = 74 I C 573, see also 18 I C 14 = 35 All 116 = 11 All L J 62.

—Disputes between the decree-holder and judgment-debtor under S. 50 and S. 52, see. A I R 1925 Nag 380 = 85 I C 768; and A I R 1930 Oudh 268 = 127 I C 865.

## (3) Adjustment of decree and payments under it.

—See cases under :—(1) C P C s. 2 (2) C P C s. 11—Execution Proceedings (3) C P C s. 144 (1) (4) C P C s. 47—Questions relating to satisfaction of decree (5) C P C s. 47—Questions relating discharge of decree.

## (4) Appeal and second appeal.

## Appeal lies.

—(1) General—Order in execution to be appealable must fall within the definition of decree. A I R 1926 All 401 = 94 I C 1. see also 99 I C 208 = A I R 1927 A 208.

—Therefore only those orders in execution which determine rights between parties are appealable. A I R 1928 All 268 = 48 A 260 = 92 I C 644.

—It is not every order made in execution which is a decree, and an order granting or refusing a process for the examination of witnesses, or an order merely determining a point of law arising incidentally or otherwise in the course of a proceeding and not refusing any relief, is not appealable. But where the Court of execution finally negatived the right of the decree-holders to proceed against the land of the Judgment-debtor an appeal lay from such an order. 2 Lah L J 398 = 56 I C 173 = 115 P L R 1920.

—Orders passed in execution between parties to the suit relating to execution discharge or satisfaction of the decree are decrees and are appealable L B R 1893—1900, 375. see to the same effect. A I R 1929 Pat 351; and A I R 1929 Lah 884; and 20 I C 203 = 10 P R 1914 = 25 P W R 1914 = 217 P W R 1913 = 273 P L R 1913; and 28 I C 282 = 201 P W R 1915 = 45 P L R 1915; and 2 Mad L T 307; and 28 Mad 127 = 14 M L J 436; and A I R 1925 Cal 318 = 81 I C 861 = 29 Cal W N 556.

—In the case of arbitration proceedings, an appeal would lie against an order in exe-

## C. P. C. ( 1908 ) S. 47 (Contd)

## ( 4 ) Appeal and second appeal—(Contd)

## Appeal lies—(Contd)

uction of an award A I R 1929 Lah 228 = 113  
I C 536 see also 1914 M W N 52 = 22 I C 548..

—Question of agreement to give time to  
Judgment debtor for delivery of possession  
after Court sale see. 20 I C 874

—Appeal from an order under s. 47 should  
be allowed on the ground of want of notice  
if want of notice has in any way prejudiced  
appellant. A I R 1925 Mad 355 = 91 I C 414.

—Execution appeal—Court cannot pass  
orders contemplating reversal of original  
decree. A I R 1921 Sind 102 = 16 S L R 260 =  
79 I C 553.

—Order in execution of decree under  
Madras Estates Land Act, s. 77—Appeal lies.  
A I R 1927 Mad 440 = 52 M L J 332 = 100 I C  
678

—Objection as to Court-fee—Question  
arises whether execution can proceed—Order  
is appealable. A I R 1922 Pat 59 = 3 P L T  
146 = 70 I C 483.

—Question between persons claiming  
through decree-holder—Appeal whether lies.  
see A I R 1927 Mad 1025 = (1927) M W N  
680 = 105 I C 606

—Purchase by decree-holder—Applica-  
tion of Judgment-debtor to set aside sale—  
Compromise that application should be  
dropped but delivery of possession delayed to  
give time to judgment-debtor to pay off debt

—Application for delivery of possession  
by decree—Objection, by judgment debtor  
—Decision is appealable 18 C W N 27 = 20  
I C 874.

—Attachment of property as belonging  
to deceased judgment-debtor—Claim by  
judgment-debtor's son—Independent title,  
allegation of—Determination of question  
is a decree and appealable 16 I C 385.

—Where a decree holder's petitions  
purported to be presented under O. 47, R. 1  
but were in substance applications under  
S. 47 C P Code, an appeal therefore lay to  
the District Judge from the Munsif's order  
of dismissal. 26 C L J 317 = 40 I C 839

—Question relating to execution—Appeal  
lies at instance of party. A I R 1927 Mad  
842 = 53 M L J 440 = 103 I C 311.

—An order under O. 31, Rr. 40 C P Code  
dismissing the application of a decree-holder  
for the arrest and imprisonment of the  
judgment debtor relates to the execution  
of a decree and is appealable. The conclu-  
ding words of S. 104 (c) C P C indicate  
that where an order directing the arrest or  
detention of the judgment debtor is made  
in execution of a decree it is to be treated as

## C. P. C. (1908) S. 47 (Contd)

## ( 4 ) Appeal and second appeal—(Contd)

## Appeal lies—(Contd)

an order coming under section 47. 53 F C 68 =  
1 Lah 77 = 22 P L R 1920 = 81 P W R 1919.

—A obtained a decree for possession on  
payment of a certain sum within a certain  
time. The payment was made after the time  
and A applied for execution. Held that the  
question was one "relating to the execution"  
of the decree and hence an order allowing  
execution was appealable. 12 A L J 12 =  
22 I C 926.

—Even if case does not strictly fall  
within s. 47, order of Court would be  
appealable if it purported to act under it  
A I R 1924 Mad 518 = 32 M L T 118 = 70 I  
C 329.

—Where an objection is treated by the  
lower Court as one under s. 47, appeal  
lies though it is not really one under that  
section. Ind Rul (1931) All 758 = 133 I C 902.

—A person, who claims the property  
sought to be attached by virtue of an  
assignment and against whom the prohi-  
bitory order is issued is a necessary party  
and has right of appeal. 1 Pat L T 75 =  
55 I C 175.

—Where the holder of a decree passed  
by the Court of a Dt. Munsif attached in  
execution thereof under O. 21, R. 52 of the  
C P Code, a sum of money which had  
been realised in execution of a decree  
passed by the Court of a Subordinate Judge  
in favour of the judgment debtor under the  
former decree and also obtained an order  
from the Sub-Court for payment of the  
said sum over to him. Held, that an appeal  
against the order of the Sub Court lay to  
the Dt. Court and not to the High Court.  
5 L W 264 = 38 I C 772.

—Order dismissing an application for a  
final decree for sale in a mortgage suit not  
order in execution. 35 M L J 552; right of  
appeal against orders—if applicable to or-  
ders under S. 70 of Hindu Religious  
Endowment Act see A L R 1933 M 193 = 37  
L W 207 = 1933 M W N 213 = 141 I C 799  
= A I R 1933 M 305.

—Where question is one under s. 47,  
appeal lies from order passed under s. 173.  
Bengal Tenancy Act, though no provision  
for appeal is made in the Act itself. A I R  
1925 Cal 122 = 85 I C 750.

—But from an order setting aside sale  
under S. 173 B T Act, no appeal lies. 19 C  
L J 81 = 20 I C 191

—The actual value of the subject-matter  
in dispute involved in the order is not the  
test of appeal under this section. 31 I C  
496; and A I R 1925 C 212; and 46 I C 584 =  
44 P R 1919 = 86 P W R 1918.

C. P. C. (1908) S. 47 (Contd)

(4) Appeal and second appeal—(Contd)

Appeal lies—(Contd)

—(1-A) Order improperly passed under the section :—S. 47 of the Civil Procedure Code is applicable to execution proceedings as much after an order has been passed declaring the decree satisfied as before an order is made to that effect where a decree has been held to have been discharged and one of the parties comes to the Court on the ground that the order has been wrongly passed and should be reviewed or reconsidered, that case could fall under S. 47 C P C and appeal is competent against the order passed therein. A L R 1933 A. 486.

—Where a court purporting to act under S. 47, directed execution to proceed against a minor and an appeal was preferred on the ground that the decree sought to be executed did not bind the minor : Held—That the fact that on appellant's own showing the minor would not be a party to the decree within the meaning of S. 47, and thus the order under S. 47, would not make the appeal incompetent. 15 C W N 725 = 8 I C 26.

—(2) Decision as to executability of decree :—Court refusing to decide executability of decree—Appeal lies. A I R 1918 Rang 40 = 5 R 775 = 6 Bur L J 225 = 106 I C 857.

—The determination of any question within s. 7 is a decree and the decision of the question whether a decree is executable or not is certainly a decree. An order that execution should issue and that a commissioner should be appointed for partition is a decree and is appealable. 37 Mad., 29 = 21 M L J 1063 = 10 M L T 437 = 12 I C 664.

—(3) Decision on question if execution is time-barred—Decision on question if execution is time-barred is decree, A I R 1924 Pat 683 = 2 Pat L R 222 = 84 I C 576.

—(4) Decision as to property attached if part of the assets of the deceased—A decision as to whether a property standing in the name of the legal representative of a deceased judgment-debtor, and attached in execution of a decree obtained against the latter, formed a part of the estate of the deceased is appealable, inasmuch as the proceedings came under S. 47 and not under O. 21, R. 58 of the C. P. Code 22 C L J 304 = 31 I C 321 following 17 C 711, and 20 C L J 48.

—(6) Order appointing a receiver in execution. In execution of a decree obtained by the appellant against the respondent as trustee of a waqf payments were made from time to time towards the satisfaction of the judgment debt but a considerable sum was still due. On the 16th April, 1912, the judgment-debtor paid Rs. 100 to the decree-holder and obtained an adjournment of the execu-

C. P. C. (1908) S. 47 (Contd)

(4) Appeal and second appeal—(Contd)

Appeal lies—(Contd)

tion proceedings, on condition that the balance would be paid in the following month in default of payment, he would raise no objection to the appointment of a receiver. On the 16th May 1912 the judgment-debtor defaulted to pay the money and the Primary Court accordingly appointed a receiver. Held, that the order appointing a receiver was appealable under S. 47 read with S. 51 (d) of the C. P. Code as it was made in an execution proceeding. 30 C L J 231 = 57 I C 70.

—An order appointing a Receiver in execution under O 40, R 1 is appealable under O 43, R 1 and is not appealable as a decree A I R 1922 C 414 = 55 C L J 1; see also A I R 1928 Notes 77, and A I R 1929 Mad 20 = 114 I C 839.

—But an order as to remuneration of the receiver is not appealable at all. A I R 1930 Lah., 352.

—(7) Order authorizing temporary alienation but refusing to sell property :—An order refusing to sell agricultural land and authorizing temporary alienation, falls under s. 47, and is appealable. Order authorizing temporary alienation but refusing to sell agricultural land is appealable. A I R 1931 Lah 141 = 32 P L R 60 = Ind Rul (1931) Lah 402 = 32 A L R 40 = 131 I C 274.

—Order under S. 72 C P Code refusing to arrange for temporary alienation of land—Order amounts to decree and is appealable. 52 I C 356.

—(8) Order confirming setting aside or refusing to set aside execution sale :—Objection to sale under s. 60. Sale confirmed, order appealable. A I R 1929 Lah 778 = Ind Rul (1929) Lah 5 = 120 I C 165.

—Order of the District Munsif extending time for payment of money is under O. 21 R 89 or 90 and therefore appealable. 36 I C 809

—A prior purchaser of a portion of a non-transferable occupancy holding subsequently sold in execution of a decree for rent is a representative of the judgment-debtor within S. 47 of the C P Code and therefore the question whether the sale should be set aside on application of the purchaser on the ground of fraud or under S. 173 of B T Act is a question between the parties to the suit or their representatives. Against a decision on such a question there is both an appeal and a second appeal. 27 I C 431.

—Application to set aside Sale—Sale set aside Appeal by auction purchaser whether Competent. B T Act 173 sec. 19 C L J 81 = 20 I C 191.

C. P. C. (1908) S. 47 (Contd)

(4) Appeal and second appeal—(Contd)

Appeal lies—(Contd)

—An application to set aside a sale by transferee from judgment-debtor before sale alleging that the execution proceedings were fraudulent that the decree had been satisfied before the sale and that the execution application of the decree holder was barred by limitation is an application under S. 47 C P Code; the order passed is a decree within the meaning of S 2 and an appeal and second appeal lay 21 I C 938 = 18 C L J 264.

—So also order dismissing application for setting aside order dismissing a previous application for execution without stating under what provisions of the law such application was being made is not appealable. A I R 1921 Lah 811 = Ind Rul (1929) Lah 446 = 115 I C 862.

—Sale set aside after confirmation—No appeal lies. A I R 1927 Lah 337 = 100 I C 800.

—Application to set aside execution sale by purchaser of a non transferable occupancy holding Rent. receipt of by landlord. See. 18 C W N 1266 = 20 C L J 341 = 27 I C 294.

—Appeal whether lies against an order rejecting an application to set aside Execution Sale—Dismissal for default—Restoration. See 56 I C 981.

—Appeal from decision on a preliminary point—Execution Sale. see 1 Pat L W 759 = (1917) Pat. 191 = 40 I C 517.

—An order setting aside an execution sale under S 173 of the B T Act on ground that the auction purchaser is a benamidar for one of the judgment debtors is not applicable by the benamidars even where the Court in arriving at the decision has considered some other matters such as O. 21 R 90 of the C P Code and other grounds in support of the application. Such a benamidar has also no right of appeal under the C P Code inasmuch as S 47 of the Code does not apply to the case of a benamidar. 46 I C 748.

—(S-A) Order directing mortgaged properties to be sold in a certain order:—An order prescribing the order in which mortgaged properties should be sold is appealable. Ind Rul (1931) All 196 = (1931) A L J 108 = 129 I C 708.

—An order directing mortgaged properties to be sold in a certain order with a view to benefit one party against another falling within S 47 and not within O 21 C 66 and is therefore appealable. The phrase "parties to the suit" does not necessarily mean parties arranged as plaintiff and defendant. It cannot be so in mortgage and partition suits

C. P. C. (1908) S. 47 (Contd).

(4) Appeal and second appeal—(Contd)

Appeal lies—(Contd)

—24 M L J 477 = (1913) M W N 382 = 13 M L T 347 = 19 I C 448.

—(9) Order dismissing application for restoration of execution case:—Order dismissing application for restoration of execution case is appealable 26 C L J 317 = 40 I C 839. but see contra A I R 1921 All 794 = L R 5 A 573 Civ = 80 I C 39.

—(10) Order dismissing application under O. 21 r. 103—Question under s. 47—Order XX1, r. 103; does not exclude appeal. A I R 1921 Mad 559 = (1921) M W N 698 = 66 I C 722.

—In execution of the decree obtained by him, a decree-holder purchased the property of some of the debtors in the suit, though they had been exonerated from liability, by the decree. These debts, applied to set aside the delivery of possession to the decree-holder and the application was dismissed. Held, that the order of dismissal was one under S. 47 of the C. P. Code and was therefore appealable. 29 M L J 629 = 32 I C 769.

—(11) Order dismissing execution proceedings—Application by Receiver for execution of decree dismissed—Appeal lies as he is representative of both parties. A I R 1929 Bom 279 = 31 Bom L R 320 = Ind Rul (1929) Bom 470 = 118 I C 694.

—A property of a judgment-debtor was attached at the instance of two judgment creditors by the Dt. Judge as also by the Subordinate Judge. The Subordinate Judge, having regard to the provisions of S. 63 of the C. P. Code then declined to proceed with the application of the attaching creditors for sale of the property and being of opinion that such proceedings should be taken in the Court of the Dt. Judge dismissed the execution case pending on his file. Held, that the order passed by the Subordinate Judge was one relating to execution within S. 47 and as such appealable. 26 C L J 42 = 42 I C 466.

—Where an application, under O. 21, r. 15, was rejected without summoning the judgment-debtor and where such debtor was not impleaded on appeal, the appellate Court might have no jurisdiction to decide the appeal; but where, in such appeal, the judgment-debtor is made a party the question comes under old s. 244, Civ. Pro. Code 1882 and an appeal would then lie. 28 P R 1898. (17 M 394, F.), but order dismissing execution application for default of decree-holder is not appealable. A I R 1923 Pat. 180 = 4 P L T 204 = 68 I C 337.



C P. C. (1908) S. 47 (Contd.)

(4) Appeal and second appeal—(Contd.)

Appeal lies—(Contd.)

—(12) Order allowing or disallowing objection to attachment—Order of dismissal of objection by judgment-debtor alleging that he has no saleable interest in property attached is appealable. A I R 1925 Oudh 618=28 O C 175=85 I C 997.

—Order releasing attached property on objection by Executor to estate is order under S. 47 and is appealable—decree being against deceased debtor's estate—execution, is taken against widow—objection by executor on ground of his not being party to decree is not maintainable decree holder is entitled to proceed against any one representing estate A L R 1934 C 3.

—Objection really falling within S. 47 mis-described by objector as one under O. 21, r. 58, and dealt with by Court under a misconception of such. The order in such a case nevertheless operates as a decree and is appealable under S. 47, 137 I C 258=33 P L R 496=A I R 1932 L 376=I R 1932 L 315

—Suit on mortgage-appointment of Receiver auction-purchaser in sale under prior attachment-impleaded in suit—income in the hands of Receiver—claim to—order on—O. appeal 21, r. 58. see A L R 1933 M 64=1933 A I R M 293=141 I C 372

—But Judgment-debtor not objecting to sale in execution but Collector thinking that the land in question is not saleable, order of the Court holding property to be saleable is merely a direction to the Collector, the order is not appealable. A I R 1929 Lah., 391=Ind Rul (1929) Lah 331 = 115 I C. 75

—A filed a suit on a mortgage against B and obtained a decree for sale of the mortgaged property. C who held a decree against B in another suit attached the profits of the mortgaged property deposited in Court to the credit of A's suit by a Receiver, and applied under R. 179 of the Civil Rules of practice (Mad) for the issue of a cheque for a sufficient part of the attached money. A objected claiming a charge on the amount for any balance that might be due to him after sale of the property. A's objection was upheld by Court and C's petition dismissed. On appeal to the High Court. *Held*, that C's petition should have been for the transfer of moneys to the credit of C's suit that the dispute was not covered by s. 17 of the Code, and the order was not appealable as one passed under S. 47 that the order should be treated as one falling under O. 21, R. 51, C P Code, on A's claim and was not subject to appeal of revision, whether it was passed under R. 137 of the Civil Rules of Practice in A's suit or under R. 137 of the Civil Rules of Practice in C's suit or under O. 21, R. 60

C P. C. (1908) S. 47 (Contd.)

(4) Appeal and second appeal—(Contd.)

Appeal lies—(Contd.)

in C's suit. The proper remedy for C was by way of a suit under O. 21, R. 53 C. P. C. 37 I C 348.

—Order allowing objection to attachment by person not party to the suit is not appealable 139 I C 785 = 1932 A L J 125 = A I R 1932 A 263=I R 1932 A 589=A L R 1932 A 380.

—A person claiming to be not a party to the suit preferred an objection to the attachment of certain property in the capacity of a stranger to the suit. The objection was dismissed on the ground that he was a party to the suit. *Held*, that the remedy of the objector was to file a regular suit to establish his right to the property attached and not to proceed by appeal. In such cases the test is whether the claim as laid by the objector is adverse to the claims of the real judgment-debtor, and an objector claiming under a paramount title is not deprived of his ordinary remedy of a regular suit merely because his objection is dismissed on the ground that he is held to be a party to the suit. 47 I C 904

—Order dismissing application for is not appealable. A I R 1924 Mad 97 = 32 M L T 155 (H C).

—Objections by judgment-debtor dismissed in default—No appeal lies, A I R 1925 Oudh 4 5 = 28 O C 124 = 85 I C 393.

—Where on the death of a judgment-debtor, his legal representative is brought on the record, and such legal representative sets up in execution proceedings, title on behalf of a person not a party to the suit, the order on such a petition is not one coming within S. 47 of the C P Code but is within the purview of O. 21, R. 58 and is not appealable, 31 I C 393, following 23 M 95; and 39 C 298; and dissenting from 7 M 255.

—Where a judgment-debtor sets up a claim to the effect the certain property attached in the execution, of a decree is in his possession, not on his own account, but on account of or in trust for some other person, and in particular where he claims that the property in question has been set apart for religious charitable purposes and is held by him as a trustee, his objection must be treated as falling under O XXI, r. 58 of the Code of 1908 12 Ind Cas 411.

—(13) Order granting or refusing execution—Order refusing execution is appealable—Separate suit is barred. A I R 1930 Oudh 268 = Ind Rul (1930) Oudh 481 = 7 O W N 523 = 127 I C 865.

—Award is decree for s. 47—Order in execution of it is appealable. A I R 1921 Sind 132 = 16 S I, R 245 = 79 I C 477.

C P. C. (1908) S. 47 (Contd)

(4) Appeal and second appeal—(Contd)

Appeal lies—(Contd)

—Order in execution of award—Appeal lies. A I R 1929 Lah 228=Ind Rul (1929) Lah 408 = 115 I C 536.

—An order refusing to execute a decree is a decree within the meaning of S. 47, C P Code and an appeal lies from such order. An executing Court has no power under O. 12 R 7 C P Code to question the jurisdiction of the Court which passed the decree under execution. (1916) 2 U B R 119 = 36 I C 10 = 10 Bur L T 159.

—An appeal lies from an order in execution proceedings of a compromise decree passed in appeal from an order confirming the sale. 22 I C 497.

—Where the executing Court, under s. 225 of C P C 1882, comes to the conclusion that the first Court had no jurisdiction to pass a decree and declines to become the executing Court the order so passed does not fall within the purview either of s. 245 or 588 of the Code and cannot be appealed against. 6 Bom L R 342 = 28 B 378. see also 4 Pat L J 468 = 52 I C 461.

—(14) Order granting or refusing extension of time for redemption or in a decree for specific performance.—Order granting or refusing extension of time in decree for specific performance is not appealable A I R 1927 Rang 311=5 R 615=6 Bur L J 216=105 I C 467.

—Decree directing payment within fixed time—Order extending time is not appealable. A I R 1929 Cal 140 = 112 I C 124 see also 39 M 876.

—(15) Order holding a person to be or not to be a legal representative.—Appeal lies against order determining whether party applying for execution is or is not the representative of the decree-holder. 24 L W 600 = 98 I C 783. see also A I R 1926 Mad 536=92 I C 377 and 25 M 545.

—(16, 17, 18) Order holding that judgment-debtor is not entitled to the benefit of O. XXI r 40.—Appeal lies from order that judgment-debtor is not entitled to the benefit of O. XXI r 40 A I R 1929 Lah 141 = 111 I C 707.

—(19) Order passed in execution of a Small Cause Court decree by a Court exercising original jurisdiction.—A Small cause Court suit for execution to jurisdiction an order passed under this section, is appealable. 38 I C 105 = 39 All 357 = 15 All L J 305.

—(20, 21) Order passed on application by transferee-decree-holder for execution.—An application by a transferee-decree-holder under O 21 R 16 C P Code is an application for execution of a decree, and not one to merely recognise him as such transferee. 14

C P. C. (1908) S. 47 (Contd)

(4) Appeal and second appeal—(Contd)

Appeal lies—(Contd)

M L J 393, foll. A dismissal for default of such a petition after an order passed on it in favour of the transferee-decree-holder is an order passed in a matter relating to the satisfaction and execution of the decree, and is appealable under S. 47 of the C P Code. 33 I C 71.

—(22) Order passed on application by sub-mortgagee-decree-holder for withdrawal of money deposited.—Application by sub-mortgagee decree-holder for withdrawal of money deposited in redemption suit is application for execution—Order on it is appealable. A I R 1929 Oudh 309 = 113 I C 733.

—(23, 24) Order passed on objection by legal representative of a deceased defendant.—Defendant dying before decree—His legal representative brought on record—Decree passed dying before execution—His legal representatives of parties to suit and their objection being under s. 47 order passed by Court on it would be appealable. A I R 1928 Bom 534 = 30 Bom L R 1447 = 53 Bom 46 = Ind Rul (1929) Bom 269 = 114 I C 861.

—(25) Order passed S. 22 of Deccan Agriculturist Relief Act.—Order under s. 22 Deccan Agriculturist Relief Act in execution falls under s. 47, so that appeal lies. A I R 1921 Sind 29 = 15 S L R 47 = 63 I C 310.

—(26) Order passed under O 20, r 11 (2).—Order under O XX r 11 (2) is appealable. A I R 1929 Rang 191 = Ind Rul (1929) Rang 319 = 119 I C 751.

—Appeal lies against order on application by judgment-debtor for payment by instalments under O 20 r 11—135 I C 858 = I R 1932 R 74 = A I R 1932 R 54.

—(27) Orders passed under O. 21 rr. 2, 15, 16, 50, (c), 53 (b), 71, 84, 85, 86, 89.—Order of re-sale under O XXI, r. 71 is appealable. A I R 1927 Nag 112 = 23 N L R 14 = 10 I C 691 (2) overruling. 7 N L R 134.

—An order for re-sale is decree within s. 47. A I R 1925 Oudh 397 = 12 O L J 261 = 2 O W N 212 = 28 O C 327 = 88 I C 131.

—Appeal lies against order under O XXI r 71. A I R 1922 All 200 = 20 A L J 105 = 44 A 266 = 65 I C 813.

—Where in execution of a decree obtained against a firm, an order was made under O. 21 R 22 directing execution against partners under O. 21 R 50 (c) Held, that the order was a final one and substantially a decree as it determines a question relating to the rights and liabilities of one parties with reference to the relief granted by the decree. 19 C L J 581 = 19 C W N 1008 = 26 I C 866.

C. P. C. (1908) S. 47 (Contd)

(4) Appeal and second appeal—(Contd)

Appeal lies—(Contd)

—On the question of the right of appeal after the confirmation of the sale the auction-purchaser must be deemed to be the representative of the judgment debtor and an order passed against him is appealable. (1917) M W N 861 = 42 I C 552.

—Where the attaching creditors have been made parties to the decree-holder's application for entering up satisfaction the question that arises between them is one falling under S. 47 of the C P Code and an appeal lies from an order thereon. 24 M L T 495 = 9 L W 32 = (1918) M W N 874 = 48 I C 109.

—An order under O. 21 rr. 15 or 16 is appealable if the case comes within S. 47 : 32 M L T 118 = 70 I C 329 = A I R 1924 M 518.

—(28,29) Order granting or refusing arrest:—Appeal lies against order of arrest where the judgment-debtor is arrested, on ground that arrest is invalid. A I R 1924 Mad 900 = 47 M L J 678 = (1924) M W N 781 = 35 M L T 102 = 84 I C 513

—But order of arrest is not appealable. A I R 1929 Mad 718 = Ind Rul (1929) Mad 875 = 3 L W 230 = (1929) M W N 74 = 119 I C 43

—Order refusing arrest is appealable. A I R 1922 Lah 259 = 4 Lah L J 266 = 79 I C 551.

—Order for arrest—Legality of arrest—Question within S. 47. 3 L W 35 = 32 I C 731.

—Order excusing judgment-debtor from arrest falls under S. 47 and is appealable. A L R 1933 P 203 = 14 P L T 271.

—(30) Order refusing to recognise transfer of decree—Order refusing to recognise transfer of decree...See 2 L W 109 = 26 I C 944

—(31) Order refusing surety of a receiver to pay up money—Order to pay money against surety for receiver is appealable. 13 Bur L T 91 = 10 L B R 236 = 59 I C 844.

—An order by Court requiring a surety for a receiver to pay up any money due under S 145 of the Code of Civil Procedure can be executed against the surety in the manner provided for the execution of decrees, and an appeal lies from such order under S. 47 of the Code. 13 Bur L T 91

—Surety becoming liable for the fulfilment of any condition imposed on him, is for purposes of appeal party within s. 47 and order discharging him from the suretyship is appealable. A I R 1925 All 344 = 23 A L J 59 = L R 9 A 171 Civ = 86 I C 105.

—(32) Order that warrant should or should not issue—Order issuing warrant for arrest in execution falls under s. 47 and is appealable. A I R 1924 Lah 360 = 73 I C 766

C P. C. (1908) S. 47 (Contd)

(4) Appeal and second appeal (Contd)

Appeal lies—(Contd)

—Order that warrant should not issue whether appealable. See 9 I C 823 = 101 P L R 1911 = 64 P W R 1911.

—(33) Order restoring execution application dismissed for decree-holder's default—Although against an ordinary interlocutory order in the course of an execution proceeding an appeal does not lie under S. 47 of the C P Code yet an appeal lies where the order is one which in substance determines a question relating to execution between the decree-holder and the judgment debtor e. g. where it has the effect of reviving an application for execution which was dismissed for default of the decree-holder especially where a fresh application by the decree-holder would be barred by limitation. 57 I C 905.

—Declaratory decree—Decision as to executability of—Appeal—See 10 M L T 437.

(2) Appeal does not lie.

—(1) General—A finding that a decree is not final was not appealable though orders under S. 47, C P C being in the nature of decrees are appealable but a finding of the type could not be termed as a final adjudication of the controversy raised in the execution—proceedings. A L R 1933 N 304.

—Execution dismissed for want of prosecution—Order rejecting application for granting one more opportunity of proceeding with dismissed proceedings is not appealable. A I R 1928 Oudh 329 = 5 O W N 529 = 110 I C 175.

—No objection taken to legality or jurisdiction—No appeal lies. A I R 1929 Rang 161 = Ind Rul (1929) Rang 181 = 7 R 110 = 117 I C 245.

—Order as to objection—appeal after sale fruitless and should be dismissed. See 15 I C 529.

—Order to sell properties in particular order is not appealable. A I R (1924) Mad 527 = 46 M L J 192 = 19 L W 235 = 33 M L T 275 = 1924 M W N 220 = 78 I C 829. see also : A I R 1925 Pat 484 = 6 P L T 393 = 1925 Pat H C C 164 = 91 I C 221.

—But see. 1926 M W N 566 = 96 I C 492 = A I R 1926 M 834 = 23 M L W 765 = 51 M L J 135.

—Compromise decree providing for arbitration in case of dispute—Court's order holding dispute to have arisen and ordering parties to nominate arbitrator is not appealable. A I R 1924 Lah 405 = 71 I C 817.

C. P. C. ( 1908 ) S. 47 (Contd)

( 4 ) Appeal and second appeal—(Contd)

( 2 ) Appeal does not lie—(Contd)

—Execution of rent decree against tenant  
—Question between rival mortgagees not within the section. 52 I C 980.

—Custom—Success on—Reversioners—Representative of the judgment-debtor's widow—No appeal—15 I C 25 = 175 P W R 1912 = 228 P L R 1912 = 14 P R 1913.

—Rule 1 of O. 41 clearly makes it an inflexible rule that in case of appeals from decrees, the memorandum of appeal shall be accompanied by a copy of the decree and the Court cannot dispense with it. An execution proceedings is a proceeding in the suit and the formal decision on the point within S. 47 of the C P Code is a decision in that suit inter parties, and the procedure in on appeal therefrom is that laid down in O. 41. Where, therefore, there is a judgment and a decree based, thereon on a question within S. 47 of the C P Code no valid appeal is filed by presenting a memorandum of appeal without a copy of the decree. 15 A L J 801 = 40 All 12 = 42 I C 888.

—Where in spite of the opposition of the judgment-debtor sale proclamation is ordered to be issued but a Judge says that he will in the meanwhile hear and decide upon judgment debtor's objection to sale, the order passed is not appealable. A I R 1921 Cal. 629 = 35 C L J 170 = 64 I C 547.

—S. 47, C P C has no application where the dispute relates solely to the right *inter se* of the judgment-debtors and the decree-holder has no interest in the decision. The question whether property of J D which had in execution been placed in the possession of a receiver appointed at the instance of the decree-holder, should after the satisfaction of the decree-amount, be handed back to one or all of the representatives, of the judgment-debtor who had died in the interval, is not a question relating to the execution, discharge or satisfaction of the decree within the meaning of S. 47 and no appeal or second appeal lies against the order dismissing a petition by one of suit representatives, praying for joint possession. 31 M L J 44 = (1916) 1 M W N 468 = 35 I C 179.

—An order allowing the decree-holder to withdraw the execution proceedings, does not determine any question, between the parties to a suit relating to the execution, discharge or satisfaction of the decree within the meaning of S. 47 of C P C and is not, therefore, appealable. 19 I C 904 = 18 C L J 53.

—( 2 ) Decision as to mode of execution:—Decision as to mode of execution is not appealable. A I R 1931 A 129.

C. P. C. ( 1908 ) S. 47 (Contd)

( 4 ) Appeal and second appeal—(Contd.)

( 2 ) Appeal does not lie—(Contd)

—( 3 ) Order accepting or refusing to accept security:—Order accepting or refusing to accept a security is not appealable. 136 I C 793 = A I R 1932 L 120 = I R 1932 L 278 (1).

—Accepting of security by the lower court in pursuance of the order of the High Court and ordering share does not determine rights of parties and hence not appealable. 41 Cal 160 = 17 C W N 1240 = 20 I C 72. See also 27 M L J 171. See also O 41 R 5.

—Security satisfactory to Court after elaborate enquiry—No appeal lies. A I R 1931 Mad 38 = Ind Rul (1931) Mad 270 = 59 M L J 892 = 32 L W 742 = ( 1930 ) M W N 1096 = 54 M 237 = 129 I C 462.

—But an order by which security offered by the decree-holder for getting delivery of possession of the property forming the subject-matter of the decree is accepted and the delivery of possession is directed to be made to the decree holder is appealable, inasmuch as the order directing delivery of possession is a final order and not an interlocutory or intermediate one. 22 C W N 657 = 44 I C 156.

—( 4 ) Order allowing one of the two assignees of decree to execute decree:—Order allowing one of two assignees of decree to execute decree is not appealable. A I R 1925 Nag 186 = 21 N L R 34 = 82 I C 734.

—( 5, 6 ) Order allowing Confession of execution petition into a suit:—An order merely allowing the conversion of an execution petition into a suit is not appealable. Though it is an order passed under s. 47, it is not one relating to the execution discharge or satisfaction of the decree. A I R 1931 Mad 270 = Ind Rul (1931) Mad 395 = 60 M L J 471 = 33 L W 549 = 130 I C 475 See also 119 I C 43.

—No appeal lies from an order merely allowing the conversion or an execution petition into a suit but where on respondent's own invitation lower Appellate Court sets aside executing Court's order he cannot turn round and say that no appeal lies at the appellant's instance to correct the error. A I R 1932 Mad 270 = Ind Rul (1931) Mad 395 = 60 M L J 471 = 33 L W 549 = 130 I C 475.

—( 7 ) Order directing receiver's amount to be paid by one party:—An order directing Receiver's remuneration to be paid by one party is not appealable. A I R 1930 Lah 352.

—( 8 ) Order passed granting mortgagee interest on mortgage-money:—Order granting mortgagee interest on mortgage-money for period during which sale proceeds are lying in Court is not appealable. A I R 1929 Rang 127 = Ind Rul ( 1929 ) Rang 256 = 118 I C 416.

## C. P. C. (1908) S. 47 (Contd)

## (4) Appeal and second appeal—(Contd)

## (2) Appeal does not lie—(Contd)

—(9) Order passed on application for appointment of a Commissioner work out the shares:—An application for the appointment of a Commissioner to work out the shares recoverable under a compromise decree for partition is a step in the suit and not in execution of the decree and is therefore, not subject to any bar of limitation. No appeal lies against an order passed on such an application. 18 M L T 145 = (1915) M W N 725 = 2 L W 63 = 30 I C 380.

—(10) Order passed on application for payment of pre-emption money:—An order passed on application for payment of pre-emption money in accordance with a decree under O 20, R. 14 (1) C P Code is not appealable under S. 47, C. P. C. but can be set aside in revision. 2 O L J 151 = 28 I C 379.

—(11) Order passed on disputes not between parties to the suit:—Order on question between assignee of decree-holder and one holding charge on decree is not appealable. A I R 1926 Mad. 691 = 24 L W 70 = 93 I C 649.

—Third party entrusted with property disposing it off on trial Court's judgment—Decision reversed in appeal—Order compelling third party to refund is not appealable. A I R 1925 All 328 = L R 6 A 36 Civ = 85 I C 161.

—Bidder at an auction—Not a party or representative—No remedy by appeal—Revision. See 51 I C 805.

—Where in a suit for sale on a mortgage of several items, a person, who was made a party defendant, on the ground of his having obtained a puisne mortgage of some of the items, objected to the sale of another item on the ground that he had purchased the same at a revenue sale, held that in doing so the puisne mortgagee was not a party to the suit within the meaning of S. 47 of the Code and that no appeal lay against the order overruling his objection. 3 Pat L W 422 = 2 Pat L J 219 = 39 I C 656.

—(12) Order passed in execution of decree under S. 9 of Specific Relief Act:—Decree under S. 9 of the Sp. Rel. Act—No appeal. 26 C L J 325.

—(13) Orders passed under O. 21, rr. 66, 70. All orders under r. 66 are not appealable. Only such as come under s. 47 are appealable. A I R 1926 Mad 834 = 51 M L J 135 = 23 L W 765 = (1926) M W N 566 = 96 I C 492.

—No appeal lies against an order under O. 21 R. 66 (4) 8 L B R 350 = 10 Bur L T 115 = 36 I C 402 following. 16 C W N 970.

—Objection to valuation in sale proclamation—No appeal lies. A I R 1930 Oudh 81 = Ind Rul (1930) Oudh 230 = 6 O W N 1085 = 5 Luck 481 = 124 I C 422.

## C. P. C. (1908) S. 47 (Contd)

## (4) Appeal and second appeal—(Contd)

## (2) Appeal does not lie—(Contd)

—Order refusing to alter valuation in sale proclamation is not appealable. A I R 1928 Bom 245 = 52 B 444 = 30 Bom L R 679 = 111 I C 892.

—An order of the executing Court overruling the judgment-debtor's objection to the valuation put in by the decree holder in the sale proclamation and refusing the judgment-debtor's prayer for adjournment of the sale and issue of a fresh proclamation is not appealable. 47 I C 512.

—An order of a Court fixing a valuation of the judgment-debtor's property under R. 66 of O. 21 of the C. P. Code is not a decree and no appeal lies from such an order. 2 Pat L J 13 = 38 I C 616, following 16 C W N 970; and 16 C W N 124.

—Every order passed in execution proceedings is not appealable; only such orders as conclusively determine the rights of the parties are appealable. No appeal lies against an order accepting the valuation put up on a property by the decree holder under O. 21 R. 66, C. P. Code. 22 I C 548.

—Order settling terms of sale proclamation—Judicial order—Applicability of Sec 49 I C 539.

—No appeal lies against an order settling the terms of a sale proclamation under O. 21, R. 66 of the C. P. Code. 46 I C 564.

—Order refusing postponement or alteration in sale proclamation is not appealable. A I R 1924 Mad 234 = 46 M L J 71 = 18 L W 615 = (1923) M W N 894 = 75 I C 901.

—But it was held that an order deciding the objection of the judgment-debtor to the area of the property as contained in the sale proclamation is appealable as it determines in certain respects the rights of the judgment-debtor. A L R 1933 L 1236 following. 36 P W R 1919.

—A complaint relating to the violation of O. 21 r. 66 C P C on the ground that notice was not given to all the parties concerned before the proclamation was settled is not covered by O. 21 R. 90 and can only be considered under S. 47 and there is an appeal, as well as a second appeal against a decision relating thereto (1919) M W N 897 = 11 L W 59 = 53 I C 809.

—Matter relating to execution—Order of sale proclamation fixing market value and upset price maintainability of, see (1917) M W N 141 = 37 I C 897.

—Appeal Proclamation—Execution sale—Judgment debtor, objections by Judgment-debtor—dismissed—Appeal. See 14 A L J 363 = 35 I C 230.



C. P. C. (1908) S. 47 (Contd)

(4) Appeal and second appeal—(Contd)

(2) Appeal does not lie—(Contd)

—So is one disallowing the objection by a judgment debtor that the value of the property specified in the sale proclamation under s 287, is grossly inadequate. 30 Calc, 617; 28 Calc, 73; 25 Bom 418. But see 25 Bom 631. But an application seeking to have the sale set aside on the ground that no notice had been issued to the applicant in the matter and that in consequence the property was sold at an undervalue, does not fall within the purview of s 311 of the Civ. Pro. Code, 1882, and an order dismissing the same is not covered by s. 312 of the Code. The order falls under s. 244 (c) of the Code, and is appealable as a decree 10 Bom L R 752=32 B 572 Order determining sale proclamation—If appealable see 16 C W N 970=17 I C 88

—Sale proclamation—Objection to statement of value of property by judgment-debtor—Order rejecting. Appeal. See 14 A L J 363.

—(14) Orders passed under O. 21, rr. 93, 95 and 96 to 100:—An order under O. 21, R 93 in favour of a third party purchaser is not a question between the parties to the suit relating to the execution, discharge, or satisfaction of the decree, as that order by itself has no legal effect on the rights and liabilities as between the decree-holder and the judgment-debtor. (1916) 1 M W N 100=3 L W 105=33 I C 235.

—Where a decree holder auction-purchaser applied for delivery of possession of the properties purchased, and obtained delivery of possession by order of Court notwithstanding objections by the judgment-debtor that the properties did not pass by the sale the judgment-debtor preferred an appeal. *Held*, on review of the authorities of all the Indian High Courts (which conflicting) that the Patna High Court should not without very good reason depart from a long course of decisions in the Calcutta High Court where the balance of opinion has been since 1883 strongly in favour of the view that an appeal does not lie. 3 P L W 62=1 Pat L J 232=20 C W N 829=35 I C 468 (F B) See also 19 C W N 835 = 20 C L J 433 = 25 I C 267 and 29 C L J 48= 49 I C 137; and 3 Pat L J 571=48 I C 129

—An application by an auction-purchaser, alleging obstruction to obtaining possession of the property purchased by him, by a person claiming to be a prior auction-purchaser, and praying that he might be put in possession, is an application under O. XXI, R 97, of the C. P. Code and not under S. 47 of the Code. An order made under O. XXI

C. P. C. (1908) S. 47 (Contd)

(4) Appeal and second appeal—(Contd)

(2) Appeal does not lie—(Contd)

R 97, C. P. C. is not appealable to the District Court and is consequently not open to second appeal. 52 I C 383.

—But the Madras High Court has held that an order rejecting application for delivery of possession, is appealable under s 47. A I R 1925 Mad 1198 = 51 M L J 106 = (1926) M W N 599=1925 M W N 577 = 90 I C 952; so also an order directing delivery of possession to decree holder purchaser—22 I C 497; and an order for removal of obstruction under O. XXI, r. 97, is appealable. A I R 1921 Mad 627=41 M L J 490=14 L W 449 = (1921) M W N 510=70 I C 367 see also 1920 M W N 562 = 12 M L W 273.

—A case may come under s. 244, and an appeal will lie, even though represented to be one under s. 335 of C. P. C. 1882 (=O. 21, rr. 97, 99, 103). 31 Calc, 737.

—Auction purchaser not party to suit—resistance to delivery by judgment-debtor—order upholding possession to purchaser—not appealable. A L R 1934 A 35; see also A I R 1931 Cal 574=58 C 808=35 C W N 286=Ind Rul (1931) Cal 687=133 I C 335.

—But resistance to possession by judgment-debtor to decree holder purchaser—Appeal lies. A I R 1925 Pat 478 = 4 Pat 726 = 6 P L T 351 = (1925) Pat 212 = 88 I C 104, see contra 120 I C 593 = A I R 1930 L 363.

—A mortgagee brought the properties to sale under a prior mortgage and, having purchased it himself, obtained possession through Court. The prior mortgagee applied to Court to restore possession to him which was dismissed. *Held* that no appeal lay from such order. 24 I C 93 = 12 A L J 672.

—But an appeal lies where application under O. XXI, r. 100 was fought out between parties to suit or their representatives. A I R 1921 Mad 612 = 41 M L J 54 = 14 L W 85 = (1921) M W N 487 = 63 I C 730.

—An order passed on an application by a judgment debtor objecting to the sale of certain immoveable property in execution of a decree is, as between the parties to the suit, an order passed under S. 47 of the C P Code and is appealable even though it also disposes of objections made by third parties to the delivery of possession. 31 I C 102.

—Application under O. 21, R. 100—Order dismissing—Remedy of aggrieved party. See 19 Bom L R 774 = 12 I C 73 = 42 Bom 10.

—(15-16) Orders passed under powers given under a scheme of management:—An order passed by the District Judge as a *persona designata* under a scheme for management of a charitable trust, is not appealable.

## C. P. C. (1908) S. 47 (Contd.)

## (4) Appeal and second appeal—(Contd.)

## (2) Appeal does not lie—(Contd.)

A I R 1931 Bom 388 = 33 Bom L R 546 = Ind Rul (1931) Bom 407 = 133 I C 823, following 28 Bom L R 64.

—So also an order on an application for modification of scheme as provided for in the scheme for the administration of a charitable trust is not one passed in the course of execution proceedings or under s. 47. No appeal lies from it. A I R 1931 Bom 391 = 55 B 414 = 33 Bom L R 520 = Ind Rul (1931) Bom 388 = 133 I C 740.

—A District Judge's order approving of the appointment of a new trustee by the Committee under a scheme, is not a decree and is not appealable. *Quære*—Whether it is a judicial order and revision lies. Ind Rul (1931) All 641 = 133 I C 401.

—Orders in pursuance of the scheme are not appealable. A I R 1930 Mad 918 = Ind Rul (1931) Mad 83 = 32 L W 608 = 54 M 315 = 60 M L J 514 = 128 I C 515.

—Nor are orders of District Judge under powers given under scheme of management of religious endowment appealable. A I R 1927 Bom 422 = 29 Bom L R 891 = 102 I C 159.

—Nor orders passed by Court in relation to a scheme sanctioned in a scheme suit. A I R 1927 Mad 1110 = 102 I C 633.

—Order made by Court exercising power given by provision in the scheme of management of trust is not appealable. A I R 1926 Mad 130 = 22 L W 796 = 92 I C 556.

—Where plaintiffs in a scheme suit which resulted in a decree of the High Court presented a petition to the Court below referring to the respondent *Dharmakarta's* failure to comply with the provisions of the decree as regards certain matters and asking for his removal but did not ask for any of the reliefs which could be granted in execution and the Court below declined to remove the respondent *held*, that the order so declining was not one passed in execution of the decree and that it was not appealable under S. 47 C P C (1917) M W N 420 = 5 L W 596 = 38 I C 415.

—Decree in scheme suit—Provision for appeal in certain matters specified in the scheme—No right of appeal in the rest. (1917) M W N 420.

—Scheme Suit under S. 92 C P Code—Election in pursuance of the scheme—Order of judge on the validity of the election—Proceedings in execution—Appeal *See* 7 Bur L T 298 = 24 I C 915.

—(17) Orders passed under S. 73 for rateable distribution:—An order under s. 47 determining a question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest does not

## C. P. C. 1908 S. 47 (Contd.)

## (4) Appeal and second appeal—(Contd.)

## (2) Appeal does not lie—(Contd.)

come under s. 47 and is not appealable. A I R 1931 Bom 350 = 33 Bom L R 537 = 55 B 473 = Ind Rul (1931) Bom 401 = 133 I C 817, following 42 I C 1; see also A I R 1921 Pat 401 = 57 I C 421.

—So also no appeal lies from an order under s. 73 determining a question of rateable distribution between rival decree-holders. If the question arises between the judgment-debtor on the one hand and the decree-holders on the other the order falls under s. 47 and is appealable. A I R 1931 Bom 252 = 33 Bom L R 503 = Ind Rul (1931) Bom 385 = 133 I C 737, see also 36 B 156.

—An order refusing rateable distribution made under S. 73 of the Code between two rival decree holders is an order in execution proceedings but is not a decree as all the conditions mentioned in S. 47 are not present and is not appealable. 42 Cal 1 = 19 C W N 1202 = 27 I C 644, following 36 C 130; see also 2 W R Mis 21.

—Contest between rival decree-holders—Judgment-debtor not interested—Decision is not appealable. A I R 1931 Bom 252 = 33 Bom L R 503.

—Court deciding that question is under s. 73, but the order passed is not such as is contemplated by s. 73 yet the order is not appealable. 118 I C 908 = A I R 1929 L 645.

—But it has been held by the Madras High Court that orders under s. 73 are appealable if they affect parties to the suit. A party to whom a right of appeal is given by S. 47, C P Code should not be deprived of it, unless the C P Code expressly denies it to him and as there is no denial in S. 73, an order passed under that section is appealable under S. 47 if the order is one between the parties to the suit. 39 Mad 570 = 29 M L J 96 = 17 M L T 427 = (1915) M W N 334 = 29 I C 231 distinguishing 42 C 1.

—So where the claim of certain decree holder for rateable distribution of money of judgment-debtor was rejected on the ground that the amount laying in Court, was not that available to those decree holders. On a question whether that order was appealable. *Held*, that order so far as it affects each decree-holder was one between him and the judgment-debtor and related to the execution of the decree: and that the order though passed ostensibly under s. 73 was really one under S. 47 of the C P Code and was therefore appealable. When the objection to the order under S. 73 is based on the invalidity of the execution application or on the character of the fund in Court the question is between the judgment-debtor and the individual cre-

C. P. C. (1908) S. 47 (Contd)

(4) Appeal and second appeal—(Contd)

(2) Appeal does not lie—(Contd)

ditors, not the creditors as a body, and the decision on it is really one under S. 47. 31 M. L. J. 820=20 M. L. T. 538=5 L. W. 374 = 37 I. C. 900.

—And though an order allowing or refusing claim for rateable distribution is not appealable, an order refusing to execute an order for rateable distribution is appealable. A. I. R. 1931 Pat 359 = 12 P. L. T. 477=Ind. Rul. (1931) Pat 326 = 133 I. C. 166.

—Similarly no appeal lies against order passed under s. 73. But order which decides a matter covered by s. 47 (1) even though it be passed ostensibly under s. 73, can be the subject of appeal. A. I. R. 1927 Lah. 100 = 98 I. C. 884.

—(18) Order refusing decree-holder leave to bid at execution sale:—Order refusing to allow bid by decree-holder is not a decree. See 19 C. W. N. 633.

—No appeal lies from an order refusing to give a decree-holder permission to purchase at a sale held in execution of a decree. 38 Cal. 717 = 15 C. W. N. 862 = 14 C. L. J. 241 = 8 A. L. J. 1117 = (1911) 2 M. W. N. 449 = 13 Bom. L. R. 694 = 6 L. B. R. 26 = 4 Bur. L. T. 257 = 11 I. C. 545 (P. C.) approving of 13 C. 174.

—(19) Order passed on application to stay execution:—See cases under "Stay of execution" infra.

### (3) Interlocutory orders

—The words of s. 47 of the Civil Procedure Code are very wide and, if they were taken in their literal sense, they might cover every order of an interlocutory nature that may be passed in execution proceedings, but it is obvious that the intention of the legislature could not have been that every such order should be appealable as a decree. Ind. Rul. (1931) All. 849 = 134 I. C. 833.

—Interlocutory order that defendants are liable to account as legal representatives of judgment-debtor is not appealable when amount due is not determined. A. I. R. 1925 All. 588 = 47 A. 543 = 23 A. L. J. 458 = L. R. 6 A. 359 Civ. = 87 I. C. 322.

—Interlocutory order holding security for stay insufficient and granting further time is not appealable. A. I. R. 1923 Lah. 446 = 75 I. C. 793.

—Per *Couch A. J. C.*—The question whether any particular person is or is not the representative of a party can be determined under S. 47 of the C. P. Code but only for a limited purpose. Under that section the Court does not purport to conclusively determine the controversy. Such an order therefore, though within S. 47 is not appealable. 11 S. L. R. 74 = 43 I. C. 165.

C. P. C. (1908) S. 47 (Contd)

(4) Appeal and second appeal—(Contd)

(3) Interlocutory orders—(Contd)

—Interlocutory order in mortgage suit declaring mortgage-debtor to be split up without finally deciding rateable liability is not decree. A. I. R. 1930 All. 638 = Ind. Rul. (1930) All. 725 = (1930) A. L. J. 1381 = 125 I. C. 581.

—An order disallowing the objection of a judgment debtor that a fresh attachment is necessary not appealable. 34 All. 530.

—On the plaintiff applying to execute the decree the Court ordered that he might be allowed to do so if he fulfilled certain conditions at different stages of the proceedings. The court determined various questions as to the character of the conditions to be imposed and called upon the decree holder to comply with them. Before the time for compliance was over, the judgment debtor appealed: *Held*, that the orders were interlocutory and were not orders determining a question relating to execution within the meaning of S. 47. 14 C. L. J. 489 = 12 I. C. 745 not following. 29 B. 71.

—Order rejecting security and ordering execution to continue, see A. I. R. 1927 Lah. 527 = 102 I. C. 621.

—But an application by purchaser of decree does not prevent s. 47 from being applied for decision of question falling within its scope. 20 C. W. N. 679 = 32 I. C. 524.

—And the Lahore High Court has held the interlocutory orders can be challenged in appeal against final order. A. I. R. 1927 Lah. 232 = 100 I. C. 653.

### (4) Second appeal.

—(1) General:—Lower Appellate Court holding property included in decree to be not saleable—Second appeal lies. A. I. R. 1926 Pat. 202 = 4 Pat. 696 = 7 P. L. T. 468 = 93 I. C. 935.

—Execution sale after winding up order without knowledge of the order—Application to set aside—Proceedings in connection with execution and satisfaction of decree—Maintainability of second appeal. See (1917) Pat. 315: but orders passed under s. 47 C. P. C. by the Revenue Court are not decrees as defined by s. 3, (14) of the Agra Tenancy Act and consequently in respect of orders passed under that section by the Revenue Court, only one appeal lies under S. 248 (3) of the Agra Tenancy Act and a second appeal is prohibited under S. 249 of the Tenancy Act. A. L. R. 1934 A. 294; so also no second appeal lies from order allowing payment directed by the decree. 30 C. L. J. 32 = 52 I. C. 401.

C. P. C. (1908) S 47 (Contd.)

(4) Appeal and second appeal—(Contd.)

(4) Second appeal—(Contd.)

—Money decree against A by two creditors—Execution sale in one and attachment in another—Auction purchaser in first claiming properties attached in second—No second appeal. See 34 I C 759=3 L W 377.

—Appeal as from an order under s. 2, provided for matter cannot be brought under s. 47 so as to allow of second appeal. A I R 1930 Cal. 249 = 33 C W N 1170 = Ind. Rul. (1930) Cal 703=126 I C 207.

—Valuation for determining if second appeal lies is that of suit. A I R 1922 Lah 290 = 3 Lah 141 = 28 P W R 1922 = 67 I C 718.

—Suit valued at above Rs. 5,000—Decree for less than Rs. 5,000—Execution proceedings, order in—Appeal only to the High Court. see 31 I C 496.

—No second appeal lies against an order in execution of a decree in a suit, valued at less than Rs. 500, of the nature cognizable by a Court of Small Causes. 10 Ind Cas 412. see 11 C W N 861.

—2) Orders confirming setting aside, or refusing, to set aside execution sale (O 21 rr. 55, 72, 90, 91, 92, 93):—The order dismissing application to set aside the sale determines a question relating to execution between the parties to a decree under S. 47 and second appeal lies to the High court. 36 Bom 156 = 13 Bom. L R 1193 = 12 I C 911.

—So it has been held under the present Code that an executing Court can set aside a sale, on any ground not falling within O 21, R 90, C P C on an application under S. 17 and no separate suit will lie for that purpose. And that it is only when O 21 R 90 as well as S 47 C P C applies to the application to set aside an auction-sale that a second appeal is incompetent. But where S 47 applies, there is a second appeal from the order on the application. Where after a judgment debtor had been adjudged an insolvent and after his property had vested in the Official Receiver, a portion thereof was sold in execution of a decree obtained before adjudication, in spite of the Receiver's objections. Held, that the sale was altogether irregular. The order rejecting the application to set aside the sale was a decree and open to second appeal. 30 M L J 611 = 19 M L T 357 = 3 L W 504 = 34 I C 829.

—S. 47 applies and second appeal lies to the High Court against the order dismissing the application by purchaser to set aside execution sale on the ground that the decree-holder, who was also receiver, did not obtain leave of Court as receiver, although he had obtained leave under O. 21 r. 72 59 C 956 =

C. P. C. (1908) S 47 (Contd.)

(4) Appeal and second appeal—(Contd.)

(4) Second appeal—(Contd.)

35 C W N 125 = 55 C L J 85 = 139 I C 186 = A I R 1932 C 672 = I R 1932 C 606 = A L R 1932 C 1003.

—Where decree-holder is the purchaser order under O XXI, r. 90 is open to second appeal. A I R 1930 Nag 191 = Ind. Rul. (1930) Nag 266 = 124 I C 250.

—Execution sale—Objection under O XXI r. 90 on ground of want of notice under r. 66—Second appeal lies. A I R 1925 Mad 1142 = (1925) M W N 701 = 87 I C 413.

—But ordinarily second appeal lies if inherent power used but not if O. XXI r. 90 applied. A I R 1924 Mad 778 = 47 M L J 549 = (1924) M W N 842 = 84 I C 975. i. e. where a person having a permanent right and whose interest does not pass under the sale applies to have it set aside under s. 47 or O 21 R 90 of the C P Code and his application is dismissed, there is no second appeal from the order of the Appellate Court. 46 I C 529.

—It is not open to a party to impeach a sale under S. 47 of the C P Code on the ground of fraud in conducting the sale. If a Court professing to act under S. 47, sets aside a sale on the objection of the judgment-debtor, the order setting aside the sale is not a decree. Where the decree-holder agreed not to hold the sale if payment was made within a certain time, and he then fraudulently proceeded to sell the property in contravention of this arrangement, held, that this amounted to fraud in the matter of the conduct of a sale within O. 21 R 90 C P C 3. Pat L J 645 = 48 I C 560.

—To sum up a decree includes the determination of any question within S. 47 of the C P Code except a determination against which an appeal lies as an appeal from an order. An order dismissing an application to set aside a sale under O. 21 R 93 C P Code falls under S. 47 of the Code, but is appealable as an order and therefore not a decree, and consequently no second appeal lies in respect of it: see (1916) 2 U B L R 139 = 39 I C 374 = 11 Bur L T 26. and 38 P L R 1915.

—But all orders under s 47 are not appealable—Order under O XXI r. 92—No second appeal lies. A I R 1926 Cal 400 = 42 C L J 176 = 90 I C 228.

—No second appeal lies from an order setting aside a sale under O. 21 r. 92 upon a mere allegation of fraud, without any attempt to substantiate it—28 Calc 4 = 5 Calc W N 124 (but see 13 C L J 467 = 10 I C 51).

—Which was a decision under s 310-A, C P C 1882; under the present Code an order under O. 21 r. 89 i. e. S. 310 A, C P C 1882 is

C. P. C. (1908) S. 47 (Contd)

(4) Appeal and second appeal—(Contd)

(4) Second appeal—(Contd)

merely an appealable order under s. (104). an order refusing to receive it and to set aside the sale, or an order setting aside the sale, is made under r. 92 of O. XXI, and an appeal lies to the District Judge under O. XLIII. r. 1 (j) and no second appeal lies to the High Court. 6 Ind. Cas. 573.

—A decree holder took every proceeding under the Code to give effective power to the Court to sell certain property. On the day fixed for sale he asked the Court to dismiss his execution case. This application was rejected and the property sold. The decree holder appealed to the District Judge and the order of the execution Court was set aside. Held, that even if the order of the first Court was wrong, it was not appealable and that the only Court that could set it aside was the High Court and that the lower appellate Court having assumed jurisdiction in the matter a second appeal was competent to the High Court. That order of the lower appellate Court must be set aside as having been passed without jurisdiction. 57 I C 396.

—A sale held in execution by a court other than that which passed the order of winding up without the premission of the latter Court is voidable at the instance of the Official Liquidator. A second appeal lies in a case where the sale has been set aside at the instance of the Official Liquidator as the order is one relating to the execution of a decree and falls under S. 47 C P Code. 2 Pat L J 77=1 Pat L W 241=(1917) Pat 31=38 I C 91.

—Sale in Court auction—application to set aside—judgment-debtor—objections preferred by—ground that mortgaged property must be sold before other property—whether falls under S. 47—competency of second appeal see. A L R 1933 L 143.

—But no second appeal lies against order setting aside or refusing to set aside sale, although matter is one between decree-holder, auction purchaser and judgment-debtor. A I R 1927 Cal 657 = 45 C L J 557=104 I C 188.

—So held in a case in which the auction-purchaser was not the decree-holder but one of the judgment-debtors and the application to set aside the sale was by another judgment-debtor that second appeal was not competent. 33 P L R 625 = 1932 P C L 755 (Civ.) = A I R 1932 L 530 = A L R 1932 L 755 (Civ.)

—(3) Orders in execution of a decree not open to Second appeal :—A second appeal will not lie in execution of decree not open to second appeal. A I R 1921 All 55 = 43 A 403 = 19A L J 72=60 I C 831.

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C. P. C. (1908) S. 47 (Contd)

(4) Appeal and second appeal—(Concl'd)

(4) Second appeal—(Concl'd)

—Suit of Small Cause nature—No second appeal lies. A I R 1925 Mad 742 = 48 M L J 499=90 I C 794; see also 80 C 405; and 11 C 169; and 7 B 292; and 10 I C 412; and 17 M L J 316=30 M 212.

—(4) Orders passed under O. 21, rr. 8, 9, 93, 95 :—Before the sale of judgment debtor's property in execution of decree against him could be confirmed, the Appellate Court allowing the appeal dismissed the suit, whereupon the defendants applied that the sale should not be confirmed or in the alternative it should be set aside under O. 21 r. 89. But the Lower Courts dismissed the application and the defendant preferred a second appeal to the High Court. Held that a second appeal was maintainable in as much as the question for decision was one of a nature in which the auction purchaser and the judgment-debtor were adversely interested and therefore, that the latter's application would fall under S. 47 C P C 43 Mad 107, 41 M L J 120, 19 Cal 683 (P. C.) followed. 13 L W 15 distinguished. A L R 1933 M 788.

—No appeal lies from an order under O. 21, r. 93. 1 Pat L T 267=56 I C 646.

—No second appeal lies from an order under O. 21, R. 89 of the C P Code. 36 I C 769 see also 44 B 472.

—It is merely an appealable order under s. 104: A I R 1926 Mad 620 = 1926 Mad W N 297 = 95 I C 128 = 23 Mad L W 757.

(5) Compromise decree.

—An Executing Court can go behind the terms of a compromise decree, to see if the compromise contained a penalty. 32 I C 697.

—And it will, in a proper case relieve the party against the forfeiture and penalty imposed by the decree. A I R 1925 L 180 = 78 I C 80; A I R 1929 L 390 = 113 I C 541.

—For a compromise decree is more or less a contract and the Court will protect a party being inequitably penalised as in ordinary contracts : 1914 M W N 92 = 22 I C 37.

—But this is not so in case of awards : A I R 1925 L 180 = 78 I C 80.

—Compromise decree in ejectment suit—Forfeiture for non payment of rent—Construction as ordinary contract—Relief sec. 12 I C 334 = (1911) 2 Mad W N 327 = 10 Mad L T 326.

—Instalment decree—Default—Power of Court to give relief see. A I R 1922 Bom 170 = 46 Bom 463 = 64 I C 570 = 23 Bom L R 1238; and A I R 1925 Bom 404 = 27 Bom L R 678 = 89 I C 217.



## C. P. C. (1908) S. 47 (Contd)

## (6) Construction of decree.

—As there are no general rules for construing decrees; each case must be dealt with individually: 17 A L J 582=50 I C 730 = 41 A 473.

—But the construction must be fair and reasonable. A I R 1921 O 138 = 8 O L J 407 = 66 I C 673; see also 56 I C 283 = 1 Pat L T 526.

—And in accordance with law—for example—Decree for possession of property conditional on payment—Subsequent mortgagor of the property, payment by—Right of withdrawal—Interests of other persons. see A I R 1924 P C 133 (135)=46 M L J 567 = 5 L R P C 105 = 26 Bom L R 549 = 1924 Mad W N 419=51 I App 236 = 48 Bom 404 = 34 Mad L T 99 = 80 I C 411=22 All L J 931 = 29 Cal W N 584.

—And to take another example—When under a decree, the contractual rate of interest ceases to be payable at a given date and the Court rate is substituted for it therefore upto the date of realization, the Court rate will be chargeable on the whole amount due with interest or at the contractual rate up to that given date. 1923 Oudh 241 = 26 Oudh Cas 59 = 74 I C 246.

—Or a decree for value of bills of exchange stated in sterling—Decretal amount in rupees is to be calculated as per rate of exchange on the date the bills matured. 1924 Cal 778 = 51 Cal 320 = 81 I C 561.

—Possession to be given in case of default—Option not limited to first default. A I R 1921 Lah 42 = 2 Lah 155 = 80 Pun L R 1921 = 63 I C 664; and 1921 Oudh 108 (2) = 24 Oudh Cas 209 = 8 Oudh L J 477 = 64 I C 101 mesne profits—No specific time limit—If recoverable up to date of possession. 16 I C 866 decree against son—Personal liability. A I R 1921 Jour 24 (1) = 2 Pat L T 396 = 65 I C 224.

—Hindu Law-widow—Compromise by, when binding on reversioners. See 12 I C 123 = 35 Mad 560 = 10 Mad L T 179. and thus the instances may be multiplied.

—Construction which might violate law and equity is bad : 60 I C 345.

—As also the one which might result in multiplicity of suits : A I R 1922 Oudh 34 (36) = 9 Oudh L J 5 = 66 I C 982.

—Decree for possession giving boundaries and the property is identifiable and cannot be said to be incapable of execution. 25 Ind Cas 534. (Cal).

—Decree directing demolition of a wall is executable. 14 Ind Cas 588 Mad.

—Award decree directing plaintiff to pay Rs. 500 to, defendant and thereupon to eject

## C. P. C. (1908) S. 47 (Contd)

## (6) Construction of decree—(Contd)

him from a certain house is capable of execution. 25 Ind Cas 932 = 8 Sind L R 58.

—The court in execution of a compromise decree can look into the compromise for understanding the terms of the decree. 21 C W N 835 = 37 I C 916.

—Intelligible decree should be given effect to and should be presumed to be legally effective for obtaining the relief sought and granted 21 M L T 82 = 5 L W 558 = 32 M L J 477 = 40 M 259 = (1917) M W N 217 and 246 = 37 I C 414 (F B).

—Where the decree is somewhat brief and ambiguous, the pleadings of parties may be looked at to ascertain the precise scope and meaning of the decree : A I R 1933 L 726; see also A I R 1924 A 690 = 82 I C 627; and A I R 1921 Pat 360 = 2 Pat L T 7=59 I C 25.

—For example to ascertain the nature of the estate in a revenue sale : A I R 1921 C 669=34 C L J 415=70 I C 6.

—But not observations in judgment : 14 I C 130; and see 50 I C 283 = 1 Pat L T 526.

—Where the decree is clear and unambiguous the pleadings cannot be looked into in execution. The court which passed the decree can amend it. 34 I C 344.

—Where a decree has been passed against the father and son composing a joint family the executing Court can look to the pleadings to find out what claim was decreed, if the contract of loan the subject-matter of suit was one to which the son was a party or one which he had ratified. A I R 1931 Pat 140=12 P L T 69 = 32 Cr L J 782 = Ind Rul (1931) Pat 225=(1932) Cr Cas 356=10 Pat 596 = 131 I C 785.

—Where there is a specific decree for money in favour of plaintiff the fact that in a certain view the defendant would be entitled to some set off against plaintiff in some further proceedings does not make the decree a declaratory decree. A I R 1921 Sind 132=16 S L R 245=79 I C 477.

—Assets in the hands of the representative, meaning of see. 14 A L J 899 = 36 I C 901.

—A decree must be executed as it stands and a Court of execution is confined within the four corners of the decree. But a decree, like any other document, is open to construction and it ought, if possible, to be construed so as to conform with the judgment. Where there is a variance between the decree and the judgment, the remedy by construction is only appropriate if the language of the decree is ambiguous. But when the language of the decree is plain and there is no ambiguity, the proper remedy is by an application

C. P. C. (1908, S. 47 (Contd))

(6) Construction of decree—(Concl'd)

for amendment of the decree. The executing Court should not amend the decree under the guise of interpretation. 36 I C 500.

(7) Court executing the decree.

—Judgment-debtor raising objections as regards the executability of the decree on application to transfer it for execution the proper Court to decide such objections is the Court which transfers the decree and not the transferee Court A I R 1929 Mad. 199=29 L W 246 = (1929) M W N 36 = Ind Rul (1929) Mad. 497= 116 I C 113.

—The proper court for entertaining an application to bring the petitioner on record as the representative of the judgment-debtor in order that he may raise a question covered by S. 47 C P C is the executing court and not the court which passed the decree. 11 L W 173 = 55 I C 812.

—Decree transferred—Transferee Court should decide question as to its executability. A I R 1928 Rang 40 = 5 R 775 = 6 Bur L J 225 = 106 I C 857.

—Transfer of decree for execution, order to bring legal representative on record by latter Court—irregularity. See 38 Mad 1076 = 28 M L J 525=29 I C 314.

(8) Court may treat a proceeding as a suit and vice versa

—A proceeding may be treated as a suit under s. 47. The executing Court can decide the character of a property on the objection to its sale that it was *wakf* property. A I R 1931 Oudh 45 = 7 O W N 1159=Ind Rul (1931) Oudh 133 = 130 I C 117. see also 2 O L J 57 = 27 I C 570.

—So also an application under s. 144 for recovery of mesne profits in a suit for redemption under a *bona fide* misconception of the applicants remedy can be converted into a suit. A I R 1931 Mad 81 = (1930) M W N 1215 = 60 M L J 219 = 33 L W 259 = Ind Rul (1931) Mad 371 = 130 I C 451.

—Through error in decree application for an enquiry into mesne profits made by execution petition. No other point involved Court can treat the petition as application in suit. A I R 1930 Mad 30 = 57 M L J 728 = 30 L W 810 = 53 M 838 = Ind Rul (1930) Mad 674 = 124 I C 290.

—Under sub-sec (2), even the appellate Court can treat proceedings in execution as proceedings in suit and grant necessary relief. A I R 1926 All. 387=48 A 362 = 24 A L J 379 = 93 I C 376.

—But Sub s. (2) is not intended to save litigants from the trouble of choosing the

C. P. C. (1908) S. 47 (Contd)

(8) Court may treat a proceeding as a suit and vice versa—(Contd)

proper form and filing a plaint or an execution petition when it is discovered in time what is the proper form and there is no question about the matter, A I R 1931 Mad 270=Ind Rul (1931) Mad 395 = 60 M L J 471= 33 L W 549=130 I C 475.

—And application for attachment of assets of deceased judgment-debtor cannot be converted—Liability of assets has to be previously declared A I R 1924 Mad 707 = (1924) M W N 342=46 M L J 374 = 34 M L T 290=83 I C 165. so also a suit to set aside execution sale in Court not proceeding with execution cannot convert suit into proceedings, A I R 1922 Nag 189 = 68 I C 693.

—Question between assignees of decree-holder—Proceedings converted into suit is proper—Appeal lies. A I R 1925 Pat 16 = 3 Pat 344 = (1924) Pat 193=78 I C 495.

—In a partition suit a compromise decree was passed by which debts were allotted. On an application for the execution of the decree it was pleaded that the decree-holder had realised certain debts which had not been allotted to him. *Held*; that the plea could not be raised in the execution department as it was not a matter which fell under S. 47, C P C. The judgment-debtor had entirely a separate cause of action against the decree-holder which could be made the basis of a separate suit. The petition of objection could not be treated as a plaint even assuming that S. 47 (2) enables the Court to do so, as no amount was specifically claimed in that petition. 11 A L J 282 = 35 A 243 = 19 I C 622.

—Partition suit—Collection of rent by Defts, subsequent to suit—Account—Claim for subsequent rents by way of execution—Proceedings to be converted into a suit. See 29 I C 905.

—Where the decree, in a suit for specific performance of a contract of sale was satisfied by execution of a registered deed of sale, and the decree-holder instead of suing for possession of the property under the sale-deed took out execution for possession. *Held*, that the applicant should be allowed to convert the application into a plaint for possession by paying the required court-fee, thereon. 40 P L R 1913 = 22 P W R 1913 = 18 I C 700.

—By a compromise in a suit the defendant admitted the plaintiff's right to the plaint house on condition of his being allowed to remain in possession as tenant and the defendant further agreed to vacate the house whenever asked to do so. A decree was passed in terms of the compromise and the plaintiff later on applied to eject the

C. P. C. (1908) S. 47 (Contd)

(8) Court may treat a proceeding as a suit and vice versa—(Contd)

defendant in execution of the decree. *Held*, that the relation of landlord and tenant commenced to exist immediately after the compromise, that the decree was practically executed by the creation of this relationship and that the defendant could not be ejected except by a suit properly framed. The present execution petition was refused to be treated as a plaint. 12 A L J 31 = 22 I C 663.

—Minor—Application to set aside sale by guardian ad litem Refusal of—Subsequent application after majority—Application for review was not the proper remedy—Application treated as suit on terms. See. 16 I C 543.

—Proceeding initiated wrongly—No question in execution—Court treating petition as suit and passing orders. 24 I C 484.

(9) Court may treat a suit as a proceeding.

—S. 47 Cl. (2) of the C P Code was intended to obviate the injustice caused to parties by a mistake in the initiation of proceedings and enables a court to treat a suit as an application and *vice versa*. It does not enable one proceeding to be treated as both a suit and an application. 1 L W 443 = 24 I C 484.

—Where persons impleaded as defts did not contest the suit the plaint was converted into application : 1 L L J 230.

—So also suit by exonerated party in prior suit out of which claim has arisen may be treated as an application under S. 47. 35 L W 103 = 137 I C 288 = 1 R 1932 M 367.

—In execution of an *ex parte* decree for rent the decree-holder purchased the holding of the judgment-debtor and obtained possession. Subsequently the decree was set aside but, in the meantime the purchaser had reaped the crops. The Judgment-debtor instituted a suit claiming the value of the crops taken by the purchaser while in possession of the holding. There was no formal prayer that the sale held in execution of the *ex parte* decree should be set aside. *Held*, that the purchaser at the auction sale, being the decree-holder himself, the sale must, as a matter of course, be set aside at the instance of the judgment-debtor, and that the proper course for the judgment-debtor to pursue was to present an application under S. 47. The High Court treated the plaint as an application under S. 47 and upheld the judgments of the Lower Courts, decreeing the claim. 1 Pat L J 43 = 3 Pat L W 95 = 34 I C 747.

—So also when objection is taken by a legal representative of a deceased judgment-debtor that the proper method of procedure

C. P. C. (1908) S. 47 (Contd)

(9) Court may treat a suit as a proceeding—(Contd)

against him was to proceed by way of execution in the Court which passed the decree under S. 50, C P C the Court to which the decree has been transferred for execution cannot cure the defect by treating the suit as a proceeding in execution under Cal. 2 of S. 47. 23 M L J 287 = 17 I C 293.

—And a suit can be converted into an application under S. 47, C P Code only if the application under S. 47 would not be barred by limitation on the date of suit. 4 L W 400 = 34 I C 774.

—In other words a suit cannot be treated as an execution application where the effect of doing so would be to prejudice the deft. in his plea of limitation. 45 I C 608.

—Plaint can be treated as application, subject to limitation against application A I R 1930 Oudh 468 = 7 O W N 887 = L R 11 A 294 Rev = 15 R D 55 = Ind Rul (1931) Oudh 56 = 128 I C 728.

—In other wards conversion will be allowed provided the execution of the decree has not been barred by limitation at the date of the institution of the suit. 14 C L J 620 = 10 I C 417 See also 1 I C 380 = 19 M L J 4 = 4 Mad L T 288. and 35 I C 337 (2).

—In the face of S. 47 (2) C P C it is not permissible to a court to dismiss a suit on the ground that the remedy of the plff was by way of execution. The mere fact that the court which decided the suit would have had no jurisdiction to determine the matter in execution is not a sound reason for not treating the suit as an application in execution. 18 M L T 247 = 2 L W 755 = 30 I C 785.

—For the object of sub-section (2) is to avoid claim being defeated on mere technical pleas A I R 1923 Nag 94 = 71 I C 42. and to correct *bona fide* mistake. A I R 1931 Mad 270 = 60 M L J 471 = 33 L W 549 = Ind Rul (1931) Mad 395 = 130 I C 475.

—So where previous objection is dismissed as premature a subsequent suit could be treated as proceedings under s. 47 and is not barred. A I R 1928 Oudh 38 = 4 O W N 1045 = 106 I C 133.

—Plaint filed after paying a higher Court-fee can still be treated as an application under s. 47. A I R 1930 Mad 12 = (1929) M W N 811 = Ind Rul (1930) Mad 440 = 123 I C 24.

—And failure to convert suit as application is revisable. A I R 1921 Nag 130 = 59 I C 477.

—Even the appellate Court can act under sub-section (2) subject to the two conditions stated above viz. jurisdiction and limitation : 28 M 64; and 31 C W N 406 = 101 I C 622 = A I R 1927 C 411 = 54 C 524.

C. P. C. (1908) S. 47 (Contd.)

## (10) Estoppel.

—Person successfully opposing application under s. 47, on ground that that section did not apply, cannot subsequently resile and say suit is barred. A I R 1929 Nag 79 = Ind Rul (1929) Nag 237 = 117 I C 285.

—Nor does a mortgagor's failing to raise plea of non-transferability before decree prevent raising it in execution. A I R 1926 All 432 = 48 All 385 = 24 A L J 489 = 95 I C 1048.

—So also there can be no estoppel against statute. The principle of estoppel cannot be allowed to defeat the provisions of a statutory enactment which affects the jurisdiction of a court, as a party cannot by his admission or previous conduct confer jurisdiction on a court where none exists. It would be the duty of the Court to take the question of jurisdiction in to account even where the party raising the plea is estopped from doing so. 54 A 25 (33-4, 43-46) = 1931 A L J 715 = A I R 1931 A 490 = 134 I C 236 (F B).

—Auction-purchaser of non-transferable holding estopped from questioning transfer in favour of private purchaser—Execution purchaser bound by estoppel which affects judgment-debtor. 29 I C 734.

## (11) Fraud.

—See cases under:—

—(1) Mistake (*infra*) (2) Legislative changes (*supra*) (3) Scope & applicability of the section—Questions as to validity of decree (Fraud) (*supra*).

## (12) Inherent powers.

—See cases under this section—(2) Scope —( Question relating to validity of decree ).

## (13,14) Interlocutory Orders.

—See (3) Appeal and Second appeal *supra*

## (15) Mesne profits.

—See also cases under C P C order 20 rule 12. Provision as to mesne profits in clauses (a) and (b) of the corresponding s. 244 of the old Code have been omitted from the present section. It follows, the refore, that the executing Court has no power to ascertain the mesne profits under the new Code. A I R 1931 Pat 1 = 12 P L T 127 = Ind Rul (1931) Pat 193 = 130 I C 785.

—And that an application for ascertaining mesne profits is not under's 47. A I R 1929 Mad 785 = 57 M L J 515 = 30 L W 738 = Ind Rul (1930) Mad 422 = 123 I C 6.

C. P. C. (1908) S. 47 (Contd.)

## (15) Mesne profits—(Concl'd.)

—See also cases under Order 20, r. 12 and A I R 1926 Pat 141 (141, 142) = 1925 Pat H C C 357 = 92 I C 629 = 5 Pat 223 = 7 Pat L T 340 ; A I R 1929 Mad 785 (2) (786) = 57 M L J 515 = 30 Mad L W 738 ; 6 I C 648 (649) = 44 Pun L R 1910 = 44 Pun W R 1910 ; and 11 C L J 501 = 5 I C 387

—Where a decree is silent as to interest, the executing Court cannot fix the rate of interest and execute the decree. 9 I A 1 = 8 C 332 ; and A I R 1926 Cal 505 = 53 Cal. 42 = 94 I C 997.

—An application for ascertainment of mesne profits is now an application in suit. 16 C L J 3 = 15 I C 709.

—In other words, the Court passing decree has to ascertain mesne profits. A I R 1931 Pat 1 = 12 P L T 127 = Ind Rul. (1931) Pat 193 = 130 I C 75.

—But the Lahore High Court has, in a recent case, held that mesne profits can be realized by an application in execution and a separate suit is not necessary for the purpose. 28 P L R 179 followed; 29 P R 1902 distinguished; 63 I C 43 approved. A L R 1934 L 239.

—Former suit between the same parties for specific performance of contract of sale and recovery of possession of property. No specific prayer for the awarding of future mesne profits, subsequent suit for the recovery of mesne profits can be maintained. A I R 1929 Mad 785 = 57 M L J 515 = 30 L W 738 = Ind Rul (1930) Mad 422 = 123 I C 6.

—Questions going behind decree—Suit is maintainable A I R 1929 All 252 = [1929] A L J 475 = Ind Rul (1929) All 395 = 115 I C 462.

—Where the decree is silent in awarding interest on mesne profits, they cannot be obtained in execution of that decree, but application should be made for amendment of that decree either through a review of judgment or by appeal or by a separate suit. L R 2 I A 219.

—Mesne profits can be ascertained in execution proceedings in case of decrees passed under the old Code see 37 M 186 ; and 45 B 819 ; and A I R 1921 Pat 185.

## (16) Mistake.

—See cases under (2) scope and applicability of section—Questions as to wrongful execution.

## (17) Mortgage Decree

—Order that mortgaged properties be sold in particular order is final as to execu-

C. P. C. (1908) S. 47 (Contd)

(17) Mortgage Decree—(Contd)

tion. A I R 1925 Pat 484 = 6 P L T 393 = 1925 Pat 164 = 91 I C 221, see also : 78 I C 829 = 46 M L J 192 = A I R 1924 M 527. But see :—  
A I R 1926 M 834 = 96 I C 492 = 23 M L W 765 = 1926 M W N 566 = 51 M L J 135.

—So also question of delivery of wrong property under mortgage decree to stranger auction-purchaser is under s. 47. A I R 1921 Mad 420 = 41 M L J 120 = 14 L W 92 = (1921) M W N 491 = 63 I C 200; as also questions of accretions under such decree. A I R 1925 P C 86 = 30 C W N 5 = 52 I A 137 = 27 Bom L R 455 = 48 M L J 648 = 49 B 233 [P C] = 86 I C 368

—Similarly, the question whether some properties mortgaged did not belong to mortgagor is under s. 47. A I R 1923 All 115 = 79 I C 486.

—For there is no distinction between a money decree and mortgage-decree. A I R 1929 Lah 762 = Ind Rul [1930] Lah 812 = 127 I C 12.

—But where the purchaser of a part, who is made deft applies that his portion be sold last the order of Court granting application but imposing certain conditions is not one relating to execution. A I R 1929 All 291 = 51 A 752 = [1929] A L J 757 = Ind Rul [1929] All 1016 = 119 I C 440.

—Auction-purchaser in execution of mortgage decree represents rights of mortgagor and mortgagee as they stand on date of mortgage. A I R 1922 All 495 = 44 A 488 = 20 A L J 337 = 67 I C 29.

—Purchaser under money-decree when mortgage-decree existed is postponed to purchaser under mortgage decree. A I R 1922 Pat 655 = 3 P L T 757 = 67 I C 262.

—Sale of mortgaged property—Prior mortgagee's right to deposit decretal amount, see 5 I C 142 = 37 Cal 282 = 14 Cal W N 672.

—Decree for redemption passed under —Dekkhan Agriculturist Relief Act but not governed by T P Act—Decree capable of execution but not executed—Second suit to redeem the mortgage does not lie. 43 Bom 703 = 21 Bom L R 720 = 52 I C 466.

—Question relating to execution. Mortgage decree—Execution—Power of mortgagee to sell whatever property he chooses—Court's right to direct in what order properties are to be sold—Limits of. See. 4 Pat L J 207, and see O. 34, r. 1.

—Previous purchaser in execution of mortgage decree, cannot object to sale in execution of money-decree. 9 Ind Cas 194 = 15 C W N 542.

—Mortgage suits proceeding for final decree—S. 47 does not apply. A I R 1925

C. P. C. (1908) S. 47 (Contd)

(17) Mortgage Decree—(Contd)

Nag. 132 = 22 N L R 110 = 82 I C 452 see also 27 A 254; and 27 A 325.

—Decree on prior mortgage—Objection by decree-holder in execution of decree on subsequent mortgage claiming priority is not under s. 47. A I R 1925 Nag 185 = 80 I C 626.

—Subsequent mortgagees who had foreclosed their mortgage of certain properties included in a previous mortgage applied, when the previous mortgagee applied for sale of the property, in execution of his own decree to have the properties, excluded from the execution sale and got an order in their favour. On appeal by the judgment-debtors : Held that the petitioners were the representatives of the judgment debtor within the meaning of S. 47 C P Code, and that the order was not merely one coming under O. 34 R 3 but also under S. 2 and hence appealable. 41 Cal 418 = 25 I C 118.

—Bar of suit—Applicability—Suit for sale by prior mortgagee against mortgagor and puisne mortgagee—decree in form Appendix D, C P Code—Right of puisne mortgagee to bring fresh suit for recovery of his mortgage amount. see 35 M L J 639 = 42 M 90 = 49 I C 36 = 9 L W 70 = 24 M L T 473 = 1918 M W N 89.

—Benamidar for mortgagee decree-holder—purchase in auction—Suit for possession by benamidar of property purchased—whether barred see. 22 Bom L R 296 = 44 B 352 = 56 I C 349.

—Decree for foreclosure—Failure to redeem—No order absolute—Suit for redemption not barred see 39 Bom 41 = 16 Bom L R 687 = 27 I C 249.

—“All objections that could be raised in execution under this section” shall be determined by the Court executing the decree and not by a separate suit. 22 I C 896 = 124 Pun L R 1914 = 1914 Pun Re No 12. T P Act s. 88.

(18) Res Judicata.

—See also cases under:—(1) Scope & applicability of this section supra (2) C P C s. 11 (execution proceedings).

—Judgment debtor failing to object to attachment in execution cannot do so in suit for possession by auction-purchaser as executing Court has exclusive jurisdiction to decide the point. A I R 1931 Nag 27 = Ind Rul (1931) Nag 58 = 130 I C 154.

—Dismissal of previous objection to attachment bars second objection. A I R 1931 Lah 6 = Ind Rul (1931) Lah 278 = 32 P L R 413 = 130 I C 406.



C. P. C. (1908) S. 47 (Contd)  
(18) Res Judicata—(Concld)

—Parties and representatives—Objections under, disallowed suit on the same objection making others also parties—Bar—See 30 M L J 238 (P C) = 32 I C 354 = 3 L W 257.

(19) Partition Decree.

—Partition during suit for possession—Substituted share can be proceeded against. A I R 1922 P C 54=(1922) M W N 415=20 A L J 650 = 31 M L T (P C) 43=43 M L J 124 = 36 C L J 1 = 26 C W N 906 = 16 L W 128 = 1 Pat 378 = 3 P L T 547 = 24 Bom L R 974 = 49 I A 139 (P C) = 69 I C 180.

—Decree-holder can be put in possession in execution of specific lands substituted for his share on partition. A I R 1929 Oudh 253 = Ind Rul (1929) Oudh 412 = 117 I C 764.

—Partition decree some properties sold away—Question of distribution of sale proceeds is under s. 47. A I R 1922 Bom 380=46 Bom 226 = 23 Bom. L R 981 = 64 I C 490.

—But the court executing decree cannot order sale of partnership property and distribution of sale proceeds where decree merely declared partner's interest. A I R 1925 Sind 318 = 93 I C 825.

—And an auction purchaser cannot obtain partition by execution petition. A I R 1926 Mad 232 = 22 L W 663 = (1926) M W N 165 = 91 I C 961.

—Land in excess of share under partition decree recovered—Final decree can be amended, and excess land restored under ss 47 and 151 A I R 1925 Sind 126 = 19 S L R 302 = 78 I C 1039.

—Plaintiff and one defendant got money decree against same defendant in partition suit; plaintiff got his decree transferred and realized certain amount. Defendant applied for rateable distribution without transfer of his decree—Order on the defendant's application under s. 47. A I R 1925 Mad 1265 = 49 M L J 375 = 20 L W 740 = 92 I C 869.

—Where a decree for partition did not include house not in possession but recorded agreement of parties to divide it when it should fall into possession, it is open to parties either to effect partition by mutual agreement or enforce their rights by a separate suit. A I R 1928 Bom 365 = 30 Bom L R 912 = 113 I C 173.

—So also separation of plaintiff's share only in partition suit does not bar a subsequent suit for partition amongst defendants. A I R 1926 Pat 154 = 7 P L T 295 = (1925) Pat 330 = 90 I C 739

—Bar of suit—Partition decree—Compromise by father without leave of court—satisfaction entered up—Remedy of son—appli-

C. P. C. (1908) S. 47 (Contd)  
(19) Partition Decree—(Concld)

cation under S. 244 see 26 M L J 460 = 24 I C 696.

—Suit for *khaz* possession by co-sharer—Decree declaring his right as co-sharer and directing him to take *khaz* possession. Defendant entitled only to joint possession and must sue separately for partition and possession of his share. 46 I C 887.

—A stranger purchaser of undivided share cannot claim to joint possession of the family dwelling-house. He can either ask for delivery of possession of what he acquired by purchase, by partition in execution proceedings or bring a separate suit for partition. 20 C W N 675 = 23 C L J 587 = 35 I C 294.

(20) Penalty clause in a decree.

—Compromise decree containing a stipulation by way of penalty—executing Court can go behind the decree so as to interfere with such stipulation—S. 74, Contract Act, applies to a compromise decree. A L R 1933 A 124 = 1933 A L J 132 = A I R 1933 A 253.

(21) Pre-emption Decree.

—Pre-emption decree—Question whether standing crops also passed is not under s. 47, when decree does not touch it. A I R 1923 Nag 327 = 76 I C 193.

(22) Questions arising between the parties or their representatives.

(1) General

—The question must arise between parties to a *suit*, and on the record 17 Cal. 769, p. 777; 14 Mad., 478; whether put rightly or wrongly. 2 C L R 545.

See also 1928 Cal. 792, and 36 Ind Cas 212 = 104 Pun L R 1916 = 179 Pun W R 1916; and 1925 Nag 288 = 8 Nag L J 73 = 89 Ind Cas 888 and 27 Ind Cas 363 = 17 Oudh Cas 374; and 1915 M W N 414 = 29 I C 976.

—And the questions relating to or affecting parties must be decided in execution only. A I R 1927 Cal 106=53 C 837=99 I C 180.

—Objection by puisne mortgagee to execution sale dismissed—Section 47 does not apply. 2 Pat L J 219 = 3 Pat L W 422 = 391 C 656.

—Executing Court cannot decide upon title of person other than judgment debtor in possession of property sold. A I R 1928 Cal 792 = Ind Rul (1929) Cal 292=115 I C 36.

—Objection by Muhammadan mortgagor's son to sale of mortgaged property alleging

## C. P. C. (1908) S. 47 (Contd.)

## (22) Questions arising between the parties or their representatives—(Contd.)

## (1) General—(Contd.)

it to be graveyard and hence inalienable—Objector could bring suit like any other Muhammadan similarly interested, contention that son could not object overruled. A I R 1931 Oudh 45 = 7 O W N 1159 = Ind Rul 1931 Oudh 133 = 130 I C 117.

—Objection as to assignee's title to execute can be raised in execution. A I R 1925 Pat. 449 = 4 Pat 120 = 86 I C 564.

—Executing Court can decide whether a person applying under r. 100 of O. 21 is a party to the decree. A I R 1921 Mad 612 = 41 M L J 54 = 14 L W 85 = (1921) M W N 487 = 63 I C 730

—Any transferee of the interest of a party whether by assignment, succession or otherwise, who so far as such interest is concerned, is bound by the decree. 1 I C 213 = 9 C L J 485; and A I R 1930 All 597 = 1930 All L J 1302; & A I R 1925 Cal 798 = 43 Cal L J 345 = 30 Cal W N 649 = 65 Ind Cas 494 = 53 Cal 781 F B

## (2, 3) Auction-Purchaser.

—A. P. Whether representative of J. D : There is no unanimous judicial opinion on this point. It has been held by the Madras High Court that a purchaser in execution of a money decree is a representative of a judgment-debtor within the meaning of s. 47 see 38 M L J 32 = 26 M L T 391 = 1919 M W N 881 = 54 I C 209 = 43 M 107 F B; and (1912) M W N 513 = 14 I C 836 and (1917) M W N 861, and 9 L W 596 = 50 I C 931, and (1920) M W N 787 = 12 L W 350 = 59 I C 894.

—And Auction-purchaser in inferior Court can object to sale in superior Court as representative of J. D. A I R 1924 Mad 889 = 47 M L J 720 = 20 L W 864 = 1924 M W N 551 = 84 I C 265, and 54 Ind Cas 205 F B; 28 Mad 119; 38 M L J 441 = 11 L W 349 = 55 I C 626. So also the Calcutta High Court 8 C L J 327 = 13 C W N 98 = 4 Ind Cas 326 (24 C 62 F.) and 12 C L J 312, and 9 C W N 824 = 32 C 1031 (24 C 62; 9 C W N 134 F; 6 C W N 128; 12 C 458 Not F) and the Allahbad High Court 2 All L J 265; 30 All 379 = 5 All L J 557 = 1908 A W N 157; 29 All 275 = 4 All L J 135 = 1907 All W N 64. 28 All 337 = 3 All L J 110 = 1906 All W N 43; but see A W N 1894, 59, and the Sind J C Court 1924 Sind 101 = 17 Sind L R 73 = 80 Ind Cas 1002; And the Nagpur J C Court A I R 1922 Nag 189 = 68 I C 693, and A I R 1924 Nag 328 = 20 N L R 170 = 79 I C 636 (contra A I R 1923 N 161) have held that an auction-purchaser in execution of a simple money decree is a representative of the judgment-debtor. The J C Court

## C. P. C. (1908) S. 47 (Contd.)

## (22) Questions arising between the parties or their representatives—(Contd.)

## (3) Auction-Purchaser—(Contd.)

of Oudh has held that the word "representative" when taken with reference to judgment-debtor means not only his legal representative, but his representative interest and includes a purchaser of his interest, whether he has purchased the judgment-debtor's interest at a private sale or at execution sale, can be made party to the execution proceedings and he can have an opportunity to raise objections against the execution proceedings, if any. The real test to be applied in determining the question whether the auction-purchaser is to be regarded as the representative of the judgment-debtor or the decree-holder depends upon the nature of the question raised and who the contesting party is. If the question is between the judgment-debtor and the auction-purchaser and the interests of the two are conflicting, the auction-purchaser can in no sense be considered to be a representative of the judgment-debtor. A I R 1928 Oudh 442 = 12 Rev. Wee. 457 = L R 10 A 85 Rev = 3 Luck 719 = Ind Rul (1929) Oudh 289 = 116 I C 49 see also 14 O C 89 and 5 O L J 551; see contra 2 O L J 57; and 12 O C 175.

—On the other hand the Bombay High Court A I R 1923 Bom 214 = 25 Bom L R 147 = 72 I C 256 and 25 B 631 and 42 Bom 411 = 20 Bom L R 495 = 46 I C 113 and the Rangoon High Court 5 L B R 85 = 3 Ind Cas 713 and 4 Bur L T 28 have held contra. So also the Lahore High Court 12 P R 1919 = 49 I C 140, and A I R 1925 L 176; but in A I R 1926 L 134 = 6 L 544.

—It has held that the purchaser of judgment-debtor's attached property is the representative see also 27 I C 570. As to Patna see 39 Ind Cas 763 = 2 Pat L J 361 = 1 Pat L W 551.

—On the question whether a purchaser in execution of a mortgage decree is a representative of the judgment-debtor or of both the mortgagor and mortgagee see 21 M L J 928 = 9 M L T 152 = 1910 M W N 662 = 81 I C 429; and 4 Bur L T 28 = 9 I C 472; and A I R 1931 A 466; and 3 M L T 306 = 31 M 177, and 1 Sind L R 158 and 14 O C 89 and A W N 1900, 42 and 3 I C 39; and 22 A 450; and A I R 1929 Rang 183 = 119 Ind Cas 222; and 12 Oudh Cas 45 = 2 Ind Cas 57; and 44 Ind Cas 169 = 8 P R 1918; and A I R 1923 All 470 = 45 All 96 = 74 Ind Cas 995 and A I R 1928 All 368 = 26 All L J 498 = 50 All 670.

—The High Courts of Calcutta and Madras and the J C Courts of Nagpur, Oudh and Sind distinguishing between decree-holder purchaser and a stranger auction-

## C. P. C. (1908) S. 47 (Contd.)

(22) Questions arising between the parties or their representatives—(Contd.)

(3) Auction-Purchaser—(Contd.)

purchaser, but not the high Court of Allahabad, Bombay, Lahore, and Patna.

—A collusive purchaser of the equity of redemption whose purchase has been declared to be such has no *locus standi* to maintain an application under S. 47 C P. Code objecting to the execution of the mortgage decree as a representative of the judgment-debtor.

42 I C 1

—Whether auction-purchaser is representative of judgment-debtor and can intervene in execution proceedings under another decree—question that auction-purchaser is benamidar of judgment-debtor can be agitated under S. 47 and not by separate suit. A L R 1933 M 53=63 M L J 941=36 L W 844=1932 M W N 1335=141 I C 54=A I R 1933 M 166.

—Decree for possession—Sale of decree-holder's interest—Vendee is not representative of decree-holder unless decree is assigned. A I R 1924 Bom 426=26 Bom L R 333=80 I C 249.

—Two persons A and B obtained separate money decrees against C. In execution of A's decree certain immoveable properties belonging to C were brought to sale and purchased by D. B then executed his decree and had the property purchased by D attached. D thereupon filed a claim petition objecting to the said attachment and being unsuccessful before the Dt. Munsif appealed to the Dt. Judge. This appeal being dismissed, he preferred a Civil miscellaneous second appeal to the High Court. Held that both the appeal to the Dt. Court and the second appeal to the High Court were incompetent inasmuch as D was not the representative of C in the suit of B 3 L W 377 = 34 I C 759.

—A. P. whether a "party":—A party to a mortgage suit, who sets up a paramount title and is discharged from the suit, no decree being passed either in his favour or against him, is not a party to the suit within the meaning of S. 47 of the C P C 1908. Such a person can object to the delivery of possession of property under Order 21, rule 100, and if such objection fails, a regular suit lies at his instance. 15 N L R 146 = 52 I C 736.

—A P. seeking possession:—In case of a stranger auction-purchaser all the Courts are unanimous in the view that the question relating to delivery of possession is not one under s. 47 as it is not one in execution between "the parties to the suit" and as such separate suit lies: see A I R 1925 C 250 = 8 I C 196; and A I R 1930 Pat 311 = 11 P L T 331=126 I C 849 = 9 P 775; and A I R 1923 C 345 = 84 I C 525; and A I R 1925 A 236 = 47

41 I C 21, 21, 31, (1) 22

## C. P. C. (1908) S. 47 (Contd.)

(22) Questions arising between the parties or their representatives—(Contd.)

(3) Auction-Purchaser—(Contd.)

A 304. See also. A I R 1928 Mad 836 = 111 I C 551.

—But where the decree-holder himself is the auction-purchaser the High Courts of Calcutta and Madras and the J C Courts of Nagpur and Sind have held that the question falls within s. 47 and separate suit is barred see 59 C 117; and A I R 1930 C 586 = 34 C W N 1059 = 51 C L J 560; and 31 C 737; and 18 C W N 27; and the full Bench ruling in 43 C L J 345 = 30 C W N 649 = 95 I C 494=A I R 1926 C 798=53 C 781 F B, and 139 I C 247 = 55 C L J 1 = A I R 1932 C 414 = I R 1932 C 589 = A L R 1932 C 406, and 12 L W 273 = (1920) M W N 562 = 39 M L J 603 = 61 I C 349 and 28 W 87; and 26 M 740; and 28 M 119; and 26 M 740; and 25 M 529; and A I R 1928 M 1270; and 44 I C 563; and A I R 1929 Mad 757=57 M L J 381 = 30 L W 424 = 52 M 899=Ind Rul (1930) Mad 23 (F B)=120 I C 567; and A I R 1927 N 294; and 44 I C 563; and 18 S L R 34 = A I R 1925 S 171.

—The High Courts of Allahabad, Bombay, Lahore, Patna and Rangoon and the J C Court of Oudh, however, hold that even where the decree-holder himself is the purchaser the question of delivery of possession is outside S. 47 see 42 I C 936 = 16 A L J 150 = 40 A 216; and 1907 A W N 131 = 4 A L J 434 = 29 A 463; and 6 A L J 71 = 1 I C 416 = 31 A 82 F B; and A I R 1930 Bom 375 = 32 Bom L R 619 = 54 B 479 = Ind Rul (1930) Bom 367 = 125 I C 703 and A I R 1924 Bom 429 = 26 Bom L R 601 = 48 B 550 (F B) = 83 I C 932 and 8 P R 1918 = 44 I C 169; and A I R 1930 Pat 308 = 9 Pat 332 = 11 P L T 315 = Ind Rul (1930) Pat 516 = 125 I C 516 and A I R 1930 Rang 61 = 8 R 162 = Ind Rul (1930) Rang 289 = 126 I C 269 and A I R 1930 Rang 281 = 127 I C 476; and 18 O C 345 = 33 I C 367; and 5 O L J 551 = 48 I C 39.

—Delivery of possession ordered in favour of decree-holder auction-purchaser—No appeal lies A I R 1928 Oudh 199 = 3 Luck 182 = 5 O W N 108 = 110 I C 83.

—Rights and liabilities of A P:—As to whether the title of an auction-purchaser is affected by the failure to obtain sale Certificate see. 25 I C 8.

—Right of A P to question encumbrances on property purchased. see. 28 I C 360.

—Where a person purchases certain immoveable property at a court sale in execution of a money decree in ignorance of the existence of a mortgage upon the same and subsequently, sells it privately to a third party who also purchases without the knowledge of the existence of the mortgage and

C. P. C. (1908) S. 47 (Contd)

(22) Questions arising between the parties or their representatives—(Contd)

(3) Auction—Purchaser—(Contd)

where the mortgage is afterwards disclosed and the private purchaser is compelled to pay the amount thereof the latter is not entitled to claim compensation from the original owner, as the purchaser of property in a Court sale takes it not only with all benefits but subject also to liabilities: 2 L W 517 = 29 I C 392 following 31 A 583 not following 7 N W P 362.

—A purchaser from a decree-holder auction purchaser in execution of an *ex-ports* decree cannot be said to be a *bona fide* purchaser for value. 32 I C 849.

—Where an auction purchaser, at an execution sale claims possession of the property sold, from persons who derive their title from the Judgment debtor and whose claim has been declared unfounded; a mistake or oversight in the description of the property sold cannot effect the real substance and subject of litigation between the parties. The auction-purchaser is nevertheless entitled to possession of the properties really meant to be sold; 29 I C 17.

—It is only an innocent purchaser for value who is not a party to any fraud that can claim the benefit of purchase in irregular execution proceedings. 36 I C 681.

—Properties sold in one lot pending appeal to High Court and prior to order of High Court that they should be sold in three lots—Auction purchaser cannot ask for possession but only for direction for re-sale. A I R 1922 All 375 = 65 I C 16.

—Reversal or variation of decree whether affects the rights of A P see. 21 I C 570. See also 30 M L J 497.

—Property passing in execution of a mortgage decree is dependent upon the terms of the plaint Where in a mortgage suit the plff. prays for the sale of the property subject to the prior lien. it is not open to the auction-purchaser in execution of the decree obtained in that suit to dispute the subsistence of the lien. 47 I C 224.

—Where a Purchaser at an execution sale brings a suit for possession, the judgment-debtor can resist the suit on the ground that the decree in execution of which the plff. became the purchaser was fraudulent and that the decree-holder himself purchased the property. The court is bound to go into those questions in such a suit. 34 I C 897.

—Auction purchaser—Suit by, for possession—Limitation—Cause of action—Symbolical possession obtained by purchaser—Actual possession with judgment-debtor,

C. P. C. (1908) S. 47 (Contd)

(22) Questions arising between the parties or their representatives—(Contd)

(3) Auction—Purchaser—(Contd)

See. 36 Bom 373 (F B) = 14 I C 447 = 14 Bom L R 115.

—Auction purchaser's Title—Question in other proceedings—Burden of proof—Nature of evidence. See 22 I C 17.

—Following 5 All 577 F B Held, a suit to recover back the purchase money by an auction purchaser lies on the ground that the judgment-debtor had no saleable interest. The correctness of the Full Bench decision was however doubted. 36 All 529 = 12 A L J 908 = 26 I C 59.

—Auction purchaser, right of Hindu widow—Decree against on mortgage for legal necessity—Whole estate passes. See 1 Pat L W 77 = 37 I C 403.

—The purchaser of a property from a decree-holder which the latter purchased at a sale in execution of the decree cannot treat as a nullity subsequent proceedings of the execution Court in which the execution sale is set aside with notice to the decree-holder but in the absence of and without notice to the purchaser as such proceedings being good proceedings against the decree-holder, are good also as regards the purchaser who claims through the decree-holder. But such purchaser is entitled to a refund of the price paid by him with interest from his vendor. 41 I C 200.

—The mere drawing up of a sale certificate to be given to a purchaser in Court sale is not a judicial order binding on any party, though an order passed on adjudication on the question as to what the sale certificate should contain will be a judicial order. 23 M L J 97 = 11 M L T 385 = 14 I C 286.

—A decree for joint possession ought not to be passed in favour of tenants in common who never had actual possession 18 C 10 applied. 25 M L J 352 = 14 M L T 346 = 21 I C 314.

—Where execution proceedings have been conducted apparently with regularity and in conformity with law, and the only defect alleged is that the decree on which the execution proceedings are founded was fraudulent, an innocent purchaser would be protected and it would be necessary to establish that he was a party to the fraud or was appraised thereof before he paid his money. 17 C L J 219 = 16 I C 811.

—Suit for refund of purchase money against attaching creditor of Judgment debtor—Limitation. See 40 I C 187.

—Auction-purchaser's liability for deficiency in re-sale on failure to deposit amount—Plea in defence See 14 Bom L R 250 = 36 B 329 = 14 I C 777.

C. P. C. (1908) S. 47 (Contd.)

(22) Questions arising between the parties or their representatives—(Contd.)

(3) Auction—Purchaser—(Contd.)

—Auction-purchaser's rights—Two mortgage decrees of equal degree of priority. See 16 C W N 701 = 14 I C 568.

—Where B agreed to pay pension to S and upon the death of B, K got into possession of all the properties left by B, and S got a decree in respect of his arrears of pension against K in respect of B's properties in his possession not duly administered by K, and S attached property Z belonging to B as having been purchased by her at an auction sale, and K raised several objections. *Held*, [1] that the fact that M, daughter of B, brought a suit against K, in which it was compromised that K should continue in possession, upon the latter paying an annual sum to M and her heirs was immaterial. [2] that the fact that B had not got actual possession of the property X, for which K had to bring a suit, did not change the character of the property. [3] that an entry in Government register showing Government revenue payable by K, under a settlement did not imply that K had an independent title by virtue of a settlement and. [4] that the purchase by B at the revenue sale was in her own rights, the rights of all co-sharers including her own as heir of her husband, having been lost. 1 Pat L T 602.

—Where a mortgagee purchases a holding at a sale in execution of a mortgage decree he must be taken to have known the nature of the holding on which he had advanced money and the terms of the contract on which that tenancy had been created. Where the holding purchased is that of a raiyat at fixed rates created by a kabuliyat containing stipulations for the payment of rent by monthly instalments and for interest at a very high rate on arrears, the purchaser and his successor in interest are bound to pay interest at the rate and pay rent in accordance with the instalments provided for in the kabuliyat. 57 I C 1004.

—Irregularity in proceedings—Title of purchaser not affected. See 20 M L T 479 = 37 I C 387.

—Sale subject to prior mortgage right—purchaser not entitled to deny. See 21 M L T 382.

—Auction Purchaser is bound by the same rule of estoppel as judgment-debtor 21 C L J 441. See also 16 I C 792.

—A receiver was appointed in mortgage suit at the instance of the plaintiff by the High Court. The mortgaged properties were subsequently sold in execution but the receiver was not discharged. The auction-

C. P. C. (1908) S. 47 (Contd.)

(22) Questions arising between the parties or their representatives—(Contd.)

(3) Auction—Purchaser—(Contd.)

purchaser continued to pay the revenue; the receiver at the same time also paid the revenue on behalf of the judgment debtor. Four years afterwards the sale was set aside and the auction-purchaser applied to the High Court for an order on the receiver to re-imburse him for the amounts which were paid for the benefit of the estate. The receiver contended that he was not subject to the orders of the High Court but that he was an officer subject to the orders of the trial Court. *Held*, that the receiver, having been appointed by the High Court to which he had submitted his accounts, must be regarded as an officer subject to the orders of the Court that so far as the auction purchaser was concerned, he was justified in considering that he was the person liable to pay to the Government revenue that became due during his auction-purchase on the principle that he became the proprietor from the date of the sale and the duty of paying the revenue devolved upon him from that moment; 40 Cal 89 P C foll, and that under the circumstances the proper order was to give the auction-purchaser leave to sue the Receiver in respect of his claim. 51 I C 706.

(4) Benami transactions.

—Application by real owner for execution of decree in favour of benamidar—Question whether applicant is real owner or not—Executing Court can decide, under S. 47, where the question is raised not by the alleged benamidar but by the judgment-debtor. 55 C L J 82 = A I R 1928 C 835.

—Question that person seeking to execute decree obtained by his benamidar alleging to be true owner is not true owner, should be decided under S. 47. A I R 1928 Cal 835 = Ind Rul (1929) Cal 255 = 114 I C 495.

—Benamidar is neither party nor representative of party under S. 47. A I R 1926 Mad 1081 = 51 M L J 391 = 24 L W 634 = 98 I C 14 but see contra. 7 C L J 299.

—Objection under colourable document—Claim can be set aside or ignored—Question as to validity of attachment between opposite parties is under S. 47. A I R 1923 Cal 344 = 76 I C 316.

(5) Claim Proceedings.

—Claim by parties in different capacity:—Question between parties but in different capacities is not under S. 47. A I R 1923 Nag 149 = 6 N L J 25 = 69 I C 500.



## C. P. C. ( 1908 ) S 47 (Contd)

## ( 22 ) Questions arising between the parties or their representatives—(Contd)

## ( 5 ) Claim Proceedings—(Contd)

—So a claim by judgment-debtor to property attached in execution of a decree on the ground that he held it in trust, must be preferred under O. 21, R. 58, and not under S. 47 C P Code, either independently or with his other objections. Any order passed on such a claim is not appealable even where it purports wrongly to have been made under S. 47. 38 I C 152, following 28 M 195. See also. A I R 1924 All 183 = L R 4 A 447 Civ = 75 I C 1053.

—An objection by the judgment-debtor that the property attached was not his private property, but one held by him as trustee or executor does not fall under s. 244, Civ. Pro. Code, 1882, so as to bar a fresh suit. 12 P R 1887.

—See also 1930 Nag 293=128 I C 401 = 27 Nag L R 10 = 13 Nag L J 205; and 28 All 644=(1906) All W N 158=3 All L J 565; and 1928 All 392 = 26 All L J 477 = 50 All 801 = 113 I C 171.

—But see contra A I R 1927 Oudh 120=2 Luck 145 = 4 O W N 102 = 100 I C 464 and 8 C W N 353.

—If A in execution of a decree for money against B personally, attaches and proceeds to sell properties of which B alleges that he is in possession, not in his own right, but as shebait of a deity to whom the properties have been dedicated an order passed on a claim preferred by B, falls within S. 278 C P C 1882 and not under S. 244 as he claims in his capacity of shebait of a deity who is no party to the suit. Under S. 244 the question must arise between the parties to the suit in which the decree was passed 7 M 255 dis. from 39 Cal 298 = 14 C L J 425 = 16 C W N 26 = 12 I C 163 ( F B ) dissenting from 7 M 255. See also 14 C L J 337 = 11 I C 280.

—When X in execution of decree for money against Y as Shebait of a deity attaches and proceeds to sell properties of which Y or his successor in office alleges that he is in possession not as Shebait of the deity but in his own right the case does not fall within S. 47 but under O. 21 R 65. The order of the original Court was not made under S 47 and was not a decree liable to be challenged in appeal. 42 Cal 440 = 20 C L J 485 = 19 C W N 520 = 27 I C 328 explaining 29 C 298; and 17 C 711. see also 12 I C 411.

—But where G was a party to the suit in his personal capacity and also as mutwali, his objection came within S. 47 of the Civil Procedure Code and appeal lay from the order refusing to execute the decree. 18 C W N 910 = 20 I C 790.

## C. P. C. ( 1908 ) S. 47 (Contd)

## ( 22 ) Questions arising between the parties or their representatives—(Contd)

## ( 5 ) Claim Proceedings—(Contd)

—Claim by Legal Representatives in personal capacity:—Legal representative of judgment-debtor asserting certain property to be his own and not part of assets of deceased—Objection is one under s. 47. A I R 1929 All 602 = Ind Rul ( 1929 ) All 772 = ( 1929 ) A L J 805 = 51 A 878 = 118 I C 164.

—Claiming property proceeded against in execution as his own cannot bring suit. 48 C L J 551 = Ind Rul ( 1929 ) Cal 353 = 115 I C 353.

—So also a suit by legal representative for declaring that he holds a charge is barred. A I R 1929 Lah 762 = Ind Rul ( 1930 ) Lah 799 = 127 I C 12.

—Decree against deceased debtor's estate—Execution against person holding deceased's property—Execution Court can decide whether property in question is assets of the deceased—Separate suit does not lie. A I R 1926 Nag 476 = 9 N L J 183 = 96 C 963.

—Objection to attachment by judgment-debtor's representative under O. XXI r. 58 is really under s. 47. A I R 1925 All 594 = L R 6 A 278 Civ = 87 I C 287.

—Legal representative objecting in his own right—Objection is under s. 47. A I R 1922 Pat 572 = 3 P L T 613 = 63 I C 369.

—Legal representative objecting to attachment, claiming the property in his own rights by virtue to a gift prior to suit by the deceased in his favour fall under s. 47. A I R 1928 Rang 29 = 5 R 659 = 107 I C 856.

—If the property claimed by A in his personal capacity was sold, in execution of a decree passed in a suit in which he was sued in a representative character as the property of B, it was open to A to apply under S. 47 of the C P Code to have the sale set aside. A separate suit was not maintainable 27 C L J 572 = 46 I C 458.

—Decree against husband—Wife impleaded as representative on his death—Objection by her that property attached from her hands did not form assets of her husband is one covered by s. 47. A I R 1929 Oudh 21 = 5 O W N 990 = 111 I C 837.

—Where a personal decree was obtained against an *anandravan* of a Malabar *tarwad* and certain properties were attached as assets on the death of the *anandravan* and the *karnavan* was added as the legal representative of the deceased and the *karnavan* put in a claim petition that the attached properties had been appropriated towards the debt due to the *tarwad* by the deceased *anandravan* which was disallowed and the *karnavan* there-

C. P. C. ( 1908 ) S. 47 (Contd)

( 22 ) Questions arising between the parties or their representatives—(Contd)

( 5 ) Claim Proceedings—(Contd)

upon appealed to the District Court and District Judge held no appeal lay as the matter arose in claim proceedings. *Held*, that the *karnavan* claimed the appropriation only in the same capacity in which he was brought in as the legal representative of the deceased *anandravan* and that therefore an appeal lay under S. 47, C P C. Where a person's claim is traceable to the same capacity in which he is brought in as the legal representative the executing court should hear and determine the matter. 5 L W 158 = 38 I C 360.

—But the Sind J C Court has held that a suit lies for a claim by legal representative in individual capacity. A I R 1925 Sind 156 = 78 I C 49.

—Claim by persons not parties :—An objection to attachment made by party or his representative should be treated as one falling under s. 47, whereas if objection is made by a third party, will be governed by the provisions of O XXI, r. 58. A I R 1929 Pat 141 = 10 P L T 95 = 8 Pat 717 = Ind Rul (1929) Pat 247 = 115 I C 695.

—O. 21, r. 58 applies to the objection of a judgment debtor that the property attached is *waqf* : 3 P L T 432 = 67 I C 438 = A I R 1922 Pat 196 = 1 Pat 637. See also 37 M L J 624 = 54 I C 536.

—The question whether an order is governed by O 21, R. 63 or not and whether it is final or not depends upon the allegations in the claim petition put in and not on what the Court finds in its order to be the real state of facts. Where the claimants allege their petition that they are trustees for the creditors of the judgment-debtors, a finding by the court that they are trustees for the judgment debtor himself and an order based thereon will not make the order passed on a petition under O. 21, R. 58 so as to make the provisions of O 21, R. 63, as to the finality of the order applicable to it. On the contrary, in the allegations in the petition, are such as on their face to show that the claimant is a trustee for the judgment-debtor, he cannot by calling his petition one under O. 21 R. 58 make the order passed thereon any the less appealable under S. 47 of the C P Code. 21 I C 748.

—Property attached from legatee's possession in execution of a personal decree against executors—Legatee not party to suit as such—Legatee's title should be decided in execution. A I R 1927 Rang 273 = 5 Rang 393 = 6 Bur L J 107 = 104 I C 121

C. P. C. ( 1908 ) S. 47 (Contd)

( 22 ) Questions arising between the parties or their representatives—(Contd)

( 5 ) Claim Proceedings—(Contd)

—O. 21, R. 63, C P C refers only to cases in which the claimant or objector was not a party to the decree. If an objector to the execution of a decree was a party to the decree the case would be governed by S. 47 of the Code, and no separate suit would lie to set aside an order overruling the objection. 16 I C 255.

—Other cases :—Objection by representative of judgment-debtor during execution is cognizable only under s. 47 and no separate suit lies. A I R 1928 All 704 = 110 I C 876.

—Objection by legal representative is under s. 47. A I R 1924 Rang 323 = 2 R 168 = 83 I C 550.

—Objection by defendant not impleaded in appeal is under s. 47. 1L C 1 = 91 I C 181 (1)

—Representative of the judgment-debtor within s. 47 might maintain an application under O. XXI, r. 100. 65 I C 467.

—Prior mortgagee holding decree impleaded in puisne mortgagee's suit—His right under his decree not put in issue—Prior mortgagee purchasing himself in execution of his decree and objecting to sale of properties in execution of puisne mortgagee's decree—Claim does not fall under s. 47. A I R 1927 Mad 431 = 99 I C 658.

—Lessees of mortgagor impleaded as defendants—Claim by them under O XXI, r. 100—Enquiry should be made into question of title. A I R 1928 Mad 1270 = Ind Rul (1929) Mad 899 = 111 I C 147.

—An award of a co-operative society must be executed as if it were a decree of Court. A I R 1926 Lah 547 = 8 L L J 310 = 27 P L R 706 = 97 I C 288.

—Objection to attachment by party—Appeal lies. A I R 1927 Lah 895 = 28 P L R 121 = 100 I C 786.

—Final decree for sale obtained—Mortgagor made *waqf* of mortgaged property directed to be sold—Beneficiaries under *waqf* need not be made parties to application for execution. A I R 1930 All 597 = (1930) A L J 1302.

—Question whether property belongs to judgment-debtor or to deceased whose legal representative he is, is governed by s. 47. Fact that question arises between auction-purchaser and judgment-debtor is immaterial. If dispute is substantially one between parties s. 47 applies. A I R 1931 Nag 27 = Ind Rul (1931) Nag 58 = 130 I C 154.

## C. P. C. (1908) S. 47 (Contd.)

(22) Questions arising between the parties or their representatives—(Contd.)

(6) Decree against Hindu father, remedies of son.

—Decree against deceased Hindu father—Execution against sons—Question of immorality of debts for which decree was passed is one within s. 47, A I R 1923 Pat 143 = 3 P L T 43 = 6 Pat L J 451 = 62 I C 905 See also 1 I C 459 = 10 Bom L R 939 = 33 B 39; and 13 C W N 138 = 9 C L J 5 = 1 I C 442; and A I R 1930 Notes 23 = 127 I C 507; and 5 C L J 491 = 34 Cal 642 = 11 Cal W N 593 = 2 Mad L T 207 F B. and 6 I C 582 and 147 P R 1907 and 5 C L J 80 = 11 C W N 163.

—And sections 47 and 53 are not confined to property which has come to son by survivorship but extends to property acquired by partition before father's death. A I R 1931 Sind 84 = Ind Rul (1931) Sind 130 = 134 I C 386.

—Nor does it bar the remedy of an auction purchaser of a share of a member of a Hindu Joint family to file a suit for partition even if he is decree holder 56 I C 254 = 1 L L J 10 = 1 L 134.

—The heir of a deceased judgment-debtor is entitled to object in execution proceedings that the ancestral property in his hands is not liable for a money-decree against the deceased on the ground that the debt was not incurred for necessity. The dispute on such an objection is one for decision in execution proceedings and is not a matter for a separate suit 243 P W R 1912 = 13 I C 670.

—A suit was instituted against a Hindu father and his son on the basis of a mortgage. The son contested his liability on the ground that there was no legal necessity. The result was that a simple money decree was granted against the father alone and in the decree it was stated that the son was "exempted" and costs were given to him against the plaintiff. On the decree being executed the sale of the father's share proved insufficient to pay off the decree. Thereupon it was sought to attach and sell the son's share, but upon objection being made by the son the objection was upheld. A suit was accordingly brought against the son for a declaration that the son's share was liable to be sold in execution on the ground of his pious liability. Held, that the suit was barred by the provision of S. 47 of the C P Code. Held, also that the expression in the decree exempting a particular person was inaccurate and the operation of the decree was to dismiss the suit against the particular debt. 16 A L J 752 = 47 I C 884.

## C. P. C. (1908) S. 47 (Contd.)

(22) Questions arising between the parties or their representatives—(Contd.)

(6) Decree against Hindu father remedies of son—(Contd.)

—Decree against joint family partnership firm of father and son—Son neither appealing, nor admitting partnership nor served individually—No order under r. 50 (2)—Son's property in his or father's hand cannot be proceeded against—Otherwise son can agitate question by separate suit. A I R 1930 Pat 205 = Ind Rul (1930) Pat 717 = 127 I C 573.

(7, 8) Defendants against whom suit is dismissed and defendants who are omitted from parties or against whom claim is abandoned and claim proceedings and other objections.

—Now under the new Code the explanation to s. 47 makes it clear that debts against whom a suit is dismissed are still to be considered as parties. These and such other cases therefore have now lost their importance. However the question as to debts whose names are deleted before notice is served or pro-forma and unnecessary debts still remains open as to which there is a conflict of opinion as will appear from cases given under this heading, see also 1929 Nag 179; and (1917) M W N 93 = 5 L W 701 = 37 I C 673. and 47 Ind Cas 671 = 28 Cal L Jour 211; and 1927 Mad 253 = 98 Ind Cas 726 and 1928 Mad W N 601 = 1928 Notes 41 (B); and 1927 Lah 237 = 8 Lah L Jour 70 = 93 Ind Cas 375 = 27 Pun L R 142; and 1928 All 234 = 26 All L Jour 524 = 116 I C 86.

—Persons who are joined as defendants but held not liable and suit is not decreed against them are still parties to the suit for purposes of s. 47 Orders in claim cases by them are therefore appealable and not revisable. A I R 1929 Pat 141 = 8 Pat 717 = 10 P L T 95 = Ind Rul (1929) Pat 247 = 115 I C 695, see to the same effect: A I R 1929 Pat 472 = 10 P L T 163 = Ind Rul (1929) Pat 243 = 115 I C 691 and 34 C L J 477 = 67 I C 6 = 1921 C 242 = and A I R 1925 Mad 1133 = 86 I C 947 and A I R 1930 Mad 12 = 1929 M W N 811 = Ind Rul (1930) Mad 440 = 123 I C 24 and A I R 1925 Pat 482 = 3 Pat L R Civ. 90 = 6 P L T 725 = 87 I C 743 even where the suit is dismissed in appeal. A I R 1924 All 313 = L R 5 A 91 Civ = 78 I C 225. also 34 C L J 477 = 67 I C 6 = 1921 A I R (Cal) 242.

—Or even if petitions by such persons are wrongly entered as being under order 21 r. 58 A I R 1924 Lah 589 = 75 I C 747 see to the same effect 1928 M W N 601 = 113 I C 547.

C. P. C. (1908) S. 47 (Contd)

(22) Questions arising between the parties or their representatives—(Contd)

(8) Defendants against whom suit is dismissed and defendants who are omitted from parties or against whom claim is abandoned and claim proceedings and other objections—(Contd)

—And so also defendant held to be liable is party. A I R 1929 Nag 179=I R 1930 Nag 208 = 123 I C 432.

—But it will depend entirely upon whether his name has been struck off from or retained on the record A I R 1926 Mad 484=49 Mad 491 = 50 M L J 205 = 1926 M W N 251=94 I C 265.

—So also such defts. and their representatives A I R 1926 Mad 687 = 50 M L J 307 = 23 L W 533 = 1926 M W N 409 = 94 I C 123.

—But not so if such person's name is struck out at plaintiff's request and no decision on merits against him. A I R 1925 Nag 118 = 80 I C 470.

—But whether a defendant against whom suit is dismissed is or is not a party to suit for purposes of s 47 depends on the circumstances of each particular case and should be decided by reference to decree, judgment and pleadings A I R 1930 Mad 817=54 M 81 = (1930) M W N 779 = 59 M L J 932 = 32 L W 836 = Ind Rul (1930) Mad 1015 = 127 I C 805.

—Person against whom the suit is dismissed as having no concern with suit is not a party whether his name remains on record is immaterial. It is otherwise where plaintiff abandons his claim against a defendant and suit dismissed against him. A I R 1930 Mad 817=54 M 81=59 M L J 932=32 L W 836=(1930) M W N 817=Ind Rul (1930) Mad 1045=127 I C 805.

—Persons joined as defendants but deleted before notice and before pleading are not parties under s. 47. A I R 1921 M 559 = 1921 M W N 698 = 66 I C 722.

—Persons joined as defendants but held to be unnecessary are not parties A I R 1927 Rang 137 = 5 R 110=101 I C 794. Compare :—6 C W N 727 = 29 C 696 wherein it is held that defts against whom suit is dismissed are not parties for purposes of this section.

—When a party has been properly impleaded as one of the defendants in a suit and the case against him would have proceeded to judgment but for the fact that the plff. elected to abandon part of his case and the suit was in consequence dismissed as against this deft he is a "deft. against whom a suit has been dismissed." within the meaning of the explanation to S. 47 of the Civil Procedure Code. 41 Mad 418 = 34 M L J 17

C. P. C. (1908) S. 47—(Contd).

(22) Questions arising between the parties or their representatives—(Contd)

(8) Defendants against whom suit is dismissed and defendants who are omitted from parties or against whom claim is abandoned and claim proceedings and other objections—(Contd)

= 22 M L T 532 (F B) = (1918) M W N 23 = 7 L W 234 = 43 I C 935 (F B).

—Where a party to a mortgage suit exonerated on the ground that he sets up a title adverse both to the mortgagor and mortgagee he does not remain a party to the suit for purposes of S. 47, C P Code. 40 Mad 964 = 32 M L J 532 = 21 M L T 121 = 5 L W 369 = 38 I C 297. see also (1917) M W N 93 = 5 L W 701 = 37 I C 673.

—A deft whose name appears in the decree without having been struck off previously from the record is a party with respect to whom the prohibition of a separate suit enacted in S. 47 of the C P Code applied notwithstanding that he has been exonerated by the decree passed by the court without an adjudication on the controversial questions between him and the plff. 23 M L T 206 = 45 I C 671.

—Where a person prior to the passing of a simple money decree, purchased from a discharged defendant property against which the decree was sought to be executed though not affected by the decree itself he is not a representative of that defendant within S. 47 C. P. C. 56 I C 809.

—Improper party discharged but name not struck off ceases to be party. A I R 1926 Lah 202 = 27 P L R 194 = 93 I C 921.

—Where a party has been struck off under the provisions of O. 1, r. 10 of C P C he is not a party to the suit. He is not a party within the meaning of s. 47 of the Code. A L R 1933 N 236.

—Suit by prior mortgagee—Subsequent mortgagee impleaded but exempted can challenge validity of the decree in separate suit. A I R 1926 All 475 = 48 A 574 = 95 I C 147.

—A suit by person who was party though *pro forma* to objection proceedings under O. XXI, r. 58 is barred. A I R 1926 Oudh 64=88 I C 542.

—An order on application under O XXI, r. 35, by decree holder auction purchaser is under s 47. The application is governed by the limitation laid down in Art. 182 and not by Art. 180. A I R 1927 Nag 294=103 I C 335.

—The use of the present participle "arising" indicates that the person should be either a party to the suit or a representative of the party to the suit at the time when the question is raised. If a suit had been withdrawn against one defendant, who accor-

## C. P. C. (1908) S. 47 (Contd.)

(22) Questions arising between the parties or their representatives—(Contd.)

(8) Defendants against whom suit is dismissed and defendants who are omitted from parties or against whom claim is abandoned and claim proceedings and other objections—(Contd.)

dingly disappeared from the suit altogether, or when he had been exempted by the plaintiff and his name had been struck off from the record, before the decree came to be passed he is on the same footing as a stranger to the litigation. Similarly if a defendant dies during the pendency of a suit and his heirs are not brought on the record and the decree is passed behind his back, his heirs are not bound to intervene in the execution department, because their ancestor ceased to be a party to the suit. The mere fact that he was a party at one time would not affect the matter, when he admittedly ceased to be a party before the decree came to be passed. 54 A 25 (34-5, 44) = 1931 A L J 715 = A I R 1931 A 490 = 134 I C 236 (F B).

—Suit against executors and widow latter exonerated—attachment of property in her possession—successful claim by widow—plaint in suit not before Court in appeal—cause of action against widow not disclosed—question of widow's rights cannot be reopened in execution proceedings under S. 47. A L R 1933 M 226

—Parties to suit—misjoinder—on exoneration by plaintiff or striking out by Court the defendants cease to be parties to the suit. A L R 1933 M 393; see also A I R 1930 M 817.

—A person who has not rendered himself personally liable for the performance of a decree is neither a party nor the representative of a party within the meaning of S. 47. 1919 P C 55 = 42 All 158 = 46 Ind pp 228 = 22 Oudh Cas 212 = 18 All L Jour 263 = 22 Bom L R 521 = 38 M L J 302 = 33 Mad L W 82 = 6 Oudh L Jour 682 = 55 Ind Cas 550.

(9) Disputes between auction purchaser and his transferee or judgment debtor

—S. 47 of the C P Code does not cover questions between a party and that party's representatives, e g, a decree holder and his transferee. In such cases the order passed, though made under S. 47 is only an interlocutory order and not a decree and is not appealable. 11 S L R 74 = 43 I C 165.

—Purchaser from decree-holder purchaser is not representative of the decree-holder—His suit for possession lies. A I R 1922 L B 18 = 11 L B R 17 = 64 I C 63.

## C. P. C. (1908) S. 47 (Contd.)

(22) Questions arising between the parties or their representatives—(Contd.)

(9) Disputes between auction purchaser and his transferee or judgment debtor—(Contd.)

—Dispute about identity of property sold between an auction-purchaser and judgment-debtors cannot be entertained under s. 47. A I R 1923 All 470 = 45 A 96 = 74 I C 995.

—Dispute between auction-purchaser and representatives of judgment debtor is not within s. 47. A I R 1924 All 856 = 78 I C 665.

—Adjudication between auction purchaser and judgment debtor is under s. 47. A I R 1924 Nag 328 = 20 N L R 170 = 79 I C 636.

—A question between judgment debtor and auction purchaser, who is a stranger, does not come within s. 47. A I R 1926 All 509 = 95 I C 46.

—Where a question of delivery of possession is raised between the parties to the suit the auction-purchaser decree holder on the one hand and the judgment-debtor on the other, the matter comes under s. 47. C P C 53 Cal 781 (F B.) followed, A L R 1933 C 582.

(10) Disputes between Decree holder and his assignee.

—Questions between decree-holder and his assignee left undecided—Order is under s. 47. A I R 1922 Lah 396 = 4 Lah L J 259 = 79 I C 546.

—The question whether there has been a transfer of the decree, or whether such transfer is benami for another can be decided by the executing Court. 32 I C 524.

(11) Disputes between rival auction purchasers.

—A dispute as to possession between rival auction purchasers of the same property in execution of different decree does not fall within the scope of S. 47 of the C P Code. A Court has no inherent power under S. 151 C P C to restrain the purchaser of a property in court auction from taking possession of a property. 25 M L T 153 = 9 L W 81 = 49 I C 629.

—Where in execution of a money decree a purchaser purchased certain lands and it was found that the sale was held after the passing of a mortgage decree, but before the sale of the property in execution thereof, held that he was bound by the subsequent sale of the property in execution of the mortgage decree. 42 I C 624.

—Sale mortgaged property in execution of money decree pending mortgage suit—Question between purchasers in money mort



## C. P. C. (1908) S. 47 (Contd)

(22) Questions arising between the parties or their representatives—(Contd)

(11) Disputes between rival auction purchasers—(Concld)

gage decrees is under s. 47. 1920 M W N 787 = 12 L W 350 = 59 I C 894.

—The plaintiff purchased the land in dispute at a sale held in execution of a decree on a mortgage executed in his favour by the father of the defendants, Nos 4 to 6. Subsequent to the mortgage decree but before the sale in execution the landlords the defendants Nos 2 and 3 obtained a decree for rent against the tenants defendants Nos 4 to 6 and purchased the holding at the sale held in execution of that rent-decree and settled it with the defendant No. 1. The plaintiff sued for possession of that land. Held that the entire holding including the interest of plaintiff as purchaser, passed by the rent decree sale, that he was not entitled to use his mortgage as a shield against the purchaser under the rent sale, and that he ought not to be allowed to claim redemption of the decree on the basis of his rights as mortgagee. 21 I C 126.

—Parties and Representatives—Defaulting purchaser no party, Suit against-order to make good deficiency—Proper remedy. 7 N L R 134 = 12 I C 360.

(12) Disputes between rival decree holders.

—Sec 47 does not apply to question arising as between different decree holders against same judgment-debtor in different suit. 113 I C 776 see to the same effect 97 I C 1020 = 1926 A I R M 1104 = 1926 M W N 683 = 51 M L J 436. and 1925 Mad 1265 = 90 I C 869 = 49 M L J 375 = 22 M L W 740; and 4 Cal L J 437 = 34 Cal 51 = 11 Cal W N 20 = 1 Mad L T 364; and 8 Ind Cas 4 = 15 Cal W N 783; and 1929 Rang 198 = 120 Ind Cas 693 and 1924 Mad 97 = 22 Mad L T 155 and 1 Ind Cas 783 = 36 Cal 136;

—Contest between rival decree-holder for reteable distribution is not within the section. 1922 Mad 99 = 42 M L J 473 = 1922 Mad W N 184 = 15 Mad L W 421 = 30 Mad L T 178 = 67 Ind Cas 546;

—Rent decree obtained by landlord—Before sale in execution, he instituting second rent suit—Decree after sale in execution of first rent decree—Tenant's mortgagee, obtaining decree and attaching surplus sale proceeds in meantime—Order that mortgagee decree holder had prior claim on surplus sale proceeds—Mortgage not representative within s. 47 as his decree was passed after mortgagor and landlord ceased to be tenant and landlord—Order was non appealable. A I R 1931 Cal 202 = 34 C W N 702.

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## C. P. C. (1908) S. 47 (Contd)

(22) Questions arising between the parties or their representatives—(Contd)

(12) Disputes between rival decree holders—(Concld)

—Where a decree is sold and the purchaser applies for execution, and on attaching creditor of the decree-holder raises an objection that the sale is fictitious, the dispute is within this section and it matters not if the judgment-debtor does not take part in the proceeding 32 I C 524 = 20 C W N 679.

—See also "Parties" attaching creditor infra. Where several decree-holders against the same judgment debtor apply for satisfaction of their decrees out of the same fund, any one of them is entitled to show that his rival's decree is a fraudulent or a sham one but it is not open to him to do so in execution proceedings. 38 Mad 221 = 29 I C 239.

—Holder of decree sought to be executed by attachment of another decree is representative of holder of attached decree. A I R 1921 Cal 580 = 35 C L J 109 = 64 I C 780.

(13,14,15,16) Official Assignee if a representative of insolvent Judgment debtor.

—Whether Receiver in insolvency is a representative of the debtor depends on the nature of the application. Where he objects to execution against debtors properties as they had vested in him he is a third party and no second appeal lies from order on such objection—*Ad interim* Receiver is not a representative. 35 C W N 971.

—The official Assignee claiming property on behalf of the creditors of an insolvent judgment-debtor is not a "representative" of the judgment debtor within the meaning of the section. 1925 Mad 688 = 48 M L J 530 = 88 Ind Cas 85. but see contra. 28 Calc 419 = 5 Calc W N 761.

(17) "Parties" or representative, meaning of:—

—"Parties to suit" means parties who are opposed to each other in the suit, though not necessarily as plaintiff and defendant. The nature of the suit and the contentions between the parties ought to be considered, and, if their rights conflict, the question is one within the meaning of S. 47. 59 C 117 (123) = 35 C W N 877 = 138 I C 177 = A I R 1932 C 126 = I R 1932 C 427 = A I R 1932 C 450.

—A puisne mortgagee impleaded as defendant remaining *ex parte* is party to suit for the purposes of S. 47. A I R 1933 M 498.

—Decree in a suit—no relief in specific terms against the petitioner—defendant

## C. P. C. (1908) S. 47 (Contd)

(22) Questions arising between the parties or their representatives—(Contd)

(17) "Parties" or representative, meaning of—(Contd)

deprived of possession in execution of the decree—objection disallowed—suit to set aside—order in execution not barred—parties to suit within the meaning of the section. A L R 1933 L 213.

—Where one of the defendants dies and his heirs are not brought on the record and a decree is passed the heirs are not parties to the decree and a suit for declaration by them of the invalidity of the decree is not barred by s. 47. A I R 1931 All 490 = Ind Rul (1931) All 812 = (1931) A L J 715 = 134 I C 236 F B. overruling 17 A 478.

—The question whether a decree-holder purchaser is a party discussed. Even a third party purchaser may be a party. A I R 1931 Pat 241 = 12 P L T 423 = 10 Pat 670 = Ind Rul (1931) Pat 337 = 133 I C 337 F B.

—The defendant sued as a legal representative, and against whom the suit has been dismissed is a party and objection filed by him as a mortgagee for removal of attachment is to be treated as petition under s. 47 though it is misdescribed as one under O. XXI, r. 58. A I R 1931 Rang 314.

—A person whose claim has been upheld in execution proceedings is not a party to the suit in which the execution proceedings took place and has no right to invoke the aid of S. 244, C P C as a bar to the plaintiffs claim. 83 Mad 126 = 10 M L T 261-21 M L J 887 = (1911) 2 M W N 237 = 12 I C 73.

—Ss. 47 and 144 C P C must be read together. The word "parties" in S. 144 must be taken to include their representatives. "Representatives" does not mean only a party's legal representative, but it means his representative in interest, and includes a purchaser of his interest so far as such interest is concerned and is affected by the decree. (1918) Pat 243 = 5 Pat L W 141 = 46 I C 465.

—Party impleaded is party for all purposes—Party constructively represented by another is party in capacity for which he is so represented. A I R 1927 Mad 1043 = 51 Mad 46 = 53 M L J 824 = 26 L W 775 = 106 I C 230 overruling 24 M 658; and 30 M 1215.

—Between parties means parties on same or opposite sides. A I R 1925 Mad 353 = 20 L W 742 = 85 I C 209.

—S. 47 applies not only to the disputes between parties who are opposed to each other but also to disputes between parties on the same side. A I R 1927 Rang 45 = 4 R 418 = 99 I C 418.

## C. P. C. (1908) S. 47 (Contd)

(22) Questions arising between the parties or their representatives—(Contd)

(17) "Parties" or representative, meaning of—(Contd)

—In order to attract the provisions of S. 47, it is necessary that the dispute must be between parties who are opposed to each other in the suit. If the legal representatives of the deceased decree-holder are disputing as regards the shares to which they are entitled in the inheritance of the deceased decree-holder, they ought to settle the point in a regular suit and they cannot do so by way of application for execution of the decree. 13 P L T 557 = A I R 1932 P 329 = I R 1932 P 283 = 140 I C 97 (1) = A L R 1932 P 732.

—Sub. S. (3) of S. 47 is ancillary to Sub. S. (1) and not an independent provision and comes into operation only when there is a dispute between the parties relating to the execution, discharge or satisfaction of the decree. Sub. S. (1) comes into operation only when there is a dispute between the parties to the suit or their representatives in execution proceedings. Held that the dispute between the legal representatives of parties in execution proceedings could not be decided under S. 47, (3) C P C. A L R 1933, B 411.

—Question between jointly decree holders is not under s. 47. A I R 1927 Pat 288 = 6 Pat 386 = 103 I C 724.

—"Parties" in s. 47 refers to parties ranged on opposite sides and not as co-decree-holders. A I R 1925 Nag 186 = 21 N L R 34 = 82 I C 734.

—Questions between co-decree holders are not under s. 47. A I R 1924 Mad 518 = 32 M L T 118 = 70 I C 329.

—Conflict between judgment debtors s. 47 is not applicable. A I R 1929 All 291 = 51 A 752 = (1929) A L J 757 = Ind Rul (1929) All 1016 = 119 I C 440.

—Questions between defendants *inter se* are covered by s. 47. A I R 1924 Mad 165 = 45 M L J 478 = 18 L W 311 = (1923) M W N 662 = 77 I C 148.

—S. 47 is not necessarily confined to decree-holders, on the one side, and judgment debtors, on the other, and is wide enough to cover a dispute between co-defendants who may be parties in a partition suit. 1932 A L J 1036 (1038) = A L R 1933 A 27.

—The question of the equities between the judgment debtors as to who will be entitled to delivery of the properties even though the deposit is by one only is no concern of the executing court and delivery has to be made jointly to all. 18 I C 312.

C. P. C. (1908) S. 47 (Contd)

(22) Questions arising between the parties or their representatives—(Contd)

(17) "Parties" or representative, meaning of—(Contd)

—Question of contribution as between defendants in a mortgage suit see. 1923 Pat 44 (44, 45) = 71 I C 26 = 1926 P H C C 6 = 3 Pat L R (Civ) 245 = 6 Pat L T 390.

—For the tests laid down as to the meaning of the word "representative" see. A L R 1933 L 229 = A I R 1933 L 352.

—A representative of party to suit includes not merely legal representatives in the sense of heirs, executors or administrators, but representatives-in-interest, that is, any transferee of the decree-holder's interest or any transferee of the judgment debtor's interest, who, so far as such interest is concerned, is bound by the decree. 36 C W N 93 (95) = 138 I C 64 = A I R 1932 C 423 = I R 1932 C 386.

—Purchaser of property of judgment-debtor in execution of a money decree subsequent to the attachment before judgment of the same in another suit is a representative of, and can intervene under S. 47 to resist the execution of his decree in that suit. 63 M L J 941 = 35 L W 844 = 1932 M W N 1335.

—Purchaser of property subject to mortgage charge is a representative of judgment-debtor. Charge is therefore realisable in execution proceedings against him. I R 1932 L 668 (1.)

—"Representatives" include assignees or successors to the interest of party. A I R 1926 Cal 798 = 53 Cal 781 = 43 C L J 345 = 30 C W N 649 = 95 I C 494.

(18) Remedies for persons not parties but are affected by execution.

—Person not party can apply or sue for recovery of possession of properties delivered in execution. 1 Lah L J 230.

—A in execution of a decree against B sought to seize the moveable property of B's father C who thereupon to avoid the attachment paid the amount named in the warrant under protest and applied under O. 21 R 58 C P Code for return of the money. Held, (1) that O. 21 R 58, C P Code was inapplicable as no property had been attached; (2) that C's claim could not be determined in execution under S. 47, C P Code and as he was neither a party to the suit nor his representative, could only be enforced in a separate suit. 9 S L R 213 = 34 I C 492.

C. P. C. (1908) S. 47 (Contd)

(22) Questions arising between the parties or their representatives—(Contd)

(19) Reversioners of Hindu widow.

—Claim of reversioner as third party allowed—S. 47 does not apply. A I R 1924 All 292 = 71 I C 1012.

(20) Surety.

—Liability of surety can be enforced in execution even where security is given by hypothecation of immoveable property. A I R 1924 All 105 = 45 A 649 = 21 A L J 604 = L R 4 A 356 (Civ.) = 74 I C 927.

—Under the the present Code a surety for due performance of acts under a decree is to be deemed a party to the suit under the terms of s. 145, C P C. An order respecting his liability is therefore appealable. A L R 1933 N 231.

—And a surety for payment of decretal amount can contest his liability as between himself and decree-holder under s. 47 only. A I R 1930 Lah 399 = Ind Rul (1930) Lah 414 = 123 I C 126.

—Suit by decree-holder against *supratdar* on ground that he had suffered loss by the *supratdar* misappropriating the property is barred. A I R 1929 All 266 = (1929) A L J 80 = 113 I C 751.

—A *Supratdar* being a surety his liability can be enforced in execution A I R 1928 Lah 181 = 111 I C 592.

—Order against, surety for arrest, whether party S. 145 of Code, See 20 C L J 129 = 11 C W N 1085 = 27 I C 10.

—S. 145, C P Code, amplifies very considerably the provisions of S. 253 of the old Code, so as to make a surety, and one who has executed a bond under S. 55 (4), a party to the suit within the meaning of S. 47. (1916) 2 U B R 103 = 34 I C 247 = 10 Bur L T 15.

—Hypothecation of property does not make a surety party under s. 47. A I R 1919 P C 55 = 55 I C 550.

—Parties and representatives—*Supratdar* whether party or not can be proceeded against in execution. A I R 1924 Nag 258 = 20 N L R 93 = 7 N L J 130 = 80 I C 49 overruling 16 N L R 178.

—Surety is party and can raise plea of fraud in execution. A I R 1925 Lah 618 = 7 Lah L J 457 = 26 P L R 561 = 92 I C 259.

—Surety's right to raise by application under S. 47 a plea of discharge—Judgment debtor's application under O. 21, r 2 rejected previously on ground of limitation—Surety not entitled to raise same question over again in such a case 59 C 1354 = 36 C W N

C. P. C. (1908) S. 47 (Contd)

(22) Questions arising between the parties or their representatives—(Contd)

(20) Surety—(Contd)

663 = 139 I C 902 = I R 1932 C 682 = A I R 1932 C 729.

—Third party furnishing security on behalf of judgment debtor—Suit by surety to cancel the security bond on the ground of fraud. 38 M L J 65 = 43 M 325 = 55 I C 363 = 11 L W 45 = 27 M L T 207 = 1920 M W N 114.

(21) Transferee from auction purchaser and judgment debtor and between the former and transferee.

—Question between auction-purchaser, decree-holder and judgment-debtor as to identity of property sold, separate suit lies. A I R 1925 All 703 = L R 6 A 282 Civ = 87 I C 641.

—From decree-holder auction-purchaser is representative and cannot bring separate suit unless judgment-debtor is holding as licensee from decree-holder. A I R 1930 Cal 186 = Ind Rul (1931) Cal 68 = 51 C L J 560 = 34 C W N 1059 = 128 I C 244.

(22) Transferee from judgment-debtor.

—Petition by transferee from J. D. s. 47, applies A I R 1928 Cal 91 = 54 C 1064 = 107 I C 357.

—Because purchaser of mortgage property covered by decree is proper party in execution. A I R 1924 Pat 367 = Pat L R 139 = 72 I C 862. see also 14 P R 1912 = 113 P W R 1912 = 14 I C 40 and 41 Cal 418 = 25 I C 118

—But purchaser from judgment-debtor who was ostensibly owner is not his representative. A I R 1921 Bom 45 = 45 B 812 = 23 Bom L R 254 = 61 I C 287.

—And transferees *pendente lite* cannot be representatives of the transferor for purpose of attacking the decree holder's right to sue. A I R 1928 Bom 65 = 52 B 208 = 30 Bom L R 102 = 108 I C 17.

—Nor is the transferee under inoperative transfer *pendente lite* representative of judgment-debtor. A I R 1921 Mad 559 = (1921) M W N 698 = 66 I C 722.

—So also vendee from judgment-debtor before attachment does not become his representative and is not bound by any proceedings against the judgment debtor subsequent to date of sale. A I R 1927 Mad 450 = 99 I C 989.

—No suit will lie for recovery of possession of property at the instance of a transferee from the judgment-debtor during the pendency of the execution, against the decree-

C. P. C. (1908) S. 47 (Contd)

(22) Questions arising between the parties or their representatives—(Contd)

(22) Transferee from judgment-debtor—(Contd)

holder purchaser in Court-auction. The question is one relating to execution and arises between parties or their representatives and must be dealt with in execution. 44 I C 978.

—A purchaser of property not directly mentioned in the decree is not a legal representative of the judgment-debtor and a claim petition filed by such a purchaser cannot be treated as a petition under S. 47 C P Code. (1916) 1 M W N 287 = 3 L W 289 = 33 I C 84.

—Purchaser of a portion of an occupancy holding without landlord's consent is a representative of the judgment debtor under S. 244 C P Code of 1882. 42 Cal 172 = 20 C L J 52 = 18 C W N 971 = 27 I C 61 (F B).

—The judgment-debtor in a money decree sold certain property belonging to him. On the same day, the decree holder applied for execution and sometime afterwards attached property and purchased it himself in execution. *Held*, that the first private purchaser was in no sense a representative of the judgment debtor inasmuch as the decree which was being executed had no relation to the property and that his title was superior to that of the subsequent execution purchaser. 15 C W N 711 = 9 I C 307.

—Mortgagees deriving title prior to the decree and tenants at will could not be regarded as representatives of the judgment-debtors and that even if they could be so regarded, they were bound by the decree. 122 P L R 1917 = 78 P W R 1917 = 39 I C 772.

—The purchaser of the whole or part of an occupancy holding not transferable by custom is not a representative of the judgment debtor and so entitled to object to the sale under S. 47 of the C P Code or maintain proceedings under O. 21, R. 100, C P Code. 3 Pat L J 579 = 4 Pat L W 129 = 43 I C 969.

—Judgment-debtor—Transferee of property from—Execution of decree against

—Right of—Transferee taking up position of representative of judgment-debtor bound by decree to extent of interest acquired by transfer—Effect. See 36 C W N 93 (95-6). Plaintiffs not originally suing on equitable mortgage—Simple money decree passed—Mortgage—Property sold by debtor—Decree executed against mortgaged property—Vendee—Objecting—Plaintiff filing declaratory suit as regards mortgage—Decree granted—Subsequent execution proceedings order in—Appeal by vendee—Vendee a representative. A L R 1933 L 193.

C. P. C. (1908) S. 47 (Contd.)

(22) Questions arising between the parties or their representatives—(Contd.)

(22) Transferee from judgment-

debtor—(Contd.)

—Foreclosure proceedings—Transfer *pendente lite*—Mortgagee executing decree against transferee *pendente lite*—Objection by latter—Appeal. A L R 1933 A 26 = 1933 A L J 113 = 1 A W R 571 = A I R 1933 A 201.

(23) Transferee from plaintiff.

—An order passed under O. 21, r. 16, C P C allowing execution at the instance of an assignee of a decree is not appealable as an order, but is appealable as a decree under S. 47, as the assignee was representative of the decree holder—Within the meaning of that section and the decision related to execution of the decree between the transferee and the judgment-debtor. A L R 1934 L 178

—Decree holder during the pendency of suit in which subsequently decree is passed assigning his rights to third party who is not brought on the record. Assignee has no right to execute the decree. A I R 1927 Sind 78 = 97 I C 257.

(24,25) Miscellaneous Cases.

—Proceedings for recovery of Commissioners' fees are not between the parties to a suit for the execution of a decree, within s. 47. A I R 1924 All 122 = 74 I C 186.

—Person acquiring title before attachment whether can be joined as party (*Quære*) A I R 1927 Mad 450 = 99 I C 989.

—S. 47 of the C P Code is not applicable where a question arises between the judgment-debtor and a person who was his partner in the subject matter of the suit but not a party to the suit. 36 I C 681.

—Representative—Purchaser of holding from tenant. See 18 C W N 971.

—Landlord pre-empting absolute occupancy land under s. 6, C P Tenancy Act after sale in decree against tenant is not his representative. A I R 1930 Nag 199=Ind Rul (1930) Nag 262 = 26 N L R 187 = 124 I C 246.

—Mortgagee of *patni* is representative of *patnidar*. A I R 1926 Cal 356 = 90 I C 955.

—Purchaser of non-transferable occupancy holding whom landlord has accepted as tenant can take objection to execution proceedings against original tenant in respect of his holding. 64 I C 124.

—Suit for possession against trespasser—Defendant lessee pending suit is not his representative. A I R 1922 P C 304=31 M L

C. P. C. (1908) S. 47 (Contd.)

(22) Questions arising between the parties or their representatives—(Contd.)

(25) Miscellaneous Cases—(Contd.)

T 131=49 I A 220=43 M L J 589=1 Pat 581=24 Bom L R 1251=27 C W N 29=36 C L J 542=20 A L J 988=16 L W 905=4 P L T 1=L R 4 P C 1=68 I C 973.

—Question between assignee of decree and purchaser of property included in decree is not under s. 47. A I R 1927 Mad 240=98 I C 856.

—Decree not a decree for sale of property but only money-decree against widow transferee from a widow can object that decree cannot be executed against the transferee unless the transferee is proved to be widow's legal representative. A I R 1930 Mad 688 = (1930) M W N 337 = 53 M 750=Ind Rul (1930) Mad 795 = 125 I C 539.

—Decree assigned—Assignor and assignee dead—Question between their representatives is within s. 47. A I R 1927 Mad 903 = 26 L W 308 = 39 M L T 176 = (1927) M W N 639=53 M L J 568 = 105 I C 405.

—Prior mortgagee party to subsequent mortgagee's suit remains party. A I R 1924 All 752=22 A L J 683 = L R 6 A 15 Civ =82 I C 30.

—A Legatee or universal donee is a representative : A I R 1930 O 268 = 70 W N 523.

—A Collector applying under O. 33 for payment of Court-fee in pauper suits is now a party within S. 47 and an order on his application is one under the section 12 Ind Cas 29 = 35 Bom 448 = 13 Bom L R 686 and 4 Pat L J 166 = 50 I C 315.

—Manager Court of Wards in possession of J. D's property is his representative. A I R 1925 Pat 179=4 Pat 172 = 6 P L T 400 = (1924) Pat 310 = 84 I C 620.

—Questions as to the liabilities of legal representatives of receiver. see 30 Ind Cas 383 = 39 M 584 = 18 Mad L T 127.

—Companies Act S. 171—Decree against company subsequently in liquidation—Transfer of decree—Application by transferee for substitution—See 41 A 432 = 17 A L J 464=50 I C 115.

—Decree against ostensible re-presentatives—Execution against real representatives

—Practice and Procedure. See 22 C L J 272 = 20 C W N 58 = 30 I C 829.

—Setting aside—Sale in contravention of O. 34, R. 14, C P C—Stranger auction purchaser—Rights of See 22 Bom L R 670 = 58 I C 231 = 45 B 174 = 1921 B 285.

—Where after the attachment of the judgment-debtor's property in execution of a money decree the property was sold in



C. P. C. (1908) S. 47 (Contd)

(22) Questions arising between the parties or their representatives—(Concl'd)

(25) Miscellaneous—(Concl'd)

execution of a mortgage decree and the purchasers applied to the court for exempting the property from sale. *Held*, that the purchase being subsequent to the attachment the application could not be treated as a claim or objection under O. 21. R. 58. That as the purchasers were really setting up an antagonistic title based on their purchase, they could not be said to be representatives of the judgment debtors for the purposes of S. 47 of the Code. An order exempting the property from sale on the application of the purchasers not being contemplated by any provision in the code was without jurisdiction and can be set aside by the High Court in revision. 15 C W N 542 = 9 I C 194.

(23) Questions relating to the execution of the decree.

—Decision whether a decree-holder is entitled to enforce default clause of an instalment decree, because he has accepted part payments after defaults adjudicates a question relating to execution of decree. A I R 1929 Lah 390 = 113 I C 541.

—Partition decree directing payment by one sharer as compensation for excess portion—Payment must be enforced by execution. A I R 1926 Oudh 230 = 91 I C 1009.

—Set off not claimed in suit cannot be claimed in execution. A I R 1924 Oudh 434 = 11 O L J 317 = 27 O C 248 = 81 I C 651.

—Order in which properties are to be sold if affecting substantive rights—Question is under s. 47. A I R 1924 Mad 365 = 45 M L J 478 = 18 L W 311 = (1923) M W N 662 = 77 I C 148.

—Question relating to execution, etc., can be raised in defence to suit. A I R 1921 Mad 279 = 41 M L J 261 = 14 L W 424 = (1921) M W N 536 = 70 I C 303.

—Purchasers in execution of a mortgage decree must be treated as assignees of the rent decree obtained by the mortgagors in the meantime and must be treated as representatives of the original decree-holders within S. 47 C P C. 57 I C 874.

—Confirmation of execution sale—Lease of property sold by judgment-debtor after sale and prior to—Rent due under—Prohibitory orders against judgment-debtor from receiving, and against tenant from paying—Court has power to pass, under S. 151 but not under O 21, r 46 or S. 47, 1932 P C L 442 (Civ) = 33 P L R 435 = 136 I C 4 = I R 1932 L 180 = A I R 1932 L 295 = A L R 1932 L 442 (Civ).

C. P. C. (1908) S. 47—(Contd)

(23) Questions relating to the execution of the decree—(Contd)

—Legal representatives, decree against—Property sold in execution. see 39 All 47 = 14 A L J 846 = 36 I C 281.

—Limited owner—Decree against—Sale of estate, after death of owner, not allowable if decree is personal. 33 I C 83.

—Where a decree-holder purchaser is placed in possession and the sale is subsequently set aside and the properties are again proclaimed for sale the right of the judgment-debtor to have the mesne profits for the period of the decree-holder's occupation of the property is a matter to be decided in execution proceeding and the judgment debtor is entitled to have the same set off against the decree amount. 7 Bur L T 64 = 24 I C 468.

—In execution of a personal decree against a Hindu lady with a limited interest in the estate, obtained in a suit, the pleadings in which raised the question whether the debt had been incurred for legal necessity, the decree holder, in order to make the estate liable, is entitled to adduce evidence to prove the necessities for which the debt was contracted. 29 I C 181.

—The section does not concern orders determining incidental questions merely as to whether proceedings are to be conducted in a certain way or not. The language of the section clearly indicates that the questions contemplated by the section must be of a nature such that it is possible to suppose that but for the section they could have formed the subject of determination by a separate suit. 10 A L J 56 = 34 A 530 = 15 I C 50.

—Whether an order in execution proceedings is within the scope of S. 47 depends upon its nature and contents. If it decides a question relating to the execution, satisfaction or discharge of the decree and if the decision has been given between parties to the suit or their representatives in interest the order of the Court falls within the scope of S. 47 and is a decree within the meaning of S. 2. 15 C L J 89 = 16 C W N 736 = 13 I C 365.

—Arrangement between parties—Substantially adding to decree—Sanction of Court—Execution after coming into force of new code—Enforceability. 11 M L T 18 = (1912) M W N 9 and 458 = 22 M L J 159 = 13 I C 204.

—The question whether a sale held in execution of a decree is valid or invalid on the ground that it is not warranted by the decree is one relating to the execution. The question of the construction of a decree is one relating to execution. Therefore, the

## C. P. C. (1908) S. 47 (Contd.)

## (23) Questions relating to the execution of the decree—(Contd.)

question whether the actual execution of a decree is in excess of the decree itself relates to execution 10 M L T 527 = (1912) M W N 44 = 13 I C 133.

—Question relating to Execution, satisfaction or discharge of the decree.—First suit for possession—Decree therein—Execution barred—Second suit See. 194 P R 1914.

—Ex parte decree—Execution proceedings under—Decree set aside and fresh decree on merits—Effect to make all proceedings nullity see. 103 P R 1916 = 35 I C 110.

—Decree—holder taking surety bond outside court—Enforcement of surety bond in execution not permissible, see 8 L W 507.

—(b) Adjustment or payment of decree:—See under the heading (24) Questions relating to discharge of decree.

—(c) Agreement as to mode of execution of decree:—Pre-decree agreement as to manner in which decree is to be executed can be set up. A I R 1924 Mad 611 = 46 M L J 240 = 19 L W 27 = (1924) M W N 144 = 77 I C 547.

—(e) Application by decree-holder to set aside order entering satisfaction of decree:—An application by a decree-holder to set aside an order entering up satisfaction of the decree on the ground of fraud of the judgment-debtor is maintainable. S. 47 C P C bars a regular suit. 57 I C 898.

—Where in an application to enter satisfaction of decree by judgment-debtor, the decree-holder objects that the compromise was effected by fraud, the question must be dealt with in execution proceedings and no separate suit lies 41 All. 443 = 17 A L J 677 = 50 I C 65.

—(f) Application for transfer of decree:—Application for transfer of decree for execution to another Court is not an application for execution of the decree. 9 I C 246.

—(g) Application that property should or should not be sold subject to incumbrance:—Application that properties should not be sold subject to incumbrances as notified is one under s. 47. A I R 1923 Pat 134 = (1923) Pat 76 = 1 P L R 53 = 72 I C 860.

—Question relating to execution Mortgage suit—Prior mortgagee impleaded as party but allowing decree *ex parte* against him—Final decree—Application by prior mortgagee under O. 34, R. 12—Application lies under S. 47. See. 27 I C 164.

—(i) Executability or non executability of decree:—The question whether a decree is or is not capable of execution falls within the scope of S. 47, C P C and can be exa-

## C. P. C. (1908) S. 47 (Contd.)

## (23) Questions relating to the execution of the decree—(Contd.)

mined by an executing Court. The District Board imposed a tax (Haisiat) and the plaintiffs obtained a decree for permanent injunction to restrain the Board from realizing the tax from them on the ground that the tax was illegal and ultra vires. The Punjab Legislative Council subsequently passed the Validating Act (3 of 1927) validating the imposition of the tax. The plaintiffs presented a petition for execution of their decree against the Board, which opposed it. Held that the tax which the District Board are now trying to realize is not ultra vires. Hence the decree could not be executed as regards the realization of such a tax. A L R 1933 L 726.

—But distinguish this case from the merger of the original decree in the appellate decree in which case it is the appellate decree alone that can be executed. Where, however, the appeal is dismissed for default, the original decree is the decree to be executed. 44 Cal 954 = 24 C L J 523 = 21 C W N 776 = 38 I C 493.

—Executing Court can recognise an extinguishment of decree *protanto*. 42 All 544 = 18 A L J 690 = 58 I C 743.

—Cause of action merged in decree—Further remedy by execution. See 16 A L J 685.

—Ex parte Decree—Transfer of decree—Decree set aside without notice to transferee—Transferee not entitled to execute decree. See 29 I C 673.

—Impartible Estate—Decree against holder for the time being—Executable against successor. Hindu Law, see. 2 Pat L J 136 = 39 I C 36 = 1 Pat L W 140.

—Debtor discharged after insolvency—Decree obtained by creditor without knowledge of insolvency proceedings—Execution of see. A L R 1933 A 300 = 1 A W R 424.

—Decree—Execution of—Order consigning execution application to the record room—Restoration of decree-holder's instance—Judgment-debtor can object to restoration. see A L R 1933 L 455.

—Order declaring decree executable against property and not person of judgment-debtor is decree. A I R 1924 Lah 674 = 75 I C 1039.

—Execution of foreign decree in British India—Decree can be objected to. A I R 1925 Mad 788 = 21 L W 330 = 86 I C 492.

—(j) Ex parte order granting leave to apply for execution:—An *ex parte* order granting leave to apply for execution is not decree nor has it force of a decree. A I R

## C. P. C. (1908) S. 47 (Contd)

## (23) Questions relating to the execution of the decree—(Contd)

1929 All 390 = (1929) A L J 553 = Ind Rul. (1929) All 465 = 115 I C 865.

—(k) *Fraudulent concealment of satisfaction of decree*:—The question whether a judgment-debtor satisfied the decree and was fraudulently kept out of all means of exercising his right to apply in Court comes within S. 47 of the C. P. Code. 30 C L J 248 = 53 I C 67.

—(m) *Legality of order for payment by instalments*:—Order for payment by instalments can be passed in execution in Burma. —Question whether such order can be passed comes under s. 47. A I R 1926 Rang 192 = 4 R 247 = 3 Bur L J 143 = 97 I C 1037.

—(n) *Objection to transfer of decree*:—Transfer of decree—Objections by judgment-debtor—Order over-ruling objections, whether a decree. see 33 M L J 366 = 33 I C 739 = 3 L W 236 = 19 M L T 235 = 1916 M W N 155.

—(o) *Objections to execution of decree*:—Objections to attachment and sale on the ground of exemption under s. 60 C P C are objections under s. 47 and are governed by Art. 166 of the Limitation Act. A L R 1934 N 62.

—There is no such provision so far as objections under S. 47, C. P. C., are concerned and when the first objection was only dismissed in default and not on merits, there seems to be no good reason why a second petition should not be entertainable. A I R 1932 L 643-(1).

—An objection by judgment-debtor that the property is not liable to sale under s. 60 (c) Civil Procedure Code, falls under s. 47 not under O. XXI, r. 58, and is governed by Art. 181, Limitation Act, when he has not been dispossessed. A I R 1931 Bom 446 = 33 Bom L R 781 = Ind Rul (1931) Bom 442 = 133 I C 858.

—The judgment-debtor cannot raise an objection that the property sold is not saleable in a suit for possession by the auction purchaser. The executing Court has an exclusive jurisdiction to determine the question 33 C W N 795 = 56 C 467, followed. 24 C 325, distinguished. 16 C 1; 21 C 323, approved. A I R 1931 Nag 27 = Ind Rul (1931) Nag 58 = 130 I C 154.

—An objection by the representative of a deceased judgment-debtor to the execution of a decree on the ground that the property attached in satisfaction is his own property and not assets held by him as the representative falls within the scope of S. 47 of C P Code. 20 C L J 481 = 19 C W N 517 = 27 I C 321.

## C. P. C. (1908) S. 47 (Contd)

## (23) Questions relating to the execution of the decree—(Contd)

—If a judgment-debtor does not set up rights acquired *pendente lite* before final decree he cannot set up such rights to resist execution. Ind Rul (1931) All 758 = 133 I C 902.

—Plea in bar of execution—Agreement prior to decree, but not attacking it can only be set up. A I R 1931 Mad 399 = (1930) M W N 11:2 = 32 L W 919 = 54 M 184 = Ind Rul (1931) Mad 338 = 129 I C 818.

—Objection based in pre decree agreement cannot be entertained A I R 1927 Rang 48 = 5 Bur L J 142 = 98 I C 1056.

—Where the parties to a suit enter into an agreement to treat the decree that might be passed in the suit as partly in-executable the agreement cannot be recognised by the executing Court as a bar to the execution of the decree. 43 Mad 725 = 39 M L J 222 = 12 L W 41 = 56 I C 976.

—Execution sale—Non-transferability of holding see. (1920) Pat 221 = 1 P L T 742 = 57 I C 261. and 11 C W N 76; and 23 I C 939; and 7 I C 48.

—A plea in execution that certain payments were made towards the decree even before the decree and that credit should be given for such payments is not admissible. A I R 1931 Mad 399 = 32 L W 919 = (1930) M W N 1152 = Ind Rul (1931) Mad 338 = 54 M 184 = 60 M L J 721 = 129 I C 818.

—*Ante* decree agreement not to execute cannot be dealt with by the executing Court under s. 47 A I R 1928 Rang 36 = 5 R 685 = 107 I C 860.

—*Ante* decree agreements not to execute question is under s. 47. A I R 1925 Mad 591 = 48 M L J 277 = 21 L W 725 = 87 I C 297.

—Post decree matters can alone be raised. 64 P L R 1922 = 4 U P L R (Lah) 93 = 67 I C 753.

—Events subsequent to sale in execution are part of execution A I R 1929 Pat 559 = Ind Rul (1929) Pat 609 = 119 I C 881.

—Possession of house and moveables taken—Complaint that list of moveables is incorrect is under s. 47. A I R 1924 Nag 246 = 20 N L R 90 = 7 N L J 151 = 83 I C 1031.

—Judgment-debtor cannot object to the execution of a decree on the ground that it is preliminary and not final when he has not raised that objection in previous execution proceedings. A I R 1927 Lah 780 = 101 I C 201.

—Objection, not available as plaintiff under s. 47, can be made ground of defence in suit by another. A I R 1922 Cal 311 = 38 C L J 17 = 27 C W N 280 = 71 I C 378.

C. P. C. (1908) S 47 (Contd)

(23) Questions relating to the execution of the decree—(Contd)

—Premature *quia timet* application should not be entertained—Objection by such defendant is under s 47. A I R 1923 Bom 381 = 25 Bom L R 440 = 73 I C 419.

—Objections by judgment-debtor for execution of decree partly upheld—Pending appeal by judgment-debtor against part disallowed the execution application was dismissed for default. The appeal ended in favour of decree-holder subsequently—execution application for the whole decree valid 34 C W N 897 = A I R 1931 C 112.

—A purchaser of a portion of the mortgaged property joined as a deft. in a mortgage suit, cannot under of S. 47 the C P Code object to the sale of the mortgaged property in execution of the final decree on the ground that he acquired a new and independent interest in that portion of the property. Any right that he has to an interest outside and independent of the mortgage must be enforced by proper proceedings outside the mortgage suit. 47 I C 374.

—In execution of a decree ordering sale of property of the judgment-debtor the execution Court can decide the question of ownership. 18 A L J 131 = 55 I C 83.

—In an execution proceeding, the judgment-debtor contended that he was entitled to deduct a larger sum than was allowed by the decree-holder on account of the transfer of certain properties by him to the decree-holder, and that the interest was erroneously claimed at a higher figure than what was due. There was also the question raised as to the date upon which credit ought to be allowed for the consideration money for the transfer. *Held*, that these questions were covered by s. 47. 9 Ind Cas 382.

—The holder of a consent-decree passed against the heirs of the debtor attached a house in execution. One of the judgment-debtors, a young *purdanashin* lady, objected to the attachment on the ground that by an arrangement before the date of decree between her and the other judgment-debtors, she had been placed in possession of the house in lieu of dower due to her and also that as she was a minor at the date of decree she was not bound by it. *Held* that the possession of the objector was that of mortgagee. That assuming that objector was bound by the decree the house was liable to the attachment subject to the objector's lien over it to the extent of her dower. 80 P R 1915 = 187 P L R 1915 = 125 P W R 1915 = 31 I C 722.

—The appellant obtained a decree against two persons I H and A H Both I H and

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C. P. C. (1908) S. 47 (Contd)

(23) Questions relating to the execution of the decree—(Contd)

A H along with two other persons held a decree against M M and M Z. The appellant applied for execution of his decree by attachment of the interest of I H and A H in the decree which they along with two other persons held against M M and M Z. This application was refused. *Held*, that M M and M Z, being not parties to the appellant's decree, the questions arising between them and the appellant could not be taken as questions relating to the execution of the decree held by the appellant. The order refusing the application did not therefore fall under S. 47, C P C and was not appealable. 17 O C 374 = 27 I C 363.

—Consent decree against a qualified female proprietor—Objection to its execution against reversioner—Overruling of such objection—See 17 M L J 288 = 2 M L T 360 = 30 M 402.

—Where a dismissal of an application for restoration under s. 151 is not right and proper the order of dismissal of the same does not conclude previous objection. *Held further* that there was in any event nothing to prevent the subsequent petition, though made under S. 47 and O. 21, r 66 of the Code being regarded as a second application under S. 151 of the Code, on which the Court could act for the purpose of reconsidering its previous order of rejection. 36 C W N 367 = A I R 1932 C 569 = 55 C L J 184 = A L R 1932 C 382.

—(p) Order dismissing execution petition:—Order dismissing execution petition on the ground that there was no decree, as no proper court fee was paid, is wrong. A I R 1923 Bom 41 = 79 I C 489.

—(pp) Orders relating to Schemes:—A decree in a suit under s. 92 directing the payment of money or delivery of property to new trustees is executable by the new trustees, but the executing Court cannot question the directions. 60 M L J 173 = 33 L W 149 = 54 M 345 = (1931) M W N 586 = Ind Rul (1931) Mad 812 = 134 I C 60.

—A decree containing a direction for delivery of trust property to newly appointed trustees can be executed. 33 L W 149 = 54 M 345 = (1931) M W N 586 = Ind Rul (1931) Mad 812 = 60 M L J 173 = 134 I C 60.

—Applications in execution of a scheme of management of trust do not fall under s. 47. A I R 1926 Mad 655 = (1926) M W N 283 = 95 I C 5.

—Orders passed relating to scheme formed and sanctioned by Court in scheme suit, are not orders in execution. A I R 1925 P C 155 = 6 L R P C 117 = 41 C L J 628 = (1925) M

## C. P. C. (1908) S. 47 (Contd.)

## (23) Questions relating to the execution of the decree—(Contd.)

W N 474=22 L W 246=30 C W N 459=23 A L J 555=27 Bom L R 872=49 M L J 25=2 O W N 535 (P. C.)=87 I C 313.

—Scheme asked for and obtained—Order granting or refusing remedy provided in scheme is not under s. 47. A I R 1924 Mad 369=47 M 139=18 L W 237=(1923) M W N 664=75 I C 189.

—Right of appeal not provided in scheme—Whether application under the scheme can be treated as arising in execution. See (1917) M W N 420.

—(q) *Plea of tender* :—A plea of tender prior to suit can be gone into in execution proceedings. (1917) M W N 308=5 L W 718=38 I C 295

—(r-s) *Questions regarding confirmation, setting aside or refusing to set aside execution sale* (O. 21, rr 22, 90, 92) :—The omission to give a notice under O. 21, R. 22 of the C P Code is by itself sufficient to render an execution sale void for want of jurisdiction, for the notice is the very foundation of the jurisdiction 42 Cal 72 ref. Where every process prescribed by the legislature with a view to appraise the judgment debtors or their representatives that execution was to proceed against them had been fraudulently suppressed *Held*, that such a case was governed by S 47 of C P Code, and the period of limitation was provided by Art. 181 of the first schedule to the Lim. Act. To such a case S. 18 of the Lim. Act applied. The burden rests upon the person, who has committed a fraud, to prove conclusively that the person injured by his fraud has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to seek the assistance of the Court. 27 C L J 528=46 I C 221.

—Application for review of order confirming sale is under s. 47 and governed by Art. 181, Limitation Act. A I R 1929 Nag 305=Ind Rul (1929) Nag 113=116 I C 65

—Where a decree directs the sale of properties in A and B Schedules and then for any deficit, the sale of C and D Schedule properties and it appeared that certain items in Sch. B were not included in the sale proclamation *Held*, that the sale must be set aside in an application under S. 47 to the executing Court without a separate suit and that the sale must be treated as held, if not without jurisdiction, at any rate, with material irregularity in the exercise of the jurisdiction of the Court. Under the proviso to R 90 of O. 21, the Court must be satisfied that the applicant had sustained substantial injury by reason of the irregularity of fraud complained of and some causal connection

## C. P. C. (1908) S. 47 (Contd.)

## (23) Questions relating to the execution of the decree—(Contd.)

must be shown between the irregularity and the inadequacy of the price which the properties fetched at the sale. O. 21 R 90 must be read with S 47, C P Code, Proceedings to set aside the sale on the ground of material irregularity or fraud in publishing or conducting the sale involve question relating to the execution, discharge or satisfaction of the decree and hence fall under both S. 47 and O. 21, R 90. Proceedings to set aside Court auction sales on any other tenable ground also involve questions relating to execution, etc. and hence fall under S. 47 though they may not fall under O. 21, R. 90. (1916) 1 M W N 256=33 I C 692.

—Execution sale—Setting aside—Objection to the whole procedure and not merely to form of sale—Limitation Act, Art. 166 not applicable see 37 I C 827=10 Bur L T 249.

—Execution sale—Application to set aside on the ground that property did not belong to judgment-debtor—Limitation—Art 166 & not art. 181 applicable. See 46 Cal 975=54 I C 431.

—O. 21, R. 90. C P C deals only with irregularity and fraud in publishing and conducting a sale and a sale by the Court of property which is in fact not saleable on the ground of non-transferability is not a material irregularity in conducting the sale. It is doubtful if an application to set aside a sale on the ground of non-transferability can be made under S. 47 C. P. C. Even if such application comes within the scope of S 47 it is an application under the Civil Procedure Code to set aside a sale in execution of a decree and as such it comes within Art. 166 of the Limitation Act and is barred if not presented within 30 days from the date of the sale 1920 Pat 221=1 P L T 742=57 I C 261.

—A landlord obtained a decree for rent against two tenants of a holding jointly but executed the decree against one of the tenants only and brought the entire holding to sale. A stranger purchased at the auction. The tenant who was not a party to the execution sale applied to set aside the sale. *Held*, that S. 47 of the C P Code does not require that a person making an application for execution thereunder should be a party to the execution proceedings, but requires that he must be a party to the suit in which the decree is passed, and as plff. was a party to the suit he was competent to make the application. S. 14 of the B T Act and O. 21 R. 90 of the C P Code are of limited scope and application, and an application which raises questions as to the execution of a



C. P. C. ( 1908 ) S. 47 (Contd)

## ( 23 ) Questions relating to the execution of the decree—(Contd)

decree, clearly beyond their scope ought to be dealt with under S. 47 of the Code.

52 I C 514.

—Application to set aside the sale, on ground that decree-holder induced Court to sell more property than allowed by judgment, comes within the scope of s. 47. A I R 1928 Rang 215 = Ind Rul (1929) Rang 71 =

114 I C 679.

—Where a judgment debtor impeaches the validity of certain execution proceedings which preceded and led up to the sale of his property and thus seeks to have the sale set aside his remedy is by application under S. 47. C P C 21 O C 317=5 O L J 551=49 I C 39.

—Mortgage decree—Sale of properties not covered by mortgage—Application to set aside by judgment-debtor. See 17 O C 94=24

I C 137.

—Held, on the facts that as the application by the lady was not one relating to "execution, discharge or satisfaction" of the decree inasmuch as the satisfaction of the decree had taken place already, S. 47 of the Code of Civil Procedure had no application to the case and the first Court's decree must consequently be restored. 8 P R 1918 and 31 All., 82 ( F B ) followed 121 P R 1919 = 48

P L R 1920 = 53 I C 460.

—The plff. obtained an *ex parte* decree for Rs. 86 against the deft. in 1906 and in execution of which the deft's. house was sold and purchased by the plff. in 1910. Subsequently, the deft. succeeded in getting the *ex parte* decree set aside and in having the case retried; but the result was that a decree for Rs. 87 was passed in plff's. favour in 1914. The deft. next applied to have the previous sale of the house in execution set aside:—

Held, ( 1 ) that the previous sale of the house in execution under the previous decree which had been set aside, should, itself be set aside as having been no longer based on any solid foundation; ( 2 ) that the order setting aside the sale could be passed under S. 47 or S. 144 or S. 151 of the C P C Code of 1908; 20 Bom L R 925 = 43 Bom 235

= 48 I C 130

—( i ) Questions regarding delivery of possession ( O. 21, rr. 95, 97 )—Order specifying items to be delivered not passed—Items in possession of vendee from judgment debtor delivered—Objection by vendee is under s. 47 A I R 1926 Mad 968 = 51 M L J 255=24 L

W 254=97 I C 1031.

—Decree-holder who is himself the auction purchaser—application by, for delivery of possession—resistance execution—dismi-

C. P. C. ( 1908 ) S. 47 (Contd)

## ( 23 ) Questions relating to the execution of the decree—(Contd)

ssal of application as barred under Art. 167, Limitation Act—fresh application for execution or possession—whether barred—Limitation Act ( IX of 1908 ), Art 167. See A L R 1934 N 14.

—When the question arises in proceedings for delivery of possession as to the kind of possession to be delivered it is a question relating to the execution. A I R 1926 Cal 798 =53 C 781=43 C L J 345=30 C W N 649 ( F B ) = 95 I C 494.

—( u ) Questions regarding legality of the execution Court's procedure or its power to order a sale :—Question regarding legality of the execution Court's procedure or its jurisdictional power to order a sale falls under s. 47. A I R 1929 Lah 449=11 Lah 1, J 306=

Ind Rul (1930) Lah 39=120 I C 279.

—Orders in execution are deemed to have been passed in presence of parties—Objection to regularity of such proceedings can only be taken either before executing Court or by way of appeal. A I R 1928 Lah 910=109

I C 561.

—A question as to the legality of an execution Court's procedure or as to its jurisdiction or power to order a sale is a question falling under S. 47, Civil Procedure Code.

6 O L J 640=54 I C 364.

—( v ) Questions regarding the appointment or removal of a receiver :—Where a Receiver is appointed in execution proceedings the question as to his discharge is a question relating to the satisfaction of the decree, and therefore, an order refusing to discharge the receiver falls under S. 47 and is appealable.

3 Pat L J 513=46 I C 655 =1919 Pat 137.

—( vv ) Questions regarding waste by judgment debtor :—Decree for possession—Question of waste by judgment-debtor after decree is under s. 47. A I R 1923 Bom 391=

25 Bom L R 449=73 I C 443.

—Question with regard to waste committed by judgment-debtor after date of decree for specific performance is question relating to execution and must be determined by executing Court and not by separate suit. A I R 1925 Bom 385=27 B 687=39 I C 265.

—But held that the waste by a tenant alleged to have been committed after decree of possession, for recovery of rent and delivery cannot relate to execution, discharge or satisfaction of the decree. A separate suit should be brought for such damages. 25 B L R 449; 27 B L R 687 not followed. A L R 1933 L 1254.

C. P. C. (1908) S 47 (Contd.)

(23) Questions relating to the execution of the decree—(Contd.)

—(w) Questions whether certain property is included in a decree or property of judgment debtor:—Question whether certain property is included in decree is one under s. 47 A I R 1927 Cal 614 = 54 C 419 = 103 IC 233.

—The question whether a certain property belongs to the judgment debtor or to the deceased whose legal representative the judgment debtor is, is a matter relating to execution of the decree arising between the parties to the suit, and should be determined by the executing Court and not by a separate suit. A I R 1931 Nag 27=Ind Rul (1931) Nag 58 = 130 IC 154.

—Execution against legal representatives of judgment debtor—Question whether certain properties are assets of deceased is under s. 47. A I R 1921 Lah 173 = 3 Lah L J 406 = 63 IC 853.

—Decision on question whether property attached in execution forms part of deceased judgment-debtor's property, comes under s. 47. 22 CLJ 304 = 31 IC 321.

—(x) Questions regarding payment or non-payment of purchase-money within time in a pre-emption suit:—A decree, in so far as it declares that in default of payment of the amount specified therein within a specified period the suit shall stand dismissed with costs becomes a decree for dismissal on the happening of such default and is appealable as such. The question whether a pre-emptor has paid the amount fixed by a pre-emption decree within time or not is a matter affecting the operation of the decree and strictly does not relate to its execution within S. 47 of the C P Code. 17 O C 14 = 21 IC 193.

—(y) Rule of Caveat emptor:—Decree-holder is the auction purchaser—Sale found to be a nullity in consequence of the decree in another suit—caveat emptor—rule of—if applicable. A L R 1933 A 62 = 1933 A L J 68 = A I R 1933 A 218.

(24) Questions relating to discharge of decree.

—Where a Court has before it an application by a judgment debtors to enter up full satisfaction of the decree, it must determine first, whether there has been an adjustment of the decree out of Court by which the decree holder is bound and secondly, whether, under the terms of the adjustment, anything remains to be paid to the decree-holder. An allegation that an adjustment of a decree out of Court is fraudulent must be gone into and decided by the Court of execution. 41 All 443 = 17 A L J 677 = 50 IC 65.

C. P. C. (1908) S. 47 (Contd.)

(24) Questions relating to discharge of decree—(Contd.)

—But a question relating to the satisfaction of a decree was a question arising in execution which must be tried by the executing Court under that section or at the discretion of that Court in suit, in either of which cases the Court would be precluded from recognising the adjustment 20 Bom L R 929 = 48 IC 135 = 43 Bom 240.

—An application was made to the executing Court by one of the judgment-debtors to enter up satisfaction of the decree as against him, on the ground that there was an agreement to that effect entered into between himself and the decree-holder prior to the passing of the decree. The latter objected that such an application was not sustainable: Held, that the application was maintainable under O. 21, R. 2, of the C P Code. The omission in S. 47 of the words "stay of execution" found in S. 244 of the old code is due to a desire to avoid surplusage. 39 Mad 541 = 33 IC 66.

—Compromise between decree-holder, judgment-debtor and claimant to property in execution—Compromise—Position of claimant see 38 All 327.

—Adjustment record of Minor-judgment debtors—Sanction of Court not obtained—Order not without Jurisdiction—Remedy of minor—Review. See 5 Pat L J 379.

—According to S 258 (Code of 1882) and also according to O.21, R.2 (Code of 1908) a certificate of payment or adjustment should be filed in the Court whose duty it is to execute the decree. 25 M L J 586=14 M L T 574=211 C 639.

—But—decree-execution-purchaser of the equity of redemption setting up agreement to adjust the decree—relief cannot be given under S. 47. A L R 1933 M 528=1933 M W N 77.

—The question whether there was an agreement between the parties to a suit that no decree should be obtained, therein cannot be gone into in execution. (1918) M W N 547 = 8 L W 205=46 IC 880.

—Application under O. 21, R. 2, (2) barred —Party not entitled to apply under S.47 of the Code. 18 C W N 1266 = 20 C L J 341 = 27 IC 294.

—If the adjustment of a decree out of Court has not been certified as required by R.2 of O.21 of the Code of 1908, the Court executing the decree cannot take notice of it. In such a case it is not open to the Court to investigate, under S. 47 of the Code, allegations of fraud made by the judgment-debtor against the decree-holder. 16 C W N 923 = 16 C L J 174 = 13 IC 63.

C. P. C. (1908) S. 47 (Contd.)

## (24) Questions relating to discharge of decree—(Contd.)

—Executing Court cannot investigate the fact of payment in respect of the decretal amount out of Court. The determination of this question is taken out of the purview of S. 47, Civil Procedure Code, by O. XXI, r. 2 (3), Civil Procedure Code 135 P R 1919=53 I C 443. See also 4 I C 402 (404) = 14 Cal W N 357 = 11 Cal L J 91; 13 I C 424 (425) = 16 Cal W N 396; and 25 I C 884 (885) Cal; and A I R 1928 Cal 527 (530) = 32 Cal W N 434 = 113 I C 9; and A I R 1923 C 342 = 50 Cal 468 = 76 I C 311; and 24 C L J 462 = 37 I C 738 and 1923 Rang 103 (106) = 11 L B R 363 = 1 Bur L J 226=68 I C 924.

—An uncertified adjustment of the preliminary mortgage-decree cannot be pleaded in bar to the execution of the final decree though the adjustment was made in pursuance of the arrangement entered into before the passing of the preliminary decree.

37 M L J 356 = 54 I C 137.

—Suit not relating to execution but to adjustment of decree is not barred. A I R 1921 Sind 159 (F B) = 16 S L R 207 = 83 I C 360.

—Thus where the judgment-debtor had arranged with his bank to pay off the decree amount and enter up satisfaction which it failed to do and subsequently the bank got an assignment of the decree recognised by Court and executed the decree and realised the amount. *Held*, in a suit by the judgment-debtor to recover the amount realised in breach of the contract that the suit was maintainable and that S. 47 of the C P Code, was no bar. (1917) M W N 359 = 40 I C 549.

—So also a suit for a declaration that a decree obtained against plff. and others has been satisfied as regards the plff. and hence cannot be executed against him is maintainable. Neither S. 47 nor order 21, rule 2, C P Code is a bar to such a suit. 234 P L R 1914 = 79 P W R 1914 = 42 P R 1914 = 25 I C 642 following 16 P R 1910. But see. 7 L B R 367 = 28 I C 468

—An adjustment out of Court so long as it has not been certified into Court cannot be recognised by the executing Court nor can it be enquired into in execution if the time for certifying payment under Art 174 has passed. While execution proceedings are pending and the decree has not been fully executed or certified adjusted, no suit can be maintained for staying execution by an injunction. But if the decree has been fully satisfied otherwise S. 47 ceases to apply and the judgment debtor can sue for the recovery of the payment which by the fraud or negligence of the decree holder has not been certified. (1913) 1 U B R 191 = 22 I C 963 (P C)

C. P. C. (1908) S. 47 (Contd.)

## (24) Question relating to discharge of decree—(Contd.)

—Final decree for partition—Dispute regarding adjustment—Question is under S. 47. A I R 1928 Cal 753 = Ind Rul (1929) Cal 469 = 116 I C 373.

—Application under O. XXI, r. 2 (2) within time but pending execution is one under s. 47. A I R 1922 Pat 276 = 1 Pat 644 = 3 P L T 487 = (1922) Pat (Sup.) 200 = 68 I C 645.

—The provisions of s. 258, Civ. Pro. Code, 1882, are express, and no payment or adjustment shall be recognised by the execution Court unless it has been certified, and, therefore, an alleged adjustment relied on by the judgment-debtor is no answer under s. 244 of the said Code to an application for execution of a decree. The application cannot be treated as one under s. 258 of the Code.

15 C L J 88 = 13 I C 944.

—Question relating to execution—Adjustment of decree not recorded—Sale in execution—Judgment-debtor cannot plead adjustment even by way of defence in suit for possession by decree-holder purchaser. A I R 1929 Cal 374 = 33 C W N 795 = 49 C L J 441 = Ind Rul (1929) Cal 681 (F B) = 118 I C 857.

—Right to have payment certified barred—Question cannot be raised under s. 47 A I R 1921 Pat. 135 = 6 Pat L J 337 = 2 Pat L T 765 = 63 I C 535.

—Decree providing for injunction and for damages in case defendants sold goods to third parties—Defendants paying damages on breach of conditions does not satisfy decree. A I R 1928 P C 27 = 55 C 238 = 55 I A 58 = 47 C L J 162 = 54 M L J 122 = 30 Bom L R 243 = 32 C W N 509 = 27 M L W 655 = 26 A L J 667 = 24 N L R 17 = (1928) M W N 951 = 107 I C 25.

—Bar of suit Applicability—Decree—Payment out of court by judgment-debtor—Omission to certify payment—Assignment of decree to person with knowledge of payment—Assignee executing decree and realising money from judgment debtor—Suit by judgment debtor for damages. *See*

36 M L J 376.

—Bar of suit—Decree—Adjustment of—Minor judgment debtors—express sanction of court if necessary—Remedy open to minor—Appeal. Reviewed. *See* 5 P L J 379 = 1 Pat L T 663 = 1920 Pat 358.

—Application to set aside sale—Validity of sale—question relating to discharge or satisfaction of decree. *See* 13 C L J 162 = 9 I C 584.

—Where the parties to a suit enter into an agreement by which one of the parties agrees to submit to a decree to be passed in

C. P. C. (1908) S. 47 (Contd)

(24) Questions relating to discharge of decree—(Concl'd)

the suit under an agreement for the discharge of the decree in a particular manner within a certain date and that the other party should not within that date execute or assign the decree and a decree is consequently passed in the suit and the decree-holder seeks to execute the decree within the time fixed in the agreement and the judgment-debtor pleaded the agreement in opposition in execution proceedings. *Held* by *Abdur Rahim, Offy. C. J.*, and *Seshagiri Aiyar, J.* (Phillips, J. dissenting) that such an agreement can be given effect to in execution proceedings under S. 47 of the Code so as to operate as a stay of execution of the decree. 40 Mad 233 = 32 M L J 13 = 21 M L T 24 = 5 L W 132 = (1917) M W N 44 = 37 I C 836 (F B).

(25) Questions relating to satisfaction of decree.

—Question relating to satisfaction of decrees one under s. 47 see A I R 1924 O 104 = 74 I C 558 = 26 O C 345 and 15 C W N 783 = 8 I C 4; and A I R 1926 R 192; and A I R 1929 C 670; and 31 M 354.

—Purchaser of decree in execution seeking to execute it—Plea that decree was satisfied is under s. 47 A I R 1925 Oudh 225 = 27 O C 277 = 38 I C 776.

—So also question whether payment under preemption decree was made within the time allowed is question affecting the satisfaction or discharge of decree and falls under s. 47. A I R 1924 Oudh 104 = 26 O C 345 = 75 I C 558.

—Pre-emption—conditional decrees. see 21 I C 193 = 17 Oudh C 14.

—Pre-emption decree—question of payment, if a question of execution open to appeal. see 11 Oudh Cas 144.

(26) Question as to whether a person is a representative.

—Under the old Code the question as to representative could be decided by the executing Court itself or under a separate suit see 28 M 357 and 59 A W N 1884.

—But under the present Code the question whether or not a person is a legal representative must be decided by executing Court and not by separate suit. Ind Rul (1929) Mad 650 = 117 I C 122 see also 11 L W 173 = 55 I C 812 and A W N 1908 92 = 5 A L J 550. and 1928 Cal 835; and 16 M L J 27; and 28 Ind Cas 906; and 2 Ind Cas 695 = 37 Cal 75 = 13 Cal W N 1110; and 16 Ind Cas 975 = 16 Cal L Jour 96; and A I R 1926 All 681 = 48

C. P. C. (1908) S. 47 (Contd)

(26) Question as to whether a person is a representative—(Contd)

A 429 = 24 A L J 462 = 94 I C 454 and A I R 1921 Pat 293 = 62 I C 113; and 21 S L R 20 = 92 I C 575 = A I R 1926 S 113.

—Thus where in execution of a decree the plff prayed for the bringing on record of the widow of a person alleged to have been a party to the suit at the time the decree sought to be executed was passed but the widow objected on the ground that her husband had died before the decree was made and execution could not therefore proceed against her, *held*, that the executing Court was competent to determine the question whether at the time the decree was passed the husband was or was not a party to the suit. 2 Pat L J 192 = 1 Pat L W 282 = 39 I C 172.

—When a decree-holder has died, and some persons appear asking to be allowed to execute that decree as representing the decree-holder, then it is under s. 47, necessary that the Court itself should decide who the legal representative of the deceased person is if the claimant who claims to be the legal representative, produces a probate or a Letter of Administration or any such general conclusive proof of his status, then the Court certainly need not go further and should accept that as conclusive. But if there is no such evidence then it is not for the Court to refer the applicant to separate proceedings, but it must itself make up its mind after such inquiry as may be possible. A I R 1926 Sind 113 = 21 S L R 20 = 92 I C 575.

—Questions as to who are the legal representatives and questions of limitation must be determined by court passing decree before it transfers the decree for execution. A I R 1926 Mad 411 = 23 L W 92 = (1926) M W N 120 = 91 I C 1056.

—Death of decree-holder legal representatives applying for execution—Judgment-debtor objecting that there are other representatives who have not applied—Execution Court must investigate the matter. A I R 1929 Pat 232 = Ind Rul (1929) Pat 611 = 119 I C 883.

—Determination that certain person is representative is decree. A I R 1925 All 66 = L R 5 A 668 Civ. = 82 I C 604 (overruling 20 A 539).

—Decision on question of right of applicant to be brought on record as legal representative of judgment-debtor is decree. A I R 1925 All 578 = 47 A 365 = 86 I C 1048.

—But where one of five decree-holders assigning a decree and the assignee applied under O. 21 r. 16—executing Court recognising assignment of the entire decree—one of the

## (26) Question as to whether a person is a representative—(Contd)

decree holders objecting the recognition of the assignment of the entire decree and appealing to the District Judge - appeal not competent under S. 47 (3) Civil P. C. A I R 1933 L 523.

—Company in liquidation—Decree against Transferor of decree—Status of—Right to apply under S. 47(3) C P Code to be brought on record in the executing court to be recognised by the winding up Court as creditor. see 17 A L J 464 = 50 I C 115 = 41 A 432.

—Where the legal representative of the deceased judgment debtor claims the property attached, in his own right, the analogy of O. 21 r 58 applies and it is for the decree-holder to prove that it is the property of the judgment debtor. A L R 1933 O 487.

—Death of decree-holder pending execution his legal representative can continue after substitution of their names. A I R 1930 All 604 = (1930) A L J 1279 = Ind Rnl (1931) All 46 = 128 I C 398.

—Objection to liability of legal representative is under s. 47. Order of substitution of legal representative making him liable to satisfy the decree as legal representative, but without deciding his objections is improper. A I R 1923 Pat 149 = 3 P L T 106 = (1921) Pat 293 = 82 I C 803.

—Buddhist husband and wife carrying on joint business and owning joint property—Mortgage by husband and decree against him:—Wife not impleaded—Decree is binding on wife also A I R 1927 Rang. 119 = 5 Bur L J 218 = 101 I C 354.

—When it is admitted that a person had got possession of the deceased in execution of a decree against the deceased person on a certain property, the onus is upon the person in possession to prove the extent of the assets of the deceased, being a fact which is clearly within his knowledge. 21 M L J 1096 = 10 M L T 272 = (1911) 2 M W N 271 = 12 I C 253.

—Ordinarily when the managing member of a family is allowed to execute a decree on behalf of all the members security need not be taken to guard the interest of the junior members. 14 M L T 233 = 21 I C 177 = (1913) M W N 802 = 25 M L J 442.

—Legal representative—Not the real heir—Proceedings if binding on true heir See 35 M L J 106 = 52 I C 109 See also 29 M L J 698 = 31 I C 920 and 31 M L J 222 = 35 I C 124.

—Where the decree is against such assets of the deceased vendor as has come into the hands of his representative it cannot be executed against inalienable property of the deft. 77 I C 862 = A I R 1923 A 169.

## C P. C. (1908) S 47 (Contd)

## (26) Question as to whether a person is a representative—(Contd)

—Decree obtained against the estate of a deceased person by joining only some of the legal representatives cannot be executed against the others : 98 I C 613 = A I R 1927 M 197.

—Redemption decree will not be barred by reason of not impleading legal representatives of mortgagee within time : 9 O L J 624 = 74 I C 162 = A I R 1923 O 156

—Legal representative to be impleaded only when execution is sought. A I R 1921 Mad 693 = 14 M L W 632.

—A Hindu widow in possession of a portion of her husband's estate allotted to her on partition among her sons mortgaged her share for a legal necessity. The mortgagee obtained a decree against her; after her death, only the son who was living jointly with her all along was brought on the record as her legal representative. The order absolute was obtained and the shares of the widow and the son who was joint with her were sold and purchased by pliffs. When they applied for mutation of names, they were opposed by the other sons. Consequently they commenced the present action for recovery of possession. Held, that the order absolute having been obtained against one out of several heirs, there was not in existence any decree under which the interests of the other heirs could be sold and consequently the pliffs, could not obtain possession of their shares 14 A L J 986 = 37 All 67 = 37 I C 100.

—Wrong person sued as heir of a deceased person—True heir not taking steps for a long time—Effect—See. 10 Ind Cas 344.

—Deceased defendant—Substitution of—Practice See. 13 C W N 787 = 3 Ind Cas 999.

—Limitation for bringing—of a deceased person on record—See 16 M L J 475 = 1 M L T 348 = 29 M 529.

## (27) Questions arising after sale Confirmed

—Executing Court is functus officio after execution of decree. A I R 1928 Nag 100 = 105 I C 420 See also 101 P L R 1901 = 63 P R 1901.

—Question relating to discharge or satisfaction—possession of property after sale—Not questions connected with the execution discharge or satisfaction of decree within S. 47 C. P. Code See 18 O C 345 = 33 I C 367.

—And an application by judgment debtor under s. 47 against unlawful dispossession is maintainable even though filed after execution application filed as fully satisfied. A I R 1924 Nag 122 = 76 I C 224.



C. P. C. (1908) S. 47—(Contd.).

(26) Question as to whether a person is a representative—(Concl'd.)

—So also reversal of decree after sale confirmed—Application for refund by auction purchaser is under s. 47 A I R 1923 All 394=21 A L J 228=45 All 369=L R 4 A 161 Civ (F. B.)=74 I C 873.

(28) Restitution or refund, when decree reversed or modified or found invalid & etc.

—An application for restitution under s. 144, Civil Procedure Code, is not an application for execution and is, therefore, governed by Art 181, and not by Art. 182 of the Limitation Act. 35 C W N 1294.

—A decision on an application for restitution under the C P C to be appealable as a decree under S. 2 must be a decision on the merits of the application and not on a question incidentally arising out of or collateral to the application. So an order that an application is not barred by limitation is not appealable as a decree within the definition in S. (2). The language of S. 47 contrasted with that of S. 144. *Obiter* Having regard to the language of S. 47 a decision on a question of limitation in execution proceedings is the decision of a question within the purview of S. 47 and hence appealable. 117 P L R 1914 = 110 P R 1913 = 22 I C 851.

—Restitution proceedings are proceedings in execution—Successive applications—No bar of *res judicata*. 5 L W 267

—Where a sale is set aside under O. XXI, r. 92, and restitution is granted under s. 151, the questions that arise in such proceedings are questions which come within the purview of s. 47. A I R 1931 Cal 779 (2) = 35 C W N 105 = 53 C L J 49.

—Restitution on setting aside of sale is not under s. 47 A I R 1930 Pat 280 = 11 P L T 156 = 9 Pat 685 = Ind Rul (1930) Pat 237 = 122 I C 589. but see contra. A I R 1922 N 198.

—Auction-purchaser dispossessed by successful claimant—Suit for refund of purchase money lies. A I R 1924 Lah 115 = 4 Lah 354 = 6 Lah L J 67 = 76 I C 606.

—Court executing decree has jurisdiction to restore the property. A I R 1928 Pat 502 = 113 I C 217.

—Receiver appointed in execution department—Suit to compel him to refund on reversal of decree is unnecessary. A I R 1925 Lah 328 = L R 6 A 36 Civ = 85 I C 161.

—Application for restitution *Ad valorem* Court-fees are not necessary A I R 1928 Lah 143 = 107 I C 491.

C. P. C. (1908) S. 47 (Contd)

(28) Restitution or refund, when decree reversed or modified or found invalid &c.—(Contd)

—Decree satisfied Application for restitution of excess property sold—Executing Court is *functus officio*. A I R 1929 Lah 121 = 10 Lah L J 474 = 113 I C 778.

—Parties and representatives—Right of assignee pending appeal to apply for restitution. See (1918) Pat 243.

—Where a decree-holder obtains possession of the property without intervention of Court and the decree is reversed on appeal, suit for possession is barred by ss. 244 and 583 but such suit was treated as an application for execution. 4 A L J 188=A W N 1907, 90 = 29 A 348. see also 32 C 332. [F 5 P R 1907 = 40 P W R 1907 = 23 P L R 1908].

—(b) Compensation:—Decree for possession reversed after execution—Question of compensation is under s. 47 and Court-fee of annas 8 is sufficient in appeal. A I R 1922 Nag 62 = 18 N L R 15 = 67 I C 225.

—(d) Excess execution:—A decree passed by the Jhansi Court was sent for execution to the Ahmednagar Court. In execution a sum in excess was recovered from the defendant on the 29th November 1910. The defendant filed a suit to recover back the amount on the 14th November 1913; but it was dismissed on the 31st March 1915 on the ground that no suit could lie and the proper remedy was to file an application under S. 47 of the Code of Civil Procedure. Before the execution proceedings could be sent back by the Ahmednagar Court to the Jhansi Court, the defendant applied to the Ahmednagar Court on the 19th May 1915 to obtain refund of the money recovered in excess from him. *Held*, (1) that the question raised was one which related to the execution of the decree and was properly entertained under S. 47 Civil Procedure Code by the Ahmednagar Court which was the Court executing the decree. 44 Bom 97 = 22 Bom L R 238 = 55 I C 967.

—Where, under an execution sale lands not included in the sale certificate were by mistake delivered to the purchaser, the judgment-debtor cannot claim their redelivery by a separate suit. The question whether the lands so delivered are correctly included in the sale certificate or not can only be determined by the executing Court on an application under S. 47 of the C. P. Code. 45 I C 608.

—Possession of excess property given to decree-holder—Separate suit for recovery of such property is barred. A I R 1928 Lah 936 = 110 I C 859.

—But where a judgment-debtor objected that the auction-purchaser had taken possession of property to which his sale certificate

## C. P. C. (1908) S. 47 (Contd)

## (28) Restitution or refund, when decree reversed or modified or found invalid &amp;c.—(Contd)

gave him no title. Held, that the question in dispute should be decided by a separate suit and could not be decided under S. 47.

14 O C 70=10 I C 714.

—Mortgage—Decree holder selling excess property and buying it—Suit to recover excess is not barred. A I R 1928 All 363=50

All 686=26 A L J 716=113 I C 725.

—In an execution proceeding the judgment-debtor contended that he was entitled to deduct a larger sum than allowed by the decree-holder on account of the transfer of certain properties by him to the decree-holder and that the interest was erroneously claimed at a higher figure than what was due. There was also the question raised as to the date upon which credit ought to be allowed for the consideration money for the transfer. Held, that these questions were covered by S. 244 C. P. C. (1882), and the court should not decline to investigate into them on the ground that the remedy of the judgment-debtor was by way of a regular suit.

9 I C 382.

—Where a judgment-debtor delivered to the decree-holder certain bags of paddy in order to satisfy the decree and it was agreed between them that he should refund any sum by which the sale-proceeds of the paddy should exceed the decretal amount and the judgment-debtor instituted a suit for refund of the excess amount. Held that such a suit was not barred under S. 47 of C.

P. C. A L R 1933 M 932.

—Separate suit lies where double payment is received by decree-holder. A I R 1923 Bom 253=25 Bom L R 247=95 I C 410.

—(c) Interest:—The question of interest by way of compensation in cases of restitution is one within the section. A I R 1927 Mad 927 (2)=1927 Mad W N 529=39 Mad L T 394=104 I C 750. See also 3 I C 798=31 All 551=36 L A. 197=10 Cal L J 257=11 Bom L R 1200=14 Cal W N 55=19 M L J 599=13 Oudh C 180=6 Mad L T 303.

## (29) Revision.

—First appeal under s 47—Auction-purchaser and not decree-holder or judgment-debtor can apply in revision. A I R 1929 Mad 84 = Ind Rul (1929) Mad 725 = 117 I C 789.

—Objection allowed—appeal by decree holder—incompetent—may be considered as revision petition. A L R 1933 L 503.

—Revision may lie from an order which is not appealable if the provisions of S. 115 are satisfied: A I R 1928 Lah 811 = 109 I C 416.

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## C. P. C. (1908) S. 47 (Contd)

## (30) Separate Suit when lies.

—(a) General:—S. 47 does not bar a suit in which the relief sought could not be obtained in the previous suit which was compromised.

6 Cal W N XCV.

—Person not party to suit or execution proceedings cannot plead bar of suit. A I R 1929 Mad 850 = (1929) M W N 718 = Ind Rul (1930) Mad 21 = 120 I C 565.

—Certain amount paid by judgment-debtor towards satisfaction of decree—Decree holder not certifying payment and recovering in execution whole amount due under decree—Suit by judgment-debtor to recover amount paid is maintainable. A I R 1929 Rang 269 = 7 R 310 = Ind Rul (1929) Rang 310 = 119 I C 742.

—Party acquiring in procedure under O. XXI, r. 58 must bring suit. A I R 1927 Rang 137 = 5 R 110 = 101 I C 794.

—Deposit by plaintiff a subsequent hypothecator to release property sold under previous mortgage—His rights as hypothecator not reserved—Suit is not barred. A I R 1922 Lah 358 = 81 I C 301.

—Matters not covered by S. 47 suit lies. A I R 1925 Cal 286 = 78 I C 317.

—Decree against A whose property attached—B successfully objecting to attachment—Suit by A against B on allegation of B setting up adverse title is not barred by s. 47. A I R 1922 All 411 = 20 A L J 169 = 77 I C 107.

—Setting up title of third person—Separate suit lies. 31 I C 393.

—Suit against—Decree-holder as *supradar* lies. A I R 1921 Nag 130 = 59 I C 477.

—When a decree is obtained in respect of certain property, and a suit in respect of the same property, is brought by a person, who is not a representative of the judgment debtor affected by the decree, before the decree is put in execution and there are no proceedings pending in which an application under S. 47 C P C could be made S. 47 is no bar to the suit. (1919) Pat 465 = 53 I C 20.

—*Ex parte* decree—Application by decree-holder for withdrawal of amount deposited is not in execution. A I R 1928 Mad 296 = (1927) M W N 835=54 M L J 452=27 L W 661.

—Where, in accordance with the terms of a *Razinama*, the wife is to wear certain jewels and, at other times, they should be in the husband's custody, and a suit was brought to recover them from the husband by the wife, the suit is not barred by s. 47. Civ Pro Code. 1912, 1 M W N 166.

—(b) Objection to execution:—The objection that a decree is void as it was passed

C. P. C. (1908) S. 47 (Contd)

(30) Separate Suit when lies—(Contd)

after the death of a person without impleading his heirs does not relate to execution and can be raised by separate suit. A I R 1931 All. 490 = Ind Rul (1931) All 812 = (1931) A L J 715 = 134 I C 236 F. B

—No Court of execution can entertain the objection that the decree under execution is inoperative in law. Where a plaintiff asked for a declaration that a certificate which was made by the Revenue authorities against her was entirely without jurisdiction: *Held*, that this was not a question within the scope of S. 244 of the Civil Procedure Code of 1882 and that the suit was maintainable. 14 C L J 50 = 101 C 532.

—Satisfaction of decree—Suit to restrain execution is maintainable. A I R 1925 Lah. 54 = 79 I C 125.

—Suit contesting validity of the decree under execution is maintainable. 54 A 25 (38-9-45) (F. B.)

—Judgment-debtor—Purchaser of property of, in execution of a money decree pending attachment before judgment of same in another suit—Decree in latter suit—Execution of—Resistance by such purchaser of—Objection by decree-holder that decree in execution of which such purchaser purchased was fraudulent and collusive and that purchaser was mere benamidar—Decision of—Executing Court's duty as to—Reference of decree-holder to a separate suit—Propriety of. The purchaser having, as the representative of the judgment-debtor, rightly intervened under S. 47, it was incumbent on the executing Court to adjudicate upon the objection raised by the decree-holder. The words of para. 1 of S. 47 are imperative and vest no discretion in the Court. 63 M L J 941 = 36 L W 844 = (1932) M W N 1335.

—(c) *Suit by defaulting purchaser for recovery of amount realized from him for deficiency in price on resale* :—S. 47 (1), Civ. Pro. Code, 1908, does not bar a separate suit by a person who, as defaulting purchaser in a Court-sale, was ordered to make good the deficiency in price that resulted in consequence of a re-sale, for setting aside the order and for recovery of the sum of money realised from him on account of such deficiency. 7 N L R 134 = 12 I C 360.

—But no suit lies for compensation for breach of terms of compromise decree O. XXI r. 32 r. 34 apply. 24 M L T 34 = (1918) M W N 333 = 7 L W 663 = 45 I C 689. See also 45 I C 864 = 46 Cal 102 = 22 Cal W N 851 = 27 Cal L J 506.

—(d) *Suit for damages* :—Suit for damages for breach of agreement to certify pay-

C P C (1908) S. 47 (Contd)

(30) Separate Suit when lies—(Contd)

ment lies. A I R 1923 Rang. 88 = 11 L B R 429 = 1 Bur L J 207 = 70 I C 115.

—Decree for endorsement of promissory notes by defendant to plaintiff—Failure of defendant to comply with decree—Notes barred in consequence—Remedy of plaintiff—Fresh suit for damages—Maintainability. See (1918) M W N 333.

—(e) *Suit for declaration* :—Where person conducts a litigation as agent of another, and the suit on being compromised takes a promissory note in his name, and sues on it and obtains a decree, a suit for a declaration that the plaintiff is the actual decree-holder is not barred by s. 9 or s. 47 of the C P C. A I R 1931 Rang 24 = Ind Rul (1931) Rang 110 = 130 I C 366.

—Co-sharer's suit against manager for share of revenue decreed—Revenue suspended subsequently—Co-sharer still executing decree—Rent remitted by Government—Suit by manager for recovery of remitted rent and declaration of co-shares's rights in remission year is not barred. A I R 1930 Bom 132 = 31 Bom L R 1415 = 51 B 162 = 124 I C 225.

—Where under the terms of a partition decree plaintiff one of the co-sharers of a village got the exclusive right of the realisation of rent from the pro-forma defendants who were tenants of the village and the plaintiff brought a suit for a declaration that he was exclusively entitled to the rents payable by the proforma defendants and asked for a decree for a refund against the principal defendants for the rents wrongfully realized by them *Held* that the suit was not barred under S. 47 of C P C as it was not one relating to execution satisfaction or discharge of the partition decree 90 I C 739 distinguished.

A I R 1933 P 296.

—Suit on mortgage—Suit by exonerated party claiming paramount for the declaration of title and alternatively for possession is not barred. A I R 1927 All 378 = 49 A 379 = 25 A L J 253 = 100 I C 495.

—Objection to attachment dismissed for default, Decree satisfied—Suit for declaration of title lies. 60 I C 516 (Lah).

—Where a person was expressly excluded from the former suit he was not party to the decree, and that, on the findings of fact as to the family conspiracy, S. 47 did not apply and so a separate suit is maintainable. 52 I C 187.

—A usufructuary mortgagee who was also a co-sharer brought on a sale by the mortgagor, a suit for pre-emption without asking for possession, obtained a decree and paid the money into court which was received by the vendees. The decree was never executed *Held*, that the plaintiff himself being in possession *qua* mortgagee, it was not necessary for him to seek any further relief

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(30) Separate Suit when lies—(Contd)

in execution of the preemption decree under O 21 R 36 of C P Code and that a suit for declaration of his title is not barred by S. 47 of the Code *Held*, further, that when the money was deposited under the decree and the same was taken away by the vendee he became the full owner of the property and no title remained with anybody else. 12 A L J 521 = 23 I C 876.

—A suit for a declaration that the properties belong to the plaintiff's judgment-debtor is not maintainable whether the execution petition has been dismissed on the ground that the defendant is not the legal representative of the deceased judgment-debtor. Such a suit can lie only if a declaration that the defendant is such legal representative has been prayed for. (1912) M W N 401 = 15 I C 224.

—A money decree was obtained against the heirs of one N. Some of the heirs subsequently transferred their interest in the disputed property to K and it was found that the transfer was *bona fide* and for value. In a suit by the heirs of K for declaration of title and recovery of possession on the ground that the property under attachment having been sold to K could not be attached in execution of the decree: *Held*—That the suit was not barred. 15 C W N 711 = 9 I C 307.

—But a suit for declaration that decree had been fully satisfied and for injunction restraining execution is not maintainable under s. 47. A L R 1934 L 18

—Partnership—Decree against—Application under O. 21, r 50 (2) pursuant to—Partner not served in suit not disputing his liability in—Suit by, for declaration that decree is not binding on him—Maintainability, See 34 B L R 1112 (1121-2).

—Auction purchaser—Declaration of title and possession—Suit for—Plea in that decree was against predecessor-in-interest of defendant and that in execution of same the property which had been purchased by defendant could not be proceeded against—S. 47 is a bar to, in absence of proof that defendant had been kept out of knowledge of execution proceedings until after suit had been brought by fraud of decree-holder or judgment-debtor. 59 C 1242 (1245-6) = 55 C L J 394 = A I R 1932 C 825 = A L R 1932 C 601.

—Possession decreed but not obtained—Suit for declaration of title is barred A I R 1922 Pat 407 = 1 Pat 157 = 87 I C 251.

—Suit for declaration that decree has been satisfied and is incapable of execution is barred. A I R 1922 Lah 428 (F B) = 3 Lah 319 = 67 I C 593.

—A suit for a declaration that a decree obtained by the deft. against the plff. was

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(30) Separate Suit when lies—(Contd)

satisfied and for an injunction restraining the deft. from executing the decree is barred by S. 47 (1) of the C P Code. An objection to the maintainability of a suit can be allowed to be raised for the first time in second appeal, if it does not involve the ascertainment of any fresh facts. 31 M L J 429 = 36 I C 988.

—(f) Suit for occupancy rights :—Sale to tenant of proprietary right set aside—Suit by tenant for occupancy rights is not barred as it is under different title. A I R 1922 Lah 44 = 4 Lah L J 400 = 67 I C 485.

—(g) Suit for partition :—Power maintainable, member of joint Hindu Family—Decree Holder purchaser—Suit for partition—Competent. See 1 Lah 134 = 1 Lah L J 10 = 56 I C 254.

—In execution of a decree against one of the co-owners, his interest was purchased by the decree-holder and the Plaintiff his assignee instituted a suit for partition making the judgment-debtor and the other co-owners parties. It was contended that the suit was barred by S. 47 C P C formal delivery not having been taken through court under S. 311 C P Code. *Held*, that plaintiff had a complete title under S. 65 and O. 21, R. 94 and S. 47 did not bar the suit. 28 M L J 642 = (1915) M W N 414 = 29 I C 976.

—(h) Suit for possession :—Delivery of possession to decree-holder auction-purchaser of property purchased by him is not a matter relating to execution within s. 47. Hence a separate suit for recovery of possession lies A I R 1931 Pat 241 = 12 P L T 423 = Ind Rul (1931) Pat 337 = 10 Pat 670 = 133 I C 337 F B. overruling 6 P L T 351.

—Suit against a tenant for arrears of rent by co-sharer landlord decree executed as rent decree. The holding was sold and purchased by third party without objection by co-sharers on partition holding allotted to co-sharers suit by them to recover possession of property alleging that the purchase was *benami* for the co-sharers landlord and that the decree obtained was a money-decree and did not operate to convey the holding to the third party. *Held*, that the suit was not barred by s. 47. A I R 1930 Pat 150 = Ind Rul (1929) Pat 610 = 119 I C 882.

—Partition suit—Property declared as subject to mortgage—Separate suit by co-sharer for possession is not barred. A I R 1928 Mad 474 = 106 I C 507.

—Son of the original owner was defendant in previous suit and plaintiff obtained a decree against the right, title and interest of the other defendant only in the suit properties and sons, title not investigated and decided, the plaintiff auction-purchaser is



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(30) Separate Suit when lies—(Contd.)

not entitled to an order for actual possession but to symbolical delivery as against the defendant who was not himself in possession. After obtaining symbolical delivery a subsequent suit by him for actual possession against son is not barred by s. 47. (1930) M W N 1051.

—Judgment-debtor's suit to recover property not liable to be sold against stranger auction-purchaser is not barred. A I R 1926 All 730=96 I C 771.

—Decree for possession—Possession obtained in another—Subsequent cause of action owing to dispossession—Second suit lies for possession. A I R 1926 Oudh 263=91 I C 14.

—Two judgment-debtors—One only proceeded against in execution—Suit by other after auction for recovery of property from auction-purchaser is maintainable. A I R 1926 Nag 68=8 N L J 184=91 I C 218.

—Decree-holder purchaser can sue for possession. A I R 1924 Bom 527=26 Bom L R 843=86 I C 503.

—Auction-purchaser taking possession of property not sold to him—Separate suit lies. A I R 1925 Pat 376=6 P L T 473=(1925) Pat 37=86 I C 648.

—A suit for restoration to joint possession granted by a decree lies when it is disturbed. A I R 1924 Nag 345=78 I C 390.

—Suit against auction-purchaser for recovery of property on ground that judgment debtor had no interest in it is maintainable. L R 4 A 526=75 I C 238.

—Auction-purchaser surrendering land to decree-holder—Decree-holder can sue for possession. 63 I C 762.

—Suit for possessions against persons who are not parties or their representatives is not barred. A. I R 1923 Bom 450=25 Bom L R 494=73 I C 402.

—Decree-holder purchaser obstructed from getting possession by judgment-debtor and stranger—Suit lies. 44 B 977=22 Bom L R 1101=59 I C 366 (2).

—Questions relating to the possession of property purchased by the decree-holder in execution of a decree are not questions relating to the execution, discharge or satisfaction of the decree within S. 47 C P C and a suit for the recovery of possession of the same is not barred by S. 47. 4 Pat L J 716=(1919) Pat 354=52 I C 711.

—An auction-purchaser, even when he is the decree-holder himself, is not bound under O 21 R 95 of the C P Code to apply for recovery of possession of the property purchased under S. 47 of the Code, but may

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(30) Separate Suit when lies—(Contd.)

maintain a separate suit for recovery of the property purchased 35 I C 468; 1 Pat L J 232 rel. 50 I C 299.

—A suit by an auction purchaser for the recovery of possession of property which he has purchased at an auction sale which has been confirmed, is not a suit which is barred under S. 47 of the C P Code. 47 I C 844.

—Delivery of symbolical possession is operative against the judgment-debtor who from that date becomes a trespasser and the remedy of the decree-holder who has failed to get actual possession is by suit. 20 C W N 675=23 C L J 587=35 I C 294.

—Decree-holder purchasing property at auction-sale can maintain a suit to recover possession from judgment-debtor and another who claimed the property. 44 Bom 977=59 I C 366=22 Bom L R 1101. dissenting from 35 B 452; and approving 31 A 82.

—Attachment of property in execution of decree—Custodian—Release of attachment—Remedy of Judgment debtor against custodian for non restoration—see 42 All 394=18 A L J 357=58 I C 448.

—A third person preferred a claim to property attached in execution of respondent's decree and it was allowed. The judgment debtor sued to set aside the settlement which was the basis of the claim and obtained a decree for possession. He then sold the property to the appellant. The respondent having re-attached the property, appellant put in a claim and having failed in it he filed a separate suit for possession. Held that the first attachment was not revived as the result of judgment debtor's suit and that the appellant's suit was not barred by s. 47 of the C P Code. 44 I C 864.

—S. 47 of the C P Code has no application to a suit brought by a decree-holder who has with the permission of the executing Court purchased the property of the judgment-debtor sold in execution of his decree for recovery of possession of that property on the strength of the sale to him; nor is such a suit barred because the plff had failed to avail himself of the summary remedy provided by O 21 R 95 of the C P Code of having sought the remedy has been unsuccessful, such summary remedy being concurrent with his remedy by separate suit. 8 P R 1918=27 C L J 535=44 I C 159.

—Redemption suit by puisne mortgagee against prior mortgagee and against mortgagor for possession—Subsequent suit against mortgagor alone—Suit not one relating to execution discharge or satisfaction. See 22 I C 396.

—Decree for possession—Dispossession of third person—Suit to be brought—No appeal. See 101 P L R 1917.



C. P. C. (1908) S. 47 (Contd)

## (30) Separate Suit when lies—(Contd)

—Question relating to possession of property after execution sale, not within S. 47.  
18 O C 345.

—The fact that the auction-purchaser happens to be the decree-holder does not seem to affect the consideration whether or not the suit raised a question relating to the execution of the decree. Some such suit may raise a question relating to the execution, discharge or satisfaction of the decree; for example, a question whether the property of which possession is sought was or was not sold or the nature of the rights which were brought to sale. It may be that in a suit such points cannot be determined. It does not follow that all orders passed on applications under r. 95 decide questions which have some reference to the execution of the decree, much less does it follow that the decree-holder who did not wish to avail himself of the provisions of r. 95 but filed a separate suit which raised no question relating to the execution of the decree was in some way to be considered to be agitating such a question. A I R 1932 N 140 = 28 N L R 250.

—Where a money decree was obtained against some of the defendants to a suit and the other defendants were exonerated, and the latter were members of a joint family with the former and the decree-holder attached what he alleged to be the shares of the defendants against whom the suit had been decreed and one of the exonerated defendants applied by a petition under O. 21 R. 58 that the properties attached were his separate properties, which petition was dismissed as too late, and properties were sold in Court auction, and the auction-purchaser sued for partition against the exonerated defendant and others, held, that the defendant not having appealed against the order or filed a separate suit under O. 21 R. 63 of the C. P. C. is precluded from claiming the properties as his separate properties. 37 M L J 624 = 54 I C 536.

—But where the plaintiff brought a suit claiming a property from one defendant, and failing to get possession, he brought a fresh suit to get that property from another defendant, held that though that particular property was not claimed from him in the former suit, the latter suit was barred by s. 47 because the parties were parties in the former suit and the property was one of the matters in dispute in it. A I R 1931 Bom 114 = 32 Bom L R 1473 = Ind Rul (1931) Bom 209 = 129 I C 737.

—Delivery of possession under partition decree is a matter relating to execution, No suit lies even if there was mistake in the

C. P. C. (1908) S. 47 (Contd)

## (30) Separate Suit when lies—(Contd)

map attached to decree proper remedy is review or amendment. A I R (1931) Pat 296 = 12 P L T 466 = Ind Rul (1931) Pat 366 = 133 I C 366.

—Decree and execution against legal representative—Suit by one of them to recover possession barred. See 14 A L J 846.

—Where a benamidar purchases a property in execution of a mortgage decree the mortgagee is not a necessary party to a suit to recover possession. Such a suit is not barred by S. 47 C. P. C. as the purchaser is not the decree holder but a third party. The purchase by the mortgagee (benamidar) without leave of court is not void. Purchase is liable to be set aside. 56 I C 349 = 44 Bom 352 = 22 Bom L R 296.

—Decree not executed for three years—Possession over property obtained—Subsequent suit for possession if maintainable. see 38 All 509 = 14 A L J 709 = 35 I C 671.

—(i) Suit for priority:—Prior mortgagee's decree paid by plaintiff—His suit for obtaining priority is not barred. A I R 1925 Mad 129 = 20 L W 651 = 35 M L T 112 = 82 I C 846.

—Executing Court cannot go behind the decree and allow the judgment-debtor to put up paramount title pending mortgage suit by puisne mortgagee prior mortgagee a party filing suit on his mortgage—Property sold in execution of the decree of the later mortgage—Purchaser under the prior mortgage claiming priority, held that the purchaser could not raise the plea in execution but should file a separate suit. A I R 1930 All 826 = (1930) A L J 1135.

—(j) Suit for profits:—Attachment and sale of profits of land—Right of purchaser to institute fresh suit for profits. See 33 I C 83.

—(k) Suit for redemption and account:—Compromise decree in suit on usufructuary mortgage providing that mortgagor should pay amount within certain time and recover possession by taking out execution payment but mortgagor after time fixed execution for possession dismissed as barred by time—Suit by mortgagor for redemption is not barred under s. 47. A I R 1930 Mad 305 = 31 L W 44 = 53 M 805 = Ind Rul (1930) Mad 520 = 123 I C 584.

—Redemption of mortgage—Previous decree merely declaratory of plaintiff's rights—Subsequent suit for redemption is not barred. A I R 1927 Oudh 457 = 4 O W N 882 = 105 I C 93.

—A mortgagor who has brought a suit for redemption and obtained a decree nisi which neither the mortgagor nor the mortgagee has applied to be made absolute, can, after the execution of that decree is time

C. P. C. (1908) S. 47 (Contd)

(30) Separate Suit when lies—(Contd)

barred bring a fresh suit for redemption. 43 Bom 334=21 Bom L R 56=49 I C 894 (F B).

—Where a puisne mortgagee was a party to the suit by the prior mortgagee and a decree was passed under S. 88 of the T P Act which made no mention of the puisne mortgagee's right to redeem and the property was sold privately after order absolute and the puisne mortgagee brought the present suit for redemption. *Held*, that the suit is not barred by S. 47 as the prior decree did not provide for the working out of the rights of the puisne mortgagee. (1918) M W N 902 = 49 I C 466.

—A mortgagee sued for recovery of possession of immoveable properties mortgaged by right of *ijara* and obtained a decree for possession, with a right to be in possession thereof so long as the moneys for which the properties were mortgaged were not repaid out of the income arising from them. *Held*, that this was a decree in a suit for ejectment and that a separate suit for redemption was not barred by S. 244 C P Code 1882. 19 C W N 1132 = 33 I C 59.

—Suit for Redemption—Prior decree in mortgagee's favour for possession—Order in execution of decree directing mortgagee to furnish accounts—Subsequent suit for redemption by mortgagor, not barred. See 19 C W N 1132 = 33 I C 59.

—Accounts between Mortgagor and mortgagee must be determined in suit and not to be left to execution. See 5 L W 339.

—Final decree for sale passed in suit on mortgage, but not executed for more than 3 years, S. 47 does not prevent mortgagor from suing for redemption. A I R 1925 Mad 1191 = 86 I C 527.

—In a suit for sale of the mortgaged property the decree passed did not comply with the provisions of the T P Act, S. 88; for no day was fixed by the High Court on which payment might be made within six months from the date of declaring in Court the amount due. In execution of the decree the mortgaged properties were attached, sold and purchased with the permission of the Court by the mortgagee decree-holder, and the sale was duly confirmed. The mortgagor subsequently brought the present suit to redeem the mortgage. *Held*, that the question now raised could have been raised before the sale was confirmed and is so raised, would have been determined by the Court executing the decree, and that the present suit was barred by S. 244 of the C P Code of 1882. 41 Mad 403 = 22 C W N 553 = 34 M L J 463=(1918) M W N 310=8 L W 427=4 Pat L W 310=20 Bom L R 580=16 A L J 353 = 23 M L T 198=27 C L J 367 = 44 I C 855 = 45 I A 54 (P C).

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(30) Separate Suit when lies—(Contd)

—(l) *Suit to enforce a decree not capable of being carried out in execution* :—Prior declaratory and unexecutable decree does not bar subsequent suit. A I R 1923 Cal 252=36 C L J 101 = 70 I C 427.

—(m) *Suit to enforce liability of a depository of property for default* :—The Liability of a depository of property attached in execution of a decree who has made default, cannot be enquired into by the executing Court but must from the subject of separate suit. 47 I C 956.

—(n) *Suit to enforce liability of surety under bond* :—The liability of a surety under his bond for the performance of any decree or for the restitution of any property taken in execution of a decree can be enforced by a separate suit. It is not necessary to resort to execution alone. 36 Bom 42=13 Bom L R 909 = 12 I C 549.

—(o) *Suit to set aside or nullify a decree* :—A claim for deduction of something from a decree, and in so far nullifying its effects, cannot be made, under S. 47 of the Civil Procedure Code, by the judgment-debtor. A mortgage-decree was obtained against the mortgagor who having died, his widow was substituted. She put forward a claim that she was entitled to the property independently of her husband for whom she was substituted, and under a title derived from her father and her uncle and she prayed that the property should be exempted from execution sale : *Held* that, the claim could not be made under S. 47. 14 I C 7.

—Where the question is either that a decree was passed against a dead person or was not passed against him at all and therefore it is a nullity, pure and simple, the dispute does not relate to the execution of the decree but aims at its utter destruction. The dispute as to the execution of a decree contemplates the existence of a valid decree. Where a decree is without jurisdiction or is otherwise utterly null and void, and can therefore be ignored by a person, his protest is not merely as to its execution, but he impeaches the decree itself. Such a dispute is not within the purview of S. 47 at all. 54 A 25 (38-9, 45) = 1931 A L J 715=A I R 1931 A 490 = 134 I C 236 (F B).

—A regular suit lies to set aside an *ex parte* decree obtained by fraud. 55 I C 412

—Property of plff attached in execution—Subsequent suit for declaration that decree a nullity—Maintainability. See 17 All L J 257 = 50 I C 109.

—(p) *Suit to set aside sale* :—S. 244 did not apply to a suit to set aside a decree and sale there under on the ground that they had been obtained by fraud. 27 M L J 100 = 42

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(30) Separate Suit when lies—(Contd.)

Cal 244 = 18 C W N 1029 = 1 L W 549 = 16 M L T 210 = (1914) M W N 636 = 12 A L J 1176 = 20 C L J 360 = 16 Bom L R 845 = 24 I C 50 (P C).

—In execution proceedings held before a Collector, when once an application is made, within the time limited by law to the Collector to set aside the sale, the Collector is bound to refer the application to the Court under Civil Circulars. As soon as the application is so made to the Collector all his powers of confirming the sale are suspended until the application has been disposed of. If the Collector, notwithstanding the reference of the application to the Civil Court, proceeds to confirm the sale it is open to the judgment debtor to file a suit to set aside the sale, when the auction purchaser is a third party 44 Bom 551 = 22 Bom L R 759 = 57 I C 440

—Minor judgment-debtor not properly represented—Sale void—Suit by minor to set aside sale not barred by S. 47 See 28 M L J 525.

—Sale duly confirmed and absolute under O. XXI, r. 92, remedy to set aside is by suit. A I R 1922 Mad 63 = (1922) M W N 121 = 15 L W 272 = 70 I C 569.

—But where application to set aside sale under O. XXI, r. 90, dismissed no suit for cancellation of the sale can lie on ground covered by r. 90. A I R 1929 Nag 130 = 25 N L R 58 = Ind Rul (1929) Nag 241 = 118 I C 49

—So also a suit for a declaration that auction sale was null and void, as auction-purchaser, the liquidator of the decree-holder Bank was not competent to purchase any property as liquidator is barred under s. 47 A I R 1928 Lah 666 = 108 I C 606.

—Decree not impeached—Suit to set aside sale does not lie. A I R 1921 Pat 54 = 6 Pat L J 16 = 2 P L T 66 = 61 I C 126.

—Where an objection to a sale in execution of decree is allowed, the decree-holder if aggrieved thereby has his remedy by way of appeal and second appeal and if he omits to appeal the order of the executing Court is final and binding upon the parties. S. 47 of the C P Code forbids the institution of a regular suit to avoid the consequence of such an order. 17 A L J 832 = 1 U P L R (HC) 99 = 51 I C 184.

—A separate suit does not lie upon an uncertified adjustment for setting aside an execution sale. No relief which is meant to interfere with the execution of a decree can be asked for in a suit based upon an uncertified adjustment. A decree confirming possession obtained out of Court under an

C. P. C. (1908) S. 47 (Contd.)

(30) Separate Suit when lies—(Contd.)

uncertified adjustment of another decree stands on the same footing as one granting an injunction restraining execution, and a suit praying for such a declaration would, therefore, be barred under S. 47 of the C P Code. 15 N L R 158 = 50 I C 956

—Where a decree is passed against the representatives of a deceased person as such representative, and as being in possession of the estate of the deceased, and property forming part of estate is sold in execution of the decree, the judgment-debtor cannot bring a suit to recover the property without getting the sale set aside. 40 P L R 1918 = 30 P W R 1918 = 43 I C 712.

—In an execution proceeding transferred to a Collector under S. 68. C P Code, 1908, the property attached was sold at auction and purchased by the decree holder. After the confirmation of the sale the judgment-debtors presented a petition to the Collector asking that the sale should be set aside on the ground, *inter alia* that the decree holder has fraudulently kept them in ignorance of the pendency of the execution proceedings. The objection having been overruled the judgment-debtors instead of filing an appeal to the Commissioner, as provided by S. 45 by the Rules of the Local Govt. (U. Provinces Gazette 1911) made in this behalf, filed a Civil Suit for the recovery of the property. *Held*, that the suit was barred by O. 21, R 92, cl. (3) of the C P Code or the corresponding provisions of cl. (3) of R 32 of the rules made by the Local Govt. *Held*, also that the suit could not be treated as an application under, S. 47. C P Code, as the Court in which the suit was instituted was not the Court executing the decree at the time when the decree was made over to the Collector. 35 I C 473.

—S. 47 is no bar to a suit to set aside a sale held in execution proceedings which were fraudulent. A suit for a declaration that the sale in execution proceedings which were fraudulent cannot affect the rights of the plaintiff in respect of the property sold is not barred by limitation though brought beyond the period of limitation provided for the setting aside of auction sale. 24 I C 695.

—In a suit to set aside a revenue sale for fraud a compromise was entered into by which the defendant agreed to execute a *kobala* within 3 months and in default the plaintiff was to get the same executed by court. In a suit after 3 years for declaration of title and for getting a *Kobala*: *Held*, that the suit was not maintainable. The plaintiff must either sue again to set aside the revenue sale for fraud or execute the decree both of which were barred. 23 I C 240.

31  
C. P. C. (1908) S. 47 (Contd.)  
(30) Separate Suit when lies—(Concl'd)

—The question whether the actual execution of a decree is in excess of the decree itself is one relating to execution. Therefore the question that a sale in execution of a mortgage-decree was invalid, on the ground that it was not warranted by the terms of the decree, cannot be raised in a separate suit. 10 M L T 527 = 1912, 1 M W N 44.

—Where an auction-sale was impeached on the ground that the attachment was not properly levied and the sale proclamation had not been served. *Held*, that an application to set aside a sale, on the ground that a notice under s. 248 of the Civ. Pro. Code, 1882, had not been served, could not be made under s. 311 of the said Code, when the validity of the sale was not attacked on the ground that there was irregularity in the publication or conduct of the sale. 13 C L J 162 = 9 Ind Cas 584.

(31) Separate suit does not lie.

—(a) *General* :—Fresh suit relating to execution is barred under s. 47 where plaintiff and defendant have been parties in former suit. A I R 1931 Bom 114 = 32 Bom L R 1473 = Ind Rul (1931) Bom 209 = 129 I C 737.

—With regard to the custody of the property, a *Sapurdar* cannot incur any expenses personally. The expenses incurred by him must come either out of the pocket of the decree-holder or the judgment-debtor. If the judgment-debtor loses the main case any cost of the custody of the property in question incurred by the *Sapurdar* will have to be borne by the judgment-debtor himself. If he could claim a deduction of the rent due for the use of his premises against the decree-holder when the latter takes possession of the property or its proceeds in satisfaction of his decree. In view of the provisions of 47 S. C P C a separate suit by the judgment-debtor against the *Sapurdar* is not competent. 1932 P C L 158 (Civ) (161) = 33 P L R 334 = 136 I C 268 = A I R 1932 L 324 = I R 1932 L 320 = A L R 1932 L 158 (Civ.).

—Part of property in former suit claimed in separate suit against other co-defendant—Suit is barred. A I R 1931 Bom 114 = Ind Rul (1931) Bom 209 = 32 Bom L R 1473 = 129 I C 737.

—Questions arising in enquiry under s 52 (2) are questions arising between parties to suit relating to execution—Separate suit does not lie. A I R 1927 Rang 127 = 5 R 44 = 101 I C 431

—Procedure under s. 47 and O. XXI, r. 103 is not cumulative and aggrieved party cannot at his option proceed by suit or

C. P. C. (1908) S. 47 (Contd.)  
(31) Separate Suit does not lie—(Contd.)

appeal. A I R 1925 Mad 1198 = 51 M L J 106 = (1926) M W N 599 = (1925) M W N 577 = 90 I C 952.

—Order under O. XXI, r 71 comes within s. 47. Separate suit is barred. A I R 1925 Oudh 360 = 12 O L J 80 = 2 O W N 141 = 29 O C 18 = 87 I C 284.

—Executable decree—Fresh suit for same relief is barred. A I R 1925 P C 34 = 23 A L J 717 = 48 M L J 20 = 6 L R P C 23 = 27 Bom L R 166 = 21 L W 286 = 52 I A 79 = 52 C 314 = 29 C W N 633 (P C) = 86 I C 245.

—Executable judgment—Suit is barred. A I R 1925 Mad 279 = 48 M 482 = 47 M L J 829 = 21 M L W 75 = 85 I C 991.

—O. 21 R. 103 of the C P Code which gives a right of suit to a party who is not a Judgment-debtor, is not restricted by the general provisions of S. 47. 52 I C 928.

—A decree in favour of Receiver appointed by High Court, under S. 395, of Civil P C—not defendant exonerated but found to be proper party to suit—bound by the decree—separate suit for adjudication of claim barred. A L R 1933 M 236.

—A decree was passed on the following terms :—“It will be established and declared that the sale-deed executed by defts. Nos. 2 and 3 in favour of debt, No. 1 is not binding upon the plff; possession will be delivered to the plff. by dispossession of debt. No 1 on condition of paying into Court Rs. 66 within one month; in case of default the plff's suit will stand dismissed.” A schedule of costs was given on the assumption that the money would be paid in time. *Held*, that under the decree as it stood, the debt. was not entitled to execution for costs. 31 I C 564.

—(b) *Allegation of misappropriation of moveables attached* :—Allegations of misappropriation of attached moveables by the decree-holder acting in collusion with the Court *amin* should be enquired into under S. 47, C P Code, and the party complaining should not be referred to a separate suit. 1 Pat L J 558 = 36 I C 280.

—(c) *Fresh suit where execution is barred* :—In view of S. 47 a second suit on the basis of a former decree is not maintainable : 18 A L J 1001 = 59 I C 632. Overruling 14 A L J 102.

—A suit which is practically an attempt to enforce the decree by suit which has become unexecutable by efflux of time is not maintainable. 2 Lah L J 724.

—(d) *Objection to attachment and sale* :—Objection to attachment under s. 10—Suit is barred if objection is dismissed. A I R 1930 Lah 928 = 31 P L R 191 = Ind Rul (1930) Lah 890 = 127 I C 858.

C. P. C. (1908) S. 47 (Contd)

(31) Separate suit does not lie—(Contd)

—Objection to sale of ancestral land on ground of want of sanction required under s. 20, Oudh Laws Act—Separate suit is barred by s. 47. A I R 1930 Oudh 256 = 7 O W N 140 = Ind Rul (1930) Oudh 293 = 125 I C 165.

—The plff's suit for a declaration that the property attached by the decree holder was his and not the judgment debtor's was dismissed as barred under S. 47 of the C P. Code on the ground that the plff. being a deft. in the suit in which the decree was passed was not entitled to file the declaratory suit but that his remedy was to appeal against the order disallowing his objection to the attachment of the property. It appeared that in the original suit the present plff. had been impleaded as a deft. in the capacity of an heir to the person against whose estate relief was claimed but the court found that he was not an heir and the suit against him was dismissed. *Held*, that the suit was barred: 241 P W R 1915 = 25 P L R 1915 = 28 I C 14.

—The objection of two Hindu widows to the sale of certain house property without reserving rooms for their residence having been disallowed, they filed a declaratory suit to establish their right. One of the widows was a party to the decree in execution of which the houses were sought to be sold. *Held*, that the plaintiff who was a party to the decree was not competent to file the suit, for S. 47 of the C. P. C. lays down that the execution court only is competent to determine the claim. 19 I C 921 = 134 P L R 1913.

—(i) Question whether a transferee of a decree is entitled to execute it:—The question whether a transferee of a decree is entitled to execute it is one falling within S. 47 C. P. Code and no separate suit will lie for a declaration of that right. Where one of two judgment-debtors obtains a transfer of the decree he cannot execute it. 26 I C 944 = 2 L W 109.

—(k) Suit based on agreement not to execute decree.—Anomalous agreement not to execute—Suit based on such agreement is barred by s. 47. A I R 1931 Mad 26 = Ind Rul (1931) Mad 363 = 130 I C 187.

—(l) Suit based on pre-decretal agreement for recovery of money realised in execution:—A suit based on a pre-decretal agreement for recovery of money realised in execution of the decree is barred by s. 47. A I R 1931 Mad 26 (2) = Ind Rul (1931) Mad., 363 = 130 I C 187.

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C. P. C. (1908) S. 47 (Contd)

(31) Separate suit does not lie—(Contd)

—(o) Suit for questioning validity of execution proceedings:—Such suit is not maintainable: 24 W R 45 see also 3 O L J 756 = 38 I C 461.

—The omission to comply with the provisions of O. 21, R. 16 C. P. C. makes all subsequent proceedings void. The question of the irregularity or illegality of the notice issued under O. 21 R 16 and its effect is one arising between the parties to the suit and could have only been properly determined under s. 47 C P C. A separate suit to declare that certain execution proceedings are void for non-compliance with O. 21, R. 16 C P. is not maintainable. 56 I C 461.

—(p) Suit for rectification of security bond and repayment of money:—Attachment of fixed deposit in Bank before judgment belonging to F or M—Security bond executed by N for fixed deposit—S succeeding in suit and recovering the amount under the bond—M suing for rectification of security bond and repayment of money by S—It was held that the suit was not maintainable. A I R 1930 P C 86 = 58 M L J 275 = 34 C W N 425 = 51 C L J 253 = 32 L W 43 = Ind Rul (1930) P C 91 (P C) = 122 I C 11.

—(q) Suit seeking relief granted in a previous decree:—Subsequent suit is barred by s. 47 if previous decree granted relief sought in subsequent suit. A I R 1925 Mad 1260 = 22 L W 195 = 91 I C 338.

—(u) Suit to enforce claims under a partition decree:—Where in a suit for partition and account between co-sharers, the liability of some of the debts is determined and a decree is passed, against them not only in favour of the plff, but also in favour of one of the debts, in that suit a fresh suit cannot be maintained by that deft for enforcing his claim under that decree. The remedy of the deft, is by way of execution of the decree and not by another suit. 57 I C 900.

—(v) Suit to enforce decree in money—suit creating charge on immoveable property:—Decree in money suit creating charge on immoveable property can be executed without separate suit. A I R 1930 Nag 17 = Ind Rul (1930) Nag 7 = 120 I C 218.

—(w) Suit to realise property given as security by judgment-debtor:—Is not maintainable: 34 M L J 84 = 1917 M W N 872 = 6 L W 762 = 43 I C 187 = 41 M 327.



C. P. C. (1908) S. 47 (Contd)

(31) Separate suit does not lie—(Conclud)

—Mortgage bond given as security under O XLI, r. 6 can be enforced in execution by Court passing decree—Separate suit or attachment is unnecessary. A I R 1930 Pat 108 = 8 Pat 801 = Ind Rul (1930) Pat 410 = 124 I C 90.

(32) Stay of Execution.

—Order staying or refusing stay is not a matter within s. 47 and is not appealable as decree. A I R 1931 Rang 221 = Ind Rul (1931) Rang 267 = 9 R 354 = 133 I C 491. (contrary view in 10 L B R 1326 = 62 I C 342 does not represent the Rangoon view) See to the same effect. —A I R 1926 Cal 830 = 94 I C 352; and A I R 1929 All 85 = 26 A L J 1325 = 112 I C 620. and A I R 1924 All 808 = 46 A 733 = 22 A L J 706 = L R 5 A 482 Civ = 83 I C 1035. and A I R 1924 All 794 = L R 5 A 573 Civ = 80 I C 39. and A I R 1922 Lah 410 = 68 I C 49. and 22 Bom L R 1212 = 59 I C 523 = 45 B 241 = 1921 B 208. and 55 I C 228 = 25 C W N 555. and 20 C L J 512 = 27 I C 444. and 25 I C 47 = 27 M L J 171. and 1925 Rang 225 = 4 Bur L J 61 = 3 Rang 255 = 88 I C 740. and 106 I C 890 = 1928 Notes 23 (E); and 106 I C 866 = 1928 Notes 26 (E).

—Contrary view was taken under the old Code in 14 C L J 489 = 12 I C 745; and 31 C 373; and; 245 A W N 1888.

—The Lahore High Court, however, holds that order staying execution of a decree till decision of the appeal is appealable as a decree. A I R 1930 Lah 187 = Ind Rul (1930) Lah 541 = 11 Lah 402 = 31 P L R 617 = 124 I C 249. See to the effect A I R 1924 Lah 602 = 76 I C 174. and A I R 1924 Lah 671 = 75 I C 1001. and A I R 1925 Lah 69 = 75 I C 789. and A I R 1923 Lah 514 = 75 I C 419. and A I R 1922 Lah 480 = 68 I C 751. and A I R 1924 Lah 631 (631) = 75 I C 615; and 1927 Lah 915 = 9 Lah L J 189 = 28 Pun L R 617 = 102 I C 25.

—An order of the executing Court that the decree-holder must first proceed to realize the balance of his decretal money from certain defendants, and on his inability to realise from them, he can proceed against the other defendants, amounts to an order staying execution, and no appeal lies against it. A I R 1931 All 129 (2) = (1931) A L J 895.

C. P. C. (1908) S. 47 (Contd)

(33) Stay of Execution—(Conclud)

—Execution transferred to Collector—Application for stay must be made to Collector—Order by transferring Court—No appeal lies. 1929 B 189 = 52 B 290 = 30 Bom L R 465 = 110 I C 710.

—Stay of execution—Question of sufficiency of security is not under s. 47. A I R 1925 Rang 225 = 4 Bur L J 61 = 3 R 255 = 88 I C 840.

—Interim receiver impleaded as a party to suit in execution—applying under S 52 of the Provincial Insolvency Act for stay of execution—order made thereon—if a decree—right of appeal. see A L R 1933 M 95 = 64 M L J 119 = 37 L W 114 = 141 I C 817 = A I R 1933 M 152.

(33) Subject to any objection as to limitation etc.

—Application under s. 47 must be governed by Art. 181. A I R 1927 Cal 57 = 97 I C 697. See also A I R 1922 Pat 507 = 3 P L T 501 = 1922 P H C C 269 = 77 I C 957 = 2 Pat 65 = 1 Pat. L R 18 = 4 U P L R (Pat) 71 and A I R 1925 Cal 351 = 51 Cal 1014 = 82 I C 322 and 26 I C 46 = 27 M L J 605 = 1 Mad L W 969; and A I R 1924 Mad 137 = 77 I C 631 = 18 Mad L W 780 = 33 Mad L T 137 = 45 M L J 829 = 1924 Mad W N 27 = 47 Mad 525.

—Art. 181 and not Art 165, governs applications which are filed by parties to the suit as objections to the execution proceedings under s. 47. A I R 1929 Oudh 76 = 8 O W N 1053 = 4 Luck 209 = Ind Rul (1929) Oudh 268 = 115 I C 444.

—Art. 138 of Limitation Act cannot override s. 47. A I R 1926 Cal 798 = 43 C L J 345 = 53 C 781 = 30 C W N 649 (F B) = 95 I C 494.

—Plaint not presented to executing Court—Conversion into proceedings was refused in appeal. A I R 1926 Lah 165 = 7 Lah 1 = 27 P L R 258 = 93 I C 1007.

—Party wrongly ordered to file suit—Mistake discovered after 12 years—Conversion was not allowed. A I R 1925 Mad 1198 = 51 M L J 106 = (1926) M W N 599 = (1925) M W N 577 = 90 I C 952.

C. P. C. (1908) S. 47 (Contd)

## ( 34 ) Time-barred Decree.

—Enforcement of decree barred by limitation—Suit does not lie. 2 Lah L J 724 See also cases under s. 11 of C P C (1908)—Execution Proceedings and see. A I R 1921 All 369 = 43 A 170 = 18 A L J 1001 = 59 I C 632; and 1927 Cal 411 = 31 C W N 405 = 101 I C 622 = 54 Cal 524 and A I R 1924 Pat 165 = 71 I C 560; and 9 S L R 148 = 32 I C 634.

—Expiration of time for application see. 25 I C 634 = 10 L J 403.

—An order dismissing for default an application by the judgment-debtor that the decree is barred by limitation is a question within this section. 28 Cal 81 p 83. See also A I R 1927 M 842; and 1929 A L J 480 = 119 I C 510 = A I R 1929 A 287 = 51 A 640.

## ( 35 ) Miscellaneous Cases.

—Collector executing decree transferred to him is not Court. A I R 1925 All 146 = 47 A 217 = 22 A L J 1060 = L R 6 A 89 Civ = 84 I C 1031.

—Fresh suit by puisne mortgagee to recover his mortgage amount—His claim not satisfied in the previous Suit by Prior mortgagee. see 43 Mad 90 = 35 M L J 639 = 24 M L T 473 = 9 L W 70 = (1918) M W N 898.

—Decree—Construction of—Declaratory decree—Mortgage of Nanker rights—Mortgagee's right to enforce payment against Taluqdar. 150 C 99.

—In equity and in law a party is required to pay a Court fee upon the sum for the recovery of which he seeks the assistance of the court in proceedings under S. 47 of the C P Code which are of the nature of a suit. Thus where a decree-holder sues to recover a sum as interest in addition to the sum named in the decree he must pay Court fees on the amount he claims. 52 I C 802 = 5 Pat L J 235 not following 17 B 41.

—Judgment-debtor not object to description cannot do so by application or suit after sale is held. A I R 1930 All 865 = (1931) A L J 49 = Ind Rul (1930) All 749 = 125 I C 765.

—Purchase by decree-holder without obtaining leave to bid or in spite of refusal of leave is not void but voidable. A I R 1922 P C 336 = 3 P L T 529 = 44 M L J 718 = 37 C L J 430 = 31 M L T 203 = 16 L W 190 = 25 Bom L R 680 = 49 I A 312 = 1 Pat 733 = 21 A L J 23 = 27 C W N 294 = 9 O & A L R 450 (P C) = 67 I C 914.

C. P. C. (1908) S. 47 (Contd)

## ( 35 ) Miscellaneous Cases—(Contd)

—Mortgage-decree is attached by a person holding a decree for costs against the mortgage-decree-holder. Mortgage-decree executed only for realising costs due to the attaching decree-holder decree for costs satisfied with the sale proceeds of portion of property. Execution sale is not absolutely void but irregular A I R 1921 Cal 382 = 25 C W N 400 = 66 I C 605.

—Application for setting aside sale on ground of want of notices under O. XXI, rr. 22 and 66, though falling under s. 47 is governed by Limitation Act. (1908,) Art 166. A I R 1931 All 145 = (1931) A L J 119 = Ind Rul (1931) All 324 = 130 I C 708.

—Application under s. 47 falls within Art. 181, and not within Art. 166 although applicant asks for setting aside sale. A I R 1928 Cal 865 = Ind Rul (1929) Cal 490 = 116 I C 634.

—The article applicable for applications under s. 47 is Art. 181. A I R 1927 Cal 614 = 54 C 419 = 103 I C 233.

—Execution sale void—Limitation for application for relief is under Art. 181 and not Art 166. A I R 1924 Mad 431 (F B.) = 47 M 288 = 46 M L J 104 = 19 L W 179 = 34 M L T 37 = 1924 M W N 182 = 80 I C 92.

—Application to set aside sale under O. XXI r. 90—Art. 166 and not Art 188 applies. A I R 1922 Mad 95 = (1922) M W N 176 = 16 L W 934 = 74 I C 458. See also A I R 1922 Mad 417 = 43 M L J 184 = (1922) M W N 514 = 16 L W 178 = 31 M L T (H. C.) 135 = 70 I C 743.

—Possession obtained privately from judgment-debtor is valid and lawful possession. A I R 1922 Lah 459 = 68 I C 744

—Stranger auction-purchaser—Subsequent amendment of decree sale cannot be set aside. A I R 1926 All 35 = 48 A 94 = 23 A L J 946 = L R 6 A 580 Civ = 89 I C 1018.

—Execution can be stayed by injunction or by order of executing Court. Where a decree is stayed by injunction as to part of the properties and by order of the executing Court itself as to the rest the decree-holder is entitled to deduct the time during which the injunction and the order continued, the date on which the injunction was issued and the order was made, and the date on which the injunction and the order ceased to be operative. A I R 1921 Cal 606 = 34 C L J 163 = 64 I C 594.

C. P. C. (1908) S. 47 (Contd)

(35) Miscellaneous Cases—(Contd)

—Compromise during proceedings under O XXI, r. 90 is compromise in suit. A I R 1921 Pat 107 = 2 P L T 273 = 6 Pat L J 253 = 62 I C 608.

—Suit by prior mortgagee—Puisne mortgagee party—Consent decree for sale free from subsequent incumbrance—Execution extinguishes puisne mortgage. A I R 1922 Mad 307 = 15 L W 123 = 41 M L J 547 = (1921) M W N 732 = 68 I C 667.

—Decree for possession—Possession without intervention of Court is ascribable to decree—decree effective to part over which possession is proved. A I R 1930 Lah 808 = 31 P L R 578 = 12 Lah L J 234 = Ind Rul (1931) Lah 270 = 130 I C 334.

—Every payment on account of debt is perfectly lawful payment irrespective of its effect upon the other creditors. A I R 1927 Mad 625 = 100 I C 24.

—Surety in case of arrest before judgment can apply for discharge but surety for due performance of decree cannot be discharged. A I R 1929 Lah 435 = 30 P L R 130 = 11 Lah L J 141 = Ind Rul (1929) Lah 883 = 119 I C 419.

—Remedy against fraudulent decree is to apply for injunction to restrain party from executing decree. A I R 1924 Nag., 413 = 80 I C 59.

—Collusion or concealment of material fact—Setting aside—Minor. see 22 I C 923.

—An incomplete statement of proposition of law in the plaint does not constitute a fraud on the part of the plaintiff. A I R 1923 Cal., 569 = 76 I C 767.

—If a decree is obtained by fraud, the proper remedy is by way of review or by a properly framed suit. 14 C L J 603 = 13 I C 374.

—Suit based on compromise plea of fraud if can be raised in defence. 39 I C 891.

—Execution of fraudulent decree—Restraind by injunction. see 9 I C 576.

—Executing Court cannot go behind decree for rateable distribution by rival decree-holders an enquire whether they are fraudulent. A I R 1922 Bom 31 = 24 Bom L R 1 = 46 Bom 635 = 65 I C 600.

—Court can grant relief against forfeiture, even if a consent decree for forfeiture

C. P. C. (1908) S. 47 (Contd)

(35) Miscellaneous Cases—(Contd)

has been passed and even in execution. 34 C L J 157 = 66 I C 766.

—Executing Court cannot enquire into the jurisdiction of the court which passed the decree. A I R 1923 Mad 212 = 16 M L W 314 = 43 M L J 293 = 1922 M W N 597 = 69 I C 465.

—Perjury and suppression of evidence do not vitiate the judgment. A I R 1922 Mad., 404 = 16 M L W 132 = 1922 M W N 463 = 69 I C 12.

—It is not open to another Court to entertain a suit to set aside a decree when the sole point is whether the first Court was wrong in believing the evidence called before it. This is not a case of fraud extraneous to the trial. A I R 1924 Rang 119 = 1 Rang 500 = 76 I C 794.

—Where the question is whether there was a consent in fact of the parties to a decree, there is power to investigate the matter in a properly constituted application and to set aside the decree if satisfied that a party never in fact consented to it. But where there was a consent decree in fact but a party alleges his consent was procured by fraud, the Court cannot investigate the fact either in review or in exercise of its inherent power and the only remedy is by suit. Factum of consent can be investigated in summary proceedings, but not so the reality of the consent. A I R 1923 Pat 483 = 2 Pat 731 = 1923 P 197 = 77 I C 14.

—The legal representative of a decree-holder was brought on the record without any notice to other decree-holders. Held, that the latter could ask the court to reconsider its decision. A I R 1922 Bom 280 = 70 I C 859.

—Court cannot examine the propriety of the previous judgment unless it is satisfied that there was some fraud in relation to the proceedings of the suit. This principle has no bearing on the case in which there was an attempt to prevent the plaintiff from making his defence. Where the Court finds as a fact, that there was no foundation for the suit itself, it is open to the Court to hold that the suppression of summons was deliberate.

A I R 1924 Pat 241 = 1923 P H C C 336 = 5 P L T 37 = 75 I C 343.

—Plaintiff's failure to serve processes or have a guardian appointed for the minor is no *per se* fraud unless the plaint itself suggests that the suit is baseless or has a fair

C. P. C. (1908) S. 47 (Contd)

(35) Miscellaneous Cases—(Contd)

defence. A I R 1923 Pat 242 = 2 Pat 335 = 4  
P L T 147 = 71 I C 705.

—Mere suppression of notice is not fraud unless deliberate—False claim is not *per se* fraudulent unless made deliberately and for a fraudulent purpose. 71 I C 962.

—The executing Court must act within the four corners of the decree itself. 35  
C L J 339.

—Suppressing evidence does not amount to fraud especially when the onus of proving that fact lies on such other party. A I R 1923 Bom 379 = 76 I C 551.

—An executing Court can construe decree in accordance with law. 2 Pat. L T 396 = 65  
I C 224.

—Plaintiffs were prevented by contrivance from placing their case before the Court and it was misled into making a decree. Held, that the decree was a fraudulent one and there was no question of obtaining a decree by perjury A I R 1923 Cal 425 = 27  
C W N 359 = 65 I C 318.

—Application under S. 47, C. P. C.—Petitioner refusing to be further cross-examined Her evidence discarded—She is justified in refusing to lead further evidence for, the only way by which she could compel inclusion of her own evidence is by getting the application dismissed and then appealing against the dismissal. A I R 1926 Cal 979 =  
91 I C 675.

—Decree in suit for redemption of mortgage—Possession deliverable on plaintiff depositing certain sum in Chitrali month of any year and not in any other month—Decree only a preliminary one and relation ship of mortgagor and mortgagee continues and time under Art. 181, Limitation Act, for applying for final decree does not begin to run until deposit is made—Even if decree is held to be barred the application for execution can be treated as one for redemption under S. 47 C. P. C. A I R 1923 Bom. 300 = 25 Bom.,  
L R 358 = 47 Bom. 692 = 72 I C 556.

—Precedents cannot be applied—Each decree should be construed on its own language and surrounding circumstances—Decree, in a suit on mortgage by widow of mortgagor, declaring plaintiff's right to recover possession and further declaring devolution of right on her death—No period for payment of mortgage money fixed—Decree is purely declaratory—Subsequent suit for redemption is not barred either by S. 11 or S. 47, C P C. A I R 1927 Oudh 457  
= 4 O W N 882 = 105 I C 93.

C. P. C. (1908) S. 47 (Contd)

(35) Miscellaneous Cases—(Contd)

—Partition decree in favour of judgment-debtor, conditional—Purchaser of his share, whether can fulfil condition and claim possession see. 37 All 120 = 27 I C 696.

—An executing Court cannot amend decrees, even to bring them in conformity with judgment. 60 I C 345.

—Attachment is only a step to be taken by the executing Court in bringing to sale the properties of a judgment-debtor. The absence of an attachment is only an irregularity and does not vitiate the sale unless substantial loss has resulted in consequence. Once the sale is confirmed the objection based on the absence of attachment can no longer be urged. (1917) M W N 89 = 37  
I C 964.

—Order directing forfeiture of the bond must be set aside, where no order was passed for personal attendance of the judgment-debtor, 90 P L R 1916 = 166 P W R 1916 = 36  
I C 73.

—Merits of the suit can be gone into for deciding if minor was properly represented. 20 A L J 329 = 4 U P L R (A) 170 = A I R  
1922 All 91 = 66 I C 372.

—Appeal—Pro forma defendant wrongly made party and having no interest in suit property—See. 2 Pat L W 108 = 41 I C 468.

—Execution against lunatic without representative—Void. 18 C W N 1929 = 24 I C 177.

—Reversal in appeal—Recovery of property in execution of original decree—Purchase of property in execution of decree against person so recovering—Restitution as against such purchaser see. 27 C L J 489 =  
46 I C 168.

—Where a decree is passed by one Court and transferred to another for execution the decree holder is entitled to make an application for execution to the former Court inasmuch as concurrent execution of decrees is permissible. 15 A L J 532 = 39  
I C 729.

—No appeal lies against a decision on a preliminary point in an execution case. (1917)  
Pat 191 = 1 Pat L W 759 = 40 I C 517.

—Setting aside sale application for compensation, judgment-debtor and auction purchaser for period during which they were kept out of possession—Order—Appeal—See  
2 Pat L J 824.

—Grant of injunction—Subsequent infringement—Fresh suit not necessary—remedy by way of execution. 12 A L J 347  
= 23 I C 247.

C. P. C. (1908) S. 47 (Contd.)

(35) Miscellaneous Cases—(Contd.)

—When, in an appeal preferred by some of the judgment-debtors, with the others added as *pro forma* respondents, one of the decree-holders, who were the other respondents, was a minor but the appellants neglected to get a guardian ad-litem appointed for them. *Held*, on an application for execution filed by the decree holders, that the decree of the appellate Court dismissing the appeal was not void and that the executing court had no jurisdiction to go behind it. 34 All 321 = 9 A L J 290 = 14 I C 506.

—Objections to decree passed without jurisdiction can be taken at any stage. 4 Pat L W 445-4 Pat L J 202-41 I C 920.

—Admission of liability by judgment-debtor Subsequent repudiation—Estoppel. 3 Pat L J 454-34 I C 673.

—Where a decree directed the demolition of a continuous length of 40 ft. of a newly erected wall and the lower Court refused to execute the decree holding that the subject matter of the decree was not identifiable and that the decree was not executable. *Held*, that the decree was capable of execution, and the Court was bound to take evidence to identify subject matter. 14 I C 588.

—Jurisdiction of executing court to legality of decree. See 60 P L R 1919.

—Decree of first Court against one of Judgment-debtors only—Amount realised from him pending appeal, Other judgment-debtor if can claim credit for moiety of—Appellate decree making former liable for other sums—Effect See 2 Pat L J 162-39 I C 662

—Courts are bound to execute the decree and could not go behind it in execution. 85 P L R 1916-163 P W R 1916-35 I C 867.

—Objection that decree is a nullity or one passed without jurisdiction—Executing Court—Jurisdiction. See 42 P L R 1918

—A decree permitted the decree-holder to open a new door in a wall of house. The decree-holder died afterwards leaving him surviving a son who was given in adoption in another family and a daughter's son. The decree-holder's son applied to execute the decree. *Held*, dismissing the application, that the applicant, by virtue of his adoption, must be treated as non-existent in the family of his natural father for the purposes of the execution of his decree, and that the nearest heir of the decree holder was the daughter's son. 43 Bom 774 = 21 Bom L R 776-52 I C 695

—Fraudulent Sale—Limitation—Whether sale can be vacated 20 C W N 659-33 I C 767.

C. P. C. (1908) S. 47 (Contd.)

(35) Miscellaneous Cases—(Contd.)

—A decree payable by instalments provided that if default was made in the payment of any instalment, the decree-holder would be entitled to realise the whole sum with interest. On the occasion of every deposit made by judgment-debtor it was expressly stated that deposit was made on account of a specified instalment, and the sum was taken out by the decree holder: *Held*, that it is not open to the decree-holder subsequently to turn round and contend that the payments were made only on account and in part satisfaction of the decree. 27 B. 1, foll. 15 C W N 10 = 3 I C 138-13 C L J 207

—Partition decree—One of the debts obtaining a larger share of lands and house—Shares can be again adjusted on application by debts. 17 Bom L R 967-31 I C 311-40 B 118.

—Declaratory decree C P Code S. 47—Mortgage of Nankar rights—Mortgagee's right to enforce payment against Talukdar see. 15 O C 99 = 15 I C 389.

—A pending execution proceeding was transferred by the Judge from the Court of a Munsif to that of a Sub-Judge who held a sale, and no objection was taken at the time to the sub-Judge's jurisdiction. *Held*, that, even if the Judge was not competent to transfer the case, yet the objection to the jurisdiction of the Sub-Judge, not having been taken at the proper time, must be considered as waived; the sale, therefore, was not liable to be set aside on the ground that the Sub-Judge had no jurisdiction to hold the sale. A judgment-debtor should take appropriate proceedings for the reversal of an irregular sale, under ss. 244 and 311 of the Code of 1882. If he does not take any such step, his transferee is bound by the same estoppel and cannot question the sale.

13 Ind Cas 542.

—Declaratory decree—Decision as to executability of—Whether decree—Appealability—First order deciding executability—Appeal against, in time—Subsequent order appointing Commissioner to carry out former order—No appeal—Effect. 10 M L T 437 = 37 M 29 = 21 M L J 1063-12 I C 664. Execution of decree—Restitution see. 163 A W N 1889.



## C. P. C. (1908) SEC. 48 (Contd)

*Synopsis.*

- (1) Legislative Changes.
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- (3) Applicability of s. 182 of Lim. Act.
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- (8) Decree, execution of
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  - (c) Decree directing mesne profits to be ascertained.
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- (9) Dekkhan Agriculturists Relief Act 17 of 1879.
- (10) Execution by Collector.
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- (14) Orders on applications for executions
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- (18) Miscellaneous.

## (1) Legislative Changes.

—S. 48 is the reproduction of paras 3 and 4 of s. 230 of the Code of 1882 with certain alterations noted below. In the old section there were to be found the words "decree for payment of money or delivery of other property" which are deleted from the present section and decrees of every kind except those granting an injunction are covered by this section. This eliminates the discussion under the Code of 1882 regarding the precise meaning of the term decree for payment of money or delivery of other property noted above.

—S. 230 was further restricted to applications for execution made "under (that) section and granted". The words "under this sections" and "granted" are omitted from the present section with the result that the limitation provided for in the section applies to all applications for execution whether granted or refused or withdrawn, and whether the application was made under the old Code or new.

—In S. 230 of the old code there also appeared the words "or of the decree (if any) on appeal affirming the same" after

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## C. P. C. (1908) SEC. 48 (Contd)

## (1) Legislative Changes. (Concld)

the words "date of the decree sought to be enforced". The former words have been omitted as being unnecessary.

—Where a decree directs payment of money or delivery of property at recurring periods the period of limitation for execution begins to run from the date of the default. There were decisions under s. 230 of the old Code ( See 14 M 296; 12 B 65; and 13 P R 1892 ) which had held that in the case above referred to limitation runs from the date of default. It was to give statutory force to the principle involved in these decisions that the words "or at recurring periods" have been expressly inserted in the present section.

—The words "no order for the execution of the same decree shall be made upon any fresh application presented" are substituted for the words "no subsequent application to execute the same decree shall be granted." This change has not altered the law in any way, but has made it clear that application for application under this section means application under O 21, r. 11—Substantive application, not merely incidental or ancillary application.

—Cl. (b) of sub-section 2 of the present section has been newly added.

## (1-a) General principles, Scope and object.

—*Scope of the Section* :—S. 48 does not contain any law of limitation for execution of decree, but fixes a time after the lapse of which no application for execution shall be granted even if not barred by limitation. 9 P R 1891;

—See also 17 Bom L R 178-28 I C 478-39 B 256.

—But it can be said that—"Law in force" means Civ. Pro. Code also, and not Limitation Act only. An application by the decree-holder for the arrest of judg-

—The Court must, therefore, allow all lawful means of realizing the decree, especially where fresh application is likely to be barred under s. 48: 95 I C 956-

A I R 1926 L 544.

—Though the Courts will discourage ingenious devices on the part of the decree-holders to evade the rule under s. 48: A I R 1928 Mad 1154-113 I C 260.

—That is to say, under the section the application need only be presented within twelve years; the Court may pass order on it at any time. 59 M L J 579-32 L W 599-128 I C 713-1930 M W N 979. A I R 1930 M 995.

—Bar of S. 48 applies only when the decree was capable of execution on the date from which 12 years period of limita-

## C. P. C. (1908) SEC. 48 (Contd)

## 1-a) General Principles. Scope

## and object (Contd.)

tion is computed. 14 Bom L R 381=36 B 368=15 I C 822.

—Applicability of the Section:—S. 48 does not apply to proceedings of a mortgage-decree, simply because when the suit in which the decree was passed, was pending the new Code came into force.

47 I C 143.

—S. 48 does not apply to insolvency proceedings, but only to execution. A I R 1924 Mad 163=45 M L J 166=18 L W 636= (1923) M W N 895=47 M 120=75 I C 572.

—The words "The period of limitation, prescribed for any suit or application for the execution of a decree" in s. 78 (2), Provincial Insolvency Act, are general and comprehensive and control or modify the period of time allowed, not only in the Statute of Limitation but also in s. 48, Civil Procedure Code 8 O W N 1186=Ind

Rul (1931) Oudh 414=134 I C 878.

—Agreement out of Court for payment in instalments of a decree for money in a lump sum does not attract the operation of S. 48 (1) (b) or prolong the period of limitation.

72 I C 477.

—The section whether retrospective:—S. 48 is retrospective and applies to decrees passed under the old Code, A I R 1921 Bom 40=45 B 365=59 I C 790.

—See also 23 A L J 977=90 I C 274= A I R 1926 A 93=48 A 121 and A I R 1924 All 696=5 L R A civ 52=78 I C 1030:

—For right to execute a decree is not a substantive right. 21 I C 113

—Limitation Act—S 60 or the Lim Act does not Control s. 48 of C P C 13 A L J 166=27 I C 865.

—S. 6 Lim. Act saves all application will execution falling under s. 48, from being time barred. A I R 1930 Bom 508=32 Bom L R 1093=54 B 776=Ind Rul (1931) Bom 44=128 I C 428

—Small Cause Court:—The twelve years rule under s. 48 does not apply to the execution of Presy. Sm, CC decree transferred to another Court for execution 26 S L R 85=A I R 1932 S 116 (118, 120) see also 21 M L J 777=2 M W N 565=10 M L T 75=11 I C 635=36 M 108.

—An order of Court after notice to the judgment-debtor as to the executability of a decree is res judicata in subsequent proceedings. A I R 1923 Pat 180=4 P L T 204=68 I C 337.

—Constructive res judicata—Notice of execution served on judgment-debtor and judgment-debtor failing to appear—Question of executability of decree is res judicata. A I R 1927 Mad 813=30 M L T 34=26 M L W 481=103 I C 825.

## C. P. C. (1908) SEC. 48. (Contd)

## (1-a) General Principles. Scope and object. (Concl'd.)

—Property sold under a rent decree cannot be sold again under another decree for rent against the tenant. But such sale is valid if the original sale was subject to the satisfaction of another decree. But if the landlord himself has purchased it subject to satisfying another decree for rent held by him, he can sell other properties of the tenant for his decree and not bound to sell the same property. A I R 1923 Pat 517=1923 P H C 205=1 Pat L R 311 =2 Pat 720=4 A L T 640=80 I C 377.

—Pre-decree agreement cannot be pleaded as a bar in execution proceedings. A I R 1921 Mad 616=14 M L W 317=1921 M W N 382=64 I C 148.

—Decree-holder failing to claim in a previous execution application interest then become due, cannot claim it in a subsequent one. A I R 1930 Cal 349=51 C L J 280=126 I C 764.

—An appeal against an order dismissing objections to attachment an sale becomes worthless if the properties are sold prior to the hearing of the appeal. 10 L L J 328=110 I C 246.

## (2) Applicability of S. 50 of Limitation Act.

—S. 48, C. P. C., contains an unqualified prohibition subject to exceptions contained in cl. (2) thereof against execution of certain kinds of decree more than 12 years old and is not controlled by S. 15 (1), Limitation Act. The period mentioned in S. 48 C. P. C. is not a period of limitation in the strict sense; and consequently S. 15 (1) of the Limitation Act is not applicable to it. 7 Luck 49= A I R 1931 O 351=132 I C 257=14 O L J 459=8 O W N 642.

—S. 48, C. P. Code, is not controlled by S. 15, Lim. Act which applies only to periods prescribed in Sch. to that Act. A I R 1928 Mad 1154=113 I C 260.

—Limitation of 12 years under S. 48 for executing decrees is not controlled by S. 15, Lim. Act. A I R 1922 Mad 268=16 L W 68=(1922) M W N 424=31 M L T 140 =43 M L J 168=45 M 785=70 I C 396.

—Period of 12 years under S. 48 cannot be extended by executing Court under S. 15, Lim. Act. A I R 1922 Mad 268=43 M L J 168=45 M 785=(1922) M W N 424=16 L W 68=31 M L T 140 (H C)=70 I C 396.

—S. 15, Lim. Act does not Control S. 48: exception contained in Sub. Sec. (2) is the only exception to sub. S. (1). A I R 1929 Pat 597=Ind Rul (1930) Pat 27=120 I C 315.

—See also 9 O W N 513=137 I C 603= I R 1932 O 253=A I R 1932 O 246=A L R 1932 O 443.

## C. P. C. (1908) SEC. 48 (Contd)

## (3) Applicability of S. 182 of limitation Act.

—The meaning of the words "provided for" is that where execution is barred by S. 48, Civil P. C. execution cannot be allowed under Art. 182 Sch. 1 Limitation Act. In other words Art. 182 is subject to the provisions of S. 48, Civil P. C. The present Limitation Act is Act IX of 1908 and by that Act the provisions in question in regard to amendment of decree was introduced and it did not exist in the previous Limitation Act of 1877. In the same year of 1908, the Civil P. C. at present in force was enacted. Now no change was made in S. 48 Civil P. C. providing for the extension of the period of 12 years in that section from the date of the amendment of a decree. The Legislature advisedly omitted the provisions for extension from 48, and the omission was not accidental. The effect of the omission is that an amendment of a decree does not give a new date for starting a period of limitation, if the application for execution is beyond the period of 12 years allowed by S. 48, that is that the period of 12 years under S. 48 is final and cannot be extended by any amendment of the decree, whether that amendment is made before the expiry of the period of 12 years, or whether that amendment is made after the expiry of the period of 12 years. The reasons why no amendment was made in S. 48 is that probably the greater period of 12 years is allowed by that section, and it is probably the intention of the Legislature that that period of 12 years should be final, and that within that period a decree-holder should amend his decree, and obtain all consequent remedies. If a decree-holder neglects to amend his decree within a sufficient period before the expiry of 12 years to allow him to obtain his remedy by execution then he has only himself to blame. 54 A 622 (625-6)=1932 A L J 471=138 I C 93-I R 1932 A 363=A I R 1932 A 351. See also 90 W N 430; and 17 Bom L R 178=28 I C 478.

## (4-5) Continuation of application step-in-aid of execution.

—Application for execution is in no sense an application in continuation of an application for the transfer of decree as it is different from it. A I R 1926 All 660=95 I C 26.

—Where execution application filed within limitation, is arrested for no fault of decree holders, a latter application to continue execution is a continuation of the former one, and as such it is not barred even if it is made beyond limitation. A I R 1926 All 331=24 A L J 437=94 I C 613

—When execution has not become

## C. P. C. (1908) SEC. 48 (Contd)

## (4-5) Continuation of application step in aid of execution. (Contd.)

time-barred, an application to summon a necessary witness starts a fresh period of limitation as if a step-in-aid of execution. A I R 1924 Oudh 177=74 I C 816.

—Where a decree-holder after the dismissal of his previous application for no fault or default of his, makes another application similar in scope and character, the latter application is a continuation of the previous one. A I R 1924 Pat 367=1 Pat L R 139=72 I C 862.

—Where property is attached in execution of decrees of two Courts higher and lower, and subsequent to the stopping of proceeding by the lower Court, an application is made to higher Court for rateable distribution, it is not barred by s. 48 as it is a continuation of the lower Court proceeding. A I R 1922 Mad 3=41 M L J 378=15 L W 245=(1921) M W N 507=64 I C 493.

—The period during which execution proceedings have been stayed cannot be deducted from that of 12 years prescribed by s. 48 C P Code, but fresh starting point of limitation is given under that section. 54 I C 279.

—Time during which execution proceedings were stayed by injunction should be excluded. 32 I C 1005.

—In calculating 12 years time during which execution was stayed by order is to be excluded. 34 I C 393.

—Where previous execution proceeding has not been completed by reasons of judgment-debtor's objections or by Court-actions, a subsequent application for executing the same decree will be considered as in continuation of the former one. 33 A 517=8 A L J 412=9 I C 817. (F B).

—Where at the instance of judgment-debtor applying in insolvency, the execution was stayed, the removal of the bar imposed for the benefit of judgment-debtor revives the previous application for execution and such a later application for execution must be regarded as in continuation of the former one. 16 I C 541.

—Execution proceedings against one of the several mortgage properties, temporarily abated owing to obstruction caused by judgment-debtor can be revived and continued after its removal irrespective of existence of other mortgaged properties. 3 O L J 706=38 I C 411.

—Application for transfer of a decree from one Court to another and application for execution are two different kinds of applications and not one in continuation of the other. 9 A L J 365=34 A 396=14 I C 172.

**C. P. C. (1908) SECTION 48 (Contd.)****(4-5) Continuation of application step in aid of execution. (Contd.)**

—Where decree was passed for arrears of rent in 1896, and execution application was filed in 1908, to attach and sell patni and the sale was subsequently set aside and a subsequent application for execution was filed in 1915 to convert the decree into a money decree and in 1917 to attach the personal property of the judgment-debtor and in 1918 also against the personal property of the purchaser of patni and where the last application to attach patni was made in 1922 Held that the last application was time-barred as it could not be deemed to be a continuation of the 1908 application it being very different in character. A I R 1929 P C 209-33 C W N 977-57 M L J 184-30 L W 407-31 Bom L R 1383-50 C L J 345-10 P L T 807-Ind Rul (1929) P C 308 (P C)=118 I C 268.

—Application for execution by decree-holder in 1920—Objection was raised by judgment-debtor—Attachment was ordered to continue but sale was stayed until disposal of appeal by judgment-debtor—Appeal was disposed of in 1928—In March, 1928 order was passed that no application being made by decree-holder, that record be consigned to record room but attachment was to continue—Order did not dismiss application for execution but merely postponed execution—S. 48 was not applicable—Later application by decree holder should have been made to continue pending proceedings. A I R 1930 Lah 647-31 P L R 321-Ind Rul (1930) Lah 401-123 I C 113.

—An application for transfer of a decree is different from that for execution of a decree, and therefore the latter application is not continuation of the former one. A I R 1929 Mad 745-(1929) M W N 633-Ind Rul (1930) Mad 1-120 I C 369.

—Where a complete execution application is filed but is arrested for no fault of decree-holder, and application for execution against other properties is filed beyond 12 years, it cannot be allowed as one for amendment of the first A I R 1928 Lah 808-Ind Rul (1930) Lah 126-120 I C 622.

—Execution applications made after the appointment of a Receiver for execution of a decree saves limitation A I R 1929 Bom 279-31 Bom L R 320-Ind Rul (1929) Bom 470-118 I C 694.

—Where execution application is filed within limitation, application to bring the heir of judgment-debtor made beyond limitation is a continuation of the former one, while application seeking to attach and sell moveables of judgment debtor beyond limitation is a new application for execution within s. 48, and cannot be allowed. A I R 1928 Cal 241.

**C. P. C. (1908) SECTION 48 (Contd.)****(4-5) Continuation of application step in aid of execution. (Contd.)**

—When a decree-holder is unable to proceed with an application for execution by reason of some bar imposed at the instance of the judgment-debtor or any other person, a subsequent application by the decree-holder of the same scope and character may be treated as in continuation of the previous application, provided the subsequent application is presented after removal of the bar which interrupted the previous proceeding. This principle is applicable to cases of applications for execution of rent-decree. 13 Ind Cas 140 (1 C L J 381, 27 A 334; 15 M L J 258; 7 Bom L R 433; 9 C W N 601; 2 A L J 397; 7 Ind Cas 886; 11 Ind Cas 48, 14 C L J 610; 14 C 385; 21 C 387 Rel on).

—An application of intervention of objections found groundless should be treated as in continuation of the earlier one for execution. A I R 1922 (N) 138-2 N L J 213-65 I C 220.

—Where properties sought to be attached in two applications are different, the latter is not a continuation of the former, nor where the former application has been dismissed for default: 79 I C 897 —A I R 1925 Pat 197.

—Application not fully disposed of by Court—Next application for same relief should be deemed as continuation of the prior one. A I R 1928 Mad 971-109 I C 375

—Whether payment of process fee is step-in-aid of execution see 20 O C 332-43 I C 342, and whether application to withdraw previous execution application is one see (1919) Pat 83-50 I C 444.

—So too whether oral repetition of request in written application is step-in-aid see 33 M L J 219-41 I C 701.

—And as to the petition returned for correction of defects not essential to its validity for the sections See. 26 I C 413.

—An application by a decree-holder to the executing Court for payment to him of certain sum of money deposited in Court in partial satisfaction of the decree is not ordinarily an application to take some step-in-aid of execution within the meaning of art 179 (4) Limitation Act, 1877. 103 P R 1908, F B-142 P W R, 1908 F B (107 P R 1881, 88 P R 1884, 27 P R 1888, 18 P R 1904, 76 P R 1904, 8 C 89; 10 C 549; 11 C 22; 23 C 196; 10 C W N 28; F, 11 M 174; 16 M 452; 17 M 165; 22 B 340; 6 A 366; 12 A 399; Not.F.). So also an application for relief not granted by the decree is not a step-in-aid: 43 I C 537.

—But where application is consigned to record room behind the back of decree

## C. P. C. (1908) SECTION 48 (Contd)

## (4-5) Continuation of application step in aid of execution (Concl'd)

-holder fresh application should be treated as continuation of the old. 3 U P L R (All) 13=A I R 1922 (A) 433=65 I C 78.

-An application for execution made by the heir of a decree-holder, without obtaining a succession certificate, is an application "in accordance with law" and saves the decree from being barred by limitation. 9 Ind Cas 800.

-Application to execute mortgage decree—Prayer to bring legal representatives on record with other reliefs not entitled to—Step in aid See 26 M L J 83 =21 I C 782

-As to the meaning of "step-in-aid" see also Art 182 of Lmt Act and the following cases:—31 M 234; and 31 M 68; and 60 P R 1912=14 I C 468; and 25 I C 58; and 16 O C 70=18 I C 917; and 35 A 389; and 155 P W R 1912=80 P W R 1912 =14 I C 335; and 103 P R 1908 F B; and 38 B 47=15 Bom L R 930; and 7 M L T 86=5 I C 758; and 15 C W N 71=8 I C 833; and 14 Bom L R 765=36 B 638; and 14 C W N 486=5 I C 147 and 31 A 309; and 30 A 179; and 6 P L R 1910=6 I C 490; and 28 M L J 494; 37 A 472; and 29 I C 479; and 35 I C 579.

## (6) Date of Decree

-Time for executing a decree begins to run from the date thereof. A I R 1924 All 263=46 A 73=21 A L J 861=L R 4 A 591 Civ=79 I C 605.

-Decree directing recovery of money from A on failure to recover from B, must be executed within 12 years from the date of decree. (Wallace J. Diss). A I R 1926 Mad 20=49 M L J 498=48 M 846=(1926) M W N 213=91 I C 597.

-The date of an amended decree within S. 48 is the date of the amendment, 60 I C 318 see to the same effect 11 O C 22; and 24 A 309 and 17 A 39; and 26 M 780, 30 A W N 982=99 I C 204.

-But the Allahabad High Court has in a recent case held contrary—that limitation runs from the date of the original decree not from the date of the amendment 54 A 622 (627)=1932 A L J 471=138 I C 93=I R 1932 A 363=A I R 1932 A 351.

-In case of preliminary and final decrees the two should be treated as a single decree and limitation runs from the date of the final decree; A I R 1924 Cal 131=50 Cal 743=74 I C 1017; see also 6 C L J 462; and 16 A L J 88=43 I C 932=43 A 211.

-Starting point is fresh from date of decree absolute in mortgage suit See C P

## C. P. C. (1908) SEC. 48 (Contd)

## (6) Date of Decree (Concl'd)

Code, O 34 Rr 4 and 6. 17 M L T 424=39 M 544=29 I C 237.

-In case of combined mortgage and personal decree limitation runs from the date of the decree in respect of both remedies. A I R 1928 Cal 668=48 Cal L J 102.

-Where a Compromise is entered into during execution proceedings by which part of the claim was given up, and part was agreed to be paid in instalments on the default of which the decree-holder was entitled to execute the whole decree, limitation for execution runs from the date of this substituted decree. A I R 1929 Cal 687=34 C W N 213=57 C 789=Ind Rul (1930) Cal 834=127 I C 258.

-Execution after twelve years from date of decree—subsequent order in another suit directing payment of money to decree holders by receiver—absence of judgment debtors and surety—does not save limitation. A L R 1933 P C 72=37 C W N 543=10 O W N 226=1933 M W N 112=141 I C 760=12 P 195=A I R 1933 P C 52.

-In case of appeal, limitation runs from the date of the appellate decree, even though the appeal was only from a portion of the original decree. 2 A L J 180=27 A 501 F B see also 12 I C 75=21 M L J 1020 =10 Mad L T 281=(1911) 2 Mad W N 239; and irrespective of the fact whether the original decree is confirmed or dismissed in appeal. 5 I C 473=32 All 136=7 All L J 58 see also 31 A 379 and 30 A 385. or where an appeal is withdrawn: 54 P R 1908=40 P W R 1908=87 P L R 1908. or is dismissed for default. 5 O L J 252=47 I C 125.

-Where appeal is filed against some defendants limitation for execution against others runs from the date of trial Court decree A I R 1926 Cal 664=30 C W N 379 =95 I C 25.

See to the same effect A I R 1923 Bom 400=25 Bom L R 371=73 I C 310.

-So also where an appeal filed from a non—appealable decree is dismissed limitation begins to run from the trial Court's decree A I R 1926 All 440=48 A 377=24 A L J 465=94 I C 961.

-While dismissing an application as barred by limitation of 12 years, time should be calculated from the date of appellate decree 21 M L J 1020=10 M L T 281=(1911) 2 M W N 239=12 I C 75.

-An execution application must be regarded as pending until it is validly disposed of. Courts interpretation of a decree is resjudicata in subsequent proceedings to enforce the same. Court has inherent powers to construe record. 16 M L T 399 =26 I C 244.



## C. P. C. (1908) SEC. 48 (Contd)

## (7) Date of default.

—Limitation for executing an instalment decree directing the payment of the whole decretal amount on default of any one instalment, runs from the date of the first default. 49 I C 497.

—Instalment-decree ceasing to be so on default cannot be restored to original status by the Court. A I R 1925 Bom 326 =27 Bom L R 461=87 I C 769.

## (8) Decree, execution of

## (a) Declaratory decree creating lien.

—A lien created by a declaratory decree is not extinguished merely because an application for execution was not made in accordance with the provisions of the Limitation Act. 109 P R 1913-19 I C 481-181 P L R 1913=108 P W R 1913.

## (b) Decree directing delivery of property at a certain date or at recurring periods.

—Where in a partition suit a decree-holder is directed to get possession of certain properties on paying a certain sum, cannot get possession unless he has made application to deposit money within 3 years of the decree. A I R 1930 Bom 503=32 Bom L R 427=Ind Rul (1930) Bom 389 =125 I C 901.

## (c) Decree directing mesne profits to be ascertained.

—Limitation for execution of a decree directing that mesne profits should be ascertained in execution, runs from the date of decree and not when mesne profits are ascertained. A I R 1927 Mad 842=53 M L J 440=103 I C 311.

—An order for mesne profits does not mean an order for the payment of money on a certain date. A I R 1927 Mad 842=53 M L J 440=103 I C 311.

## (d) Decree directing payment of maintenance.

—Where a decree for maintenance directing amount to be ascertained in execution is passed it becomes executable and time begins to run only when amount is determined. A I R 1931 Bom 492=33 Bom L R 1082=134 I C 1153.

## (e) Decree directing payment of money,

—A decree-holder has the undoubted right to waive a default where the decree directing payment of money by instalments contains a clause giving an option to the decree-holder to execute for the whole balance of the decretal amount on the happening of any default and there is a default, S. 48 is a bar to the execution

## C. P. C. (1908) SECTION 48 (Contd)

## (8) Decree, execution of (Contd)

## (e) Decree, directing payment of money. (Concl'd)

of the decree only in respect in instalments of more than 12 years before the date of the application and is no bar to execution in respect of instalments payable within 12 years of the date of the application. A I R 1932 L 564=138 I C 255=1 R 1932 L 436.

—A Solenama instalment decree passed in a mortgage suit authorising decree-holder to realise whole amount in case of default, final decree passed some time after, limitation for executing the decree runs from the date of solenama decree. A I R 1928 Calc 668=48 C L J 102=Ind Rul (1929) Cal 280=114 I C 792.

—Limitation runs from the date of first default in case of provision for payment of whole on default of any one instalment. 49 I C 497.

—“Decree for payment of money” does not include a mortgage-decree. 18 I C 455.

—“Decree upon compromise against the lessees and on their default to pay against the property of the surety, must be executed within 12 years from the date thereof. 10 A L J 256=34 A 636=16 I C 190.

## (f) Mortgage decree.

—A decree absolute in a mortgage suit cannot be challenged in execution on the ground that the Court ought not to have gone and made the decree absolute inasmuch as the application for execution of it was barred by limitation. 47 I C 143.

—Limitation for application for executing a mortgage-decree absolute runs from the date of the decree absolute even if the preliminary-decree was based on compromise. 23 C L J 573=33 I C 180.

—Limitation for execution of a mortgage-decree directing certain accounts to be taken and sums to be drawn runs from the date of the original decree, and not from the date when the sum is ascertained. 20 C W N 950=1 P L J 359=34 I C 504 =3 P L W 102.

—Limitation for executing a mortgage-decree providing for the balance against the property and person of the mortgagor runs from the date of the decree and as such, an application for executing the same against other properties of the

mortgagor must be made within 12 years from the date of decree. A I R 1926 Mad 954=52 M L J 256=50 M 5=23 L W 26=(1926) M W N 140=92 I C 846.

—Where a mortgage-decree directs that unrealised balance of the decree

## C. P. C. (1908) SEC. 48 (Contd)

## (8) Decree, execution of (Contd)

## (f) Mortgage decree (Contd).

should be recovered from the other properties of the mortgagor, limitation for executing the decree against those other properties runs from the date when mortgaged properties are sold and the sale proceeds are found insufficient to satisfy the decree (Phillips, J. Diss.) 31 M L J 513-20 M L T 391-4 L W 507 = (1916) 2 M W N 296-37 I C 741 (F. B.).

—Limitation for executing a mortgage-decree providing for the unrealised balance against the person and other non properties of the mortgagor runs from the date of decrees. A I R 1921 Cal 456-34 C L J 167-66 IC 758 See to the same effect 82 I C 827-A I R 1925 M 331.

—Application to execute a mortgage-decree directing that unrealised balance of decree should be recovered from mortgagor personally must be made within 12 years from the date of the decree. 18 C W N 492-24 I C 35.

—Where a mortgage-decree directs that unrealised balance of decree should be recovered from the other properties and from mortgagor personally an application for executing the same against his other properties must be made within 12 years from the date of the decree. 22 C W N 145 (P C)-45 I C 436. On appeal from 18 C W N 492-24 I C 35.

—Where a mortgage-decree makes the mortgagor "personally liable for balance due under the decree" after the sale of mortgaged property, limitation for executing the same runs from the date of the decree and not from the date when sale-proceeds prove insufficient to satisfy the decree. Mortgagee is not entitled to the benefit of exclusion of period of management by Court of wards, unless the decree has been transferred to the Collector for execution. 29 I C 556.

—Application for execution of a decree conditional on redemption of prior mortgage is time barred if the prior mortgage is redeemed after the period of limitation for execution of the decree. 18 I C 897.

—Where a decree directs payment of mortgage-amount, and the sale of mortgagor's properties on default, an application for executing the same against those properties must be made within 12 years from the date thereof. 43 I C 122.

—Where a plaintiff after obtaining a mortgage-decree directing the sale of the mortgaged property and also of the other properties of the mortgagor obtains a personal decree against the mortgagor, limitation of 12 years for executing the latter decree runs from the date of that decree. 57 I C 507.

## C. P. C. (1908) SEC. 48 (Contd)

## (8) Decree, Execution of (Concl'd)

## (f) Mortgage decree (Concl'd)

—Period of 12 years for executing a personal mortgage-decree must be calculated from the date of such decree. 34 C L J 167-66 I C 758.

—And it should be noted that s. 48 has retrospective effect and applies to application for execution of a mortgage-decree passed under the old Code. A I R 1925 Bom 326-27 Bom L R 461-87 I C 769.

—As S. 48 of C. P. C. is retrospective in operation, all decrees whether passed before or after the Code came into force are governed by it. Mortgage-decrees must be executed within the prescribed time, the period when the property was in Collector's hands is not allowed to be excluded. 11 N L R 25-27 I C 969. see to the same effect 22 Bom L R 1420-59 I C 790-45 B 365; and 17 C W N 622-19 I C 391-40 C 704; and 19 I C 899; and 32 I C 39. See also 33 M L J 543-42 I C 282.

—A mortgage decree passed under the old Code cannot be executed after twelve years if the new Code had come into operation at that time. 19 I C 899.

—Application for execution in 1913 of a mortgage-decree of 1882 is barred by S. 48. Acknowledgment of liability within S. 19, Lim. Act by the judgment-debtor gives the decree-holder a fresh period of 3 years within which he can apply for execution of the decree. No retrospective effect is given to an acknowledgment of 1902 by C. P. Code of 1908 so as to give the decree-holder a fresh period of 12 years for application for execution. 1 Pat L J 214-20 C W N 952-2 Pat L W 370-34 I C 27.

—Mortgage decree for sale before new Code—Decree combined—Directing recovery of amount by sale of property and payment of deficiency by debt—Application to recover balance of sale proceeds proving insufficient—Limitation Sec. 33 M L J 543-(1917) M W N 845-6 L W 675-42 I C 282.

## (9) Dekkhan agriculturists Relief Act 17 of 1879.

—Limitation for executing a mortgage-decree under Dekkhan Agriculturists Relief Act runs from the date of decree nisi, and not from that of decree absolute. A I R 1922 Bom 95-46 761-24 Bom L R 269-67 I C 153-

—Time spent in obtaining conciliator's certificate should be excluded under S. 48 Dek. Agri. Relief Act. 42 Bom 367-20 Bom L R 360-45 I C 494. See also 6 B 31-

## C. P. C. (1908) SEC. 48 (Contd.)

## (10) Execution by Collector.

—While executing a decree against the holder of an estate, the time during which the estate was under the management of Court of Wards, cannot be excluded unless the decree is transferred to the Collector. Power to amend the pleading should not be granted if it prejudices the rights of the opposite party such as defence of limitation. Provisions of Lim. Act as to exclusion of time are applicable to the period of 12 years in S. 48, C. P. C. and as such time during which execution was stayed by injunction can be excluded. 27 M L J 25-24 I C 195.

## (11) Fraud.

—Per Ashworth J—Circumvention also is fraud: A I R 1927 All 668-25 A L J 842-103 I C 277.

—Evasion of process of Court in order to prevent execution amounts to "fraud" 13 M L T 226-24 M L J 270-18 I C 1008- (1913) M W N 182.

—Evading arrest for not paying decretal amount amounts to fraud. A I R 1924 Mad 836-47 M L J 428-20 L W 475- (1924) M W N 745-80 I C 731.

—A fresh start to the period of limitation is given by intentional avoiding of arrest under a warrant to avoid payment of decretal amount as it amounts "fraud" 12 L J W 710- (1920) M W N 788-60 I C 630.

—A decree for money can be executed either against the property or the person of the judgment-debtor. "Fraud" under s. 48 is a wider term than that used in English Law; locking house, evading arrestor payment or fictitious transfer is "fraud" A I R 1925 Nag 82-22 N L R 67-80 I C 905.

—Judgment-debtor's fraud, in preventing the execution of a decree removes for a period of twelve years the bar to execution created by the first clause of s. 48. 8 A L J 1020-34 All 20-11 I C 672.

—As to evasion of execution by fraud and discretion of Court and the nature of proof by creditor see 22 M L J 35-12 I C 679-35 M 670.

—Wilful evasion of arrest in execution by judgment-debtor amounts to fraud within the meaning of S. 48 (2) (1920) M W N 788-12 L W 710-60 I C 630.

—The elapse of 12 years from the date of the decree owing to evasion of arrest by the judgment-debtor pretending to prosecute insolvency proceedings does not bar an application for execution. 9 A L J 17-13 I C 929.

## C. P. C. (1908) SEC. 84 (Contd.)

## (11) Fraud. (Contd.)

—But the mere fact that there was prolongation of the execution proceedings due to objections raised by the judgment debtor from time to time would not of itself amount to fraud or force within s. 48 (2) (a). A I R 1931 All 134-Ind Rul (1931) All 204-129 I C 716.

—And the fraud of one judgment-debtor does not extend the time for execution as against the others 38 Mad 419-30 I C 423 [On appeal from 35 Mad 670-22 M L J 35-12 I C 679.

—See to the same effect 32 L W 615-128 I C 455-1930 M W N 729; and 35 M 670.]

—So too the proposition that any action of the judgment debtor which puts off the decree-holder from executing his decree at once must be taken as fraud if the result thereof is to bar the execution of the decree under the 12 years rule is too a broad statement, 54 A 573 (584)-1932 A L J 365-138 I C 583 (2)-16 R D 293-13 L R A 199 (Rev)-I R 1932 A 467-A I R 1932 A 273-A L R 1932 A 272 (F B).

—Fraud or force of judgment-debtor in preventing the execution of decree must be of such a nature which though unknown to decree-holder, prolongs the proceedings. A I R 1931 All 134-Ind Rul (1931) A 204-129 I C 716.

—Force or fraud on the part of judgment-debtor in preventing execution of decree alone entitles decree-holder to the benefit of S. 48 (2) where decree-holder is refused permission to proceed against properties of judgment-debtor in hands of a Receiver, and he does not proceed against the person or other properties of the judgment-debtor or surety which he is able to do within 12 years, he cannot succeed under S. 48 (2) A I R 1929 Pat 597-Ind Rul (1930) Pat 27-120 I C 315.

—There is no fraud or force in non-suspension of execution during pendency of appeal by judgment-debtor: 20 C W N 686-32 I C 931.

—Pardanashin lady is not guilty of fraudulent conduct merely because she is living within closed doors, without any proof of her deliberate intention or attempt. 4 O L J 345-40 I C 399.

—"Fraud" Contemplated by s. 48 should be such as to prevent the decree-holder from executing his decree. Parties cannot extend the period prescribed by s. 48 by any agreement. 15 C L J 678-13 I C 88.

—Raising of the plea of limitation by judgment-debtor is not by itself a fraud. 54 A 573 (584, 597, 604)-1932 A L J 365

## C. P. C. (1908) SEC. 48 (Contd)

## (11) Fraud (Contd)

=138 I C 583 (2)=16 R D 293=13 L R A 199  
(Rev)=I R 1932 A 467=A I R 1932 A 273=  
A L R 1932 A 272 (F B).

—Obstruction of execution by frivolous objections of judgment-debtors, entitles the decree-holders to the benefit of S. 48. A I R 1922 All 145=44 A 319=20 A L J 185 =65 I C 877.

—A decree-holder is entitled to the benefit of S. 48 (2) C P C. by reason of fraud even though it was long anterior to last application. Decree-holder is not bound to plead fraud or force which prevented his applying in time even if it be assumed that the principle of constructive res-judicata is applicable to execution proceedings. 10 L W 566=53 I C 862.

—Exercise of due diligence by decree-holder in execution of decree entitles him to the benefit of S. 48. Extension of limitation for the whole of the period of 12 years through fraud or stratagem of the judgment-debtor is sufficient to give the decree-holder the benefit of S. 48. 14 O C 238=12 I C 793.

—Judgment-debtor pleading payment found not to have been made is guilty of fraud (1930) M W N 729=32 L W 615=Ind Rul (1931) Mad 39=128 I C 455.

## (12) Fresh application for execution.

—Where execution application was suspended for a time and an application is made after the obstacle to continuance is removed, held, that it is not a fresh application for execution A L R 1934 Oudh. 105.

—But an application by decree holder, after the expiration of twelve years from date of decree, for attachment of property not mentioned in the previous application, is a fresh application within the meaning of s. 48 and cannot be entertained. Pendency of execution proceedings started on previous application is not sufficient to save limitation. [A I R 1928 Lah 808; A I R 1928 Cal 241; 34 I C 271, relied on.] A I R 1931 All 134=Ind Rul (1931) All 204=129 I C 716.

—But an application to continue execution against legal representative of a deceased judgment-debtor may be made in a pending application. No separate application is necessary. Even if a separate application is made it is not a 'fresh application.' (Essentials of fresh application pointed out) A I R 1931 Bom 425 (2)=Ind Rul (1931) Bom 538=33 Bom L R 858=134 I C 730.

—Execution applications made after, new code came into force are governed by S. 48, and as such only fresh applications

## C. P. C. (1908) SECTION 48 (Contd)

## (12) Fresh application for execution (Contd)

after 12 years and not applications to continue prior execution applications in time, are barred by S. 48. 21 I C 923.

—Where a complete execution application is filed within 12 years, Court cannot allow an application for execution against other properties filed beyond 12 years as an amendment of the first. A I R 1927 Mad 347=52 M L J 137=38 M L T 42=100 C 20.

—So also a decree for payment of money and in default for sale of property or surety must executed within 12 years from its date (Chamier, J. Diss). 9 A L J 79=13 I C 187.

—Fresh applications for execution after 12 years from the date of decree are governed by S 48, but applications for amending previous execution application filed within 12 years are not governed by S 48 even if the amendment is ordered after 12 years. S. 48 clearly bars applications for amendment after 12 years which are in substance fresh applications for execution of decree. A I R 1928 Mad 1154=113 I C 260.

—To be a "fresh" application within the meaning of S. 48 it must be substantive application, not merely an ancillary one. S A L J 412=9 I C 817=33 A 517; e. g. an application merely to revive the first application is not a "fresh" application.

—Similarly an application after removal of obstruction by judgment-debtor is not a "fresh" application: 7 I C 707; and the mere circumstance that an application for execution has been dismissed for default does not take away the effect of any previous order which might have been made: 17 C W N 113=15 C L J 453=10 I C 359.

—And it may be said generally that an application which is in substance an application made with the object of moving the court in the matter of a prior application which has been postponed, suspended or otherwise stayed by reason of some order is an application to continue the suspended proceeding from the point where it was stayed and may be made at any time within three years from the date when the right to apply accrued, i. e. when the order for postponement, suspension or stay was withdrawn or became inoperative even though the execution proceeding may have been struck off by that order. 17 O C 169 =25 I C 160. see to the same effect:—17 C L J 125=18 I C 841; and 6 M L T 333 =3 I C 940; and 227 A W N 1908=5 A L J 616=30 A 499; and 68 P W R 1909=2 I C 76=66 P L R 1909=45 P R 1909; and 3 A L J 845=152 A W N 1906=28 A 651; and 18 C W N 539=20 I C 244; and 32 I A 102 =9 C W N 601=7 Bom L R 433=15 M L J 258=2 A L J 397=27 A 334 P C.

**C. P. C. (1908) SEC. 48 (Contd)****(12) Fresh application for execution. (Concl'd)**

—Where a claim is at first successful but ultimately unsuccessful, subsequent application can be rightly treated as a revival or continuation of the first application for execution. But where the claim is subsequently successful, the subsequent application cannot be treated as a continuation of the previous application before the claim was put forward. (17 C 268 F; 23 C 437, 33 C 689, Diss.). Where an application for execution has been dismissed, although the attachment has been kept in force, it is not open to the decree-holder to apply for execution any length of time afterwards and contend that the subsequent application is one made in continuation of the previous application.

11 I C 48;

A I R 1928 C 241; and 74 I C 1017=A I R 1924 C 131-50 C 743.

—An application for amendment of previous application will operate to save limitation if the defect is not fundamental. 6 O W N 1064=A I R 1930 O 65=124 I C 445=5 Luck 458 and 79 P L R 1905=2 P W R 1905=27 P R 1905; but not if the defect is fundamental. A I R 1928 L 808; and 15 M L J 243; and 119 I C 411=A I R 1929 Pat 407=8 Pat 462.

**(13) Minority.**

—It was held under the old code that when the person entitled to make an application for execution of a decree is a minor at the time from which limitation is to be reckoned s. 7 of the Limitation Act saves the execution of the decree from being barred, and any application made by his guardian on his behalf is also exempt from the operation of limitation. 23 Calc. 374. see also 28 Cal 405 and 22 All 199. and 20 C W N 852=34 I C 86

—But it has now been held that minority is no ground of exemption to save the bar of s. 48; 24 M L J 96=13 M L T 79=18 I C 586=37 M 186; and 13 A L J 826=30 I C 521; and 14 Bom L R 387=15 I C 829=36 B 498; and 128 P R 1894; but see 32 Bom L R 1093=128 I C 428=A I R 1932 B 508=54 B 776.

—Minority is no ground to extend the limitation under S. 48. Proceedings for the ascertainment of mesne profits are not proceedings in execution under the new code. The law in force when the decree was passed decides whether the decree was complete or not for execution 37 Mad 186 =24 M L J 99=(1913) M W N 114=13 M L T 79=18 I C 586.

—As to the effect of minority of the legal representative of the holder of a

**C. P. C. (1908) SEC. 48 (Contd)****(13) Minority. (Concl'd)**

decree based on compromise. see 39 Bom 256=17 Bom L R 178=28 I C 478.

—The Madras High Court has however, recently held that S. 48 C P C does not override S. 7 Lmt. Act. and as such it does not imply that minority will not extend the period of limitation; 30 L W 361= 1929 M W N 158=119 I C 39=A I R 1929 M 394.

**(14) Orders on applications for execution.**

—An order dismissing an execution application on account of decree-holder's absence, is not an order for stay of execution within the meaning of s. 15, Lim. Act. Limitation for executing a decree is not extended because two of the judgment-debtors are adjudicated insolvents. A I R 1931 Lah 125=31 I C 345.

**(15) Period of Limitation.**

—The period of limitation prescribed by S. 48 is a part of the substantive law of limitation, as will appear from the wording of Arts. 181 and 182, Limitation Act. It has nothing to do with the manner of executing the decree. Indeed when the section lays down in effect that a decree is so to say extinct after 12 years and is no longer executable, it cannot be maintained that such a provision indicates the mode or the manner in which a decree is to be executed. A I R 1932 S. 116 (118-120)=26 S. L R 91=A L R 1932 S. 82.

—Bar under s. 48 cannot be got rid of by private agreement to the contrary. Such agreement may give rise to a separate suit, but cannot estop the judgment-debtor from objecting to the further execution of the decree. 54 A 573 (590)=1932 A L J 365=138 I C 583 (2)=16 R D 293=13 L R A 199 (Rev.)=I R 1932 A 467=A I R 1932 A 273=A L R 1932 A 272 (F. B.)

—For "Period of limitation" includes period prescribed by S. 48 C P Code, 52 I C 742.

—But period of limitation prescribed by S. 48 is secondary to the period of limitation in strict sense which means such a period that a proceeding to which it is sought to be applied will be in time if filed within the period, and beyond time, if filed after it, and as such it is a sort of further check to an application or suit which is found not wanting when strict period of limitation is applied. A I R 1922 Mad 268=16 L W 68=(1922) M W N 424=31 M L T 140=45 M 785=43 M L J 168=70 I C 399.

—Revival of former application for execution is governed by Art. 181, Lim.



## C. P. C. (1908) SEC. 48 (Contd)

## (15) Period of Limitation. (Concl'd)

Act, and not by S. 48 of C P C 1908. 3 Pat. L J 103-5 Pat. L W 21-44 I C 560.

—Where owing to the absence of a formal order for delivery of possession, a decree absolute in a foreclosure-suit is incapable of execution, the period of 12 years must be computed from the date the decree becomes capable of execution. 54 I C 129.

—Where plaintiff's appeal against a decree decreting all his claims is dismissed, 12 years' period of limitation runs from the date of dismissal of appeal. A I R 1921 All 134-43 A 405-19 A L J 159-61 I C 129.

—But see 25 Bom L R 371-73 I C 310=A I R 1923 B 400.

## (16) Plea of 12 year's bar-not allowed in appeal or review.

—Though the High Court has power under very exceptional circumstances to allow amendments in second appeal, it will not ordinarily allow an amendment in second appeal which would defeat the bar of limitation, as by substituting in a later application in the column of relief the property comprised in a previous application. 43 I C 122.

—Due service of notice of petition for attachment on J D who allows orders to be passed ex parte estopps him from asking for review of the order or raise in appeal the plea of limitation under s. 48 A I R 1929 Mad 826-123 I C 23.

—Execution, application for, after 12 years of date of decree—execution ordered without objection as to limitation—plea of limitation, not open in subsequent collateral proceeding—jurisdiction of Court to decide wrongly—where want of notice of execution pleaded—question to be decided and finding given on the limitation issue. See A L R 1934 C 25.

## (17) Subsequent order.

—A subsequent order can be passed by the Court to which the decree has been transferred. A I R 1926 Lah 465-95 I C 243.

—Order absolute gives fresh starting point to an application for execution. 39 Mad 544-17 M L T 424-29 I C 237.

—“Any subsequent order” refers to any order made by a competent Court, and as such, an order by executing Court to pay decretal amount by instalments, being such order, gives a fresh period of limitat-

## C. P. C. (1908) SEC. 48 (Contd)

## (17) Subsequent order. (Contd)

ion. A I R 1925 Bom 503-27 Bom L R 961-49 B 695-88 I C 949.

—O. XXI, r. 2 empowers executing Court to certify an adjustment. Order made by executing Court under s 48 (1) (b) is a subsequent order within the meaning of that clause. A I R 1931 Nag 50-27 N L R 150-132 I C 456.

—The wording of cl. (b) of s. 48 (i) is general and contains nothing to indicate that the subsequent order must be passed by the Court that passed the decree acting as such. [49 Bom 695, approved. 40 All 198, dissented.] A I R 1931 Nag 50-27 N L R 150-Ind Rul (1931) Nag 104-132 I C 456.

—See similarly the views of the Calcutta and Madras High Courts. A I R 1929 Cal 687-34 C W N 213; and 21 M L W 29 Jour and 4 M L T 233-18 M L J 548.

—But it has been held by the Patna High Court that “Subsequent order” under s. 48 (b) refers to subsequent order made by the Court which passed the decree only, and as such, an order of an executing Court to adjust the claims does not save limitation. 1920 Pat 229-58 I C 393. See also 48 I C 704.

—So also the Allahabad High Court has held that the expression “Subsequent order” in s. 48 is an order by the Court passing the decree acting as that Court and as a Court executing the decree and such order giving time for payment by executing Court is not a “subsequent order” so as to exclude that time in computing limitation. 40 All 198-16 A L J 71-44 I C 24.

—See to the same effect 54 A 573 (599,600, 605)=1932 A L J 365-138 I C 583 (2)=16 R D 293-13 L R A 199 (Rev.)=I R 1932 A 467=A I R 1932 A 273=A L R 1932 A 272 (F B).

—Order passed in execution proceedings on agreement by judgment-debtor to pay the decretal amount by instalments is not a “subsequent order” and as such does not extend the period of limitation but failure of judgment-debtor to pay according to the agreement amounts to fraud. A I R 1931 All 31-Ind Rul (1930) All 475-124 I C 43.

—Though s. 48 (1) (b) is not confined to orders under O. 20, r.11. 54 A 573 (585)=138 I C 583 (2)=1932 A L J 365-16 R D 293-13 L R A 199 (Rev.)=I R 1932 A 467=A I R 1932 A 273=A L R 1932 A 272 (F B).

—Limitation will not be extended unless an order under s. 48 is passed by the Court which made the decree and acting as that Court, and as such an order passed by executing Court to pay decretal

C. P. C. (1908) SEC. 48. (Contd.)

(17) Subsequent order. (Concl'd)

amount by instalments on a compromise does not extend the limitation. A I R 1923 Lah 678-73 I C 794.

—But an order to pay the decretal amount by instalments passed on a compromise extends the limitation under s 48.

A I R 1923 Lah 381-73 I C 671.

—Where a Court to whom the award is presented, orders it to be filed and a decree to be made in accordance with it, but draws up the decree finally some time after the judgment, limitation for executing such a decree runs from the date of the original order. 42 Bom 309-20 Bom L R 481-46 I C 107.

—It may also be noted that the failure of the court to apply its mind to the provisions of s 48 (2) and to record a finding required by that section is a material irregularity because the section prohibits the making of any order upon the application unless the conditions laid down in it are fulfilled, 54 A 573 (581-2, 597; 604)-1932 A L J 365-138 I C 583 (2) ±16 R D 293-13 L R A 199 (Rev.)-I R 1932 A 467-A I R 1932 A 273-A L R 1932 A 272 (F B).

#### (18) Miscellaneous.

—Decision as to application being in time—Whether binding on judgment debtor in his absence. see 18 C W N 1288 ±27 I C 225.

—An order granting or refusing execution under s. 48 amounts to a decree and is appealable as such, 26 I C 866-19 C L J 581-19 C W N 1008 see also 7 B 301.

—As to fraud noted under heading (11) supra see also the following cases 8 I C 805-1910 Mad W N 853-9 Mad L T 162; and 75 P L R 1909-4 I C 958; and 11 C W N 440, and 6 A L J 401-2 I C 222; and 125 I C 830-A I R 1930 S 218.

#### C. P. C. (1908) SECTION 49

—As to the applicability of the section see 42 Mad 338-36 M L J 376-9 L W 443 ±50 I C 584-(1919) M W N 248. S. 49 and O 21 r, 16 authorise transferee of the whole of a decree, or of the whole interest of one of the several decree-holders, but not a transferee of a portion of decree to apply for execution. Limitation for execution by a transferee of decree begins to run from the date of transfer under Art 181 Lim. Act. 15 P R 1917 ±39 I C 654.

—The transferee in execution holds subject to the equities which may be enforced against the original decree-holder, and will hold subject to the rights of the

C. P. C. (1908) SEC. 48. (Concl'd)

(18) Miscellaneous. (Concl'd)

judgment-debtor to set off a cross-decree in existence at the date of his purchase and in the same Court. A I R 1934 C 44 see to the same effect 10 W R (F B) 32-1 B L R (F. B) 23; 6 W R Mis. 73; 18 W R 442; 19 W R 85; 21 W R 141. —And where the assignment is fraudulent, the right of set-off remains unaffected. 7 W R 470.

—Application for recognition as transferee of a decree unaccompanied by prayer for execution is not entertainable. 14 I C 704.

—A judgment debtor of an assigned decree obtaining a cross-decree after the assignment can attach the amount deposited under the assigned decree. A I R 1924 Nag 46-19 N L R 164-75 I C 752.

—The question whether the property held by legal representative can be claimed as property of the deceased by those in whom inheritance Vested after the death of propositus determines whether it is property of the deceased though property converted into different form is not "property of the deceased" it is liable for debts of the deceased. A I R 1924 Oudh 364-27 O C 262-11 O L J 411-81 I C 464.

—Assignee of a decree can execute it irrespective of equities which the mortgagor judgment-debtors may have against the mortgagee judgment-creditors for whom he is said to be the benamidar. A I R 1925 Pat 449-4 Pat 120-86 I C 564.

—Where consideration for assignment is partly unpaid assignee's right to execute depends on parties' intention about transfer of title. A I R 1925 Pat 449-4 Pat 120-86 I C 564.

—Transferee of a decree is not entitled to execute it unless he is brought on record, nor will he be entitled to benefits arising from execution until he takes out execution of the decree. A I R 1927 Rang 55-4 Rang 426-5 Bur L J 181-99 I C 309.

—Transferee of decree including even assignee without notice holds the decree subject to equities which the judgment-debtor could have enforced against the decree-holders. A L R 1933 Mad 856.

—Assignment subject to equities—claim for restitution under a decree, against the assignor—whether it is an equity that can be pleaded against the assignee see A I R 1934 C 44.

—Equities of judgment-debtor against decree-holder—Practice—Procedure. 4 Bur L T 254-12 I C 205.

#### C. P. C. (1908) SEC. 50

—This section applies to H C and Pro. S C C See Ajmere Regulation II of

## C. P. C. (1908) SEC. 50 (Concl'd)

1877, s. 29. This section omits the power given by s. 210, Art. VIII, 1859, to execute a decree against the estate of a deceased judgment-debtor.

*Synopsis.*

- (1) (2) Before the decree has been fully satisfied.
- (3) Court to which application to be made.
- (4) Death of Judgment-debtor or legal representative.
- (5) Decree for injunction.
- (6) Extent of liability of legal representative.
- (7) Legal representative.
- (8) Legal representatives bound by previous proceedings.
- (9) May apply to execute the decree against the legal representative.
- (10) Miscellaneous.

## (1-2) Before the decree has been fully satisfied.

—S. 50 does not exclude cases where the judgment-debtor dies before the passing of the decree, but only refers to the death of the judgment-debtor before the decree has been fully satisfied. Where therefore the decree is a good decree notwithstanding the death of the judgment-debtor before the passing of the decree, as in the case of a decree of the Privy Council, the case comes well within the terms of the section because death takes place also before the decree has been fully satisfied. 11 P 445=139 I C 397=A I R 1932 P 261=I R 1932 P 229=13 P L T 719=A L R 1932 P 360.

—If before the issue of certificate under S. 41, a judgment-debtor dies, the transferee Court loses jurisdiction over execution proceedings unless the decree-holder obtains an order from the Court passing decree for substitution of legal representative before the execution proceeds, but any acquiescence by legal representative estops him from challenging the jurisdiction. A I R 1928 P C 162=3 Luck 314=55 I A 227=5 O W N 502=26 A L J 681=48 O L J 23=32 C W N 70=28 L W 25=30 Bom L R 1373=55 M L J 545=(1928) M W N 863 (PC)=109 I C 417

## (3) Court to which application to be made.

—An application to substitute names of legal representatives for a deceased judgment-debtor may be made to a Court to which a decree has been transferred for execution. A I R 1931 All 320 (2)=1931 A L J 166=Ind Rul (1931) All 721=133 I C 609 but see contra 17 M L J 303.

—The latter High Court, has, however, also held that where a legal repre-

## C. P. C. (1908) SEC. 50 (Cont'd)

## (3) Court to which application to be made. (Concl'd)

sentative of the judgment-debtor is brought on record by the Court to which the decree had been transferred for execution and not by the Court which passed the decree is a mere irregularity and does not invalidate the sale 28 M L J 525=38 Mad 1076=29 I C 314.

—See also to the same effect 11 P 445=139 I C 397=A I R 1932 P 261=I R 1932 P 229=13 P L T 719=A L R 1932 P 360.

—Irregularity of execution by Court of transfer against legal representative without application to Court which passed the decree is curable by s. 99. A I R 1926 Lah 34=26 P L R 740=90 I C 1050.

—Irregularity of substitution of legal representative by transferee Court pending execution in contravention of s. 50 is curable by s. 99 and the legal representative acquiescing is estopped from challenging jurisdiction. A I R 1925 Oudh 448=12 O L J 146=2 O W N 73=28 O C 330=87 I C 21.

—There is nothing in s. 50 to indicate that the word 'dies' is intended to include Civil death A I R 1931 All 306=(1931) A L J 263=53 All 529=Ind Rul (1931) All 406=131 I C 598.

—Decree against father—Execution against assets in the hands of son—Death of son pending execution—Son's heir, a legal representative. See (1914) M W N 354=24 I C 280.

## (4) Death of legal representative or Judgment-debtor.

—See the former case followed in 17 A 162; 18 C W N 766; and 45 M L J 413=47 M 63.

—The Civil Procedure Code does not contemplate the representatives of a judgment-debtor being placed on the record after the appellate decree has been passed. 18 B 244; See also 28 M 466 F B and 24 B 142; and 17 A 243; and 21 B 314; and 28 O C 330; and A I R 1925 O 448 and 55 I C 156.

## (5) Decree for injunction

A decree for injunction in respect of land against a Hindu father representing the family could be enforced against sons taking by survivorship. Principles of liability discussed. A I R 1931 Bom 484=33 Bom L R 1144=55 B 703=Ind Rul (1931) Bom 545=134 I C 961.

—So also a decree for injunction after the death of the defendant, can be executed against all the sons of the defendant when some of them continued to obstruct.

## C. P. C. ( 1908 ) SEC. 50 (Contd.)

## (5) Decree for Injunction.

They can be brought on record under s. 50.  
A I R 1931 Bom 280=33 Bom L R 266=  
Ind Rul (1931) Bom 356=133 I C 244  
following 4 Bom L R 14=26 B 283.

—Where a decree for an injunction has been obtained against the father, the son not being joined as a party, and the father dies during the pendency of the execution proceedings, the decree can be enforced under s. 50 against the son as his legal representative by proceeding under O XXI, r 32. A I R 1931 Bom 482=33 Bom L R 118=Ind Rul (1931) Bom 552= 134 I C 968.

## (6) Extent of liability of legal representative.

—Not only legal representative, but also transferee from him pending execution proceedings are liable under execution A I R 1927 Bom 93=51 B 37=29 Bom L R 60=100 I C 582.

—As to liability of legal Representatives of Receiver, in execution for loss to the estate see 18 M L T 127=39 Mad 584=30 I C 383.

—But the liability for the debts of the deceased is not personal; it only extend to the estate of the deceased in the hand of the legal representative. 33 Bom L R 130=A I R 1931 B 229.

—Legal representative or heir at law is liable only if he has received property of the deceased which can be disposed of for satisfaction of debts of the deceased A I R 1925 Nag 449=89 I C 477.

—A legal representative of the deceased cannot be made personally liable under a decree, and Court can remedy any error in this respect at any stage of execution proceedings. A I R 1923 Bom 414=80 I C 180.

—So the decree-holder desiring to make a legal representative or administrator liable under s. 50 (2), must prove the amount of assets left by the deceased and the receipt of the same by them. A I R 1924 Mad 466=19 L W 119=(1924) M W N 207=79 I C 894.

—So also a personal decree obtained against a deceased judgment debtor cannot be executed against the ancestral property of the deceased which has passed into the hands of his legal representatives. 160 P W R 1912=173 P L R 1912=4 P R 1913=15 I C 866.

—Decree for maintenance being only a personal decree against judgment-debtor and not creating any charge on estate,

## C. P. C. ( 1908 ) SECTION 50 (Contd.)

## (6) Extent of liability of legal representative. ( Contd. )

subsequent holders of property after judgment debtor's death are not liable under it. A I R 1929 Cal 423=49 C L J 267=Ind Rul (1930) Cal 65=120 I C 705,

—And a decree passed against a person who dies pendente lite cannot be executed against his legal representative. 16 N L R 138=55 I C 449.

—In a suit against dead person substitution of legal representative is invalid: 51 I C 160.

—Once it is admitted or proved that the man sought to be made liable under a decree obtained against a deceased person had come into possession of assets belonging to the estate of the deceased judgment-debtor, it is for him to satisfy the court as to the extent of assets received by him and to account for them. 3 Mad 359=2 M W N 271=30 M L J 391 followed. A L R 1933 R 349.

—“ Assets ” do not include gratuity given to the heir of an employee. A I R 1923 Oudh 21=9 O L J 401=26 O C 53=69 I C 893.

—If the property devolved by inheritance after the death of the propositus can be claimed as property of the deceased by those in whom it vested, it is the property of the deceased within the meaning of s. 50 (2). A I R 1924 Oudh 364=27 O C 262=11 O L J 441=81 I C 464.

—Ancestral property of a deceased Jat—judgment-debtor passed into the hands of his heirs is not assets of his estate for the due disposal of which the heirs are bound to account under s. 50—1913 P R 4 N=79 P W R 1911=11 I C 375.

—Ancestral property of a deceased Jat in the hands of his heirs which is not charged by him in his life-time, is not assets within the meaning of s. 50. 80 P W R 1911=11 I C 376.

—Question of determination of assets being entirely for executing Court, no suit against legal representative can be dismissed merely for want of possession of assets left by deceased. Ind Rul (1930) Nag 29=120 I C 333.

—Mesne profits—Assets in the hands of the legal representative. See 30 M L J 391=(1916) 2 M W N 92=35 I C 224.

—Decree against the holder for the time being of impartible estate is executable against successor. 1 Pat L W 140=2 Pat L J 136.

—See also 2 I C 18.

—Where in execution of a decree against legal representative of the deceased objections are raised by the legal repre-

## C. P. C. (1908) SEC. 50 (Contd)

## (6) Extent of liability of legal representative. (Contd.)

representative, Court should exercise its equitable jurisdiction and make such order as it thinks fit. 13 S L R 138=52 I C 906.

—Legal representative is liable for the debts of the deceased to the extent of the property he has received which can be disposed for satisfying the debts and as such, Crops grown by widow of a deceased Govt. ryot governed by central Provinces Land Revenue Act S 67 E are not liable to attachment in execution of a decree against the latter. 9 N L R 137=21 I C 272.

—Ancestral property of a deceased Jat-judgment debtor passed into the hands of his heirs is not assets of his estate for due disposal of which the heirs can be bound to account under S 50. 11 I C 375 =79 P W R 1911=182 P L R 1911.

—Ancestral property of the father passing to son by Survivorship and ultimately to son's heirs, is the assets of the father in the hands of the son are his heirs and liable for father's debts not contracted for immoral or illegal purposes. (1914) M W N 354=24 I C 280.

“Assets”—Hindu Law—Surety debt—Decree against father—Liability of son—Liability of property in the hands of the son after partition See. 27 M L J 112 =38 M 1120=24 I C 474=1914 M W N 742.

Order making legal representative of Hindu debtor liable to the extent of assets of the deceased in his hands, cannot exempt ancestral property from liability. A I R 1929 Lah 424=30 P L R 593=Ind Rul (1929) Lah 748=118 I C 396.

Representative of a deceased judgment-debtor sued under the decree obtained against the deceased and proved, to possess assets of the deceased, must prove the extent of the assets and account for them. 21 M L J 1096=10 M L T 272=(1911) 2 M W N 271=12 I C 253. See also 24 I C 206.

To manage property of deceased judgment-debtor in the hands of his legal representatives, Collector can be appointed by the Court under s. 22, Dekkhan Agriculturists' Relief Act. A I R 1921 Sind 29=15 S L R 47=63 I C 310.

Under the Punjab Colonization Act V of 1912 S. 18, tenancy is not liable to attachment or sale in the hands of the tenant, crops grown by heir of deceased tenant is not property of the deceased and liable as such under S. 50. 84 P W R 1916=33 I C 741.

As to the extent of the liability of legal representative of judgment-debtor see 13 O C 297 and 25 I C 370=41 C 271.

—Person in possession of deceased judgment debtor's property is liable to the extent of assets. 24 I C 200=35 All 439.

## C. P. C. (1908) SEC. 50 (Contd)

## (6) Extent of liability of legal representative. (Concl'd)

—So also a person who intermeddles with the estate must account for the assets in his hands. 42 I C 122.

—Where a decree is passed for a debt due by deceased debtor in a suit brought against a person in possession but who is not the heir of the deceased debtor's estate, the decree and the proceedings in execution of such decree bind the interests of the real heir. Such a case is an exception to the general rule that proceedings in execution of a decree do not bind. The interest of any person who was never brought on the record as a party to the proceedings in the suit. 36 M L J 106 =52 I C 509.

—Whether possession of assets is necessary for suing a legal representative see. 8 A L J 199.

—As to the liability of a secretary of a Company to pay monies found to have come into his father's hands. see 33 M L J 468.

—As to the power of Court as regards objections to execution against legal representative see. 13 S L R 138.

—As to whether and when is a decree against wrong person binding on the estate see 19 C L J 19. see also 29 M L J 698=31 I C 920.

—Execution against legal representative of decree obtained against ostensible representatives—Procedure. see 22 C L J 272=28 I C 925.

## (7) Legal representative.

—See also under O 22 r. 3 and S 2 (11)

—So also a widow in possession of rents being her personal moveable property, is not liable to be proceeded against in execution of a decree obtained against her deceased husband—19 All 235. but see 30 M L J 391=35 I C 224.

—A person who in law represents the estate of the deceased is a legal representative, and as such proof that a certain person may become possessed of assets of the deceased, entitles the decree-holder to execute it against him. 8 A L J 199=33 A 414=9 I C 935.

—Execution of appellate decree against a party on record in appeal who was himself a legal representative of the deceased judgment-debtor, is valid and proper, and cannot be objected on the ground that no legal representatives had been brought on record. 28 I C 925.

—On the death of the holder of a preliminary decree in a partition suit, his widow is the proper legal representative. 2 L W 325=28 I C 543.

—Suit by member of joint Hindu family for specific performance—Death pending suit—Right of wife and of surviving members. See 17 A L J 576.



C. P. C. (1908) SEC. 50 (Contd.)

(7) Legal representative. (Concl'd)

—As to whether a successful pre-emptor is representative of vendee. See 12 I C 497.

—Whether a purchaser of property not directly mentioned in the decree is one. See (1916) 1 M W N 287.

—It is the duty of the Court to decide who the proper legal representative is pendente lite, and the decision is not appealable. (1918) M W N 198.

—A person who intermeddles with even a portion of the estate of a deceased person is a legal representative of the deceased under S. 2 (11) of the C. P. Code and is liable to the extent of the value of the property taken. Where a person who has wrongfully converted property will not produce the same, it shall be presumed to be the best of the description of its kind. 115 P R 1913=39 P L R 1914=22 I C 242.

(8) Legal representatives bound by previous proceedings

—Legal representatives of a deceased judgment-debtor are not bound by execution sale held after his death but without bringing them on record. A I R 1926 Mad 138=22 L W 828=50 M L J 662=92 I C 308.

—Sons brought on record as legal representatives in execution proceedings of a decree against their father are bound by the execution proceedings and as such by execution sale of property. 9 M L T 481 =9 Ind Cas 648.

—Execution—decree against the assets of the deceased in the hands of his widow—widow, holding a life interest—death of widow and vesting of the assets in another person, previously exonerated from suit—decree will not bind such other person in whom the assets are vested. A L R 1933 M 485.

—As to defence open to a legal representative in a suit against him: 19 C L J 152=19 I C 90.

—Objection by legal representative that proper procedure was in execution. See 23 M L J 287=17 I C 293=1912 M W N 888.

(9) May apply to execute the decree against the legal representatives.

—If the decree-holder has any complaint against the legal representatives of the deceased judgment debtor for not properly administering the estate, the complaint can be dealt with in execution of a decree. The decree-holder need not file a separate suit. A L R 1933 R 349 following 5 R 44.

C. P. C. (1908) SEC. 50 (Contd.)

(9) May apply to execute the decree against the legal representatives. (Contd.)

—An ex parte order permitting execution against legal representatives is valid. A I R 1928 Rang 40=5 R 775=6 Bur L J 225=105 I C 857. O 22. r. 10 applies to execution proceedings. Proceedings for ascertainment of mesne profits of property sold pendente lite, are in continuation of the original suit, and as such mesne profits are determinable in the suit itself and not by way of execution and the whole suit continues. 39 Cal 220=16 C W N 103 =41 I C 939.

—Execution proceedings do not abate on the death of judgment-debtor, but can be continued as against his heirs by bringing them on record on decree-holder's application. 18 A L J 735=42 A 570=57 I C 610.

—Procedure under O. XXXII and O. XXI r. 22 is to be adopted, when judgment-debtor dies leaving minor son and a widow. A I R 1921 Nag 126=59 I C 757.

—Six months at least must be given to the decree-holder within which to make an application to bring legal representative on record. 62 I C 52 (Pat).

—Suit by Hindu reversioner—Death of reversioner—Substitution of the next reversioner as legal representative, see 38 Mad 406=29 I C 298 (P C) see also 8 M L J 288=22 M 119.

—As to provision for bringing a legal representative on record under Cr. P. Code See Cr P. Code S. 145; and 27 M L J 613 =25 I C 1094.

—Where a puisne mortgagee agreeing to property being sold free of his mortgage on condition that balance left after discharge of prior mortgage is paid to him, but dies subsequent to the order of sale and prior to sale itself, omission to bring his legal representative on record vitiates the sale. A I R 1922 Mad 307=15 L W 123 =41 M L J 547=(1921) M W N 732=68 I C 667.

—Where a decree is made executable on default, it is unnecessary to bring a legal representative on record till such default after the death of judgment-debtor. A I R 1921 Mad 693=14 L W 632.

—And an application for bringing on record the legal representative of a deceased plaintiff cannot be made after a suit is dismissed for default. The suit must first be restored before such an application is put in. 14 I C 711.

(12) Miscellaneous.

—Judgment debtor acquiescence in execution cannot subsequently object. 10 L B R 280=13 Bur L T 173=62 I C 299.

## C. P. C. (1908) SEC. 50 (Concl'd)

## (12) Miscellaneous. (Concl'd)

—Where at the request of parties the property is ordered to be sold with a guarantee, the request cannot be subsequently withdrawn. 13 M L W 429=62 I C 730.

—In the presence of a widow and mother of the deceased, the widow of deceased's cousin should not be added as legal representative, and her name, if added, should be struck off. 70 P L R 1915=9 P W R 1915=27 I C 598.

## C. P. C. (1908) SECTION 51

## (1) Scope of the Section.

—S. 51 prescribes the mode in which the decree-holder may seek execution of his decree and does not give any right to the judgment-debtor to apply for appointment of a Receiver. A I R 1922 Pat 369=4 P L T 58=(1922) Pat (Sup) 66=67 I C 606.

—Decree-holder alone can apply for execution of decree and a stranger getting benefit under compromise-decree cannot execute it but must institute a separate suit. Irregularity, the effect of which is to perpetuate a fraud on the Govt. Revenue cannot be sanctioned. 37 I C 133=3 O L J 570.

—Application by the decree-holder for a temporary alienation of judgment-debtor's land to him in execution of a money-decree can be entertained neither by Assistant Collector nor by Collector sitting as Revenue Court. 8 P R (Rev) 1917=7 P W R (Rev) 1917=43 I C 356.

—Simultaneous execution in more than one Court, should be ordered only in rare cases. 3 L W 336=34 I C 302.

—Reading into a decree a supplementary or alternative relief which is not there is not authorised by cl (e). A I R 1922 Mad 299=42 M L J 356=16 L W 589=70 I C 529.

—Proceedings in execution before Collector cannot be filed unless all lawful means for satisfying the decree have been tried and found impracticable. A I R 1929 Lah 195=112 I C 790.

—Mortgage by executing Court of land of a judgment-debtor in possession of moveable sufficient to satisfy the decree, but successfully resisting the execution for about 10 years, is valid. A I R 1930 Lah 77=Ind Rul (1929) Lah 839=119 I C 231.

## (2) Detention and Arrest.

—No compulsion should be made to a decree-holder applying for arrest of Judgment-debtor in execution of decree, to accept payment in instalments instead. A I R 1930 Lah 220=30 P L R 736=Ind Rul (1930) Lah 573=125 I C 61.

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## C. P. C. (1908) SEC. 51 (Cont'd)

## (1) Scope of the Section (Concl'd)

—Order committing a judgment-debtor to jail passed without jurisdiction to which no objection or question of legality is raised is not an order under S. 47 and as such, is not appealable A I R 1929 Rang 161=7 R 110=Ind Rul (1929) Lah 181=117 I C 245.

—In executing a personal decree, a judgment-debtor can be arrested unless he is a female, legal representative or a minor. A I R 1922 Nag 98=18 N L R 145=5 N L J 49=65 I C 53.

## (3) Execution without Attachment.

—Mortgage-decree directing sale of property can be executed without attachment. A I R 1929 Lah 90=10 Lah L J 491=30 P L R 6=10 Lah 543=113 I C 907.

—Court has jurisdiction to sell without attachment, and as such a sale is not vitiated by failure to attach unless substantial injury is caused. A I R 1923 Pat 45=3 P L T 765=2 Pat 207=(1922) Pat 321=68 I C 363.

—A mortgage-decree based on compromise not indicating that attachment is necessary can be executed without attachment. A I R 1921 Pat 320=2 P L T 38=60 I C 652.

—for sale without attachment is not void though it may amount to irregularity: 92 I C 833=1925 M W N 887=51 M L J 172=A I R 1926 M 211;

—and 77 I C 368=A I R 1924 R 124=1 R 533.

—decisions in 42 I C 259 (Cal); and A I R 1927 C 847; and 36 B 156 holding contra do not represent sound law.

## (4) Receiver.

—S. 51 (d) of the Code no doubt recognises the appointment of a Receiver as a mode of execution of a decree, and says that such an order may be made on the application of a decree-holder. The clause only gives legislative sanction to certain decisions under the old Code, in which it was held that execution may be had by appointing a receiver where that course is more likely to benefit both the judgment-debtor and the decree-holder than a sale of the attached property. S. 51 does not entitle the decree-holder to apply for execution by the appointment of a receiver as of right and as a matter of course; on the other hand, the remedy by the appointment of a receiver is by way of equitable execution or indirect execution the receiver taking the place of the debtor.

## C. P. C. (1908) SEC. 51 (Contd)

## (4) Receiver. (Contd.)

in cases in which equitable and special considerations intervene. A proper case is therefore required to justify the exercise of the Court's discretion to appoint a receiver by way of execution. As regards the circumstances, which would justify such appointment, cases under the old Code are not altogether negligible, because they lay down principles of equity and so are generally principles of universal application. One such is to see whether, in view of the assets, the amount due under the decree is likely to be realised within a reasonable time from the profits of the attached property. What is a reasonable time for that purpose must be determined upon the facts and circumstances of each case. Another principle is that such appointment should appear in the circumstances to be the best course both for the creditor and for the debtor. Much more care should be taken to ascertain whether the order should be made in a case where the decree-holder applies for the appointment of a receiver. The Court should see whether the appointment applied for is "just and convenient" within the meaning of O. 40, r. 1, that is, just and convenient in view of the equities in favour of both the parties. A mere apprehension that there are means open to the judgment-debtors of harassing the decree-holders cannot justify the appointment of a receiver which is otherwise entirely unjustifiable. Where the Court below made an order appointing a receiver at the instance of the decree-holder almost as a matter of course, and far from satisfying the requirements of the phrase "just and convenient" in O. 40, r. 1, held that the order was unsustainable. 59 C 205-35 C W N 1066-137 I C 98-A I R 1932 C 189-I R 1932 C 257-A L R 1932 C 521.

—So also a receiver can be appointed in execution of a decree against debtor upon whom immoveable property is settled without power of alienation suit over rents and profits of which he has disposing power: 59 C 1.

S. 51 of the C. P. Code empowers the Court to appoint a Receiver of rents of the estate of the deceased person for the purpose of liquidating debts against that estate, and there is nothing in the Code to limit the appointment of a Receiver of rents to a case where the debt to be discharged is a debt against the heirs and not against the deceased holder of the estate and that so long as the present Receiver is maintained, application of the appointment of a Receiver for the sale of the property held by the Receiver already in possession thereof

## C. P. C. (1908) SEC. 51 (Contd)

## (4) Receiver (Contd)

cannot be entertained: 22 O C 194 =52 I C 305.

Appointment of receiver to manage the jahagir, granted under Berar Inam Rules—allowance to judgment-debtor. see A L R 1933 N 61.

Whether appointment of receiver over property subject to mortgage militates against Sub. r. 2 of r. 1 of O 40 C P C see A L R 1933 A 76-1933 A L J 51-A I R 1933 A 227.

Mere convenience of decree-holder or one of the mortgaged properties proving to be saleable, is no ground to justify the appointment of a receiver. Mortgagee cannot proceed against personally until the whole mortgage security has been sold and a personal-decree against mortgagor is obtained. 16 O C 238-21 I C 283.

The High Court has the power to appoint a receiver and to direct him to sell the property in the mofussil. 51 C L J 270-A I R 1931 C 174.

But the Court should not grant execution of decree by appointment of a Receiver unless ordinary execution cannot be effected with advantage, and when such case is made out application for such appointment is to be made as execution application to Court within whose jurisdiction property is situate. A I R 1930 Cal 502-34 C W N 238 =51 C L J 209-57 C 964-Ind Rul (1931) Cal 17-128 I C 97.

Thus Receiver for realising property outside jurisdiction can be appointed by executing Court A I R 1921 Mad 119-13 L W 150-(1921) M W N 106-61 I C 753.

A judgment-creditor's position is not in any way improved by appointment of Receiver in execution instead of execution by attachment and sale. A I R 1930 mad 4.

If a Receiver has been appointed to realise properties in execution proceedings, it is unnecessary for other decree-holders to apply for appointment of a Receiver over the same properties in execution of their decrees. A I R 1930 Mad 4.

In Santhal Pargannas, Court can appoint receiver in respect of agricultural land of the judgment-debtor by way of equitable execution A I R 1929 Pat 700-10 P L T 846-Ind Rul (1929) Pat 545 (F B) =118 I C 721.

Order directing appointment of receiver-Execution sale without leave of court-Sale if void. See 29 C L J 424-51 I C 394.

Moneys received by receiver appointed under S. 51 (d) do not ipso facto belong to decree-holder, as the former is not agent of the latter. A I R 1930 Mad 4.

Such moneys belong to the Court and cannot be spent except under the court's

**C. P. C. (1908) SEC. 51 (Concl'd)****(4) Receiver. (Concl'd.)**

orders. Such a receiver is for the benefit of all persons interested in the suit or proceeding. A I R 1930 M 4.

S 51 O. 21 R 11 and O. 40, R. 1 are to be read together. An order of appointment of a receiver at once vests the property in him unless it is made conditional upon furnishing of security. 14 C L J 489=12 I C 745.

—Ghatwali tenure-Income if may be attached—Appointment of receiver, see 39 Cal 1010=14 I C 227=16 C W N 802.

—Appointment of Receiver in execution only when property is subject to attachment. See 40 Mad 302=30 M L J 361=34 I C 381.

—Execution against that property—Appointment of receiver to collect rents and profits—Position of transferee—Powers of receiver. 30 C L J 231=57 I C 70.

—Order directing sale of property in the hands of a Receiver has the effect of discharging the Receiver. 110 A W N 1905.

—An order appointing a Receiver made in execution, falling within the purview of O. XL, r. 1, is appealable under O. XLIII r. 1 (s.) A I R 1927 Lah 190=100 I C 298.

—See also 30 C L J 231=57 I C 70.

**C. P. C. (1908) SEC. 52***Synopsis.*

- (1) Appeal
- (1-a) General principles scope and object
- (2) Decree against executors
- (3) Decree against wrong person
- (4) Decree and its executions against legal representatives of a deceased person
- (5) Effect of decree passed against a dead person
- (6) Failure to satisfy the court of the proper application of the assets and its effect.
- (7) Insolvency of heirs after decree
- (8) Legal representative
- (9) Liability of legal representatives
- (9-a) Mahomedan
- (10) Out of the property of the deceased
- (11) Right of creditor to follow the assets in the hands of the legatee
- (12) Where no such property exists
- (13) Miscellaneous Cases

**(1-a) General principles, scope and object.**

—The questions arising in an enquiry under s. 52 (2) are questions relating to the execution, discharge or satisfaction of the decree, and must be decided by the

**C. P. C. (1908) SECTION 52 (Contd)****(1-a) General principles, scope and****object. (Concl'd)**

Court executing the decree and not by a separate suit. A I R 1927 Rang 127=5 R 44=101 I C 431.

**(2) Decree against executors**

—Where, no executor is appointed by will, a decree passed against karnavan can be executed against the estate. A I R 1928 Mad 243=(1927) M W N 894=108 I C 409.

**(3) Decree against wrong person.**

—Decree against wrong legal representative—Estate in the hands of true heir, if bound. See 15 Bom L R 41 =18 I C 381.

—In absence of fraud or collusion, a decree obtained against a wrong legal representative is binding on the real one. A I R 1928 Mad 243=(1927) M W N 894=108 I C 409.

—Suit against legal representative—another person turning out to be actual legal representative—liability of estate in latter's hand—no collusion or fraud see. A L R 1933 L 161.

**(4) Decree and its execution against legal representatives of a deceased person.**

—Proof of existence of assets of a deceased person in the hands of his legal representative entitles the plaintiff to a decree. 56 I C 962.

—A decree on a pro note executed by the deceased can be passed against the father and sons of the deceased a forming joint Hindu family under s. 52. 26 A L J 799=Ind Rul (1929) All 518=116 I C 86.

—Thus a decree-holder is entitled to attach property of Ward already attached by Court of Wards. 22 I C 694=18 C W N 1055=16 C L J 406.

—But a decree passed against the assets of the deceased, against some of the legal representatives, others not made parties to the suit are not affected. A I R 1927 Mad 197=98 I C 613.

—Though a decree not providing personal liability can under certain circumstances, be personally executed. (1916) 2 M W 128=35 I C 614.

—Decree can be passed against a legal representative without deciding whether he is in possession of deceased's assets or not. Proper shape for such enquiry is in execution. A I R 1931 Nag 173=27 N L R 247 =Ind Rul (1931) Nag 190=134 I C 862.

—A decree in a suit brought against the grandson ran as follows:—"The plain-

## C. P. C. (1908) Section 52 (Contd.)

## (4) Decree and its-execution against legal representatives of a deceased person. (Concl'd)

tiff shall recover out of the estate of the deceased Dalichand Nauchand (grandfather) a sum of Rs. 1, 264-14-0, the costs of this suit and interest, etc." Held that the decree was against the grandsons as legal representatives of their grandfather and limited to the joint family estate in their hands. The proper decree to pass in this case would have been a decree against the defendants for the sum claimed to the extent of the assets of the deceased or the joint family estate coming into the hands of the defendants. It was not disputed that the family was joint and undivided, and, having regard to the fact that the appellants were the defendants in the case in which the decree was passed, it is clear that the decree was against them as legal representatives of Dalichand and limited to the joint family estate in their hands 34 Bom L R 1005  
= A I R 1932 B 522= A L R 1932 B1260.

—Decree, form of—Suit by a vendee from a Hindu father for refund of proportionate consideration. see 31 M L J 502=36 I C 387=20 M L T 320=4 L W 366=1916 (2)  
= M W N 217.

## (5) Effect of decree passed against a dead person.

—Where the heirs of a deceased mortgagor were mentioned in an application for final decree and notices were served on them but they did not appear and the decree was made final but their names were not mentioned in the final decree it is not open to such heirs to question in execution the validity of the final decree, A I R 1927 Bom 156=101 I C 129. See also under s. 50.

## (6) Failure to satisfy the Court of the proper application of the assets and its effect.

—Representative of a promisor is bound by the promises to the extent of the assets of the promisor received by him unless he fails to satisfy that he had duly applied.

the assets, in which case he is personally liable. Decree passed against representative not specifying that it should be payable out of the assets of the deceased is erroneous. 65 P R 1874. A legal representative paying away the whole of the property of the deceased to bonafide creditors, is said to have duly applied the same under S 52 even though some other creditors remain unpaid. 68 P R 1895. Legal representative of deceased debtor is

## C. P. C. (1908) SEC. 52 (Contd.)

## (6) Failure to satisfy the Court of the proper application of the assets and its effect (Concl'd.)

not liable to distribute his assets rateably among the creditors, he is liable only to apply the assets duly 26 M 792=13 M L J 258. So also a decree passed against representatives of deceased judgment-debtor can be executed only against the property of the latter unless the former have misapplied it in which case their private property will also be liable 12 B L R 66 Note=10 W R 199. But a person in possession of the assets of deceased disposing of such a portion thereof as to exceed debts, without any right is personally liable for the debts A I R 1922 Oudh 200=77 I C 306.

—That is to say a decree against the estate of the deceased cannot be executed personally against the legal representative, unless he fails to account for the assets of the deceased in his hands A I R 1930 Lah 33=124 I C 338.

—Heirs can be, therefore, personally liable under the decree if they fail to prove that they have applied the income of the property of the deceased towards his debts. A I R 1930 Lah 204=31 P L R 292=Ind Rul (1930) Lah 587=125 I C 187.

—Where the heirs are not in possession of property of the deceased, and fail to show that property come into his possession has been duly applied, Sub S. 2 applies A I R 1930 Lah 354=31 P L R 29=Ind Rul (1930) Lah 193=121 I C 289.

## (7) Insolvency of heirs after decree.

—Decree passed against estate of deceased Hindu before the insolvency of heirs cannot be executed against the estate in the hands of Official Receiver 18 M L T 147=30 I C 256.

## (8) Legal representative.

—As to Bombay see 8 Bom 220 in which it has been held that under the provisions of Bombay Act VII of 1866 when a Hindu dies intestate leaving property, his son is liable to his (the father's) creditors to the extent of the value of the property although the property may not have come into the son's possession but remains in the hand of third persons. see also 53 B 463.

—Whether executor de son tort is a legal representative see 50 I C 651.

—Per Ashworth J—In paying debts of the deceased, a legal representative may show preference and may retain a debt due to himself A I R 1927 All 459=49 A 645  
=25 A L J 359=101 I C 507.



## C. P. C. (1908) SEC. 52 (Contd)

## (9) Liability of legal representatives.

—Legal representative is bound to account for the property that has come into his possession and profits of the same. In absence of any puisne incumbrances, a merger takes place on a mortgagee becoming entitled to equity of redemption. 30 M L T 391=(1916) 2 M W N 92=35 I C 224.

—Where property is sold in execution of a decree passed against 2 persons as legal representatives of a deceased person, a separate suit by one of them to recover possession is barred by s. 47. 39 A 47=14 A L J 846=36 I C 281

—Liability of a son sued on a hundi executed by the father of a Mitakshara family extends only to the extent of the assets of the co-parcenary property held by him. 2 P L T 396=65 I C 224.

A Hindu son brought on record under O XXII r. 4, is liable for the debts of his father as his father's legal representative to the extent of property liable for the same received by him. A I R 1926 Oudh 301=92 I C 787.

—Sale in execution of a rent-decree does not affect the heirs of a recorded tenant to which they were not made parties. A I R 1923 Cal 166=67 I C 149.

## (9-a) Mahomedan

—A sale in execution of a decree against some of Mahomedan Co-heirs does not affect the co-heirs who were not parties to the decree. 21 Bom L R 329, see also 11 C L R 268.

—And where a decree was obtained against a Mahomedan widow for a debt due by her husband who had died leaving a widow and a minor daughter, it was held (though the point was not directly before the Court) that the daughter was not bound by the decree—1 All 57; 7 All 822; followed in A I R 1927 A 415; and A I R 1929 M 609; and A I R 1921 C 572; but see 12 Bom 101. See also on this point 14 W R 448; 14 W R 448, note.

## (10) Out of the property of the deceased.

—An heir in possession of the property of the deceased is liable for the decree for payment of money out of the assets of deceased debtor, and the neglect on his part in allowing a larger portion to be sold than was necessary does not affect the purchaser's rights. A I R 1925 Oudh 515=2 O W N 407=12 O L J 512=89 I C 534

—Where heir of a deceased jagirdar against whom a decree is passed remits money to Court for his own personal decree, the decree-holder is entitled to share the

## C. P. C. (1908) SEC. 52 (Contd)

## (10) Out of the property of the deceased. (Concl'd)

money. 55 P L R 1913=42 P W N 1913=18 I C 55.

—“Assets” include income from impartible Raj passing from deceased Jemindar to his representative and that accruing since the death of the Zemindar. A I R 1924 Mad 530=47 M 411=46 M L J 261=34 M L T 17=(1924) M W N 346=80 I C 163.

—And also rents and profits accruing from immoveable property. A I R 1928 Oudh 40=2 Luck 408=4 O W N 98=99 I C 897;

—For rents and profits are legal incidents of immoveable property and must bear the same character as the property itself. 9 O W N 315 (318)=137 I C 632=I R 1932 O 261. See also 137 I C 25=33 P L R 462=A I R 1932 L 383.

—But no creditor is entitled to rents and profits of property of the deceased received by heir-at-law until sequestration of the estate by attachment or otherwise. 17 O C 207=25 I C 384.

—A maintenance decree in the hands of a Hindu widow does not constitute assets so as to be rendered liable to be attached and sold in execution of a mortgage-decree against her husband. A I R 1931 All 368=Ind Rul (1931) All 150=129 I C 374.

—Execution of decree—Assets that may be in the hands of the representative—Meaning of See 14 A L J 899=36 I C 901.

—Legal representative—impartible property—Property in the hands of successor if assets, See 34 All 79=8 A L J 1251=12 I C 915.

## (11) Right of creditor to follow the assets in the hands of the legatee.

—A decree obtained against a legal representative cannot be executed against the assets in legatee's hands, but a separate decree against the latter should be obtained. A I R 1930 Cal 762=34 C W N 761=52 C L J 16=58 C 170=Ind Rul (1931) Cal 419=129 I C 419.

## (12) Where no such property exists.

—The mere fact that legal representatives do not possess assets of the deceased does not justify dismissal of the suit.

A I R 1926 Nag 170=89 I C 236.

—An application for execution of a money-decree obtained against a deceased person was filed against his brother and, notwithstanding objections raised by the brother, a portion of the amount was realised from out of the assets of the deceased in his hands. The brother did

**C. P. C. (1908) SEC. 52 (Concl'd)****(12) Where no such property exists. (Concl'd)**

not then raise the plea that the assets in his hands were insufficient for the payment of the decree debt, although he could have done so. On such a plea being raised by him in bar of a subsequent application filed by the same decree holder for the realisation of the balance due to him under his decree. Held that the plea was barred by res judicata. The plea was one which the brother could and ought to have raised in bar of the prior application for execution, 9 O W N 315 (318)= 137 I C 632  
=I R 1932 O 261

**(13) Miscellaneous Cases.**

—The plea of 'plene administravi' can be taken in a suit as a reason for no decree being passed, irrespective of the fact whether it can be taken in execution proceedings or not. A I R 1927 All 459-49  
A 645-25 A L J 359=101 I C 507.

**C. P. C. (1908) SECTION 53.****(1) Scope of the Rule.**

This section is new and its effect is to enable decree-holders to have such questions of Hindu Law tried out in execution and to spare them the expense and delay entailed by the institution and maintenance of a fresh suit. It is of course open to the son or other descendant to set up all or any defence which he could raise in a separate suit and no liability is imposed by this section other than that established by the substantive. The section sets at rest a conflict of judicial opinion see s. 50. The section now expressly makes the son or descendant of a Hindu his legal representative in respect of the joint family property in his hands. But Order of the lower Court passed under old code cannot be reversed by appellate Court on the ground that since then a different rule has enacted by the new Code. 1911, 2 M W N 386=12 I C 553.

—The section is not confined to money-decrees. A I R 1924 Mad 571=46 M L J 471=19 L W 484=34 M L T 209=83 I C 985.

**(2) Liability of Hindu Heir.**

—Members of a joint Hindu family are not legal representative within the meaning of s. 2 (11) and as such a decree for injunction against two members of a joint Hindu family cannot be executed against the surviving members who were not parties to the suit after the death of those two members ( Beaman, J. Diss ) 42 Bom 504=20 Bom L R 660=46 I C 745.

**C. P. C. ((1908) SEC. 53 (Cont'd.)****(2) Liability of Hindu Heir (Cont'd).**

—But ancestral property in the hands of the son is liable under Hindu Law for the payment of a decree on debt due by father. A I R 1925 All 471=23 A L J 467= L R 6 A 321 Civ=88 I C 200.

—So also under s. 53 C. P. C. a decree obtained against Hindu father can be executed against properties attached and the execution will be binding on the son in absence of any limitation as to share, or illegality or immorality attached to the debts. A I R 1930 Mad 257=Ind Rul (1930) Mad 7=(1929) M W N 776=120 I C 375.

—This sets at rest the conflict as to whether property in the hands of a Hindu heir is "assets" See 11 I C 376.

and cases under s. 50. Thus the legal representative of a deceased Hindu lambardar is, so far as the assets of the deceased in his hands are concerned, liable to the same extent as the lambardar, that is to say, not only for the money actually collected by the lambardar, but also for money left uncollected owing to his negligence or misconduct. 1932 A L J 873=16 R D 580=13 L R 363 (Rev.) =A L R 1932 A 1103.

—And it should be noted that the decree can be executed against entire ancestral property and not merely against father's share. A I R 1924 Oudh 393=11 O L J 202=27 O C 111=81 I C 15.

See also 16 C L J 85=16 I C 970.

—Entire joint property including ancestral property in the hands of a Hindu son is liable for a decree against his father. Ind Rul (1930) Bom 619=32 Bom L R 919 =127 I C 507.

—The date of the death of the deceased is the crucial date for the purpose of determining whether a certain person is the legal representative of the deceased with regard to property sought to be attached. A I R 1926 All 220=48 A 245=24 A L J 273=91 I C 785.

—No person taking property by survivorship other than son or descendant can be joined as legal representative under s. 56. A I R 1924 All 873=L R 5 A 279 =Civ 78 I C 637.

—Legal representative for the purposes of s. 50 do not include nephew. A I R 1923 All 539=21 A L J 353=45 A 455= L R 4 A 220 Civ=73 I C 958.

—A mortgage-decree can be executed against son as legal representative without an order of attachment. A I R 1923 Pat 143=3 P L T 43=6 Pat L J 451=62 I C 905.

—A decree, obtained on a debt due by father not tainted with illegality or immorality can be executed under Hindu Law against the ancestral property in the hands of the son. A I R 1923 All 124=20 A L J 969=L R 4 A Civ 31=71 I C 417.

## C. P. C. (1908) SECTION 53 (Contd)

## (2) Liability of Hindu Heir. (Contd)

—Costs awarded in a partition suit against father can be recovered from the son by attaching the share fallen to the father at partition but passed in the hands of the son after his death. 19 I C 252.

—Decree against legal representative directing the amount to be realised from private property of the deceased, cannot be executed against ancestral property passed into the hands of his heirs. 9 I C 631.

—A son and a separated Hindu brother cannot be sued as legal representative for appropriating crops sown by the deceased father. A I R 1927 All 683=103 I C 338.

—Deccan Agriculturists Relief Act exempts land belonging to Hindu father in the hands of the agriculturist son from attachment, but not the rents there of. A I R 1929 Bom 233=Ind Rul (1929) Bom 499= 53 B 463=31 Bom L R 442=119 I C 179.

—In execution of a decree passed against son simply but really against assets of deceased father, compensation in respect of forest dues from Government becoming due after the death of the father and received by the son can be attached. A I R 1930 Nag 134=Ind Rul (1930) Nag 120=121 I C 664.

—Possession of the standing crops can be ordered to be delivered by Collector. A I R 1927 Nag 300=103 I C 231.

—Decree against undivided co-parcener

—Attachment of his interest before death

—No survivorship. 16 M L T 123=24 I C 667.

—“Assests” do not include gratuity given to heirs of a deceased employee by a Railway administration. A I R 1923 Oudh 21=9 O L J 401=4 U P L R (Oudh) 96=26 O C 53=69 I C 893.

—Decree in a suit on debt passed without enquiry as to the existence and binding character of the debt is illegal. 57 I C 36.

—Decree against manager—Liability of shares of co-parceners. See 40 Bom 329=33 I C 956=18 Bom L R 52.

—Surety for restitution—Applicability to son's property at partition during lifetime of father. See 27 M L J 112=38 M 1120=24 I C 474=1914 M W N 742.

—In a Mitakshara Joint Hindu family the father can for a personal debt of his own, sell not merely his own interest but also the interests of the sons in the joint family property provided the debt is not an illegal or immoral one; and a creditor of the father can avail himself of this right even though the sons are not parties to the transaction or the proceedings in Court. The interest of the sons also can be sold in execution of a decree against the father and the sale will be held good if the

## C. P. C. (1908) SEC 53 (Conclld)

## (2) Liability of Hindu Heir (Conclld)

purchaser has no notice either of the illegality or the immorality of the debt. The sons need not have been parties to any such proceedings, but if from the proceedings, it is found that only the interest of the father was sought to be proceeded against then the fact that sons were not parties would be material. —The words “right title and interest” of the judgment-debtor might mean the father's share alone or the son's share also and it depends on the intention to be gathered from the circumstances in each case. 18 C W N 42=22 I C 873.

See also 43 I C 678; and 33 A 71; and 33 A 7; and 33 A 436.

—Joint Hindu Family—Decree against manager—What passes by the sale is a question of fact, depending on circumstances. See (1918) Pat 71.

—Joint Hindu Family—Mortgage by father and managing member—Decree on mortgage—Existence of minor sons of mortgagor unknown to mortgagee—Minor's interest if passes—Father's representation sufficient. See 27 I C 425.

—The question of “interest sold” is one of fact. 21 M L J 321.

## C. P. C. (1908) SEC. 54 (Contd)

## Synopsis.

- (1) General principles, scope and object.
- (2) Civil Court's Jurisdiction to hear objections to Collector's partition.
- (3) Estate, meaning of
- (4) Execution of decree
- (5) Final decree in partition suit
- (6) Partition by Civil Court—and its Jurisdiction
- (7) Partition by Collector.
- (8) Suit for partition.

## (1) General principles, scope and object

—So also S. 54 does not apply to estates assessed at acerates, but only to estates assessed to revenue in one lump sum for the whole estate. A I R 1926 Rang 80=5 R 206=4 Bur L J 260=95 I C 39.

—S. 54 applies only to a case where the decree comprehends the partition of the whole of the estate paying revenue to government. A decree for possession of a share of a portion of an undivided estate is not a decree for “possession of a share of an undivided estate” in any sense and hence does not fall within the term of S. 54. A L R 1933 M 714 following 34 C W N 895 and 34 C W N 892.

## CIV. PRO. CODE (1908) SEC. 54 (Concl'd)

## (1) General principles, scope and object (Concl'd)

—But, where applicable, the section applies even though the division of the land is not to be followed by the apportionment of the revenue assessed on it. A L R 1933 M 714.

## (2) Civil court's Jurisdiction to hear objections to Collector's partition.

—As to whether S. 54 prevents a Civil Court from decreeing a partition of a revenue paying estate—Separate allotment of revenue not asked for. See 39 I C 173 =2 P L J 221=1 P L W 335.

—Execution referred to Collector—Application to Civil Court to expedite execution, if an execution application—Power of Court to control Collector's proceedings See 29 I C 58=8 S L R 335. Partition suit—Revenue paying estate—Concurrent jurisdiction to execute decree—Liability to pay land Revenue—Apportionment of, entirely within Jurisdiction of Revenue Court. See (1918) Pat 134.

## (3) Estate, Meaning of.

—The case of a man entitled to possess an adequate portion of the whole undivided estate considered as one, is contemplated by the words "for the Separate possession of a Share of such an estate". A I R 1931 Cal 93=Ind Rul (1931) Cal 321 =58 C 122=34 C W N 892=130 I C 129.

—Partition of entire estate is contemplated by the Section, and as such, partition of only non-revenue paying property cannot be insisted by any party A I R 1931 Cal 93=Ind Rul (1931) Cal 321 =58 C 122=34 C W N 892=130 I C 129.

## (5) Final decree in partition suit.

—Partition suit—Final order when to be passed See 35 Mad 26=(1911) 2 M W N 516=12 I C 775.

## (6) Partition by Civil Court and its jurisdiction.

—A decree for partition of a revenue paying estate can be executed by Civil Court provided it does not encroach upon Collector's powers to partition the liability for land revenue (1918) Pat 134=4 Pat L J 29=5 Pat L W 9=45 I C 895.

—Civil Court's partition on a mere application to partition the lands of an estate is not binding on the Collector, and, he can make

## CIV. PRO. CODE (1908) SEC. 54 (Concl'd)

## (6) Partition by Civil Court and its jurisdiction (Concl'd)

his own partition if Civil Court's partition does not suit him. Civil Court's partition must be reopened to secure the Government Revenue 1 Pat L W 51=38 I C 593.

—Division of revenue paying land made by Civil Court even with consent of parties is ultravires, and objection to jurisdiction even at a late stage must prevail. 2 O L J 321=30 I C 209.

## (7) Partition by Collector.

—Partition made by Collector under s. 54 C. P. Code cannot be re-opened by Civil Court. 42 B 689=20 Bom L R 411 =46 I C 10.

—S. 54 does not apply to execution of a decree in an administration suit, and as such Collector cannot be directed to partition the estate. 8 L B R 338=36 I C 385=10 Bur L T 206.

## (8) Suit for partition.

—Where a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, and the decree has become by lapse of time or otherwise, unenforceable, it is competent to the parties or any of them, if they still continue to be interested in the joint property, to bring a fresh suit for partition—13 All 309, see also A I R 1928 B 365=30 Bom L R 912.

—In a partition suit by patnidar of share of revenue paying estate, division of revenue need not be prayed for. A I R 1931 Cal 93=Ind Rul (1931) Cal 321=58 C 122=34 C W N 892=130 I C 129.

—Suit for partition by a tenure holder having a right to ask for partition of the whole of the estate is governed by s. 54. Prayer for division of Government revenue is not necessary. A I R 1931 Cal 104=Ind Rul (1931) 351=34 C W N 895=130 I C 287.

## C. P. C. (1908) SEC. 55 (Cont'd)

## Synopsis.

- (1) Legislative Changes.
- (1-a) General principles, scope and object.
- (2) Appeal or revision.
- (3) Apply to be declared insolvent within one month.
- (4) Arrest in execution of decree.
- (5) Bar to arrest.
- (6) Duty of Court.
- (7) Furnishes security.
- (8) In any other place.
- (9) Leave of Court.

## C. P. C. (1908) SEC. 55 (Contd.)

- (10) Security to be realized ( or Liability of surety ).  
 (11) Miscellaneous Cases.

## (1) Legislative Changes

—(1) The Second Proviso:—The words "unless...thereto" have been newly added by the Code of 1908. This effects a change in the law, and is an endeavour to prevent vexatious resistance to executions the outer door is no longer any protection to the judgment-debtor, if he endeavours to resist execution.

—(2) The Sub Section (2):—this is entirely new and is intended to cover the case of railway servants and others whose sudden arrest might endanger or inconvenience the general public.

—(3) The Sub Section (4)—The words "and to appear" are new. Under the old Code a surety was released when the J. D. applied to be declared insolvent, even though he failed to appear. Under the present Code the surety is released only if the J. D. applies and also appears.

## (1-A) General principles, scope and object.

—S. 55 is mandatory. A I R 1928 Cal 62=54 C 782=106 I C 66.

## (2) Appeal or revision.

—Realization of security—Order under S. 55 (4) for—Appeal from—Surety's right of—Order made after notice to surety and hearing him—Order must be considered to be under S. 145, so far as the surety is concerned, and he can appeal from it. 33 B L R 1593=135 I C 812=I R 1932 B 124= A I R 1932 B 77.

## (3) Apply to be declared insolvent within one month.

—The section should be interpreted to "apply in the proper form and after due compliance with the formalities prescribed by law or the rules framed thereunder within the prescribed period or within such extension thereof as may have been granted by the Court and failure to do likewise does not discharge surety." A I R 1928 Sind 192=111 I C 258.

—The period of one month cannot be extended by Court. A I R 1926 Mad 286= 36 I C 304.

—See to the same effect 50 M L J 477=1926 M. W N 360=95 I C 444= A I R 1926 M 689.

## C. P. C. (1908) SEC. 55 (Contd.)

## (3) Apply to be declared insolvent within one month (Concl'd)

—But a judgment-debtor who had been arrested was released on furnishing security that he would, within one month, apply to be declared an insolvent. The month passed and he failed to make an application. He was not arrested again and at a subsequent date, applied under s. 344, C P C 1882 to be declared an insolvent. Held he was entitled to do so. 25 Mad 724.

—Whether S. 55 (3) entitles a debtor to be declared an insolvent when the provisions of insolvency law are not complied with. See 25 M L J 545=14 M L

T 307=21 I C 293.

## (4) Arrest in execution of decree

Arrest shall be effected by the person making it by touching the body of person to be arrested unless the latter submits to the custody by word or action. A I R 1930 Rang 131=Ind Rul (1930) Rang 185= 7 R 598=123 I C 137.

—But a person to be arrested need not in the first instance be shown warrant of arrest issued by Civil Court. A I R 1921 Cal 79=25 C W N 815=66 I C 1003.

—Where a warrant is addressed not by the name but to the bailiff of the Court, an arrest in consequence is not illegal (1914) M W N 498 =25 I C 328. see also 1 L W 500=24 I C 175

—But S. 56 of the present Code, the corresponding section of which was introduced in 1888, now provides contra. It may be noted that a decree-holder is not precluded by bar of arrest from executing the decree by attachment and sale of moveable or immoveable property of the judgment-debtor A I R 1924 All 707=L R 5 A 408 Civ=82 I C 1.

## (5-6) Duty of Court.

—Court can proceed either against the judgment-debtor or the surety under s. 55 (4), but not against both together A I R 1929 Lah 479=Ind Rul (1929) Lah 736= 117 I C 910.

—But the Court cannot arrest though it can serve notice on the defendant unless he is within the jurisdiction of the Court A I R 1926 Sind 51=89 I C 401.

—Application for arrears of judgment debtor—Illness whether ground for refusing application—Discretion of Court to issue notice to show cause against the application—see 14 O C 36=9 Ind Cas 740.

—Where a decree-holder chose to have the judgment-debtor committed to prison and at the same time applied to the court



**C. P. C. (1908) SECTION 55 (Contd)****(5-6) Duty of Court (Concl'd)**

to proceed against the surety for realisation of security. Held that the judgment-debtor once having been committed to prison, the court cannot concurrently proceed against the surety. S. 55 (4), Civil P. C. lays down that if the judgment-debtor fails to appear on the date fixed, the court may either direct the security to be realised from the surety or commit the debtor to the civil prison. The court cannot proceed against both simultaneously.

A L R 1933 N 193.

—Court shall discharge the surety producing the judgment-debtor before it and requesting for being absolved from further liability. A I R 1929 Lah 262=Ind Rul (1929) Lah 774=30 P L R 595 118 I C 438.

—Court should direct surety under s. 55 (4) to continue until he is finally declared insolvent on his petition. A I R 922 Bom 340=23 Bom L R 1263=46 B 702=64 I C 648.

**(7) Furnishes security.**

—Security bond cannot be interpreted outside the conditions expressly mentioned therein. A I R 1930 Lah 575=Ind Rul (1930) Lah 596=125 I C 324.

—Security to appear should be taken when an order of adjudication is produced. Court should carry to the end proceedings commenced before adjudication order as it is not inoperative. A I R 1925 Rang 305=3 R 187=89 I C 381.

**(8) In any other place.**

—Pardanashin lady. arrest of—Entry into Zenana—see 7 C 19=9 C L R 25, but see contra s. 56. Arrest of judgment debtor—application for, not to be refused on the ground that he resides out of jurisdiction. See 3 Pat L J 95=44 I C 296.

—For notifications under this section see No. 217 of Burma Gazette 1897 Part I, Fort St. George Gazette 1903 Pat I p. 646.

**(9) Leave of Court.**

—Judgment-debtor whose application for declaration of insolvency is dismissed and is re-arrested cannot be released again under s. 55 (3) and (4), unless he obtains leave of Court under r. 11 of rules under the Insolvency Act for fresh application. 9 Ind Cas 121.

**C. P. C. (1908) SECTION 55 (Contd)****(10) Security to be realized (or Liability of surety).**

—If either of the two conditions under s. 55 (4) is not complied with, security can be realised. A I R 1927 Mad 1081=52 M L J 523=26 L W 49=101 I C 525.

—Thus failure of judgment-debtor to apply for insolvency within time fixed, makes the surety liable. A I R 1928 Lah 974=Ind Rul (1929) Lah 538=116 I C 554.

—So also the surety is liable if the judgment-debtor fails to apply and dies after prescribed date. A I R 1924 Bom 428=48 B 500=26 Bom L R 415=86 I C 257.

—Though the surety's liability to produce judgment-debtor in Court on the date fixed, is not dependant upon the decree-holder's appearance in Court. A I R 1928 Lah 974=Ind Rul (1929) Lah 538=116 I C 554.

—And where a surety of judgment-debtor undertakes that the latter would apply in insolvency within a specified time and would appear in court when required to do, the decree-holder cannot enforce conditions of the undertaking if the judgment-debtor dies before the specified time 17 C W N 1241=41 Cal 50=19 I C 981.

—But surety's liability does not terminate with the filing of an insolvency petition by judgment-debtor or the dismissal of an execution application surety bond under s. 55 (4) must be in strict conformity with the provisions of the section and s. 145 provides for surety's liability. (1916) 2 M W N 273=34 I C 407.

—The surety's liability does not cease with the dismissal of the execution proceedings. A I R 1926 Mad 286=86 I C 304.

—Dismissal of the execution case does not terminate surety's liability, which can be enforced even on such dismissal. A I R 1924 Pat 487= 5 P L T 336=22 Pat 63=81 I C 702.

—A surety under s. 55 (4) is not discharged from liability until the judgment-debtor applies to be declared an insolvent and appears when called upon to do so want of service of notice cannot be pleaded by the party appearing though not served with it. Death of a person causes abatement of his right to set aside an order for his arrest. 15 M L T 224=22 C 953.

—Liability of surety undertaking to pay the decretal money does not end with the striking off the execution case, but the decree can be enforced against him even after that. 1 Pat L T 604=5 Pat L J 417=57 I C 303.

## C. P. C. (1908) SEC. 55 (Contd)

## (10) Security to be realized ( of Liability of surety) (Contd)

—So also by the absence of the decree holder on a particular date the liability of the surety does not come to an end and is matured when an application for insolvency is not made within the time given by the Court. 33 P L R 676-I R 1932 L 428-A I R 1932 L 492-138 I C 198.

—But a surety is absolved from liability under the bond by a valid excuse for non-production of the judgment-debtor like serious illness of the judgment-debtor. A I R 1929 Lah 479-Ind Rul (1929) Lah 734-117 I C 910.

—And the obligation of the surety is discharged by the death of the judgment-debtor—24 Mad 637; and so, if the execution-proceedings are allowed to drop and are struck off—14 Calc 757. but see 75 I C 830-A I R 1924 M 241 and A I R 1926 M 286 and A I R 1924 Pat 487.

—An application under s. 55 (4) need not contain all the particulars required by Insolvency Acts and where a bona fide application is made within time, the surety is discharged though the application is wrongly rejected for want of particulars. (i) Mere re-arrest of debtor does not release surety. A I R 1931 Bom 444-33 Bom L R 820-Ind Rul (1931) Bom 526-134 I C 718.

—Notice given to surety before order for realization under s. 55 (4) is also a notice under s. 145. It is unnecessary that the proceedings should be duplicated by the surety being first called on under S. 55 (4), and that subsequently fresh proceedings should be taken under S. 145. The notice that was given may, and ought rightly to be considered as a notice under S. 145 also. 33 B L R 1593-135 I C 812-I R 1932 B 124-A I R 1932 B 77.

—Security bond containing words "until he presents insolvency petition and is adjudicated and discharged" binds the surety to produce the judgment-debtor when so ordered by the Court in the course of insolvency proceedings and his liability is not discharged on the judgment-debtor's filing petition for discharge which is rejected. A L R 1933 Mad 931.

—Execution of a decree against deposit of security in the first instance can be refused by Court. A I R 1922 Bom 340-46 Bom 702-23 Bom L R 1263-64 I C 648.

—Credit is to be given for the amount realised on forfeiture of security under s. 55 (4) against the decretal amount. A I R 1921 Cal 559-25 C W N 36-59 I C 778.

—Surety for appearance of judgment-debtor—Money realised from—Satisfaction

## C. P. C. (1908) SEC. 55 (Concl'd)

## (10) Security to be realized ( of Liability of surety) (Concl'd)

of. decree. See 25 C W N 36-A I R 1921 Cal 559-59 I C 778.

—The surety bond under s. 55 (4) is not governed by s. 135 Contract Act and is in favour of the Court though the decree-holder may be the ultimate beneficiary. A I R 1927 Lah 336-100 I C 762.

—Production by surety for appearance of the judgment-debtor before the Court when not called upon and during the continuance of stay order in his favour does not discharge surety from his liability. A I R 1925 All 344-23 A L J 59-L R 6 A 171 Civ-86 I C 105.

## (11) Miscellaneous cases.

—Warrant for-Insolvent in attendance as witness. see 24 I C 513.

## C. P. C. (1908) S. 56

—A money decree may not be a personal decree executable by arrest of judgment-debtor. A I R 1922 Nag. 98-5 N L J 49-18 N L R 145-65 I C 53.

## C. P. C. (1908) S. 58

## Subsistence allowance.

—Failure of subsistence allowance sent by money order to reach the officer in time is omission to pay within the meaning of S 58. 22 I C 25.

—Subsistence allowance—Supply of clothing to prisoner by arresting judgment creditor. See Prisons Act. S. 33, 17 I C 911-5 Bur L T 159.

—Court while considering means of livelihood, cannot ignore the question of burden of proof. A I R 1931 All 20-L R 11 A 340 Rev-14 R D 716-132 I C 809.

—Exemption:—Exemption under S. 60 must be claimed before sale. A I R 1930 Lah 196-Ind Rul (1930) Lah 207-121 I C 303.

—S 60 does not exempt compensation by the Government for forest dues in respect of Jagir land taken over by the Government for forest purposes from attachment. A I R 1930 N 134-Ind Rul (1930) Nag 120-121 I C 664.

—A debtor claiming exemption from attachment under S. 60 (1) (c) must prove conditions entitling him to exemption. A I R 1930 Lah 1034-31 P L R 842-Ind Rul (1931) Lah 291-130 I C 419.

—What can be attached:—No future, fluctuating and uncertain profits accruing from immoveable property not belonging to judgment-debtor can be attached. A I R 1929 Cal 352-33 C W N 282-Ind Rul (1930) Cal 191-121 I C 751.

**C. P. C. (1908) SEC 58 (Contd)****Agriculturist.**

—A person whose main source of livelihood is agriculture is an agriculturist.

A I R 1931 Nag 8=Ind Rul (1931) Nag 17  
=26 N L R 295=130 I C 81.

—See to the same effect A I R 1931  
All 20=L R 11 A 340 Rev=14 R D 716=132  
I C 809.

—Non-transferable occupancy is exempt from attachment and cannot vest in a receiver. A I R 1930 Sind 75 =Ind Rul (1930) Sind 60=121 I C 876.

—An agriculturist's house and his hut in the field cannot be attached. A I R 1930 Rang 129=7 R 766=Ind Rul (1930) Rang 105=121 I C 777.

—Court, becoming cognizant any how, of the fact that the property attached is property of an agriculturist, must withdraw the attachment. A I R 1930 All 727 =1930 A L J 1244=Ind Rul (1930) All 911 =127 I C 447.

—Where an agriculturist allows his house to be attached and sold without any objection under s. 60, not even his minor sons can challenge the validity of the sale by a separate suit. A I R 1931 All 112 =1930 A L J 1599=52 A 1027=133 I C 478.

**Assignee and Legatee.**

—The residuary legatee does not become a proprietor until the completion of administration and ascertaining and making over residues to him. A I R 1931 Pat 76=Ind Rul (1931) Pat 147=130 I C 163.

In execution of a decree against a residuary legatee, his interest being a vested and transferable interest is liable to attachment and sale. A I R 1931 Pat 76=Ind Rul (1931) Pat 147 =130 I C 163

**Release and Discharge.**

—Release of judgment-debtor while being taken to Civil Jail, is not a release from detention under S. 58 as to exempt him from rearrest. A I R 1929 Lah 361=Ind Rul (1929) Lah 787=118 I C 531.

—It is competent to a judgment-creditor to agree the release of the judgment debtor to the security bond being cancelled, to agree to the order prohibiting garnishee to pay sum due to judgment debtor being discharged without agreeing that his decree has been fully satisfied. When the decree holder fails to certify the adjustment of a decree as a whole or when the judgment-debtor fails to apply to have an adjustment recorded as certified, the Court will not recognise any alleged adjustment. A L R 1933 S. 423.

**C. P. C. (1908) SEC. 58 (Concl'd)****Surety.**

—The surety does not automatically lose his proprietary interest in the property offered as security as only a first charge is created on the security S. 60 does not exempt such security from attachment. A I R 1930 All 225=52 A 619=(1930) A L J 402=Ind Rul (1930) All 685=125 I C 477.

—Surety bond for release of judgment debtor given out of Court but filed in Court, is enforceable in execution proceedings. 10 L W 172=53 I C 673.

**C. P. C. (1908) SEC. 59**

—The words "the existence of" are new and are presumably inserted to cover cases in which the judgment-debtor has been in contact with some other infected person. Application for execution of a decree by arrest of judgment-debtor may be refused by the Court if it thinks fit in such cases as illness of judgment-debtor unfit to undergo confinement, and enquiry may before arrest. 14 O C 36=9 I C 746.

**C. P. C. (1908) SEC. 60****Synopsis.**

- (1) Legislative Changes.
- (2) General principles, scope and object.
- (3) Allowance being less than salary of a public officer while absent from duty.
- (4) Compulsory deposits in Provident funds.
- (5) Cooking vessels.
- (6) Debts.
- (7) Disposing power.
- (8) Execution of decree.
- (9) Expectancy of succession right to future maintenance etc.
- (10) Gratuities, political pensions, stipends etc. allowed by Government, and private pensions.
- (11) Houses occupied by Agriculturists and materials of houses.
- (12) Implements of husbandry.
- (13) Indian articles of War.
- (14) Objection-when to be raised.
- (15) Ornaments.
- (16) Profits of property.
- (17) Religious Trust.
- (18) Right of personal service.
- (19) Right to future maintenance.
- (20) Right to sue for damages.
- (21) Salary of army officers.
- (22) Salary of insolvent.
- (23) Salary of public officer while on duty.

**C. P. C. (1908) SEC. 60 (Contd.)**

- (24) Saleable property.
- (25) Tools of artisans.
- (26) Miscellaneous Cases.

**(1) Legislative Changes.**

—(1) The words "cooking vessels", "beds", and "and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman" in clause (a) are new (2) The words "and such" to end in clause (b) are also new. (3) The scope of clause (c) has been extended by addition of the words in the brackets. (4) In clause (g), the words "or payable out of any service family pension etc" are new. (5) Clause (h) is entirely new. (6) In clause (i) the words "allowances equal to salary" and "while absent on duty" have been newly added. (7) The clause (k) is entirely new. (8) The words "whether payable in money or in kind" in clause (l) have been newly added. (9) The words "with the materials enjoyment" in sub-section (2) are new.

—The words "Twenty Rupees" and "Forty Rupees" in cl. (1) (i) were substituted by the words "Forty Rupees" and "Eighty Rupees" respectively by Civ. Pro. (Amend) Act 26 of 1923. Proviso to cl. 1 (i) was added by Act 20 of 1925. Clause (b) to sub-section (2) laying down that the provisions of this section will not affect the provisions of the Army Act has been added by Act 10 of 1914 Sch. II.

**(2) General principles scope and object.**

—General :—S. 60 must be strictly construed. The word "agriculturist" means a person obtaining his main source of livelihood by cultivation. 47 P R 1897.

—S. 60 does not cover the income of the panchotra. A I R 1924 Lah 226=73 1 C 928.

Transfer of Property Act—As to what property may be transferred, see s. 6, Act IV of 1882.

—Land acquisition Compensation.—Money in the hands of the Collector as compensation for lands taken up for public purposes cannot be attached in execution of a mortgage decree. Claims to such compensation must be made before the Collector—16 All 78. but this was dissented from in 6 C L J 745=13 C W N 450.

—Pre-emptive price.—The holder of a decree for pre-emption paid the pre-emptive price into Court.

**C. P. C. (1908) SEC. 60 (Contd.)**

- (3) Allowance being less than salary of a public officer while absent from duty.

Malikana allowance—Payable from Government treasury—If attachable. See Pension Act, S 11: 13 I C 194.

**(4) Compulsory deposits in Provident funds.**

—Compulsory deposits in the General Provident Fund is exempt from attachment even after the retirement of the contributor from service. A I R 1929 All 417=(1929) A L J 670=51 A 845=Ind Rul (1922) All 734=117 I C 622.

—So Compulsory deposits by optional subscriber within r. 3. of the General Provident Fund Rules cannot be attached A I R 1924 Pat 524=3 Pat 74=6 P L T 129=80 I C 424.

—"Compulsory deposits" in Railway Provident Funds are exempt from attachment. A I R 1923 Cal 585=27 C W N 472=7 I C 1025=50 C 347=82 I C 59.

—So also money payable to retired employee can be attached A I R 1922 Cal 196.

—In other words, a compulsory deposit ceases to be a deposit after it is paid over to the person concerned, and then it can be attached. A I R 1927 Oudh 22=13 O L J 425=1 Luck 313=29 O O 278=315 O W N 378 =92 I C 673.

see also 6 Bom L R 921 =29 B 259 and 88 A W N 1897. i. e. though The subscriber of a provident fund retires it becomes attachable only when it is paid. A I R 1924 All 68=45 A 554=21 A L J 454=L R 4 A 256 Civ=74 I C 746.

—In execution of a money-decree against an officer of the Railway. Compulsory deposits made in State Railway Provident Fund by him during his employment cannot be attached even though he has ceased to be in Railway employment at the time of execution. A I R 1923 Cal 585=50 C 347=27 C W N 472=77 I C 1025. Provident Fund established by Calcutta Corporation to which Provident Funds Act applies is not liable to attachment. 12 C W N 633=35 C 641.

**(5) Cooking Vessels.**

—Expression "cooking vessels" not confined to vessels in which food is actually cooked but includes vessels necessary for cooking operations. Thali and gagra (water jug) are "cooking vessels." 54 A 399=136 I C 280=I R 1932 A 148=A I R 1932 A 344.

## C. P. C. (1908) SEC. 60 (Contd)

## (6) Debts

—The word 'debt' in s. 60 means an actually existing debt, that is a perfected and absolute debt not merely a sum of money which may or may not become payable at a future, or the payment of which depends upon contingencies which may or may not happen [ 27 Cal 38, referred to ] A I R 1931 Bom 288=33 Bom L R 396=Ind Rul (1931) Bom 360=133 I C 248.

—Future debt which is payable in future cannot be attached, but existing debt whose payment is deferred is attachable. A I R 1925 Cal 561=78 I C 881.

—Prospective debts are unattachable and as such rents that are not yet due cannot be attached. A I R 1925 Rang 318 =3 R 235=39 I C 794.

—Rent for future period not fallen due cannot be attached. A I R 1928 All 193=50 A 507=LR 9 A 47 Rev=26 A L J 253=108 I C 229.

—A policy of insurance effected by a husband for the benefit of his wife forms part of his estate on his death even though the wife was named as beneficiary, in absence of any assignment in writing or trust, and as such it can be attached in execution of decree against him. 37 Bom 471=15 Bom L R 320=19 I C 736.

—So also an attachment of money payable under policy of assured deceased cannot be prevented by his sons. A I R 1928 Cal 518=55 C 1315=47 C L J 587=32 C W N 634=Ind Rul (1929) Cal 258=114 I C 658.

—But it has been held by the Rangoon High Court that the sum standing to the credit of deceased in the benefit fund is not a debt liable to attachment. A L R 1933 R 48=11 R 116.

—For payments of debts incurred by the previous male proprietor estate in the hands of his mother deriving her title by virtue of marriage can be attached. A I R 1926 Lah 7=26 P L R 735=90 I C 1052.

—Attachment of debts due to judgment debtor Evidence. see 5 L W 712=1917 M W N 879=42 I C 690.

## (7) Disposing power.

—House in which judgmentdebtor has no saleable interest is not attachable. 9 O W N 1144=16 R D 589.

—Property given to a Hindu widow by deed of compromise without any disposing power, is not attachable. A I R 1923 Bom 276=25 Bom L R 293=47 B 597=73 I C 196.

—Money deposited to the credit of decree-holder who has already assigned his

## C P. C. (1908) SECTION 52 (Contd)

## (7) Disposing power (Contd)

interest in the decree, cannot be attached by his creditors unless assignment is shown to be malafide. A I R 1925 Pat 372=6 P L T 504=3 Pat L R 18=(1925) Pat 43 =86 I C 626.

—Present gift with a postponed payment creates a vested interest. A I R 1926 Mad 371=20 M L J 79=92 I C 1021.

—In execution of a money-decree against a tenant, whole or part of interest in non-transferable occupancy holding, of the tenant can be sold. A I R 1922 Pat 19 =(1922) Pat (Sup) 49=65 I C 335.

—Crops grown by the heir of a deceased tenant after his death are not crops of the deceased in the hands of his heir and attachable as such. A I R 1924 Lah 335=69 I C 520.

—In execution of a personal decree against Mahant, asthan property cannot be attached and sold. A I R 1921 Oudh 119=8 O L J 210=61 I C 757.

—Offerings made to heir of Bengali —if attachable. See 42 I C 390.

—A cover containing notes in the Post Office is in the disposing power of the addressee 13 Mad. 242: but the trustee of a religious endowment has not a disposing power over the corpus of the estate. L R, 15 I A, 1=51 Calc, 329.

—Where the plaintiff in execution of a money decree against the defendant as executors of the deceased debtor attached his interest in the Times of India Employees Death Benefit Fund: Held, that the amount being vested in trustees, there was a valid trust within the meaning of s. 5 of the Trusts Act, the ownership of the interest of the deceased had been transferred to trustees, and that there was nothing to be attached. A I R 1931 Bom 300=33 Bom L R 720=Ind Rul (1931) Bom 494 =134 I C 558.

—Power to dispose partner's interest in a partnership is not exempt from attachment and sale. A I R 1929 Mad 641=52 M 563=29 L W 823=57 M J J 264=Ind Rul (1929) Mad 535 (F B)= 116 I C 343.

—Though the share of interest of an heir in the hands of administrator holding as trustee is not determined or allowed to him, it can be attached in execution of a decree against him. A I R 1929 Lah 600 =Ind Rul (1929) Lah 620=117 I C 76.

—Gratuity granted to the heirs of a deceased employee by a Railway administration cannot be attached in execution as assets of the grantee in the hands of his heirs A I R 1923 Oudh 21=26 O C 53=9 O L J 401=69 I C 893.



## C. P. C. (1908) SEC. 60 (Contd.)

## (7) Disposing Power (Conclud.)

—Widow's estate—Alienation of life interest—Residence of interest attachable by creditors of widow. See (1915) M W N 577=39 M 565=29 M L J 546=2 M L W 352 =18 M L T 394=36 I C 101.

—Beneficial enjoyment of donee after discharge of trust—Attachment of property in—See 13 Bom. L R 101= 9 Ind Cas 768.

—The custom of railway company was to make a gift to any of its servants at the conclusion of his service depending upon the quality of the service rendered by him and his rank and the length of the service. Such gratuity was under the rules of the company, not payable until the end of the service and its payment was entirely at the discretion of the company and there was no contract of any kind on the part of the company with any of its servants for payment of the gratuity on his retirement. A guard in the service of the company went to Europe. The company wrote a letter to him asking him to nominate a bank or other agent to receive the gratuity which was its intention to pay him and he replied nominating a certain bank to receive the money. After this but while the amount of gratuity was still in the hands of the company, a creditor of the guard applied for the attachment of the amount. Held that the amount was not attachable. Held further that the intimation that the gift was to be made and the intimation of the precise sum that was to be paid was not equivalent to payment 11 P 584 (589)=A I R 1932 P 311=140 I C 561 (2)

A L R 1932 P 602.

## (8) Execution of decree.

—A right to apply for attachment as a processual right and a privilege, within the discretion of Court. A I R 1928 Mad 1173=55 M L J 382=28 L W 314=113 I C 416.

—There is no restriction as to the extent to which attachment in execution may be effected, property of judgment-debtor may be attached on account of mesne profits to be assessed in future. 16 I C 708.

—Attachment of debt due—Security—Money not immediately payable. See 56 I C 948.

—S. 60 does not apply to executions under mortgage-decrees. A I R 1929 Rang 17=Ind Rul (1929) Rang 127=115 I C 671.

—Where after attachment the execution case is dismissed for default but restored on the same day and the dismissal is not known to any body, the original attachment will continue. A I R 1923 Nag. 18=63 I C 643.

## C. P. C. (1908) SEC. 60 (Contd.)

## (8) Execution of decree (Conclud.)

—The attachment of a judgment-debtor's property is not illegal merely because other property not belonging to him was also included in it. 22 M L J 228 =11 M L T 27=(1912) M W N 56=13 I C 795.

—Execution of legal process—Unintentional interference with person or property—Attachment of land—Nominal damages—See 14 C L J 515=16 C W N 540.

—Attachment does not create any charge in favour of the decree-holder. Auction purchaser in a sale under a latter attachment gets the property free of an earlier attachment and can redeem any mortgage. The attaching creditor under the earlier attachment loses his right to redeem after sale. 44 Mad 232=40 M L J 65=(1921) M W N 53=62 I C 121.

—In execution of a decree Jatribhai of a Gayawal judgment-debtor containing the names and addresses of the pilgrims cannot be attached and sold. A I R 1922 Pat 556=1 Pat 619=3 P L T 603=(1922) Pat 228=68 I C 944.

—The law requires that of every attachment of a share in a Mauza there should be fresh sanction from Government to the sale of the property attached. Where a certain share in a mauza is attached but a larger share is put up to sale and sold the sale is invalid and must be set aside. It cannot be upheld to the extent of the share actually attached. 16 I C 51=15 I C 780.

## (9) Expectancy of Succession etc.

—Possible rights which a judgment-debtor might acquire in an agreement under a decision of Court are not saleable. A I R 1931 Oudh 298=Ind Rul (1931) Oudh 394=3 O W N 927=134 I C 602.

## (10) Gratuities, political Pensions allowed by Government

—Government Pension:—Pension does not include profits of land but only moneys paid by Government periodically. A I R 1931 P C 160=53 C L J 492=(1931) A L J 495=35 C W N 791=Ind Rul (1931) P C 215 =61 M L J 208=132 I C 727.

—Ordinarily a pension is unattachable unless the decree-holder proves otherwise in the particular case. A I R 1922 All 429 =44 All 697=20 A L J 679=68 I C 854.

—Grant of land by Government for political considerations must be interpreted with reference to the original sanad and not the opinions of Revenue Officers. Such grant in the hands of grantee's heirs is not a political pension within S. 60 (g) and is liable to attachment in execution. 36 All 318=12 A L J 437=25 I C 170.

## C. P. C. (1908) SEC. 60 (Contd)

## (10) Gratuities, political Pensions

allowed by Government (Concld)

—But a gratuity payable by a University to its servants is not in the nature of Government pension and is attachable. A I R 1924 Lah 688=75 I C 947.

—The question of saleability of pension directed to be sold by trial Court by decree passed under O XXXIV r. 4. cannot be re-opened by the executing Court. A I R 1925 All 652=47 A 900=23 A L J 841=L R 6 A 448 Civ=39 I C 364.

—For satisfying the debts of a deceased wasi-kadar, arrears of wasika allowance accrued due in his life-time and paid to his heirs. Cannot be attached. 21 O C 329=49 I C 511=6 O L J 137.

—Jagirs—Jaghir being a grant of land revenue not burdened by any condition as regards service is attachable in execution 35 L W 395=1932 M W N 202=137 I C 799=A I R 1932 M 417= I R 1932 M 449=A I R 1932 M 843.

—Grant of jagir was held to be grant of land rather than revenue and was not a political pension within S. 60 (g). Such grant for maintenance, though not attachable in the grantee's hands, but is attachable in the hands of his heirs in execution. 22 C W N 577=(1918) M W N 384=47 I C 632 (P C.)

—A jagir or land revenue in lieu there of is exempt from attachment in execution. 133 P R 1890=133 I R 1888. note. Jagirs of villages or lands are unattachable. A I R 1929 Nag 232=Ind Rul (1929) Nag 181= 116 I C 661.

—Crops standing on lands granted as jagir without power of alienation are liable to attachment in execution. 24 I C 805.

—A jagir is not presumed to be a political pension; it must be so proved by judgment-debtor. 111 I C 838.

—Though the service Inam lands cannot be attached, the crops standing on the lands can be attached in execution of a decree against a service Inam Holder. 45 Mad 620 referred to A I R 1933 Mad 953.

—Whether crops on jaghir land granted without power of alienation are attachable see. 24 I C 805.

## (11) Houses occupied by agriculturists.

—House of a person is not protected from attachment and sale by S. 60 (c) unless he is an agriculturist having agriculture as his main source of livelihood. Zamindar doing some cultivation is not an agriculturist unless cultivation is his main source of livelihood, and as such his house can be attached. A I R 1927 All 601=L R 8 A 229 Rev=106 I C 49.

## CIV. PRO. CODE (1908) SEC. 60 (Contd)

## (11) Houses occupied by agriculturists (Contd)

—A person cannot claim exemption unless he proves himself to be an agriculturist. A I R 1927 Lah 810=100 I C 104.

—To do this he must prove that his main source of livelihood is agriculture or that he personally does agriculture labour. A I R 1923 Bom 12=105 I C 795.

—A person whose main source of livelihood is agriculture or who does personally agriculture labour is agriculturist, and as such a person owning some land but not cultivating himself, but letting to tenants on batai system, and not owning cattle but a house used for stabling his mare and storing fodder is not an agriculturist. A I R 1928 Lah 132=106 I C 45.

—Where sons of deceased debtor occupy the house to be attached as agriculturists proof of its occupation by their as agriculturist is unnecessary. A I R 1928 All 211=L R 9 A 130 Rev=Ind Rul (1929) All 500=116 I C 20.

—A female occupancy tenant can be an agriculturist in spite of her not cultivating the field herself, and her house cannot be attached. A I R 1927 Nag 374=10 N L J 159=102 I C 712.

—Where one of the judgment-debtors is an agriculturist, the house belonging to all cannot be attached. A I R 1928 Nag 23=105 I C 129.

—A house of a person who is both agriculturist and zemindar can be attached unless it comes within S. 60 (c). A I R 1927 All 601=L R 8 A 229 Rev=106 I C 49.

—A person who is both a zemindar and a cultivator deriving his main source of income from agriculture cannot necessarily be called agriculturist. A I R 1928 All 211=L R 9 A 130 Rev=Ind Rul (1929) All 500=116 I C 20.

—Agriculturist-judgment-debtor may waive his privilege under S. 60 (c) and agree to the sale of his house. A I R 1927 Pat 233=6 Pat 254=8 P L T 503=102 I C 616.

—The word "occupation" may signify something more than mere residence. A I R 1927 All 214=99 I C 376.

—Groves situate on ex-proprietary holding are exempt from attachment and sale in execution. A I R 1927 All 779=L R 8 A 132 Rev=1011 I C 526.

—No exemption can be claimed by a person having properties more than sufficient for his agricultural requirements in respect of all them. A I R 1929 Lah 181=30 P L R 29=10 Lah L J 543=Ind Rul (1929) Lah 398=115 I C 478.

—A person, does not by temporary lease of his land cease to be an agriculturist. A I R 1930 Lah 191=30 P L R 649=Ind Rul (1929) Lah 833=119 I C 225.

## C. P. C. (1908) SEC. 60 (Contd)

## (11) Houses occupied by agriculturists (Contd)

—House inside abadi occupied by agriculturist—granted for flour mill—not exempted from attachment. A I R 1933 L 76(1).

—Under S. 60 (1) proviso (c) only the house that is occupied by an agriculturist in good faith for purposes of agriculture is exempted from attachment. Other houses which are not occupied for the purpose of earning the livelihood by agriculture are not exempted from attachment, though they are occupied by him for his own convenience. A I R 1933 R 175.

—House in the occupation of agriculturist is exempt from attachment even where it is not used for agricultural purposes. A I R 1933 All 740.

—Where exemption from attachment for a house was claimed on the ground of its being used for the purposes of stoking fodder, but it was proved that there was sufficient room in another house for keeping fodder where the judgment-debtor's cattle were tied: Held, that it was, under the circumstances, not exempt from the attachment, as it was not occupied by the judgment-debtor bonafide for the purposes of agriculture. A I R 1934-L 177.

An agriculturist for the purposes of the section is a person whose main source of livelihood is agriculture. As to cases where a person cultivates his own land and aggregate income derived from his labour and ownership of the land is spent on the maintenance of himself and his family no hard and fast rule can be laid down. Each case depends on its own circumstances. A I R 1931 All 20-14 R D 716-L R 11 A 340 Rev=Ind Rul (1931) All 553-132 I C 809.

—The burden of proving the conditions for the applicability of s. 60 (1) (c) lies on the judgment-debtors. A I R 1930 Lah 1034-31 P L R 842-12 Lah 367=Ind Rul (1931) Lah 291-130 I C 419.

—To claim exemption from attachment under s. 60 (1) (c), it must be established that the house or the site was being used or occupied for bona fide purposes of agriculture. A I R 1930 Lah 1034=Ind Rul (1931) Lah 291-31 P L R 842-12 Lah 367=130 I C 419.

—Whether the buildings exempted under S. 60 (c) are limited to what was necessary for storing grain, etc. See A I R 1933 N 167=29 N L R 105.

—The judgment-debtors in the present case have been able to show that they are agriculturists in the sense that they come of an agriculturist caste and cultivate the soil, and it is not proved that they have any other occupation, except possibly the letting out of certain land for

## C. P. C. (1908) SEC. 60 (Contd)

## (11) Houses occupied by agriculturists (Contd)

building purposes. The Judge himself does not ascribe to them any other profession. In the circumstances of this case, we are satisfied that these persons are agriculturists and they occupy this house in that capacity. 1932 A L J 499=138 I C 67=16 R D 506=I R 1932 A 361-13 L R 340 (Rev)=A I R 1932 A 499=A L R 1932 a 865.

—The intention of S. 60, in the proviso in question, is that an agriculturist should not be deprived of his means of livelihood by having his house and other buildings taken from him. Where a decree was passed against the assets of a Hindu father, a member of a joint Hindu family, in hands of his undivided son, held, accordingly, that it was the occupation of the son and not that of the father that ought to be considered. 1932 A L J 675=A I R 1932 A 508=138 I C 685 (1)=16 R D 599=I R 1932 A 491 (2)=A L R 1932 A 883.

—The term "agriculturist" is used in S. 60 (1) (c) to denote a person making his living by tilling the soil; in other words one whose sole means of livelihood is gained by cultivating land and does not necessarily mean a person who works with his hands. It includes a small holder of land who tills the soil; but not a large landed proprietor even though his sole income is derived from land. The property of an agriculturist to be exempt under S. 60 (1) (c) must be shown to have been occupied by him as such for purposes of agriculture, that is, in order to enable the owner or occupier to cultivate the land. 8 O W N 135=136 I C 335=16 R D 130=I R 1932 O 127=A I R 1932 O 76=A L R 1932 O 170.

—Whether the word "agriculturist" as used in S. 60 (c) denotes a person making his living by tilling the soil and whether a judgment-debtor who is a Government servant cannot be said to have his sole means of livelihood by cultivating the land. see 9 O W N 1144=16 R D 539.

—The mere fact that these persons have obtained permission to build houses on a portion of the land which was formerly their occupancy tenancy does not necessarily imply that they have themselves ceased to be agriculturists or that they no longer occupy this house in the capacity of agriculturists. 1932 A L J 499=138 I C 67=16 R D 506=A I R 1932 A 499=I R 1932 A 361-13 L R A 340 (Rev.)=A L R 1932 A 865.

—Under the Agra Tenancy Act, an occupancy holding is exempt from attachment and sale in execution, and as such, a decree for sale of a dwelling house of occupancy tenant mortgaged by him is unlawful. 8 A L J 190=33 A 136=9 I C 931.

## C. P. C. (1908) SEC. 60 (Contd)

## (11) Houses occupied by agriculturists (Contd)

—Sale of agriculturist's house in execution of a mortgage-decree is legal 9 I C 825 See also 33 A 136- 9 I C 931.

—A person both an agriculturist and zemindar claiming exemption of his house from sale under S. 60 (c), must prove that he is an agriculturist in the strict sense of the term having agriculture as his main source of income. 11 A L J 437-19 I C 125-35 A 307.

—House used for keeping implements of agriculturist cannot be sold in execution 14 A L J 240-33 I C 727.

—Appurtenant to occupancy holding—  
What is—Attachment and sale of-Legality.  
See 13 A L J 846-30 I C 549.

—A house occupied and used by an agriculturist for agricultural purposes, though not his dwelling house, cannot be attached and sold in execution. 15 N L R 83-51 I C 129.

—Applicant for insolvency possessed of zemindari and cultivating land is not an agriculturist, and as such his dwelling house can be attached and sold in execution. 15 A L J 540-40 I C 544.

—A person, does not, by transfer of his land on lease or mortgage, cease to be agriculturist, and his property cannot be attached. 16 N L R 89-55 I C 481.

—House of agriculturist is exempt from attachment. A judgment-debtor claiming such exemption must prove that he is an agriculturist having agriculture as his main source of livelihood. 20 C W N 874-35 I C 343.

—Where under a consent-decree to pay money in certain instalments the decree-holder was entitled to execute it in case of default, against the person and non-transferable properties the judgment-debtor cannot oppose decree-holder's application for attachment of the same on such default. 24 C W N 575-37 I C 249.

—S 60 cl. 1 does not forbid sale of agriculturist's house not appurtenant to the holding in execution of a mortgage-decree. 34 A 25 (F B)-11 I C 646-8 A L J 1045.

—Vacant site owned by agriculturist and used for storing manure and fodder can be attached in execution. 21 P L R 1917-4 P W R 1917-39 I C 375.

—All persons engaged in cultivation of land either as proprietors or tenants are included in the term agriculturist. 41 Bom 475-19 Bom L R 281-39 I C 639.

—House of an agriculturist not appurtenant to his inalienable holdidg can be attached in execution of a mortgage-decree. 45 I C 546.

## C. P. C. (1908) SEC. 60 (Contd)

## (11) Houses occupied by agriculturists (Contd)

—House of an agriculturist appurtenant to his holding cannot be sold in execution of a decree on a mortgage of the house. 51 I C 553.

—A person is not an agriculturist unless his main source of living is agriculture. 63 I C 631 (Cal).

—A mortgaged-house of an agriculturist can be sold in execution of a mortgage-decree. (Ryves J. Contra.) A I R 1924 All 328 (F B)-22 A L J 321-L R 5 A 201 Civ 46 A 489-84 I C 749.

—Person whose main source of livelihood is other than cultivation is not an agriculturist. A I R 1925 Oudh 365-85 I C 700.

—House of a person whose only source of income is agriculture, cannot be attached. Person objecting to attachment must prove such exemption. A I R 1925 All 432-L R 6 A 217 Civ-37 I C 564.

—A person does not, by becoming Akali, cease to be an agriculturist. A I R 1925 Lah 331-7 Lah L J 95-26 P L R 465-86 I C 543.

—Occupancy holding is liable to attachment and sale in execution. A I R 1926 Cal 337-90 I C 998.

—The word 'agriculturist' in cl. c must be strictly interpreted, and as such it cannot include a large landed proprietor even though his sole income may be from land. Neither a mansion in a large village in which the owner lives even though his sole income is from land, nor a house of ordinary agriculturist situated far away from the land he cultivates and which is not necessary for effective or convenient cultivation is such a house as is contemplated by cl. c. A I R 1926 Mad 350-49 M 227-50 M L J 90-92 I C 398.

—House of an agriculturist in city where he spends his nights and brings cattle from agricultural land cannot be attached even though he may have two other houses used for agricultural purposes. A I R 1926 Lah 230-92 I C 759.

—The meaning of "occupied by" is "lived in by, or used for agricultural purposes by". A I R 1926 Lah 230-92 I C 759.

—S. 60 exempts that house only which is occupied by agriculturist as such A I R 1927 Lah 66-98 I C 857.

—A house of an agriculturist in ruins having no doors and roof can be attached. A I R 1927 All 214-99 I C 376.

—Non-transferable occupancy-holding-Sale when valid without consent of landlord and raiyat. See 36 I C 803.

## C. P. C. (1908) SEC. 60 (Contd)

## (12) Implements of husbandry.

—“Implements of husbandry” include the press and Karah used for making gur from sugarcane grown in the field, and as such the latter are not attachable. A I R 1928 Lah 943=111 I C 56.

—Profession is determined by chief means of livelihood and not by one means. A I R 1927 Mad 342=92 I C 416.

—“Implements of husbandry” include charak, an iron pot used for the purpose of manufacturing gul from the sugar cane and wooden planks required for the purpose. A I R 1924 Bom 294=25 Bom L R 1211=81 I C 679.

—Cattle of agriculturist necessary to enable him to earn his livelihood as such, cannot be attached in execution. 61 I C 777 (All).

—See to the same effect 13 S L R 210 =56 I C 69.

—Attachment effected by entering a house, which had been closed, but was opened by getting over the roof, is valid. Cattle and seed grain of an agriculturist unable to replace them without much inconvenience, are exempt from attachment. 1 L W 519=25 I C 117.

—Exproprietary holding—Trees—If can be sold in execution of decree See 33 I C 707.

## (13) Indian articles of war.

—The Indian Articles of War, (Act V of 1869), amended by Act XII of 1894, now replaced by Army Act 1911, apply only to soldiers and followers of the Native Army. By arts 182 and 183 of these Articles of War, as well as by proviso (i) of this section, the pay and allowances of persons subject to them, as well as of Indian reservists, when actively employed are absolutely protected from attachment. Art Act must now be regarded as being referred to by the reference in s. 60 (j) to the Indian Articles of war. A I R 1926 All 122=48 A 73=23 A L J 929=L R 6A 578 Civ=89 I C 882.

## (14) Objection, when to be raised,

—Objection under S. 60 raised by judgment debtor and dismissed for default rather than on merits may be entertained once more on application of the judgment debtor. A L R 1933 L 854.

—Exemption under s. 60 C. P. C. can only be claimed by the judgment debtor if, for some reason or other, the judgment-debtor chooses to waive that privilege, his son cannot complain of his action. A L R 1934 L 124.

## C. P. C. (1908) SEC. 60 (Contd)

## (14) Objection, when to be raised. (Concld)

—A judgment-debtor who is aware of the proclamation of sale that his property has been attached and is to be sold, and who does not make any objections prior to the sale cannot after the sale raise objections under S. 60, C. P. C. A L R 1934 N 62.

—S. 60 (1) is mandatory and Court can entertain objection though raised at a later stage of execution proceedings. A I R 1 1930 Nag 11=Ind Rul (1929) Nag 309=119 I C 677.

—Objection to attachment under s. 60 (c) by judgment-debtor falls within s. 47 not O. XXI. r. 58 C. P. C. and is governed by Art 181, Limitation Act (ii) Objection must be raised before sale, if objection to attachment is raised but not substantiated, judgment-debtor cannot raise an objection under s. 60 (c) after sale, A I R 1931 Bom 446=33 Bom L R 781=Ind Rul (1931) Bom 442=133 I C 858.

—Dismissal of objection under s. 60 for default and not on merits does not bar a subsequent petition raising the same objection. A I R 1932 L 643 (I).

—If the house of an agriculturist is once sold without objection, the sale cannot subsequently be impugned on this ground. Where the judgment-debtor was a Hindu father the sons cannot impeach the sale subsequently on this ground. A I R 1931 All 112=(1930) A L J 1599=52 A 1027=Ind Rul (1931) All 686=133 I C 478.

—Once the sale of agriculturist's house in execution has been allowed by him to take place and is confirmed, he is estopped in a separate suit by the purchaser for possession, from raising objection on the ground that the house was not saleable. 40 A 680=16 A L J 691=47 I C 947.

—In case of attachment of holding objection, of non-transferability must be urged before sale. 23 I C 939.

## (15) Ornaments.

—Where a custom is proved, by which palas or turns of worship are sold, mortgaged or devised, though alienated within a limited circle, held that they were attachable under the law. A L R 1934 Cal 187.

## (16) Profits of property.

—The interest of an utpat or priest's share in the net balance of the offerings to the deity is not exempt from attachment. A I R 1927 Bom 143=29 Bom L R 102=100 I C 1008.

—As to profits of Ghatwali tenure see. 16 C W N 802.



## C. P. C. (1908) SEC. 60 (Contd.)

## (16-a) Religious Trust.

—A priestly office with emoluments attached cannot be transferred either by private sale, or by sale execution of a decree—1 Calc W N 493 followed in 50 A 394; but dissented from in A I R 1930 C 960.

## (17) Right of personal service.

—Only that property which the judgment-debtor can lawfully alienate can be sold in execution. Right of personal service is exempt from attachment. Inam lands for doing public service being unsaleable are exempt from attachment and sale in execution of any decree against the inamdar. A I R 1922 Mad 197=45 Mad 620=(1922) M W N 307=15 L W 513=42 M L J 477=30 M L T (H C) 255=70 I C 466.

—Birt of a Mahabrahman being a right of personal service is exempt from attachment and sale. 1 U P L R (H C) 101=41 All 656=17 A L J 842=51 I C 539 [On appeal from 43 I C 650]. See also 169 A W N 1889.

## (18) Right to future maintenance.

—A bare right of maintenance enforceable by law and payable in future is contemplated by the expression "a right of maintenance" A I R 1921 All 120=43 All 617=19 A L J 648=3 U P L R (All) 109=63 I C 181. See also 23 W R 427; and 7 W R 311; and 15 W R 188; and 1 May 583.

—S 60 exempts a right to future maintenance from the attachment for the realisation of which, no receiver can also, be appointed. 40 M 302=30 M L J 361=34 I C 381.

—A right to future maintenance is exempt from attachment under S. 60, but not debtor's property or interest in property though granted to him for maintenance and as such. Crops standing on land given for maintenance to a widow can be attached in execution of a decree against her. 22 M L J 204=13 I C 152=10 M L T 493=(1911) 2 M W N 563.

—Although the right of maintenance is unattachable, Court can appoint Receiver to realise the rents and profits of the property, and to pay out of the same a sum sufficient for maintenance of judgment-debtor and his family and to apply the balance in liquidation of debts. A I R 1925 P C 176=3 Pat L R 142=47 A 385=52 I A 262=49 M L J 244=1925 M W N 630=22 L W 284=6 L R P C 138=30 C W N 818=41 C L J 383=23 A L J 634=27 Bom L R 849=87 I C 295.

## C. P. C. (1908) SEC. 60 (Contd.)

## (18) Right to future maintenance. (Contd.)

—Heritable annuity conferred by will is not a right of maintenance, and is attachable. A I R 1921 Oudh 164=24 O C 256=63 I C 851.

—Annuity made payable personally to judgment-debtor, but charged on property may be attached and sold in execution. Restraint on alienation of such annuity was held to be illegal, and even if considered valid as being in the nature of Spendthrift trust, involuntary Sale of the annuity at the instance of creditors was held to be not barred. Direction in execution for payment of annuity in Court is invalid. Annuity charged on property is different from a right to receive future maintenance. 16 C L J 354=17 C W N 662=17 I C 284.

—Interest of a member of a Malabar tarwad in properties given in lieu of maintenance without any right of alienation except by way of lease, can be attached in execution. 29 I C 578.

## (19) Right to sue for damages.

—Plaintiff filed a suit for recovering a sum of money on account of his share of the crop which was grown in the field cultivated by himself and the defendant jointly under a batai contract. The plaintiff's case was that the entire crop was deposited with the defendant. Held that the suit was not for recovery of the actual crops but for compensation for wrongful appropriation of crops by the defendant in violation of the agreement between the parties and was professedly one for damages resulting from a breach of contract. 28 N L R 340 (344).

—Right to improvements of a Mulgeni Tenant, if can be attached and sold. See (1918) M W N 887=36 M L J 92=48 I C 705=9 L W 78.

## (20) Salary of army officers.

—Under S. 120 of the Indian Army Act 1911 which applies only to Indian officers and persons specified in S. 2 of that Act pay or allowance of persons subject to that Act cannot be attached: 23 A L J 929=A I R 1926 A 122=89 I C 882=48 A 73.

Under S. 136 of the English Army Act 1881 which applies to British Officers in His Majesty's Regular Forces including Indian Army it is provided that the pay of an officer under the Act should not in any way be deducted except under any special law passed by Governor General in Council; and it was held that S. 60 (2) (b) of C P C was such law and that, therefore, half the pay of an officer under the Act

## C. P. C. (1908) SEC. 60 (Contd)

## (20) Salary of army officers, (Concl'd)

1881 was attachable : 24 C 102; 25 M 402; 17 O C 99; 59 P R 1897; ( but see contra 33 A 529; 37 B 26; 38 B 667 ); but that "officer" meant a Commissioned officer : 48 A 73—not a warrant Officer : 14 O C 82; and 43 B 368—nor a non-Commissioned officer : 3 U B R 20=11 Bur L T 130=42 I C 90.

—S. 60 (2) (b) was repealed by the amending Act of 1914 with the result that conflict above noted has now been set at rest and the salary of a British Officer in an Indian Regiment can now be attached 39 A 308; and 43 B 716.

—But it should be noted that special provisions of Ss. 144 and 145 of the Army Act are still in force and hence the pay of a "soldier" is exempt from attachment : 14 O C 82; and 10 P R 1910; and 43 B 368.

## ( 21 ) Salary of insolvent

—Only moiety of insolvent's salary is divisible amongst creditors under S. 28 (5), the Provincial Insolvency Act and S. 60 (1) (III). A I R 1923 All 466=45 A 364=21 A L J 216=L R 4 A 149 Civ=73 I C 413, see to the same effect 1922 M W N 717=70 I C 572=A I R 1922 M 439; and 38 I C 410.

—Under Ss. 46 and 47, vic C 52, see 8 Ind Cas 438, and 8 C L R 213=7 C 213.

—A reasonable allowance can be ordered by Insolvency Court, to be given to the insolvent from out of his half salary vesting in Receiver. A I R 1923 All 466=45 A 364=21 A L J 216=L R 4 A 149 Civ=73 I C 413.

—Order of attachment of money deposited by insolvent as security for costs of appeal to His Majesty can be made but subject to the result of appeal. A I R 1929 Pat 97=9 P L T 969=18 Pat 478=Ind Rul (1929) Pat 145=114 I C 465.

## ( 22 ) Salary of public officer while on duty.

—Where the judgment debtor is a public officer as defined in s 2 (17) C. P. C. his salary is exempt from attachment to the extent mentioned in cl (1) of the proviso to s. 60 (1) C. P. C. and if he is not such a public officer, it is not exempt from attachment to any extent. A L R 1933 All 859.

## ( 23 ) Saleable property.

—No property can be attached under S. 60 unless it is saleable or the judgment-debtor has a disposing power over it, and as-such, a house in which the judgment-

## C. P. C. (1908) SEC. 60 (Contd)

## ( 23 ) Saleable property. (Contd)

debtor has only the right of residence can not be attached in execution. 8 P R 1900. and "saleable" means saleable by Court-auction at a compulsory sale: 19 C W N 1182=23 C L J 428=28 I C 837.

—The interest of the judgment-debtor in properties covered by an execution sale may be attached till the sale is confirmed. A I R 1931 Mad 511=Ind Rul (1931) Mad 478=34 L W 531=131 I C 14. See also 1931 M W N 272.

—Property over which judgment-debtor has no disposing power cannot be sold in execution. The measure of liability to involuntary alienation is the power of voluntary transfer. A I R 1931 Pat 364=12 P L T 508=Ind Rul (1931) Pat 292=10 Pat 582=132 I C 868.

—The interest of the residuary legatee is a vested interest and being generally transferable is liable to attachment and sale in execution of a decree against the residuary legatee. [32 Cal 198 (P C); A I R 1923 Cal 21, relied on] A I R 1931 Pat 76=Ind Rul (1931) Pat 147=130 I C 163.

—Power of executing Court to attach moveable property belonging to judgment-debtor in the hands of another is co-extensive with the right of the latter to sue for the recovery of the same. 4 Pat L J 141=(1919) Pat 155=48 I C 943.

—Money paid under an order of fine set aside by higher court is attachable in execution. 89 P R 1912=220 P L R 1912=227 P W R 1912=16 I C 779.

—A creditor of a Bungahi is not entitled after his death to attach share of offerings made to his heir after Bungahi's death as the same cannot be treated as property inherited by the heir. 126 P L R 1917=159 P W R 1917=42 I C 390.

—Right of Gangaputra to occupy a particular spot on bank together with physical articles can be attached even though his right to receive offerings is unattachable. A I R 1929 Oudh 444=6 O W N 780=Ind Rul (1930) Oudh 22=120 C 822.

—When the joint property of husband and wife is mortgaged by husband alone and the mortgagee brought a suit on the mortgage impleading the wife not in her personal capacity but as an heir of the husband. Held that the decree in the suit did not bind her personal interest and that her interest could not be brought to sale under the decree. A L R 1933 R 116.

—A right to get reconveyance and possession of property worth 15 lakhs for payment of six lakhs being a valuable property is liable to attachment. A I R 1921 Mad 498=(1921) M W N 519.

## C. P. C. (1908) SEC. 60 (Contd)

## (2.) Saleable property. (Concl'd)

—Interest of a Buddhist couple in marriage property is indeterminate and variable according to contingencies and as such it is not saleable property within S. 60 A I R 1927 Rang 274-5 R 478-104 I C 516.

—Wife's share in lettet-paw property—Alienability-Attachability see 8 Ind Cas 992.

—Right to hold property as a security for dower debt until the satisfaction of the dower debt is transferable property. A I R 1923 Pat 33- (1922) Pat 348-2 Pat 84-4 P L T 272-70 I C 312.

—Khei offering to the deity is not liable to attachment. 1 Pat L T 75 =55 I C 175.

—An executing Court can attach ex-cisable articles without license, but should act with great circumspection so as not to defeat the provisions of Excise Act. 11 N L R 67-29 I C 339.

—Standing crops are, for the purposes of the Code of Civil Procedure, immoveable property. 11 M 193 (F 15 A 394-A W N 1893, 145, 1 N L R 121; Appr 14 A =A W N 1891, 417.) Decree for mesne profits—Not to be sold under S 60 See (1918) Pat 257-4 P L J 336-48 I C 183 =5 P L W 208.

Equity of redemption—The equity of redemption, being a substantial right, is attachable and saleable. A I R 1923 Rang 119-4 U B R 132-70 I C 536.

—Lease-hold interest made non-transferable can be sold by Court in execution unless it has been immuned from Court-sale. 19 C W N 1182-23 C L J 428-28 I C 837.

—A heritable but non-transferable lease granted by a settlement Court in Oudh is exempt from execution Sale. The objection as to non-transferability can be taken by the lessee himself against the holder of money-decree A I R 1915 Oudh 702-12 O L J 543-2 O W N 737-90 I C 256.

## (24) Tools of artisans.

—A 'tool' includes a sewing machine. A I R 1923 Nag. 289-19 N L R 22-65 I C 416.

—Musical instruments, whether industrial implements or artisans' tools. See 38 I C 414, (1916) 2 U B R 133.

—Tools of soap manufacture are tools of an artisan. 54 A 399-136 I C 280-I R 1932 A 168-A I R 1932 A 344

—Artisan means one who practises or cultivates an art, an artist, though in common parlance the word is generally

## C. P. C. (1908) SEC 60 (Contd)

## (24) Tools of artisans. (Concl'd)

taken to mean handicrafts-man. 54 A 399-136 I C 280-I R 1932 A 168-A I R 1932 A 344.

—The word "artisan" is not defined in the Civil procedure Code. The term implies a handicraftsman i. e. one who makes certain things as part of his trade or calling and does not include the instruments of a professional man like a surgeon or a doctor.

—The instruments used by a practitioner doctor in midwifery cases do not fall within S. 60 C P C and so they are not exempt from attachment. A I R 1933 L. 985.

## (25) Miscellaneous Cases.

—A decree-holder is liable if damages have been caused by his attachment of wrong property even though he may have acted in good faith and innocently. A I R 1925 Nag 390-8 N L J 170-94 I C 573.

—A person whose property was wrongfully attached by attaching creditor can sue the latter in damages even though he might have acted honestly. A I R 1929 Lah 200-112 I C 848.

—A site with dilapidated house on it cannot be sold in execution unless owner is proved to have no intention to rebuild. A I R 1928 Nag 23-105 I C 129.

—No charge on property, nor title in creditor is created by attachment but only private alienation of the property is prevented thereby. Property attached may deteriorate in value and property sold may be different in condition from the property attached. A I R 1923 Lah 261-3 Lah 414-69 I C 720.

—Irregularity of omission to follow the correct procedure under the appropriate order and rule does not render the sale void. A I R 1927 All 76-49 A 292-25 A L J 173-99 I C 443.

—A suit by the rightful owner for wrongful attachment is maintainable against the decree-holder, in spite of a subsequent order that the property should not be released pending the decision of the suit by decree holder under. O 21, R 63. 32 C L J 236-60 I C 280.

—Where property under attachment is disposed of under orders of Court by a person and the order is set aside in appeal it is the person who has disposed of the property who is to refund and not the one at whose instance the order was made. A I R 1925 All 328-6 L R A Civ. 36-85 I C 161.

—A decree creating a charge can be executed by enforcement of the charge without a separate suit. A I R 1922 Cal 35-35 C L J 61-64 I C 852.

**C. P. C. (1908) SEC. 60 (Concl'd)****(25) Miscellaneous Cases. (Concl'd)**

—An attachment is not necessary in the case of a decree creating a charge on the property. *I R 1930 Lah 68=121 I C 369.*

—Exemption from attachment See Prov. Insolvency Act S 16 Cl 2 18 C W N 1052=19 C L J 83=21 I C 950.

—Where a decree-holder, in executing his decree by attachment of the house and property of his judgment-debtor, is prevented from doing so by a third person, he has a right of action against such third person to recover damages arising from his act. *14 Bom L R 356=15 I C 541.*

**C. P. C. (1908) SEC. 62**

—Scope of the Section:—Under the corresponding S. 271 of the old Code outer door of a dwelling-house could never be broken open. But the present section provides an exception in the words "unless etc.....thereto". So where the amin opened the outer door by getting over the roof it was held that the entry was valid and justified by the circumstances *1 L W 519=25 I C 117.*

—The word 'residing' does not necessarily contemplate actual staying within the jurisdiction at the time of the initiation of proceeding, but only a residence, *A I R 1925 All 140=L R 5 A 695 Civ=87 I C 795*

**C P C ( 1908 ) Sec-63****(1) Applicability of the Section**

—Section aims at the prevention of confusion in execution of decree. *A I R 1921 Pat 140=6 P L J 332=2 P L T 719=62 I C 33.*

—Unless S. 63 is extended to Revenue Courts it applies only as between Civil Courts. Property attached by Civil Court can be subsequently sold by Revenue Court and purchaser can sue for declaring the property to be unsaleable in execution of the Civil Courts decree. *A I R 1921 All 142=43 A 612=19 A L J 643=3 U P L R (A) 115 =63 I C 909.*

—But a sale in execution of a subsequent decree of property attached in execution of a prior decree of different Court is invalid unless it has taken place in ignorance of prior right. And where property was attached by two Courts in execution, but was sold by the Court attaching it subsequently, the sale proceeds should be required by the Court which first attached it, to be transferred to itself instead of holding a second sale.

**C. P. C. (1908) SEC. 63 (Concl'd)****(1) Applicability of the Section. (Concl'd)**

*A I R 1921 Pat 140=6 Pat L J 332=2 P L T 719=62 I C 33.*

—Attachment under old Code in force till released—Attachment by two courts—Sale by inferior court—Setting aside. See *(1914) M W N 796=25 I C 906.*

**(2) Effect of Sub-Section.**

—The Sub-section (2) which has been newly added by the Code of 1908 now clears up the difficulties raised under the old Code Viz that the proceedings of an inferior Court will no longer be vitiated by a contravention of sub-section (1) see *38 C L J 266=75 I C 325=A I R 1924 C 168; and 17 A L J 893=30 I C 779; and 47 M L J 720=20 L W 864=84 I C 265=A I R 1924 M 889; and 32 I C 927.*

—Execution sale by inferior Court during pendency of attachment by Superior Court is valid. *33 M L J 217=22 M L T 119=(1917) M W N 505=6 L W 404=41 I C 612.*

—Where property is attached by Courts of different grades and proceedings in lower Court are stopped. S. 48 does not bar an application thereafter to higher Court for rateable distribution as it is in continuation of lower Court proceedings. *A I R 1922 Mad 3=15 L W 245= 41 M L J 378=(1921) M W N 507=64 I C 493.*

—Ss. 63 and 73 must be read together. A decree-holder attaching a sum in execution of Small Cause decree need not again apply for execution to High Court subsequently attaching the same in execution of the High Court decree on original side where the money was paid. *A I R 1928 Rang 157=6 R 131=110 I C 744.*  
—See also *46 C 64.*

—Under the old Code, the buyer at the sale by the Superior Court had the better title, but now the proceedings in the inferior Court are expressly saved from the result of contravening the provision of sub-section (1), and the sub-section (2) does not make it clear how the rights of two innocent purchasers at sales by two separate Courts are to be determined.

**(3) "Is under attachment."**

—This has been made clear by the substitution of the words "is under attachment" for the words "has been attached".

**(4) Rateable Distribution.**

—Where there are decrees of various courts against the same judgment-debtor, whose assets are under s. 63 C. P. C. real-



C. P. C. (1908) SEC. 63 (*Contd*)(4) Rateable Distribution. (*Conclud*)

sed by the higher court, the decree-holders of inferior courts are entitled to apply to the superior court for rateable distribution under s. 63 read with s. 73, Civil C. P., without transferring the decree or taking out execution therein. A L R 1933 All 795. Under s. 63 the Court of the higher grade can rateably distribute the assets either after realising the assets in execution, after it has actually received them after calling for them from the Court of the inferior grade. A I R 1931 Bom 350-33 Bom L R 537-55 B 473-Ind Rul (1931) Bom 401-133 I C 817.

—Where property attached by First class Subordinate Judge is subsequently attached and sold by Second Class Subordinate Judge, the former can call for sale proceeds to his Court for rateable distribution. A I R 1925 Bom 420-49 B 655-27 Bom L R 917-89 I C 980.

—Where property was attached by Subordinate Judge as well as by District Munsif, but was sold by the latter in ignorance of former's attachment, the sale proceeds should be called for by Subordinate Judge to its own Court to be distributed according to principle of s. 63. A I R 1927 Mad 67-51 M L J 661-98 I C 628.

—Rateable distribution can be claimed without applying to Superior Court for rateable distribution unless the attachment by inferior Court is subsequent to that of Superior Court. A I R 1921 Cal 87-25 C W N 740-63 I C 11.

—Rateable distribution can be claimed by holders of decrees of inferior Courts whose execution had been stopped by Superior Court under s. 63, without any further applications. A I R 1925 Cal 966-29 C W N 575-87 I C 783. (under the old Code such application was necessary 14 C W N 396-3 I C 105).

—Where properties were attached by Courts of different grades and were wrongly sold by the Court of inferior grade. Held, that the proceeds ought to have been sent to the superior Court and a person had attached through the superior Court was entitled to apply for rateable distribution before the assets were received by the superior Court. (1931) A L J 880-Ind Rul (1931) All 666-133 I C 466.

—Rival money decree holders attaching the property of judgment-debtor in several Courts an claim rateable distribution by applying to the Court of highest grade before the receipt of assets by that Court even if their decrees are not transferred to that Court 8 Bur L T 201-29 I C 21-8 L B R 204. Where rival decree-holders have attached the property in two different

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Courts, they are entitled to rateable distribution, and as such where whole assets have been wrongfully paid to one decree-holder the other decree-holder is entitled to get a refund of the share of sale-proceeds which he would have received on a proper rateable distribution. U B R 1910 3rd gr. 53. All rival money-decree holders attaching the property of the judgment-debtor in several courts are equally entitled to share in the rateable distribution of assets subsequently realized by the Court of highest grade. M L J 406-1 L W 403-23 I C 909.

—The word 'proceeding' includes the sale as well as the order allowing the decree-holder to set off the decretal amount against the purchase-money. Such an order is valid and cannot be cancelled by a superior Court in which execution against the same property is pending. It is only any excess amount that there be deposited in Court, that such superior Court can call for. A I R 1931 Bom 650-33 Bom L R 537-55 B 473-Ind Rul (1931) Bom 401-133 I C 817.

—Attachment before judgment—Money lying in Court of another district—Proper Mode of Attachment. See 26 I C 941.

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*Synopsis.*

- (1) General principles. scope and object.
- (2) Alienation under invalid attachment.
- (3) Attachment does not create a charge.
- (4) Claims enforceable under the attachment.
- (5) Claims for rateable distribution of assets are claims.
- (6) Contract for sale.
- (7) Contrary to such attachment.
- (7-a) Effect of attachment.
- (8) Effect of order of adjudication on attachment.
- (9) Effect of striking off execution proceedings or removing them from file.
- (9-a) Effect of removal, suspension, or revival of attachment.
- (10) Effect of winding up order on attachment.
- (11) Liability for unlawful attachment.
- (12) Objection to the validity of attachment.
- (13) Private sale to decree holder.
- (14) Private transfer.



## C. P. C. (1908) SEC. 64 (Contd.)

- (15) Private transfer under O-21-R-83.
- (16) Where an attachment has been made.
- (17) Miscellaneous Cases.

## (1) General principles, scope and object.

—Attachment before judgment is covered by attachment in S. 64, but is not a process in execution of a decree. A I R 1922 Nag 238=68 I C 183.

—S. 64 aims at the benefit of decree-holder who can agree to forgo it and such agreement is binding on transferee of decree with knowledge of it. A I R 1923 Mad 230=16 L W 988=44 M L J 80=(1923) M W N 51=31 M L T 423=72 I C 839.

—Claims enforceable under the decree in execution of which attachment is made are not referred to by S. 64. A I R 1921 Oudh 176=8 O L J 358=66 I C 642.

—S. 64 renders void only alienations pending attachment and not alienation by a successful claimant after claim order but before institution of a suit under O. 21 R 63. 38 Mad 535=26 M L J 449=25 I C 11.

—The section was held inapplicable to compromise of attached decree under which the decree-holder accepted a reduced sum as consideration for withdrawal of an application for leave to appeal to Privy Council. A L R 1932 A 984=1932 A L J 792.

—S. 64 is applicable to sale by consent or with connivance of decree-holder. A I R 1927 Mad 648=38 M L T 310=101 I C 591.

—O. XI, r. 53 and not S. 64 governs attachment to money-decree. A I R 1929 Pat 1=7 Pat 726=9 P L T 822=113 I C 673.

—S. 64 contemplates attachment under which execution sale is held and not attachment of creditor who is paid off. A I R 1928 Bom 545=30 Bom L R 1488=Ind Rul (1929) Bom 318=115 I C 414.

—And it has no application to a case of sale by judgment-debtor after order of attachment, but before completion under O. XI, r. 54. A I R 1929 Bom 395=53 B 851=31 Bom L R 1111=Ind Rul (1930) Bom 222=123 I C 510.

—The section does not draw any distinction between attachment before or after judgment. A I R 1929 Cal 494=33 C W N 805=57 C 274=Ind Rul (1930) Cal 269=122 I C 637.

—S. 64 does not relate to private alienation of property after the issue of an ad interim injunction restraining alienation, but to private alienation after attachment by order of Court. A I R 1930 Lah 858=Ind Rul (1931) Lah 32=128 I C 304.

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## C. P. C. (1908) SEC. 64 (Contd.)

## (2) Alienation under invalid attachment.

—Invalid attachment of mortgagee's interest—Payment by mortgagor pending attachment—Validity 28 M L J 338=39 Mad 389=28 I C 284.

—Where the attachment itself is wrong, the sale of properties so attached is a fresh and greater invasion of the rights of the lawful owner. The person injured might have sued but is not bound to sue. The attachment gives the creditor only certain rights. The title to the properties continues in the owner and will so continue, even if his objection to the attachment be disallowed. The sale passes the title. It affects the owner's title differently and to a greater degree than an attachment. (1911) 2 M W N 531.

## (3) Attachment does not create a charge.

—See also under (7-a) Effect of Attachment. Attachment does not create any charge or lien on the attached property, nor does it confer any title on attaching creditor, but merely prevents private alienation. 19 C W N 1159=31 I C 664.

—See to the same effect 69 I C 720 =A I R 1923 L 261=3 Lah 414; and 31 Bom L R 1209=122 I C 836=A I R 1930 B 16.

—No title is conferred by attachment on attaching creditor, which merely prevents private alienations, and he is to be classed with other creditors. A I R 1929 Cal 524=57 C 122=Ind Rul (1930) Cal 369=123 I C 737.

—Attachment merely prevents alienation but gives no priority to first attaching creditor. 38 Mad 221=29 I C 239.

—Attachment does not confer title by way of charge or otherwise on the attaching creditor, but prevents private alienations only and not Court sale of attached property. A I R 1921 Mad 30=44 M 232=40 M L J 65=(1921) M W N 53=62 I C 121.

—Attachment neither passes title, nor creates any charge on the property, and as such it gives no cause of action for a suit by reversioners for a declaration. A I R 1929 Lah 90=10 Lah L J 491=30 P L R 6=10 Lah 543=113 I C 907.

—Attachment of property subsequent to its mortgage or encumbrance created pendente lite is not binding on the mortgagee. A I R 1921 Cal 801=33 C L J 7=62 I C 167.

—Attachment affects only the right, title and interest of the judgment-debtor at the date of attachment and does not affect rights created by judgment-debtor against him prior to attachment. 21 C W N 158=23 C L J 115=34 I C 953.

## C. P. C. (1908) SEC. 64 (Contd)

## (3) Attachment does not create a charge. (Concl'd)

—An attaching creditor only acquires the rights that the debtor had. The attachment does not affect the prior rights of third parties. A I R 1931 Cal 474=Ind Rul (1931) Cal 625=58 Cal 1=133 I C 97.

—Execution sale of property in pursuance of subsequent attachment prohibits a resale of the same under a previous attachment at the instance of another decree holder. 55 I C 558=2 U P L R 105.

—Attachment is not binding from the date of order of attachment, but when all processes of attachment necessary under law to effect valid attachment have been served. A I R 1931 Pat 58=9 Pat 860=12 P L T 398=Ind Rul (1931) Pat 94=129 I C 142.

## (4) Claims enforceable under the attachment.

—Private alienation is void only as against all claims enforceable under the attachment. Attachment ceases with the end of execution of proceedings, and no claim for rateable distribution of other decree is cognisable if attachment has ceased 12 I C 572=35 B 516=13 Bom L R 977.

—The purchaser is subject to the same liabilities as the judgment-debtor was and does not by reason of his transfer get any higher rights 63 M L J 945=36 L W 781=140 I C 600.

—S 64 invalidates a purchase during pendency of attachment against all claims enforceable under it and purchaser is not entitled to a lien for his purchase-money. 34 I C 34.

—Temporary discontinuance of attachment does not effect the decree-holder's rights. Alienation during attachment is invalid. Decree-holder cannot claim benefit of s. 60 unless he has secured title from the Court and has a claim enforceable under the attachment. 2 Lah L J 99.

—Irregular dismissal of execution proceeding does not terminate attachment, and where a decree is attached in execution of another decree, alienation of the former decree is void as against the claims enforceable under the attachment and the holder of the latter decree is entitled to proceed with execution. (1918) Pat 353=48 I C 786.

—Words "All claims enforceable under the attachment" do not refer to "All claims of attaching creditor enforceable under that or any subsequent attachment under that or any subsequent attachment under the same decree. A I R 1923 Pat 564=4 P L T 409=77 I C 1.

—The meaning of the word 'enforceable' is not necessarily 'in process of

## C. P. C. (1908) SEC. 64 (Contd)

## (4) Claims enforceable under the attachment. (Concl'd)

enforcement". A I R 1926 Mad 307=49 M 38=97 I C 496.

—Claims under attachment cease to be enforceable with the end of attachment by satisfaction of the decree. A I R 1928 Bom 545=30 Bom L R 1488=Ind Rul (1929) Bom 318=115 I C 414.

—Purchaser under a money-decree is bound by mortgage executed to pay of prior mortgage-debt. A I R 1928 Mad 703=28 L W 213=55 M L J 369=111 I C 266.

—Objection that transfer is void can be taken by only persons having claims enforceable under attachment. A I R 1929 Pat 1=7 Pat 726=9 P L T 822=113 I C 673.

—No claim is enforceable under attachment within the meaning of S. 64 if no assets are held by the Court. A I R 1928 Bom 545=30 Bom L R 1488=Ind Rul (1929) Bom 318=115 I C 414.

—A transferee of property pending its attachment in execution of a decree is entitled to apply to set aside the sale held pursuant to the attachment on the ground of material irregularity or fraud 63 M L J 945=36 L W 781=140 I C 600.

## (5) Claims for rateable distribution of assets are claims.

—Property attached by two decree-holders, was ordered to be sold under first attachment, but amount due under first decree was deposited prior to the sale, and the property was sold privately to another person, the second decree holder entitled to rateable distribution of the amount deposited and the private transfer is void as against him. 8 Bur L T 14=26 I C 264.

—Private alienation subsequent to attachment is void against all the claims of the creditors applying for rateable distribution of assets after that private alienation was made. Claims to rateable distribution by subsequent creditors are only claims enforceable under the attachment and as such if attachment ceases, such claims cannot prevail against private alienation. 14 Bom L R 511=15 I C 950.

—First attachment ceasing to exist on compromise of the claim survives for the purpose of second decree-holder by force of his application for either rateable distribution or second attachment and as such a private sale after the compromise is void under S 64 13 Bom L R 1189=12 I C 923.

—Private alienation during the continuance of attachment which has been raised is voidable by non-attaching decree-

## C. P. C. (1908) SEC. 64 (Contd)

## (5) Claims for rateable distribution of assets are claims (Contd)

holders applying for rateable distribution under a subsisting attachment. 33 M L J 707-22 M L T 461=(1917) M W N 882-41 Mad 265-7 L W 298-4 3 I C 539 (F B).

—Alienee under a private alienation is not affected by subsequent claim for rateable distribution. A I R 1921 Cal 801 =33 C L J 7-62 I C 167. (Dissented from in 1926 Mad 307).

—All subsequent claims for rateable distribution by execution creditors before the assets are realised are claims enforceable under the original attachment. A I R 1922 Bom 241-24 Bom L R 364-46 B 895-69 I C 161.

—Apart from attachment under which claims under S. 73 are enforceable, no priority is given under Explanation to S 64 A I R 1921 Oudh 176-6 O L J 358-66 I C 642.

—Explanation to S 64 aims at securing priority to the prior attaching creditor for full payment of his decretal amount over the private transferee. Transfer of property pending attachment is void not only against the attaching creditor but against all creditors applying to court for attachment or rateable distribution before sale, if the alienee fails to discharge the claim of the prior attaching creditor and permits the sale of the property. A I R 1926 Sind 177-20 S L R 111-93 I C 366.

—Provisions of r 89 O XXI are not controlled by the explanation to S 64 A I R 1927 Mad 445-52 M L J 157-100 I C 82.

—No claim for rateable distribution can be put up by a person merely obtaining attachment before judgment. A I R 1928 Bom 545-30 Bom L R 1488-Ind Rul (1929) Bom 318-115 I C 414.

—Attachment in execution of decree before auction sale another decree-holder applying for execution and rateable distribution—judgment-debtor making private transfer—he, paying decretal amount to the first decree-holder—subsequent attachment and sale by the second decree-holder—subsequent purchaser's title as against private vendee. A L R 1933 N 82.

—Salary of a Government Officer attached in execution of decree amounts to assets within the meaning of S 64 and as such it can be claimed in rateable distribution by the party attaching it subsequently. 14 Bom L R 633-16 I C 640.

—Plaintiff, having obtained a money-decree against one B got certain property belonging to B attached in execution of the decree. The execution was thereafter transferred to the Collector. While the

## C. P. C. (1908) SEC. 64 (Contd)

## (5) Claims for rateable distribution of assets are claims. (Concl'd)

execution-proceedings were pending before the Collector the plaintiff obtained another money-decree in another suit against B and in execution of it the same property was again attached. The proceedings under the latter decree were also transferred by the Civil Court to the Collector. While the Collector was in management of B's property and taking steps for the execution of the first decree, the plaintiff informed that, as B had satisfied the decree, the necessity for sale had disappeared and that the darkhast could be disposed of. This was done and the papers formally forwarded to the Court. In the meantime, B executed a deed of sale of the property to the defendant in consideration of the latter's satisfying the plaintiff's first decree and other debts of B. The plaintiff obtained a third decree against B in execution of which the property was sold through the Civil Court and was purchased by the plaintiff himself at the Court sale. He then sued for a declaration that the property in the hands of the defendant was liable to be attached and sold in execution of his second decree which remained unsatisfied. Held, (1) that the sale in question was not void as the decree presupposed a decree which had to be satisfied and which was therefore, capable of execution. That could not be said of a decree, which its holder, by his declaration to the Collector or was not subsisting but acknowledged to have been, satisfied. (2) That s. 276 C P C 1882 did not apply, since, though the attachment had existed at the date of the sale and was never formally raised darkhast claim having been satisfied was no longer enforceable under it. Held, further that the second attachment itself was illegal under the provisions of the last portion of the first paragraph of s. 225-A, and it could not affect the private sale to the defendant by B; and that the sale was not illegal and void under s. 276, there being no claim enforceable under such an attachment. Held, also that the sale could not be invalidated, even under the combined effect of ss. 276 and 295 read together. 13 Bom L R 977-12 I C 572.

## (6) Contract for sale.

—Sale in execution of a decree of property already sold by judgment-debtor before its attachment, does not affect the rights of the private purchaser even if the property had once been attached before the private sale under a different decree. 44 Cal 662-32 M L J 425-21 M L T 244-5 L W 711=(1917) M W N 473-21 C W N

**C. P. C. (1908) SEC. 64 (Contd)****(6) Contract for sale. (Concl'd)**

585=25 C L J 508=19 Bom L R 424=15 A  
L J 382=1 Pat L W 425=40 I C 242=44 I A  
72 (P C).

—Promisee under an agreement for sale entered into by the judgment-debtor before notice of previous petition for execution by attachment and sale was served upon him, is entitled to assert his rights in execution proceedings. A I R 1921 Mad 30=44 M 232=40 M L J 355=(1921)  
M W N 53=62 I C 121.

—A person, who has agreed to purchase immovable property, can claim to raise attachment, and the attaching decree-holder is bound by the title of the former if he has perfected his title by obtaining transfer to himself A I R 1924 Mad 610=(1924) M W N 329=34 M L T 110=19 L W 455=46 M L J 361=30 I C 388.

—Where before issue of attachment against vendor, purchaser pays purchase money and takes possession, his rights are not affected by attachment merely because sale-deed was executed during attachment. A I R 1925 Rang 382=4 Bur L J 166=92  
I C 777.

—Attachment is not affected by agreement to sell entered into before attachment as it does not create any interest or charge on the property A I R 1929 Cal 494=33 C W N 805=57 C 274=Ind Rul (1930) Cal 269=122 I C 637.

—Mortgage executed by Court pursuant to decree for specific performance of agreement to execute a mortgage is not a contract for sale and is valid as against an attachment of the same property effected after the decree for specific performance but before the execution of the mortgage by Court. 31 Bom L R 117=139 I C 610= A I R 1932 B 301=I R 1932 B 524=A L R 1932 B 166.

—Sale by judgment debtor in pursuance of pre-existing contract—Purchaser entitled to property as against attaching creditor or auction purchaser of property. See 5 M L W 234=38 I C 107.

—Maintenance suit by Hindu widow—

—Attachment of husband's estate before decree in suit—Sale after decree.—Maintenance decree, binding on purchaser. See 25 I C 759.

**(7) Contrary to such attachment.**

—Where attaching creditors are paid off and their suits are dismissed, private sale of property under attachment before judgment is not contrary to attachment. A I R 1928 Bom 545=30 Bom L R 1438=Ind Rul (1929) Bom 318=115 I C 414.

**C. P. C. (1908) SEC. 64 (Contd)****(7) Contrary to such attachment. (Concl'd)**

—S. 64 only avoids transfers contrary to, and not during attachment. It does not prevent a person who has attached a debt from adjusting his claim, arranging that the debt of the garnishee should be made over to himself A I R 1931 Mad 570=(1931)  
M W N 259.

**(7-a) Effect of Attachment.**

—Attachment how invades rights see 9 I C 663.

—An order of attachment by the Civil Court covered the property actually attached and cannot be held by implication to apply to other property of the judgment-debtor has ceased to be the owner of the entire property originally attached. 20 I C 43.

—Effect of—Insolvency of judgment-debtor—Order of Administration—Effect of attachment sale of the order—Right of attaching creditor. Pras Towns Insolvency Act, Ss 53, 108 and 109. see 44 Cal 1016. see also 15 I C 860.

**(8) Effect of order of adjudication on attachment.**

—Assignment of a decree already subject to attachment though valid as between the parties is subject to the rights of attaching creditors, and the assignee has only permissive right to execute the decree. No difference will be created by insolvency of assignor after assignment, and steps can be taken by the Official Receiver with regard to the vesting of or distribution of the proceeds of the decree if and when realized. A I R 1927 Mad 1025=(1927) M W N 680=105 I C 606.

—Attachment of property by Court is not analogous to vesting order by which the rights of insolvent are vested in the Official Assignee. A I R 1928 Mad 735=51 M 417=(1928) M W N 294=28 L W 109=55 M L J 175 (F B)=112 I C 541.

**(9) Effect of striking off execution proceedings or removing them from file.**

—Dismissal of execution petition does not affect prior attachment before judgment where records relating to attachment before judgment had been destroyed, reattachment in execution, exmajore Cantela of properties already attached before judgment does not amount to abandonment of prior attachment. 1 I W 932=25 I C 81.

—An order merely dismissing an application for execution has not the effect of raising the attachment which ensures for the benefit of the decree-holder if it is set aside in appeal. 8 A L J 619=10 I C 243.

## C. P. C. (1908) SEC. 64 (Contd.)

## (9) Effect of striking off execution proceedings or removing them from file (Contd.)

—Satisfaction of the decree in part only certified to the Court has not the effect of raising attachment. 10 A L J 165-15 I C 677.

—Per Wallis, C J.—Attachment struck off is presumed to be abandoned if no steps have been taken to keep alive decree except keeping decree alive for statutory period. A I R 1921 Mad 30-44 M 232-40 M L J 65-(1921) M W N 53-62 I C 121.

—Transfers made not during continuance of attachment are not governed by s. 64. Dismissal of execution application raises attachment. A I R 1922 Nag 81-66 I C 850.

—OXXI, r. 57 contemplates default of the decree-holder in the discharge of some obligation laid on him by the code or rules framed under it as a ground for dismissing execution application. Dismissal of execution application on decree-holder failing to pay batta and file a schedule of the immovable properties required to be attachment, as ordered by the Court, is not a Dismissal under O. XXI, r. 57 and the attachment already subsisting on the property does not cease. A I R 1923 Mad 703-(1923) M W N 529-45 M L J 315-75 I C 491.

—Alienation during first attachment which ceased under, O. XXI, r. 57, is not void as against a purchaser under a second attachment. 97 I C 547.

—When the amount due under the writ of execution is paid and the attachment comes to an end, there are no further claims enforceable under the attachment in respect of which the alienation can be said to be void, and *ex post facto* the alienation is rehabilitated in law. 10 R 199 (203)=138 I C 201=A I R 1932 R 103=I R 1932 R 156=A LR 1932 R 234.

—Applications to determine mesne profits are to be heard as applications for execution. Their striking off does not finally decide them—28 Cal 242 but see 37 I C 997.

—Revival of attachment—Where an execution sale is set aside for any reason other than default on the part of the decree-holder the attachment which had been obtained prior to the first sale revives to support a subsequent application for execution, and no fresh attachment is necessary 3 Pat L J 310=(1918) Pat 343-45 I C 589.

—Restoration of attachment once set aside by mistake reverts the parties to position at the time of original attachment, rendering void all private alienations of

## C. P. C. (1908) SEC. 64 (Contd.)

## (9-a) Effect of removal, suspension, or revival of attachment. (Conclud.)

the property during interval. 42 All 39-17 A L J 901-52 I C 343.

—Reversal of a decree in a claim suit in appeal revives the attachment once raised and renders transfers during interval invalid. A I R 1922 Nag 138-4 N L J 213-65 I C 220.

—Attachment released on claim on the attached property being allowed, revives on a suit by attaching creditors challenging the claim being decreed A I R 1922 Mad 176-45 M 84-41 M L J 393-14 L W 371-(1921) M W N 642-69 I C 642.

—Person taking transfer after attachment is validly withdrawn though under misapprehension, is not affected by a subsequent attachment. A I R 1929 Rang 229-7 R 201=Ind Rul (1929) Rang 263=118 I C 615.

—A decree was passed against one H and his property was attached in execution of the decree. An appeal was filed in the High Court and during the pendency of the appeal the execution case was struck off on account of the decree-holder's default in paying certain requisite fees. The decree-holders after the disposal of the appeal, applied for the revival of the execution proceedings and they prayed for the sale of property already attached. Meanwhile the judgment-debtor made a gift of the property in favour of his mother who sold it to the debts. Held, that the attachment was not withdrawn by reason of the dismissal of the application for execution and the transfer by the judgment-debtor during the pendency of the attachment was void. 37 All 542-13 A L J 750-30 I C 787.

## (10) Effect of winding up order on attachment.

—The effect of an attachment is only to prevent private alienation it does not confer title. A vesting order passed by a competent foreign Court is a transfer by operation of law, and the right of the Official Receiver override those under an earlier attachment in British India. A I R 1931 Mad 474-33 L W 562=(1931) M W N 444=Ind Rul (1931) Mad 649-54 M 727-132 I C 297.

## (11) Liability for unlawful attachment.

—In India the attachment is made at the risk of the attaching creditor and he is responsible for any results which can be traced to an unlawful attachment carried out upon application made by him. In the



## C. P. C. (1908) SEC. 64 (Contd)

## (11) Liability for unlawful

## attachment. (Concl'd)

case of sale in execution in India, although there is no warranty given by the Court or by the officer entrusted with the duty of carrying out the sale, there is a warranty by the decree-holder that the property does belong to the judgment-debtor. The property is sold as the property of the judgment-debtor on the representation to that effect made to the Court by the decree-holder who is taking out execution. A stranger whose property is sold behind his back without any authority does not need to have the sale set aside. 14 O C 343.

## (12-13) Private sale to decree holder.

—A direction in assignment to pay debt can be revoked before payment only if the debt is unsecured. Where mortgagee assigns his rights after they have been attached directing the assignee to pay off the attaching creditor out of the consideration money, payment by the assignee to the attachment creditor is not void as against other creditors even if they had attached the money in assignee's hands before payment. 1 L W 977-26 I C 223.

—Attachment of property falling to another person by reason of award pending attachment, and consequent execution sale only take effect subject to award. Purchase by attaching creditor subsequent to a decree in terms of award, is good only subject to the decree. 35 M L J 441-24 M L T 477-8 L W 582-48 I C 123.

—Property attached by two creditors before judgment, but sold and purchased by one creditor in execution of his own decree, cannot be attached or sold by the other creditor in execution of his decree because after the purchase by first creditor at execution sale, the judgment-debtor retained no interest in the property. 38 M L J 441-11 L W 349-55 I C 626.

## (14) Private transfer.

—Decree passed during pendency of attachment of property, in terms of a bona fide award transferring the property to a third person is not a private transfer. A I R 1922 Mad 221-45 M 103-41 M L J 557-14 L W 524-(1921) M W N 808-68 I C 673.

—Transfer of property pursuant to a decree for partition based upon an award—whether a private transfer within the meaning of S. 64 see A L R 1933 P C 8-35 B L R 1-56 C L J 324.

—Sale of attached property by third

## C. P. C. (1908) SEC. 64 (Contd)

## (14) Private transfer. (Contd)

party prior to attachment—Judgment-debtor not party to Consent to such sale given by, after attachment—Alienation pending attachment—Consent amounts to—Alienation not valid as against decree-holder under S. 64. 1932 P C L 830 (831-2) (Civ) A L R 1932 L 830 (Civ).

—Transfer of attached property by judgment-debtor pursuant to a decree for partition on foot of an award is not a "private transfer," though the arbitration itself was private. 63 M L J 664 (669-70) =9 O W N 829-36 L W 456-1932 M W N 1063-16 R D 522-1932 A L J 909-13 L R 350 (Rev)-56 C L J 324-36 C W N 1129 =I R 1932 P C 285-139 I C 85-A I R 1932 P C 235 (P C).

—Attachment is not complete until it is duly intimated under O 21 R 54 and in absence of such intimation, alienation pending attachment is not void. Decree-holder permitting alienation to be notified in sale proclamation is estopped from questioning its validity. 3 O L J 422-36 I C 732.

—Where a decree-holder holding two decrees against same judgment-debtor attached and sold certain properties of the judgment-debtor under his first decree but the execution sale was set aside under O. 21, R 89 and the decree was satisfied out of deposits, he cannot satisfy his second decree from the same properties without separate attachment, and as such subsequent private alienation of the same before second attachment is valid. 7 L W 573-45 I C 782.

—Attachment—Private alienation—Alienation not void unless preliminaries by O 21, R 54 have been observed. See 26 I C 204-10 L J 549.

—Applicability of—Attachment—Claim suit—Private alienations by claimant—Lis Pendens See 32 M L J 374-40 Mad 955- (1917) M W N 284-5 M L W 519-38 I C 778.

—Rights acquired subsequent to attachment are void, and as such, mortgage effected subsequent to attachment cannot affect rights of the purchasers at sale of the property. 23 O C 18-55 I C 481-70 L J 1.

—Where subsequent to compromise of one decree under which property was attached an application was made by another decree-holder for attachment or rateable distribution any private alienation after the subsequent attachment is void. 13 Bom L R 1189-12 I C 923.

—Alienation pending attachment is inoperative against execution purchaser even if decree-holder is not prejudiced. 20 I C 241- (see also 11 W R 1-2 B L R 49 F B). But see 30 I C 238.

## C. P. C. (1908) SEC. 64 (Contd)

## (14) Private transfer. (Contd)

—Transfer by judgment-debtor of his property under attachment is inoperative as against a subsequent judgment-creditor, even though his decree is passed after transfer, but attachment is made before transfer. 33 I C 492.

—Decree-holder unable to satisfy his decree out of the unsold portion of property attached can proceed against the portion sold privately by judgment debtor. 34 I C 91.

—Transfer pending attachment—Right of transferee to apply under O 21, R 89 C. P. Code. see. 36 I C 510.

—Private alienation of attached property is prohibited only from the date of proclamation under O. 21 R 54 (2). 42 Mad 844=37 M L J 375=10 L W 391=(1919) M W N 678=26 M L T 281=53 I C 207 (F B).

—Private alienation by judgment-debtor pending attachment which has subsequently been raised, is valid against a non-attaching creditor applying for rateable distribution. 5 P R 1919=49 I C 134.

—Mortgage effected subsequent to the setting aside of sale under attachment is valid against second attachment effected subsequent to it A I R 1921 All 45=43 A 399=19 A L J 221=60 I C 846.

—Attachment of property renders its private transfer only voidable and not absolutely void. 63 I C 108.

—Private alienations are not merely voidable. A I R 1925 Mad 338=47 M L J 913=85 I C 349.

—Purchaser of property usufructually mortgaged during pendency of attachment and subsequently sold, must sue for possession within 12 years he took symbolical possession. A I R 1926 Mad 966=51 M L J 143=24 L W 263=97 I C 718.

—Sale of property in execution prevails over the private sale of the same effected pending the attachment by the attaching creditor, but the charge for amount of incumbrance discharged by the alienee must be discharged. A I R 1926 Mad 1082=51 M L J 358=24 L W 444=(1926) M W N 737=97 I C 932.

—Sale of property subject to attachment is valid if the sale-deed was registered after the attachment was released. A I R 1927 Nag 289=103 I C 65.

—Where subsequent to the decree property attached before judgment is mortgaged to a third person, the mortgage can be challenged by the decree holder auction-purchaser even though the mortgage was mentioned in execution application and in sale proclamation. A I R 1928 Bom 444=30 Bom L R 1136=113 I C 333.

## C. P. C. (1908) SEC. 64 (Contd)

## (14) Private transfer. (Concl'd)

—A money-decree can be transferred even if it is attached, and the transferee is entitled to have his name substituted in place of assignors and to apply for execution under. XXI R 16 A I R 1929 Pat 1=7 Pat 726=9 P L T 822=113 I C 673. Attachment before judgment does not affect prior transfer. A I R 1928 Bom 545=30 Bom L R 1488=Ind Rul (1929) Bom 318=115 I C 414.

—Transfer of interest is involved in an assignment of debt or fund, equitable or legal. A I R 1929 Rang 229=7 R 201=Ind Rul (1929) Rang 263=118 I C 615.

—No sale is rendered void against a bona fide purchaser, by a temporary injunction restraining alienation of property pending decision of suit. A I R 1930 Lah 858=Ind Rul (1931) Lah 32=128 I C 304.

—Whether the operation of a registered deed from the date of execution is in any way affected by attachment of property between date of execution and registration. see A L R 1933 C 33=59 C 1176=36 C W N 733=A I R 1933 C 242.

## (15) Private transfer under O 21 R 83.

—Auction purchaser is not bound by mortgage during attachment even if it was entered into to pay off another attaching creditor. A I R 1922 All 443=44 A 714=20 A L J 722=68 I C 790.

## (16) Where an attachment has been made.

—It was to give effect to this ruling that word "contrary to such attachment" were substituted for the words "during the continuance of the attachment" which were too wide and liable to be misconstrued to mean any attachment.

—Attachment of property before judgment which is mortgaged subsequently is ultra vires and does not affect mortgage if procedure of r. 5, O. XXXVIII is not followed. A I R 1922 Nag 238=63 I C 188.

—An attachment is not effectual till the prohibitory order is posted in the Court-house. Though the registration of the mortgage deed was subsequent to the posting of the prohibitory order in the Court-house, yet, as, under S. 47 of the Registration Act, a registered deed operates from the time of its execution and not merely from the time of its registration, the deed took effect before the attachment became effectual and prevails over the attachment. 59 C 1176 (1179-80)=36 C W N 733=A L R 1933 C 331.

C. P. C. (1908) SEC 64 (*Contd.*)(16) Where an attachment has been made. (*Concl'd*)

—Attachment is not complete until it is made in manner provided by O 21 R 54, and as such alienation of property after order for its attachment, but before its actual attachment in pursuance of O 21 r. 54 is not invalid. S 64 does not raise the question of bonafides of the alienee. 42 Mad 565=36 M L J 284=26 M L T 45 =50 I C 261.

—No prohibitory order restraining payee of a pro-note from receiving money under it has the effect of an attachment. A I R 1923 Mad 317 (2)=(1923) M W N 91 =46 M 415=17 L W 314=44 M L J 206=72 I C 189.

—Subsequent attachment relates back to the time when first attachment was made if the latter was released wrongly. But if attachment is validly released interest created in meanwhile must be recognized by Court. A I R 1924 Cal 741 =51 C 548=39 C L J 418= 83 I C 233.

—Property attached by one creditor cannot, by any act of another creditor, be put beyond the reach of the former. A I R 1927 Mad 1147=39 M L T 196=26 L W 209=105 I C 246.

—In absence of a proper guardian, no order absolute for attachment before judgment can be made. But the fact that a guardian proposed comes and says he is unwilling to act, does not invalidate a conditional order simply preventing alienation of the property pending the disposal of application. The conditional order made absolute is binding on the property; but during the subsistence of the conditional order, the purchaser of such property can object to the conditional order being made absolute. A I R 1928 Mad 1=106 I C 142.

—Where attachment of property consisting of three fields is made and one field is sold in execution of the decree, attachment by another decree-holder of the remaining two fields subsequent to their mortgage does not enure for the benefit of such decree-holder but that the mortgagee having a better title to them is entitled thereto. A L R 1933 N 239.

—Attachment order does not take effect from the date of Court's order but only from the date of its actual promulgation. 32 I C 276. See also 39 I C 857.

—Attachment made in manner prescribed by O 21, R 54 is the attachment referred to in s. 64. There is no difference between old and new code except the omission of a surplusage. 39 I C 857 (On appeal from 32 I C 276.).

C. P. C. (1908) SEC 64 (*Concl'd*)

## (17) Miscellaneous Cases

—Ancestral property—Liability to attachment under money decree against male proprietor after his death, when the property has passed to his widow. See 29 I C 572.

## C. P. C. (1908) SEC 65.

*Synopsis.*

## (1) General principles scope and object:—

- (a) General
  - (b) Decree-holder
  - (c) Effect of new interpretation of law on sale
  - (d) Effect of vesting order in insolvency proceedings
  - (e) Immoveable property
  - (f) Land Revenue Sale
  - (g) Limitation
  - (h) No title guaranteed
  - (i) Registrar's sales
  - (j) Sale of mortgaged property under money decree
  - (k) Second appeal
  - (l) Sheriff's sales
  - (m) Silence of creditor: fraud
  - (n) Silence of debtor
  - (o) Widow: representative
- (2) Effect of reversal of decree upon sale where decree reversed *after* confirmation of sale
- (3) Effect of reversal of decree upon sale where decree reversed *before* confirmation of sale
- (4) Mesne Profits
- (5) Rights of Purchaser
- 5-a) Sale-Certificate
- (6) Sale, validity of
- (7) Suit for possession by purchaser
- (8) Vesting of property in purchaser
- (9) What passes under Court-sale
- (10) Miscellaneous Cases.

## (1) General principles, scope and object

—(a) *General*:—This section is exactly opposite in effect to the corresponding S. 316 of the old Code. The title to the property sold is now to vest in the purchaser from the date of the sale. For a history of the legislation on this point see under headings (5-a) and (8) *infra*. As to the effect of the change in the new Code on Bengal Tenancy Act, See 23 I C 100.

—(c) *Effect of new interpretation of law on sale*:—In execution of a decree against the holder by custom of primogeniture of an impartible zamindari, his right, title and interest was sold in 1876. By the law as then interpreted, such holder had only a limited interest and no power of alienation

## C. P. C. (1908) SEC. 65 (Contd)

## (1) General principles Scope and object. (Contd)

beyond his life time. Subsequently, this interpretation was reversed by the Judicial Committee, which decided that the holder of an impartible estate had an absolute interest and made it alienable, unless a custom against alienation was proved. In a suit by a purchaser at a sale against the successor by survivorship to the judgment-debtor for possession of the subject of the sale on the ground that the plaintiff had purchased an absolute interest in it, held, the reversal of the previously received interpretation of the law did not displace its application to the contract contained in the certificate of sale in 1876, the parties to which were bound by the law as then understood, and that only the life-interest of the then holder passed by the sale. 27 Mad 131 See also 1 Cal L J 176; and 43 C 334; and 13 C L J 641=10 I C 510; and 94 I C 68=23 L W 349=A I R 1926 M 851 and 37 M 22.

## (2) Effect of reversal of decree upon sale where decree reversed after confirmation of sale.

—Reversal of decree in appeal does not affect a bonafide purchaser in execution of decree pending the appeal. "Goodfaith" means absence of fraud, relation of agent or benamidar to decree-holder etc. 30 M L J 497=19 M L T 381=(1916) 2 M W N 73=34 I C 760.

## (3) Effect of reversal of decree upon sale where decree reversed before confirmation of sale.

—Between the Court Sale and its confirmation the judgment-debtor is entitled to have the Sale set aside, and the purchaser has in equity a good title, and as such, money spent by the latter on the property after the Sale cannot be recovered from the former if the sale is set aside. A I R 1928 Pat 552=9 P L T 795=111 I C 243.

—Confirmation of the previous sale of property through one Court prevents its subsequent sale through another Court in execution of another decree from materializing although confirmed, but title by second sale dates back from the date of the sale, if the first one is not confirmed and set aside. A I R 192 Bom 483=27 Bom L R 963=83 I C 962

—Under the present section, however, the decree under which the property is sold need not be subsisting at the time of the confirmation of the sale.

## C. P. C. (1908) SEC. 65. (Contd)

## (4) Mesne profits.

—Auction-purchaser's right to claim profits relates back to the date of sale 5 O L J 31=45 I C 248.

## (5) Rights of purchaser

## Synopsis.

- (1) Father's debt.
- (2) Purchaser at auction-sale
  - (a) General
  - (b) Money-decree
  - (c) Mortgage-decree.
- (3) Right to recover purchase money.
- (4) Sale when void or voidable.

## (1) Father's Debt

—Where in a suit on a mortgage a decree absolute for sale has been obtained against a deceased mortgagor without substituting or mentioning his sons as his heirs and a sale has taken place, the sons cannot challenge the sale, 28 C 73 ref. Sons under the Mitakshara law have not right to redeem the self-acquired property of their father sold in execution of a mortgage-decree obtained against the latter. 35 I C 404.

—Setting aside—Decree against Hindu father on foot of a mortgage—Sons not parties—Sale in execution—Purchase by decree-holder—Sons not entitled to redeem in the absence of proof of immorality or irregularity of debt, See 1 Pat L W 197=37 I C 833.

## (2) Purchaser at auction-sale

—Title of bonafide purchaser at execution sale is not affected on the ground that the decree has been set aside in appeal. 30 M L J 497=19 M L T 381=(1916) 2 M W N 73=34 I C 760 see also 19 M L T 93=32 I C 391.

—Title of auction-purchaser vests in him as from date of sale, and as such dealing with the property by previous owner subsequent to that date is that of a trespasser. 9 O W N 948=140 I C 560=16 R D 567.

—The title of the auction-purchaser is derived from the sale and not from the sale certificate. It accrues on the sale becoming absolute but takes effect from the date of sale itself. The sale certificate is merely evidence of title of the auction-purchaser and not the title deed in the sense that the title is conveyed or created

C. P. C. (1908) SEC. 65 (Contd)

(5) Rights of purchaser. (Contd)

(2) Purchaser at auction Sale. (Contd)

by it. The word "sale certificate" itself denotes that it is only a certificate by the Court that the auction-purchaser had purchased the property. It is not incumbent on a purchaser at an execution sale, which has been duly confirmed, to produce his sale certificate, but it is competent for him to prove his purchase aliunde 136 I C 49=A I R 1932 P 80 (83-4)

—Right of purchaser after sale and before its confirmation See 23 M L T 9=41 Mad 474=34 M L J 156=7 M L W 159=43 I C 685=(1918) M W N 121.

—Property directed to be sold and the sale proceeds to be formed into trust—Before such sale, property is attached and sold under a decree against the trustee—The purchaser gets a good title. A I R 1921 All 224=43 All 508=19 A L J 452 =62 I C 904

—Auction purchaser—Title of Rent decree—Liability of outgoing tenant for rent after sale. See 23 I C 101=18 C W N 136.

—If Court sale is confirmed, purchaser's title is not affected by failure to obtain sale certificate. 25 I C 8.

—Auction purchaser—Title of, when complete. See 38 Mad 705=(1915) M W N 45 =27 I C 323=27 M L J 740,

—See also 7 I C 100.

—Auction-purchaser may claim a higher right in the property sold, than what is mentioned in the sale proclamation, if the judgment-debtor was entitled to it. A I R 1928 Cal 880=56 Cal 173=48 C L J 97=32 C W N 587=115 I C 81.

—Auction purchaser in a sale by civil court takes the property subject to all equities affecting the judgment-debtor. A I R 1925 Pat 106=3 Pat 947=6 P L T 769 =88 I C 219.

—Also A I R 1925 Cal 485=78 I C 668.

—Auction-purchaser of the entire interest of a joint family can contest validity of sale by one of them. A I R 1926 All 718=97 I C 344.

—Sale gives the purchaser all the interest of the judgment-debtor in the property. A I R 1921 Pat 409=2 P L T 240 =(1921) Pat 205=61 I C 922.

—Purchase of property at execution sale by decree-holder himself for full amount of the decree does not result in the satisfaction of the decree until confirmation of sale. 41 All 526=17 A L J 617=50 I C 772.

—Title of auction purchaser, when accures—Liability to Govt. revenue—see 40

C. P. C. (1908) SEC. 65 (Contd)

(5) Rights of purchaser. (Contd)

(2) Purchaser at auction Sale. (Contd)

Cal 89 (P C)=16 C W N 985=23 M L J 311=14 Bom L R 1046=16 C L J 606=16 I C 210=12 M L T 352.

—There is distinction between rights of a purchaser at revenue and voluntary sales. A I R 1926 Cal 97=52 C 862=90 I C 901.

—Sale of property over which maintenance charge in pauper suit is decreed directing realization of Govt. costs from arrears of maintenance for those costs through Court, is a sale of equity of redemption subject to the charge of maintenance. A I R 1926 Cal 859=94 I C 391.

—S 65—Sale in favour of highest bidder is not invalidated by decree-holder's failure to fulfil the conditions on which he was permitted to bid. A I R 1926 Pat 335 =(1926) Pat 138=95 I C 441

—As regards the land sold, Court auction places the purchaser exactly into the shoes of the judgment-debtor and no liability attaches to the Court for breach of warranty. A I R 1928 Rang 67=5 R 803=109 I C 151.

—Mortgagee under an invalid mortgage can get equitable relief only by way of repayment of his mortgage amount, and cannot question auction-purchaser's title. A I R 1927 Rang. 332=6 Bur L J 230=106 I C 861.

—Where before confirmation of sale, auction-purchaser not actually in possession makes a gift authorizing the donee to take possession, the gift passes title. A I R 1927 Oudh 261=2 Luck 496=1 Luck Cas 50=132 I C 72.

—Stranger auction-purchaser need not enquire if decree and sale are valid. A I R 1924 Cal 1008=39 C L J 394 =83 I C 1040.

—The purchasers from decree-holders auction-purchasers in execution of ex parte decrees cannot avail themselves of the plea of bona fide purchasers for value. 20 C W N 665=22 C L J 409=31 I C 894.

—Stranger auction purchaser and purchase by decree-holder or party—Distinction between. See 19 C W N 537 =27 I C 139.

—The reason for the rule that a stranger purchaser is not affected is that he cannot be expected to go behind the judgment to inquire into the irregularities in the suit and that it is sufficient for him to know that the court had jurisdiction and exercised it and that the order on the faith of which he purchased was made and did



## C P C. (1908) SEC. 65 (Contd)

## (5) Rights of purchaser. (Contd)

## (2) Purchaser at auction Sale. (Contd)

authorise the sale. The reason for the rule disappears when the purchaser is himself a party to the suit and has notice or at least opportunity of knowledge of all the proceedings therein. The case is clearly one for the application of the maxim "*Cessante Ratione Legis Cessat ipsa Lex*" and the purchase by such party is liable to be set aside. 19 C W N 527=20 C L J 469

=27 I C 139.

—The holder of a money-decree, though having a mortgage, is in no better position than an ordinary decree-holder.

2 W R 130. but see 50 M L J 183.

—(c) Mortgage decree:—The interest of a purchaser at a sale in execution of a mortgage decree is certainly more than merely the interest of the judgment-debtor.

A I R 1923 M 160=50 M L J 183.

—Sale under a mortgage decree—Purchaser acquires interests of both mortgagor and mortgagee—Alienee of property, subsequent to mortgage sued on not made a party to suit. He is entitled to redeem. His rights are not affected by the decree and sale—The purchaser is not entitled to possession but can sue for sale of the property. A I R 1926 Rang 183=4 Rang 96

=97 I C 243

—Right to the charge in favour of the mortgagor judgment-debtor can be claimed by purchaser in execution of mortgage-decree A I R 1927 Cal 359=45 C L J 151

=100 I C 413

## (3) Right to recover purchase money

Concealment of encumbrance by decree-holder entitles the auction-purchaser to sue for recovery of whole or portion of his purchase-money. 16 I C 215.

## (4) Sale when void or voidable.

—Decree amended after sale—Sale in favour of stranger cannot be set aside. A I R 1926 All 35=48 All 94=23 A L J 946=6 L R A (Civ.) 580=89 I C 1018. Also 24 A L J 65=6 L R A 420=A I R 1926 A 41=89 I C 369.

—In a suit for possession of property sold in execution of a decree on the basis that the sale was a nullity, it is not necessary to set aside the sale. In a suit for possession of property sold in execution of a decree on the basis that the sale was void, it is not necessary to set aside the sale. 53 I C 404.

—Where some of the judgment-debtors apply to set aside sale in execution of a joint decree, the whole sale can be set aside. 14 C L J 346=16 C W N 704=11 I C 438.

## C. P. C. (1908) SEC. 65 (Contd)

## (5) Rights of purchaser. (Contd)

## (4) Sale when void or voidable. (Contd)

—When on an appeal preferred by one of the auction-purchasers at an execution sale, an Appellate Court reverses the order of the first Court setting aside the sale, the order of the first Court does not stand good even against the other auction-purchasers who did not appeal. 32 I C 193.

—As soon as an *ex parte* decree is set aside the execution-sale held thereunder falls through if the purchaser is the decree-holder and a fresh decree subsequently made cannot validate the sale. The primary Court is competent in certain circumstances to set aside an execution sale on a ground which was not mentioned in the application of the judgment debtor and did not in fact exist when the application was made 20 C W N 667=22 C L J 412=31 I C 896.

## (6) Sale, validity of

—It is not desirable to interfere with Court sales on grounds not strong enough. A I R 1928 Cal 328=32 C W N 309=113 I C 562.

—Thus a flaw in, or absence of, attachment is no ground for setting aside sale; A I R 1923 Nag 18=68 I C 643.

—See also 4 N L J 118=18 Nag L R 152=A I R 1922 Nag 267=64 I C 420.

—And one sale in execution of two decrees against the same person is valid: 105 I C 123=A I R 1928 N 34.

—so also property sold clearly identified but inaccurately described in documents relating to sale is valid and is conveyed to the purchaser. A I R 1923 Mad 442 (2)=44 M L J 357=17 M L W 402=(1923) M W N 217=32 M L T (H C) 246=72 I C 464. so also where execution application is barred by limitation sale held under it is valid. A I R 1927 Pat 261=8 P L T 494=101 I C 694.

—But sale held by one court after another court granted an injunction restraining decree-holder from selling the property is void. A I R 1922 Pat 382=1922 Pat. (Sup.) 225=3 Pat L T 645=1 Pat 662=70 I C 394.

—so also sale in execution of a non-transferable occupancy holdidg is not a nullity. 10 I C 417.

—Mortgage suit against two defendants, one of them minor represented by the other defendant—The major defendant died during suit and without bringing his legal representative on record or appointing fresh guardian—Decree was passed and property sold—The sale is not binding on the minor and he can sue to set it aside. 61 I C 291

## C. P. C. (1908) SEC. 60 (Contd)

## (6) Sale, validity of (Contd)

—But an execution sale after death of the guardian ad litem of a minor judgment-debtor without appointing a fresh guardian is not a nullity. A I R 1927 Nag 198=23 N L R 146=10 N L J 27=101 I C 288.

—A sale in execution of a fraudulent decree is not void, but voidable; till vacated by an appropriate proceeding, the rights created thereby are effective. Such a sale cannot be set aside without setting aside the decree; consequently where the right to have the decree set aside as fraudulent has become barred by limitation, no decree can be made setting aside the sale only as made in execution of a fraudulent decree. 20 C W N 659=33 I C 767.

—An ex parte order for stay of an auction sale was obtained by fraud and it was subsequently discharged by the judge who passed it. Before the ex parte order was set aside the sale was held and the property sold. Held that the sale was not void. 16 A L J 46=43 I C 665.

—Though a stranger whose property is sold has a right to be replaced in possession. 60 I C 120.

—As to the effect of non-joinder of attaching money decree-holder see 37 Mad 418=15 I C 334.

—Company winding up order—Sale after the order in execution of decree without knowledge of order. See (1917) Pat 315=38 I C 91.

—Execution-Auction-sale of equity of redemption-Representation by auctioneer Purchase under misapprehension induced by such representation-Duty of Court See 6 A L J 34 P C=13 C W N 249=5 M L T 126=9 C L J 165=11 Bom L R 227=36 C 323=19 M L J 115=5 L B R 25=1 Ind Cas 122=36 I A 32.

—The question about validity of sale can be determined under S. 47 C. P. C. Want of notice under O. XXI r. 22 invalidates the sale. A I R 1930 Mad 12=(1929) M W N 811=Ind Rul (1930) Mad 440=123 I C 24.

Alienation Act the execution Court cannot proceed with the sale even though there is a decree for its sale. If a sale took place the sale is a mere nullity. A I R 1924 All 261=46 All 153=21 A L J 917=4 L R A Civ 607=79 I C 532.

—Property of person against whom no decree or executable order is made, cannot be sold. A I R 1930 Mad. 12=(1929) M W N 811=Ind Rul (1930) Mad 440=123 I C 24.

## C. P. C. (1908) SEC. 65 (Contd)

## (7) Suit for possession by purchaser.

—Court-sale of interest of one co-owner-Suit for partition without formal delivery, 28 M L J 642=(1915) M W N 414=29 I C 976.

—Suit for possession on basis of purchase in Court-auction-Limitation-9 Ind Cas 271=9 M L T 359.

## (8) Vesting of property in purchaser

—From the date of sale property sold vests in the purchaser with all profits and responsibilities therein, A I R 1926 Nag. 17=88 I C 693.

—Under the provisions of S. 65 C P C therefore the title to the mortgaged property vests in the purchaser from the time when the property is sold in execution of the decree on the mortgage there after has no title left in the property and any act of Conversion on his part is an act of a trespasser and is liable to be questioned in a civil court. A L R 1933 O 619.

—Title vests on confirmation from date of sale without issue of sale certificate. 95 I C 965.

—Under S. 65 property vests in the purchaser from the date of its sale and as such S. 66 is not applicable to a suit to enforce the agreement convey property passed by the purchaser to another person. A I R 1930 Bom 81=31 Bom L R 1271=Ind Rul (1930) Bom 245=124 I C 117.

—Execution sale takes effect from moment of sale. A I R 1925 Mad 95=7 M L J 622=21 M L W 336=85 I C 855.

## (9) What passes under Court sale.

—Sale of land does not pass structures or buildings thereon in absence of anything else. A I R 1926 Cal 97=52 C 862=90 I C 901.

—Auction sale of land already leased passes rights to rent due from the lessee A I R 1928 Rang 67=5 R 803=109 I C 151.

—Jackson J-Court sale of land passes Government running with the land eg. that for title provided in s. 55 (2) T P Act. A I R 1928 Mad 894=51 M 688=(1928) M W N 419=55 M L J 151=28 L W 346=110 I C 830.

—No Court sale can be set aside by a purchaser unless the judgment-debtor had no saleable interest at all in the property sold, otherwise he takes the property with all risks and defects therein A I R 1930 Lah 937=12 Lah L J 203=Ind Rul (1931) Lah 305=130 I C 513.

—In absence of notification of sale or proved custom to the contrary growing

## C. P. C. (1908) SEC. 65 (Contd)

## (9) What passes under Court sale (Contd)

crops passes with the sale of a tenure. A I R 1923 Pat 355=4 P L T 318=1 Pat L R 239=73 I C 451.

—No sale in execution expressly subject to and admitting existence of a mortgage can operate against the mortgagee.

A I R 1926 Nag 446=95 I C 563.

—Decree against widow—What is sold See 20 C L J 23=25 I C 84.

—At a sale of an impartible zamindari, when what is sold according to the sale certificate is the right, title and interest of the judgment-debtor, the purchaser takes an interest for the life only of the judgment-debtor—22 Mad. 110, but see 23 M W 349=94 I C 68.

## (10) Territorial Jurisdiction.

—Agency Court has no right to sell the right to collect kattubadi in villages situated beyond the limits of its territorial jurisdiction. A I R 1924 Mad 144=18 M L W 747=76 I C 269.

—Sale held by Court without territorial jurisdiction is void. Objection to defect of jurisdiction must be taken at the earliest opportunity in the Court of first instance. A I R 1923 Cal 619=27 C W N 542=77 I C 253.

—Order adjourning sale and further providing that damages should be paid if further adjournment was asked for is illegal and not executable. (1923) Pat 202=A I R 1923 Pat 407=72 I C 1035.

## (10-a) Miscellaneous Cases.

—Purchaser at an auction sale which took place under old Code, but became absolute under new one, is bound by s 66 of the new Code of 1908 A I R 1928 Cal 338=32 C W N 112=107 I C 67.

—As between a bona fide decree-holder auction-purchaser between a mortgage decree nisi and decree absolute, in execution of his money decree, and the mortgagee the case is one of respective equities in favour of both to be adjusted by the Court viz. that the mortgagee is entitled to have his dues realized from the property and that the purchaser should not suffer if he has paid for an absolute interest. A I R 1927 Cal 522=43 C L J 255=31 C W N 521=101 I C 124.

## C. P. C. (1908) SEC. 66.

## Synopsis

- (1) General principles, scope and object.
- (2) Certified purchaser and his representative.

## C. P. C. (1908) SEC. 66 (Contd)

- (3) Joint purchase.
- (4) Other suits whether barred.
- (5) Persons claiming through beneficial owner.
- (6) Plea of benami-purchase as a defence.
- (7) Suit by beneficial owner in possession for declaration of title.
- (8) Suit by a third person for a declaration that the certified purchaser is merely a benamidar.
- (9) Suit for a declaration that the insertion of purchaser's name in the sale certificate was fraudulent or an authorized etc.
- (10) Suit for specific performance of contract of sale or purchase.
- (11) Miscellaneous Cases.

## (1) General principles, scope and object

—The object of S 66 is to check benami purchases at auction sale, but a co-decree-holder purchasing the property of judgment-debtor at execution sale is a trustee for other decree-holders and the purchase enures for the benefit of all decree-holders 37 All 545=13 A L J 999=29 M L J 329=18 M L T 203=19 C W N 1175=22 C L J 508= (1915) M W N 713=2 L W 837=17 Bom L R 998=30 I C 265=42 I A 177 (P C).

—At a sale in execution of a decree, the plaintiff purchased certain property in the name of the defendant and continued in undisturbed possession for eight years. He then sued the defendant for a declaration of his right and for an injunction restraining him from interfering with it. Held, that the suit did not come within the scope of s. 317, C P C 1882 but was maintainable—23 Cal 699, but this was not followed in 43 C 20 and 53 C 297.

—The rule under S 66 does not operate retrospectively. A I R 1923 Cal 228=36 C L J 396=27 C W N 305=70 I C 555.

See contra, 43 A 416=19 A L J 227=62 I C 725 and 12 A L J 1145; and 29 I C 447 (All); and 3 M L W 86=32 I C 434.

—By disapproving of benami transactions, s. 66 aims at preventing actions against certified purchasers and their transferees. A I R 1921 All 165=43 A 416=19 A L J 227=62 I C 725.

—S. 66 covers suits for confirmation of possession as also for recovery of possession from benamidar A I R 1926 Cal 542=53 C 297=30 C W N 180=92 I C 984.

—Sale by a Receiver is not governed by S. 66 A I R 1926 All 124=48 A 209=24 A L J 26=L R 6 A 610 Civ=90 I C 116.

## C. P. C. (1908) SEC. 66 (Contd.)

## (1) General principles, scope and object (Conclud)

—The Section does not render benami sales illegal, but discourages them. A I R 1930 Bom 81=31 Bom L R 1271=Ind Rul. (1930) Bom 245=124 I C 117.

—Cases of contest between two persons each claiming to be the real beneficiary under a benami Court-auction purchase are not governed by S. 66. Release by a benami purchaser in favour of beneficiary without conveying any title to the property is a release pure and simple not making the beneficiary a certified purchaser. (1916)

1 M W N 184=3 L W 233=33 I C 1000.

—Suit by principal against agent for recovery of property purchased at execution sale by the agent out of principal's money for principal's benefit is maintainable. (1919)

M W N 693=9 M L W 276=49 I C 734.

—S. 66 does not apply to cases where title accrued under old code but where no such title is accrued prior to the date when new code came into force, S. 66 is applicable. 23 C W N 604=50 I C 335.

—Case of one of several decree-holders obtaining leave to bid and purchasing on behalf of all is not covered by s. 317. 33 All 563=8 A L J 616=11 I C 517.

—S. 66 does not apply where plaintiff's claim is not based on auction-purchase, but is independent of and prior to the sale. 36 I C 681.

—As to whether the section applies to representatives see 24 C W N 659=58 I C 745.

—And as to the applicability of the section to execution of fictitious decrees see 18 C W N 1331=27 I C 230.

—Manager of a Hindu Family-Purchaser with funds belonging to himself and other members. See 17 I C 434.

## (2) Certified purchaser and his representatives

—Owing to the substitution of the "against any person claiming title under a purchaser certified by the Court in such manner as be prescribed" in the present section for the words "against a certified purchaser" in the old section the Bombay view has obtained a legislative recognition. Thus suits against representative of certified purchaser are barred by S. 66. Possession by real owner through certified purchaser is insufficient to give him any title if it is for shorter period than statutory. Oral declaration of trust in respect of immovable property is unenforceable even if it is followed by accounting of profits to cestuique trust. 28 M L J 251=7 M L T 158= (1915) M W N 204=28 I C 203.

## C. P. C. (1908) SEC. 66 (Contd.)

## (2) Certified purchaser and his representatives. (Contd.)

—Suit against purchaser's representatives or assigns is governed by s. 66—Plea of estoppel based on facts subsequent to a Court sale is not barred by s. 66 23 M L J 301=36 Mad 564=12 M L T 211=(1912) M W N 882=16 I C 30.

—Persons claiming under a Court purchaser are "certified purchaser". 22 O C 222=53 I C 961=6 O L J 563.

—Suit against assignee from certified purchaser is not barred by s. 66 18 M L J 305. Successor in title of certified purchaser can claim protection of s. 66. S. 66 bars a suit for a declaration but a claim for declaratory decree on the ground of adverse possession for over 12 years against certified purchaser is not barred. 13 N L R 87=55 I C 499.

—Representatives of certified purchaser at auction under Act VIII of 1859, can claim protection of s. 66 against a real owner if disputes arise after the new Code 12 A L J 1145=25 I C 821.

—S. 66 does not affect any right vested in a party before the new code came into force. S. 66 applies also to persons claiming under a certified purchaser, while old s. 317 applied only to certified purchaser. 29 I C 716.

See also 24 C W N 1011=31 C L J 463=58 I C 327

—Suit in ejectment by benamidar to recover possession is not maintainable though he may be holding a sale certificate. Real purchaser can take action under O. 21, Rr. 97 to 103. 31 M L J 877=5 L W 623=37 I C 497.

—S. 66 is applicable even if the ostensible purchaser at auction sale is real purchaser of only a portion of property sold. 57 I C 684.

—And if the plaintiff's claim is not contested by certified purchaser the suit is not barred. A I R 1925 All 47=L R 5 A 671 Civ=82 I C 344.

—Under 3rd sch. of Bengal Tenancy Act, possession of real purchaser for 3 years extinguishes the title of the certified purchaser and the former acquires title by adverse possession. Benamidar of certified purchaser failing to assert his rights against real purchaser during latter's possession after auction cannot be said to have waived or transferred his rights. 24 C W N 1024=59 I C 719.

## (3) Joint purchase.

—Purchase by a joint family in the name of a female member entitled to maintenance is governed by s. 66. A I R

## C. P. C. (1908) SEC. 66 (Contd)

## (3) Joint purchase. (Concl'd.)

1921 All 185=43 A 711=19 A L J 787=63 I C 676.

—S. 66 to prevent a member of a joint family from recovering the property which has been bought out of the joint family money in the name of some person benami at a Court auction by the managing member of the family, he himself being the decree-holder A I R 1922 Mad 481=45 M 856=16 L W 358=43 M L J 363 = (1922) M W N 584=73 I C 478

—S. 66 does not bar a suit claiming half of the property by one of two persons who have entered into a joint venture to by property at the Court sale, the funds being provided jointly, but the sale certificate is issued in the name of the other. A I R 1926 Bom 525= 50 B 600=28 Bom L R 997=97 I C 688.

## (4) Other suits whether barred.

—A suit by decree-holder for possession of property from a person purchasing the property in his own name disregarding the instructions of the decree-holder to bid at the sale for him after obtaining the Court's permission, is barred by s. 66 A I R 1925 Nag 41=82 I C 541.

—S. 66 does not bar a suit based on dispossession after an adverse possession of 12 years even on proof of benami on an alternative cause of action. 43 A 416 = A I R 1921 All 165=62 I C 725 Reversed. A I R 1929 P C 228=57 M L J 177=33 C W N 1961=6 O W N 637=30 L W 395=(1929) A L J 930=(1929) M W N 734=56 I A 330=31 Bom L R 1393=50 C L J 357=51 All 675=Ind Rul (1930) P C 11=120 I C 651.

—But the section bars a suit by a co-mortgagee defendant in suit upon mortgage by other co-mortgagee for share of property purchased by the latter under the decree. A I R 1923 All 403.

## (5) Persons claiming through beneficial owner.

—In no way the title of persons interested beneficially in the purchases other wise than by way of benami, are affected by s. 66. A I R 1924 Oudh 218=10 O L J 481=78 I C 393.

—Suit by real owner for possession of property purchased by certified purchaser on the ground of benami purchase is not maintainable A I R 1923 All 619=50 A 512=26 A L J 245=103 I C 133.

—Nor is a suit by beneficial owner or his successor-in-title against certified purchaser maintainable. 10 A L J 97=16 I C 439

## C. P. C. (1908) SEC. 66 (Contd)

## (5) Persons claiming through beneficial owner. (Concl'd)

—But suit lies against certified purchaser if plaintiff does not claim through the person for whom defendant was benamidar, 11 A L J 101=35 A 138=18 IC 246.

—So also where the real owner redeems property purchased by him benami in another's name, from a prior mortgagee, he is entitled to the benefit of the security and can maintain a suit against the certified purchaser for possession as mortgagee. He cannot get a personal decree against the certified purchaser (1931) A L J 601=Ind Rul (1931) All 696=133 I C 536.

—Manager of joint Hindu family—Purchase of properties in an execution sale in the name of son-in-law—Claim of others. See 44 I A 201=15 A L J 684=19 Bom L R 737=26 C L J 267=21 C W N 1065=33 M L J 180=20 O C 211=22 M L T 121=6 M L W 509=1917 M W N 477=4 O L J 762=2 P L W 160=40 I C 988=1917 P C 12.

## (6) Plea of benami purchase as a defence.

—In a suit by certified purchaser real owner in possession can set up a plea of benami purchase as a defence. 11 N L R 130=31 I C 58.

—And the plea of bar under S. 66 which goes to the root of the suit does not depend upon disputed facts and may be allowed to be taken at any stage and the Court is bound to give effect to the plea. 136 I C 538=I R 1932 C 218=A I R 1932 C 170.

—Plea of benami purchase for defendant can be set up as a defence in a suit by heir of certified purchaser to eject defendant 11 N L R 130=31 I C 58.

—Suit between members of joint Hindu family are not governed by s. 66. Plea of bar under s. 66 can be raised for the first time in appeal. 37 I C 111=30 L J 508.

—Suit for possession by benami purchaser cannot be defended by ostensible purchaser on plea of his own fraud. A I R 1925 Mad 1016=22 L W 313=91 I C 776.

—In an application to set aside a sale auction—purchaser is a necessary party even if the sale was benami. A I R 1928 Bom 189=52 B 290=30 Bom L R 465=110 I C 710.

—Mortgage—mortgaged property purchased subject to mortgagee's rights—suit on mortgage—mortgagors pleading benami purchase—preliminary decree passed without deciding plea validity of see A L R 1933 L 477.



## C. P. C. (1908) SEC. 66 (Contd)

## (7) Suit by beneficial owner in possession for declaration of title

—S. 66 must be construed strictly, it bars suits by persons claiming to be beneficial owners against certified owners. The principle of advancement is inapplicable in India to purchases made in the names of children 2 Lah L J 353.

—S. 66 bars a suit by real owner for declaration of his title against a certified purchaser on the ground of benami purchase. (1916) 1 M W N 220=3 M L W 86=32 I C 434.

—But it does not bar a suit by real purchaser in possession of properties purchased for declaration of his title against a benamidar purchaser at auction sale. 7 L B R 260=25 I C 810.

—Where land bought by a mahomedan father at Court sale with his money in the name of one of his sons is settled with a tenant attorning to him and paying rents to his heirs after his death the suit by heirs for arrears of rent against tenant and certified purchaser is maintainable. 24 C W N 51=54 I C 127.

—S. 66 does not bar a suit by infant to recover property purchased at execution sale by manager of infant in his own name with infant's fund 30 I C 212.

—The object of s. 66 is to check benami purchases. Suit by real purchaser against benamidar is not maintainable on fact of possession. 43 Cal 20=20 C W N 147=29 I C 787.

S. 66 does not bar a suit by a real owner seeking for a declaration of his real title against one not claiming under certified purchaser A I R 1928 Cal 448=55 C 1070=32 C W N 759=108 I C 585, S 66 has no application where the plaintiff as owner sues for declaration of title to certain property, merely because of the existence of earlier benami transactions between plaintiff's vendor and the defendants. Ind Rul (1931) Lah 791=32 P L R 295=133 I C 551.

## (8) Suit by a third person for a declaration that the certified purchaser is merely a benamidar.

—S. 66 bars a suit by a mortgagee for declaration that auction purchaser of mortgaged property was a benamidar of the mortgagor and not a beneficial owner. 8 A L J 184=9 I C 298=33 A 382. Or a suit for declaration that the purchase made by the defendant certified purchaser is benami for plaintiff. 32 I C 365=2 O L J 584.

—S. 66 bars a suit by a separated son for share in property purchased in Court

## C. P. C. (1908) SEC. 66 (Contd)

## (7) Suit by beneficial owner in possession for declaration of title (Concl'd)

sale by father in name of another separated son. Ind Rul (1929) All 921=118 I C 713.

--So also it bars a suit against a certified purchaser defendant as being a benamidar. Ind Rul (1929) All 921=118 I C 713.

—S. 66 must be construed in a strict sense and not extended beyond its express terms. S. 66 bars a suit to oust a certified purchaser on the ground that his purchase was really made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims, but it does not bar a suit based on prior contract to convey property. S. 66 is a bar to an enquiry whether certified purchaser is real or nominal purchaser A I R 1921 Pat 39=(1921) Pat 21=62 I C 720.

—But a person is only barred by S. 66 from attempting to enforce his secret title as against a sale certificate holder. A I R 1923 Cal 302=27 C W N 208=37 C L J 403=75 I C 196.

—Evidence as to the auction purchaser being benami for another is not excluded by S. 66 if such evidence is relevant. A I R 1925 Oudh 20=11 O L J 466=84 I C 98.

—Suit against certified purchaser buying Benami—Applicability to sales under Bengal Public Demands Recovery Act See 16 O L J 412=16 C W N 973=15 I C 291 (Dissenting from (1905) I C L J 550 (556).

## (9) Suit for a declaration that the insertion of purchaser's name in the sale certificate was fraudulent or an authorized etc.

—S. 66 does not bar a suit for declaration that property purchased by one member of joint Hindu family is a joint family property. 18 O. C. 160=2 O. L. J 283=30 I C 279.

—So where in execution of a mortgage-decree the property mortgaged is purchased by one of the co-mortgagees, suit by other co-mortgagees for his share of the property is not barred by S. 66 25 I C 735.

—So also where in execution of a money-decree the property of judgment-debtor was purchased by one of decree-holders, suit by the other decree holders against the purchaser for share of the property on the ground of benami purchase is not maintainable. 29 I C 447.

**C. P. C. (1908) SEC. 66 (Contd)****(10) Suit for specific performance of contract of sale or purchase.**

—S. 66 applies to a contract before the execution sale but not to a contract after the execution sale. 136 I C 538-I R 1932 C 218-A I R 1932 C 170.

—and it validates an agreement to sell property to be purchased at Court-sale.

A I R 1923 Nag 11-68 I C 559.

—And it also bars a suit for enforcement of agreement by benamidar auction purchaser to execute sale-deed to real owner. 29 I C 138.

—S. 66 aims at checking benami purchases at execution-sale. Agreement by purchaser at court auction to convey property purchased is enforceable. 24 C W N 699-18 A L J 584-28 M L T 13-39 M L J 11-12 M L W 1-(1920) M W N 389-47 I A 108-43 Mad 643-56 I C 395.

—Suit by judgment-debtor for recovery of property under an agreement to purchase in execution for benefit of judgment-debtor and to recover the property to the latter is barred by s. 66. 50 I C 546.

—But the second proviso to s. 66 is no bar to specific performance of agreement by purchaser at Court sale before the deposit of balance, to share the property with others. Certificate of sale is to be granted to the person declared to be purchaser after the bids are concluded. 24 C W N 27-54 I C 726.

So a suit to enforce specific performance of agreement by auction-purchaser to convey the property purchased to plaintiff is not barred even though it contains a plea that auction-purchaser is benamidar. 42 Mad 615-37 M L J 98-26 M L T 46-(1919) M W N 355-9 L W 598-51 I C 111 (F B).

—S. 66 does not bar a suit for specific performance of post purchase as it is not based on ground of benami purchase. A I R 1930 Bom 81-31 Bom L R 1271-Ind Rul (1930) Bom 245-124 I C 117.

**(11) Miscellaneous cases**

—Sanction of Commissioner of Division to a sale of agricultural land in execution is unnecessary from the date on which new code of 1908 came into force. 167 P L R 1913-123 P W R 1913-19 I C 479.

—Where judgment-debtor's property mortgaged by him is attached in execution of money-decree and purchased by decree-holder, a suit by mortgagee against the judgment-debtor as owner and execution purchaser as person in possession for his own benefit is not barred. 37 M L J 586-54 I C 967.

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**C. P. C. (1908) SEC. 66 (Conold)****(11) Miscellaneous cases (Conold)**

—Benamidar of the certified purchaser failing to assert his rights against the real purchaser during the latter's possession after the auction-purchase cannot be said to have waived or transferred the right 24 C W N 1024-59 I C 719.

—Proclamation under s. 66 must specify the revenue assessed upon the estate; omission vitiates the sale. A I R 1923 P C 93-18 L W 137-45 M L J 403-28 C W N 593-33M L T 275-(1923) M W N 714-L R 4 P C 197-75 I C 546.

—An omission to state value in sale proclamation is fatal to the sale only if it is a material irregularity. 35 C W N 75-58 Cal 813-53 C L J 575-Ind Rul (1931) Cal 501-131 I C 353.

—Decree sent to Collector for execution—jurisdiction of civil court to interfere with orders of Collector. See 46 I C 835.

**C. P. C. (1908) SEC. 67**

—Sale of ryotwari land or enfranchised shrotriem village must be published at the Collector's office. A I R 1924 Mad 217-46 M 736-45 M L J 263-(1923) M W N 463-75 I C 369.

**C. P. C. (1908) SEC. 68****Synopsis.**

- (1) Applicability of the section.
- (2-3) Collector and his powers
- (4) Execution of decrees.
- (5) Jurisdiction of Civil Court to set aside orders of Collector.
- (6) Notification of the rules official in the Gazette.
- (7) Transfer of execution.
- (8) Miscellaneous cases.

**(1) Applicability of the section.**

—When a declaration has been made under s. 68 the Civil Courts cease to have jurisdiction to execute such decrees: 4 A 382.

—S. 68 does not apply in the Punjab. A I R 1928 Lah 475-110 I C 173.

**(2-3) Collector and his powers.**

—The Collector has no jurisdiction to withdraw the attachment effected by the order of the Civil Court. A I R 1930 All 281-123 I C 105.

—Collector executing a decree transferred to him under s. 68 cannot enquire into objections to attachment or applications for rateable distribution or matters of that kind, even though his powers are co-extensive with those of Civil Court to which the decree has been transferred for execution. A I R 1928 Nag 297-109 I C 381.

**C. P. C. (1908) SEC. 68 (Contd)****(4) Execution of decrees.**

—Collector must partition strictly according to terms of decree—Once collector executes it, it cannot be sent back to him for repartition. A I R 1926 Bom 258; 28 B L R 523=94 I C 656.

—Land of an agricultural tribe may be alienated temporarily in satisfaction of money-decree. 4 L L J 476=74 I C 194.

—Judgment debtor conniving at a sale of ancestral property in execution of decree in the manner prescribed for sale of non-ancestral property, is not entitled to sue to set aside the sale. A I R 1922 All 56=44 A 380=20 A L J 281=L R 3 A 167=67 I C 934.

**(5) Jurisdiction of Civil Court to set aside orders of Collector,**

—The Civil Court has no jurisdiction to interfere with an order passed by the Collector under Sch. III of the Civil Procedure Code in respect of decrees transferred to the Collector for execution under s. 68 of the Civil P. C. A L R 1933 Bom 403, and no suit to set aside sale by a person against whom order of confirmation of sale is made by the Collector is maintainable. A I R 1923 All 186=21 A L J 53=45 A 203=L R 4 A 43. Civ (F B)=79 I C 82.

—So also Civil Court has no power to pass any order in the cases transferred to Collector. Property once sold can be resold by Collector to realize the balance of the purchase money. A I R 1924 All 704=46 A 562=22 A L J 452=L R 5 A 350 Civ=83 I C 766.

—After transfer under s. 68 the orders passed by the Collector or mistakes committed by him cannot be interfered with or rectified by Civil Court. A I R 1928 All 558=50 A 827=26 A L J 769=Ind Rul (1929) All 349=115 I C 125.

**(6) Notification of the rules official in the Gazette.**

—Under general rules for Allahabad Civil Courts, Civil Court has no power to sell an ancestral grove or garden with a house standing thereon in execution, but the decree must be transferred to Collector for execution. 36 All 33=11 A L J 1009=21 I C 831.

—Bombay High Court Rule 47—Where decree is transferred to Collector for execution, the sale proclamation must state that a person wishing to set aside sale must apply to Civil Court; and applications made to Collector after that should be referred to Civil Court. 45 B 1132=23 Bom L R 476=62 I C 221.

**C. P. C. (1908) SEC. 68 (Concl'd)****(6) Notification of the rules official in the Gazette (Concl'd)**

—Notification by Government that execution of decrees by sale of agricultural land should be transferred to Collector—sale ordered by Court before notification came into force but to a date after it came into force—sale ought not to be held on the latter day, as amendments in procedure affect pending proceedings. See A L R 1933 O 135=10 O W N 517.

**(7) Transfer of execution.**

—But s. 68 does not state that the Collector to whom execution is transferred shall become the Court executing the decree. The powers conferred by the C P C on the Court executing the decree do not pass to the Collector. A I R 1931 All 320 (2)=Ind Rul (1931) All 721=1931 A L J 166=133 I C 609.

—And unless immoveable property is directed to be sold, no simple money-decree can be transferred for execution to Collector. A I R 1926 Oudh 318=92 I C 906.

—No decree can be transferred to the Collector for execution against the land of a member of an agricultural tribe. A I R 1926 All 339=48 A 392=24 A L J 397=93 I C 1020.

—Decree transferred for execution under s. 68 may be executed by Collector under para 1, Sch. III or para 2 61 I C 579.

—Decree sent to Collector for execution—application under O. 21 r. 2 by judgment-debtors to enter satisfaction—returned for presentation to Collector—latter certifying satisfaction—Court confirming it—subsequent application by decree-holders for recovery of balance found due through error in calculation—decree-holders not estopped—no res judicata. See A L R 1932 S. 43=26 S L R 506=A I R 1933 S 112.

**(8) Miscellaneous cases.**

—Appointment of one of several coparceners to officiate as Patil—Presumption as to adverse possession—Bom Act XI of 1843 sec. 1 B 533, Note.

**C. P. C. (1908) SEC. 69**

—After transfer of decree for execution to the Collector, no injunction should be issued to the Court which passed the decree. A I R 1929 Oudh 235=6 O W N 226=4 Luck 635=Ind Rul (1929) Oudh 375=117 I C 471.

—Execution proceedings transferred to Collector—Powers of Collector. See 37 Bom 32=14 Bom L R 787=17 I C 142.

## C. P. C. (1908) SEC 70

*Synopsis.*

- (1) Appeal.  
 (2-3) Jurisdiction of Civil Courts whether barred.  
 (4) Powers of Collector.  
 (5-6) Rules made by Local Government.

## (1) Appeal

—Appeal under the section is governed by the rules prescribed under S 70 (1) (c) 8 A 536; and 5 A 314; and 7 Bom L R 682; and 5 N L R 121.

—Thus no appeal or revision lies to Chief Court of Oudh from orders passed by the Collector in discharge of his powers under s. 68. A I R 1926 Oudh 288 =92 I C 549.

## (2-3) Jurisdiction of Civil Courts whether

barred.

—Notification transferring decrees to the Collector ousts the jurisdiction of the Civil Court in matters of execution of them with effect from 1st April 1927. A I R 1927 Nag 324=103 I C 884.

—Civil Court has no authority in the matter of execution by Collector and as such no suit lies for declaring the sale held by Collector under s. 68 null and void. A I R 1926 Oudh 612=1 Luck 558=13 O L J 807=3 O W N 739=97 I C 1036.

—No sale can be set aside by the Collector after he has confirmed it and retransmitted the decree to the Civil Court such an order can be challenged in a Civil Court. A I R 1926 All 575=48 A 568=24 A L J 687=95 I C 578.

—Application for leave to bid at sale in execution of decree transferred to Collector should be made to the Collector and not to the Civil Court, Civil Court, after such transfer, cannot allow a set off. 20 Bom L R 708=46 I C 653=42 Bom 621.

## (4) Powers of Collector.

—The sale certificate can be corrected by the Collector to make it conform with the proclamation of sale after confirmation of sale. A I R 1926 All 575=48 A 568=24 A L J 687=95 I C 578.

—A private partition followed by long possession of a specific share and payment of separate Government revenue in respect of that share creates title and bars the jurisdiction of the Collector to make a partition. 13 I C 814.

## C. P. C. (1908) SEC. 70 (Concl'd.)

## (5-6) Rules made by Local Government.

—Order confirming a sale of ancestral property by Revenue Court under powers conferred by Local Government under s. 70 is final and cannot be set aside in a Civil Court. 18 A L J 124=2 U P L R (H C) 35=42 All 275=54 I C 801.

—Rules framed under U P Government—Execution sale proprietary rights—Objection to—Action of Court under R 63—Amendment of execution application so as to confine it to the right to receive the revenue—Procedure proper. 31 I C 78 =3 O L J 529.

—Sale of immoveable property—Transfer to Collector—Collector a revenue Court—If can pass sanction order. See 38 I C 419.

—Rule under—Dispossession of party by collector in execution proceedings—Application to Court for restoration—Jurisdiction. See 16 Bom L R 637=38 Bom 673 =26 I C 266.

## C. P. C. (1908) SEC 71

—Exercising Judicial functions—Subordinate to the High Court. See 37 Bom 114. Mamlatdar Courts Act—Deputy Collector not included in the term. See 17 Bom L R 579.

—Collector appointed president of municipality—Acts done in official capacity—Subordinate Judge—Jurisdiction—Bombay Act VI of 1873 Bom. Act XIV of 1869, s. 32 see 1 B 628 Position of Collector in management of estate see 9 Ind Cas 41=9 M L T 191.

—A man who chooses to act upon a Collector's certificate as evidence of title does so at his own risk. (1913) M W N 674=21 I C 21.

## C. P. C. (1908) SEC. 72

—Collector under s. 72 has power to propose temporary alienation of land of judgment-debtor of agricultural tribe. 1 P R (Rev) 1919=51 I C 399; but no sanction of revenue authorities is necessary for sale of revenue paying land in execution of a decree 69 P L R 1918=143 P W R 1918=46 I C 864.

—In absence of notification under S. 3 of Act I of 1914 that special rule as to sale of agricultural land framed under S. 72 was in force, no sanction of Commissioner is necessary for sale of agricultural land. A I R 1921 Lah 223=3 Lah L J 5=66 I C 891.

## C. P. C. (1908) Section 72 (Conold.)

—And where a reference for execution was made to Collector who directed Sub-Div. Officer to carry out the sale, proposal made by the latter, for temporary alienation is not binding on District Judge. 9 P L R 1915-34 P W R 1915-27 I C 630.

—Application for rateable distribution of assets realized in execution sale held by Collector must be made to him before the sale proceeds are received by him. 22 Bom L R 1001-58 I C 992.

—Collector must dispose of all objections relating to the proceedings before him. A I R 1928 Lah 475-110 I C 173.

—On Collector's report of his inability to execute a decree sent to him for execution, execution should be proceeded with by Court in accordance with law, instead of filing the execution petition. A I R 1926 Lah 682-96 I C 199.

—Action of Collector under s. 72 is of an administrative and not of a judicial character which may or may not be accepted by the Court. 1 Lah 192-2 Lah L J 333 -58 I C 603. (F. B.)

—On disapproval by Civil Court of proposal by Collector for stay of sale under S. 72, orders for sale of property ought to be passed by the Civil Court itself. 63 P R 1906-121 P L R 1906.

—Attachment and sale—Execution of money decree—Notice to collector—Interference—Power of Court, See 52 I C 356.

## C. P. C. (1908) SEC. 73

## Synopsis.

- (1) General principles, scope and object.
- (2) Appeal or revision.
- (3) Attachment before judgment.
- (4) Assets available for rateable distribution.
- (5) Assets held by Court.
- (6) Assets not available for rateable distribution.
- (7) Before the receipt of the assets.
- (8) Court to which application either for execution or rateable distribution to be made.
- (9) Declaratory and regular suits.
- (10) Decree for payment of money against the same judgment-debtor.
- (11) Government-right of.
- (12) Inquiry into the validity of decree.
- (13) Insolvency, effect of on right under the section.
- (14) Lien of attorney.
- (15) Limitation.
- (16) Rateable distribution of assets.
- (17) Rights of mortgagee.
- (18) Rival decree holders priority

## C. P. C. (1908) SEC. 73 (Contd.)

among-to sale proceeds.

(19) Sale in execution of decree.

(20) Set off of purchase money.

(21) Suit for refund.

(22) Miscellaneous Cases.

## (1) General principles, scope, and object.

—Applicability & Scope:—S. 73 aims at equitable distribution of assets between decree-holders applying for execution of their decrees before realization of assets, and as such attention should be given more to the substance than to the form of application. A I R 1929 Mad 703-52 M 760-57 M L J 97-30 L W 110-(1929) M W N 611-Ind Rul (1929) Mad 760-118 I C 72.

—The section does not follow the general principle of "first come, first served as was asserted in" A I R 1928 Mad 129-107 I C 298.

—And is inapplicable where assets are not liable to be rateably distributed. A I R 1922 Mad 99-42 M L J 473-30 M L T 178-(1922) M W N 184-15 L W 421-67 I C 546.

—Nor where money is desposited by judgment-debtor in Court for payment to a particular decree holder, but where money is realised in execution by process of Court. A I R 1925 Nag 157-81 I C 7.

—No change has been made by the word "passed" in the law prior to C. P. C. 1908. The object of s. 73 is to prevent unnecessary multiplicity of execution proceedings and to place all decree-holders upon the same footing. A I R 1924 Cal 801-51 C 761-39 C L J 439-28 C W N 704-78 I C 731.

—Hypothecation of moveables without possession is governed by s. 73. A I R 1924 Cal 990-80 I C 20.

—S. 73 & S. 63 must be read together. A I R 1928 Rang 157-6 R 131-110 I C 744.

—Execution in different Courts is governed by s. 73. A I R 1929 Rang 198-Ind Rul (1930) Rang 53-120 I C 693.

—S 73 covers a decree raised against same judgment debtor and another or others A I R 1930 Sind 300-Ind Rul (1931) Sind 14-128 I C 686.

—Provisions of S. 73 control provisions of O. XXI, r 72. A I R 1931 Mad 103-(1930) M W N 568-Ind Rul (1931) Mad 378-130 I C 458.

—Cases where a decree-holder is himself a mortgagee, and the decree-debt and mortgage-debt are not two distinct and different debts are not governed by S. 73. proviso (a) and (b) A I R 1930 Mad 138-31 I W 38-(1929) M W N 917-Ind Rul (1930) Mad 334-122 I C 366.



## C. P. C. (1908) SEC. 73 (Contd)

## (1) General principles scope and object.

## (Conclo)

—Encumbrances entitled to precedence over money decree-holders mentioned in fourth category only are referred to by the third category in cl. (c) A I R 1921 Cal 801=33 C L J 7=62 I C 167.

**Sale proceeds**—The Court may allow a decree-holder to take out the purchase-money before confirmation of sale 6 Bom 16; 12 Calc 252 See however 18 Calc 242 and 25 I C 859.

## (2) Appeal or revision.

—An order under s. 73 determining a question between rival decree-holders does not fall under s. 47 and is not appealable. A I R 1931 Bom 350=55 Bom 473=33 Bom L R 537=Ind Rul (1931) Bom 401=133 I C 817 following 42 C I.

see to the same effect A I R 1931 Bom 252=33 Bom L R 503=Ind Rul (1931) Bom 385=133 I C 737 and 14 A 210; and 9 W R 514 and 6 I C 522=12 Bom L R 365.

—As to whether and when an order rejecting claim for rateable distribution is appealable see 31 M L J 820=20 M L T 538= 37 I C 900=5 M L W 354, and (1915) M W N 334=39 Mad 570=17 M L T 427=29 M L J 96=29 I C 231; and 1 L W 234=23 I C 422.

—And whether application under s. 73 is a suit and whether order of rejection appealable see 1 Pat L T 296=5 P L J 415 =57 I C 421.

—But an order allowing rateable distribution can be summarily executed and an order refusing execution is appealable, A I R 1931 Pat 359=Ind Rul (1931) Pat 326=12 P L T 477=133 I C 166.

—Per Walmsley, J—S. 47 does not cover questions between decree-holder and judgment-debtor relating to the discharge of decree if third persons have to be brought into the proceedings Per M. N. Mukerji J—Order under s. 73 is not appealable unless it decides a question between the decree-holder and the judgment-debtor, A I R 1924 Cal 801=51 C 761 =39 C L J 439=28 C W N 704=78 I C 731.

—An order ostensibly under s. 73 deciding matter Covered by s. 47 is appealable, but on order passed wholly and simply under s. 73 is not appealable. A I R 1927 Lah 100=98 I C 884.

—Order of rateable distribution of judgment-debtor's assets among rival decree-holders in execution of decrees is not revisable. 17 I C 254=171 P W R 1912=176 P L R 1912. see to the same effect 1912 M W N 956=17 I C 389. See also 1 C W N 633; and 25 I C 592.

## C. P. C. (1908) SEC. 73 (Contd)

## (2) Appeal or revision (Contd)

—Orders disallowing or allowing claim for rateable distribution cannot be interfered with by High Court except in very exceptional circumstances. 40 I C 371 (Lah).

—Order for rateable distribution is neither a decree nor an order under S. 47 S. 151 should be applied only in absence of other modes of redress. A I R 1922 Mad 99=42 M L J 473=(1922) M W N 184=15 L W 421=30 M L T (H C) 178=67 I C 546.

—The aggrieved decree-holder has no remedy under S. 47 or by way of revision but by Way of Suit, A I R 1924 Mad 97 =32 M L T 155.

—Order under s. 73 cannot be interfered with in revision unless there is any obvious mistake and the result of the regular suit is certain. A I R 1927 Mad 944=39 M L T 609=104 I C 735.

—But the order is revisable if there is manifest error in spite of Special remedy by Way of Suit under S. 73. A I R 1926 Mad 179=49 M L J 753=22 L W 744=(1926) M W N 27=91 I C 11.

—Order under S. 73 can be revised if it is obviously wrong. A I R 1927 Mad 1030=(1927) M W N 795=106 I C 208.

—In such cases S. 73 enables High Court to interfere in revision even though the difference can be finally adjusted by the parties in a regular suit under the law. A I R 1928 Mad 362=54 M L J 278=27 L W 804=109 I C 577. See also 4 M 383; and 13 C 225; and 9 M 508; and 15 M 372.

—And the Nagpur J. C. Court has held that revision lies on order rejecting an application for rateable distribution. A I R 1926 Nag 380=95 I C 205.

—And the Rangoon High Court has held that order under S. 73 is revisable as it is not ministerial and non-judicial act of a Judge. A I R 1928 Rang 163=6 R 582 =113 I C 815.

—No appeal lies from a final order passed while purporting to decide question under S. 73 even if it be one not contemplated by the Section. A I R 1929 Lah 645=Ind Rul (1929) Lah 828=118 I C 903.

—Order under S. 73 is not a decree but an order in execution proceedings. A I R 1929 Rang 198=Ind Rul (1930) Rang 53=120 I C 693.

—If rateable distribution under S. 73 is asked for by decree-holder, no order under O. XXI, r. 73 can be passed. A I R 1930 Cal 761=52 C L J 19=Ind Rul (1931) Cal 248=129 I C 776.

—Where an application for payment out of the fund in Court belonging to judgment-debtor attached by a decree-holder, is made, order refusing payment so

## C. P. C. (1908) SEC. 73 (Contd)

## (2) Appeal or revision. (Conclud)

as to invite claims for rateable distribution at the instance of persons whose claims had not matured into decrees is illegal and must be set aside. 42 Mad 692-26 M L T 82=(1919) M W N 623-56 I C 925. But See 44 Mad 100 (F B)=60 I C 302.

—Where an order was made in respect of surplus sale proceeds deposited in Court after satisfying the mortgage decree, giving the same to another decree-holder on the ground that he was a secured creditor and the rival (simple money) decree-holder filed an appeal against the order. Held that no appeal lay as the dispute was between two rival decree-holders. Held also that an order passed under S 73 C P C is a judicial act. A L R 1933 S 181 dissenting from 5 Pat 445.

## (3) Attachment before Judgment

—No right in the property attached is conferred by attachment before judgment on the person obtaining the order for attachment. Suit to recover assets wrongly distributed is maintainable. 37 All 575-13 A L J 732-29 I C 622.

—A decree-holder who has obtained an order of attachment before judgment cannot claim rateable distribution if he obtains his decree after realization of assets. Erroneous order of a Subordinate Court allowing rateable distribution is open to revision by High Court. 21 C L J 614-30 I C 38.

—S. 73 A with two decrees against D on different dates, and under both, D's goods attached before judgment. B also with decree against D and D's goods attached between dates of two attachments by A. All decrees passed by Small Cause Court, Calcutta. A applied to the Munsif at N and B applied to the Sub-Judge at D for execution by whom the goods were sold. A applied for rateable distribution to the Sub-Judge at D but the application was disallowed. Held, that as regards the decree, the attachment due to which was prior to that of B, he was entitled to rateable distribution and as regards the other, he had no right. 25 C W N 740-63 I C 11.

—Where same fund is attached before judgment by several creditors, priority of attachment does not create right to preferential treatment and the fund should be rateably distributed amongst all those obtaining decrees. A I R 1922 Mad 236-15 L W 531=(1922) M W N 262-31 M L T (H C) 70-68 I C 714.

—Money sought to be attached before judgment, if deposited in Court, is a deposit in satisfaction of claim under O. XXIV, r. 1, and must be paid to the plaintiff in satisfaction of his claim even if not

## C. P. C. (1908) SEC. 73 (Contd)

## (3) Attachment before Judgment (Conclud)

applying for execution. A I R 1927 Rang 278-5 R 753-106 I C 77.

—No claim for rateable distribution can be entertained merely on attachment before judgment without decree and application for execution of decree. A I R 1928 Bom 545-30 Bom L R 1448-Ind Rul (1929) Lah 318-115 I C 414.

## (4) Assets available for rateable distribution

—In the present section the words "before the receipt of assets" have been substituted for the words "prior to the realisation" so as to make the meaning clear. "Assets" include money paid by judgment-debtor under O. XXI, r. 43 and such money is liable to rateable distribution. A I R 1926 Bom 242-28 Bom L R 237-93 I C 852.

—Money deposited by surities for release of an attachment before judgment is liable for rateable distribution under s. 73. High Court interferes under s. 115 where no appeal is allowed. A I R 1922 Cal 19-26 C W N 169-70 I C 539.

—Where property is sold in execution of decrees against brothers forming a joint Hindu family, decree-holder against one of the brothers can claim rateable distribution only to the extent of his share in the property sold. A I R 1928 Mad 362-54 M L J 278-27 L W 804-109 I C 557.

—Money in hands of Execution Court is liable to be distributed pro-rata among execution creditors whose attachments are registered before receipt of assets, and money attached by different courts will be distributed in order of time. A I R 1927 Bom 405-29 Bom L R 689-106 I C 184.

—Assets of partnership held by a Receiver in a partnership action are available to creditors of partnership in satisfaction of their decrees without waiting for the result of partnership accounts. A I R 1927 Bom 405-29 Bom L R 689-106 I C 184.

—Money realised by sale of judgment-debtor's property in execution of one decree, and deposited to the credit of the decree-holder's suit, is liable to rateable distribution with the other decree-holder against the same judgment-debtor who had attached the deposit before judgment, and had applied for payment of the money deposited after obtaining a decree. A I R 1921 Mad 481-14 L W 582=(1921) M W N 817-70 I C 20.

—Money paid by Judgment-debtor in execution to a Sheriff who paid it into Court, is assets liable for rateable distribution. The right to rateable distribution does not apply to costs of a previous application for execution, but is limited to

C. P. C. (1908) SEC 73 (Contd)  
(4) Assets available for rateable distribution. (Contd)

the amount due under the decree. 47 Cal 515-59 I C 458.

—Fund in custody of one Court to the credit of a person attached by another Court in execution of a decree against him becomes "assets" as soon as it is transferred to execution Court, and if the executing Court and custody Court are the same the fund becomes the assets by order of attachment coupled a formal order of transfer of the fund to the credit of the suit in which execution is sought. 44 Mad 100-39 M L J 608-60 I C 302=(1921) M W N 14-12 L W 744 (F B).

—Money remaining in the hands of a rival decree-holder purchaser is liable to rateable distribution as it is as at the disposal of the Court and can be ordered to be paid into the Court. 43 I C 715.

—Where Several decree-holders against the same judgment-debtor have attached and brought to sale property of the judgment-debtor permission granted by Court to raise money by private alienation to pay off one of the decree-holders is improper, and all the decree-holders are entitled to rateable distribution of the money so paid in Court as it is "assets" 41 M 616-35 M L J 150=(1918) M W N 524-47 I C 538.

—Money paid to Sheriff who paid it into Court in execution of a decree is "assets" available for rateable distribution Costs of previous execution application cannot be claimed in rateable distribution. 47 Cal 515-59 I C 458.

—Though O. 21 r. 89 C. P. C. mentions payment to the decree-holder that is only an injunction to the judgment-debtor as to what amount he has to pay for the purpose of getting the sales set aside. The sale may be held at the instance of one of the execution creditors, but any money received from the judgment-debtor in Court under pressure of the sale must enure for the benefit of all the execution creditors who have acquired a claim to rateable distribution under S. 73, 40 Cal 719 not approved A L R 1933 N 388.

—Although r. 89, O 21 specifically mentions payments to the decree-holder, it cannot be interpreted so as to make the money not available for rateable distribution, since it is only an intimation to the judgment-debtor as to the amount he is to pay for the purpose of getting the sale set aside. If the auction-purchaser deposits the purchase-money in Court, there is no question that it is available for distribution among the various decree-holders. One fails to see why if the decretal amount was voluntarily paid by the judgment-

C P. C. (1908) SEC. 73 (Contd)  
(4) Assets available for rateable distribution (Concld)

debtor or with a view to set aside the sale, that money could not be rateable distributed only because the judgment-debtor voluntarily pays the money into Court. Whatever money is realized in execution at the instance of one decree-holder becomes assets held by the Court within the meaning of S. 73 C. P. C., for the benefit of all decree-holders who have applied for execution before the receipt of the assets. 28 N L R 179 (183)-A I R 1932 N 156-140 I C 293-I R 1932 N 143-A L R 1932 N 217.

—Property attached—judgment-debtor paying decretal amount to decree-holder—amounts to deposit under O 21 r. 89—assets for rateable distribution. See A L R 1933 N 82.

(5) Assets held by Court.

—The scope of the section is very much widened by the substitution of the words "where assets are held by a Court" for the words "whenever assets are realised by sale or otherwise in execution of a decree" which occurred in the old section. The word is not confined to "assets realised by sale or otherwise" in execution of a decree—Money paid into Court by judgment-debtor in part satisfaction of a decree is an asset held by the Court within the meaning of the section, and other decree-holders who had also applied for execution before the money was so paid into Court are entitled to rateable distribution. 54 A 516 (519)=1932 A L J 359-138 I C 106-I R 1932 A 369-A I R 1932 A 411-A L R 1932 A 546.

—S. 73 does not lend validity to the view that the money realised by the Court under pressure of execution is alone capable of a rateable distribution and not that which is voluntarily paid by the judgment-debtor in the course of the execution proceedings "Assets held by the Court" is an expression which is wide enough to cover such money as comes into the custody of the Court otherwise than by a coercive process 28 N L R 179 (182)-A I R 1932 N 156-140 I C 293-I R 1932 N 143-A L R 1932 N 217.

—Money paid into Court for the benefit of the decree-holder under O. 21, r 89 becomes assets in the hands of a court in the same way as any other money paid for his benefit, whether realised by the sale or paid in to avoid attachment and the fact that under O 21, r. 89 this money is described as being paid for payment to the decree-holder does not make it earmarked for his exclusive benefit any more than any other money realised under stress of ex-

**C. P. C. (1908) SEC. 73 (Contd)****(5) Assets held by Court. (Contd)**

cution towards satisfaction of his decree is to be regarded as specially ear-marked and so as to remove it from the operation of S 73 Civil P. C. A I R 1933 P 249.

—Purchase money is in the hands of the decree-holder purchaser who is allowed to set off purchase money in satisfaction of his decree are assets in power and at disposal of Court within meaning of S. 73 where the circumstances of the case are such that the Court can order him to pay that sum into Court. 11 P 250 (255-6) =A I R 1931 P 405.

—Moneys realised on personal decree and in execution are 'assets' 15 I C 406 = (1912) M W N 407.

—Where a set off is allowed under O XXI r 72 after another decree-holder has applied in another Court for rateable distribution but before the order is communicated, the purchase money in the hands of first decree-holder is "assets" A I R 1930 Cal 761-52 C L J 19- Ind Rul (1931) Cal 248-129 I C 776.

—Assets levied in execution or paid into Court in satisfaction of the decree under execution are 'assets held by Court. An order of attachment to the credit of the suit in which the attachment takes place does not of itself effect a transfer of money standing to the credit of another suit. 14 L W 582-(1931) M W N 817-70 I C 20 (2)

—Revision lies on order rejecting application under S. 73 Where attachment before judgment is raised on security being furnished, money deposited by surties after decree is 'assets' held by Court. A I R 1922 Cal 19-26 C W N 169-70 I C 539

—Any assets held by the Court irrespective of the manner in which they came into the possession of the Court are "assets" including money brought voluntarily into Court by the J. D. A I R 1921 Cal 749-35 C L J 327-70 I C 541.

—Assets levied in execution, or paid into Court in satisfaction of the decree under execution only are "assets held by a Court" Money belonging to a Common Judgment-debtor attached before judgment by one creditor is liable to rateable distribution with other creditors who apply for execution before the attaching creditor has obtained a decree and applied for execution. A I R 1923 Mad 505 (F B)-46 M 506-44 M L J 413-17 L W 390-32 M L T 198 -72 I C 820.

On default in payment of full amount 25 percent deposit made by auction— purchaser under O. XXI r. 84 becomes assets under s. 73, A I R 1926 Mad 872-49 M 570 =97 I C 86.

**C P. C. (1908) SEC. 73 (Contd)****(5) Assets held by Court. (Contd)**

—"Assets" include compensation money awarded under Land Acquisition Act. A I R 1926 Mad 307-49 M 38-97 I C 496.

—Money realised in another suit attached under O. XXI, r. 52 becomes assets realised in execution of decree only if it is transferred to attaching creditor's account. A I R 1928 Sind 165-22 S L R 345-113 I C 319.

—Money paid to the Sheriff in garnishee proceedings is "assets held by the Court" and remains so in spite of Subsequent bar to paying the same in Accountant General's account with the Bank. A I R 1930 Cal 623-57 C 736-Ind Rul (1931) Cal 141-129 I C 189.

—Money paid into Court by judgment-debtor for avoiding attachment of his property in execution is "assets" held by the Court. A I R 1930 Sind 300-Ind Rul (1931) Sind 14-128 I C 636.

—Assets does not include deposit of earnest money. A I R 1925 Cal 966-29 C W N 575-87 I C 783.

—"Assets" do not include money paid to a judgment-creditor by the judgment-debtor out of the Court. 15 C L J 49-13 I C 907.

—"Assets held" do not include money paid into Court under O. 21 R 55. Where payment is made in respect of decree debts with reference to which attachment has taken place, the property cannot be subsequently sold in respect of other decrees with reference to which no attachment had been effected. 13 Bom L R 1193 -36 Bom 156-12 I C 911.

—"Assets" do not include money paid into Court in pursuance of a prohibitory order. 42 I C 436-167 P W R 1917.

—Money held to the credit of judgment-debtor by a Court to which execution has been applied for is not "assets" in the hands of the executing Court, unless it is attached in capacity of executing Court A I R 1921 Mad 218-44 M 100-(1921) M W N 14 (F B)-60 I C 302. [Dissenting from 42 Mad 692-50 I C 925.]

—The custody Court cannot distribute pro rata the moneys in its hands among the attaching creditors. A I R 1927 Bom 405-29 Bom L R 689-105 I C 184.

—Fund in Court attached by several decree-holders is not to be rateably distributed but paid in order of attachment.

—Attachment of money after decrees for sale but before payment of money into Court is invalid. 24 I C 617-26 M L J 364.

—O. 21, R. 65 clearly contemplates employment of agent for the conduct of a sale in execution of a decree, and as such receipt of purchase money by an auctioneer



## C. P. C. (1908) SEC 73 (Contd)

## (5) Assets held by Court (Contd)

so appointed is receipt of "assets" by Court, disentitling a decree-holder to rateable distribution applying for execution after such receipt of the purchase money.

44 Cal 789=25 C L J 303=35 I C 830.

—Where sale proceeds of properties sold in separate lots are realised separately the assets are realised separately for each separated lot. A I R 1925 Calc 966=29 C W N 575=87 I C 783.

—The receipt of assets under S 73 includes receipt of the whole of assets realized by order for sale A I R 1926 Nag 380=93 I C 205.

—Sale proceeds held by a Subordinate Court ordered to be transferred by superior Court to itself are to be deemed to be realised under S. 73 only if actually received by the latter Court A I R 1927 Bom 247=29 Bom L R 319=101 I C 411.

—Subordinate Judge holding assets calling records of execution in Munsif's Court cannot be said to have ordered transfer of execution case to its own file. A I R 1927 Pat 252=101 I C 908.

—Leave of the appointing Court is not a condition precedent to maintainability of application for rateable distribution in sale-proceeds held by the Receivers appointed by the Court. 34 B L R 1405 (1409-11)=A I R 1932 B 622.

—Deposit by stranger to set aside sale-Distribution-Jurisdiction. See (1916) I M W N 195=34 I C 350.

—Attachment-Salary of Government officer, see 16 I C 640.

—Rateable distribution-Decree against deceased jagirdar-Heir remitting money to court for his own personal decree-Right of decree-holder to share of money. See 18 I C 55.

—Execution petition-Money paid into court by judgment-debtor before process-Realised by application. See 23 I C 241.

—Assets-Security-Effect of-Money decree-Attachment-Deposit in Court-If can be attached by subsequent decree-holders-Rateable distribution. See 29 I C 791.

—Attachment by two decree-holders of same property—Sale ordered under first attachment—Deposit of decretal amount of first decree-holder—Assets—Second decree holder—Right of, to rateable distribution. See 26 I C 261.

—Assets-Immovable property given as security by judgment debtor-Realisation of security in execution Rateable distribution. 34 M L J 84=43 I C 187=41 Mad 327.

## C. P. C. (1908) SEC. 73 (Contd)

## (6) Assets not available for rateable distribution.

—Money deposited under O 38, R 2 on arrest before judgment is not available to other creditors for rateable distribution. 8 Bur L T 22=29 I C 714.

—A sued B, and before judgment attached a decree which B had obtained against C A's suit was decreed and in executing his decree, A applied for the execution of the decree against C. The proceeds of execution were paid into Court.

—D another decree holder against B, made a similar attachment and claimed rateable distribution. It was contended by D, that as A had not executed his own decree but merely applied for execution of the attached decree, he was not entitled to rateable distribution: Held, that as A had applied for the execution of the attached decree, only to the extent of the amount due to him under his own decree, he was in effect executing his own decree and was not entitled to rateable distribution. (1913) M W N 1021=14 M L T 533 =21 I C 611.

—Money paid by judgment-debtor before levy of attachment to bailiff who showed him a warrant for attachment of moveable property in execution of a decree, is payable only to the attaching creditor and not available for rateable distribution among all judgment-creditors. 21 Bom L R 975=53 I C 599.

—Moneys paid by judgment-debtor to the officer arresting him to secure his release are not assets and liable as such. 19 Bom L R 274 =39 I C 623.

—Money deposited in Court under O 21, R 89 to set aside an execution sale cannot be rateably distributed by Court. 40 Cal 619=18 C L J 144=19 C W N 1125=18 I C 839.

—Money paid into Court for payment to decree-holder is not assets and liable as such. 42 I C 507.

—Money paid into Court to avoid defendant's arrest in a suit being money paid for specific purpose cannot be attached by judgment-creditors other than the judgment-creditor who has been instrumental in compelling the deposit who acquires lien over it. 14 S L R 164=61 I C 424.

—No payment into Court by a judgment-debtor to avoid arrest is attachable by other judgment-creditor. 14 S L R 164=61 I C 424.

## (7) Before the receipt of the assets.

—Applications of rival decree-holder for execution must be made before the



## C. P. C. (1908) SEC. 73 (Contd)

## (7) Before the receipt of the assets. (Contd)

receipt of assets by the Court. An application for rateable distribution is in time if made before date of sale. A I R 1931 Bom 252-33 Bom L R 503-Ind Rul (1931) Bom 385-138 I C 737.

—Application for rateable distribution cannot be allowed unless execution application is made before the realization of asset by the Court. Leave granted by Court to proceed against a receiver subsequent to the presentation of execution application validates the application presented before the Court was called upon to make a rateable distribution. Order by lower Court refusing to exercise jurisdiction through misapprehension of true effect of statutory provisions is revisible by High Court. 14 C L J 50-15 C W N 872-10 I C 527.

—S. 73 does not apply unless an application for execution has been made before realisation of assets and the assets are realised in execution. 38 Mad 221-29 I C 239.

—Attachment of Sale proceeds by a puisne mortgagee after the sale of mortgaged property by a prior mortgagee does not end the rights of the former under the mortgage. A simple creditor simply by attaching before judgment cannot claim priority over a mortgagee or rateable distribution without applying for execution prior to realisation. 32 I C 944.

—S. 73 applies only if execution application is made before realization of assets. O. 21 R 52 is applicable only to money actually in hands and does not allow an anticipatory attachment of money expected to reach the hands of a public officer. Fund in Court attached by several creditors is to be rateably distributed amongst them, and no preferential treatment is to be given to any one creditor by reason of priority of his attachment. 21 C W N 887-25 C L J 595-41 Cal 1072-41 I C 516.

—Sale proceeds of moveables of judgment-debtor realised before date of application by other decree-holder for execution are not liable to rateable distribution 33 P R 1918-45 I C 108.

—In case of sale immoveable properties assets are not "received" on the date of deposit but on the date of full payment.

When an order sending a decree for execution to another Court is made, application for rateable distribution can be made even before the copy of transferred decree is received by the latter Court. Assets realized by sale by District Court of property attached in execution of Munsiff's decree are available for rateable distribution to the attaching creditor wi-

## C. P. C. (1908) SEC. 73 (Contd)

## (7) Before the receipt of the assets (Contd)

thout transfer of Munsiff's decree to District Court. 35 Mad 588-21 M L J 505-8 I C 852-(1911) 1 M W N 47-9 M L T 121. A decree-holder is not entitled to rateable distribution unless he has applied for execution before receipt of assets. Money not paid into Court in execution of a decree are not liable to rateable distribution. 11 P L R 1920-54 I C 41-3 P W R 1920.

—Rateable distribution cannot be allowed unless an application is made to the Court holding the assets before the receipt of such assets. Sale proceeds of property sold in execution in separate parcels are deemed to be realised only when the entire amount of purchase-money in respect of all parcels is paid into Court. A I R 1921 Cal 801-33 C L J 7-62 I C 167.

—Application for rateable distribution cannot be granted unless it is made before the assets are realised by the executing Court. 62 I C 837 (Cal.)

—Application for rateable distribution must be made before the assets are realised by the executing Court and in form prescribed in O. XXI, r. 11 (2). A I R 1921 Nag 5-17 N L R 143-54 I C 53.

—Decree-holder even though he may effect attachment before judgment, will not be entitled to rateable distribution, unless the decree is passed before realization of money. A I R 1924 Lah 70-40 P L R 1922-69 I C 718.

—If execution application has been made before realization of assets application for rateable distribution made after realization of assets cannot be refused. A I R 1925 Mad 587-48 M L J 459-21 L W 518-(1925) M W N 173-87 I C 390.

—Rateable distribution cannot be ordered merely on attachment after judgment, if no application for execution has been made before realization of assets. A I R 1926 Cal 249-90 I C 527.

—Rateable distribution under s. 73 cannot be granted unless the decree is transferred to Court having custody of attachment, and execution has been applied for according to O. XXI, r. 11, before assets are realised. A I R 1926 Sind 177-20 S L R 111-93 I C 366.

—A decree-holder claiming rateable distribution must apply for execution of his decree under O. XXI, r. 11, before realization of assets a mere application for rateable distribution is insufficient. A I R 1929 Nag 148-25 N L R 94-12 N L J 61-Ind Rul (1929) Nag 175-116 I C 655.

—A decree-holder can claim rateable distribution only if he has applied for execution of decree before assets are realised by Court. A I R 1929 Lah 645-Ind Rul (1929) Lah 828-118 I C 908.

## C. P. C. (1908) SEC. 73 (Contd)

## (7) Before the receipt of the assets (Concl'd)

—Execution creditor cannot be deprived of his right under s. 73 or otherwise because he obtained attachment after date of receipt of assets. Where a Court by stop order withholds payment of money paid into Court in pursuance of garnishee proceedings to creditor, it cannot be attached by another creditor during the stay of such order as it does not raise the date of receipt of assets. A I R 1930 Cal 623-57 C 736-Ind Rul (1931) Cal 141-129 I C 189.

—Decree-holders applying for rateable distribution after the attachment can claim the benefit of attachment, if they had applied for execution of their decrees before realization of assets. A I R 1931 All 92-Ind Rul (1931) All 356-(1930) A L J 1552-131 I C 244.

—Application for rateable can be made before appropriation of money towards decree. A I R 1930 Mad 4.

## (8) Court to which application either for execution or rateable distribution to be made.

—Money lying in Court of another District cannot be attached by a Court, but the decree should be transferred to the former Court. Money retained under temporary injunction is liable to rateable distribution. 7 Bar L T 277-26 I C 941.

—When the property is already under attachment, a person to be entitled to rateable distribution need not take out an application for fresh attachment. A I R 1931 All 92-(1930) A L J 1552-Ind Rul (1931) All 356-53 A 125-131 I C 241.

—Application for execution to superior Court within s. 73 does not include application to superior Court to transfer execution case to itself from inferior Court. A I R 1921 Cal 87-25 C W N 740-63 I C 11.

—No application for rateable distribution by decree-holder attaching earlier to superior Court is necessary unless a attachment by superior Court is prior to that by inferior Court. A I R 1921 Cal 87-25 C W N 740-63 I C 11.

—Application for execution does not include application for rateable distribution. 17 N L R 143-64 I C 53.

—Rateable distribution of assets realized cannot be ordered without application to Court holding the assets. A I R 1926 Lah 538-95 I C 151.

—No application for execution can be entertained for purposes of s. 73 by transferee Court unless and until it has received decree. A I R 1928 Mad 496-27 L W 423-55 M L J 120-109 I C 404.

## C. P. C. (1908) SEC. 73 (Contd)

## (8) Court to which application either for execution or rateable distribution to be made. (Concl'd)

—If application for rateable distribution is supplemented with transfer Certificate subsequently received, the decree need not be actually transferred to the Court granting rateable distribution. A I R 1928 Nag 332-110 I C 524.

—To entitle the decree-holder to rateable distribution the application must specify the mode of execution. A I R 1929 Nag 148-25 N L R 94-12 N L J 64-Ind Rul (1929) Nag 175-116 I C 955.

—Where money is standing to the credit of one suit application for transfer to another suit must be made in the former and Certificates of Accountant-General and Registrar are required with the application if it is made to the Original Side of the High Court. 19 C W N 345-31 I C 616.

—Application for making an entry in the Negative Register kept by the Prothonotary of the Bombay High Court under Rules 318 and 323 of Bombay High Court Original Side Rules of 1930 is an application for execution within the meaning of s. 73 (1) 34 B L R 1405 (1409)-A I R 1932 B 622.

—Decree sent for execution to Collector—Collector's duty—Prohibitory order from another Court—Effect of—Proper course for decree holder to apply for rateable distribution to the Court whose decree is being executed. See 36 Bom 519-14 Bom L R 527-16 I C 59.

## (9) Declaratory and regular suits

—Where rival decree-holders are claiming rateable distribution, one decree-holder is entitled to impeach the decree of a rival decree-holder only for fraud and collusion—Suit for a declaration that the decree of a rival decree-holder was obtained by fraud and collusion is maintainable even before the actual distribution of assets. 43 Mad 361-38 M L J 108-27 M L T 66-(1920) M W N 92-11 L W 81-55 I C 452.

—Assets-rateable distribution- rival decree-holders-suit by one for declaration of his rival's decree as void-maintainability. See A L R 1933 N 139.

## (10) Decree for payment of money against the same Judgment debtor

—Decree in a mortgage-suit directing realization of decretal amount from the mortgaged property and the mortgagor personally is a mortgage-decree. 17 C W N 1039-20 I C 829.

—Where the same property is attached by two Courts, and the attaching creditor

## C. P. C. (1908) SEC. 73 (Contd)

## (10) Decree for payment of money against the same Judgment debtor. (Contd)

in the Subdivisional Court applied for rateable share of the assets to be realised by sale of the property, it is not necessary for him to get the decree transferred to the District Court for execution. He is entitled to a due share of the sale proceeds. A I R 1931 Rang 111 (2)=Ind Rul (1931) Rang 224=132 I C 832.

—Mortgage decree expressly exempting personal liability of the debtors is not a "money decree." On proof of collusion and corrupt bargain between judgment-debtor and decree-holder consenting to a personal decree so as to entitle the decree-holder to rateable distribution. Court will not allow rateable distribution 23 M L J 699=12 M L T 660=17 I C 940.

—Decrees obtained against the same person, one obtained against him personally and other as legal representative are decrees against the same judgment-debtor and as such proceeds of the sale of the property of the judgment-debtor attached by both the decree-holders are liable to rateable distribution between them. (1917) M W N 859=42 I C 897.

—Property attached in execution of two decrees against the same judgment-debtor by two courts of different grades should be sold by superior Court, but if sale is held by inferior court, the sale proceeds should be transferred to superior court for rateable distribution 46 Cal 64=27 C L J 145=44 I C 249.

—A decree-holder is not entitled to rateable distribution unless he holds money-decree against the same person and has applied for execution of that decree before the realisation of the assets. A I R 1926 Mad 179=49 M L J 753=22 L W 744=(1926) M W N 27=91 I C 11.

—Rateable distribution is not permissible except in case of money-decree. A I R 1926 Oudh 616=1 Luck 569=3 O W N 749=98 I C 33.

—A Collector holding a decree ordering pauper appellant to pay the Court-fee which he would have had to pay had he been not permitted to appeal as a pauper, must apply to the executing Court in order under S. 73 because such a decree is a money-decree. A I R 1930 Rang 342=8 R 294=Ind Rul (1930) Rang 398=127 I C 605.

—Rateable distribution cannot be granted where two decrees are not passed against the same judgment-debtor and a judgment-debtor's legal representative is same as judgment-debtor in personal capacity. A I R 1930 Cal 454=34 C W N 294=Ind Rul (1931) Cal 355=130 I C 227.

## C. P. C. (1908) SEC 73 (Contd)

## (10) Decree for payment of money against the same Judgment decree (Conclud)

—Decree against persons as legal representatives—Personal decree against one of the representatives—Mode of execution—Appointment of receiver—Rents realised by receiver—Same judgment debtor. See C. P. C. 52 I C 905.

—Same judgment-debtor necessary—Order refusing rateable distribution not a decree See 42 Cal 1=27 I C 644=19 C W N 1202.

## (11) Government-right of.

—Where rights of the two attaching creditors and of Government were brought into existence at one and the same time and by the same decree, and the assets were realized or rather came into the hands of the court before any of the judgment creditors applied for execution and were still held by the courts and though the two creditors had obtained attachment before the Crown had obtained one, but no payment had been made to the creditors, Held that where the right of the Crown and that of the subject met at one and the same time, that of the Crown was in general preferred, and that applying the principle, the claim of the Crown should prima facie be preferred to the other two claims. 26 S L R 41. Distinguished. A L R 1933S 357.

## (12) Inquiry into the validity of decree.

—S. 73 empowers a Court to investigate if any of the decree-holders claiming rateable distribution is a b.namidar for judgment-debtor or not. 16 C L J 582=17 C W N 326=16 I C 795.

—So also it empowers an execution Court to which application for rateable distribution is made to hold a summary enquiry into fraudulent character of applicant's decree. Examination of witnesses without notice to the parties or their pleaders is not justified by S. 165 Evidence Act. 19 C W N 903=18 C L J 646=22 I C 407.

—But it does not empower an execution Court to hold a summary enquiry into the fraudulent character of the decree. Decision based on evidence not taken in accordance with law is irregular and cannot be justified by S. 165, Evidence Act. 19 C W N 903=18 C L J 646=22 I C 407.

—Enquiry under S. 73 is of ministerial nature and as such the execution Court has no power to enquire into bonafides of decrees relied upon in support of

## C. P. C. (1908) SEC. 73 (Contd.)

## (12) Inquiry into the validity of decree. (Conclud)

claims for rateable distribution. 40 Mad 841=32 M L J 553=21 M L T 255=5 L W 538=(1917) M W N 280=38 I C 117.

—Court when rateably distributing assets cannot inquire whether the decree has been obtained by fraud and the person raising such plea must proceed under S. 73 (2) A I R 1922 Bom 31=46 Bom 635=24 Bom L R 1=65 I C 600. (overruling. 113 Bom 154)

—S. 73 does not empower a Court to go behind the decrees and go into their bonafides. A I R 1924 Nag 39=19 N L R 172=75 I C 749.

—Court under S. 73 Cannot go behind the decree and inquire into objection of a decree holder that rateable distribution should not be granted as second decree-holder's decree was collusive A I R 1926 Pat 47=5 Pat 445=98 I C 759.

—The validity of the decree sought to be executed under S. 73 cannot be enquired into by the Court. A I R 1927 Mad 944=39 M L T 609=104 I C 735.

## (13) Insolvency effect of, on right under the section.

—Money allowed to various decree-holders by order for rateable distribution belongs to the decree-holders from the date of the order and cannot be recovered by the official Receiver from the Court or the decree-holders for the general body of creditors. A I R 1922 Mad 31=42 M L J 361=15 L W 37=(1922) M W N 51=30 M L T (H C) 67=68 I C 512.

—Insolvency after attachment has no effect 15 Mad 372.

Company—Voluntary liquidation—Attachment prior to liquidation—Property whether vests in liquidator—Sale—Distribution of proceeds See. 43 Cal 536=20 C W N 358=34 I C 253 Attachment—Private alienation whether void against subsequent attachment—Insolvency—Attachment after insolvency—Claim enforceable under the attachment. See. 37 Bom 138=14 Bom L R 904=17 I C 625.

## (14) Lien of Attorney.

—S. 73 is not applicable to attorney's lien. A I R 1927 Bom 542=51 B 855=29 Bom L R 1196=103 I C 383.

## (16) Rateable distribution of assets

—No rateable distribution of assets among two rival decree-holders can be granted if the decrees have been

## C. P. C. (1908) SEC. 73 (Contd.)

## (16) Rateable distribution of assets. (Contd)

passed against the same person filling two different Characters—one a personal one and the other representative one. Distribution in case of several judgment debtors some of whom are common to two decrees can be made only according to interest of those in the decrees. 7 Bur L T 67=24 I C 476.

—Rateable distribution cannot be claimed by a mortgagee who has not obtained a decree against mortgagor. Where an order under O. 21, R. 62 directing continuance of attachment subject to mortgage is passed, what is sold at auction sale, is only judgment debtor's right of redemption. 12 Bur L T 43=51 I C 580.

—S. 73 does not say that before the receipt of such assets an application must be made to the Court. The first step that is necessary in these cases is that there must be assets held by the Court. The next step is that there must be a decree-holder who has a decree for the payment of money passed against the same judgment-debtor. The decree holder must not have obtained satisfaction and he must have made an application to the Court for the execution of his decree before the receipt of the aforesaid assets. Having satisfied all those conditions he can then claim to come in and have a rateable distribution of assets held by the Court, 54 A 516 (522)=1932 A L J 359=138 I C 106 =I R 1932 A 369=A I R 1932 A 411=A L R 1932 A 546.

—In O. XVI r. 57, C. P. C., the words "where any property has been attached in execution of a decree" necessarily pre-suppose an application for execution for attachment and sale of the property. If there has been no such application for attachment and sale of the property, r. 57 has no application. An application for rateable distribution is not such an application. A I R 1931 Bom 550=33 Bom L R 1130=55 B 693=Ind Rul (1931) Bom 556=134 I C 972.

—Rateable distribution of sale proceeds, in the hands of the Receiver cannot be allowed unless leave of the Court is obtained. A prohibitory order under s 372 is not equivalent to leave. Subsequent leave of Court validates the application presented without obtaining a leave. 14 C L J 55=15 C W N 925=11 I C 187.

—Where several persons hold money decrees against certain judgment debtors, assets will be distributed proportionately to the share of the assets of the several judgment debtors. 16 A L J 520=46 I C 101.

—A decree-holder whose execution application is dismissed does not lose



## C. P. C. (1908) SEC. 73 (Contd.)

## (16) Rateable distribution of assets. (Contd)

his right to share in rateable distribution and can apply to set aside a sale under O. 21, R. 90. 18 C W N 1311= 24 I C 83.

—Decree-holders holding decrees against the estate of the deceased testator represented by two out of three executors one of these two being common to the two suits, are entitled to rateable distribution. 27 C L J 100= 43 I C 452.

—Where application for rateable distribution is made on the same day in which the assets are realized, no order of events are presumed but must be ascertained by the Court. 24 M L T 179=(1918) M W N 520=47 I C 296.

—Mortgagee under a mortgage executed while the property was under the management can claim rateable distribution in respect of simple money decree for interest due on the mortgage and he is not governed by O. 34 r. 14. 22 O C 150=52 I C 645=6 O L J 558= 1 U P L R (J C) 67.

—Decree-holder failing in application for attachment is entitled to claim rateable distribution. Money paid under wrong order of Court can be ordered to be brought in the Court by High Court under its inherent powers. 21 C L J 624 = 30 I C 49.

—Although no actual payment is made, moneys allowed to various decree-holders by order for rateable distribution and standing to the credit of their respective suits are the properties of the decree-holders, and not that of the judgment-debtor. A I R 1922 Mad 31=42 M L J 361=(1922) M W N 51=15 L W 37 =68 I C 512.

—Where execution of several decrees is taken against common judgment debtors, rateable distribution can be allowed even if no application for rateable distribution has been made. A I R 1923 Pat 521=4 P L T 373=(1923) Pat 216= 74 I C 626

—No order in anticipation can be made under s. 73. A I R 1925 Cal 102=28 C W N 988=84 I C 747.

—Where execution of decree of inferior Court is stayed by superior Court decree-holder can, without any further application, claim rateable distribution. A I R 1925 Cal 956=29 C W N 575=87 I C 783.

—In absence of regular execution application rateable distribution cannot be ordered. A I R 1925 Nag 382=87 I C 1025.

—Where property of two persons is attached under a decree obtained against them jointly, application for rateable distribution by another creditor holding decree against one of the two joint-debtors is entertainable. A I R 1926 Bom 150=28 Bom L R 78=93 I C 222.

## C. P. C. (1908) SEC. 73 (Contd)

## (16) Rateable distribution of assets (Contd)

—In absence of transfer of decree and execution application, mere forwarding of records does not entitle a decree-holder to rateable distribution of assets held by another Court. (Held in 1931 Rang 111 as overruled by 1928 Rang 157) A I R 1928 Rang 96=5 R 757=107 I C 169.

—Rateable distribution can be prayed for in an application for execution without any separate application under s. 73. A I R 1931 All 92=Ind Rul (1931) All 356=(1930) A L J 1552=131 I C 244.

—Where property is attached and sold by one of the many decree-holders each competent to execute his decree, rateable distribution can be claimed by all the decree-holders. A I R 1930 Mad 4.

—Applications for execution to be against same judgment-debtor—Decree against person as legal representative—Decree against person in his personal capacity mode of execution—Appointment of receiver—No right to rateable distribution.

See 52 I C 305.

Right to rateable distribution—Sale set aside under O. 21, r. 89. See 45 I C 782.

—Right to apply—Mortgage decree—Making judgment debtor personally liable for deficiency—Application by decree-holders for rateable distribution.—See 39 Mad 570=29 I C 231=29 M L J 96.

—Application for rateable distribution by non-attaching decree-holder—Private alienation by judgment-debtor, valid. See 33 M L J 707=41 Mad 265=22 M L T 461=(1917) M W N 882=43 I C 539=7 M L W 298.

—Rateable distribution—Right to—Rival money decree-holders—Attachment in several Courts—Payment into Court of highest grade—No transfer of decree to that Court—Distribution. See 29 I C 21.

—Suit for rateable distribution—Maintainability of—Application under O. 21, r. 90, to set aside execution sale dismissed—No appeal preferred from order dismissing application—No application made under S. 73—Suit for rateable distribution not maintainable in case of. A L R 1932 L 278 (282) (Civ)=1932 P C L 278 (Civ.)

—Application for rateable distribution is not necessary—A L R 1933 A 227=1933 A L J 129.

—Application for rateable distribution—when application for execution—attachment whether can be allowed. see A L R 1933 O 16=9 O W N 1079=142 I C 238=A I R 1933 O 75.

—Rateable distribution—sale to enforce a mortgage—application for rateable distribution should be made before sale be.



## C. P. C. (1908) SECTION 73 (Contd)

## (16) Rateable distribution of assets. (Concl'd)

held—sale when complete. See A L R 1933 B 270=34 Bom. L R 1405.

## (17) Rights of mortgagee

—In case of sale of mortgaged property under S. 295 (b)—interest on the sale proceeds can be claimed by the mortgagee 10 I C 552.

—A subsequent incumbrancer can claim surplus assets after execution sale only with consent of mortgagor. A I R 1927 All 467=49 A 636=25 A L J

390=1011 C 505.

—Execution sale cannot be free from prior incumbrance without incumbrancer's consent. Application for private alienation cannot be allowed unless the Court is satisfied that the application is made in good faith and that the decree amount may be raised by the alienation in which case prior incumbrancer's interest is not affected. Private alienation to pay decretal amount unlike as under s. 73 does not affect prior incumbrancer and it is not necessary that he should be referred to. A I R 1924 Lah 132=5 Lah L J 279=76 I C 529.

—Where property is sold in execution free from mortgage under s. 73 (1), mortgagee's interest in sale proceeds is identical with that in the property sold. The interest can be enforced by way of suit only, and the amount alleged to be due under the mortgage cannot be ordered to be paid until he obtains a decree. 13 Bur L T 210=10 L B R 398=64 I C 417.

—Mortgagee holding a money-decree against the judgment-debtor apart from the mortgage, can get relief under s. 73. A I R 1924 Pat 434=74 I C 140.

—Property subject to usufructuary mortgage cannot be sold in execution of a decree free of the mortgage unless the mortgagee consents, otherwise mortgagor's right of redemption only is sold. (1919) 3 U B R 139=51 I C 750.

—Mortgage—Suit by second mortgagee

—Surplus sale proceeds taken out by fourth mortgagee in execution of his decree—Third mortgagee if may sue to recover amount realised by fourth mortgagee. See 19 C W N 535=19 I C 226.

## (18) Rival decree-holders priority among-to sale proceeds.

—As to priority of Co-operative Society without decree or charge. See 18 C W N 1140=42 I C 377.

## C. P. C. (1908) SEC. 73 (Contd)

## (18) Rival decree-holders priority among-to sale proceeds. (Concl'd)

—In determining priority date of receipt of assets by Court and not date of sale of mortgaged property is material. Where same fund in Court is attached by several creditors right to preferential treatment is not created by priority of attachment. A I R 1921 Cal 801=33 C L J 7=62 I C 167.

—S. 64 does not give priority to claims under S. 73 apart from the attachment in connection with which they were made, and under which they are enforceable A I R 1921 Oudh 176=8 O L J 358=66 I C 642.

—In absence of a decree or charge under S. 20 of Co-operative Societies Act, Court under S. 73 cannot enforce the claim of a Co-operative Society 42 Cal 377=18 C W N 1140=26 I C 81.

## (19) Sale in execution of decree.

—Where out of sale proceeds of property sold in execution of a decree subject to mortgage, the mortgage is satisfied, and the attaching creditor gets only the surplus, a suit for recovery of his balance of decretal amount on the basis of "money had and received" can be maintained by him. A I R 1931 Rang 56=8 R 485=Ind Rul (1931) Rang 56=128 I C 834.

—Where in execution of a decree obtained by a second mortgagee, the mortgaged property is sold, surplus sale proceeds left out after satisfying the decree of the second mortgagee, is taken out by fourth mortgagee, a suit by third mortgagee against fourth mortgagee for recovery of money as his own without making any claim against mortgagor is not maintainable. 19 C W N 535=19 I C 226.

## (20) Set off of purchase money.

—When the amount of the successful bid of a decree-holder permitted to bid, is less than the decree amount, the whole of the set off must be deemed as made on the date of sale and the whole of the amount must be deemed to have been received or realised *eo instanti* the sale is made. S. 73 will give no benefit to other decree-holders who apply for rateable distribution after the conclusion of the sale however soon after its conclusion their application may be made. Permission to set off may be granted at the time as the permission to bid before the sale is held. 32 Bom 379 and 1930 M W N 565 followed 12 L W 328 and 33 Bom L R 503 dissented from. A L R 1933 Mad 1003.

**C. P. C. (1908) SEC. 73 (Contd)****(20) Set off of purchase money (Concld)**

—Right of a decree-holder permitted by Court to bid at auction sale and to set off his decree-debt is subject to right of other decree-holders for rateable distribution 12 L W 328=59 I C 86.

—Where the decree-holder is granted permission to set off the amount due against the purchase-money under O XXI, r. 72 the notional receipt amounts to the holding of assets, and s. 73 becomes applicable to the case. The proceeds of the sale at which the decree-holder is permitted under O XXI, r. 72 to purchase the property in execution of his decree must be shared with the competing decree-holder applying for execution before receipt of assets by the Court and would not be allowed to be set off against the money due of the former on his decree. A I R 1931 Bom 252=33 Bom L R 503=133 I C 737.

—Where permission to bid at auction—sale and set off was given to one of the two rival decree-holders, purchase by him of one item without deposit of money and purchase of a second item by a stranger with deposit of money do not affect the right of other decree-holder to rateable distribution. 12 L W 328=59 I C 86

—Application for set-off must be granted by the Court in absence of application under S. 73 for rateable distribution and then there can be no receipt to assets by the Court within S. 73 A I R 1925 Oud 287=80 I C 40.

—case of transfer of a decree for execution, the money is received by the parent court for the purposes of S. 73 on the day the money is received by the transferee's court's officer conducting the sale, and in the case of application by decree-holder for set off of his claim against the decretal amount the money is received on the date of such application. If he applies to the parent court though the transferee Court, the money is received on the date on which the parent court receives the application. A I R 1926 Nag 380=95 I C 205.

—Relied on. Held further that S. 73 applies both to sale made by the court and to sale by Collector to whom the decree is transferred for execution. Held also, that the court should be deemed to be holding the assets of the judgment-debtor where purchase-money is set off against the decretal amount, for S. 73 C P C has been so worded as to include cases in which it is possible that the purchase-money may not be actually deposited. 10 Pat 830 and 33 Bom L R 503 relied upon. A L R 1933 All 685.

**C. P. C. (1908) SEC. 73 (Concld)****(21) Suit for refund.**

—Leave to bid under O XXI, r 72, C P C., is subject to claims for rateable distribution and the decree-holder can be asked to refund amounts due to claimants under s. 73. A I R 1931 Pat 405=Ind Rul (1931) Pat 472=12 P L T 639=134 I C 616.

—Order giving permission to decree-holder to bid, under O XXI r. 72 C P C is subject to claims for rateable distribution and the Court has power to order decree-holder to refund amounts payable to other decree-holders under s. 73. A I R 1931 Pat 359=12 P L T 177=Ind Rul (1931) Pat 326=133 I C 166.

—Suit for refund of assets before they are rateably distributed is not maintainable 16 A L J 530=46 I C 101.

—Where proceeds of sale in execution are distributed, a mortgagee of the property sold, is not entitled to share in the proceeds without obtaining a decree 26 I C 273.

—Wrong distribution of assets and not the manner in which those assets were obtained raises the cause of action under s. 73 65 I C 230.

—Money paid to a wrong person Suit for refund Rateable distribution Limitation See 39 Mad 62 =27 M L J 640=26 I C 219 =16 M L T 509=1 M L W 952

See also

39 A 322.

**(22) Miscellaneous Cases.**

—Conflicting claims to the surplus assets not determined in suit or in execution proceedings cannot be determined except by a separate suit A I R 1927 All 467=49 A 636=25 A L J 390=101 I C 505.

—It is not obligatory upon Judge to make any enquiry as to proprietorship of property before making order under S. 73. A I R 1928 Rang 163=6 R 582=113 I C 815.

—Certificates of the Accountant General and the Registrar must be produced by an applicant in the original side of the Calcutta High Court for the transfer of a fund governed by the provisions of S. 73 (f) provi. (C). 19 C W N 345= 31 I C 616,

**C. P. C. (1908) SEC. 74**

—This section corresponds with s. 330 of the old Code but is wider in scope than the latter in that the old section was confined to decrees for possession.

—Under S. 104 (h) appeal lies against order of detention under the present section.

## C. P. C. (1908) SEC. 75 (Contd)

*Synopsis.*

- (1) General principles, scope and object.
- (2) Appeal.
- (3) Commissioner and his powers.
- (4-6) Commission to examine any person.
- (7) Commission to examine or adjust accounts.
- (8-9) Commission to make a partition.
- (10-11) Jurisdiction of Court to go behind Commissioner's report.
- (12) Powers of Court to delegate its powers to Commissioner.
- (13) Miscellaneous Cases.

## (1) General principles, scope and object

—This section merely summarises the general powers of the Court as detailed in sections 333 to 396 of the Code of 1882. The provisions of those sections are now set out in the Rules under Order XXVI. The powers under S. 75 cannot be exercised unless a suit is pending. Rules in the First Schedule and High Court Rules control the Section. A I R 1922 Bom 444=24 Bom L R 858=47 Bom 250=75 I C 221.

## (2) Appeal

—It would be obviously unfair to compel a defendant, who resides at Colomabo, to come to Cuttack, where a suit for account has been instituted against him, to be examined in Court or practically to abandon his defence. He should be examined on commission. Where interrogatories for the examination of a defendant cannot be issued owing to the failure of plaintiffs to furnish a translation of their account papers, the commission should be issued without the interrogatories. The discretion of a Court must be exercised judicially. If there has been an erroneous exercise which has prejudiced the parties, the Court of Appeal will not hesitate to set matters right, whether the order directs the issue of a Commission or refuses the application. 16 I C 750.

## (3) Commissioner and his powers.

—A Commissioner is a person appointed by Court, whose decision is not binding on the parties who may Challenge it, and an arbitrator is a person selected by

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## C. P. C. (1908) SEC. 75 (Contd)

## (3) Commissioner and his powers (Concl'd)

the parties consenting to be bound by his decision and as such it cannot be challenged by the parties. A I R 1927 Pat 135=7 P L T 739=(1926) Pat 161=95 I C 321.

## (4-6) Commission to examine any person

—No case in which one of the parties is personally engaged in agricultural labour can be referred to the Commissioner. A I R 1928 Bom 145=30 Bom L R 131=109 I C 133.

—In an application for the examination of a Hindu lady, (a pardanashin) under commission the question is not whether the lady, who does more or less frequently go about in public, should be made to appear in Court, but whether the Court ought to compel her to continue to appear in public. If there were allegations that such a lady had been in the habit of appearing in public and had no regard to the customs of her country and her religion, such allegations being denied in general terms, the Court should not force into public gaze a woman who may have gone outside the purdah, and a commission should be issued, for examining her as a witness. 26 C 651 Note=3 C W N 750; followed in 3 C W N 751=26 C 650; see also 26 C L J 319; and 18 W R 230; and 3 C W N 753; and 4 S L R 257=11 I C 582; and 3 C L R 93=4 C 20; and 11 P W R 1913=43 P L R 1913=18 I C 147.

—Examination of party to suit or proceeding—see 11 Ind Cas 668.

—Examination of complainant by commission—see 18 C W N 1020.

## (7) Commission to examine or adjust accounts

—Court unable to come to any decision may order a party to submit certain papers to Commissioner asking him to state in his report whether what had been submitted was adequate and also whether the party should not be ordered to pay money compensation for what has not been supplied because the Court will necessarily consider the matter after the Commissioner submits his report. A I R 1926 Cal 57=89 I C 24.

—But no commission to render proper account of improvements can be issued to two persons. A I R 1929 Mad 661=Ind Rul (1929) Mad 792=118 I C 296.

—It is improper to arbitrarily withhold permission to examine accounts in Court. 18 C W N 697.

**C. P. C. (1908) SEC. 75 (Contd)****(8-9) Commission to make a partition.**

Where a Commissioner appointed on application of one of the parties after the passing of final decree for partition grants in execution more to that party through mistake and another Commissioner is appointed on application by other party unaware of the previous proceedings for allocation of his share under partition decree the latter can rectify previous Commissioner's mistake. A I R 1931 Cal 170=84 C W N 909=130 I C 840

**(10-11) Jurisdiction of court to go behind Commissioner's report.**

—Appointment of a Commissioner under O. 26 rr. 9, 10 bars a successive appointment unless the first commissioner has so misconceived his fundamental duties as to render his report useless. Where a party objects to the report the Court must judiciously examine the facts upon which the objection is based so as to come to the correct conclusion as to the value of the report. A L R 1933. A 475.

—Taking of accounts—power to decide questions of Law—Court's jurisdiction See, 18 Bom L R 798.

**(12) Powers of Court to delegate its powers to Commissioner.**

—S. 75 Defines the powers of a Court to issue commission, and as such delegation of powers by Subordinate Judge to a Commissioner after framing issues and considering preliminary objections was held to be improper 17 C W N 369=15 C L J 17 =13 I C 440.

—Where a commission for local investigation is issued to elucidate any matter in dispute, the Court cannot delegate to the Commissioner the trial of any material issue which the Court itself is bound to try. The fact that the parties took no objection to a finding on such a material issue by the Commissioner is not sufficient for the Court to adopt it. A I R 1930 Cal 76=Ind Rul (1931) Cal 192=53 C L J 229 =129 I C 416.

—Court cannot delegate to Commissioner the trial of material issue, and as such, the report of a Commissioner referred to make local investigation and report if land was re-formed or accretion cannot be adopted by the Court simply because the parties do not object to the findings made by the Commissioner being adopted. A I R 1930 Cal 764=53 C L J 299=Ind Rul (1931) Cal 192=129 I C 416.

**C. P. C. (1908) SEC. 75 (Concl'd)****(12) Powers of Court to delegate its powers to Commissioner (Concl'd)**

—The power of a Court to issue a commission is defined in S. 75 and as such delegation of power to try a material issue by court to a Commissioner is improper. A I R 1922 Lah 47=3 Lah 209=63 I C 802.

—Delegation by a Judge of the whole case and his functions in the matter of taking evidence and determining issues to Commissioners is improper. A I R 1926 Lah 145=89 I C 333.

**(13) Miscellaneous Cases.**

—The issue of a succession of commissions covering the same ground is not contemplated by Civil Pro. Code. A I R 1929 Mad 661=Ind Rul (1929) Mad 792=118 I C 296.

—Facts provable by well recognised publications—Practice. See 13 S L R 107.

—Administration of estates—Gross or net assets. See 41 Cal 771.

**C. P. C. (1908) SEC. 77**

—This section introduces a new power following the English practice under R S C O 37, r. 6-a.

—In England it has been held that the letters of request ought only to be issued where the evidence would be material to the case and not merely collateral evidence in corroboration. Letters of request will not be issued in England merely to obtain inspection of documents, and this section refers only to the examination of a witness outside British India.

**C. P. C. (1908) SEC. 78**

—The words "subject to such conditions and limitations as may be prescribed" and "or at the instance of" have been newly added and the words "for the time being in alliance with His Majesty which occurred in cl (c) have been deleted.

—Endorsement on the back of the summons by a relative of a person summoned that he had gone to a certain place does not mean that the person summoned 'could not be found. 135 P L R 1911=227 P W R 1911=10 I C 242.

**C. P. C. (1908) SEC. 79**

—Form of suit:—There is nothing in any of the sections from 79 to 82 or O 27 of CP C which contemplates a suit being brought against the office as distinguished from the individual for the time being holding the office. An action can be brought only against the individual as an individual. The secretary of State for India

**C. P. C. (1908) SEC. 79 (Concl'd)**

in Council can be sued as a corporation  
sole 51 Bom 749 followed. A L R 1933  
L 890.

—No public servant should be sued in his official name e.g. a suit against Sheriff of Bombay for damages for default should not be brought in his official name but against him personally. A I R 1927 Bom 521-29 Bom L R 1071-51 B 749-104 I C 685.

—Obiter—The head of a Government department can be made liable for wrongful acts of officials in the Department only if the act complained of is substantially the act of the head of the department himself. A I R 1927 Bom 521-29 Bom L R 1071-51 B 749-104 I C 685.

—Suit against Govt Railway must be filed against the Secretary of State. A suit against the Railway Administration through the Agent is bad. A I R 1931 Pat 326-Ind Rul (1931) Pat 371-10 Pat 466-133 I C 451.

see to the same effect 80 I C 531-26 Bom L R 71-A I R 1924 B 306-43 B 297.

—Secretary of State is not bound by the contracts unless they are in strict conformity with the provisions laid down in the statute. A I R 1928 Cal 74-54 C 969-197 I C 350.

—Where Government acquires a plot of land for the Dt. Board, the District Board has no power to appeal against the decision allowing compensation to the owners of the plot. A I R 1929 Lah 10-9 Lah 667-10 Lah L J 330-29 P L R 268-111 I C 477.

—The Secretary of State must be sued where the cause of action has arisen —1 Mad H C 286; 1 Hyde, 37. See also 6 All. H C 47; 14 Cal., 256 but see 16 C W N 747.

**C. P. C. (1908) SEC. 80***Synopsis.*

- (1) General principles, scope, and object.
- (2) Limitation.
- (3) Notice.
  - (a) Amendment of plaint, necessity of in.
  - (b) Common manager appointed under S. 95 of the B T Act.
  - (c) Municipality,
  - (d) Declaratory suits,
  - (e) Limitation.
  - (f) Necessity of, when defendant's interest devolves upon Govt. pending suit
  - (g) Notice given before accrual of cause of action and its effects.

**C. P. C. (1908) SEC. 80 (Cont'd)**

- (h) Notice to Secretary of State.
- (i) Object of
- (j) Objection to as to want of notice.
- (l) Other suits against public officer for acts done in official capacity.
- (m) Receiver or official assignee or Liquidator.
- (n) Sufficiency of.
- (o) Suit for injunction,
- (p) Suit in torts against a public officer
- (q) Suits on Contracts
- (r) Village Sanitation Panchayat.
- (s) Waiver of.
- (t) When required.
- (4) Miscellaneous Cases.

**(1) General principles, scope and object**

—S. 80 C. P. C. applies to all forms of suits whether the relief sought includes a prayer for injunction or not therefore the subsequent abandonment of a plea for an injunction cannot validate a suit which should properly be regarded as never having been brought at the time when the plaintiff filed the suit. 51 Bom 725 (P. C) followed. A L R 1933 S. 216.

—No exceptions or qualifications to the explicit terms of s 80 can be made on account of considerations of hardship and absence of prejudice or detriment to the interests of the Government. A I R 1931 Mad 175-32 L W 810-Ind Rul (1931) Mad 264-52 M L J 923-54 M 416-129 I C 456.

—S 80 must be complied in a strict sense and all kinds of actions and reliefs are governed by it. A I R 1927 P C 176-51 B 725-54 I A 338-25 A L J 641-29 Bom L R 1227-46 C L J 76-53 M L J 81-(1927) M W N 561-I L C 291-32 C W N 61-26 L W 809-104 I C 257.

—S. 80 is mandatory and is not controlled by O XLVIII, r 2. No notice under S. 80 can be served on the son of the officer 35 C W N 161

—S. 80 is applicable to all Kinds of Suits whether for injunction or otherwise even when the plaintiff is likely to sustain an immediate injury. A suit does not cease to be a "Suit" because an injunction is inter alia prayed for there in. A I R 1928 Sind 76-22 S L R 63-105 I C 729.

—All forms of actions and all Kinds of reliefs are governed by the section. A I R 1927 Bom 649-29 Bom L R 1427-103 I C 756.

—Only the public officer and the Secretary of State is referred to by the word "Act" in S 80 : Suits of every Kind whether for injunction or otherwise are included in the words "no Suit shall be



## C. P. C. (1908) SEC. 80 (Contd)

## (1) General principles, scope and object. (Concl'd)

instituted against Secretary of State in Council". 13 Bom L R 273-35 -B 362-10 I C 639.

-As to suits to which the section is applicable see 140 I C 265 (267)-I R 1932 S 186.

## (2) Limitation.

-Where after the notice of suit to Govt. the agent of Govt threatens injury to property the suit can be instituted before expiry of two months from the date of notice 40 Bom 392-18 Bom L R 243-34 I C 535.

-Time spent in giving prescribed notice- Deduction of see 33 I C 600.

-Notice under-Time spent in-Suit against Secretary of State under S. 104 H. of the B T Act-No deduction of time See 46 I C 899.

-Deduction of two months for service of notice under S 80 cannot be allowed when a suit is alleged to be barred under Special law of limitation. A I R 1921 Cal 661-34 C L J 205 -66 I C 287

## (3) Notice.

## (a) Amendment of plaint necessity of in.

-Amendment of plaint necessitating a notice under S 80 cannot be allowed 38 C 797-13 I C 370.

-Where in a plaint the cause of action was initially stated to arise on a certain date and subsequently, the plaintiff applied for amendment of the plaint and introduced another date as the date on which the cause of action arose. Held, that the notice given before the accrual of the cause of action subsequently mentioned was in no way defective or irregular because the defendant (Secretary of State in Council) the written statement gave the same date as was mentioned by the plaintiff in the innamended plaint as being the date on which the cause of action arose. A L R 1933 B 329.

## (b) Common manager appointed under S 95 of the B T Act.

-Where the suit is against the public officer who has himself executed the mortgage, notice of suit is necessary, because it is in respect of his act that the suit is instituted. Where the suit is against his successor, notice of suit will even then be necessary, because the suit will be against him on the ground of his act, viz, the

## C. P. C. (1908) SEC 80 (Contd)

## (3) Notice. (Contd)

## (b) Common manager appointed under s. 95 of the B. T. Act. (Concl'd)

breach or non-performance on his part of the condition of the mortgage as regards the re-payment of the mortgagee's dues. 59. C 961 (976-7)-55 C L J 8-138 I C 4-A I R 1932 C 275-I R 1932 C 401-A L R 1932 C 1037 Common manager appointed under S 95 of the B T Act-Notice of suit against if necessary-Acts of defacto manager within scope of assumed authority -Notice necessary. See 30 C L J 279-21 C W N 138-53 I C 747.

## (c) Court of wards.

-Manager of the Court of Wards-Not a public servant-Notice of suit not necessary 53 I C 515.

## (d) Declaratory suits.

-Notice under s 80 is necessary for a suit for declaration that the Official Receiver has no power to sell joint family property. The section applies whether the property is sold or threatened to be sold. A I R 1931 Lah 703-12 Lah 269-31 P L R 865-Ind Rul (1931) Lah 516-132 I C 4.

-Suit for declaration that the Official Receiver had no power to sell the joint family property of the insolvents cannot be instituted without notice under S 80. 31 P L R 865-12 Lah 269-132 I C 4.

-Even suits for a mere declaratory decree are governed by S. 80 A I R 1930 Lah 708-Ind Rul (1930) Lah 641-125 I C 625.

## (e) Municipality.

-Suit against the Municipality can be instituted without notice under S 80 as it is not an officer of the Govt within the meaning of S. 80. A I R 1930 Mad 844-59 M L J 690-(1930) M W N 821-32 L W 794-Ind Rul (1931) Mad 17-128 I C 161.

-Municipalities are not public officers within s. 80. A I R 1941 Mad 893-61 M L J 612-(1931) M W N 1097-34 L W 719.

## (f) Necessity of, when defendant's interest devolves upon Government pending suit.

-Notice is not necessary when defendant's interest devolve upon Government during suit as the matter is governed by O XXII, r. 10. A I R 1923 AH 685-34 A L J 726-96 I C 351.

-Where after a notice under S. 77 of the Railways Act has been properly given the Railway has been taken over by Secretary of State, the Suit against the Secretary of State can be maintained without notice under S. 80 A I R 1928 Mad 599-(1923) M W N 218-109 I C 406.

## C. P. C. (1908) SEC. 80 (Contd)

## (3) Notice. (Contd)

## (f) Necessity of when defendant's interest devolves upon Government pending suit (Contd)

—Where the Manager, Encumbered Estate takes under his protection a defendant against whom a suit for partition is pending, the act of the Manager in assuming the rights of the Zamindar during the pendency of the suit is not such an act as would lay upon the plaintiff seeking partition, the obligation of first giving notice under S. 80 C P C. A L R 1933 S 202.

## (g) Notice given before accrual of Cause of action and its effect.

—Notice given before the cause of action has arisen is invalid. A I R 1928 Cal 74= 54 C 969=107 I C 360.

—Variance between the notice and plaint would not lead to dismissal of the Suit if it is not substantial. If no objection is raised by defendant to the amendment of the plaint he must be taken to have waived the objection 20 C W N 636= 32 I C 752.

## (h) Notice to Secretary of State.

—Suit against Government cannot be brought without giving notice under S. 80 unless it is humanly impossible for the plaintiff to do so. 14 Bom L R 353=15 I C 539.

—In a suit against Secretary of State for India under S. 104 (H) an objection under S. 134 E of the final settlement of rent roll does not constitute a notice 22 I C 36=18 C L J 566.

—All Suits against Secretary of State or a public officer in respect of any act purporting to be done by the said public officer in his official capacity though for injunction and irreparable injury is likely to be caused if injunction is not granted are unsustainable without notice 39 M L J 151=28 M L T 163=12 L W 193=(1920) M W N 495= 58 I C 885.

—Though notice under S. 80 C P C on the Collector within Six months, is a good notice under S. 77 to the Railway Administration, notice under S. 80 to Secretary of State must be given even if notice of claim is given under Ss. 77 and 140 Railways Act. A I R 1923 Bom 421=52 B 548=39 Bom L R 979=113 I C 511.

—Suit against the Secretary of State as representing the State owned Railway cannot be filed without notice under S. 80. A I R 1931 Nag 96=13 N L J 194=Ind Rai (1930) Nag 240=123 I C 902.

—An application under para. 17 of Sch. II, though treated as a suit for

## C. P. C. (1908) SEC. 80 (Contd)

## (3) Notice. (Contd)

## (h) Notice to Secretary of State. (Contd)

certain purposes, is not a suit for all purposes S. 80 itself places the embargo created by it upon a suit only. Not only does the section expressly use the word 'suit' but it also provides that "the plaint shall contain a statement that such notice has been so delivered or left". It is, therefore, clear that the civil proceeding governed by the section must be a suit which is initiated by a plaint. The object of the notice required by S. 80 is to inform the Secretary of State of the public officer of the claim which it is contemplated to bring against him and to afford him an opportunity to settle it, if so advised without litigation. If an agreement to refer to arbitration has been entered into by him, he is already in possession of all the information required by him; and it would be an act of supererogation to give him a notice repeating the same information. 13 L 672 (675-6) —1932 P C L 790 Civ=33 P L R 508=137 I C 266=I R 1932 L 314=A I R 1932 L 374 =A I R 1932 L 790 (Civ).

—Suit against Govt. Railway must be instituted against the Secretary of State and notice to the Secretary of State under s. 80 is necessary. Notice to the Agent is insufficient. A I R 1931 Pat 326=Ind Rai (1931) Pat 371=10 Pat 466=133 I C 451.

—Where a suit is brought against Secretary of State representing a railway company, service of notice under S. 77 of the Railways Act on the railway company does not obviate the necessity of serving notice upon the Secretary of State as contemplated by S. 80. 52 All 837 Followed. A L R 1933 All. 510.

—In all cases where the suit is against the Secretary of State or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, it cannot be instituted without two month's notice to the Secretary of State or the public officer sued. S. 80 is express, explicit and mandatory and it admits of no implications or exceptions. 12 Lah 260 and 51 Bom 725, followed 50 Mad 239 and 136 I C 777 dissented from. A L R 1933 Lah 890.

—A Suit against the Secretary of State can be instituted only after the expiry of two months notice under S. 80 even when injunction is prayed for or irreparable or immediate is apprehended. A Suit for injunction to prevent a threatened act against a public officer requires no such notice as it is a suit in respect of something which a public officer is going to do in respect of further acts threatened. A I R 1924 Bom 1=26 Bom L R 1=48 B 87=90 I C 13.

**C. P. C. (1908) SEC. 80 (Contd)****(3) Notice (Contd)****(h) Notice to Secretary of State. (Conclud.)**

—But this was overruled in. A I R 1927 P C 176; see also A I R 1927 B 649.

**(i) Object of**

—As to the object of the notice see A I R 1932 L 374=A L R 1932 L 790=13 L 672; and 18 C L J 566=22 I C 36.

—Notice sent—If constitutes cause of action—Right to sue accrues only when order of Collector is passed. See 19 I C 565.

**(j) Objection to as to want of notice.**

—Failure to serve notice as required by S. 80 entails a rejection of the Suit and not its dismissal. 35 C W N 161.

—Plea as to want of notice under S. 80 can be raised for the first time at the final hearing. A I R 1925 All 241=47 A 291=22 A L J 1116=L R 6 A 106 Civ=84 I C 739.

—The plea of want of notice under S. 80 cannot be taken at a very late stage but must be taken at the earliest possible opportunity otherwise it would be taken to have been waived. A I R 1931 Cal 175=53 C L J 31=Ind Rul (1931) Cal 414=130 I C 894

—On the non-compliance with the provisions of s. 80, the Court should reject the suit and not dismiss it after going into the question. A I R 1931 Cal 503=58 C 850=Ind Rul (1931) Cal 586=35 C W N 161=132 I C 634.

—Notice to public officer—Objection as to want of notice under s. 424 C P C 1882 to be taken only by Secretary of State—see 10 O C 49.

**(l) Other suits against public officer for acts done in official capacity.**

—Suit against public officer for an act done in bad faith can be brought without notice under s. 80. 16 C W N 145=13 Cr. L J 65=13 I C 721.

—Suit against the Bench-Clerk of a Sub-Court for recovery of a sum of money lost through his carelessness in losing or concealing an execution application cannot be instituted without notice under s. 80. 40 I C 677=11 Bur. L T 95 =(1917) 3 U B R 1.

—Suit against a public officer for mala fide action in discharge of his duties cannot be instituted without notice under s. 80. The words "act purporting to be done in his official capacity" refer to "an act intended to be done by him in his official capacity." 41 Mad 792=34 M L J 494=23 M L T 357=(1918) M W N 414=7 L W 586=46 I C 86.

**C. P. C. (1908) SEC. 80 (Contd)****(3) Notice (Contd)****(i) Other suits against public officer for acts done in official capacity. (Contd.)**

—Where act is done in official capacity whether in good or bad faith, notice is necessary. 13 A L J 788; followed. A I R 1924 All 851=22 A L J 812=L R 5 A 599 Civ=46 A 884=80 C I 72.

—Only past acts and not future ones are covered by the words "in respect of any act purporting to be done. A I R 1927 Mad 166=50 M 239=51 M L J 671=24 L W 730=99 I C 284.

In the case of a government School master notice under s. 80 is necessary as he is a public officer even if his services are lent to a public body. A I R 1928 Nag 33=104 I C 762.

—Acts done by the Officer in the course of his official duties considering himself to be acting as public officer and desiring other persons to consider that he was so acting are acts purporting to be done in his official capacity irrespective of the motives with which they were done. A I R 1930 All 704=(1930) A L J 1080=Ind Rul (1930) All 561= 124 I C 705.

Whether a fresh defendant can be substituted for a sole existing defendant against whom no cause of action is found to exist—Whether notice under s. 424 C P C 1882 is necessary in case of adding a public officer as co-defendant in a case against Secretary of State—See 59 P W R 1908, See also 9 C 271.

(Note:—The section does not prevent a Court from adding the Secretary of State as a party to the suit)

—The section refers to a past act and not to any action merely contemplated or threatened. 31 L W 993=1932 M W N 299=136 I C 777=I R 1932 M 313.

—It is enough that the act is done and that it is purported to have been done in an official capacity; and it is not necessary to go further and inquire whether it was done in execution or intended execution of any statute or public duty or authority. 59 C 961 (975-6)=55 C L J 8 =138 I C 4=A I R 1932 C 275=I R 1932 C 401=A L R 1932 C 1037.

—Notice required by S. 80 C P C is not necessary in every case in which a public officer is impleaded as a defendant. The suit must be against him in respect of any act purporting to be done by him in his official capacity which implies that the plaintiff's cause of action is essentially based on some act attributable to the public officer. If the act of the public officer is not an essential part of the cause

## C. P. C. (1908) SEC. 80 (Contd)

## (3) Notice (Contd)

## (f) Other suits against public officer for acts done in official capacity. (Contd)

of action disclosed by the plaint, though having regard to his position in relation to the subject-matter of the suit, he is a necessary party, no notice is necessary. 1932 A L J 797=A I R 1932 A 657=139 I C 484=I R 1932 A 569.

—Where a zemindar is placed under protection of the manager, Encumbered Estates, during the pendency of a suit against the zemindar, the manager can be joined as party without notice. A I R 1931 Sind 158=Ind Rul (1931) Sind 106=25 S L R 200=133 I C 74. following 96 I C 351.

—A partition suit is not a suit in respect of an act done by the defendant and can be instituted without notice against a public officer (e. g. Manager, Sind Encumbered Estates). A I R (1931) Sind 158=25 S L R 200=Ind Rul (1931) Sind 106=133 I C 74.

—Very little distinction is made by the section between suits against the Secretary of State for India in Council and as against public officers. Only this distinction is left between the two classes of suits that, whereas in the absence of a notice under S. 80, the Secretary of State for India in Council cannot be made a defendant in any suit, no matter what its character may be, a public officer may without such a notice be defendant in a suit, in which no act of his is in question but he is made a party for some reason or other. The restrictive words in the section were unnecessary and would be inopposite in the case of the Secretary of State for India in Council firstly, because the Secretary of State for India in Council is a statutory body which has no capacity but an official one; and, secondly, because he is often responsible for the acts of other public bodies and officers. 59 C 961 (977) =55 C L J 8=138 I C 4=A I R 1932 C 275 =I R 1932 C 401=A L R 1932 C 1037.

## (m) Receiver or Official Assignee or Liquidator.

—Notice under S. 80 must be given to a Receiver appointed by Court as he is a public officer. 35 C W N 161.

—Notice under S. 80 is necessary in the case of the Official Receiver as he is a public officer. A I R 1930 Lah 708=Ind Rul (1930) Lah 641=125 I C 625.

—Per Costello J.—It is extremely doubtful whether Receivers are public officers within the meaning of s. 80. A I R 1931 Cal 175=53 C L J 31=Ind Rul (1931) Cal 414=130 I C 894

## C. P. C. (1908) SEC. 80 (Contd)

## (3) Notice. (Contd)

## (m) Receiver or Official Assignee or Liquidator. (Contd)

—But no notice is necessary to institute a suit for declaration and injunction to restrain the Official Receiver from selling the suit properties. A I R 1927 Mad 166=50 M 239=51 M L J 671=24 L W 730=99 I C 284.

—Suit against the Official Assignee for declaration and possession of insolvent's land can be brought without notice as required by S. 80. A I R 1923 Bom 392=25 Bom L R 378=73 I C 240.

—An Official Receiver being a public Officer within S. 2 sub. cl. 17 (d) cannot be sued without being served with notice under S. 80. A I R 1924 All 40=21 A L J 737=L R 4 A 483 Civ= 46 A 16=77 I C 57.

—S. 80 protects a receiver appointed under the Provincial Insolvency Act as he becomes a public officer within the meaning of s. 2, sub-S 17 and he must be given a notice under S. 80; Sanction granted by Insolvency Court *ex parte* is insufficient. A I R 1925 All 241=47 A 291=22 A L J 1116=L R 6 A 106 Civ=84 I C 739.

—Suit against the Official Receiver for establishing and realizing a charge over moveable and immoveable property of a debtor without alleging any act or omission on the part of the Receiver can be instituted without notice under S. 80. A I R 1927 All 132=48 A 821=24 A L J 1067 =99 I C 138.

—A Receiver appointed under Provincial Insolvency Act (1920) even if a public officer within the meaning of S. 80, C P C can be sued for recovery of a mortgage-property without notice under S. 80 as such a suit is not a suit in respect of any act done by Receiver as such. A I R 1930 Bom 11=31 Bom L R 1199=Ind Rul (1930) Bom 185=122 I C 857.

—Receiver-Public Officer- Notice of suit-Receiver appointed under the Prov. Ins. Act. See 44 Bom 895=58 I C 411=22 Bom L R 987.

—Suit for damages against Official Assignee purporting to act legally though his act is not strictly legal cannot be instituted without notice under S. 80. A I R 1930 Mad 458=31 L W 339=59 M L J 501=Ind Rul (1930) Mad 608=124 I C 144.

—A liquidator is a public officer within the meaning of s. 2 (17) C P C and is entitled to notice of suit under s. 80. Where the liquidator has acted through the Deputy Commissioner, notice to the latter is sufficient. A L R 1934 Nag. 65.

—A Receiver appointed by Court cannot be sued without notice under s. 80. There is no distinction between

## C. P. C. (1908) SEC. 80 (Contd)

## (3) Notice, (Contd)

## (m) Receiver or Official Assignee or Liquidator. (Contd)

cases of the Receiver being already discharged and those where the order of discharge has not been made. A I R 1930 Cal 737-34 C W N 671=Ind Rul (1931) Cal 28=128 I C 108.

—S. 80-Official Receiver neglecting to recover rent is purporting to act in his official capacity. A I R 1931 Cal 61=57 C 1127=Ind Rul (1931) Cal 423=130 I C 903.

—Where on the official assignee's publishing notices to sell properties and refusal to partition the same a suit is brought by the plaintiff against the official assignee representing the estate of certain insolvents for partition of property and for perpetual injunction restraining the official assignee from selling the property held that the suit besides being based on the fact that certain rights have devolved on the official assignee being in respect of an action threatened by him notice as required by s. 80 is necessary. A L R 1933. S. 216.

—Receivers appointed by Court to take charge of the debtor's property and dispose of it according to the orders of the court are public officers within the meaning of S. 80 and s. 2 cl. 17 sub-cl. (d) and (h) of the Civil P. C. A L R 1933 M 693.

—A notice signed on behalf of the Collector of a District and sent to the receiver of Zamindari requiring him to execute certain repairs to a tank which owing to its then state of disrepair was a source of danger to a government canal and informing him that legal proceedings would be taken against him in case he failed to execute those repairs within a particular period is valid notice under S. 80 and the same cannot be impugned on the ground that it did not state the cause of action or it did not give the name description and place of residence. A L R 1933 M 693.

—In a suit for partition and possession and for injunction restraining sale of property by official assignee. Held that notice under S. 80 was necessary as the suit was not merely based on the fact that a certain title or certain rights have devolved on the Official Assignee but the suit was in respect of an action threatened by the Official Assignee. 140 I C 265=I R 1932 S. 186.

—Contract entered into by Official Receiver as such-Suit against him in respect of-Notice of suit under S. 80 necessary, 1932 A L J 842=A I R 1932 A

## C. P. C. (1908) SEC. 80 (Contd)

## (3) Notice (Contd)

## (m) Receiver or Official Assignee or Liquidator. (Contd)

575 (577)=I R 1932 A 574=139 I C 701-A L R 1932 A 814.

—Receiver appointed by Court to take charge and dispose of debtor's property according to orders of Court is a public officer 36 L W 694=140 I C 458=1932 M W N 1240 also see 34 L W 993=1932 M W N 299= 136 I C 277=I R 1932 M 313.

—Suit by donor under deed of gift for (1) a declaration of invalidity of gift deed on ground of fraud and (2) a declaration that property purporting to be transferred under deed was not liable to be attached or sold in execution of a decree against donee's father an insolvent-Attachment of property made by Official Receiver under orders of District Judge passed on application of certain creditors of insolvent-Suit against donees under gift deed, the Official Receiver, and defendants 4 and 5 creditors of the insolvent who had moved District Judge for attachment of the property-Notice under S. 80 not necessary in such a case. 1932 A L J 797-A I R 1932 A 657=139 I C 481=I R 1932 A 569.

## (n) Sufficiency of.

—Cause of action in s 80 should not be construed in a narrow sense, but it must be stated in notice with some precision. A I R 1928 Cal 74=54 C 969=107 I C 360.

—The notice under S 80 is sufficient if the parties are informed generally of the nature of the suit intended to be filed there by A I R 1926 Mad 408=23 L W 464=91 I C 368.

—Notice under S. 80 will be considered as sufficient if it states the cause of action i e. if it sufficiently informs the parties the nature of the suit intended to be filed 13 C L R 195. If notice under S 80 is defective, a suit based on such a notice is not maintainable 32 I C 235.

—In the cause of a State Railway, a party may give either a combined notice satisfying all the requirements of S 77 Railways Act and S. 80 C P C or separate notices under the respective sections A I R 1928 Mad 599=(1928) M W N 218=109 I C 405.

—Though notice under s 77 Railways Act is given, notice under S. 80 is necessary A I R 1930 All 476=Ind Rul (1930) All 567=(1930) A L J 1125=124 I C 711.

—The person actually becoming the plaintiff alone can give notice. Notice by plaintiff's father for the same cause of



## C. P. C. (1908) SEC 80 (Contd)

## (3) Notice. (Contd)

## (n) Sufficiency of. (Contd)

action is insufficient A I R 1930 Bom 367  
=32 Bom L R 604=Ind Rul (1930) Bom  
318=124 I C 814.

It is sufficient if the provisions of S.  
80 are substantially complied with A I R  
1929 Sind 61=Ind Rul (1930) Sind 161=125  
I C 193.

—Notice must be given by the person  
who actually files the suit and by none  
else A I R 1931 Mad 175=32 L W 810=Ind  
Rul (1931) Mad 264=53 M L J 923=54 M  
416=129 I C 456.

—Notice is invalid if it does not  
contain description and statement of place  
of residence A I R 1931 Cal 61=57 C  
1127=Ind Rul (1931) Cal 423=130 I C 903.

—In determining whether a particular  
document satisfies the requisites of S. 80  
the Court is not bound to abandon all  
common sense but on the contrary it  
must look at the document and understand  
it in a fair and reasonable sense in the  
way in which the writer meant and the  
addressee understood it 36 L W 694=140  
I C 458=1932 M W N 1240.

—The subsequent abandonment of  
a plea for an injunction could not validate  
a suit which should properly be regarded  
as never having been brought at the time  
when the plaintiff filed the suit. The law  
did not allow him to sue on the cause of  
action which he alleged in the plaint 140  
I C 265=1 R 1932 S 186.

—The words of s. 80 as to mode of  
serving notice are mandatory. Notice under  
s. 80 cannot be served on the son of the  
public officer A I R 1931 Cal 503=35 C  
W N 161=58 C 850=Ind Rul (1931) Cal  
586=132 I C 634.

—A suit cannot be instituted against  
a Railway Administration which is owned  
by the Government without giving a  
notice under s. 80, C P C. A notice under  
the Railways Act served on the Manager  
of the Railway Administration is insuffi-  
cient. A I R 1931 Pat 393=12 P L T 681.

—S. 80 is drawn so as to suit the vast  
majority of cases that arise under it and  
it is reasonable where the plaintiff is a  
private party that his name, his description  
and place of residence should be known  
and stated. There is no exception in favour  
of the Secretary of State as to the  
contents of the statutory notice where he  
is suing as plaintiff. But, where the question  
is whether a particular document said to  
be sent in the name of or on behalf of  
the Secretary of State was really so  
sent and says so with sufficient clearness  
to give notice to the defendants, the  
Court might import a little common  
sense in deciding the question. Held,

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## C. P. C. (1908) SEC. 80 (Contd)

## (3) Notice. (Contd)

## (n) Sufficiency of. (Conclud)

accordingly that, where notice of suit  
was given by the Collector of the District,  
the objection to the non-mention in  
the notice of the Secretary of State and  
his place of residence was, though literally  
plausible, not of substantial weight. 36 L  
W 694=140 I C 458=1932 M W N 1240.

—In determining whether a particular  
document satisfied the requisites of a  
valid notice under S. 80, the Court is not  
bound to abandon all common sense but  
must look at the document and understand  
it in a fair and reasonable sense in the  
way in which the writer meant and  
addressee understood it. A L R 1933 M 693.

## (o) Suit for injunction.

—Where Collector acting under S.  
79 A of Bom. Land Revenue Code, 1879,  
serves upon plaintiff a notice to recover  
possession of certain land summarily,  
notice of the Suit for injunction restrain-  
ing the Collector from taking possession  
summarily is necessary under S. 80 14  
Bom L R 577=16 I C 445.

—A talukdari Settlement Officer is a  
public servant. No Suit against a public  
officer for injunction restraining him  
performing an act in his public capacity is  
sustainable without notice under S. 80 16  
Bom L R 766=26 I C 749.

—To a suit for injunction against a  
Public Officer no notice under S. 80 is  
necessary. 14 Bom. L R 1148 =37 Bom  
243=17 I C 876 but see contra 6 S L R 123  
=19 I C 361.

—Every suit whether for injunction or  
otherwise against Secretary of State is  
governed by S. 80. The words "purporting  
to be done" in S. 80 are applicable only  
to public officers 23 M L J 181=16 I C  
947=37 Mad 113=(1912) M W N 786=12  
M L T 224.

—Suit for injunction where the cause  
of action has already arisen, is governed  
by S. 80. Courts in India cannot  
invoke equitable jurisdiction of Chancery  
Court to override Indian Statutes 19 I C  
838=6 S L R 250.

—Official Assignee—Suit for injunction  
against—Notice—Necessity. See—21 Bom  
L R 980=44 Bom 555=53 I C 627.

—In a Suit against a public officer  
for injunction to restrain the commission  
of an act, not done but threatened to  
be done no notice is necessary 3 Sind.  
L R 175=41 C 1156.

—In a Suit for injunction against  
Secretary of State for India restraining  
his officers from taking possession of  
inam villages notice under S. 80 is necessa-  
ry (Per Heaton J Diss.) 13 Bom L R  
273=35 Bom 362=10 I C 639.

## C. P. C. (1908) SEC. 80 (Contd)

## (3) Notice. (Contd)

## (p) Suit in torts against a public officer.

—To file a suit for malicious prosecution against a Police Officer who acted in his official capacity in charging a person notice under S. 80 is necessary A I R 1930 All 742 = (1930) Cr Cas 998 = (1930) A L J 1433 = 132 I C 17.

—In a Suit against a Police officer for act done under powers conferred by Cr. P. Code, notice is necessary. 13 A L J 788 = 30 I C 173.

—Suit for damages for assault and battery by a Police officer while investigating cognizable offence can be instituted without notice either under S. 80 (4) of Bombay District Police Act or C P C. A I R 1928 Bcm 352 = 30 Bom L R 1018 = 52 B 832 = 30 Cr L J 278 = 12 A I Cr R 154 = Ind Rul (1929) Bom 198 (F R) = 114 I C 246.

—Suit for damages for wrongful arrest against a public officer even if he has acted mala fide in discharge of his duty cannot be instituted without notice under S. 80, but a Suit for recovery of money extorted from the plaintiff as a consideration for his release requires no such notice A I R 1924 Cal 145 = 50 Cal 992 = 38 C L J 104 = 28 C W N 10 = 75 I C 173.

—A Village Headman being a public officer within S. 2 cannot be sued for damages for acts done in his official capacity without being served with notice under S. 80 A report to the S D C or D C does not constitute a notice A I R 1923 Rang 250 = 2 Bur L J 29 = 79 I C 818

## (q) Suits on contracts.

—Notice under S. 80 must be served upon Collector of the Dt. in which Suit is instituted. Notice is necessary in the case of a Suit for damages for breach of contract No Suit is to be dismissed or plaint rejected for defective notice Defendant taking exception to Court's jurisdiction does not submit to it if he does not apply for transfer 18 C W N 1340 = 27 I C 232.

—The non-performance or the breach of a contract is equally within the meaning of the section 59 C 961 (976) = 55 C L J 8 = 138 I C 4 = A I R 1932 C 275 = I R 1932 C 401 = A L R 1932 C 1036.

## (r) Village Sanitation Panchayat.

—To file a suit against a village Sainitation Panchayat no notice under S. 80 is required as it is not a public officer. A I R 1929 Nag 70; Ind Rul (1929) N 64 = 114 I C 288.

## (s) Waiver of.

—Notice of claim to the Secretary of State for India in Council must state the

## C. P. C. (1908) SEC. 80 (Contd)

## (3) Notice. (Contd)

## (s) Waiver of (Concl)

names, descriptions and places of all plaintiffs, though it need not be Signed by all of them Want of notice cannot be pleaded at a late stage of the trial by the Secretary of State who is competent to waive the notice but a co-defendant may raise the issue 17 C W N 64 = 40 Cal 503 = 16 I C 849.

—Third party cannot raise objection in case of waiver of notice by party entitled to it: 13 P L T 169 = 136 I C 445 = 1 R 1932 P 109.

—Obiter:—where a suit against the official receiver was instituted without giving him notice required by S. 80 C P C and the case was allowed to proceed to decree without objection the objection as to want of notice should be deemed to have been waived and cannot be raised in appeal. A L R 1933 Mad 1091.

## (t) When required

—Notice is not required where the suit is ex-contractual 20 Bom 697; 19 Bom 407. though breach of contract amounting to tort requires notice: 59 C 961.

## (4) Miscellaneous Cases.

—Notice by a Pleader on behalf of his client under s 80 C. P. C. cannot be classed with a private letter. A I R 1928 Bom 338 = 30 Bom L R 934 = 113 I C 519.

—Accompaniments to notice under s. 80 cannot be claimed back unless expressly asked otherwise in a letter with the notice. 22 Bom L R 785 = 57 I C 531.

## C. P. C. (1908) SEC. 83

—The question whether a person is an "alien enemy" will not be determined by nationality. Residence in a hostile Country for a substantial period of time Confers the disability attaching to an enemy during that period. A firm in which one of the partners is an alien enemy, has no right to sue for recovery of money owing to the firm. 1 Lah 276 = 2 Lah L J 275 = 55 I C 324.

—S. 83 does not bar a suit against an alien enemy, it only precludes the right of an alien enemy to sue. 8 S L R 329 = 29 I C 22.

—And prohibition-Prohibition Confined only to commercial inter course does. not render illegal all contracts whatever their nature. 31 M L J 860 = 37 I C 957.

—Suit by an alien enemy residing in Br. India is maintainable only with the permission of the Gov. Gen in Council. An

## C. P. C. (1908) SEC. 83 (Concl'd)

application for service of summons in foreign enemy country cannot be refused under s. 83. 39 All 377-39 I C 862.

—A suit by an alien enemy licensed to trade in British India is maintainable in Indian Courts. 9 Bur L T 51-31 I C 888.

—Suit against, if lies—Cause of action arising upon contract made after war—Internment, effect of See 43 Cal 1140-35 I C 951-20 C W N 691.

## C. P. C. (1908) SEC. 84

—A state cannot be said to have maintained its sovereignty unless it pays allegiance to the ruler, laws of the ruler are enforced and, those laws are enforced by his Courts. A I R 1930 Mad 1004-59 M L J 548-32 M L W 673-53 M 968-Ind Rul (1931) Mad 166-128 I C 870.

—Suit in British Indian Courts by Dharam Arth Bank, Nabha and by the Administrator of the Nabha State appointed by the Government of India, when the Maharaja of Nabha had been permitted to sever his connection with the State—whether competent see A L R 1933 L 531-34 P L R 470.

—Residence in a hostile country for a substantial period of time confers the disability attaching to an alien enemy during that period Suit in a Br. Indian Court by a firm some of whose partners are 'alien enemy' is not maintainable. 1 Lah 276-2 Lah L J 275-55 I C 324.

—Suit against the State of Travancore or its Dewan is maintainable only with the consent of the Governor—General in Council. 23 M L J 605-12 M L T 496-17 I C 444.

—A recognised agent under s. 85 can act for his minor principal without being appointed guardian ad litem. 80 Ind Cas 100-29 Cal W N 287-A I R 1925 Cal 513.

—Where a claim is made for a share of inheritance and the suit is not brought in the form of an administration suit the trial court should have it treated as such and after due trial of the matters involved pass a decree on the lines of the model decrees in App. D. forms 17 and 20 C P Code. 41 I C 579.

—As to warrant of attorney see Bourk 0 C 244.

—Raja of Tipperah is a sovereign prince. 25 Ind Cas 271.

—See also 1 Ind Cas 604-1909 P R 21-27 P W R 1909-1909 P L R 32; so also the Maharaja of Benares 78 Ind Cas 559-28 All L J 317-5 L R A Civ. 129-1924 All 422-46 All 355; so also Kurundwad Jagirdars are ruling Chiefs: 51 Ind Cas 228-21 Bom L R 376.

## C. P. C. (1908) SEC 86

## (1) Scope of the Rule.

—S. 86 exhausts the question of suing a Native Chief or Prince, but does not refer to the nature of the relief sought. 25 M L J 621-38 Mad 635-14 M L T 486-(1913) M W N 977-21 I C 930 [See on appeal. 39 Mad 661-29 M L J 667-30 I C 511.]

—S. 83 applies to a case where the defendant becomes a Ruling Chief after the institution of the suit, but acquiescence on his part to continue the suit will estop him from questioning the Court's jurisdiction afterwards A I R 1921 Pat 23-6 P L J 185-2 P L T 180-1921 Pat 136-61 I C 989.

—Cases of defence put forth as set off are not governed by the section. 62 I C 778.

—S. 86 is applicable to a suit against a ruling chief in his capacity as a co-sharer in respect of the property in British India. A I R 1924 All 422-46 All 355-22 A L J 317-L R A 5 Rev 129-78 I C 559.

## (2) Ruling Chiefs

—Suit against a Sovereign Prince—The Maharaja of Hill Tipperah—is not maintainable unless previous consent of the Gov. General or the Local Government is obtained. 2 C L J 163.

See to the same effect 25 I C 271.

## (3) Sanction of Governor General

—Suit against a Ruling Chief can be maintained only after the previous consent of Gov. General is obtained. Pleading on merits after claiming the privilege does not amount to a waiver of privilege or submission of jurisdiction. 39 Mad 661-29 M L J 667-(1915) M W N 534-2 L W 637-30 I C 511.

—Conf 38 M 535. The consent of Governor General is necessary when Kurundwad Jagirdars are sued. 21 Bom L R 376-51 I C 228.

—Sanction of Gov. General in Council to sue a Ruling Chief must be strictly construed, and as such a sanction given for one purpose cannot be utilised for other purpose. 22 I C 889

—Suit against Ruling Chief as a trustee is not maintainable without consent of Governor General in Council. 18 M L T 163-(1915) M W N 640-30 I C 351.

—Contracts entered into by an agent of a foreign State on behalf of his principal are not binding on the State but on the agent personally if they do not come

**C. P. C. (1908) SEC. 86 (Contd)****(3) Sanction of Governor General. (Concl'd)**

under s. 86 and no permission to sue is necessary. A I R 1928 Sind 189=113 I C 345.

—A suit against the Gwalior Light Railway, which is owned and managed by the Gwalior Durbar, does not come under s. 86 C P C as it could not be said to be a suit against any Sovereign Prince or Ruling Chief Ind Rul (1931) Lah 924=134 I C 300.

—A person holding lands of a Ruling Chief free of rent is not a tenant of immoveable property, and as such he cannot sue the Ruling Chief without the consent of Governor General in Council. 58 I C 912.

**(5) Waiver**

—Ruling Chief submitting to the jurisdiction of a British Court, is said to have waived the privilege, and cannot be allowed in appeal to plead the same. 46 I C 538.

**C. P. C. (1908) SEC. 88**

—Defendants in an inter-pleader suit contesting the title of each other stand in the position of plaintiffs. A I R 1925 Mad 497=48 M L=93 I C 705.

—The plaintiff will be debarred from bringing such a suit if he has in some way indentified with one of the parties, but no relief will be refused to him merely because he has natural affinity for one side. A I R 1927 Rang 91=4 R 465=99 I C 985.

—A suit in which several claimants are deemed to be claiming adversely to each other is an interpleader-suit. Persons adopted by co-widows and arrayed in one suit on the same side as defendants must be deemed to be claiming adversely to each other. A I R 1928 Oudh 155=1 L C 733=108 I C 817.

—A suit, in which the defendants do not claim adversely to each other the suit property from the plaintiff who is not ready to pay or deliver it to one of them is not an interpleader suit. A I R 1922 Cal 138.

—In an interpleader suit an order to pay the amount paid by plaintiff into Court to one of the defendants pending the result of the suit on condition of its being restored with interest if necessary on the result of the suit is bad. The amount should be kept under the control of the Court and be available for payment at any time. 24 M L J 404=13 M L T 326=(1913) M W N 363=19 I C 219.

**C. P. C. (1908) SEC. 88 (Contd)**

—As to the nature of the suit by tenant to declare who is landlord see. 13 I C 40.

—Where a tenant gives two gubuliats to two parties in respect of certain land he cannot maintain a suit to get rid of one. 5 Ind Cas 577=11 C L J 577=14 C W N 784=37 C 552.

—Procedure—Non appearance of defendants—Plffs. in possession of money—Plffs. to be discharged from all liability on payment of money into court less their taxed costs See 21 Bom L R 948.

—Ascertainment of right to collect water-cess—Whether suit or proceeding within the meaning of the Estates Land Act. Sch A See, 27 M L J 734.

**C. P. C. (1908) SEC. 89***Synopsis.*

- (1) Scope and object of the section.
- (2) Appeal.
- (3) "Any other law in force".
- (4) Formalities,
- (5) Power of Court.

**(1) Scope and Object of the Section.**

—S. 89 does not prevent the reference or award being used for a purpose other than making it a rule of Court. A I R 1931 Oudh 127=8 O W N 71=Ind Rul (1931) Oudh 203=131 I C 443.

—The object of S. 89 is to confer jurisdiction to link up the Sch. and the body of the Code, and to provide for exercise of jurisdiction in the case of those references to arbitration falling within Sch. II. A I R 1927 Bom 565=51 Bom 908=29 Bom L R 1254=105 I C 516.

—As to applicability of Code to proceedings under the Arbitration Act. See. 17 I C 902.

**(2) Appeal.**

—On an application under para 20, Sch. II, a decree on an award as modified by a lawful compromise filed by the parties can be passed by the Court, and no appeal lies from such a decree except in so far as the decree is in excess of or not in accordance with the award so modified. A I R 1922 Oudh 189=9 O L J 219=25 O C 213=681 C 209.

**(3) "Any other law in force".**

—The words 'any other law for the time being in force' in s. 89 refer to O. XXIII r. 3, and the words 'by any lawful agreement or compromise' in O.

## C. P. C. (1908) SEC. 89 (Contd)

## (3) "Any other law in force" (Contd)

XXIII, r. 3, include, and indicate arbitration proceedings. A I R 1931 Rang 58-131 I C 57-9 R 39.

—In other words, those words mean any law other than the Arbitration Act and the provisions contained in the Second Schedule of the C P C. The words are wide enough to include the provisions of O XXII, r. 3. A I R 1931 Oudh 127-8 O W N 71-Ind Rul (1931) Oudh 203-131 I C 443.

—When legislature has provided special tribunal, no partial decision should be given by Court which cannot be made effective to end the dispute. A I R 1930 Bom 232-32 Bom L R 416-54 B 825-Ind Rul (1930) Bom 235-125 I C 897.

—Except where the Arbitration Act or any other law of arbitration applies, Sch. II is applicable to all references to arbitration whether by an order in suit or otherwise. Parties wishing to go to arbitration must proceed in the manner indicated in S. 89 A I R 1931 Bom 98-31 Bom L R 1403-54 Bom 197-Ind Rul (1930) Bom 247-124 I C 119.

—The law as laid down in other parts of C P C is not excluded by the words "any other law" in S. 89. A I R 1928 Mad 1025-51 M 800-55 M L J 429-28 L W 321-113 I C 632.

—Only those cases in which persons choose to avail themselves of the machinery provided by Sch. II, are governed by the provision in S. 89 about references to arbitration. S. 82 does not affect the operation of O. XXIII, r. 3 which may be resorted to by the parties to a suit if the suit is adjusted by an award. A I R 1927 Bom 365-51 B 908-29 Bom L R 1254-103 I C 516.

—S. 89 does not preclude the operation of O. XXIII, r. 3. The general power given to parties under O. XXIII, r. 3 to adjust their disputes by a lawful compromise at any time after the institution of the suit cannot be superseded by the power given by s. 20 of Sch. II to any person interested to apply to a Court. A I R 1925 Mad 50-76 I C 502.

—"Any other law for the time being in force" do not apply to O. XXIII, r. 3 but to the amendments of, or substitutes for, the Arbitration Act or other piece of legislation. Court should recognise reference to arbitration in a pending suit without intervention of Court. A I R 1921 Cal 238-25 C W N 127-61 I C 919.

—"By any other law for the time being in force" in S. 89 do not refer to O. XXIII, r. 3 but to some law extraneous

## C. P. C. (1908) SEC. 89 (Contd)

## (3) "Any other law in force." (Concl'd)

to the C. P. C. Award arrived at during pendency of a suit without the intervention of the Court will not be recorded as an adjustment and enforced by one of the parties if not consented to by the parties. A I R 1921 Lah 232-3 Lah L J 162-67 I C 123.

—Per Kanhaiya Lal J.—"Any other law" in s. 89 applies to O. XXIII, r. 3 or to any other portion of the C. P. C. S. 89 clearly aims at giving effect to the provisions of Sch. II, as if they had been enacted in body of Civil Pro. Code. (Mukerji J. Contra). A I R 1925 All 503-47 A 637-23 A L J 561 (F B)-88 I C 763.

—Per Madgavkar and Aston, A. J. Cs. O. XXIII, r. 3 is not included in the words "Any other law" in s. 89 A I R 1921 Sind 65-16 S L R 174-81 I C 653.

—Award during the pendency of a suit and without the consent of the Court cannot be enforced either under O. XXIII, r. 3 C. P. C. or under the Indian Arbitration Act. Arbitration in the course of litigation is not governed by the Indian Arbitration Act but by the second schedule. A I R 1922 Cal 404-49 C 608-69 I C 803.

—A party wishing to enforce an award made on reference to arbitration of the Court must prove that it was justly, legally and properly arrived at. The expression "any other law for the time being in force" in s. 89 apply to O. XXIII, r. 3. Reference to arbitration without the intervention of the Court is not recognised. 37 B 639-15 Bom L R 340-19 I C 786.

## (4) Formalities.

—Award arrived at by the parties to a suit in arbitration without an order of the court can be confirmed in the terms of the decree. A I R 1931 Rang 58-9 R 39-Ind Rul (1931) Rang 121-131 I C 57.

—Arbitration without intervention of Court—Application to file the award—Not compulsory—Suit to enforce the award—Maintainability of—Not res judicata See 18 A L J 960-43 All 108-60 I C 626.

—Arbitration—Agreement to refer present or future differences—Suit in contravention of—Agreement not a bar to suit—Proper procedure to take steps under C. P. C. Sch. II paras. 17 and 18—Sp. Rel. Act, S. 21 not applicable. See 23 C W N 716-29 C L J 399-51 I C 80-46 Cal 1041.

—Application to obtain a decree in terms of an award, only under this section —Governs all arbitrations except specially excluded—Arbitration without order of Court during pendency of suit not excluded. See 18 Bom L R 559-37 I C 140-40 Bom 386.



## C. P. C. (1908) SEC. 89 (Concl'd)

## (5) Power of Court.

—Where a Court has power to give merely a declaration without any substantial relief which was reserved to entirely different tribunals under the statute, thereby barring a fresh suit founded on the declaration, the case cannot be one "fit to be decided" within the meaning of O XXXVI r. (5) (2) (c), A I R 1930 Bom 232=32 Bom L R 416=Ind Rul (1930) Bom 385=125 I C 897.

—After the institution of a suit the Court controls all proceedings in arbitration. Award made on private reference cannot be enforced in the suit as an adjustment of disputes under O XXIII, r. 3 or under the general law of contract unless consented to by both the parties. A I R 1927 Cal 837=47 C L J 59=33 C W N 390=104 I C 360.

—Court may regard an award passed in suit which is pending without the intervention of the Court as an adjustment under O. XXIII, r. 3. A I R 1927 Mad 1126=53 M L J 444=39 M L T 593=26 L W 231=104 I C 674.

## C. P. C. (1908) SEC. 91

—The insertion of this new provision enables a suit to be brought for relief against a public nuisance irrespective of special damage. S. 91 is not applicable to a suit for declaration of the rights of the inhabitants of the village to the use of a pathway. Obstruction of a village pathway does not affect the public at large, 46 I C 970

—No right which did not exist before is created by S. 91, and no body is deprived by S. 91 of any right derived from the general land of the land. S. 91 is not a prohibitive section. A I R 1924 All 599=46 A 470=22 A L J 729=L R 6 A 67 Civ=85 I C 304.

—O I, r-8 is not controlled by S. 91 which does not affect the plaintiff's right to sue independently of its provisions. A I R 1925 Cal 1233=88 I C 505.

—A suit to remove encroachment on of road kept open by a right of easement is not governed by S. 91, and can be maintained without the consent of Advocate General. A I R 1929 All 790.

—Where relief sought is not in respect of public nuisance but in respect of a right easement, no declaration can be made that the place in suit was a public thorough fare and had been obstructed, as such. A I R 1923 Lah 546=73 I C 616.

—No suit for declaration that suit land was street land and for mandatory order directing the defendant to remove the otla made by him or the land, is maintainable in absence of proof that he was unable to use the road, and of special damage. A I R 1925 Bom 367=27 Bom L R 421=87 I C 934.

## C. P. C. (1908) SEC 91 (Concl'd)

—In a suit to establish public right relying on special damages, the plaintiff must specifically allege special damages mere general allegation is insufficient. A I R 1926 Cal 549=91 I C 728.

—No private action is maintainable for public injury but a private action is maintainable for private nuisance. Where a procession of Hindu Idol was obstructed along a certain road by Mahomedans it was held that each party was competent to bring a private suit for an injunction, against the other 12 N L R 130=36 I C 534.

—No private action is maintainable for obstruction of a highway without any special damage. 23 M L J 539=12 M L T 491=(1913) M W N 991=16 I C 962.

—But the plea that suit is not maintainable for want of sanction of the Advocate-General under S. 91 C. P. C. cannot be raised for the first time in the appellate Court. A I R 1928 Nag 39=105 I C 113.

—A suit to remove an obstruction to public road causing substantial damage to the plaintiff can be maintained without the consent of Advocate General. A I R 1929 Bom 94=53 B 187=31 Bom L R 97=Ind Rul (1930) Bom 417=117 I C 513.

—Highway-Right to go in procession along-Threat of obstruction-No damage-Order under S. 144. Cr. P. Code-Cause of action for a suit for injunction. See 36 M L J 79 (F B)=42 Mad 271=25 M L J 39=49 I C 533.

—Vesting of high way in public authority does not preclude private individuals from suing with leave in respect of public nuisances on the street. Acceptance of dedication of a highway to the public is to be inferred from public user of the way. 21 C W N 595=40 I C 74.

—The question whether a particular form of nuisance is a substantial grievance constituting a wrong peculiar to the plaintiff must be considered by the Court although it is not possible to translate into rupees and annas. A I R 1924 All 599=46 All 470=22 A L J 729=L R 6 A 67 Civ=85 I C 304.

## C. P. C. (1908) SEC 92.

## Synopsis.

- (1) Legislative Changes
- (2) Applicability scope and object of the section.
- (3) Appeal or Revision
- (3-a) Collector
- (4) Conditions necessary for a suit under S. 92
  - (a) Alleged breach of a public trust
  - (b) Necessity for directions of the court in administration of such trust

## C. P. C. (1908) SEC. 92 (Contd)

## (c) Consent of Advocate-General

- (4-a) Costs
- (4-b) Court fees
- (4-c) Decree
- (5) Jurisdiction of High Court to entertain suits under s. 92
- (5-a) Limitation
- (6) Meaning of the words "express or constructive trust created for public purposes of a charitable or religious nature"
- (6-a) Notification by Government
- (7) Parties to suit under S. 92
- (8) Who can sue under S. 92
- (9) What reliefs can be claimed in a suit under S. 92
  - (a) Clause (a) Removing a trustee
  - (b) Clause (b) Appointing a new trustee.
  - (c) Clause (c) Vesting any property in a trustee
  - (d) Clause (d) Directing accounts and enquiries.
  - (e) Clause (g) Settling a scheme
  - (f) Clause (h) Granting such further or other relief as the nature of the case may require.
- (10) Religious Endowments Act 1863 and s 42 of specific Relief Act 1877, bearing of on S. 92 C P C
- (11) Parctice.
- (12) Miscellaneous Cases.

## (1) Legislative Changes.

—The words "public purposes of a charitable or religious nature" have been substituted for the words "public charitable and religious nature" so as to clear away the doubts arisen under the old Code and to widen the scope of the section. So also the words "in the principal court of original jurisdiction" have been substituted for the words "in the High Court or the District Court" and the words "or any other Court empowered in that behalf by the Local Government" newly added.

—Clause (a) is new as also the clause (d) and the sub-section (2) So also the words "whether contentious or not" are new, and the words "what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust" have been substituted for the words "the proportion in which its objects are entitled." Since repeal of the word "direct" by Act 7 of 1888 the plff. need not now have "direct interest" so as to come under S. 92.

## C. P. C. (1908) SEC 92 (Contd)

## (2) Applicability scope and object of the section.

—S. 92 does not apply when suit is not for vindication of public right but of a private right of being a co-trustee.

A I R 1927 Mad 338=97 I C 480.

—A suit to establish the existence of the trust itself, where the whole question involved is whether such a trust exists or not is not within the purview of s. 92 A I R 1926 Pat 321=5 P 539=7 Pat L T 679=(1926) Pat 145=94 I C 433.

—S. 92 is inapplicable to trusts not yet completed. Suit for administration of trusts of a will for charitable purposes is maintainable though it is not brought under s. 92. 31 M L T (H. C) 63=16 L W 922=70 I C 903.

—A suit by the worshippers at a mosque to set aside alienation of property by trustee is not within the purview of s. 92. 51 I C 799=4 Lah L J 55=58 P W R 1919.

—In the absence of a regular trustee of temple property right to sue for possession accrues to the general body of worshippers. 71 I C 463.

—As to the scope of the suit under s. 92. see 23 C W N 115=49 I C 355.

—S. 92, C. P. C. applies to suits against trustees de son tort of a public trust. 40 I C 165.

—A trustee de son tort may be sued under s. 92. A minor even under the Mahomedan Law cannot be a trustee or mutuwalli of a mosque. 18 O C 38=27 I C 389=10 L J 726.

—S. 92 does not apply to private trusts. 25 I C 661.

—That Provisions of s. 92 are mandatory is made clear by the new sub-section 92 (2) 24 M L J 658=20 I C 767. Suits relating to private rights are not within the purview of s. 92. 35 A 459=11 A L J 673=20 I C 37.

—S. 92 (2) protects rights of the public and does not infringe private right. 13 M L T 515=19 I C 740=25 M L J 373.

—Whether notice to Court of wards in a suit against a ward is necessary see 18 Bom. L R 563=40 Bom 541=37 I C 186.

—Suit by a trustee against a trespasser does not come under the purview of s. 92. 23 M L J 347=17 I C 586.

—Provisions of Section 92 if retrospective Declaratory or mandatory See 13 I C 264.

—A relief asking for a permanent injunction restraining the defendant from obstructing the general public in

## C. P. C. (1908) SEC. 92 (Cont'd)

## (2) Applicability scope and object of the section. (Cont'd.)

going to the Thakurbari in dispute for the purposes of puja is not one of the reliefs set out in cls. (a) to (h) of S. 92. It is no doubt true that in a suit properly framed under s. 92 a relief may be granted to the plaintiff which may ultimately amount to an injunction restraining the defendant from prohibiting the plaintiff from performing puja in the Thakurbari but, it is not a relief which is contemplated by s. 92 and there is no bar to the grant of such relief on account of the absence of the consent of the Advocate-General. Claim that Thakurbari was public property—The relief asked for by the plaintiff was not one of the reliefs set out in s. 92, Civil P. C. requiring the previous sanction of the Advocate-General—Also held that though it is true that in a suit properly instituted under s. 92 C. P. C. the defendant may raise the objection that the property was not the property of the nature of an express or Constructive trust created for public purposes, and on such objection being taken the Court has to decide whether or not the subject matter of dispute is such as the defendant claims to be, yet that does not take away the jurisdiction of the ordinary Civil Court to make a declaration that a particular property is a property belonging to the general public. A L R 1933 P 265.

—S. 92 does not apply in the case of a suit for declaration of right of joint management of a mosque by plaintiffs together with defendants and the residents of their moholla 33 B L R 1575=135 I C 806=I R 1932 B 118=A I R 1932 B 65.

—Suit by trustee for recovery of alienated property does not come under the purview of s. 92 55 M 549 (555)=62 M L J 180=132 M W N 9=35 L W 156=138 I C 74=A I R 1932 M 234=I R 1932 M 493=A L R 1932 M 767.

—The object of s. 92 is to provide special proceedings to determine questions relating to the administration of public religious or charitable trust and to protect trustees from vexatious suits. 10 R 342 (349)=A I R 1932 R 132=140 I C 317= I R 1932 R 231.

—To see whether S. 92 (1) applies to any case, there are two tests—(1) whether the case relates to any breach of an express or constructive trust mentioned therein or whether the direction of the Court is deemed necessary for the administration of any such trust; and (2) whether the relief asked for is one of the reliefs specified in that section. 61 M L J 703 (706)=1932 M W N 1340=36 L W 633=I R

## C. P. C. (1908) SEC 92 (Cont'd)

## (2) Applicability scope and object of the section. (Cont'd.)

1932 M 829=140 I C 197. see to the same effect 33 B L R 1575=135 I C 806=I R 1932 B 118 =A I R 1932 B 65.

—S. 92 does not apply in the case of a suit to establish right to trusteeship A I R 1931 Mad 801=34 L W 254=Ind Rul (1931) Mad 702=133 I C 14.

—S. 92 does not apply in the case of a suit for declaration of right to manage a Charitable Institution 22 B 216; 23 B 20; 33 C 789; 35 A 459; 41 C 749; 45 A 335, followed. 44 A 62, distinguished. A I R 1931 Nag 198=27 N L R 299=Ind Rul (1931) Nag. 185=134 I C 857.

—S. 92 does not apply in the case of a suit by new trustee for declaration of right to trusteeship and injunction A I R 1931 Rang 322=9 R 459.

—Trustee's suit for recovery of possession of property from a trespasser is not under s. 92 A I R 1931 Bom 170=32 Bom L R 1687=Ind Rul (1931) Bom 213=129 I C 741.

—S. 92 governs a suit for a declaration that certain property belongs to a public charitable trust and for an injunction against the pujari against alienating the same. A I R 1931 Sind 87=Ind Rul (1931) Sind 49=131 I C 177.

—In order to bring s. 92 into operation, there must be a suit alleging a breach of some express or constructive trust created for public purposes of a charitable or religious nature or the direction of the Court must be deemed necessary for the administration of such a trust. 30 Bom L R 774 (P C)=26 Bom L R 950, relied on. A I R 1931 Bom 33=Ind Rul (1931) Bom 107=32 Bom L R 1435=128 I C 891.

—A society converting public property into money can be sued under S. 92, and not under s. 307. Succession Act A I R 1931 All 212=(1931) A L J 36=53 All 422=130 I C 493.

—S. 92 (1) applies to Mutts and public trusts. (1913) M W N 581=25 M L J 393=38 M 356=13 ML T 498=19 I C 694.

—S. 92 (2) is retrospective in its effect and therefore a suit instituted before the new Code came into force without the consent of Advocate-General was held not maintainable for want of such consent when the suit was taken up for disposal after the new Code came into force. 5 S L R 181=13 I C 264.

—Suit under S. 92 being a representative suit it does not abate on the death of one of the plaintiffs but the court can add other parties under O 1 r 10 C P C 31 M L J 279=(1916) 1 M W N 402=3 L W 305=34 I C 384=40 Mad 110.

## C. P. C. (1908) SEC. 92 (Contd)

## (2) Applicability scope and object of the section. (Contd)

—The object of S. 92 is protect not only public rights but also rights of trustees and institutions. A I R 1930 Mad 129=58 M L J 30=53 M 223=30 L W 954=(1929) M W N 911=Ind Rul (1930) Mad 652=124 I C 220.

—Section 92 does not apply to suit between rival claimants to trusteeship—Trustee appointed by founder cannot be removed by him except under s. 92. A I R 1922 All 499=44 A 721=20 A L J 712=68 I C 786.

—A suit for declaration to the effect that the character of the waqf property should be retained, is not within the scope of s. 92. 9 I C 755

—A suit for recovery of possession of waqf property and for a declaration that the plaintiff is the rightful mutwalli is not within the scope of s. 92. and the relief claimed is not any of the reliefs under the section. 29 I C 423=20 C W N 605.

—A suit by a newly appointed trustee against the old trustee to recover lands and moveable property, mesne profits accounts and damages was held in appeal to fall within the scope of s. 92 CPC because it was a suit for the removal of the trustee for taking accounts, and for damages for wrongful acts. There is much which is common between s. 92 C P C and s. 14 of the Rel. End. Act but the former is wider. 20 Bom L R 954=42 Bom 742=43 I C 514.

—S. 92 is mandatory and no relief mentioned therein can be obtained without its aid. A I R 1925 Pat 544=4 Pat 741=7 P L T 4=(1925) Pat 194=88 I C 1035 A suit by the trustees of a public religious trust to recover trust property from strangers is not within the scope of s. 92. 37 Bom 95=17 I C 665=14 Bom L R 941 see also 24 M L J 48=18 I C 622.

—Power of Courts to fix limits for period of accounting in a suit for account is discretionary. Persons who are members of the community for whose benefit a choultry was founded and who reside within its locality are interested persons within the scope of s. 92. 35 M L J 661=9 L W 1=25 M L T 86=48 I C 740

—A suit for accounts and directions as to what should be done with trust funds falls within s. 92. A I R 1924 Bom 518=26 Bom L R 950=86 I C 490. See also A I R 1923 Nag 298=6 N L J 209=74 I C 45.

—Suit by trustees against a co-trustee for accounts falls under cl. 1 and cannot be instituted except in conformity with cl. 1 A I R 1921 Mad 696=16 L W 155=(1922) M W N 83=66 I C 837.

## C P. C. (1908) SEC 92 (Contd)

## (2) Applicability scope and object of the section. (Contd)

—Suit by admitted trustee against non-trustee for recovery of trust property and submission of accounts is cognisable without sanction S. 92 does not apply to a suit for establishing right to the office of Mutawalli A I R 1925 Pat 544=7 Pat 471=7 P L T 4=(1925) Pat 194=88 I C 1035.

—Suit by one trustee against another for accounts is not governed by s. 92 and no sanction is necessary. A I R 1922 Mad 17=45 M 113=15 L W 18=30 M L T (H C) 1=41 M L J 608=(1921) M W N 833 (F B) =69 I C 394, also A I R 1923 Nag 298 =74 I C 45.

—S. 92 does not apply in the case of a suit for declaration that the property is waqf. 2 Lah L J 457.

—A suit to set aside alienation and declaration that the property is waqf is not a suit under s. 92, 8 A L J 710=11 I C 36 =33 A 660.

—Suit by worshippers of temple for possession is not maintainable, but they can sue for declaration that it is trust property. But to such a suit s. 92 will not apply. 1 Lah L J 150=84 P L R 1922 =67 I C 320 (2).

—Suit for declaration that the property is wakf does not require sanction. A I R 1927 Lah 350=8 Lah 111=28 P L R 486=99 I C 756.

—Suits for declaration of title to property attached to religious and charitable institutions is out of the scope of s. 92 A I R 1929 Lah 740=Ind Rul (1929) Lah 1 =120 I C 161.

—S. 92 does not cover a suit for declaration that property is wakf. A I R 1930 Cal 787=34 C W N 1129=53 C L J 91 =58 C 474=130 I C 369.

—Suit by pujari claiming share in offerings which formed part of temple fund falls under s. 92. A I R 1921 Bom 297=45 B 683=23 Bom L R 125=60 I C 924.

—A scheme suit does not lie in the case of grants of Inam lands to officers in a Hindu temple because those grants are not held in trust and are given simply in lieu of services 18 M L T 122=(1915) M W N 531=2 L W 632=30 I C 74.

—Where defendant is neither constructive trustee nor trustee de son tort, suit under s. 92 is not maintainable. A I R 1923 All 247=L R 4 A 190 Civ=21 A L J 310.

—Any decree passed in suit under s. 92 is binding not only on the trustees, but also on all the worshippers. A I R 1925 Mad 1070=(1925) M W N 505.

—Suit under s. 92 will lie against a trustee de son tort. A I R 1922 All 512=21 A L J 105=44 A 652=69 I C 990

## C. P. C. (1908) SEC 92 (Contd)

## (2) Applicability scope and object of the section-(Contd)

—Suit under s. 92 can be maintained by worshippers in Sikh Dharmshala. A I R 1925 Lah 189=5 Lah 455=85 I C 111.

—Under s. 92 suit against express trustees is maintainable. A I R 1924 All 884=22 A L J 866=L R 5 A 697 Civ=47 A 17=84 I C 631.

—A suit to determine the right between two rival claimants is not within the scope of s. 92 A I R 1924 Pat 502=5 P L T 231 =76 I C 89.

—Section 92 does not apply where suits are not brought to establish public right but to remedy infringements of individual rights. A I R 1921 Pat 511 =(1931) Pat 6=57 I C 270.

—Section 92 does not cover suit to protect private right as mahant. A R 1924 Lah 131=4 Lah 295=5 Lah L J 480=73 I C 645.

—Suit against trespassers for recovery or trust properties does not fall under s. 92 4 Lah 295=73 I C 645.

—S. 92 C P C does not apply to a private trust. A direction by will that the grandson should worship the idols from the income of property does not amount to a charitable gift of the whole property to the idols. A I R 1922 P C 253=24 Bom L R 937=49 I A 100=16 M L W 963=36 Cal L J 57=49 Cal 459=27 C W N 174=20 All L J 625=43 M L J 116 (P C)=67 I C 561

—Section 92 will not apply where claim is based on plaintiff's personal right of possession mingled with a claim based upon breach of trust. A I R 1923 Pat 309 =67 I C 464

—Suit by a trustee against a person whom he alleges to have lawfully dismissed is outside the scope of s. 92. A I R 1921 Mad 403=14 L W 38=(1921) M W N 439 =62 I C 761.

—Suit under s. 92 is not maintainable where plaintiff does not allege defendants to be trustees. A I R 1921 All 116=19 A L J 236=62 I C 744.

—Per Dalal J—A suit lies against trustees de son tort A I R 1924 All 884 =L R 5 A Civ 697=47 A 17=22 A L J 866 =84 I C 631.

—Suit under s. 92 cannot be referred to arbitration, as it is not a suit for determination of private rights. A I R 1923 Nag 112=6 N L J 7=72 I C 1010

—Defendant claiming under trust—Plaintiff challenging defendant's appointment as trustee—Suit under s. 92 lies. A I R 1925 Cal 1106=86 I C 799

—A suit under s. 92 can be maintained by Hindus of neighbouring villages attending the temple on important occa-

## C. P. C. (1908) SEC. 92 (Contd)

## (2) Applicability scope and object of the section (Contd).

ssions. A I R 1926 Mad 267=49 M L J 746 =(1926) M W N 40=91 I C 924.

—S. 92 does not apply in the case of a suit by a plaintiff suing for possession as a trustee and alleging the defendant to be a trespasser A I R 1928 All 33=50 A 165=25 A L J 902=106 I C 389

—Where the relief sought is of one enumerated under s. 92, it is doubtful whether distinction between enforcement of public and private rights is still maintainable S. 92 does not affect, but merely prescribes modes of enforcing, substantive rights. A I R 1928 All 660=51 A 30=26 A L J 1016=111 I C 93.

—S. 92 does not apply to a suit for a declaration that the property in dispute is a public charitable property and not the property of the defendant. A I R 1930 Bom 167=32 Bom L R 265=Ind Rul (1930) Bom 349=125 I C 445.

—Even though S. 92 does not apply to a suit to recover possession from alleged trespassers it does not bar the suit by the plaintiff in his private capacity. A I R 1929 Bom 193=31 Bom L R 349=Ind Rul (1929) Bom 427=117 I C 523.

—S. 92 does not apply to suit by co-trustee to establish right to joint management. A I R 1927 Mad 948=39 M L T 214 =105 I C 194.

—Requirement of s. 92 cannot be evaded by claiming bare declaration. A I R 1926 Mad 1029=24 L W 286=97 I C 630.

—Relief can be granted against a trustee de son tort but not against the alienees of trust property in a suit under s. 92 A I R 1925 Mad 212=78 I C 950.

—Sanction 92 would not apply to a suit by person claiming as trustees against trustees in possession A I R 1923 A 319=21 A L J 191=45 A 335=L R 4 A 142 Civ =71 I C 767.

—Suit by trustee of temple is not exempt from s. 92. A I R 1921 Mad 479=14 M L J 238=62 I C 911.

—Person put in charge as pujari of an idol is a servant and not a trustee—Suit under S. 92 is not maintainable against him A I R 1923 All 247=21 A L J 310=L R 4 A 190.

—S. 92 of the C P Code has no application to a suit for a declaration that the plaintiff and the defendant are the mutwallis of a waqf property, and are entitled to manage it jointly. 52 I C 628.

—A suit for a declaration that plff. is the duly constituted mahant of a mutt and for recovery of possession and injunction is not one under S. 92 of the C P Code 34 I C 502.



## C. P. C. (1908) SEC. 92 (Contd.)

## (2) Applicability scope and object of the section (Concl.)

—Held, that a suit for possession cannot be maintained under s 92 of Act V of 1908 against a trespasser in possession of trust-property. 14 O C 65.

—A suit to remove a trespasser does not come within the scope of S. 92, 36 B 29-13 Bom L R 989=12 I C 577.

## (3) Appeal of Revision.

—An order passed on an application for modification of the scheme for administration of a charitable trust is not appealable and does not come under s. 47 C. P. C. even though a scheme contained provisions for such modification. A I R 1931 Bom 391=55 B 414=Ind Rul (1931) Bom 388=33 Bom L R 520=133 I C 740. Order approving appointment of new trustee by Committee under a scheme is not a decree and is not appealable. Ind Rul (1931) All 641=133 I C 401.

—Order passed by District Judge as a persona designata under a scheme is not appealable. A I R 1931 Bom 388=33 Bom L R 546=Ind Rul (1931) Bom 407=133 I C 823.

—Order on an application for modification of Scheme is not appealable. A I R 1931 Bom 391=33 Bom L R 520=55 B 414=Ind Rul (1931) Bom 388=133 I C 710.

—It was held that an appeal lay from an order in a Scheme suit, declaring rights of new trustees to recover money from the defendants. A I R 1931 Mad 471=60 M L J 167=(1931) M W N 590 =33 L W 143=54 M 337=Ind Rul (1931) Mad 686=132 I C 654.

—The rules framed by Court under a scheme decree to regulate the functions of Dharmakartas and to enforce office discipline are not appealable. 49 M L J 25; 54 Mad 345; 54 Mad 315, distinguished. A L R 1933 Mad 993.

—No appeal lay from an order declining to remove a trustee when a decree in a scheme suit provided for appeal from an order removing a trustee or appointing a new one (1917) M W N 420=5 L W 596=38 I C 415.

—Stay of hearing of a suit for the removal of the trustee and for appointment of new trustee by the District Judge—pending adjudication as to nature of trust by a competent Court was held, to be a wrong action of the District Judge in refusing to exercise his jurisdiction. A I R 1931 All 332=Ind Rul (1931) All 267=130 I C 299 (1).

—An order refusing to remove a trustee for misconduct is not appealable. A I R 1927 Mad 427=99 I C 425.

## C. P. C. (1908) SEC 92 (Contd.)

## (3) Appeal or Revision. (Concl.)

—An appeal by one surviving appellant is maintainable from the decree in a suit brought by two persons with sanction. 2 O L J 259=30 I C 240.

—Revision of Collector's order granting sanction for suit to remove Mahant does not lie. 40 P L R (1911)=8 I C 1160=104 P R 1910.

—Order bringing on record new trustees instead of old ones, in evasion of s 92 is without jurisdiction. A I R 1931 Cal 281=52 C L J 78=Ind Rul (1930) Cal 386=130 I C 866.

—Without a regular suit being filed under s 92, the District Judge acted without jurisdiction in ordering suspension of a mahant on mere report and therefore the High Court could set aside the order in revision. 16 A L J 742=47 I C 850.

## (4) Conditions necessary for a suit under s. 92.

## (a) Alleged breach of a public trust.

—Conditions necessary for a suit under s. 92 are either of the two viz that there must be an alleged breach of any express or constructive trust created for public, charitable or religious purposes or there must be some direction of the Court in the administration of such trust. 10 Bom L R 87.

—Neglecting to save property from the effects of breach of trust committed by predecessor is also a breach of trust on the part of the present trustee. A I R 1925 All 683=23 A L J 601=L R 6 A 352 Civ.=47 A 770=89 I C 40.

—Question of breach of trust cannot be decided where suit is not under s 92. A I R 1927 All 526=49 A 191=25 A L J 281=99 I C 568.

—A trustee setting up adverse title to the trust property is guilty of breach of trust and a suit can lie. 17 I C 779=14 Bom L R 1135.

—A suit under s 92 is the only remedy when there is a breach of trust, for declaration of disputed properties to be a trust, for the removal of the trustee or for the preparation of a scheme. 11 P 288 (346)=12 P L T 817=136 I C 417=I R 1932 P 81=A I R 1932 P 33=A L R 1932 P 373.

—Breach of trust is an essential condition for a suit under s. 92 suit by reversioners for the removal of a Hindu widow from trusteeship, for appointment of plaintiffs and for possession of trust property can be maintained only under s. 92. 31 M L J 280=4 L W 264=36 I C 678.

## C. P. C. (1908) SEC. 92 (Concl'd)

## (4) Conditions necessary for a suit under S. 92. (Concl'd)

## (a) Alleged breach of a public trust. (Concl'd)

—It has generally been the practice of the Court to decide the question of public trust first. An order as to costs of the plaintiff payable out of the trust estate on account of the defence raised that there was no public trust even though his suit was dismissed for want of cause of action was held to be without jurisdiction and was therefore revisable under s. 115 C P C 20 C W N 1354=35 I C 837.

—Per Karamat Husain J.:—Strong evidence is required to prove a public trust. Mere fact that the income of the property Per Chamber Judge and Per Richards, C. J. dissenting. 9 A L J 709=34 A 468 =14 I C 698.

—Grant made in favour of "Nanak shahi gaddi" by a Muhammadan Ruler for charitable purposes was held to be trust-property for public charitable and religious purposes, (Karamat Husain Judge dissenting) It was also held that the Mahant was the trustee thereof. 11 Ind Cas 166.

## (b) Necessity for directions of the Court in administration of such trust.

—In the case of public religious trust if the trustees named by the testator to carry out the trust are dead when the trust became operative the Court will administer such trust. A suit of ejectment against trespasser is not a suit under s. 92. 13 Bom L R 989.

—Words "where the direction of the Court is deemed necessary for the administration of any such trust" mean that where the Court has to give direction in the nature of framing a scheme or otherwise for the administration of the trust. Mere appointment of mutwalli is not such a direction, A I R 1998 Cal 368=55 Cal 1284=32 C W N 835=110 I C 416.

—A court has power under S. 92 to direct in administration of trust money in proper security. 33 I C 677.

—Necessity for direction of court for administration of trust is a necessary condition for a suit under s. 92. A I R 1931 Bom 33=32 Bom L R 1435=Ind Rul (1931) Bom 107=128 I C 891.

—Injunction restraining defendants from interfering with right of joint management of trust whether amounts to a direction for administration of trust. 33 B L R 1575=135 I C 806=I R 1932 B 118=A I R 1932 B 65.

—Where the prayers in the plaint were (i) for a declaration that the plaintiff as a co-sharer was entitled to act as

## C. P. C. (1908) SEC. 92 (Concl'd)

## (4) Conditions necessary for a suit under s. 92. (Concl'd)

## (b) Necessity for directions of the Court in administration of such trust. (Concl'd)

pujari (trustee) once in every three years and (2) to appropriate the income from the offerings made to the deities, held, that the suit came within the purview of s. 92 C. P. C. as his appointment once in three years would involve the removal of defendant for that year and that the claim of the plaintiff to appropriate the offerings for himself involves the directions by the court as to the taking of accounts. S. 92 C. P. C. contemplates also cases where the directions of the court may be necessary even though there has been no breach of an express or implied trust. Per Tyabji J.—The application of S. 92 C P C to the facts of any particular case must depend upon the nature of the trust as well as the particular reliefs sought. A L R 1934 Bom 52.

—Where direction of Court is deemed necessary for administration of public trust, s. 92 applies. A I R 1928 All 33= 50 A 165=25 A L J 10=106 I C 389.

—Beneficiaries can sue trustees for proper administration without seeking their removal if the trustees misappropriate temple property. A I R 1927 All 518=101 I C 744.

—The civil courts can question the appointment of a trustee by the temple committee if made unreasonably and not in good faith and a suit for declaration and injunction against the new trustees cannot lie unless sanction is obtained under s. 92, because the prayer asks for the direction of the court in the administration of a public trust within the meaning of s. 92. 42 Mad 668=26 M L T 143 = (1919) M W N 522=53 I C 603.

## (c) Consent of advocate general.

—A suit by a person having special right to be a trustee is not within the scope of s. 92 and no sanction is required. 24 M L J 48=1013 M W N 368=18 I C 622.

—As a suit in forme pauperis is not allowed under s. 92, sanction of the Legal Remembrancer to such persons is not valid unless the plaintiffs pauperism had been brought to his notice at the time of granting sanction. The pujari of a temple is a person interested in the trust within the meaning of s. 92 All persons are interested in the trust if they have an interest in its due and proper administration 14 I C 731=15 O C 202.

## C. P. C. (1908) SEC. 92 (Contd)

## (4) Conditions necessary for a suit under s. 92. (Contd.)

## (c) Consent of advocate general. (Contd.)

—If a suit relating to public religious charity is brought with the consent of Advocate General, fresh consent is necessary on the addition of a new party defendant if new reliefs are asked against him. 13 Bom L R 583=36 Bom 168=11 I C 726.

—New sanction on the addition of a new defendant is required only when the scope of suit is altered thereby A I R 1926 Mad 970=24 L W 419=(1926) M W N 626 =97 I C 462.

—In the case of a suit relating to public charity sanction given by Collector in the name of one of the plaintiffs alone is good and valid. 13 Bom L R 49=9 Ind Cas 358. Delegation of the duty of sanction by Collector to his subordinate is illegal 13 Bom L R 207=35 B 243=101 C 803

—Consent of Advocate-General is necessary in the case of a suit for appointment of new trustee 9 I C 168=(1911) M W N 142=9 M L T 301=21 M L J 430.

—A suit brought by worshippers of a shrine for the removal of the trustee thereof falls under S 92 of the Code and, if instituted without the consent in writing required by the section, the relief for the removal of the trustee cannot be adjudicated upon. 11 P W R 1918=44 I C 879.

—Sanction under s. 92 is necessary only when the suit is for one or more of the reliefs mentioned therein but if it is for other reliefs e. g. for declaration that certain land is temple land and for injunction restraining defendant from alienating the same, then sanction is not necessary. 42 I C 260.

—No Sanction is necessary in the case of a suit by disciples for setting aside alienation of mutt properties by mata-dhipati. 41 Mad 124=33 M L J 357=22 M L T 218=42 I C 366=6 M L W 666.

—Suit by worshippers for declaration that alienation by Temple Committee of offerings of worshippers is invalid is maintainable without the sanction of the Advocate General. 40 Mad 212=31 M L J 777=20 M L T 490=38 I C 73.

Duty of sanctioning authority before giving sanction under s. 92 is to see whether the case is bona fide and whether the petitioners are interested in the trust suit under s. 92 for private purposes is an abuse of the process of the Court. 37 I C 897.

—Suit relating to public trust cannot be maintained without Advocate-Generals,

## C. P. C. (1908) SEC. 92 (Contd)

## (4) Conditions necessary for a suit under s. 92. (Contd.)

## (c) Consent of advocate general. (Contd.)

consent unless the plaintiffs have a special interest in the trust. Right to worship idol is not a sufficient or special interest. 35 I C 846.

—In case of suits to enforce privileges to worship—Sanction if necessary for institution of suit 3 L W 512=35 I C 88.

—Sanction under s. 92 of Advocate-General or Collector is not necessary in the case of an administration suit which was held to be cognizable by the subordinate Judge's Court. But in the case of bequest to charity sanction is necessary. 40 Bom 439=18 Bom L R 335=34 I C 167.

—Abatement of a suit brought by two persons with sanction does not take place on the death of one during pendency of suit because another member of the public interested in the trust can take his place with the necessary sanction 37 All 296 =13 A L J 379=28 I C 681.

—The consent of the Collector under s. 92 should not be conditional but must be specific permission, 30 Bom 580=17 Bom L R 625=30 I C 17.

—Consent of the Collector of Sind under S. 92 is required to institute a suit regarding public trusts. A temple worshipper has a sufficient interest to file a suit under the section Offerings in a public temple are not private property but are public property. 24 I C 712=7 S L R 129.

—Sanction of Advocate-General under s. 92 is not necessary for a mutwalli applying to Dt Judge for sanction to lease. 24 C W N 339=47 Cal 592=56 I C 475.

—Consent of Advocate-General is necessary in the case of a suit by the beneficiaries impugning compromise of a suit by trustee for removal, for accounts and for a scheme. 7 Bur. L T 169=23 I C 111=7 L B R 333.

—Consent of the Advocate-General is not necessary to apply for modification of a scheme when a clause in it gives liberty to apply. A I R 1931 Bom 388=33 Bom L R 546=Ind Rul (1931) Bom 497=133 I C 823 following 33 Bom L R 520

—Consent of Advocate-General is not necessary in the case of a suit by the trustee of a religious trust to recover possession of trust property against a trespasser. 41 Cal 749=22 I C 677=19 C W N 234.

—It is not necessary that the suit under S. 6 of Act XIV of 1920 which may be instituted without the sanction of the Advocate General on the trustee's failure to comply with the court's order to produce

## C. P. C. (1908) SEC. 92 (Contd)

(4) Conditions necessary for a suit under  
S. 92. (Contd)

## (c) Consent of advocate general (Contd)

accounts should be presented only by the persons who made the applications under SS. 3 and 4 of the Act Nor does the suit abate if the persons who made the application drop out. The relief claimed in the suit under S. 92 filed in pursuance of permission obtained under S. 6 must be confined to those which arise out of the trustee's failure to produce accounts and are connected with it. A prayer for a declaration that defendant is not the rightful Mahant is in no way connected with the failure to produce accounts and such a relief cannot be granted 1933 A L R 1039.

—Suit by a Hindu on behalf of the Hindu community can be instituted with the Court's sanction to recover Thakurdwara property from a trespasser but the permission of the Legal Remembrancer is unnecessary. 19 I C 973

—Sanction of Advocate General is not necessary in the case of a suit to restrain interference with plaintiff's right to exclusive worship 11 Bur L T 249  
=50 I C 509.

—Collector's sanction is necessary to join a third person being a real trustee after a suit being instituted against an alleged trustee with necessary sanction. A I R 1928 Lah 717=Ind Rul (1929) Lah 510=116 I C 34.

Collector's order granting sanction under s. 92 is not invalidated by want of notice to defendants. (1930) M W N 456.

—Court of Appeal can stay an appeal pending before it and allow the plaintiff to obtain Collector's sanction against other defendants if it is found that sanction is obtained only against one of three defendants. (1930) M W N 456.

—A declaratory suit that the property in dispute is wakf and alienations thereof void does not require sanction. A I R 1928 Lah 888=113 I C 120

—The trustees should be given a notice before granting sanction under s. 92, and sanction should be granted only after taking into consideration the status and position of the plaintiffs. A I R 1930 Mad 129=Ind Rul (1930) Mad 652=30 L W 954=(1929) M W N 911=58 M L J 39=53 M 223=124 I C 220.

—Suit restraining defendants from preventing plaintiffs from enjoying the uses and objects of trust requires Collector's consent. A I R 1930 Sind 204=Ind Rul (1930) Sind 225=126 I C 49.

## C. P. C. (1908) SEC. 92 (Contd)

## (4) Conditions necessary for a suit under

## S. 92. (Contd)

## (c) Consent of advocate general. (Contd)

—Fresh sanction is not required where new party is added but scope of scheme suit is not enlarged A I R 1929 Mad 635=Ind Rul (1930) Mad 388=122 I C 644.

—No relief can be granted with reference to prayers not covered by sanction A I R 1930 Mad 129=58 M L J 39=53 M 223=Ind Rul (1930) Mad 652=30 L W 954=(1929) M W N 914=124 I C 220.

—The necessity for a representative suit is obviated by s. 92 a suit under which requires only the consent of the Advocate-General A I R 1925 Mad 1070  
=(1925) M W N 505.

—Sanction is unnecessary if a suit is merely for vindication of private individual rights though the relief even claimed are those specified in s. 92. A I R 1927 Mad 820=103 I C 134.

—Suit filed with sanction but amended without such sanction adding strangers as defendants and reliefs not covered by s. 92, compromised by some plaintiffs does not fall within s. 11, Expl. 6 of Civil P. C. A I R 1928 P C 16=9 P L T 65=27 L W 339=32 C W N 482=26 A L J 464=54 M L J 609=55 I A 96=55 C 519=30 Bom L R 774=48 C L J 55 (P C)=108 I C 361.

—Sanction is necessary even where suit does not specifically asked for relief mentioned in s. 92 but does so by implication. A I R 1927 Mad 886=26 L W 274  
=109 I C 862.

—In order to be parties defendants do not require any permission of the Government Advocate. A I R 1927 Rang 180=5 R 263=103 I C 261.

—Sanction obtained against a person who is not a trustee cannot subsequently be availed of against real trustee. A I R 1928 Mad 970=24 L W 419=(1926) M W N 626=97 I C 462.

—The object of sanction being that trustees should not be sued unless there is a prima facie case against them, objections as to sanction cannot be waived. A I R 1926 Mad 970=24 L W 419=(1926) M W N 626=97 I C 462.

—Persons not having interest in trust will not be entitled to sue even with Advocate-General's written consent. A I R 1924 P C 221=51 I A 282=47 M L J 361=35 M L T 189=47 M 884=22 A L J 983=L R 6 P C 17=26 Bom L R 1121=40 C L J 454=29 C W N 154=20 L W 803=(1924) M W N 749=26 Pat L R 1=82 I C 804.

—A suit filed with sanction can be amended by addition of new parties

## C. P. C. (1908) SEC. 92 (Contd)

## (4) Conditions necessary for a suit under

S 92. (Contd)

## (c) Consent of Advocate General. (Contd)

without fresh sanction. A I R 1923 Sind 35=16 S L R 221=79 I C 539.

—Sanction is not necessary in the case of a suit in which one trustee sues another for accounts. A I R 1923 Nag 298=6 N L J 209=74 I C 45.

—Consent of Advocate-General is not necessary when a declaratory suit that a certain way was public is filed with Court's permission. A I R 1921 Cal 405=26 C W N 587=69 I C 910.

—Sanction granted for suit under s. 92 means any suit which may be raised under that section and is not confined to one of the species of suits that could be raised on the application. 48 C 493=13 L W 318=(1921) M W N 24=17 N L R 37=25 C W N 794 30 M L T 194=48 I A 12 (P C) =62 I C 737.

—Sanction granted by Collector is not invalidated because of his failure to consider whether trust was public etc. 60 I C 570.

—The effect on the scope of a suit determines whether sanction is required on the addition of interested parties in the suit. 12 L W 772=(1920) M W N 478=58 I C 124

—A suit by one trustee against other trustees for inter alia settlement of a scheme for management of trust property in rotation by the Co-trustees does not require sanction if it is based upon an agreement between the Co-trustees or on the terms of a will but if it is otherwise, then sanction is necessary. 63 M L J 703 (706-7) =36 L W 633=1932 M W N 1340=140 I C 197=1 R 1932 M 829.

—Details as regards names of proposed defendants and reliefs are not necessary for the validity of an order granting sanction. 90 W N 966 (971-2).

—Sanction of Advocate-General is not necessary for an application for modification of the scheme for administration of a charitable trust containing a clause giving liberty to apply for directions. [51 M 31, F B; 49 M 580; 6 R 590, dissented from; 24 B 45; 36 M 364; 45 B 683; 17 C W N 841; 37 C L J 281; A I R 1923 Pat 420; 28 Bom L R 309, followed, 15 Bom L R 142 (P C), relied on] A I R 1931 Bom 391=55 B 414=33 Bom L R 520=Ind Rul (1931) Bom 388=133 I C 740.

—Sanction is not necessary in a suit by disciples to declare decree against mutt. 28 M L J 410=18 M L T 135=28 I C 337.

—Sanction is necessary in the case of a suit for removal of a trustee and appoint-

## C. P. C. (1908) SEC. 92 (Contd)

## (4) Conditions necessary for a suit under

S 92. (Concl'd)

## (c) Consent of Advocate General. (Concl'd)

ment of a new one. 21 M L J 450=9 I C 168=9 M L T 301.

—Sanction is not necessary in the case of a suit for declaration that the plaintiff is founder of wakf, is entitled to appoint mutwallis, and that he made valid appointment in pursuance of such rights. A I R 1927 All 257=49 A 435=25 A L J 329 =99 I C 1045.

—Sanction is necessary in the case of a suit for accounts against the trustee in possession of waqf property under a compromise of a litigation. 49 I C 530.

—Suit by general trustee for balance of amount due brought against subordinate trustee is bad for want of sanction. A I R 1921 Mad 479=14 L W 238= 62 I C 911.

—S 92 C. P. C. 1908 is retrospective in its operation and bars a scheme suit even though instituted before passing of the new Code without sanction. 5 S L R 184=13 I C 264.

—Scheme being settled it is desirable that permission to apply should be given to any person interested in the trust. A I R 1928 Mad 268=108 I C 199.

—Before barring a suit for want of necessary consent under s. 92, the Court should see whether the suit is within the purview of s. 92 C P C. A I R 1923 Bom 67=46 B 101=23 Bom L R 876=64 I C 353.

—The Advocate-General is not concerned with private trusts. A I R 1921 Bom 338=24 Bom L R 1060=84 I C 759.

—Where the individual rights of a person are infringed, suit by him against a trustee is maintainable without sanction. A I R 1927 Mad 531=52 M L J 541=38 M L T 288=25 L W 575=102 I C 328.

## (4-a) Court fee.

—Clauses (a) and (b) are distinct AIR 1930 M 226. Suit under S 92 is governed by Art 17 (4) Sch II of Court Fees Act and not by S. 7 (iv) (C) A I R 1928 L 113= 8 L 730. Madras High Court Fees Rules (1925) do not exempt payment of fees in respect of suits under S 92 53 M L J 457= 26 L W 378= A I R 1927 M 940= 105 I C 119

## (4-b) Decree.

—Plaintiffs approving appointment of certain persons as committee—No consent in other matters decided—Decree is not consent decree. A I R 1927 Lah 382=100 I C 838.



## C. P. C. (1908) SEC. 92 (Contd)

## (4-b) Decree. (Concl'd)

—Body itself a creation of the decree if and when may be a decree-holder See 35 L W 22 (25).

## (5) Jurisdiction of High Court to entertain suit under.

—The High Court on the original side has jurisdiction to entertain suit under S. 92 even though the trust property is situate wholly outside jurisdiction if the defendant works for gain or dwells or carries on business within jurisdiction. 59 C 357 (360-1).

—Trust money deposited outside jurisdiction with a person carrying on business at the time of institution of suit within jurisdiction of the Calcutta High Court was held to be within jurisdiction of the High Court and therefore it could entertain the suit, 59 C 357 (361-2)=137 I C 808=A I R 1932 C 444=I R 1932 C 380=A L R 1932 C 572.

—The High Court has the power to alter or modify rules framed under scheme of management. A I R 1926 Bom 179=28 B L R 309=94 I C 47.

## (6) Meaning of the words "express or constructive trust created for public purposes of a charitable or religious nature"

—An express or constructive trust should exist before s. 92 C. P. C. applies. 1 A L J 26.

—The expression "express or constructive trustee" is not limited to trust, as in English Law "constructive trustee" include person holding fiduciary position, A I R 1927 Mad 614=50 M 567=52 M L J 415=25 L W 461=(1927) M W N 233=39 M L T 37=101 I C 420.

—Unless there is evidence that a trust was created for public purposes of a charitable or religious nature a Court is without jurisdiction to try a suit under s. 92. Mere feeding of an idol or maintaining fakirs and pilgrims from the income of certain property is not enough to constitute such a trust. The words "express or constructive trust in" s. 92 should be construed liberally and favourably to the assumption of jurisdiction whenever possible. 11 I C 308=8 A L J 1120.

—Public means a section of the public. 11 P 282 (344)=12 P L T 817=136 I C 417=I R 1932 P 81=A I R 1932 P 33=A L R 1932 P 373.

—Wakf for maintenance of Khankahs and for distribution of alms and charities is a public trust 11 P 288 (344-5)=12 P L

## C. P. C (1908) SEC. 92 (Contd)

(6) Meaning of the words "express or constructive trust created for public purposes of a charitable or religious nature (Concl'd)

T 817=136 I C 417=I R 1932 P 81=A I R 1932 P 33=A L R 1932 P 373.

—The words "trust" and "trustee" as used in S. 92 have not been used in any technical sense of the term as used in English law or in the technical sense in which the word "wakf" is used in the Mahomedan Law. The words have been used in the ordinary sense. It has been held in long series of decisions that this section does apply to Mahomedan wakfs and to Hindu debotters where there is no conception of two estates and two ownerships. What is required for the purposes of S. 92 is to find whether or not there is a property burdened with obligations for public purposes of a charitable or religious nature. It will apply in all cases, whether wakf or not where there is a clear indication that there is an obligation annexed to the property in favour of religious or charitable objects of a public nature 11 P 288 (337)=12 P L T 817=136 I C 417=A I R 1932 P 33=I R 1932 P 81=A L R 1932 P 373.

—A constructive trustee is subject to the same obligations as an express trustee and includes a person holding fiduciary position. A mahant of a mutt is a constructive trustee. A I R 1924 Bom 193=25 Bom L R 747=84 I C 808.

—A suit regarding matter which is more of a family matter than of a public nature should not be entertained by the Court under s. 92. A suit for a Scheme is premature when the property is probably nonexistent. A direction for accounts in a suit for administration against the administrator of an estate cannot be made unless he is made a party to the suit as such administrator 28 I C 611.

—Public Trust—Test of—Nanakshahi Gaddi. 11 I C 166.

—Whether purpose is public or not is to be found out from circumstances of each case. A I R 1921 Pat 511=(1921) Pat 6=57 I C 270.

—Under s. 92 trust must be for public purposes of charitable or religious nature. A I R 1923 Mad 376=17 L W 31=32 M L T 47=(1923) M W N 111=46 M 300=73 I C 991.

—Origin and founder of temple unknown—Members of public freely admitted, festivals are celebrated in a certain manner lead to the inference that the temple is a public one. 40 M L J 289=62 I C 655.

## (6-a) Notification by Government.

—The notification contemplated by S. 92 should not be a notification directed to

## C. P. C. (1908) SEC. 92 (Contd)

a particular Judge and purporting to deal with a particular litigation. 16 C W N 44=39 C 146=13 I C 243.

—Sub-Judge, to whom was transferred by District Court suit under s. 92 being empowered by Government notification to try suits under s. 92, is not deprived of his jurisdiction by subsequent notification confining jurisdiction to specified area. 31 I C 397.

—Suit under s. 92 C P Code, can be tried by Additional Judge by virtue of assignment of the functions of the District Judge under Bengal Civil Courts Act, s. (2). A I R 1921 Cal 210=48 C 53=62 I C 115.

—In deciding whether the jurisdiction of a Civil Court is barred under proviso 2 to section 92 of the C P Tenancy Act, the Court must take into account the true position of the defendant, as disclosed by all the pleadings, if the defendant takes up a position for the purpose of taking advantage of the bar created by the 2nd proviso to section 92, the Court must determine whether that proviso has any application. 58 I C 966.

—Provided that the assignment of the duties referred to in S. 7 of the Oudh Civil Courts Act has been sanctioned in the manner required by law, suits instituted under S. 92 of the C P Code can be transferred for trial by a Dt. Judge to the Court of an additional Judge. 22 O C 93=52 I C 45.

—The trust created by a sanad is a religious, charitable and public trust if it provides for maintenance of a mosque, feeding of travellers etc. Sanction of the Advocate General and not of the Court is necessary for a suit for scheme and removal of trustees. 35 I C 880.

—A suit for the administration of a public charity under s. 92, Civ Pro Code, was properly instituted before the District Judge. Subsequently the Government by a notification empowered a Subordinate Judge to try that suit and the District Judge thereupon transferred the suit to the said Subordinate Judge. Held—That, as the notification was directed to a particular Judge and purported to deal with a particular litigation which was at that date already pending before another Court, it was not such a notification as was contemplated by s. 92, Civ Pro Code. Held, further, —That the Subordinate Judge, had therefore no jurisdiction to try the suit, and the District Judge had no power to transfer the suit to him. 16 C W N 44=39 Cal 146=13 I C 243.

—Transfer of suit under s. 92 to Additional Dt. Judge—Validity of sec. 18 C W N 612=41 Cal 883=22 I C 951.

## C. P. C. (1908) SEC. 92 (Contd)

## (7) Parties to suit under.

—Strangers to the trust are neither necessary or proper parties nor can any reliefs be claimed against them in a suit under s. 92. Otherwise there will result a clear misjoinder of parties and of causes of action. 10 R 342 (353-4, 356)=A I R 1932 R 132=140 I C 317=I R 1932 R 231.

—In a suit under s. 92 only the trustee is a necessary party neither persons in possession of trust property nor those who do not put forward—a claim adverse to the trust are necessary parties. 11 P 288 (345-6)=12 P L T 817=136 I C 417=I R 1932 P 81=A I R 1932 P 33=A L R 1932 P 373.

—Where sanction is granted to more than two persons all must join as parties. 29 M L J 231=31 I C 236.

—Sanction gives an authority to sue and all those persons who obtained it must join in the suit otherwise the suit will not lie. 29 M L J 231=31 I C 236.

—A trustee is a necessary party in an action for trespass at the instance of the beneficiaries alone because the latter cannot maintain the suit, not being in possession without joining the trustees in charity as parties, 11 Bur L T 249=50 I C 509.

—In the case of a suit by one relator with sanction, all living relators must be joined as parties even though the sanction is valid. A I R 1925 Sind 1=76 I C 345.

—Under s. 92, a suit may be filed by worshippers with the consent of Advocate-General or by Advocate General himself or by the Advocate-General in conjunction with those persons. The Court has under O 1 r. 10 power to add parties in a scheme suit for the good—administration of the trust. 43 M 707=38 M L J 201=27 M L T 100=11 L W 219=55 I C 546.

—Suit by only some of the persons obtaining sanction is not maintainable. A I R 1935 Mad 129=30 L W 954=(1929) M W N 911=58 M L J 39=55 M 223=Ind Rul (1930) Mad 652=124 I C 220.

—Where sanction is given to three persons, two of them cannot maintain suit or prosecute appeal. A I R 1927 Lah 382=100 I C 838.

—Transferees of trust property can be made parties in a suit under s. 92. A I R 1925 All 683=47 A 770=23 A L J 601=L R 6 A 352 Civ.=89 I C 40.

—In a suit under s. 92 the only necessary parties are those professing to be trustees and managing property and not persons in adverse possession of it. 35 I C 860.

—Alienage of or trespasser upon trust property if a necessary party. 28 M L J 537=(1914) M W N 581=24 I C 369.

## C. P. C. (1908) SEC. 92 (Contd)

## (7) Parties to suit under. (Contd)

—Persons disputing the existence of a trust can be made parties to a suit under s. 92. 8 A L J 896=33 A 752=11 I C 218.

—A trespasser denying the title of a trust is a necessary party to a suit under s. 92. 13 Bom L R 49=9 I C 358

—An alienee from a trustee is not a necessary party to a suit under s. 92. 5 S L R 103=12 I C 668.

—On an appeal by an alienee from a trustee, the trustee and the Collector were made parties but pending appeal, the trustee died. Held that the appeal did not abate as the trustee was not a necessary party. 26 M L J 537=(1914) M W N 581=24 I C 369 see also 38 Mad 1064=33 I C 45.

—Alienees of trust property are proper but not necessary parties, and no relief can be granted against them. The judgment though not operating as Res Judicata would be strong evidence against them in a subsequent suit. 27 M L J 266=16 M L T 178=(1914) M W N 692=25 I C 794.

—In a suit by two worshippers of a temple under s. 92, the Court has jurisdiction to add other worshippers as parties on due cause shown. 10 M L T 514=13 I C 232.

—An alienee of a trustee is a proper party in a suit to remove the trustee and for possession of property alienated. 42 Calc 1135= 32 I C 801.

—If a suit is bad for want of requisite interests on the part of the plaintiffs, held that it could not be dismissed if other interested persons are subsequently added as parties with the necessary sanction 43 Mad 720=38 M L J 504=11 L W 536=(1920) M W N 337= 56 I C 450.

—A trustee appointed by a registered society having no power to appoint, cannot be a party to a suit under s. 92 A I R 1931 Calc 281=52 C L J 78=Ind Rul (1931) Cal 386=130 I C 866.

—Suit brought under sanction of Advocate-General is not bad because of addition of stranger as defendant. A I R 1925 Cal 187=80 I C 44.

—In a suit for declaration of the invalidity of alienation, the alienee from the trustee whether a necessary party. 5 S L R 103=12 I C 668.

—The death of defaulting trustee does not abate a suit for scheme under s. 92 when the scheme is the main relief and not auxiliary, and the successor can be made a party without any irregularity. 28 M L J 174=2 L W 148= 1915) M W N 185=27 I C 874.

—In a scheme suit all trustees should be made parties so that their rights might not be affected. 50 I C 58.

## C. P. C. (1908) SEC 92 (Contd)

## (7) Parties to suits under (Conclld.)

—The death of a defendant in a suit under s. 92 for his removal and for framing a scheme does not cause the abatement of the suit. A I R 1926 Mad 162=48 M 688=49 M L J 324=22 L W 130=(1925) M W N 569=91 I C 109.

—Trespassers or alienees are not proper parties in a suit for scheme under s. 92 because a suit for recovery of possession against them is not within the scope of s. 92 C P C. 28 C L J 4=47 I C 111.

—In a suit to eject trespasser—alienee if necessary party—35 Bom 470=13 Bom L R 690=12 I C 30.

—In a suit relating to public charity a trespasser is not a proper party and possession cannot be asked for against him. 1 O L J 548=26 I C 108.

—Although one of the plaintiffs obtaining sanction for instituting suit dies, neither the suit nor appeal, therefrom abates. A I R 1925 Mad 244=47 M L J 745=20 L W 882=85 I C 666.

—Suit under this section is prosecuted as re-presenting general public, and so it does not abate on the death of the original plaintiffs. 48 C 493=13 L W 318=(1921) M W N 24=17 N L R 37=48 I A 12=25 C W N 794=30 M L T 194 (P C)=62 I C 737.

—Question of interest must be determined on the facts of each case. A I R 1921 Mad 563=41 M L J 20=68 I C 631.

—Suit instituted for settlement of scheme for Dargah Mutawalli in possession is necessary party. A I R 1929 Mad 635=Ind Rul (1930) Mad 388=122 I C 644.

## (8) Who can sue under S. 92.

—Constant visitors of temple who are related to the founder can sue under S 92 A I R 1929 All 433 (1)=1929 A L J 438=Ind Rul (1929) All 748=117 I C 828.

—Persons interested are not bound by result in prior suit in which no decision was arrived at but was fraudulently withdrawn. A I R 1928 Mad 268=108 I C 199.

—If the persons suing are interested in the trust, it is not necessary that they should be personally affected. A I R 1927 Mad 462=50 M 726=25 L W 594=(1927) M W N 197=38 M L T 253=53 M L J 545=102 I C 270.

—Persons worshipping an idol in a temple, having built a shrine therein and being of the same caste as the founder are interested persons & can sue under s. 92 9 O W N 966 (972).

—Collector can sue under s. 92 if specially authorized by Local Government even though duties of Advocate-General

## C. P. C. (1908) SEC. 92 (Contd)

## (8) Who can sue under S. 92 (Contd.)

are to be discharged by Legal Remembrancer generally. A I R 1931 P C 121=(1931) A L J 369=35 C W N 699=53 C L J 537=33 Bom L R 968=(1931) M W N 662=Ind Rul (1931) P C 233=34 L W 63=61 M L J 402=132 I C 745 P C.

—Collaterals of founder have interest sufficient to entitle them to sue. A I R 1929 Lah 428=Ind Rul (1929) Lah 515=116 I C 451.

—Persons in whom founder has vested right of control are not the only persons who can sue under s. 92. A I R 1929 Lah 428=Ind Rul (1929) Lah 515=116 I C 451.

—Where a property is dedicated to chuttram all persons entitled to receive food can sue. A I R 1928 Mad 268=108 I C 199.

—Public interested in the performance of obligations by the head of a mutt can maintain a suit against him under s. 92. A I R 1927 Mad 614=52 M L J 415=25 L W 461=1927 M W N 233=50 M 567=39 M L T 37=101 I C 420.

—In respect of properties forming public trust, mere worshipper cannot sue for possession. A I R 1926 Lah 425=8 Lah L J 231=27 P L R 833=96 I C 934.

—Mere worshipper as such cannot sue for possession of trust properties. A I R 1925 Rang 294=3 R 213=89 I C 623.

—A trustee can also sue under s. 92. A I R 1925 Mad 820=48 M L J 534=87 I C 194.

—Suit under s. 92 can be maintained by persons who make offerings and give subscriptions and who are in the habit of worshipping at a temple. A I R 1932 A 708 (709)=1932 A L J 886.

—Descendants of the founder of a trust have an interest in the proper carrying out of the alleged trust and, therefore, have a locus standi to sue for a declaration that the certain property and income arising therefrom is wakf and a particular person is a trustee and alienation thereof is void. Although the provisions of S. 92 O P C do not cover a suit of this nature, it would be remarkable indeed if in alleged trust, the trustee and beneficiary could collude between themselves and nobody should be able to intervene in order to prevent a misappropriation of the trust property 47 Mad 884 (P C) followed. A L R 1933 L 721.

—A subsequent suit by a trustee to establish his private rights is barred by a Scheme once settled by the Court under s. 92 but his only remedy is to request the Collector to ask for its modification 21 M L J 952=36 M 364=12 I C 449=10 M L T 356=(1911) 2 M W N 387.

## C. P. C. (1908) SEC. 92 (Contd)

## (8) Who can sue under S. 92. (Contd)

—S. 92 C. P. C. does not take away the right to enforce the proper observance of a religious trust. Suit by worshipper in ejectment against a trespasser is maintainable because he is an interested person within the meaning of s. 92. So also the representative of founder may sue for preventing abuse of trust. 23 M L J 348=17 I C 589.

—An heir of founder has a right to manage the trust unless his previous conduct prevents vesting it in him. A suit under s. 92 can lie against him for his subsequent conduct. A I R 1931 Bom 107=32 Bom L R 1687=Ind Rul (1931) Bom 213=129 I C 741.

—A Compromise in a suit to remove mutwali of mosque whether lawful depends on the question whether endowment is public or private and therefore it cannot be recorded by the Court unless that question is decided. 18 C W N 1264=26 I C 360.

—Heirs of founder are interested persons within the meaning of s. 92 and have a right to institute a suit for removal of a trustee in order to secure the proper administration of the trust, 30 C L J 177=54 I C 6=24 C W N 478.

—The worshipper has the right to sue for declaration that alienation by the mutawalli is void even in the absence of proof of special damage. 23 C W N 115=49 I C 355.

—Only interested persons have got a right to maintain a scheme suit in respect of a temple even though non-interested persons are joined as parties A I R 1925 Mad 1011=86 I C 371.

—Person having no interest in trust property cannot impeach acts of private trustee. 7 O L J 246=56 I C 707.

—Persons having a right to perform worship in a temple intended for public worship are competent to institute a suit under S. 92 C. P. C. 5 O L J 97=45 I C 213.

—Followers of Guru Govind Singh who are not Hindus but Sikhs have no right to sue in respect of Udasi Dera. A I R 1926 Lah 100=7 Lah 275=27 Pat L R 115=94 I C 695.

—Interest must be clear and present and substantial mere residence in locality of mosque does not give necessary interest. A I R 1926 Mad 466=23 L W 240=92 I C 950.

—A suit by a person having no interest in the trust property of a private trust is not maintainable to question acts of trustees unlike a public trust. 56 I C 707.

## C. P. C. (1908) SEC. 92 (Contd)

## (8) Who can sue under S. 92. (Contd)

—Future possibility of resorting to the institution for worship does not give interest to maintain suit under s. 92. A I R 1930 Lah 1-11 Lah 142-31 P L R 424  
—Ind Rul (1920) Lah 513-124 I C 305.

## (9) What Reliefs can be claimed in a suit under S 92

## (a) Clause (a)-Removing a trustee.

—In a suit under S 539 C P C 1882 an existing trustee cannot be removed—  
21 M L J 784-11 I C 728.

—In cases of positive misconduct a hereditary trustee can be removed if his acts are such as to endanger the trust-property or to show a want of proper capacity or honesty. He has no right to re-imbursment if he spends money not required by the terms of the endowment. (1918) M W N 555-48 I C 897.

—A duly appointed Mutwalli of a public religious or charitable trust cannot be removed except by a suit under s. 92. C P C. 11 A L J 25-35 A 98-18 I C 573

—The Court has no power to order removal of existing trustees the Court cannot make a selection of trustees from family members when there is a hereditary right to trusteeship. Association of a respectable stranger in the management of a trust can be made by the Court in settling a scheme. 21 M L J 784-11 I C 728.

—A breach of trust must be alleged or proved in order that a suit for removal of Mutwalli can lie under s. 92. A defacto mutwalli has a right to appoint his successor because he is presumed to be de jure. 37 All 86-13 A L J 26-26 I C 778.

—If a trustee mismanages the trust property, the proper remedy is a suit for his removal, under s. 92. 23 I C 479.

—The Court can remove mutwalli of waqf even though that relief is not asked for by parties, in the proper administration of Wakf and its discretion is not hampered by any provision in Waqf named. 18 M L T 48-29 I C 849.

—A suit under s. 92 C. P. C. is the proper remedy for the removal of an insolvent trustee if his insolvency has been declared after his appointment under a compromise in a suit under s. 92. 30 I C 482.

—In a suit to remove a trustee inter alia, mere fact that a person is indebted to his employer in a sum of Rs two thousand and odd is not a ground for holding that he is a pauper and in such embarrassed pecuniary circumstances as to be ineligible to retain his office as trustee. A L R 1934 Lah 211.

## C. P. C. (1908) SEC. 92 (Contd)

## (9) What Reliefs can be claimed in a suit under S. 92. (Contd)

## (a) Clause (a)-Removing a trustee. (Contd)

—Sanction under the Rel End. Act, is not necessary for the removal of trustees if sanction under s. 92 is obtained. Jurisdiction of a Court does not depend on its decision as to whether it can allow some of the reliefs asked for. Relief against alienees cannot be given in a scheme suit. (1916) 2 M W N 351-4 L W 444-37 I C 688.

—A suit for removal of Mahant under s. 92 is valid even though some of the plaintiffs give their consent in appeal to maintain the original Mahant and, the jurisdiction of the Court is not ousted thereby. Because repudiation of Counsel's admission of fact should have been made at the earliest opportunity. A trust whether private or public can be determined by its history, and nature of its traditions. 20 O C 49-38 I C 800.

—A suit to remove the head of a mutt is maintainable under s. 92 C. P. C. 32 M L J 271-40 I C 627.

—A suit for the removal of the defacto trustee, for appointment of a new one and for vesting property in him is a suit within the purview of s. 92, and does not abate on the death of one of the plaintiffs. 97 P R 1918-47 I C 983-173 P W R 1918.

—The District Judge as the kazi has the discretion to remove the mutwalli and appoint a stranger as such. 47 Cal 866  
—24 C W N 690-58 I C 705.

—The hereditary archaka trustees cannot be removed when they have been appropriating the surplus income of the lands supposing to be the owners thereof subject to render services to the deity 30 M L T 101 (H C)-64 I C 816.

—Even where plaintiff has not prayed for the removal of the trustee Court can appoint Receiver pendente lite. A I R 1923 M 224-16 L W 927-1923 M W N 75-41 M L J 545-68 I C 565.

—Keeping mistresses and gambling were held to amount to misconduct and the worshippers can file a suit for removal of the Mahant of the Mutt. A I R 1924 Oudh 261-10 O L J 619-27 O C 149-80 I C 674.

—Where managers put forward their own adverse and absolute title to waqf property they were held liable to be removed from the management. A I R 1924 Lah 107-4 Lah 364-77 I C 398.

—A trustee must be removed by a suit under s. 92 before recovery of properties transferred by him. A I R 1925 Mad 689-21 L W 525-83 I C 375.

—The welfare of the trust is the main consideration of the Court in removing a



## C. P. C. (1908) SEC. 92 (Contd)

(9) What Reliefs can be claimed in a suit under S. 92 (Contd)

(a) Clause (a)-Removing a trustee (Contd)

trustee for breach of trust. A I R 1924 Cal 1024=28 C W N 781=81 I C 833.

—Suit praying for removal of trustee

—Prayer for declaration that alienation made by trustee may be declared void comes under s. 92. A I R 1925 All 683=47 A 770=23 A L J 601=L R 6 A 352 Civ=89 I C 40.

—The proper remedy of reversioners was to sue for removal of widow under s. 92 and not to sue to recover possession of property alienated by the widow of the founder appointing himself a trustee and after his death his heirs. A I R 1926 Mad 280=50 M L J 42=22 L W 701=(1926) M W N 117=92 I C 823.

—The Court can remove a trustee in the interest of the institution and not of individuals. A I R 1926 Mad 1150=51 M L J 457=98 I C 208.

—A regular suit under s. 92 is the only remedy to remove a trustee when the scheme provides for appointment but not removal of trustees. A I R 1926 Mad 799=94 I C 610.

—Trustee setting up his own title and alienating trust property can be properly removed. A I R 1927 Mad 1033=26 L W 581=(1927) M W N 759=106 I C 134.

—Trustee can be held unfit for acts and omissions of his, and not of his predecessor, rendering him personally unfit. A I R 1928 Mad 879=113 I C 635.

—Trustee cannot be removed merely for his asserting that trust is his private property. A I R 1928 Mad 879=113 I C 635.

—Clause in scheme providing for the removal of trustee merely by application is invalid. A I R 1931 Nag 82=Ind Rul (1931) Nag 87=131 I C 423.

—To justify removal of trustee there must be such gross negligence or misconduct as to evidence a want either of capacity or of fidelity which is calculated to put the trust in jeopardy. A I R 1928 Cal 225

—The removal of a trustee may be ordered in the interest of the trust administration even though misconduct or negligence is not sufficiently proved in the trustee. A I R 1925 Mad 1070=(1925) M W N 505.

—A trustee is not unfit merely for his indebtedness and cannot be said to be wasting money on immoral purposes. A I R 1929 All 433=(1929) A L J 438=Ind Rul (1929) All 748=117 I C 828.

—Removal of Sajjadahnashin is not allowed under the provisions of s. 92 C. P. C. 6 A L J 632=3 Ind Cas 503.

## C. P. C. (1908) SEC. 92 (Contd)

(9) What Reliefs can be claimed in a suit under S. 92 (Contd)

(a) Clause (a)-Removing a trustee. (Contd)

—Trustee falsely asserting his own ownership is sufficient ground for his removal. A I R 1922 P C 325=45 M 565=43 M L J 536=16 L W 247=31 M L T 1=49 I A 237=24 Bom L R 1214=21 A L J 250=27 C W N 317=36 C L J 524 (P C)=68 I C 1.

—Doubt as to existence of trust—Hereditary trustees not keeping accounts—No wilful default on their part—Failure to keep accounts is no ground for their removal. A I R 1923 Mad 163=16 L W 839=32 M L T 89=74 I C 35.

see also A I R 1929 All 433=(1929) A L J 438=Ind Rul (1929) All 748=117 I C 828.

—Trustees not misappropriating any funds and being interested in maintaining temple cannot be removed from office. A I R 1925 Mad 1011=86 I C 371.

—A mutwalli of a mosque was not liable to be removed simply because he being blind failed to keep accounts or failed to employ a writer, nor could he be removed simply because he renounced his faith in the tenants of the Rafayadaiu community and became a Hanafite. 16 I C 9.

—Hostile removal of a trustee de son tort being not guilty of misconduct and managing the trust for a long time should not be allowed by the court at the instance of strangers. 1918 M W N 786=48 I C 833.

(a) Clause (b) Appointing a new trustee.

—Appointment of trustees from plaintiff's community on the ground that the trust had largely benefited by its endowment can be claimed in a suit for settling a scheme of management of a temple. 10 L W 494=54 I C 263.

—A suit for the appointment of a new trustee is maintainable even though the defendants are not de facto trustees. Trespassers are proper parties in an ejectment suit. A I R 1925 All 759=47 A 867=23 A L J 795=L R 6 A 405 Civ=89 I C 639.

—Where there is no mutwalli, Court can appoint one in respect of a wakf even without suit under S. 92, A I R 1928 Cal 368=55 C 1284=32 C W N 83=110 I C 416.

—Under Muhammadan Law, Court can appoint trustees directly without having recourse to s. 92 A I R 1930 Mad 226=(1929) M W N 744=Ind Rul (1930) Mad 343=122 I C 455.

—In appointing a new trustee the court should care for the proper administration of the trust and is not bound to accept wishes of the founder. Ind Rul (1931) All 641=133 I C 404.

## C. P. C. (1908) SEC. 92 (Contd)

## (9) What Reliefs can be claimed in a suit under S. 92 (Contd)

## (a) Clause (b) Appointing a new trustee. (Concl'd)

—Even if a District Judge has the powers of a kazi still he can reject an application to be appointed mutwalli of waqf property on the ground that petitioner is to proceed only by way of a suit under s. 92. 23 C W N 138=49 I C 799.

—A direction in the decree in a suit under s. 92 by which two members of a particular community are to be elected trustees subject to confirmation by Court, is not ultra vires. 60 M L J 173=33 L W 149=54 M 345=(1931) M W N 586=Ind Rul (1931) Mad 812=134 I C 60.

—Power of appointing new trustee and of making a scheme for administration of property is restricted to s. 92 only. A I R 1925 Pat 544=4 Pat 741=7 P L T 4=(1925) Pat 194=88 I C 1035.

## (c) Clause (c) Vesting any property in a trustee.

—The words "vesting any property in a trustee" refer to cases where a new trustee is appointed, and does not include cases in which it is sought to recover possession of the trust property by ejecting trespassers who are wrongfully in possession of it. 10 R 342 (355)=A I R 1932 R 132=140 I C 317=I R 1932 R 231.

—A direction as to delivery of trust property or payment to new trustee under s. 92 is valid and can be executed by the new trustee. 60 M L J 173=33 L W 149=54 M 345=(1931) M W N 586=Ind Rul (1931) Mad 812=134 I C 60. See also. 61 M L J 312=54 M 722=33 L W 528=(1931) M W N 290=A I R 1931 Mad 586, and 60 M L J 178 note.

—The court has power to direct delivery of trust property to the new trustees can appoint strangers as trustees if suitable persons are not available from the family of the testator. 17 A L J 957=58 I C 566.

—The plaintiff can recover possession in execution, of a field declared to be under trust under a scheme framed. A I R 1928 Nag 326=9 N L J 45=94 I C 326.

—In order to create a valid wakf, the property must be substantially and not merely colourably dedicated to religious or charitable purposes 17 Calc 498=L R 17 I A 28; 20 Calc 116; 22 Calc 619=L R 22 I A 76; 19 All 211; 21 All 329; see also 19 Calc 412.

## (d) Clause (d) Directing accounts and inquiries.

—A trustee can be made to account and to pay what is found due on taking the account under S. 92 C P C. 28 I C 886.

## C. P. C. (1908) SEC. 92 (Contd)

## (9) What Reliefs can be claimed in a suit under S. 92 (Contd)

## (d) Clause (d) Directing accounts and inquiries. (Concl'd)

—A suit for accounts against non-trustees is not maintainable at the instance of relators but can be maintained only by duly appointed trustees. Relators can claim accounts from trustees only under S. 92. 10 S L R 12=35 I C 593.

—The High Court sitting as a court of appeal has power to remedy technical defect of the lower court. On an application of a decree-holder purporting to be under O 38 rr 5 and 6 for security or in the alternative for attachment of the trustee's immovable property because the trustee did not obey the order for furnishing accounts under s. 92 C P C; the court ordered him to give security and also issued an order for attachment. It was held that this mistake was technical and the High Court had power to rectify it and treat it as passed under O. 21 r 42 of C. P. C. 41 I C 89.

—Court can order trustee to pay amount found due on the taking of accounts. A I R 1927 Mad 416=52 M L J 182=38 M L T 143=(1927) M W N 202=100 I C 841.

—Where in a suit under s. 92 it is only prayed that trustee should be compelled to restore misappropriated sums to trust Art 17 (b) Sch II Court Fees Act applies. A I R 1925 Mad 722=48 M L J 514=(1925) M W N 104=87 I C 25.

—Where trust property lost can be traced to possession of tarward, then and then only can the tarward be called upon to restore it. A I R 1928 Mad 879=113 I C 635.

—A trustee is liable to account for trust funds in his hands and if he mixes up the trust money with his private funds, the burden is on him to prove that a particular gain is not the trust property but his own (1918) M W N 786=48 I C 833.

## (e) Clause (g) Settling a scheme

—Framing of a scheme for better management of the trust is within the discretion of the court even in the absence of a breach of trust. 5 O L J 97=45 I C 213.

—The court has discretion in settling a scheme and unless the discretion is improperly exercised the Judicial committee should not interfere 24 M L J 199 (P C) =17 I C 441.

—The order of a single judge on the original side as regards the election of a trustee of a mosque under a scheme framed by a court is appealable being an order in execution proceedings. If a

## C. P. C. (1908) SEC. 92 (Contd)

## (9) What Reliefs can be claimed in a suit under S. 92. (Contd)

## (e) Clause (g) Settling a scheme. (Contd)

scheme is defective, it can be amended or if it does not provide for future modification the remedy is a fresh suit. 7 Bur L T 298=24 I C 915.

—On the preferential claim of a descendent of founder to be made a party to a scheme suit instituted by a person interested in the trust on the death of the mutwalli, being overlooked by the Court, the proper remedy of the claimant is to file a scheme suit under s. 92 C P C to establish the preferential claim to mutwalli-ship. 43 Cal 467=20 C W N 113=22 C L J 577=32 I C 21.

—Mismanagement or misconduct of trustee is not necessary but simply difficulty of management is sufficient for settling a scheme under s. 92. Hereditary right of trustees, how far a consideration for Courts in framing scheme. 4 L W 228=34 I C 551.

—A temple used for caste-meeting does not necessarily become private property. Grant of inam lands, rites and ceremonies such as are performed in public temples, and public worship open for all, these facts strongly prove the public character of a temple, and a scheme can be framed for it even when trustees are not guilty of misconduct 9 Bom L R 514 foll. In framing a scheme a court need not remove trustees already holding office when no misconduct is proved against them. 4 L W 228=34 I C 551.

—In framing a scheme the Court can go into questions not arising directly in the suit in order to ascertain what the trust properties are. A I R 1921 Mad 563=41 M L J 20=68 I C 631.

—Limitation does not run against persons filing a scheme suit on behalf of the general public. A I R 1922 Mad 394=43 M L J 448=(1922) M W N 464=31 M L T 125 (H C)=16 L W 122=69 I C 15.

—Application to the Court is the proper remedy and not a regular suit in order to correct defects in the original scheme when there is a provision to apply in the scheme drawn up by court. A I R 1922 Mad 413=(1922) M W N 477=70 I C 579.

—Where a trust is created for public purposes suit lies for settling scheme, and a heir-at-law is a proper party to such suit. A I R 1923 Mad 376=17 L W 31=32 M L T 47=(1923) M W N 111=46 M 3300=73 I C 991.

—When there has been gross mismanagement of the affairs of the

## C. P. C. (1908) SEC 92 (Contd)

## (9) What Reliefs can be claimed in a suit under S. 92. (Contd)

## (e) Clause (g) Settling a scheme. (Contd)

temple, a scheme for co-ordination of various Kattalais and their harmonious working is necessary and should strictly prohibit borrowing and lending of money by the trustees from and to the trust money or from one kattalai to another one. A I R 1924 Mad 168=18 L W 247=74 I C 115.

—No distinction can be drawn between interpretation of an Act, and of scheme under s. 92. District Court in such scheme means not person but tribunal. A I R 1924 Mad 369=471 M 139=18 L W 237=(1923) M W N 664=75 I C 189.

—Court sanctioning a scheme for administration of a charitable trust can vary the scheme from time to time. But the rules of succession of High Priest cannot be varied. A I R 1924 Cal 330=37 CLJ 281=76 I C 220.

—Where most of the worshippers were Bengalee Muhammadans, scheme should provide majority of Bengalee Muhammadan Trustees. A I R 1924 Kang 134=2 Bur L J 208=76 I C 788.

—While framing a scheme Courts should not assume to themselves continued supervision of institution for management. Because it is contrary to principle and objectionable in practice. A I R 1925 Mad 411=47 M L J 714=20 L W 687=35 I C 183.

—Scheme framed—Appeal from order of the Court in the matter of its execution does not lie. A I R 1926 Mad 659=91 I C 794.

—Where scheme provides for application to Court for proper management, Court has no jurisdiction to order payment of archakes salaries. A I R 1926 Mad 655=1926 M W N 283=95 I C 5.

—On settling a scheme the suit comes to an end and the Court cannot manage the institutions. Jurisdiction to alter the scheme on an application is not given to the Court simply because there is a provision to that effect. Where scheme provides for application to amend scheme, order on such application not being in execution cannot be appealed against. A I R 1926 Mad 59=1926 M W N 226=49 M 580=95 I C 720.

—Where persons interested in trust desire to modify scheme remedy is not by application but by fresh suit under s. 92. A I R 1927 Sind 1=21 S L R 220=97 I C 393.

—Orders passed in relation to a scheme sanctioned in scheme suit are not in execution, Hence no appeal lies. A I R 1927 Mad 1110=102 I C 33.

## C. P. C. (1908) SEC. 92 (Contd)

## (9) What Reliefs can be claimed in a suit under S. 92 (Contd)

## (e) Clause (g) Settling a scheme (Contd.)

—No appeal nor revision lies from order of District Judge as persona designata under scheme of management of a charitable institution A I R 1926 Bom 167=28 Bom L R 64=93 I C 195.

—Remedy not asked for in suit but given in scheme—It cannot be and need not be asked in execution—Order thereon is non-appealable. A I R 1924 Mad 369=47 M 139=18 L W 237=(1923) M W N 664=75 I C 189.

—Where malversation is not proved no scheme can be settled A I R 1928 Mad 401=106 I C 375.

—Reservation of permission to apply for reliefs under s. 92 unless necessary to carry out the provisions of the scheme already settled is ultra vires A I R 1927 M 1073=51 M 31=53 M L J 792=26 L W 728=(1927) M W N 816=39 M L T 422 (P C) =106 I C 665.

—Once a Scheme is settled—direction for applying for modification is ultra vires A I R 1928 Mad 268=108 I C 199.

—Where temple has temple properties and Kattalai properties dedicated for special purposes, separate schemes should be framed by each. A I R 1928 Mad 955=(1927) M W N 405=108 I C 649.

—A Court's order on an application for confirmation of elections is appealable being a decree when a reservation to that effect is made by the Court while framing a scheme A I R 1928 Rang 168=6 R 97=110 I C 41.

—Modification or alteration of a scheme being in effect to frame a new scheme is subject to the conditions under s. 92 A I R 1929 Rang 20=6 R 594=Ind Rul (1929) Rang 53=114 I C 293.

—Interests of beneficiaries should be protected from waste in settling a scheme for the conduct of institution A I R 1929 P C 27=1929 M W N 417=31 Bom L R 243=(1929) A L J 401=33 C W N 352=29 L W 118=Ind Rul (1929) 50 (P C)=114 I C 10.

—Where under scheme, Board of Trustees was given liberty to apply to the Court for directions, the Board as a whole must apply. A I R 1929 Mad 625=Ind Rul (1929) Mad 965=119 I C 469.

—When a scheme is framed by the court the court cannot intervene to compel the trustee to comply with its terms unless some method is provided in it. A I R 1929 Mad 526=(1929) M W N 300=Ind Rul (1929) Mad 74=120 I C 874.

—Application by trustee for direction whether, after passing Act II of 1927, North Arcot District Committee had

## C. P. C. (1908) SEC. 92 (Contd)

## (9) What Reliefs can be claimed in a suit under S. 92. (Contd)

## (e) Clause (g) Settling a scheme. (Contd)

jurisdiction to appoint new trustee of temple, is not maintainable for question raised is not one left for future determination under liberty clause. A I R 1929 Mad 625=Ind Rul (1929) Mad 965=119 I C 469.

—Only those in whose favour liberty to apply is reserved, can apply. A I R 1930 Mad 226=1929 M W N 744=Ind Rul (1930) Mad 343=122 I C 455.

—Whether the court has jurisdiction to frame scheme in a representative suit. 24 M L T 20=45 I C 423.

—The court can apply cypres doctrine to income in a scheme suit. (1919) M W N 662=53 I C 677.

—A suit for scheme is maintainable in the case of a grant to specific persons as servant of a mosque for expenses of lamp oil etc. because the gift even though burdened with a service was held to be a public religious trust. 8 W R 313; 6 B 88; 15 C 329; Rel. 10 L W 135=51 I C 42.

—A scheme which goes beyond what was decided in scheme suit, and decides matters which come within purview of s. 92 is so far ultra vires. True test of legal propriety of clause in a scheme is whether relief granted by that Court is such relief that if it was being sought before scheme was sanctioned, it would have to be sought by suit under s. 92 A I R 1930 Mad 226=(1929) M W N 744=I R (1930) Mad 343=122 I C 455.

—Vacancies in office of trustees appointed for five years by a scheme can be filled by the court simply on application when there is a provision in the scheme to that effect which does not amount to its modification. A I R 1930 Mad 918=54 M 315=60 M L J 514=32 L W 608=Ind Rul (1931) Mad 83=128 I C 515.

—A provision in a scheme that election of new trustees shall be subject to confirmation by Court is not an alteration or modification and is not ultra vires. 60 M L J 173=33 L W 149=54 M 345=(1931) M W N 586=Ind Rul (1931) Mad 812=134 I C 60.

—A suit for scheme can be maintained even in the case of a private trust by the founder or some of his heirs alone others being parties. 53 C L J 621=Ind Rul (1931) Cal 864=134 I C 576.

—The court has power to frame a scheme with regard to a temple managed by a Temple Committee. 39 Mad 700=30 M L J 29=19 M L T 25=32 I C 211.

—In settling a scheme for a public religious trust the Court has full discretion but it should take into consideration the

## C. P. C. (1908) SEC. 92 (Contd.)

(9) What Reliefs can be claimed in a suit under S. 92 (Contd.)

(e) Clause (g) Settling a scheme (Contd.)

wishes of the founder, the past history of the institution and the way in which the management has been carried on theretofore.

40 I C 177.  
—Scheme—Framing of—Points to be ascertained. see 42 I C 474.

—Scheme—Grant to temple subject to burden of service—Proprietary right—Absence of usage as regards application of income—Misappropriation. 31 M L J 202=36 I C 270.

—Fresh suit for scheme is not necessary to make alterations in the scheme already made by the court but an application is sufficient for the same. 43 I C 772.

—Scheme as to religious institution. 43 Cal 1085=31 M L J 290=35 I C 30.

—The alteration of a scheme framed by award made on submission by all villagers, the award being made into a decree as regards a private temple is possible only by bringing a suit for the same, and not without the Court's aid. 1918 M W N 595=8 L W 357=47 I C 548 (F B).

—The practice of making the court the actual manager of a public religious trust is often condemned, and therefore the trivial deviation from formal compliance with rules under the scheme does not matter. A I R 1932 M 658 (659)=36 L W 669=140 I C 443=I R 1932 M 910=1932 M W N 1311.

—In a scheme suit delay should be excused if an appeal is not represented within time not bona fide and the persons other than the original appellants filing it are entitled to continue it. A I R 1928 Mad 456=28 M L W 279=54 M L J 629=108 I C 298.

—The rights of certain persons to use a mosque being declared by the decree in a scheme suit cannot be curtailed against the provisions of the decree in the scheme framed under it. 34 B L R 655 (666)=138 I C 810=A I R 1932 B 356=I R 1932 B 434=A L R 1932 B 599.

—Terms of grant or the usage of the institution do not bind the court in framing a scheme. 11 P 288 (351)=12 P L T 817=136 I C 417=I R 1932 P 81=A I R 1932 P 33=A L R 1932 P 373.

—In framing a scheme, the Courts are averse to the creation of a hereditary right to the office of a public trustee and the rights of persons to the office of trustee should be taken into consideration. 23 M L J 134=12 M L T 269=16 I C 225.

—The court can sanction a scheme on a cypres application of a charitable trust under s. 92 C P C 47 I C 611=37 M L J 489.

## C. P. C. (1908) SEC. 92 (Contd.)

(9) What Reliefs can be claimed in a suit under S. 92. (Contd.)

(e) Clause (g) Settling a scheme. (Contd.)

—Suit for the settlement of a scheme for the management of the trust properties in rotation—whether S. 92 is a bar to the maintainability of the suit. see A L R 1933 M 529=63 M L J 703=36 L W 633=1332 M W N 1340=A I R 1933 M 70.

(f) Clause (u) granting such further or other relief as the nature of the case may require.

—Reliefs that are not included in the sanction cannot be allowed by the Court. 144 P R 1919=50 P W R 1919=51 I C 611.

—A suit under s. 92 C P C cannot be tried with regard to reliefs other than those sanctioned by Collector. A I R 1923 Bom 428 =79 I C 200.

—Every subsidiary order or direction on any matter of detail to carry out the principal object of the section are covered by the words "such further or other relief as the nature of the case may require" 40 I C 182.

—Relief against an alienor of trust properties to deliver possession of property and to declare that the property is trust property cannot be granted in a suit under s. 92. 28 M L J 326=17 M L T 191=28 I C 898.

—Decree for mere declaration cannot be passed where consequential relief can be but was not prayed for. A I R 1928 Rang 143=6 R 188=110 I C 595.

—The facts that some of the reliefs cannot be granted on account of the absence of the consent in writing of the Advocate General would not disentitle the plaintiff to the other reliefs. A L R 1933 P 265.

—"Further or other relief" in—must be read ejusdem generis with clauses (a) to (g) of S. 92 (1). 33 B L R 1575=135 I C 806=I R 1932 B 118=A I R 1932 B 65.

—Legislature does not intend to include relief against third parties in cl. (h) under "further or other relief" A I R 1928 P C 16=55 C 519=55 I A 96=9 P L T 65=32 C W N 482=27 L W 339=26 A L J 464=54 M L J 609=30 Bom L R 774=48 C L J 55=1928 M W N 926 (P C)=108 I C 361.

—The words "further or other relief" in cl. (h) means reliefs on the nature of those which are enumerated in cls. (a) to (g). A I R 1928 P C 16=55 C 519=55 I A 96=9 P L T 65=32 C W N 482=27 L W 339=26 A L J 464=54 M L J 609=30 Bom L R 774=48 C L J 55=(1928) M W N 926 (P C)=108 I C 361.

—A Judge has jurisdiction to pass decree on the basis of compromise in a suit



## C. P. C. (1908) SEC. 92 (Contd)

## (9) What Reliefs Can be claimed in a suit under S. 92 (Concl'd)

(f) Clause (h) granting such further or other relief as the nature of the case may require (Concl'd.)

brought under s. 92. A I R 1925 Cal 187=80 I C 44.

—Although as a general rule Court should not disregard arrangement in wakfnamah, it has power to do so, Parties should be allowed liberty to apply for directions from time to time. A I R 1923 Pat 420=4 P L T 326=71 I C 240.

—A declaration regarding the validity or otherwise of an alienation by a trustee comes within the provisions of clause (h) of s. 92. Consequential relief is also necessary. Otherwise the first relief can not be granted A I R 1922 All 349=20 A L J 557=44 A 622=67 I C 659

—A suit by one of the founder's heirs for declaratin of his right to share in the management and for joint possession of the trust property should not be dismissed simply for the fact that person entitled to the office of the trustee may not be able to work harmoniously together. A I R 1921 Mad 388=44 M.205=59 I C 464.

—Wishes of the donor should be taken into consideration by the Court in passing an order regarding the management of the trust property. 1 Pat L T 428=57 I C 270.

—A compromise of a suit under s. 92 C. P. C. with the object of conferring benefit on private parties should not be sanctioned by the court. 47 I C 611=37 M L J 489

## (10) Religious Endowments Act 1863 and S. 42 of Specific Relief Act 1877, bearing of on S. 92 C P C.

—Decree obtained in suit under s. 5 Religious Endowments Act is no bar to a suit under s. 92 of the Code. 63 I C 418.

—The interest in S. 92 C. P. C. must be present and substantial members of the caste living near the endowment have sufficient interest to file a suit regarding the trust providing for the widows and orphans of the caste. A I R 1923 Lah 518=73 I C 302

—Principal objects of a body cannot be altered by a majority of the body unless there be a special reservation of that right. A I R 1931 Mad 12=33 M L W 113=53 Mad 737=59 M L J 770=Ind Rul (1931) Mad 235=129 I C 235.

—The court has power to alter scheme. 17 I C 999.

## C. P. C. (1908) SEC. 92 (Contd.)

## (10) Religious Endowments Act 1863 and S. 42 of Specific Relief Act 1877 bearing of on S. 92 of C P C (Contd)

—Declaration that properties specified are waqf properties is clearly within s. 92. A I R 1925 All 683=47 A 770=23 A L J 691=L R 6 A 352 Civ=89 I C 40.

—Per *Old Field and Coutts Trotter, JJ* (Abdur Rahim J dissenting). Mere right to worship is not a sufficient interest so as to confer a right to sue for a scheme. The interest must be a present and substantial interest and not contingent like possibility of succession. It need not be pecuniary direct or immediate or in any way different from that required by ss. 14 and 15 of the Rel. End. Act. 42 Mad 360=36 M L J 396=25 M L T 304=9 L W 492=(1919) M W N 370=50 I C 693.

—Right of founder's heir to be on board of trustees—Grounds for not recognising. see 9 O W N 966 (976-7).

—The district Judge can grant reliefs under s. 92 in the case of a suit under s. 6 Charitable and Religious Trusts Act for breach of trust. A I R 1930 All 582=(1930) A L J 1291=52 A 863=Ind Rul (1931) All 33=123 I C 385.

—Section 75, Religious Endowments Act, cannot be construed as having retrospective effect with regard to scheme settled under s. 92 A I R 1929 Mad 222=Ind Rul (1929) Mad 374=115 I C 54.

—Dedication by Will and appointment of Vars to perform charities with properties of testator make complete dedication. 47 I C 611.

—A deed providing for support of grants to family is not dedication to public religious endowment and s. 92 C. P. C. does not apply. 41 All 1=48 I C 94.

—Charitable corporations are subject to Court's jurisdiction as they are trustees of the corporate properties. A I R 1931 Mad 12=53 M 737=59 M L J 770=33 L W 113=Ind Rul (1931) Mad 235=129 I C 235.

—Breach of trust is committed when the Mutawallis spend the income of the waqf property for themselves against the provisions of the waqf. A I R 1929 Mad 635=Ind Rul (1930) Mad 388=122 I C 644

—In determining whether a temple is public or private, inam proceedings are of great importance; evidence of other temples should not be considered as important, but strong evidence is necessary to prove it to be private when it is open to the public for centuries. The question is one of fact. A I R 1928 Mad 879=113 I C 635.

—S. 92 does not bar suit by religious institution against trustees of different

## C. P. C. (1908) SEC. 92 (Contd.)

(10) Religious Endowment Act 1863 and S. 42 of Specific Relief Act 1877 bearing. (Contd.)

funds for recovering a portion of that fund A I R (1929) Bom 153=31 Bom L R 192=Ind Rul (1929) Bom 551=119 I C 775.

—Endowment partly religious and partly secular—Before allocation to religious uses trust is governed by s. 92. A I R 1930 Mad 216=58 M L J 104=31 L W 849=Ind Rul (1930) Mad 305=122 I C 337.

—Question of the true nature of an endowment cannot be decided in a suit not constituted by s. 92 A I R 1927 All 526=49 A 191=25 A L J 281=99 I C 568.

—A person can sue in his individual capacity in respect of a wakf where his personal rights are infringed. A I R 1927 Cal 130=44 C L J 339=31 C W N 184=99 I C 205.

—In a suit for change of management of a religious endowment, it is not the views of majority entitled to sue, but original purposes of trust that must be looked to A I R 1926 Lah 100=7 Lah 275=27 P L R 115=94 I C 695.

—The court has power to inquire whether sanction is necessary when a Mutwalli has leased the waqf property with kazi's consent. 47 Cal 592=24 C W N 339=56 I C 475.

—Section 92 does not cover suit by idol against persons interfering with its property. A I R 1923 A 120=20 A L J 977=45 A 215=L R 4 A 50 Civ=71 I C 420.

—Existence of obvious tests such as the use by the public, worship by the public and offerings by the public should be found out for determining whether endowment is public or private. A I R 1924 Pat 502=5 P L T 231=76 I C 89.

—S. 92 of Code of 1908 and S 14 Rel. Endowments Act (XX of 1863), so far as the forms of relief to which they relate are the same, offer a choice to persons interested in the trust to proceed under either provision and a suit brought for removing the trustee with the sanction of the Collector is not bad because the leave of the Dt. Court also is not taken under the latter provision. A suit for removal of a trustee instituted after the coming into force of the new Code, is not liable to be dismissed on the ground that the leave of the Collector was given in Nov. 1908, when there was no provision of law enabling such suits to be brought with the Collector's sanction. 37 Mad 184=24 M L J 697=14 M L T 44=20 I C 515.

—The management of the mausoleum mosque and khangah of a religious Mahomedan who was the founder of a new religious order and to whom there could

## C. P. C. (1908) SEC. 92 (Contd.)

(10) Religious Endowment Act 1863 and S. 42 Specific Relief Act 1877 bearing of on S. 92 of C P C (Contd.)

be no succession under any recognised rule, is a constructive trust created for public purposes of a religious nature, such as a Civil Court is competent to interfere with. The offerings made at the mausoleum not to the sect of the deceased but to his memory belong to his heirs and not to his followers. 4 O L J 174=40 I C 101.

—There are three classes of cases which confer the right to enforce privilege in a temple. (1) The object of a suit may be to secure certain advantages to a trust, in which case, any two persons, with the sanction of the Advocate General or the Collector of the Dt. concerned, can institute a suit in that behalf (2) the Rel. End. Act empowers persons who have an interest in the temple to go to a Court of law for a declaration that the trustee is bound to carry out certain duties and; (3) the third class of cases in which individuals can claim rights, either as citizen or as having a hereditary right to worship in a temple or perform certain festivals in which case the suit is really for a direction that the officer in charge of the trust should perform the duties according to mamool and the sanction of Advocate General or the Dt. Judge is not required for its institution under S 92 of the C P Code or Ss. 14 and 18 of the Rel. End. Act. 3 L W 512=35 I C 88.

—Where a deed of endowment did not expressly state whether the temple built by the executant was intended for private or public worship, but it was found from extrinsic evidence that the executant was anxious to obtain religious benefit for her soul, that the temple had been from its very beginning open to the public for worship and that the customary religious festivals had been celebrated there in a public manner. Held, that under the above circumstances the trust may be taken to be a public trust, erected for religious purposes. 5 O L J 97=45 I C 213.

—Where, in a suit for a mere declaration of the plaintiff's right to the office of Dharmakarta of a temple, it is found that, if the plaintiff gets possession of the office of Dharmakarta the tenants will pay rent to him, and where no prayer is made for the recovery of possession of lands in the hands of tenants. Held, that s. 42 of the Specific Relief Act will be no bar to the suit. Where a scheme has once been settled by Courts under s. 539; Civ. Pro. Code, 1882 (=s. 92, Civ Pro Code 1908), it would preclude suits between parties to establish a private right, which if established would interfere with a charit-

## C. P. C. (1908) SEC. 92 (Contd)

(10) Religious Endowments Act 1863 and S. 42 of Specific Relief Act 1877 bearing on

## S. 92 of C. P. C. (Contd)

able scheme settled by Court. A scheme once settled by Court cannot be altered except by the Court and then only on substantial grounds. A person cannot sue under s. 539. Civ Pro Code merely to establish his right as hereditary trustee. The High Courts and the District Courts in this country to which this jurisdiction is confined by s. 92, Civ Pro Code 1908 possess the same practically unlimited jurisdiction as the Court of Chancery possesses in matters relating to the public charities, religious or otherwise. Where the rights of a person, whose prayer to be included as party to a scheme suit under s. 539, Civ Pro Code, 1882 was refused, are prejudiced, his only remedy would seem to be to induce the Collector by taking action under s. 92, Civ Pro Code, 1908. 10 M L T 356=21 M L J 952=12 I C 449.

—Though a suit to eject a trespasser from trust-property is outside the scope of and reliefs claimable under s. 539 of the Civ Pro Code, 1882, yet a suit, wherein a breach of trust is complained of and the alienee denies that the property is a public trust for religious purposes can be tried under s. 539, and the alienee can be joined as a party to it. Such an alienee is a necessary party where it is alleged that he has taken the property from the trustee with full knowledge of its character as a public trust for religious purposes and that he has for some years paid part of the income to and for the trust. 13 Bom L R 690=5 Bom 470=12 I C 30.

## (11) Miscellaneous.

—Panchayat being a public body can be compelled by Court to produce documents in its possession A I R 1928 M 299=15 Mad 1=54 M L J 174=27 L W 611=108 I C 760

—Even where trust deed enjoins only one trustee Court can appoint additional trustees if interests of institution demand it, Court should respect rights of family members to take part in management. A I R 1928 Mad. 955=(1927) W N 405=108 I C 649.

—Application to Court to enforce executable part of a scheme decree to one in execution and order thereon is appealable. A I R 1928 Mad 61=39 M L T 579=27 L W 32=107 I C 136.

—Omission to include some of the reliefs sanctioned invalidates suit only if omission is material. There is no reason

## C. P. C. (1908) SEC. 92 (Contd)

(12) Miscellaneous. (Contd)

why mere addition of a claim should render whole suit liable to be dismissed. A I R 1928 Mad 205=39 M L T 628=27 L W 42=107 I C 130.

—Additional prayer not covered by sanction added and subsequently removed—Suit is not bad. A I R 1927 Mad. 1033=26 L W 581=(1927) M W N 759=106 I C 134.

—Suit under S. 92 ejectment of trespassers—prayer for inclusion of—not proper—withdrawal of suit. see A L R 1933 L 178.

—Decree for damages for loss caused to the Devasthanam by the trustee's misconduct cannot be passed. A I R 1926 Mad. 509=92 I C 526.

—Where suit under s. 92 prayer for possession is also included, Court is not justified in returning plaint. Decree for actual possession against transferees from trustee cannot be passed. Cl. (h) refers to reliefs ejusdem generis with those actually mentioned in s. 92. A I R 1925 A 683=47 A 770=23 A L J 601=L R 6 A 352 Civ =89 I C 40.

—A suit omitting some of the reliefs for which sanction was obtained, cannot be maintained. A I R 1925 Mad 636=21 L W 71=85 I C 1045.

—Where defendants raised constructions on trust property which interfered with public rights, suit by members of public some of whom were also trustees for demolition should be decreed. A I R 1924 All 850 =46 A 813=22 A L J 747=L R 5 A 603 Civ.=81 I C 294.

—Descendants in female line from founder of charity have an interest therein although not directly obtaining benefit. A I R 1924 P C 221=51 I A 282=47 M L J 361=35 M L T 189=47 M 884=L R 6 P C 17=22 A L J 983=26 Bom L R 1121=40 C L J 454=29 C W N 154=20 L W 803=(1924) M W N 749=26 P L R 1 (P C)=82 I C 804.

—Beneficial interest in private trusts is vested in definite individuals while in public trust it is vested in fluctuating body. A useful test for a Judge to apply to see whether the evidence satisfies the conditions of the private trust, is to ask himself whether any of the acts testified to by the witnesses could have been prevented or penalised by proceedings for trespass. Woodroffe and Ameer Ali's Commentary on P C s. 92. Lewin on Trust. Ch. II P 18 Ed. 12 Referred to. A I R 1922 All 519 =20 A L J 789=77 I C 97.

—Though Court has very wide powers under s. 92, it cannot impose a control which was not a part of the original trust A I R 1922 M 409=(1922) M W N 620=70 I C 87.

## C. P. C. (1908) SEC. 92 (Contd.)

## (11) Miscellaneous. (Contd.)

—Appellate Court cannot give directions on matters left undecided by trial Court. A I R 1930 Lah 1056=12 Lah L J 199=31 P L R 1018.

—Plaintiff is not entitled to temporary injunction on the ground that interference with collection of rent and breach of peace is feared. A I R 1926 Cal 604=30 C W N 214=94 I C 871.

—In order to entitle the plaintiff to succeed in an action for damages under s. 95 it is necessary that process complained of should have terminated in his favour or superseded or discharged. Section 95 applies only when the attachment is actually effected though a separate suit lies where a larger compensation than Rs. 1,000 is claimed basis of the suit does not in any way differ from the basis on which the compensation is allowed excepting that in a suit the plaintiff has to show that attachment was applied for not merely on insufficient grounds but that it was so done maliciously and without probable cause. A I R 1925 Bom 357=49 B 629=27 Bom L R 525=87 I C 1026.

—In an independent suit for damages where plaintiff was not a party to the suit, it is not necessary to prove that the prosecution was taken out maliciously and without probable cause suit will lie in case of wrongful attachment though made in good faith. A I R 1924 Rang 302=2 R 181=83 I C 433.

—Where injunction was granted after hearing both parties on sufficient grounds, and the plaintiff has not failed in his suit it is uncertain if damages can be awarded. To allow a Court to come to a finding inconsistent with and opposed to its prior order—Such anomaly is not intended by s. 95. A I R 1923 Mad 352=17 L W 150=71 I C 450.

—Tortious temporary injunction is a sufficient ground to a separate suit for compensation. In absence of sufficient grounds in an action under s. 95 (2) malice can be inferred if the plaintiff has suffered injury. A I R 1922 Lah. 303=45 P L R 1922=69 I C 523.

—Injury having been caused as a result or what was actually done though attachment was not completed, may entitle plaintiff to claim compensation. Malice may be inferred from want of reasonable and probable cause in taking legal action. In an action under s. 95 plaintiff should have succeeded only if judicial disposal is possible as such. A I R 1922 Mad 206=45 M 527=(1922) M W N 242=15 M L W 442=30 M L T (H C) 269=66 I C 760.

## C. P. C. (1908) SEC. 92 (Concl'd)

## (11) Miscellaneous. (Concl'd)

—Arbitration—Reference to, in a suit under S. 92, if valid. See 1 Pat L W 260=1917 P H C C 93=38 I C 296.

—Where a person builds temple either out of his own funds collected by subscription, direction by him regarding manner of management and person by whom it is to be managed is not illegal. A I R 1926 Mad 11 50=51 M L J 457=98 I C 208.

—In order to make s. 92 applicable it is not necessary that the existence of trust should be admitted by the defendant. A I R 1924 Pat 657=5 P L T 305=3 Pat 842=80 I C 980.

—Notice—Trustee a ward of Court—If notice under S 31 of the Court of Wards Act necessary. See 40 Bom 541=18 Bom L R 563=37 I C 186. Yauma, see 11 M 283.

## C. P. C. (1908) SEC. 93

—S. 92 is imperative and therefore conditional consent by Collector is not a valid consent 17 Bom L R 625=30 I C 17=39 B 580;

—But once a valid consent is obtained it is good for all the reliefs referred to in S. 92. 37 M 184; and it has been held that where the Collector refuses to give the sanction it may be granted by the Advocate General. 107 I C 130=A I R 1928 M 205.

—The fact that in the United Provinces, the Legal Remembrancer is invested with the duties of the Advocate General is not reason why for the purposes of a particular suit the Local Government may not appoint the Collector or any other officer to prosecute it. A I R 1931 P C 121=(1931) A L J 369=35 C W N 699=53 C L J 537=33 Bom L R 968=(1931) M W N 662=Ind Rul (1931) P C 233=34 L W 63=61 M L J 402=132 I C 745 P C.

—It had been held by the Privy Council that the appointment of an Officer to exercise the powers conferred by Ss 91 and 92 on the Advocate General and the previous sanction by the Local Government to the exercise of such powers were conditions precedent to the applicability of S. 93; and that, therefore, a suit instituted without such previous sanction must be dismissed 62 M L J 249=36 C W N 257=34 Bom L R 494=A I R 1932 P C 51=136 I C 461=53 A 990 P C.

—It is to counteract the effect of this decision that Act XI of 1932 has been passed. Sanction of Local Government required by—Suit pending at date of Public Suits Valuation Act (XI of 1932)—Necessity for such sanction in case of See 90 W N 966 (971).

## C. P. C. (1908) SEC. 94

—Clauses (a) to (e):—There is a conflict of judicial opinion as to the power of Court to pass orders under clauses (a) to (e). The Madras High Court has held that the Court has not got wider powers under S. 94 in the matter of granting temporary injunction than those conferred upon it by O. 39, S. 94 is governed by O. 39 which contains the rules prescribed. 92 I C 615=23 L W 85=A I R 1926 M 258; see to the same effect—26 L W 899=38 M L T 358=102 I C 700=A I R 1927 M 687; and 109 I C 281=27 L W 418=A I R 1928 M 491.

—The Allahbad High Court also takes this view. 37 A 423. But the Lahore High Court holds that the Court has an inherent power to act ex debito justice even in cases not prescribed by rules. 2 L L J 283=55 I C 403; see also 73 I C 909=A I R 1923 L 144; and A I R 1927 L 833=9 L L J 536=107 I C 753 and the Patna High Court follows the Lahore view as does the Sind J. C. Court see 1919 Pat H. C. C. 302=3 Pat L J 456, and 3 S L R 128=4 I C 609.

—The Bombay High Court has not expressed any view as to inherent power of Court, but see 16 Bom L R 676=27 I C 56.

—Clause (c):—A Civil Court cannot stay criminal proceedings by an interlocutory injunction unless the existence of very special circumstances is proved by the party applying for the same. 32 C W N 576=112 I C 712=A I R 1928 C 464=55 C 978.

—Nor can a Court restrain a party from bona fide exercising his statutory rights e. g. under s. 40 of Bengal Tenancy Act. 5 Pat L J 71=1919 P H C C 461.

—The Court will not grant an interlocutory injunction restraining proceedings which are null and void although the same be vexatious. 23 C W N 811.

—And a mere apprehension of interference with the plaintiff's right does not justify the grant of an injunction. 30 C W N 214=94 I C 871=A I R 1926 C 604. As to penalty for disobedience of an injunction see O. 39, r. 2.

—Other interlocutory orders:—An order directing furnishing of security and submission of accounts is an interlocutory order under Cl. (e) of s. 94 and not under O. 39, r. 1 and could not be interfered with in revision. 17 C W N 318=17 I C 361.

## C. P. C. (1908) SEC. 95

—Appeal:—An appeal lies under S. 104 (1) (g) from an order refusing relief under s. 95 as well as from one granting such

## C. P. C. (1908) SEC. 95 (Contd)

relief: 25 M L T 46=49 I C 86. see also 11 I C 917 and 21 I C 756.

—Action for damages:—In order to entitle the plaintiff to succeed in an action for damages under s. 95 it is necessary that process complained of should have terminated in his favour or superceded or discharged. S. 95 applies only when the attachment is actually effected though a separate suit lies where a larger compensation than Rs. 1000 is claimed. basis of the suit does not in any way differ from the basis on which the compensation is allowed excepting that in a suit the plaintiff has to show that attachment was applied for not merely on insufficient grounds but that it was also done maliciously and without probable cause. 27 Bom L R 525=87 I C 1026=49 B 629.

—A person whose property was attached wrongfully can claim damages from the attaching creditor though acting bona fide: 112 I C 848=A I R 1929 L 209.

—That the debt was actually about to dispose of his property is sufficient to justify attachment before judgment but not his mere straightened circumstances: 9 L W 69=25 M L J 45=49 I C 86.

—A claim made in counter affidavit for compensation for wrongful attachment of property before judgment is no bar to a suit for damages. S. 95 acts as a bar only if either of the conditions mentioned therein have been fulfilled: 1920 M W N 192=11 L W 479=27 M L T 258=38 M L J 324=35 I C 786.

—No damages will be awarded in an independent suit merely on the ground that an injunction was issued preventing him from doing what was subsequently held to be within his rights, except in case of malice or want of probable cause. There is no inconsistency with sub-section (2) of S. 95 C P C and art. 40 of Limitation Act 1908 respecting the above proposition: 46 C L J 455=106 I C 277=A I R 1928 C 1 see also 18 C W N 1189=21 C L J 68=26 I C 296=42 C 550 and the cases discussed therein.

—In an independent suit for damages where plaintiff was not a party to the suit, it is not necessary to prove that the prosecution was taken out maliciously and without probable cause suit will lie in case of wrongful attachment though made in good faith. 83 I C 433=A I R 1924 R 302=2 R 181.

—Suit for damages can lie for having wrongfully obtained temporary injunction on insufficient grounds: A I R 1927 C 247=100 I C 319=53 C 1008.



## C. P. C. (1908) SEC. 95 (Contd)

—Amount of damages to be awarded by Bombay High Court is not limited to Rs. 1000 as by virtue of Rule 329 of that Court, S. 95 does not apply to suit under the ordinary civil jurisdiction: 28 Bom L R 1077=A I R 1926 B 523=97 I C 753.

—Injury having been caused as a result of what was actually done, though attachment was not completed, may entitle plff. to claim compensation. Malice may be inferred from want of reasonable and probable cause in taking legal action. In an action under s. 95 plff. should have succeeded only if judicial disposal is possible as such. 15 L W 442=66 I C 760 =1922 M W N 242=A I R 1922 M 206=45 M 527.

—General damages such as damages for defamation or humiliation are also included in expense or injury in s. 95 for wrongful arrest: 3 L W 30=(1916) 1 M W N 76=32 I C 592.

—If no evidence as to the damages suffered is forthcoming, general damages can be claimed in an action for damages under s. 95; 24 L W 252=97 I C 634=A I R 1926 M 962.

—In a suit for damages for attachment before judgment, the plff. is bound to prove want of reasonable and probable cause for applying for attachment and malice in fact: 35 M 598; see also 32 M 170.

—But any person, when he unlawfully interferes with the exercise of property rights of another, commits an act in the nature of trespass to property and is liable in an action for trespass; it is not necessary for the plff. in such a case to prove any malice or want of reasonable or probable cause. 16 C L J 34.

—Quaere whether independently of S. 95, upon proof that a person maliciously and without probable cause asked for an attachment before judgment and obtained it by making untrue statements to the Court, a cause of action in the nature of malicious prosecution would arise. 59 C 1073=36 C W N 447 (449)=A I R 1932 C 821.

—Compensation:—There is nothing in the language of s. 95 to exclude conditional attachments of the class contemplated by O. XXXVIII, r. 5 (3) from its operation. In such cases, compensation may be awarded. 35 C W N 545.

—In a suit for compensation the plff. must prove actual malice in addition to the facts required to be proved by s. 95. 35 M 598.

—The passing of an order absolute for attachment before judgment under O. XXXVIII, Civil Procedure Code, does not preclude the Court from entertaining an application under s. 95 Civil Procedure

## C. P. C. (1908) SEC. 95 (Contd)

Code for compensation for wrongful attachment. (1931) M W N 956.

—S. 95 C. P. C. deals only with cases of compensation not exceeding Rs. 1000 and the section cannot be applied to cases where a security bond for a larger amount than Rs. 1000 has been given. A L R 1933 Mad 859.

—Compensation may be given for improperly obtaining a temporary attachment, though the same is set aside on notice. 25 M L T 46.

—The order for payment of compensation for unreasonable arrest before judgment on insufficient grounds is independent of the decree in the suit and the proper procedure is for the Court to make a separate order. The amount of compensation can, however, be set off against the decree amount. 21 I C 756.

—Compensation can only be granted by the Court which disposes of the case. 3 W R Mis 28 followed in 16 C W N 540.

—Injunction.—The issuing of an injunction is a judicial act; 46 C L J 455=106 I C 277=A I R 1928 C 1.

—Tortious temporary injunction is a sufficient ground to a separate suit for compensation. In absence of sufficient grounds in an action under s. 95 (?) malice can be inferred if the plff. has suffered injury; 45 P L R 1922=69 I C 523=A I R 1922 L 333.

—Where injunction was granted after hearing both parties on sufficient grounds and the plff. has not failed in his suit it is uncertain if damages can be awarded. To allow a Court to come to a finding inconsistent with and opposed to it, prior order such anomaly is not intended: 17 L W 150=A I R 1923 M 352=71 I C 430.

—An application under S. 95 does not bar a subsequent suit for damages caused by reaping and removal of the crop from the land which the plaintiff by the court's injunction was forbidden to enter. In such a suit the cause of action is trespass, and there is no need to prove malice. The injunction is an incidental, not an essential circumstance. It is not the proximate cause. The suit barred under S. 95 (2) and the application under S. 95 must be ejusdem generis with the same cause of action 1932 M W N 536=A L R 1932 M 973.

—Limitation:—Bombay and Madras High Courts hold that art. 36 of Lmt. Act. applies 38 M L J 324; and 23 M 621; and 6 Bom L R 704.

—A suit for damages for wrongfully obtaining a temporary injunction is governed

**C. P. C. (1908) SECTION 95 (Concl'd)**

by art. 42 and time runs from the date when the said injunction ceases: 42 C 550.

—Negligence of judgment-debtor:—A decree holder cannot make the judgment debtor liable in execution for negligently allowing the decreed house to be burnt down 33 I C 520 following 5 C L R 522.

**C. P. C. (1908) SEC. 96***Synopsis.*

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- 10 Save as otherwise provided.
- 11 Scope of S. 96.
- 12 Special Acts & Regulations as to appeal.
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- 15 Words and Phrases..

**(1) Appeal from orders.**

—Order setting aside execution sale in that notice to the auction-purchaser is appealable. 3 Lah L J 463=62 I C 936.

—An order setting aside the decree of the lower Court and directing a re-trial of the suit with reference to the entry in the Record of Rights published after the decree is an order in the exercise of the inherent power of the Court and not under O XLI r 3 and therefore an appeal lies therefrom under s. 96 read with s 100 A I R 1923 Cal 606=37 C L J 491=74 I C 1038.

—Appeal does not lie from an order rejecting the claim of a person as a legal representative of a deceased plaintiff, and not conclusively determining the rights of the parties. Hence remedy by way of

**C. P. C. (1908) SEC. 96 (Cont'd)****Appeals from orders (Cont'd)**

revision lies A I R 1924 Mad 813=47 M L J 370=35 M L T 82=(1924) M W N 763 =80 I C 942.

—No appeal lies from an order as to costs unless a question of principle is involved. A I R 1924 All 794=L R 5 A 573 Civ=80 I C 39.

—Appeal lies under s. 96 though not under s. 104 (1) (b) from an order issuing arrest warrant against judgment-debtor. A I R 1924 Lah. 360=73 I C 756.

—An order striking off the name of a party is in substance a decree though not one in form. The proper remedy of the aggrieved party is by appeal and not by revision. A I R 1931 All 333 (2)=(1931) A L J 181=Ind Rul (1931) All 388=131 I C 548.

—An appeal against a remand order will lie even after the decision of the lower court in consequence of the remand 37 Mad 29= 21 M L J 1063=10 M L T 437 =12 I C 664.

Dissenting from 36 C 762 and 32 C 1023.

—In deciding whether an appeal is competent the substance of the order should be looked at and the provision of law quoted by the Court passing the order is not decisive 24 M L J 477=13 M L T 347=(1913) M W N 382=19 I C 443.

—An appeal is incompetent and should be dismissed where even if it were successful it would be fruitless 15 I C 529.

—Interlocutory orders intermediate between preliminary and final decrees are not appealable. 17 C L J 605=13 I C 170.

—Order that no warrant of attachment should issue by a certain date—Appeal—see 101 P L R 1911=9 Ind. Cas. 823.

—Order passed under wrong rule of C P C—Effect—Appeal—see 9 Ind. Cas. 431.

**(2) Appeal shall lie—Right of appeal.**

—There is no definition of appeal in the Civil Procedure Code, but any application by a party to an appellate Court, asking it to set aside or reverse a decision of a subordinate Court is an appeal within the ordinary acceptance of the term, and it is no less an appeal because it is irregular or incompetent. 59 I A 283=63 M L J 389=36 C W N 803=34 B L R 1065=36 L W 7=1932 A L J 643=9 O W N 681=1932 M W N 817=55 C L J 528=137 I C 529=I R 1932 P C 195=33 P L R 621=A I R 1932 P C 165=A L R 1932 C 435 (P C).

## C. P. C. (1908) SEC. 96 (Contd)

## (2) Appeal shall lie—Right of appeal (Contd)

—A right of appeal must be given by statutory enactment. 40 Cal 21=23 M L J 276=16 C W N 961=16 C L J 245=12 M L T 195=(1912) M W N 781=14 Bom. L R 833=10 A L J 271=5 Bur L T 205=6 L B R 150=39 I A 197=16 I C 188 (P C).

—It cannot be assumed that there is a right of appeal in every matter which comes under the consideration of a judge. Such right must be given by a Statute or by some authority equivalent to a statute. Consequently if the right of appeal is challenged it is incumbent upon the appellant to establish the right to appeal. But unless the objection was obviously sound the appellant could hardly be expected to answer by anticipation the grounds that might possibly be assigned by the respondent in support of the objection. The practice therefore usually followed in the Calcutta High Court has been to require the respondent at the outset to indicate concisely the ground upon which his objection is based. 14 C L J 489=12 I C 745. (not following 8 B 287).

—Right to appeal exists in all civil proceedings though not called suits, unless it is expressly barred by the Code. A I R 1929 Mad 223=29 L W 237=(1929) M W N 62=56 M L J 387=Ind Rul (1929) Mad 425=115 I C 345.

The test for finding out whether a defendant against whom the suit is dismissed has a right of appeal is to see whether the appellant is aggrieved by the decree in spite of the dismissal of the suit. It is open to the parties to go behind the decree and see what really the adjudication was. 1913 M W N 690=14 M L T 189=21 I C 15 following 9 C W N 534.

—And subsequent enactment during the pendency of a suit cannot take away the right of appeal which is a substantive one. A I R 1930 All 706=(1930) A L J 842=52 A 886=Ind Rul (1931) All 38=128 I C 390.

—The appellant has a right of appeal though one of his grounds of appeal is that the decision on issue whether the case was covered by s. 144, C P C was wrong. A I R 1924 All 64=73 I C 602.

—There is no right of appeal to a party against a decision in his favour on the ground that one of the findings is against him. 24 I C 36.

—But there is a conflict of opinion on this point as to which see S 11 Heard and Decided—Adverse findings.

—In an ejectment suit against several defts. it was found that one of them was a benamidar of several others, and the

## C. P. C. (1908) SEC. 96 (Contd)

## (2) Appeal shall lie—Right of appeal. (Contd)

Lower Court passed a decree in favour of the plffs. making all the defts. liable for mesne profits and costs. Upon an appeal having been preferred by the benamidar deft. alone against the whole decree Held that the appeal was maintainable and as the ground was common to himself and the other defts so far at least as the question of mesne profits was concerned, the whole case came under review in appeal inasmuch as there could be no decree for mesne profits without one for possession. 19 C W N 1319=21 C L J 261=28 I C 343.

—A vendee applied to withdraw the money deposited by the pre-emptor under a pre-emption decree. He again made another application saying that he had changed his mind and would not take the money deposited. He then filed an appeal against the decree. Held, that by simply making the application to withdraw the money the vendee did not accept the decree and did not lose his right of appeal. 13 A L J 677=29 I C 452.

—Person not a party to suit nor his representative has no right to appeal. 79 P R 1919=12 P W R 1919=49 I C 381.

—Party against whom suit is dismissed, if can appeal see 22 I C 961.

—Dismissal of suit—Test of finding whether defendant is entitled to appeal —Open to parties to go behind the decree and see what the decision is. See 21 I C 15.

—Plff. claiming alternative reliefs obtaining a decree—Right of appeal. See 19 C W N 102=29 I C 429.

—Right of appeal—Construction of statute see 21 M L J 631=9 M L T 259=9 I C 937.

—Suit against villagers and Govt. for declaration and injunction in respect of channel—Decree—No appeal by Govt.—Right of villagers. see (1914) M W N 788=26 I C 18.

## (3) Forum of Appeal.

—No appeal lies to the Dt. Judge from an order of the Record Officer. 29 I C 421.

—Suit on contract—Decree by Court having jurisdiction in the place where the contract was made—Transfer of jurisdiction after decree—Appeal—Forum—Jurisdiction. See 37 Mad 477=26 I C 519.

—The appellate Court can dismiss an appeal though originally remanded for taking additional evidence if it afterwards find that it cannot stand. A I R 1931 Cal 353=34 C W N 839=Ind Rul (1931) Cal 450=131 I C 562.

## [C. P. C. (1908) SEC, 96 (Contd)]

## (3) Forum of appeal (Contd)

—Relief asked for cancellation of deed—Incidental relief—Appeal to District Judge—Jurisdiction—see 8 A L J 660=33 A 634=11 I C 934.

—Suits according to revenue payable on the land—Same on appeal—not according to amount payable under decree. see 10 P L R 1914=23 I C 89=21 P W R 1914.

—What determines the forum of —Decision of trying Court as to valuation of suit—Appeal—see 14 C W N 343=5 Ind Cas 18. Aggregate value of reliefs exceeding Rs. 5,000—Appeal to High Court—see 8 A L J 266=9 Ind Cas 574.

## (4) From every decree.

## (a) Amended decrees.

—Where a decree is amended a party affected by the decree as amended has a right of appeal against a decree in the amended form 11 N L R 92=29 I C 589.

## (a-1) Awards, decree based on.

Where the decree is not in excess of the award and where the award is made through intervention of Court. It cannot be treated either as a compromise under r. 3 O XLIII or an order appealable under s. 104 (1) (f) A I R 1924 Bom 324=26 Bom L R 171=79 I C 723.

—An appeal from a decree on an award in so far as the decree is not in accordance with the award, A I R 1930 Lah 102=10 Lah 688=30 P L R 722=Ind Rul (1930) Lah 282=122 I C 90.

## (b) Compromise Decree

See also under O 23, r. 3

—The right of appeal generally given against all decrees by S. 96 (1) and (2) of the C P Code is only with help by sub-section (3) in the case of decrees passed with the consent of parties. Sub-Section (3) is limited to cases where the parties invite the Court to pass a particular decree and the Courts act accordingly. 46 I C 775.

—Appeal does not lie from an order in terms of compromise passed in appeal by the District Court. A I R 1922 Lah 309=3 Lah 175=66 I C 258 see also 9 O C 365.

—Where the parties agree to abide by the finding on a particular matter, the decision in such cases is in the nature of an arbitrator's award and as such is not appealable, 113 I C 365

—See also 19 A L J 14=43 A 266=A I R 1921 All 310=59 I C 787 and 9 I C 296 =38 C 421.

## C P C (1908) Sec 96 (Contd)

## (4) From every decree. (Contd)

## (b) Compromise Decree. (Contd)

—But where in spite of the objection of one of the parties to a compromise that he only consented to execute a sale-deed outside the court in consideration of the plaintiff with-drawing the suit and did not consent to a decree being passed against him. Held that an appeal lay against the sale decree and that an S. 96, cl. (3) if the C P Code (V of 1908) did not prohibit it. 27 M L J 173=16 M L T 125=1 L W 541=25 I C 56. Partition suit—Compromise between some of the parties—Appeal by person not parties to the compromise 27 I C 242. An order directing the appointment of a Commissioner with the Consent of parties does not come under cl (3) of S. 96, 29 M L J 219=30 I C 357.

—A Judgment obtained by consent of counsel acting in court in a matter within their authority cannot form the subject of appeal. When consent of the Counsel was accorded when the Judge intimated that he would otherwise decline to entertain that motion it is not free and fair but constrained and involuntary acquiescence in a court of trial which the Court has decided to adopt 31 C L J 283=24 C W N 454=56 I C 541.

—Compromise decree can be appealed against by a person not a party to the compromise 22 C L J 333=20 C W N 178=31 I C 426.

—Compromise decree—Appeal against —When lies—Vakalat Containing power to Compromise. See 41 Mad 233=22 M L T 149=41 I C 429.

—An order made by consent of parties, is not liable to be challenged by way of appeal. The principle is now embodied in sub-section (3) of S. 96 of the C P Code. A pleader in charge of a case, can in certain cases exceed his authority in compromising a case, 30 C L J 331=57 I C 70,

—Decree in accordance with adjustment are decrees passed with the consent of party within the meaning of s. 96 (3) and hence no appeal lies therefrom. A I R 1922 Lah 309=3 L 175=66 I C 258.

—Consent decree still remains a consent decree-passed on consent originally given but afterwards withdrawn. A I R 1921 Mad 696=16 L W 155=(1922) M W N 83=66 I C 837.

—Consent decree ceases to be a consent decree if consent to it has been caused by the compulsion of the Court. A I R 1923 Lah 129=69 I C 653.

## C. P. C. (1908) SEC. 96 (Contd)

(4) From every decree. (Contd)

(b) Compromise Decree. (Contd)

—The Judge does not become arbitrator in a case wherein he is asked to dispose it off in a particular manner by the parties unless they agree to abide by his decision, A I R 1924 Sind 134-18 S L R 306-76 I C 309.

—Order passed with the consent of the Pleader under a mistake of fact can be set aside only if grave injustice is established. A I R 1923 P C 184-40 C L J 272-47 M L J 164-18 L W 437-26 Bom L R 189-46 M L J 160-33 M L T 376-5 L R P C 30-77 I C 355.

—Person who is not a party to the compromise can appeal against the decree based thereon if he sustains injury thereby. A I R 1925 Cal 421-40 C L J 535-85 I C 168.

—Appeal does not lie from order recording compromise after the decree has been passed thereon. A I R 1926 Cal 412-29 C W N 928-87 I C 248.

—Appeal does not lie from decision based on an agreement by which the parties agree to produce only documentary evidence and to be bound by the decision. A I R 1926 All 90-L R 6 A 541 Civ-89 I C 586.

—Decree passed in terms of the agreement arrived at by the parties during the pendency of a suit is a consent decree and as such no appeal lies therefrom. A I R 1926 Bom 39-27 Bom L R 1279-91 I C 294.

—The only remedy by which an objection can be taken by a party to a compromise is either by review or by a separate suit and not by way of appeal. A I R 1926 Cal 512-91 I C 670.

—Mere approval of the appointment of certain gentlemen as a committee of management by the plaintiffs does not make the decree a consent decree when either party do not consent to the conclusions arrived at by the Judge in other matters. A I R 1927 Lah 382-100 I C 838.

—Appeal lies as to the exact nature of the compromise in dispute, A I R 1928 Cal 108-46 C L J 358-105 I C 529.

—A decree passed for maintenance of illegitimate daughters against their father's family with the consent of the opposite party though not entitled to it, is no consent decree and appeal therefrom is a breach of agreement, thus disentitling the daughter to maintenance. A I R 1928 Mad 127-(1927) M W N 750-53 M L J 861-107 I C 419.

—An appeal lies against a consent decree passed ex parte, by a person not a party

## C. P. C. (1908) SEC. 96 (Contd)

(4) From every decree. (Contd)

(b) Compromise Decree. (Concl'd)

to the compromise by his absention from appearance. A I R 1928 Mad 922-108 I C 784.

—S 96 (3) does not take away the right to appeal by a person who denies that he was a party to the alleged compromise. A I R 1929 Sind 32-Ind Rul (1929) Sind 53-114 I C 101.

—Appeal lies against an order directing that a consent decree be passed, not limited merely to the property in dispute, A I R 1929 Sind 32-Ind Rul (1929) Sind 53-114 I C 101.

—Appeal lies from a decree on compromise by a person on whose behalf the suit was compromised by a party without authority. A I R 1929 Oudh 385-6 O W N 604-4 Luck 562-Ind Rul (1929) Oudh 449 (F B)-118 I C 753.

—Where parties agree as to the procedure to be adopted to come to decision on merits and also agree that such decision will be binding, the decision not being an adjustment under O. XXIII bars a right to appeal therefrom. Nor is s. 28 Contract Act, applicable to such an agreement. A I R 1929 Oudh 451-6 O W N 771-Ind Rul (1930) Oudh 26-120 I C 826.

—It is within the competence of the Court to set aside an interlocutory order made by consent, if a proper case is made out by an application in the same suit. A I R 1930 Bom 362-32 Bom L R 667-Ind Rul (1930) Bom 361-123 I C 697.

—Compromise of suit by, agent without authority—Order recording compromise in the order issuing decree—Appeal See 212 P L R 1914-96 P R 1914-24 I C 630.

## (c) Declaratory Decree

—Person having no title—Declaratory decree in wide terms—No right to appeal against 28 M L J 256-26 I C 528.

## (c-2) Decree passed on Award.

—See under (a-1) Awards supra.

## (d) Decree passed on Review.

—Appeal does not lie from original decree and reversed in a review, the decision in a review again being set aside in appeal, thus restoring the original decision. A I R 1925 P C 174-6 L R P C 128-26 P L R 526-89 I C 185. but see 85 P R 1891.

—Where an application for review of a judgment is granted, and an order passed thereupon, the original decree is superseded. Held, therefore that where the original decree was modified upon review



## C. P. C. (1908) SEC. 96 (Contd.)

(4) From every decree. (Contd.)

(e) Ex parte Decree. (Contd.)

by the Court which passed it and an appeal was filed from the original decree and not from the order upon review, the appeal could not be heard inasmuch as the decree under appeal had ceased to exist.

34 A 282-9 A L J 183-14 I C 472.

—Ex parte decree passed in an application filed under para. 20, Sch. II. of the Code is appealable. A I R 1928 Mad 969-55 M L J 262-29 L W 490-112 I C 691.

(e) Ex parte Decree.

—In an appeal from ex parte decree Appellate Court is to look to the merits only and whether there has been proper service of summon is not a subject matter of an appeal but of special proceeding under O IX. A I R 1924 Rang 137-2 Bur L J 282-2 R 108-79 I C 506.

—Ex parte decree—Appeal from—Remand for further evidence.—Appellate Court, powers of. See 34 I C 493.

—Dismissal of suit in the absence of defendant—Ex parte decree—Restoration, application for—Remedy—Appeal against decree—No interference in second appeal. 39 All 143-36 I C 277.

(f) Final Decree.

—Suit dismissed against minor defendant not represented does not amount to a decree and as such no cross appeal lies. A I R 1929 Cal 669-33 C W N 742-124 I C 75.

—Where the order in a decree was that certain defendants are not liable for mesne profits appeal lies from a decree and not against judgment. A I R 1924 Cal 1006-39 C L J 251-81 I C 527.

—Appeal lies against decision whether such decision was in favour of the plaintiff or not in a suit for rent where the plaintiff's title was proved but relation of tenancy disproved. 33 C L J 384-63 I C 520.

—Appeal lies against decree making defendant's liable for their own costs on withdrawal of claim against some of them. 18 M L T 460-(1915) M W N 1021-31 I C 312.

—Order declaring a suit has abated is a decree and hence appealable. 30 M L J 486-34 I C 372.

(i) Preliminary Decree.

—But preliminary decree cannot be appealed against after the passing of the final decree. But appeal may be allowed to be so amended as to convert it into one against the final decree. 33 C L J 414-25 C W N 776-48 C 1036-61 I C 923.

## C. P. C. (1908) SEC. 96 (Contd.)

(4) From every decree. (Contd.)

(i) Preliminary Decree. (Contd.)

—Preliminary decision without decree being drawn up is not a preliminary decree and no appeal lies therefrom. 15 I C 935-8 N L R 92.

—If there has been both preliminary and final decree and sufficient time is available to appeal against both the decrees, the proper course is to grant a reasonable time to the appellant within which to amend his appeal. Appeal having been filed against the preliminary decree before final decree was passed subsequent passing of final decree does not affect appeal against preliminary decree. But the final decree would fall if preliminary decree be set aside in appeal. A I R 1925 Sind 178-18 L R 133-78 I C 978.

—The plaintiff sued for damages for breach of contract. The defendant claimed a set off. The lower Court decided on a preliminary issue that the plaintiff's claim was barred by limitation; Held, on by the plff; (i) that the suit was one embracing both the claim and the set-off, and hence the decision of the plff's claim was not a decision of the suit and therefore, no decree could be passed, (ii) that no appeal lay under S 96 of the C. P. C. (Act V of 1908) and it was also incompetent, for want of compliance with the provisions of O. 41 R 1. Preliminary decrees are passed when after the decision of the suit, the Court has to stay its hand in order to work out the consequences on which the complete disposal of the suit depends. They are enumerated in O 20, Rr 12 to 16 and 18 and in O 34, Rr 2 to 5, 7 and 9. 19 I C 922-6 S L R 287.

(j) Small Cause Court Decree.

—But where a suit in the nature of a Small Cause suit is instituted in a Court the presiding officer of which is not invested with Small Cause jurisdiction and is decided as an ordinary suit by the successor of the first officer who is invested with such jurisdiction, the nature of the suit is not altered and an appeal from the decree to the District Judge is competent. 51 I C 967.

—Suit of Small Cause nature tried as regular suit by mistake by Judge having small cause powers—Decree—Appeal—see U B R 1907, Provincial Small Cause Courts Act I.

—Appeal from decree in case transferred from Small Cause Court to Munsif's Court to be treated as original suits. —See 23 M L J 373-38 Mad 25-17 I C 425.

## C. P. C. (1908) SEC. 96 (Contd)

## (5) Joinder of Parties in appeal.

—Plff. brought a suit to recover money against A and K. The first Court held that A was liable, A appealed against that decree only against the plaintiff and did not implead K. The lower appellate Court held that A was not liable but that K was. Held that inspite of this finding, no decree could be passed against K; the decree of the first Court dismissing the suit against him having become final, 6 A L J 643=2 Ind Cas 552=31 A 521.

## (6) Jurisdiction of Court passing the Decree,

—Jurisdiction of first Court after appeal presented and after appeal disposed of see 9 Ind Cas 185=15 C W N 399.

## (7) Letters Patent.

—And merely because an appeal lies under the Letters Patent does not necessarily mean that a similar appeal lies in every other case governed provisions of C P C unless it is so allowed by the Code itself, A I R 1929 Rang 198=Ind Rul (1930) Rang 53=120 I C 693.

—Order supersedes order of lower Court whether confirmatory or reversing see 17 M L T 208=39 M 1196=28 I C 367.

## (8) Limitation.

—Where a suit is time-barred but the defence of limitation is waived and a decree is passed, such decree is a consent one, and no appeal lies therefrom, 39 M L J 68=22 Bom L R 1313=24 C W N 1055= (1920) M W N 366=18 A L J 625=28 M L T 97=12 L W 260=47 I A 200=56 I C 539 (P C).

## (9) Practice and Procedure.

—Where there is a difference of opinion between the two Judges of the High Court hearing the appeal from mofussil, the opinion of the confirming Judge prevails, A I R 1925 Mad 1032=21 L W 721=86 I C 857.

—If the review is successful to any extent whatever, any appeal is pending, the proper course is to draw a fresh decree as it appears in a final shape. Per Suhrawardy, J.—Time may be given, if necessary, to file an appeal from the final decree, A I R 1931 Cal 323=Ind Rul (1931) Cal 434=34 C W N 1002=131 I C 258.

## C. P. C. (1908) SEC. 96 (Contd)

## (9) Practice and Procedure. (Contd.)

—Plea not taken in grounds and not revised in the first court, if can be allowed by appellate court. See 45 P L R 1914=34 P R 1913=22 I C 250.

—When jurisdiction has been usurped by a Court, an appeal against its order cannot be successfully defeated on the ground that the order has been made without jurisdiction; in other words, a party, who has induced a Court to act without jurisdiction, cannot be permitted, when the validity of the order made for his benefit is challenged by way of appeal, to take up an inconsistent position and to defeat the appeal by proof that the order was made without jurisdiction, 8 Ind Cas 26=15 C W N 723.

## (11) Scope of the section,

—There is not to be found in the sections of the Code which relate to the powers of an appellate Court, or in the rules, any provision which corresponds to O. LVIII r. 1 of the English Rules of the Supreme Court that all appeals shall be by way of re-hearing, 8 M L T 258=7 Ind Cas 202=37 M 1=1910 M W N 399.

—Interference with the finding of fact when the question depends on credibility or otherwise of witness of the trial Judge should as far as possible be avoided but it is otherwise when the question in issue depends upon circumstantial evidence and the evidence has not been gifted by the trial Court with reference thereto, A I R 1922 Cal 260=34 C L J 384=25 C W N 779=49 C 132=66 I C 782.

—Civil P C s. 96 cl. (3) has no application to execution proceeding, A I R 1924 Pat 346=4 P L T 735=79 I C 594.

—Appeal does not lie from a decree based on finding of a District Judge and accepted by the Counsel for defendant and confirmed by the High Court though in another case but relating to the same transaction, 10 Lah L J 333=109 I C 713.

—Appeal does not lie from decisions arrived at by Court by spot inspection and oral statements at spot, at the instance of the parties themselves in a dispute respecting land, A I R 1930 All 127= (1930) A L J 452=Ind Rul (1930) All 285=122 I C 685.

—Appeal does not lie from a prayer by person who sought the relief granted, A I R 1930 Lah 190=Ind Rul (1930) Lah 545=124 I C 673.

## C. P. C. (1908) SEC. 96 (Contd.)

## (11) Scope of the Section. (Contd.)

—Where two suits are in respect of the same transaction and a party is plaintiff in one and defendant in the other and vice versa, it is to be taken they were consolidated. One appeal is enough unless the party against whom the appeal is made impleaded as respondent, pro forma or otherwise. A I R 1930 All 706=(1930) A L J 842 =52 A 886-Ind Rul (1931) All 38=128 I C 390.

—Two decrees in the same suit—Appeal against one decree only—Other decree allowed to become final—Appeal barred—9 Ind Cas 667, but see cases under s. 11—Heard and Decided—(7-a) Two decrees appeal from one only.

—Second appeal does not lie against the order correcting omission made in judgment of the Appellate Court of a suit compromised in appeal. A I R 1928 Lah 352=9 Lah 176=30 P L R 135-Ind Rul (1929) Lah 849=119 I C 257.

—Findings in judgments as between co-defendants in a suit dismissed and not embodied nor implied in a decree do not operate as res judicata nor does an appeal lie therefrom. A I R 1924 Mad 858 =47 M L J 612=(1924) M W N 867=22 L W 384=85 I C 868. See also A I R 1922 Mad 446=16 L W 440=43 M L J 290=(1922) M W N 495=70 I C 425.

—Plaintiff can be said to have sustained an injury if joint possession instead of an exclusive one is awarded by a decree. A I R 1924 Cal 850=28 C W N 865=40 C L J 90=82 I C 386. See also 53 P L R 1919=51 I C 622.

—Resolution by the District Board to the effect that appeal from the decision be not preferred, is no ground for the dismissal of an appeal if filed by the Board itself. A I R 1930 Oudh 434=7 O W N 843-Ind Rul (1931) Oudh 60=128 I C 732.

—One and the same document cannot be a decree and judgment. 12 M L T 309 =16 I C 45.

—Decree in appeal dating back to and standing for the original decree see 17 M L T 168=28 I C 85=2 L W 169.

—As to appeal from adverse finding in a favourable decree the following cases may be noted. Appeal does not lie by a decree-holder, from a decree with adverse finding. A I R 1929 Pat 586=8 Pat 617=10 P L T 643-Ind Rul (1929) Pat 602=119 I C 554

—Appeal lies from a decree though formally in favour of a mortgagor but with adverse findings on their contentions

## C. P. C. (1908) SEC. 99 (Contd.)

## (11) Scope of the section (Contd.)

on the strength of which the Court dismissed the plaintiff's suit. A I R 1926 Mad 974=51 M L J 211=24 L W 292=(1926) M W N 761=97 I C 346.

—Mere adverse finding in a particular matter against an appellant though suit against him was dismissed is not a sufficient ground for the maintenance of an appeal. A I R 1925 Mad 264=47 M L J 743 =20 L W 734=(1925) M W N 141=84 I C 945.

—Decree-holder can appeal against adverse finding if it substantially be in issue and if the decree was passed in his favour merely on some other ground. In a declaratory suit where the relief claimed for is refused the decree should contain the results of declaration, but if the suit is dismissed decree is one where the declaration is refused. A I R 1924 Mad 689=20 L W 63=(1924) M W N 491=47 M 633=83 I C 960.

—Adverse finding —Decree in favour of party—Appeal not maintainable. See 51 I C 622.

## (14) Who may or may not appeal.

—A party cannot appeal from a decree which is in his favour even though the decision on some of the issues is against him. The decision is not res judicata in a subsequent suit between the same parties. 120 P L R 1911=101 P W R 1911=9 I C 1030.

—Where during the pendency of an appeal, the appellant is declared insolvent, the only person who can continue the appeal is the Receiver appointed under the Insolvency Act to manage the affairs of the insolvents. 18 I C 922.

—Where an appeal is dismissed respondent is not an aggrieved party and, therefore he cannot appeal. A I R 1923 Lah 504=77 I C 477.

—Government has a right to regulate the water supply in ryotwari tracts and hence an appeal lies by the party adversely affected by the decree against the Government. Such a decree as well as the order allowing the suit to be withdrawn as against them was illegal. A I R 1924 Mad 79=(1923) M W N 677=18 L W 243=45 M L J 212=74 I C 4.

—A party in whose favour a suit is dismissed with costs has no right of appeal especially when he is not adversely affected in any way by the decision in the suit or by any finding necessarily implied therein. 37 Mad 25=21 M L J 947=10 M L T 291=(1911) 2 M W N 303=12 I C 167. Party against whom the suit has been dismissed. See 22 I C 916.

**C. P. C. (1908) SEC. 96 (Contd)****(15) Words and Expressions.**

—Word an "appeal" in s. 96 includes the filing of a fresh appeal unless the dismissal of the first appeal bars a fresh one. A I R 1923 Pat 514=4 P L T 405= (1923) Pat 213=2 Pat 739=75 I C 284.

—The distinction between an appeal and an application for revision is that in the former case when the appeal is dismissed, the Appellate Court exercises its jurisdiction while in the latter it is entirely discretionary with the High Court to exercise it or not. A I R 1931 Nag 17=Ind Rul (1931) Nag 49=130 I C 145.

—In order that a decision may amount to a "decree" it must be found whichever way decided. A I R 1929 Mad 404=Ind Rul (1930) Mad 375=122 I C 519.

—"Decree" meaning of—Appeal—Judgment wherein there is no final adjudication—Appeal, whether lies against. See 12 M L T 309=(1912) M W N 1122=16 I C 45.

**C. P. C. (1908) SEC 97.**

—Under the present section, a party not appealing against preliminary decree is barred from raising any objections to such decree in an appeal against the final decree: see 42 C 914; and 50 I C 747; and 6 O W N 969; and 6 O W N 974; and A I R 1930 L 24; and A I R 1924 N 419; and 23 C 179; and 4 Pat L J 306; and 40 B 321; and 36 B 536; and 20 C W N 43; and 22 C L J 90; and 19 C L J 346; and A I R 1930 Pat 557; and 126 I C 372.

—At the same time it is incompetent for the Court passing final decree to re-open question decided by the preliminary decree: A I R 1929 A 65 and A I R 1929 A 252.

—The section applies only where preliminary decree is drawn up: 25 Bom L R 826; and 34 B 182; and 38 B 331; and 8 L R 92; and A I R 1924 C 1006.

—Whether passing of final Decree after the appeal from preliminary decree affects such appeal :—Such appeal is maintainable and is not affected by the final decree, see 34 A 493; and A I R 1928 C 804; and 52 I C 697; and 37 M 455; and 37 M 29; and 24 M L J 190; and 36 A 532; and 19 C W N 1132;

and A I R 1925 O 39 and 92 I C 545.

—So if an appeal from final decree is dismissed for default, the appeal pending from preliminary decree remains unaffected. A I R 1927 C 559. And if appeal against preliminary decree is allowed the final decree will fall to the ground 18 C L J 223=21 I C 510, see to the same effect: 27 Pat L R 180=93 I C 851=A I R 1926 L 534.

—Whether appeal lies from preliminary decree after the passing of final decree: —The question is not yet definitely decided.

**C. P. C. (1908) SEC. 97 (Concl'd)**

The High Courts of Madras, Allahabad and Patna have held that appeal lies: 1913 M W N 140; 37 M 29; 37 M 455; 36 A 532; and A I R 1930 Pat 177.

So also the Calcutta High Court A I R 1929 C 689

—( this latter decision has rendered obsolete the former decisions of the same High Court which were varying in views.) The Lahore High Court has held that no appeal lies from preliminary decree after the passing of the final decree: A I R 1921 L 265;

—and A I R 1928 L 73.

—As to Bombay view see 18 Bom L R 76; see also 18 S L R 133; and Nagpur view see A I R 1922 N 179.

**C. P. C. (1908) SEC. 98**

—1. This sub-section was added by s. 2 and the First Sch. of the Repealing and Amending Act 1928 (XVIII of 1928)

**(1) Legislative Changes**

—The words " they may state the point of law upon which they differ and the appeal shall then be heard upon that point only or more of the other Judges and such point shall be decided in " the proviso to clause (2) have been substituted for the words " the appeal may be referred to one or more of the other Judges of the same Court and shall be decided." As to the result of this change see the observations of Jenkins C J. and of Mookerjee J. in the undermentioned cases. Per Jenkins, C. J. Before a reference to one or more of other Judges under S. 98 of the C. P. Code is made, the Judges hearing the appeal should come to a complete decision with the reservation of the points of law on which they differ and they should by their judgments make it clear what the result will be in case the point of law referred is decided one way or the other 22 I C 383=18 C W N 33

—Under S. 575 of the Code of Civil Procedure of 1882, it was the appeal that was referred to a third Judge. When the Judges hearing the appeal differed in opinion on a point of law, and on such reference, the whole appeal was open for agreement, and not merely the point of law on which the Judges had differed in opinion. Under S 98, sub-S. (2) of the Code of 1908, the proper procedure is to state the point of law upon which the judges differ, the appeal is then to be heard upon that point only and what is to be decided is not the appeal but the point of law only. 14 C L J 552=39 C 353 =16 C W N 817=13 I C 353.



## C. P. C. (1908) SEC. 98 (Contd)

## (2)-Scope of the section

—S. 98 (2) proviso restricts third Judge to give decision of points of law refused. A I R 1922 Oudh 189=9 O L J 219=25 O C 213=68 I C 209.

—S. 98 is confined to appeals from Mofussils Courts and does not apply to Letters Patent appeal. A I R 1923 Bom 218=76 I C 317.

—S. 98 does not apply in revision in Small Cause Court's case. A I R 1925 Mad 281=47 M L J 876=85 I C 1016.

—The expression in S. 10, of C. P. Courts Act, "any enactment for the time being in force" must include the Code of Civil Procedure and having regard to the subject-matter of S. 10 must include S. 98 of that Code. Such a view will not make S. 10, Courts Act, a nullity. 28 N L R 80=140 I C 630=A I R 1932 N 88.

—When an appeal is laid before a judge under S. 98 of the Civil Procedure Code, he has jurisdiction only to deal with the questions of law on which there is a difference of opinion and he has no jurisdiction to go into other matters. 35 A 487 at 498=40 I A 182=17 C W N 1165=16 O C 247=25 M L J 492=(1913) M W N 785=14 M L T 299=11 A L J 901=18 C L J 384=15 Bom L R 1001=21 I C 288 (P C)

—Division Bench— Difference of opinion—Reference to Full Bench— Punjab Courts Act, S. 10 (2) (b) subject to S. 98 (2) C. P. Code See 109 P W R 1916=34 I C 714 (F B).

—Appeal under S. 54 of the Land Acquisition Act—Difference of opinion between members of division Bench See 35 M L J 110=41 M 943 (F B)=49 I C 27.

## (3) Letters Patent and S. 98.

—S. 98 does not control cl. 36 of Letters patent. A I R 1921 P C 6=45 B 718=19 A L J 469=23 Bom L R 628=33 C L J 488=25 C W N 605=40 M L J 519=14 L W 7=(1921) M W N 408=48 I A 181=69 I C 872.

—S. 98 cannot control or override the provisions of Cls. 10 and 27 of the Letters Patent (All). The words of sub-S. 3 of S. 98 cannot be construed to mean that S. 98 (1) and (2) is superseded by reason of certain provisions of the Letters Patent. Cl. 27, Letters Patent, and S. 98 of the Code are not incongruous. 135 I C 58=1931 A L J 1157=I R 1932 A 267=A I R 1932 A 195.

—S. 98 supersedes where clause 36 of Letters Patent is inconsistent. A I R 1925 Cal 845=41 C L J 456=29 C W N 755=52 C 894=88 I C 637.

## C. P. C. (1908) SEC. 98 (Contd)

## (3) Letters Patent and S. 98 (Concl'd)

—S. 98 C P Code and cl. 36 Letters Patent, certain rules of procedure whereas cl. 15, Letters, Patent, gives a right of appeal in certain cases. A I R 1927 Mad 641=52 M 563=29 L W 823=57 M L J 264 =116 I C 343.

—Procedure prescribed by cl. 36, Letters Patent is to be followed in appeal before the High Court where there is an equal difference of opinion between the judges as regards the applicability of either of C P Code or letters Patent A I R 1929 Mad 641=29 L W 823=53 M 563=57 M L J 264=Ind Rul (1929) Mad 535=116 I C 343.

—S. 98 applies to appeals from Subordinate Courts and not to Letters Patent appeals. A I R 1925 Pat 625=4 Pat 510=6 P L T 634=87 I C 849.

—Cl. 27 of the Letters Patent and S. 98 of the Code do not overlap and are applicable to different set of circumstances. Where there is an appeal under the Letters Patent and two Judges hearing the appeal differ in their opinion, the procedure is governed by Cl. 27 of the Letters Patent, but where the appeal is under the civil Procedure Code the procedure is governed by S. 98. The essence of a Code is to be exhaustive and the Civil Procedure Code has indicated the course which should be adopted in case of a difference of opinion between two Judges hearing an appeal to the High Court under the Code. In such a case the procedure laid down in the Code should be followed and not that laid down in Cl. 27 of the Letters Patent. 137 I C 58=1931 A L J 1157=I R 1932 A 267=A I R 1932 A 195. Under Cl. 27 of the Letters Patent the reference is imperative and obligatory and not discretionary as in S. 98 and under cl. 27 the subject of the reference is wider in scope as it may relate to both questions of fact and of law and is not restricted to points of law only as in S. 98 (1911) 1931 A L J 1157=137 I C 58=I R 1932 A 267=A I R 1932 A 195. S. 98 (3) C P C excludes chartered High Courts from the operation of S. 98 C P C. 11 P 772. In second appeals from the mofussil on the appellate side of the Bombay High Court where the Judge differ the procedure is governed by S. 98 of the C P Code and not by clause 36 of the Letters Patent of the Bombay High Court 43 Bom 433=21 Bom L R 157=50 I C 715. See Also 43 Bom 492. Where the Judge to whom an appeal is referred under the provisions of s 575 of the Civ Pro. Code 1882 agrees with one of the differing Judges as to the result of the appeal. But the agreement does not proceed



**C. P. C. (1908) SEC. 98 (Contd)****(3) Letters Patent and S. 98 (Concl'd)**

on the identical lines of reasoning there is no further appeal to the High Court against such decision under 15 of the Letters Patent. 6 Bom L R 230.

**(4) Difference of opinion between Judges.**

—Where the two judges differ appeal is confirmed A I R 1925 Mad 1032=21 L W 721=86 I C 857.

—Where Bench of two judges hearing appeal differ decision of appeal is to be regulated by S. 98 A I R 1926 Lah 65=7 Lah 179=27 P L R 50=8 Lah L J 13=93 I C 344.

—Confirmation of the decree appealed from is the rule, and its modification or reversal is only an exception. Where there is no complete agreement between the two judges as to the variation or reversal of the decree passed by the trial Court, and the decree of the Court of first instance should be confirmed A I R 1926 Lah 65=7 Lah 179=27 P L R 50=93 I C 344.

—In appeal against a decree heard by two judges, only that part of decree will be reversed upon which the judges were agreed and decree will be confirmed as to the rest A I R 1928 Mad 180=51 M 291=54 M L J 703=28 L W 158=109 I C 153.

—S 98 governs when Bench differs in deciding an appeal. A I R 1926 Cal 121=52 C 1018=91 I C 897.

—Appeal from Subordinate Court  
—Judges of Bench of High court hearing  
—Difference of opinion equal between one of the Judges being for its dismissal and the other for allowing it—S. 98 C P C comes into operation in case of and the appeal will be dismissed 1932 P C L 966 (Civ)=A L R 1932 L 966 (70) (Civ) Where reference is made under this section to a third Judge, such third Judge should not be one of those who first heard the appeal. 15 P R 1887. Third Judge disagreeing with referring Judges can only express his opinion. Third Judge has now to decide appeal as indicated by referring Judges—If he disagrees he should confirm the Judgment A I R 1922 Cal 544=26 C W N 985.

—There is nothing in the language of s. 575 of the Civ. Pro Code 1882 to support the view that the third Judge to whom reference is made under the section cannot sit and hear the appeal alone 6 Bom L R 131=27 Bom 189. A reference to a third judge under S. 98 C P Code can be made only when the point of law on which the Judges have disagreed has been stated

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**C. P. C. (1908) SEC. 98 (Concl'd)****(4) Difference of opinion between Judges. (Concl'd)**

by both the judges for purposes of the reference. 23 C L J 592=34 I C 584.

—Difference between judges of Divisional Bench in Prob. and Adm matter  
—Appeal see 22 C L J 298=31 I C 319.

—Difference of opinion between judges of Division Bench in matters coming within S. 115 C P Code  
—Judgement of Senior Judge prevails  
—C P Code S. 98 (2) not applicable see 18 M L T 591=32 I C 330.

**C. P. C. (1908) SEC. 99****Synopsis**

- (1) General
- (2) Error, defect or irregularity in proceedings in suit
- (3) Misjoinder

**(1) General.**

—This section is intended to discourage technicalities defeating ends of justice 8 A 365, by laying down that mere error or irregularities cannot be raised as grounds of appeal where the decision appealed from was given on merits by the lower Court and was within the jurisdiction of such Court 9 M I A 268, but "irregularities" under the section do not include illegalities 42 M 83.

—Under the present section error defect or irregularity may have prior or subsequent to the suit. It was held under the corresponding s. 578 of the old Code that the error should have been subsequent to the institution of the suit 26 B 259; 37 C 552. and the irregular order s. 99 need not be set aside if appellant's case is weak. A I R 1926 Cal 95=90 I C 121.

—Provisions of ss 99 and 105 do not conflict A I R 1927 Rang 150=5 R 80=102 I C 379.

—Want of jurisdiction is not cured by s 99. A I R 1926 All 650=95 I C 405.

—Decision in appeal on technical ground ignoring s 99 can be interfered in revision A I R 1926 Lah 402=93 I C 938.

—Questions about constitution of a right to maintain suit do not arise in proceedings in suit and so it is doubtful if S. 99 applies A I R 1929 Cal 455=49 C L J 957=Ind Rul (1930) Cal 523=125 I C 299.

—Question of paramount title tried in mortgage suit without objection, merits or jurisdiction not affected, A I R 1928 Nag 306=113 I C 884.

—Suit for arrears of revenue under cl. 16 of s. 108 of Oudh Rent Act decided

## C. P. C. (1908) SEC. 99 (Contd)

## (1) General (Contd)

under cl 15, as plaintiff was not prejudiced decree cannot be reversed A I R 1927 Oudh 468-4 O W N 933-106 I C 569.

—Where the appellate judgment did not refer to all material points for consideration in the case and it was clear that the Court had not applied its mind to the case fully a fresh disposal of the appeal should be directed. S 99 does not apply A I R 1931 Cal 164-52 C L J 566-130 I C 573.

—The words "not affecting the jurisdiction of the Court" mean not affecting the competency of the Court to try—17 Cal 155. As to the distinction between irregularity and want of jurisdiction, see 3 P D at p 128. This section only applies to mistakes and irregularities subsequently committed in a suit which has been instituted in such a way as to give the Court jurisdiction to try it. 26 Bom 259; it does not apply where the proceedings and the decree passed by a lower Court are without jurisdiction—5 All H C 55. The section is retrospective in operation 22 M L J 225-13 I C 788.

## (2) Error, defect or irregularity in proceedings in suit.

—No decree can be reversed or case remanded for any irregularity, error or defect not affecting the merits of the case or the jurisdiction of Court, such as trying the suit together Marsh, 45; 54 All 289.

—Minor appearing through different guardian—No objection taken is defect curable under s. 99. 61 I C 605.

—But a minor is sued without guardian—Omission to appoint guardian of a minor is fatal. A I R 1921 Cal 534-25 C W N 525-62 I C 464.

—Plaint signed and verified by next friend of a plaintiff who was major before institution of the suit is not valid as it is a material irregularity. A I R 1924 All 54-45 A 701-L R 4 A 342-21 A L J 626-77 I C 30.

—Although a formal appointment of a guardian ad-litem is necessary in a suit against a minor under O 32 R 3, when a suit against a minor has been a prior right under R 3 (4) to be appointed guardian-ad-litem and no ground is shown which would justify a Court in excluding him from the guardianship-ad-litem, the want of formal appointment is only an irregularity that is curable under S 99 of the C P Code, 30 Cal 1021 foll. There is no provision in the C P Code for the formal appointment of a next friend in a suit by

## C. P. C. (1908) SEC. 99 (Contd)

## (2) Error defect or irregularity in proceedings in suit. (Contd)

a minor. If a next friend or guardian-ad-litem refers a suit to arbitration without the leave of the Court a suit will lie to set aside any decree based on an award of the arbitrators in such reference without leave. 9 Bur L T 158-33 I C 941.

—Guardian-ad-litem—Effectual representation of minor in proceedings—No formal notice to guardian—Not a material defect See 35 I C 404.

—Court's refusal to summon witnesses or examine them affects the merits of the case. A I R 1923 Nag 58-68 I C 272.

—Section 99 applies when Appellate Court admits additional evidence not affecting merits. A I R 1921 Sind 155-16 S L R 17-66 I C 833.

—Court having wrong view as to onus not affecting merits is not fatal. Appellate Court will not interfere. A I R 1923 Nag 62-69 I C 541.

—Judgment though based on inadmissible evidence is curable by s 99 if it is based on positive evidence for plaintiff and absence of evidence for the defendant. The case need not be remanded. A I R 1924 Cal 370-71 I C 300.

—Even after the Court's finding that the defendant is major the suit be not amended, and the major defends the suit with a plea that irregularity is cured by the conduct of the parties. A I R 1923 All 257-L R 4 A 291-71 I C 447.

—Deposition of expert admitted on being signed by him—Failure by Judge to sign it is a mere irregularity, A I R 1923 Nag 7-68 I C 564; see also 35 I C 404.

—Plaintiff failed to sign plaint which he filed through agent. Power-of-attorney was not given to agent and no cause was shown for failure to sign the plaint. No objection to this was taken. This is a mere irregularity curable by s. 99. A I R 1923 Rang 206-1 R 42-74 I C 100.

—Absence of a formal order of appointing guardian ad litem is a mere irregularity when the Court by its action is supposed to have sanctioned the appointment. If there be no fraud or collusion, even failure to give notice to the minor concerned is not fatal. A I R 1923 Oudh 206-25 O C 113-74 I C 409.

—No fraud, but a formal defect in presenting the case to Court—Section 99 applies. A I R 1924 Pat 114-2 P L R (Civ) 174-74 I C 1035.

—Absence of a general power-of-attorney in a suit is a mere irregularity and can be no ground to disturb the decree appealed from. A I R 1923 Bom 44-24 Bom L R 1302-47 B 227-76 I C 34.

## C. P. C. (1908) SEC. 99 (Contd)

## (2) Error defect or irregularity in proceedings in suit. (Contd)

—Where some days after the filing of a plaint which was signed by B, the then Chairman of the Managing Committee, the Managing Committee was suspended for breach of a certain bye-law, objection was raised that B was not legally the Chairman of the Managing Committee and had no power to sign the plaint. Held, that, as de facto Chairman of the Managing Committee, B alone could have signed the plaint under the rules of the Municipality, and that, as the Municipality had authorised the filing of the suit, there was no substance in the objection. Held, further that the case was covered by S. 99 C P C as at the most it was an irregularity in the which did not affect the merits of the case. 56 B 448-34 B L R 1216-140 I C 213-I R 1932 B 567-A I R 1932 B 562-A L R 1932 B 1153 (1160).

—Omission to obtain direction of Court under O. 30, r. 3 for service of summons on partner of a firm is not an error or irregularity affecting jurisdiction of Court in relation to defendant firm. 59 C 496 (500)-138 I C 637-I R 1932 C 475 -A I R 1932 C 541.

—But failure to effect at all service of summons or in manner prescribed by law is fatal-ibid. Failure to give 10 days' time to file objections to awards is no ground for reversal of a decree based on the award if no valid objection could be raised at all. A I R 1931 All 453-(1931) A L J 442-Ind Rul (1931) All 575-133 I C 31.

—An Appellate Court can vary a decree under appeal not only for error but also on grounds which have come into existence since it was passed. A I R 1931 Bom 280-33 Bom L R 266-Ind Rul (1931) Bom 356-133 I C 244.

—Defect of not dealing with appeals separately is not cured by s. 99. A I R 1924 Pat 245-(1923) Pat 339-78 I C 593.

—Where parties' remedy lost by Court's action s. 99 applies. A I R 1924 Oudh 337-27 O C 35-83 I C 850.

—Error of Court fee is cured by s. 99. A I R 1925 Rang 65-2 R 462-84 I C 971.

—Refusing inspection on grounds of delay and absence of possibility of benefiting party does not vitiate the trial. A I R 1925 Bom 105-26 Bom L R 907-84 I C 363. Omission to apply to Court passing for substitution of name of legal representative of judgment-debtor and he acquiescences in the irregularity case is covered by s. 99. A I R 1925 Oudh 448-12 O L J 146-2 O W N 73-28 O C 330-87 I C 21.

## C. P. C. (1908) SEC. 99 (Contd)

## (2) Error defect or irregularity in proceedings in suit. (Contd)

—Omission to give notice to natural guardian before appointing a guardian does not prejudice minor defects cured by s. 99. A I R 1925 All 548-L R 6 A 323 Civ.-88 I C 294.

—Defect of not applying to the Courts which passed decree for substitution of legal representative is cured by s. 92. A I R 1926 Lah 34-26 Pat L R 740-90 I C 1050.

—Defect of omission to hear argument is cured by s. 99. 13 O L J 473-93 I C 291.

—Omission to frame issue when suit decided as if issue framed—Error is covered by s. 99. A I R 1926 Bom 384-28 Bom L R 743-96 I C 827.

—Omission to draw up final decree where terms are ascertainable—Error is covered by s. 99. A I R 1927 Bom 131-51 B 125-29 Bom L R 107-109 I C 956.

—Where merits not affected—Failure to amend plaint is no ground for interference. A I R 1928 Bom 425-30 Bom L R 1099-113 I C 381.

—Multifariousness if not affecting merits is no ground for interference. A I R 1929 All 148-(1929) A L J 204-Ind Rul (1929) All 305-114 I C 881.

—Not examining the witness by Judge following him to be examined by others does not affect merits of the case and when no objection is taken judgments need not be reversed. A I R 1928 Pat 438-10 P L T 474-Ind Rul (1929) Pat 205-115 I C 237.

—Issue or summons to produce document refused—Copy produced but not proved—No miscarriage of justice caused. A I R 1929 Cal 459-49 C L J 546-Ind Rul (1930) Cal 248-122 I C 552.

—Where the objection raised is technical and error did not affect the merits of the case or the jurisdiction of the Court the case would be covered by s. 99. A I R 1929 Cal 445-49 C L J 357-Ind Rul (1930) Cal 523-125 I C 299.

—Court's mistake in procedure must not make the party suffer. A I R 1931 Oudh 22-Ind Rul (1930) Oudh 353-126 I C 385.

—After appellate decree is passed, an application simply for revival of the execution proceedings by the party executing the decree, though bad in form, is merely an error of procedure which is curable under s. 99 of the Code. A I R 1930 Bom 225-32 Bom L R 300-Ind Rul (1930) Bom 519-127 I C 199.

—Omission to sign or to verify plaint is no ground for interference in appeal. A I

## C. P. C. (1908) SEC. 99 (Contd)

## (2) Error defect or irregularity in proceedings in suit. (Contd)

R 1930 Lah 735-Ind Rul (1931) Lah 31=128 I C 303.

—See also A I R 1928 Pat 51=8 P L T 820=104 I C 747.

—The irregularity of not delivering the judgment in person owing to illness of the Judge cannot be cured by s. 99. A I R 1931 Cal 164=52 C L J 566=139 I C 573.

—Sch. II of the Code is as much an enactment as any other part of the Code, and where parties apply to refer the matter to arbitration in appellate Court, that Court must, under paragraph 3, sch. II, refer the matters in dispute between the parties to arbitration, and if the Judge omits to do so, his judgment is defective, and s. 99 does not cure the defect. 8 A L J 678.

—An appellant died after filing his appeal and no application was made to bring his representatives on the record but a vakalatnama was filed by a pleader on behalf of the representatives and the appeal was heard and the suit decreed in the name of deceased appellant: Held, that this was not a mere irregularity which could be cured by S. 99 of the Code of Civil Procedure 1908, and that the appeal had abated. 9 I C 197.

—Where the objections of the judgment-debtor had not been heard before ordering the attachment, which was a step in the execution proceedings, it was held that the procedure adopted was unlawful and not merely irregular. 13 Bom L R 973=12 I C 547=16 Bom 58.

—Incomplete verification i. e. by three out of six plffs. (one of the three having further verified for the next friend of three minor plffs.) is cured by S. 99 if the trial had proceeded on the merits. 17 C W N 989=15 I C 583.

—The object of S. 99 is to prevent higher Courts from reversing the substantive decrees of lower Courts on mere technical grounds. The section does not warrant that an irregular remand should not be interfered with. 14 Bom L R 1154=37 Bom 289=17 I C 891.

—An Appellate Court has no power to order a remand except—under O. 41, rr. 23 and 25. Consequently, the inherent power of the Court to remand a case otherwise than under O. 41 of Rr. 23 and 25 of the Code seems to be taken away if it ever existed by a direct legitimate enactment. 12 C L J 368=7 I C 75 dissented from, S. 564 of the old Code was not re-enacted in the new Code, because it was unnecessary. A suit having been decide

## C. P. C. (1903) SEC. 99 (Contd)

## (2) Error defect or irregularity in proceedings in suit. (Contd)

by the first court upon the merits, the lower Appellate court reversed the decree and remanded the case under O. 41, R. 23 of the Civil Procedure Code. Held, that the mistake of the lower Appellate Court was an irregularity under S. 99 of the C P C not affecting the merits of the case, and the High Court therefore would not set it aside. 28 C 324=5 C W N 509 followed. 20 I C 39=41 Cal 108=18 C L J 613.

—Where the question in appeal was as to the amount of court-fee to be paid on the written statement claiming a set-off under the C. P. C. of 1882. Held, that the error, if error there was did not affect the merits of the case or the jurisdiction of the Court and so afforded no ground for reversal, substantial variation or remand under S. 99 of the C. P. C. of 1908. 17 C L J 365=19 I C 918.

—Defect of signature on pleadings is curable by s. 99. 1 P L T 647=59 I C 282.

—S 99 C P C shows the principle to be adopted in appeals: the Appellate Court will not reverse the order of the Court below on a point which is not of importance at the time of the hearing of the appeal and which does not affect the merits of the case. (1917) M W N 89=37 I C 954.

—Death of party before hearing of arguments—Legal representative not brought on record—Judgment, pronouncing of. See 43 I C 161.

—Judgment written and signed by judge who tried the case—Judgment pronounced by colleague in open court. See 46 I C 618.

—The verification required under O. 21, R. 66 (3) of the C P Code by the Kurbazdor of the decree-holder is valid, when the court is satisfied that he was acquainted with the facts of the case. An objection as to defect in signature on the petition cannot be allowed to be raised for the first time in appeal, as it could have been cured by amendment under O. 6 R. 17 of the new C. P. Code of 1908. Moreover, the mere fact that a plaint is not duly signed does not make it void, 2 C L J 11 doubted 22 All 55; 34 All 348 and 17 Cal 589 rel. Under S. 99 of the C. P. Code, an appellate court will not reverse a decision merely on the ground of a defect of signature. 1 Pat L T 647=59 I C 282 See also 103 P L R 1902 and 7 N L R 33 and 10 I C 731.

—Omission to prove loss of document before giving secondary evidence is not fatal. 59 I C 461.

—Appointment of receiver in partnership suit—Parties and court understanding

## C. P. C. (1908) SEC. 99 (Contd.)

## (2) Error defect or irregularity in proceedings in suit. (Concl'd)

him to be commissioner to look into accounts—Report by him not a nullity—Irregularity cured by conduct of parties accepting receiver as Commissioner. See 72 P L R 1914=45 P W R 1914=22 I C 526.

—Transfer by District Judge of remanded suit—No objections—Decision on merits—Effect on. See 15 M L T 304=23 I C 425.

—Suit for restitution of conjugal rights—Right to begin wrongly decided—No prejudice—Interference in appeal. See 7 Bur L T 129=23 I C 242.

—Foreclosure suit—Time filed for payment and redemption—Extension of time—Redemption decree must be formally drawn up—Decree passed by implication, treated as such under the section. See 26 I C 701

—Irregularity not affecting merits of the case—Improper admission of additional evidence—When appellate court will interfere. 26 I C 50.

—Appeal entertained without Jurisdiction—Further appeal if lies. See 17 C W N 116=16 C L J 77=16 I C 940.

## (3) Misjoinder.

—A and B obtained two separate money decrees against C and attached certain properties in execution thereof. When the properties were attached by A, the three plaintiffs and the 4th defendant, the children of C, put in a claim-petition on the ground that the properties belonged to their deceased mother. No such claim-petition was put in when B attached these properties. The suit for declaration that the attachments made by A and B are not valid, was dismissed by the Munsiff but was decreed by the Sub-Judge. Held, that the objection that the suit was bad for misjoinder of causes of action cannot be heard in second appeal. S. 99 of the new Code is applicable to all appeals heard after the new Code came into force. 1912, 1 M W N 50.

—Suit for enhancement of rent in respect of two etmans. See 23 C W N 945=30 C L J 140=54 I C 850.

—Partition suit—Objection as to misjoinder of causes of action must be taken in lower Court. 33 C L J 317=63 I C 161.

—As to what amounts to misjoinder of causes of action see under Order II rr. 3, and 4 and the undermentioned cases. A suit for possession on ground of defendant being a trespasser cannot be converted

## C. P. C. (1908) SEC. 99 (Contd.)

## (3) Misjoinder. (Contd.)

into one for redemption, at the last stage especially; obiter. A suit for possession and one for redemption in the alternative cannot be included in a plaint. 1 P L R 1912=167 P W R 1911=12 I C 576.

—A suit seeking possession by redemption against one set of defts and possession by ejectment against other, defts could not be allowed. 13 A L J 342, 44=28 I C 602; See also 12 A L J 1233=3 27 I C 35.

—Ejectment from several plots included in one suit—Different defts in possession under different titles—suit if bad for misjoinder. See 18 I C 852.

—In a suit for possession by inheritance, the plaintiff can, in one suit, attack several alienations made at different times in respect of various portions of property by a deceased owner in favour of different persons. There is no misjoinder of parties or causes of action by including all the alienees in one suit. 167 P L R 1911=10 Ind. Cas. 48=120 P W R 1911.

—As to conditions for joinder see 12 I C 813.

—The observations under the first two paras of the last heading apply to the case of misjoinder of parties. Where a plff filed a suit in ejectment against several defts in possession of different plots of lands on the ground that the defts have no Kudivaram interest therein, held that the suit was not bad for misjoinder of parties and that the suit having been tried by the first court, it was not open to the Appellate Court to treat it as bad for misjoinder. 41 I C 167 following 36 C 780.

—In a suit by plffs for a declaration that alienations of family lands made by their father in favour of several alienees was without consideration and necessity and did not affect their reversionary rights, on a preliminary objection that the suit was bad for misjoinder of parties and the trial court upheld the objection and dismissed the suit. On appeal the District judge held that there was no misjoinder of parties or causes of action and reversed the decree of the first Court. Held, that the suit was not bad for misjoinder of parties and the plffs, were competent to bring one suit against the vendees and the prior mortgaged and that the District Judge was justified in reversing the decree and remanding the case for trial. 17 P L R 1920=2 U P L R (L) 29=54 I C 512.

—Having regard to S. 99, C. P. Code a second appeal is not competent on the ground of misjoinder of parties. 118 P L R 1916=37 I C 197.



## C. P. C. (1908) SEC. 99 (Contd)

## (5) Misjoinder. (Contd)

—Where the misjoinder of parties does not affect the merits of the case, an appellate Court should not dismiss the suit for misjoinder. 8 Ind Cas 889.

—Redemption suit—Parties Tenant of mortgagee in possession if necessary party—If joinder a sufficient cause for dismissal on the ground of mis-joinder of parties See 52 I C 105.

—Reversal of decree on ground of misjoinder of parties when valid See. (1917) M W N 417-40 I C 414.

—Misjoinder of parties—Objection on appeal—Suit decided on the merits See. 17 I C 97.

—The Lahore High Court has held that S. 99 does not apply where there is misjoinder both of parties and causes of action. A I R 1926 Lah 145-89 I C 333.

—But, it is submitted, this view is not correct. Mis-joinder of parties or causes of action not affecting merits, decree cannot be reversed. (1928) M W N 82-108 I C 544.

—S. 99—Misjoinder of parties and causes of action—Objection to be taken or allowed in second appeal when no prejudice to parties. 43 I C 960.

—It is not competent to an Appellate Court to reverse a decree passed on the merits by the Court of the first instance on the ground of non-joinder and the defendant is precluded from raising this question in appeal under S 99 of the Code of Civil Procedure. 21 I C 537-18 C L J 260.

—S. 99 of the new code is applicable to all appeals heard after the new Code came into force though instituted before the Act. When the Appellate Court, overruling a plea of misjoinder, passes a decree on the merits of a case, the second Appellate Court should not reverse the decision on the ground of misjoinder. 22 M L J 225-13 I C 788-11 M L T 25 (1912) M W N 50.

—Misjoinder of causes of action and parties—Defendants not prejudiced by misjoinder,—Practice—Appeal. See 10 I C 515.

—Misjoinder—Want of jurisdiction—Objection not raised in Court of first instance, no ground for setting aside decree. see 25 I C 25.

—A suit by the plaintiffs who derive their titles from different sources, but who between them are entitled to a sixteen anna share of the property, against the defendants who were keeping them out of possession of the property, for ejectment, is not bad for multifariousness, though they stated in the plaint that their cause of action was a certain order made in

## C. P. C. (1908) SEC. 99 (Contd)

## (3) Misjoinder. (Contd)

criminal proceedings, which applied to some only of the plaintiffs, the real cause of action being found from other allegations in the plaint to be common to all of them. 16 C L J 1-16 Ind Cas 84.

—Misjoinder, whether includes non-joinder (Quaere). A I R 1923 Mad 337-17 L W 241-44 M L J 249-(1923) M W N 89 =72 I C 63.

—“Mis-joinder” includes “non-joinder” A I R 1926 C 592-92 I C 899;

—see also 9 C L J 623; and 3 P R 1869; and 6 A 57; and 42 M L J 133; and A I R 1922 M 439.

—See to the same effect 33 M 436; but this was dissented from in a recent case in which it has been held that S. 99 of the Civil P C would not prevent the court interfering in appeal in a case of non-joinder of parties. A L R 1933 Mad 805.

—S. 99 does not cover case where non-joinder affects merits. A I R 1926 Cal 416-89 I C 171.

—Non-joinder or misjoinder if affecting jurisdiction cannot be protected by s. 99. A I R 1930 Mad 714-58 M L J 613 =31 L W 757-Ind Rul (1931) Mad 373-130 I C 453.

—Joint right of action. Necessary parties must be added, if not the suit should be dismissed. Proper party may be added. Objection as to non-joinder must however be taken at the earliest stage. A I R 1922 Mad 317-15 L W 283-(1922) M W N 105-42 M L J 133-31 M L T 266-70 I C 645 but see 80 A W N 1882.

—Non-joinder of party—When not fatal—Receiver made party in trial Court but not in appeal. This defect is not fatal when the order in appeal was in his favour. A I R 1922 Mad 439-(19 ) M W N 717-7 I C 572.

—One of two mortgagees suing on a mortgage alleging that he bought up the share of the other mortgagee—Non-joinder of latter—Effect—Procedure—See 10 Ind Cas 776.

—Wrong person sued as heir of a deceased person—True heir not taking steps for a long time, effect. See 10 Ind Cas 344.

—Suit should not be dismissed for defective declaration of partners of plff's firm—May be corrected later. See 21 I C 836.

—Non-joinder of Dharpatnidar—Not fatal to suit—Addition in appeal, no prejudice, B T Act, S. 167. See 26 M L J 86-21 I C 928. (P. C.)

## C. P. C. (1908) SEC. 99 (Concl'd)

## (3) Misjoinder. (Concl'd)

—Suit to recover trust property by some of the trustees—Others impleaded as Defts denial of title in other trustees  
 --Subsequent acknowledgement during trial  
 —Suit not bad for non-joinder. 28 M L J 571=29 I C I.

—Joint Hindu family—Suit for sale, on mortgage by father, without joining sons  
 See 1 O C 53, see also 69 P R 1906 and 12 A L J 794=24 I C 252.

## (8) Words and Phrases

—The word "jurisdiction" in S. 99 of the Civil Procedure Code judged from the point of view of locality, pecuniary value or the subject-matter of a suit, is equivalent to competency to try 7 N L R 33=10 I C 731 following 17 C 155 and 28 C 324

—In s. 99, 'jurisdiction' is that of trial Court. A I R 1926 Lah 402=93 I C 938.  
 C. P. C. (1908) SEC. 100.

## Synopsis to S. 100.

- (1) Addition of parties in Second appeal.
- (2) Awards.
- (3) Burden of proof.  
 See (9) Erroneous decisions on point of law.
- (4) Competency.  
 (a) Orders dismissing first appeal for default.  
 (b) Review.
- (5) Court-fee.
- (6) Cross-objections or cross-appeal.
- (7) Custom.  
 (a) General.  
 (b) Mixed questions of law and fact.  
 (c) Questions of law.  
 (d) Questionous of fact.
- (8) Defective judgment See 14 (4) (b) Grounds for.
- (9) Erroneous decisions on point of law:—  
 (a) General.  
 (b) Burden of proof.  
 (c) Mistake of law.
- (10) Ex-parte appellate decisions.
- (11) Findings of fact.  
 (1) General.  
 (2) Attestation.  
 (3) Abandonment.  
 (4) Acquiescence.  
 See 15 (1) (b) Inferences.  
 (5) Adverse possession  
 See 22 (2) mixed questions of law and fact.  
 (6) Ancestral property  
 See 11 (40) Nature of property infra.  
 (7) Benami  
 (8) Bonafides  
 (9) Change of law

## Synopsis to S. 100. (Cont'd)

- (10) Compensation
- (11) Compromise
- (12) Concurrent findings
- (13) Conflicting findings  
 See 14 (9)—Grounds for—
- (14) Consideration
- (15) contract
- (16) Costs
- (17) Custom  
 See (7) Custom
- (18) Damages
- (19) Decision in ejectment suit
- (20) Discretion
- (21) Earnest money
- (22) Easement
- (23) Erroneous decisions
- (24) Estoppel—See 15 (1) (b)—Inference
- (25) Findings based on proper evidence
- (26) Foreign Law
- (27) Fraudulent transaction  
 See 11 (42) Nature of transaction infra
- (28) Inferences  
 See 15 (3)—Inferences
- (29) Injunction
- (30) Intention
- (31) Interest
- (32) Legal effect—  
 See 15 (1) (d)—Inferences
- (33) Legal necessity
- (34) Legitimacy
- (35) Market Value
- (36) Marriage
- (37) Meaning of words
- (38) Minority
- (39) Nature of place
- (40) Nature of property
- (41) Nature of tenancy
- (42) Nature of transaction
- (43) Negligence
- (44) Notice
- (45) Novatio
- (46) Nuisance
- (47) Ownership and possession
- (48) Presumption  
 See (29) Presumption
- (49) Proof
- (50) Reasonable or probable Cause—  
 See 22 (8) Mixed questions of law and fact
- (51) Reference of issues of fact by High Court to lower appellate Court
- (52) Rent, rate of
- (53) Representation
- (54) State of mind
- (55) Status
- (56) Sufficiency or weighing of evidence
- (57) Sustainability
- (58) Tender

## Synopsis to S. 100. (Contd.)

- (58) Will
- (59) Wakf
  - See 11 (40) Nature of property
  - Supra
- (60) Waiver
  - See 15 (1) (b)-Inferences
- (61) Miscellaneous
- (12) Forum
- (13) Fraud
- (14) Grounds for :-
  - (1) Erroneous decisions on point of law
    - See-9-Erroneous decisions on point of law
  - (2) Misconception of real questions at issue
  - (3) Issues of law left undecided
  - (4) Substantial error or defect in procedure—
    - (a) General
    - (b) Defective judgment
    - (c) Misconception of real questions at issue
      - See-14 (2) Misconception of real questions at issue
    - (d) Misjoinder of Causes of action or of parties
    - (e) Misreading of evidence and judgment
      - See 14 (7) Misappreciation of evidence
    - (f) Omission to consider evidence
    - (g) Admission or refusal to admit additional evidence by lower appellate Court
  - (5) Findings based on inadmissible evidence
  - (6) Findings based on no evidence
  - (7) Misappreciation of evidence
    - See also (18) Misconstruction of document
  - (8) Want of jurisdiction
  - (9) Conflicting findings
  - (10) Other questions of law
- (15) Inferences.
  - (1) Questions of law.
    - (a) General.
    - (b) Acquiescence, estoppel Waiver.
    - (c) Inferences from fact.
    - (d) Legal effect.
  - (2) Mixed questions of law and fact
  - (3) Questions of fact,
- (16) Interpretation of Documents
  - See also (18) Misconstruction of documents infra
- (17) Limitation.
  - See also (24) New plea-infra.
- (18) Misconstruction of Documents.
- (19) Misjoinder.
  - See 24 (4) (d) Grounds for.

## Synopsis to S. 100. (Contd.)

- (20) Misreading of evidence and judgment.
  - See 14 (7) Grounds for
- (21) Mistake of law.
  - See 9 (c) Erroneous decisions on point of law.
- (22) Mixed questions of law and fact.
  - (1) General
  - (2) Adverse possession
  - (3) Custom
    - See 7 (b)—Custom.
  - (4) Inferences
    - See 15 (2) Inferences.
  - (5) Interpretation of Documents
    - See 16—Interpretation of Document.
  - (6) Limitation.
    - See 17—Limitation.
  - (7) Notice.
    - See 11 (44) Findings of fact.
  - (8) Reasonable or probable Cause.
- (23) New Case.
- (24) New plea.
  - (1) General.
  - (2) Abandonment of plea.
  - (3) Abatement.
  - (4) Acquiescence, estoppel, Waiver.
  - (5) Adverse possession
  - (6) Burden of proof.
  - (7) Cause of action.
  - (8) Court-fee.
  - (9) Improper valuation of suit.
  - (10) Custom
  - (11) Intention
  - (12) Legal necessity
  - (13) Limitation
  - (14) Misjoinder or Nonjoinder
  - (15) New defence
  - (16) Objection as to maintainability of suit
  - (17) Objection as to want of notice
  - (18) Objection to admissibility of evidence
  - (19) Objection to document for want of registration
  - (20) Objection to jurisdiction
  - (21) Plea of applicability of certain law
  - (22) Plea of being an heir
  - (23) Plea of lispendens
  - (24) Plea of title
  - (25) Point of Law
  - (26) Mixed questions of law and fact
  - (27) Resjudicata
  - (28) Other pleas
- (25) Objection to jurisdiction
  - See 24 (20)—New plea-supra
- (26) Orders passed in execution proceedings—
  - (1) General
  - (2) Applicability of Act X of 1877
  - (3) Applicability of Act I (B. C.) of 1879 as amended by Act V (B. C.) of 1903

## Synopsis to S. 100 (Conold.)

- (4) Orders Confirming or setting execution sale
- (5) Orders passed in execution of a decree in a Small Cause Suit
- (27) Pleadings
- (28) Practice and procedure in second appeal See also cases under O-42 r. 1
  - (1) Admission of fresh evidence
  - (2) Consideration of evidence
  - (3) Contents of judgment of lower appellate Court
  - (4) Duty of Appellate Court
  - (5) Powers of Appellate Court
  - (6) Objections
  - (7) Practice
  - (8) Sufficiency of evidence See 11 (56) findings of fact
- (29) Presumption
- (30) Privy Council
- (31) Question of fact See 11-Findings of fact-Supra
- (32) Refusal by lower appellate Court to extend time for filing appeal
- (33) Remand
- (34) Resjudicata, plea of-See 24 (27) New plea-Supra
- (35) Review
- (36-A) Save where expressly provided
- (36) Revision.
- (37) Small Cause Suits.
  - (1) General
  - (2) Applicability of Act XXIII of 1861, S. 27
  - (3) Applicability of Act X of 1877
  - (4) Original framing of suit
  - (5) Suit for account
  - (6) Suit for contribution
  - (7) Suit for damages
  - (8) Suit for enforcement of hypothecation of moveable property
  - (9) Suit for mesne profits
  - (10) Suit for money due for personal property
  - (11) Suit for money due under a contract or agreement
  - (12) Suit for profits
  - (13) Suit by auction-purchaser for refund of purchase-money
  - (14) Suit for rent
  - (15) Suit to recover land cess
- (37-A) Who may or may not appeal
- (38) Miscellaneous

—(1) Addition of Parties in second appeal See also under O. 1, r. 10.

—Person not made party in first appeal cannot be included in second appeal. However, it all depends upon discretion of Court. A I R 1930 Bom 554 =54 B 902= Ind Rul (1931) Bom 241=32 Bom L R 1252. see also 12 A L J 1277=26 I C 25.

—Second appeal —Making decree in favour of party not made party in lower appellate Court—Power of Court—See 9 Ind Cas 815.

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## C. P. C. (1908) Section 100 (Contd.)

## (2) Awards.

—Second appeal lies in suit to enforce award with request that it should be filed. A I R 1929 Rang 166=7 Rang 136=Ind Rul (1929) Rang 206=117 I C 574.

—Where instead of passing first an order directing the award to be filed and then passing a decree in terms of it, the Court passed a composite order decreeing the plaintiff's claim in terms of it: Held, that even if the order of the Court were taken to be an order recording a compromise, an appeal would lie from that order and that such appeal must be treated as an appeal from an order, with the result that no second appeal would lie 92 I C 600.

—A question of the award of future interest is not a pure question of law. 77 I C 450=50 C 370=37 C L J 233=A. I. R. 1923 C 485.

## (3) Burden of proof.

—See-(9) Erroneous decisions on questions of law.

## (4) Competency.

## (a) Orders dismissing first appeal for default.

—S. 2 (2) now expressly lays down that an order of dismissal for default is not a "decree". This sets at rest the conflict stated above. So also where the High Court is justified in ordering a party to furnish security for costs it has no option but to reject the appeal when the order for security has not been complied with. The order dismissing the appeal is not a fit one for appeal to His Majesty as the matter does not involve a substantial question of law. 36 All 325=12 A L J 451 =23 I C 532

## (b) Review.

—See under the heading (35) Review infra and see also under O. 47, r. 1.

## (5) Court-fee.

—A second appeal lies from an order dismissing an appeal for deficiency of Court fee or if a dismissal of appeal raises a question of law. A I R 1927 Nag 100=98 I C 663.

See contra, 21 Mad 152

## (6) Cross-objections or cross-appeal.

—As to competency of second appeal from order of first appellate Court dismissing cross objections see A L R 1933 L 169.

## C. P. C. (1908) SEC. 100 (Contd)

## (7) Custom.

—(a) *General*:—Question whether the village is a town or not is covered by issue on the point of customary right of kamins to alienate abadi sites. 10 Lah L J 360= 112 I C 402.

—Per Ramesam, J.—Whether a custom relating to a pathway is reasonable or unreasonable should be considered with reference to its extent relatively to the total extent of lands held by the owners of the servient tenements, where the lower Court takes that fact into consideration in considering the question whether the custom is reasonable or unreasonable, High Court sitting in Second Appeal cannot say that the finding of the lower Court is vitiated on account of such considerations. Per Odgers, J.—One of the most important questions, in considering whether or not a customary right is reasonable or not, is to see what effect it will have or what will be the extent of the burden on the servient tenement; for, an easement or a right which when exercised obliterates so to say the servient tenement entirely, is unreasonable. A I R 1927 Mad 653=52 M L J 674=25 L W 773=38 M L T 395= 103 I C 331.

—In second appeal an inquiry can be started whether all the attributes of a local custom had been established or not by evidence accepted by the lower Court. There is no difference between cases where custom is accepted and those in which the existence of the custom is not accepted. A I R 1926 Oudh 53=2 O W N 838=90 C 525.

—Question of right by special custom cannot be raised in absence of a certificate in second appeal. A I R 1923 Lah 53=70 I C 838.

—See also 2 Lah 348= 66 I C 492.

—Whether question regarding custom is involved or not can be considered. A I R 1925 Lah 82=79 I C 488. High Court can only consider if facts support custom. A I R 1921 Mad 694=41 M L J 437=14 L W 702=(1921) M W N 754=69 I C 570.

—Finding of fact—Assumptions based on—Liable to be set aside in Second appeal. See 46 I C 511.

—Second appeal—Question of custom must be confined to that set out in certificate. A I R 1922 Lah 426=3 Lah 344=69 I C 507.

—Existence of custom not challenged in lower Court cannot be challenged in appeal. A I R 1923 Pat 309=67 I C 464.

—Plaintiff relying on custom—He cannot in second appeal be allowed to take new stand which would re-open whole case. 19 A L J 442=3 U P L R (All) 81=62 I C 884.

## C. P. C. (1908) SEC. 100 (Contd)

## (7) Custom. (Contd)

—The words "usage having the force of law" in S. 100 (a) of the Code do not give the court any larger powers of interference with findings as to custom in so far as they are findings of fact than with any other findings. If notwithstanding uncontradicted instance ranging over a long period and recognised judicially in several cases, the lower Appellate Court found against the existence of a proper custom on the ground that in its opinion the instances are not sufficient in number, the High Court is clearly entitled to hold that on the facts found by the lower Appellate Court, the custom is legally established. 41 Mad 374=34 M L J 104=23 M L T 44=(1918) M W N 350=7 L W 243=44 I C 699 (F B). [Overruling 29 Mad 24].

—A custom to be valid must be ancient continuous, reasonable and definite and all these elements must be established by clear and unambiguous evidence. Where the evidence established the custom to be only 16 years old and where the instances proved were few in number that they could not establish the continuity of the custom, it could not be held to have been established in law. Where the custom as to the exclusion of daughters is not established and the reversioner sued to set aside a deed of gift executed by the widow, their suit is not maintainable in the presence of a daughter and especially of a daughter's son. 15 I C 247.

—A plaintiff basing his right on custom cannot in second appeal ask the Court to decide the case upon the basis of Muhammadan Law 67 P R 1915=148 P W R 1915=31 I C 85.

—Question of onus not to be raised without certificate under S. 41 (3) of the Punjab Courts Act. See 96 P R 1915=169 P W R 1915=31 I C 497.

—A question of custom cannot be taken up in a second appeal without the required certificate. Where the donee's line of descent having become extinct, the land reverts to the line of the donor, the possession of any person occupying the land along with the last holder not become adverse during the life time of the latter: 193 P L R 1914=94 P W R 1914=24 I C 623.

—Grounds for law or usage having the force of law—Existence or non existence of custom—Adequacy or credibility of evidence See 17 O C I=20 I C 894.

—High Court will not interfere in second appeal for mere technical irregularity. 35 I C 631.



## C. P. C. (1908) SEC. 100 (Contd)

## (7) Custom (Contd.)

—(b) *Mixed questions of law and fact*:—The existence of a custom or usage having the force of law is a mixed question of fact and law. S. 100 precludes the High Court from interfering in Second Appeal with the findings arrived at by the lower appellate court of actual facts from which the existence of the custom has been inferred. A L R 1933 M 678.

—But the existence or non existence of an alleged custom is a mixed question of law and fact and a finding about it is revisable by the High Court in Second appeal 38 M L J 275=27 M L T 111=1922 M 290=55 I C 380.

—So also the Bombay High Court holds that question of existence of custom is a mixed one of law and fact, and even concurrent findings thereon can be set aside by High Court A I R 1931 Bom 167=32 Bom L R 1679=129 I C 881.

—Question if evidence proves alleged custom is mixed question of law and fact.

—A I R 1929 Mad 751=Ind Rul (1929) Mad 972=119 I C 476.

—The Allahabad High Court, however, has held that the question of the existence of custom is one of fact and is ordinarily binding on the High Court in second appeal. Acts found to be done in pursuance of the alleged custom are facts but the conclusion, whether the facts found fulfilled the requirements of the law may be a question of law A I R 1931 All 104=(1930) A L J 1555=53 A 308=131 I C 217. see to the same effect A L R 1933 A 478. and 54 A 6=A I R 1931 All 499=(1931) A L J 757=Ind Rul (1931) All 789=134 I C 21 F B and 21 C W N 729 (P C)=40 M 709=19 Bom L R 567=39 I C 722;

—And that the findings as to custom is a mixed question of law and fact, but concurrent finding of lower Court will not generally be upset. A I R 1926 All 215=93 I C 363.

—Decision on question of custom is mixed finding of law and fact. A I R 1922 All 88=20 A L J 57=64 I C 956.

—And the Oudh J C Court also holds the same view Viz that findings of as to existence of custom are pure findings of fact, but all questions of interpretation involve an element of law. Where there was no question that the documents relied on to establish custom were silent as to the rights of a father to inherit from his son, yet two opposite interpretations were placed on this omission by parties. Held that it was a fit matter for second appeal. A I R 1928 Oudh 269=5 O W N 275=112 I C 68.

## C. P. C. (1908) SEC. 100 (Contd)

## (7) Custom (Contd.)

—Existence of custom is question of mixed fact and law and can be considered afresh. A I R 1925 Oudh 55=81 I C 1033.

—The question of custom is one of mixed fact and law A I R 1924 Oudh 157=26 O C 386=76 I C 774.

—Point of custom raising a mixed question of law and fact—Court in second appeal can go into evidence of custom. A I R 1923 Oudh 102=9 O L J 518=73 I C 727.

—The question of the existence of a custom is a mixed question of law and fact. A I R 1926 Lah 251=92 I C 769.

—Existence of custom derived from facts proved can be agitated. A I R 1925 Nag 179=82 I C 815.

—Custom-Mixed question of law and fact—Judge to record finding on the things alleged to have been and then to determine the validity of the custom.

—See 40 Mad 709=39 I C 722 (P C) =1917 P C 33.

—Whether certain events did or did not happen is a question of fact, but whether the facts found do or do not establish a custom is a question of law. A judgment based upon evidence not admissible in law is unsustainable. If a party sets up a special custom of a family to take the succession out of the ordinary Hindu law, such custom must be proved to be ancient continuous certain and reasonable, and being in derogation of the general rule of law, must be construed strictly 20 I C 810=18 C L J 559=18 C W N 55.

—(c) *Questions law*.—If lower Appellate Court has passed judgment based on illegal or insufficient evidence to establish alleged custom, there can be second appeal. Ind Rul (1929) All 623=116 I C 799.

—But a question as to the existence or non-existence of a particular custom where the lower Appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom is one of law. A I R 1927 All 471=8 L R 8 A 110 Rev.=100 I C 605.

—Finding on question of existence of custom, being substantially one of fact, is binding on second appeal, except when it is not one of pure fact or is based on illegal or legally insufficient evidence or there was error in stand-point of approach or in placing burden of proof or in assumption of condition A I R 1931 All 104=(1930) A L J 555=131 I C 217.

—Insufficiency of evidence to establish custom can be gone into in second appeal as question of law but where lower Court finds evidence

## C. P. C. (1908) SEC. 100 (Contd)

## (7) Custom. (Contd)

sufficient no appeal lies. A I R 1922  
All 241=66 I C 613.

—The question, whether, in any given instance, the evidence led to prove the existence of the proper attributes of custom is adequate proof of what the law requires is a question of law which can be discussed in second appeal. It is not competent to a Court of Second Appeal to consider the credibility of any particular evidence. But where the lower Court has acted upon inadmissible evidence has rejected admissible evidence, or has acted upon evidence which does not come up to the standard of adequacy its finding would be open to correction in second appeal. 17 O C 1=20 I C 894.

—To establish a custom, High Court can consider sufficiency of evidence in law in second appeal A I R 1927 All 605=102 I C 596. see also 11 I C 536.

—Where wajib-ul-arz is rejected under erroneous view of law as irrelevant in deciding point of custom second appeal from finding is competent. 24 O C 237=64 I C 86.

—But where evidence as to custom is found to be unreliable by lower Appellate Court, its value will not be discussed in second appeal merely on ground that the Court expressed an erroneous opinion as to its relevancy. 8 O L J 202=61 I C 781.

—Insufficiency of evidence can be called into question when custom has been proved by single instance. A I R 1925 Bm 380=27 Bm L R 830=83 I C 891.

—Sufficiency of evidence required to establish custom can be examined. A I R 1926 All 43=18 A 77 =23 A L J 932=88 I C 752, see also A I R 1924 All 477=L R 6 A 115 Rev=79 I C 134 and A I R 1923 All 241=75 I C 657, and 7 A L J 36=4 Ind Cas 304=32 A 125.

—The question whether the facts proved and found satisfy the requirements of law to establish a custom is a question of law and one which the High Court can and must consider in second appeal. 12 L W 371=55 I C 770. see also 16 M L J 8=29 M 24.

—So also it is open to an appellant in Second Appeal to show that the evidence relied upon by the otherside, even if believed and considered sufficient, does not in law amount to the proof of an alleged custom. 15 I C 247.

—Under S. 100 of the C P C Code, in a case whether a custom differing from the general law, it set up, the High Court in second appeal

## C. P. C. (1908) SEC. 100 (Contd)

## (7) Custom (Contd)

should consider whether the evidence adduced suffices to establish all the elements of antiquity, continuity and certainty necessary to constitute a valid custom. 43 I C 235=3 P L J 51.

—But sufficiency of oral evidence regarding custom cannot be re-challenged. Which of two wajib-ul-arzes governs case can be re-called into question. A I R 1926 All 153=89 I C 89.

—Finding as to existence of mercantile usage can be attacked in second appeal 13 L 31 (31-5)=3 P L R 353=137 I C 873=A I R 1932 L 274=1 R 1931 L 320=A L R 1932 L 240 but see 4 M 703=21 O W N 729 (P J)=1 A L J 435=19 Bm L R 357=25 O L J 153=1917 P C 33.

—Question whether it is reasonable or not is a question of a law. 19 C W N 1188=29 I C 312.

—Finding following not from custom but from application of judicial authorities is one of law and can be questioned in second appeal. A I R 1929 Lah 425=11 L L J 110=10 Lah 868=31 P L R 93=Ind Rul (1929) Lah 652=117 I C 380.

—Alienation—Question as to necessity is a question of law. In all tribes custom does not recognise an alienation for a debt due from a previous holder of the land as a justifiable necessity. A I R 1927 Lah 896=100 I C 803.

—It is open to doubt whether the expression 'a usage having the force of law' should not be confined to the usages of the country or of the community as suggested in 7 A. 650. Customs like pre-emption, the law merchant and usages like those referred to in S 11 of Act VIII of 185, seem to have been in the contemplation of the legislature. It seems doubtful whether a private right—right of the daughter of an Ubhayaker to perform a festival fall within S 100 Cl (a). However that may be the High Court should not be called upon to examine the oral and documentary evidence relating to a private custom as if it were hearing a first appeal. 40 Mad 1103=32 M L J 237=5 L W 345=21 M L T 411=40 I C 516.

(d) Questions of fact :—Where there is evidence legally sufficient to support a finding as to the existence of an usage the High Court cannot in second appeal set aside the finding on the ground that the quantum of evidence is meagre and scanty. But where the usage has not been pleaded with precision and the evidence adduced is vague and inconsistent, a finding may be overset by the High Court. A I R 1931 All 583=(1931) A L J 390.

## C. P. C. (1908) SEC. 100 (Contd)

## (7) Custom (Contd)

—Finding as to existence of tribal or family custom is one of fact and cannot be disturbed in second appeal. A I R 1930 Oudh 330=7 O W N 333 =14 R D 140=Ind Rul (1930) Oudh 147=123 I C 15.

—Decision that no custom has been established is a finding of fact. The weight or value of evidence cannot be discussed in second appeal. A I R 1928 Oudh 301=5 O W N 432=112 I C 142.

—Finding that a custom has not been established by reliable evidence is finding of fact. A I R 1928 Oudh 121=4 O W N 1229=107 I C 560.

—Whether on evidence a custom is established is a question of fact but whether evidence is legally sufficient to establish the alleged custom is a question of law. A I R 1927 All 201=991 C 292.

—Whether a single wajib-ul-arz establishes a custom is a question of fact. A I R 1926 Oudh 143=13 O L J 121=3 O W N 69=91 I C 942.

—Weighing evidence on custom is entirely within jurisdiction of first appellate Court and Court of second appeal cannot reverse finding. A I R 1930 Oudh 330=7 O W N 333=14 R D 140=Ind Rul (1930) Oudh 147=123 I C 51.

—Whether the evidence as to the existence of a custom is sufficient or not cannot be questioned by the High Court in Second appeal, but whether the requirements of a custom are fulfilled can be so fulfilled. A I R 1926 Oudh 460=3 O W N Sup 10=94 I C 987.

—The question whether a given state of facts establishes a binding custom or usage, is a question of law, but the question whether such a state of facts has been proved by the evidence is a question of fact. Cases on the subject reviewed. 25 C L J 613=21 C W N 972=45 Cal 285=41 I C 939.

—Question whether under-raiyat's rights pass on inheritance by custom is one of fact for second appeal, A I R 1930 Pat 562=11 P L T 539=Ind Rul (1930) Pat 739=127 I C 835.

—A finding as to particular custom should not be disturbed unless it is based on insufficient evidence or the necessary requisites are not established. A I R 1926 Bom 153=50 B 133=28 B L R 49=93 I C 135.

—Finding of fact—Existence of custom of pre-emption. See 13 A L J 717=37 A 524=29 I C 100.

—Finding of fact as to the existence of custom cannot be interfered with in second appeal; evidence on that point cannot be weighed in second appeal. 25 I C 104;

## C P. C. (1908) SEC. 100 (Contd)

## (7) Custom. (Conclld)

—But; though decision as to the existence of a custom is a question of fact an appellant in second appeal is entitled to show that the evidence before the Court, even if true does not establish the custom. 14 I C 12.

—Question whether custom exists to remit rent of land allowed to lie fallow is one of act. A I R 1930 P C 234=Ind Rul (1930) P C 308=(1930) M W N 885=53 M 597=59 M L J 289=52 C L J 265=32 L W 548 (P C)=126 I C 84.

—Finding of Lower Appellate Court based on evidence as to custom—Binding in second appeal. see 35 I C 630.

—The Question whether the parties to a case follow Mahomedan Law or custom is a question of fact and cannot be agitated in second appeal. 106 P W R 1916=34 I C 219=60 P L R 1917.

—Whether the parties to a suit are governed by Hindu Law in the matter of inheritance to the estate of a deceased person is a mere question of fact and is not a ground of second appeal. (1917) M W N 98=37 I C 879.

—Customary right of way in agricultural tract is set up whether the custom is reasonable or not is a question of fact. A I R 1927 Mad 653=52 M L J 674=25 M L W 773=38 M L T 395 =103 I C 331.

## (8) Defective judgment

—See 74 (4) (b)—Grounds for.

## (9) Erroneous decisions on point of law.

—(a) General:—In case in which the defendant clearly admitted in his written statement the factum of a sale, and no issue had been framed by the trial Court on the point, the lower appellate Court recorded finding that no sale took place. Held that the lower appellate Court was not justified in giving a finding on the question whether a sale did in fact take place or not under the circumstances and in deciding the case on that finding and that the finding was not binding in second appeal. 1932 P C L 541 (Civ)=A I R 1932 L 541 (543) (Civ).

—Where the judgment of the lower appellate Court proceeded upon the view that unless the petitioners proved what it was not their duty to prove they should lose, held that the judgment was coloured by that erroneous view and the lower appellate Court was thereby disabled from weighing evenly the evidence, and that its decision must be set aside on that ground alone 36 L W 219 (223)=A I R 1932 M 513=A L R 1932 M 1449=140 I C 674,

## C. P. C. (1908) SEC. 100 (Contd)

## (9) Erroneous decisions on point of law (Contd)

—Where the lower Appellate Court reversed the finding of the trial judge in favour of legitimacy without reference to the presumption arising from continued living as husband and wife, upon a mere balance of probabilities, its finding was set aside on second appeal as being contrary to law. 17 C W N 494=15 I C 328.

—The circumstance that a finding of a lower Appellate Court is based mainly upon evidence which is explicitly referred to and avowedly reproduced in the judgment, but is not to be found anywhere in the record, vitiates the decision and renders it contrary to law within the meaning of s. 100 of the Civil Procedure Code of 1908. 15 I C 515=17 C W N 37.

—A decision of the lower Court which was right according to the view of the law then prevailing is liable to be set aside in second appeal if the subsequent ruling of the Privy Council takes a contrary view. A I R 1926 Nag 49=60 I C 2110.

—Second appeal lies on a point of law going to the root of the merits of the whole case. A I R 1923 All 343=71 I C 381.

—High Court in second appeal can interfere with erroneous decision based on erroneous findings contrary to facts found by the Court. 13 I C 814.

—It is to ask reversal of lower Court's decision on proposition of law neither cited nor pressed in lower Court. A I R 1930 All 726=Ind Rul (1930) All 925=127 I C 525.

—On a second appeal under S 100 of the C P Code the decision of the Lower Appellate Court is the only one which has to be dealt with under clauses (a) and (b) of the section and a reference to the original Court's decision in the ground of appeal is erroneous. The question whether a trustee can divest himself of the trusteeship is a matter of law, 6 Bur L T 180=7 L B R 39=21 I C 232.

—Ground for—Applicability of a particular section of a Code—Lower Court's reasons erroneous—Power of High Court to interfere. see 17 C W N 108=15 C L J 7=13 I C 120.

—Erroneous reason as to applicability of s 90 Evidence Act—Interference in second appeal—See 15 C L J 7.

—(b) Burden of proof:—Finding based on positive evidence is not finding based on error as to onus of proof 59 I A 29=59 C 1012=62 M L J 336=36 C W N 221=55 C L J 72=35 L W 112=9 O W N 119=16 R D 95=34 B L R 481=1932 M W N 275=136 I C 398=A I R 1932 P C 28=1932 P C 58=I R 1932 P C 94=A L R 1932 P C 112 (P C).

## C. P. C. (1908) SEC. 100 (Contd)

## (9) Erroneous decisions on point of law (Contd)

—And it cannot be laid down as a proposition of universal application that an erroneous view of the burden of proof necessarily renders a Court incapable of weighing the evidence properly. 35 L W 511=1932 M W N 345=A I R 1932 M 415.

—Though even Privy Council can interfere with finding of fact if it is deduced from placing burden of proof on wrong party. A I R 1929 P C 13=31 Bom L R 264=56 I A 6=49 C L J 98=56 M L J 115=29 L W 86=56 M 83=(1929) M W N 43=Ind Rul (1929) P C 45=114 I C 5=33 C W N 233.

—An order based on an error of the principles governing the question of onus of proof is appealable. A I R 1926 Lah 653=36 I C 820.

—Question of burden of proof is one of law and can be attacked in second appeal. 2 Lah 249=64 I C 901 also I R 1931 C 668=A I R 1931 C 779 (1)=53 C L J 619=133 I C 222 and 431 C 478. and A I R 1921 Lah 199=4 Lah L J 199=77 I C 246. —see also 2 Lah 243=A I R 1921 Lah 128=106 P L R 1921=64 I C 901 and 3 Ind Cas 431, and A I R 1924 Lah 195=73 I C 216, and 65 I C 745. Defendant admitting execution but not denying partial or total consideration—Burden of proof is question of law. A I R 1921 Lah 199=4 Lah L J 199.

—Finding of fact arrived at by Appellate Court on correct appreciation of direction of lower Court as to burden of proof cannot be disturbed in second appeal. 12 L W 170=591 C 973.

—No doubt as soon as there is a conflict of evidence the question of onus disappears. But conflict implies and predicates not only the existence of evidence on both sides but also consideration of both by the Court; and where the lower Appellate Court ignored the evidence of one side altogether and it was apparent from the judgment that the Judge would have dismissed the appeal and suit even if the defendant or respondent had not produced any evidence at all then it is a case for interference. 16 C W N 779=15 I C 30.

—Allocation of onus—vital question between the parties—Duty of the court to rectify a mistake in second appeal See 1 Lah 429=58 I C 982.

—Finding of burden of proof wrong—Evidence on record disregarded—Finding is not binding in second appeal. A I R 1924 Pat 310=2 Pat 919=5 P L T 315=76 I C 347.

—Finding of fact, otherwise conclusive, may be displaced for misplacing burden

## C. P. C. (1908) SEC 100 (Contd)

## (9) Erroneous decisions on point

of law (Contd.)

of proof on a party 51 C L J 465=128 I C 108=A I R 1930 C 591.

—Burden of proof may sometimes be a ground of second appeal—Second appeal will lie from a decision arrived at on a wrong laying of onus in absence of all evidence on an issue. 36 P W R 1917=40 I C 1003.

—Finding of fact involving a wrong allocation of burden of proof can be set aside in second appeal. 37 P W R 1917=40 I C 176.

—Where in a suit by a mortgagee the executants of mortgage admitting receipt of whole of consideration made up various items before sub-Registrar deny part at mutation. Second appeal lies on a question of burden of proof. 2 Lah 249=64 I C 901.

—Question of burden of proof clearly involving a question of custom cannot be argued in second appeal by the appellant without a certificate. A I R 1921 Lah 77=2 Lah 348=66 I C 492;

—But if onus is wrongly thrown—Observation that no evidence is produced by Deft -And finding given on all the evidence in the record—Weight of evidence for the lower appellate Court—No irregularity. 9 I C 4;

—So too, a wrong allocation of onus becomes immaterial, if it does not affect the decision on merits A I R 1921 Lah 162=3 Lah L J 445.

—Misplacement of onus by trial Court without shutting evidence does not raise any laid point for second appeal, if it is set right by lower Appellate Court by considering entire evidence. A I R 1931 Lah 220 =Ind Rul (1930) Lah 335=31 P L

—High Court is not justified to interfere where burden of proof is wrongly placed but the party is not prejudiced thereby. A I R 1924 Lah 335=69 I C 521.

—Where a District Munsiff misdirected himself as to the burden of proof, but the subordinate Judge on appeal considered the evidence from the correct stand point and concurred in the Munsiff's finding. Held, in second appeal that the finding of the Appellate Court must be accepted. 12 L W 170=59 I C 973.

—(c) *Mistake of law*:—Finding of fact based on erroneous presumption of law can be interfered with in second appeal. A I R 1929 Lah 772=Ind Rul (1930) Lah 509= 123 I C 877.

—High Court is not to interfere with lower Appellate Court's findings of fact unless same are bad for error of law. A I

## C. P. C. (1908) SEC. 100 (Contd)

## (9) Erroneous decisions on point

of law (Contd.)

R 1929 Pat 28=7 Pat 832=10 P L T 36 =Ind Rul (1929) Pat 622=119 I C 894.

—Concurrent finding is no finding if based on error of law. A I R 1929 P C 38=Ind Rul (1929) P C 201 =116 I C 593.

—Decision based on erroneous view of law is not binding in second appeal. A I R 1928 Lah 122=9 Lah 325=29 P L R 697 =106 I C 877.

—Finding so based on an erroneous proposition of law that if the proposition be corrected the finding disappears, is no finding at all. 112 I C 166.

—Finding of fact based on erroneous presumption of law—Effect. See 26 M L J 385=24 I C 547.

—Finding following wrong interpretation of law is not one of fact. Ind Rul (1929) All 720=117 I C 368.

—Lower Appellate Court's finding affect following in correct view of law can be challenged in second appeal. A I R 1929 Nag 110=Ind Rul (1929) Nag 235=117 I C 283.

—High Court can interfere with finding of fact based on misdirection of laws. The question whether evidence given is sufficient to hold if grove land has changed character is a question of law. A I R 1929 All 557=L R 10 A 272 Rev=Ind Rul (1929) All 728=117 I C 616.

—Finding as to uniform rate of rent for 20 years based on wrong conception of law can be interfered with by High Court in second appeal. A I R 1926 Cal 1169=30 C W N 520=95 I C 525.

—High Court can interfere in second appeal on a finding of fact based on misconception of law, pleadings and effect of evidence. A I R 1926 Nag 416=95 I C 636.

—Findings of fact of lower Appellate Court can be interfered with by High Court in second appeal, if they are based on misconception of law or are unsupported by any evidence. A I R 1924 Pat 336= (1923) Pat 332=75 I C 946.

—High Court must interfere with finding of fact based on erroneous view of law. 23 I C 796.

—Finding of facts, coming from an erroneous view of law, and inconsistent with facts accepted as established—High Court can interfere. A I R 1922 All 188=44 A 602=20 A L J 473=67 I C 67.

—When reasons assigned by the lower Appellate Court as to the applicability of the provisions of S 90 of the Evidence Act are erroneous in law, the High Court can interfere in second appeal. 15 C L J 7=17 C W N 108=13 I C 120.



## C. P. C. (1908) SECTION 100 (Contd.)

## (9) Erroneous decisions on point of law (Concl'd)

—Where the lower Court's view of law is incorrect the view of fact which is the basis of the view of law is not binding in second appeal. A. I. R. 1926 Nag 197=90 I C 196.

—Finding of fact can be disturbed only for absence of evidence or for wrong notion of law taken. A I R 1925 Cal 169=80 I C 290.

—Obvious mistake committed by lower Court on ordinary legal point in arriving at finding can be corrected. A I R 1925 Mad 973=22 L W 352=85 I C 938.

—No second appeal lies unless misdirection by Appellate Court in point of law in dealing with the question of fact upon evidence is shown. A I R 1923 P C 187=40 C L J 16=29 C W N 131=21 A L J 723=25 Bom L R 1287=L R 4 P C 184=45 M L J 663=33 M L T 291=(1923) M W N 832=4 P L T 627 (P C)=74 I C 482.

—Where the lower Appellate Court under an erroneous view of the law has treated the *wajib-ul-arz* as irrelevant to the issue which it had to decide, it is open to the High Court to interfere in second appeal. A I R 1921 Oudh 137=24 O C 237=54 I C 86.

## (10) Ex parte-appellate decision.

—Second appeal lies from appellate Court's *ex parte* decree against a respondent not summoned as it is illegal. Ind Rul (1929) Lah 661=117 I C 229.

—An appellate decree passed *ex parte* can be examined in second appeal. A I R 1922 Lah 439=3 L 357=69 I C 499. See to the same effect. 6 B H C A C 161. See 8 All 354=3 Cal 228=16 Bom 117.

—Even in presence of other remedies *ex parte* decision is open to second appeal. A I R 1925 Cal 497=80 I C 14.

## (11) Findings of facts

## (1) General

—Finding of fact cannot be disputed in second appeal. A I R 1922 Oudh 96=9 O L J 127=67 I C 803.

see to the same effect. A I R 1921 Lah 211=3 Lah L J 231=60 I C 705. and 5 L L J 11; and A I R 1924 L 382=69 I C 415; and A I R 1923 N 7=68 I C 664. and A W N 1887, 183. and 136 I C 825=1 R 1932 R 82=A I R 1932 R 6 (8) and A I R 1932 C 351 (352-3). and A I R 1930 Lah 142=Ind Rul (1930) Lah 10=120 I C

## C. P. C. (1908) SEC. 100 (Contd.)

## (11) Findings of facts (Contd.)

## (1) General (Contd.)

170 and 8 O L J 4=61 I C 135 and 111 I C 791 and 38 I C 161 and A I R 1929 Rang 213=Ind Rul (1930) Rang 188 and A I R 1931 Mad 206=1930 M W N 1235=131 I C 121 and A I R 1925 Nag 271=8 N L J 29=86 I C 847 and A L R 1933 A 295=1932 A L J 1089=A L R 1933 A 94. and A L R 1933 M 459 and A L R 1933 R 72=A I R 1933 R 91. and 1932 P C L 438 (441) (Civ.)=33 P L R 285=13 I C 202=1 R 1932 L 426=A I R 1932 L 311=A L R 1932 L 418 (Civ.) and 9 I C 456 and 1932 P C L 810 (Civ.)=33 P L R 564=139 I C 110=1 R 1932 L 569=A I R 1932 L 473 (474)=A L R 1932 L 810 (Civ.) and A L R 1933 L 1031 and 11 I C 95, A I R 1923 Lah 236=7 P W R 1923=73 I C 232 See also as to the principles underlying this rule 38 P L R 1918=92 P W R 1918 47 i C 39 and the Privy Council decision in A I R 1927 P C 117=54 C 586=54 I A 196=8 P L T 255=1927 M W N 437=31 C W N 885=53 M L J 117=39 M L T 170=26 L W 642 (P C)=101 I C 359.

—Finding of fact cannot be reversed in second appeal though High Court might have held differently. A I R 1931 Nag 95=13 N L J 202.

—So also trial Court's finding cannot be set aside without considering all important material, A I R 1925 Cal 993=85 I C 540.

—And no second appeal lies to test soundness of finding regarding question of fact A I R 1930 Oudh 176=Ind Rul (1929) Oudh 272=4 Luck 665=6 O W N 206=115 I C 448. see also 1 Lah L J 64.

—Court in second appeal cannot reverse finding of lower Appellate Court on authority not quoted before it, A I R 1930 Lah 737=Ind Rul (1930) Lah 721=125 I C 433 no more than it can change finding of fact A I R 1929 All 885=(1930) A L J 340=Ind Rul (1929) All 923=118 I C 715.

—On the same principle, issues of fact cannot be raised in second appeal. A I R 1923 Lah 11=70 I C 299.

—And no decree on the facts will be pronounced by High Court in special appeal even with consent of parties Marsh 4 See also 1 Hay, 25

—High Court in second appeal cannot go into question of fact and decide that the appellant succeeds on a careful consideration of the evidence and the circumstances 6 I C 760 So also it will not interfere with the finding of fact by District Judge that the suit is not collusive A I R 1921 Lah 45=3 Lah L J 86=59 I C 865.

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact (Contd)

## (1) General (Contd)

—Nor would it interfere in second appeal on findings of fact by lower Appellate Court unless they are unsupported by evidence. A I R 1927 P C 257=53 M L J 703=32 C W N 3=107 I C 449.—see also A I R 1926 Pat 187=7 P L T 547=94 I C 929.

—A finding of fact is binding upon a second Appellate Court unless it can be shown that in coming to the finding the first Appellate Court committed some error of law. 21 I C 251. see also A I R 1929 Pat 127=10 P L T 138=Ind Rul (1929) Pat 266=115 I C 890. and 9 O W N 568=139 I C 365=A I R 1932 O 264=1 R 1932 O 357=A L R 1932 O 505. and 13 O L J 146=95 I C 463. and 10 Ind Cas 188.

—An objection to the admissibility of a document in evidence cannot be allowed to be raised in Second Appeal, when, in the Lower Appellate Court, the party objecting only endeavoured to explain away its effect. A finding of fact arrived at by the Lower Appellate Court is conclusive in Second Appeal, unless it is vitiated by an error in Law or by there being no evidence to support the conclusion, or unless the conclusion drawn is not warranted by the findings. 29 M L J 362= (1915) M W N 614=2 L W 650=30 I C 983.

—Finding of fact cannot be interfered with by High Court in Special appeal, but no such appeal is barred merely because the suit is cognisable by small cause court 25 W R 166 see also 25 W R 166, Note.

—Finding that goods have been damaged is one of fact and is conclusive. A I R 1924 Pat 240=1 Pat L R 398=79 I C 183.

—If allegation in plaint is not specifically denied in written statement finding cannot be questioned. A I R 1925 Pat 532=2 Pat L R 284 Civ=85 I C 1024.

—Finding of fact must be determined according to the circumstances of each case and the finding of lower appellate Court binding in second appeal. 136 I C 783=I R 1932 M 319=A I R 1932 M 173.

—So a second appeal decided only on question of fact—Decision should be set aside. A I R 1921 Lah 341=4 Lah L J 464.

—But High Court can deal with a question of fact going to the root of the case and finding on which is necessary to deal with the law if not definitely found by lower Appellate Court I R (1931) Rang 14=8 Rang 425=128 I C 366.

—And a finding of fact becoming irrelevant owing to a change in the

## C. P. C. (1908) Section 100 (Contd)

## (11) Findings of fact. (Contd)

## (1) General (Contd.)

existing law can be considered by High Court in second appeal in view of the change A I R 1926 All 725=66 I C 775.

—So also findings of fact wrongly decided by lower appellate Court can be interfered with by High Court in second appeal if there is sufficient evidence under S. 103 as amended. A I R 1927 Cal 1=31 C W N 32=99 I C 189.

—But finding of trial Court regarding untrustworthiness of witness cannot be intervened unless strong ground exists for it. A I R 1929 Nag 117=Ind Rul (1929) Nag 144=116 I C 432.

—Entire material on record should be considered by lower Court for giving finding of fact. A I R 1930 Lah 12=Ind Rul (1930) Lah 477=123 I C 573.

—Finding that the plff. has failed to prove a fact is prima facie a finding of a fact which cannot be challenged in second appeal. The lower appellate court must apply its mind to every piece of relevant evidence produced but it is not necessary for the Court to refer to every portion of such evidence. 52 I C 173=1 U P L R (J C) 12; In other words, there must be precise and definite finding on a question of fact to preclude second appeal, there must not be mere rambling suggestions and bare possibility of certain view of evidence being plausible. A I R 1929 Oudh 458=6 O W N 801=Ind Rul (1930) Oudh 159=123 I C 63.

—Finding based on whimsical reasoning must be set aside. A I R 1925 Oudh 386=12 O L J 105=86 I C 686.

—As also the finding based on incorrect apprehension regarding matters not on record A I R 1925 Cal 452=82 I C 974.

—But findings of fact cannot be questioned on ground that unnecessary importance was given to certain facts. A I R 1929 Nag 270=Ind Rul (1929) Nag 306=119 I C 674.

—To sum up: a decision of lower Court though defective cannot be interfered with in second appeal so far as it is based on finding of fact but beyond it, the Appellate Court can interfere. A I R 1929 Oudh 447=5 Luck. 377=13 R D 685=Ind Rul (1930) Oudh 214=6 O W N 859=L R 10 A Rev. 388=124 I C 358.

—Or that the findings of fact cannot be interfered with in second appeal except when law is wrongly applied or when there is no evidence to support the findings. A I R 1924 Pat 591=75 I C 846 see also 16 Ind. Cas 887.

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (1) General (Concl'd.)

—An appeal does not lie on the ground of an erroneous finding of fact, however gross and inexcusable the error may be; (compare 16 Cal., 645) but an appeal does lie to impeach the conclusions arrived at from the finding—L R 19 I A 228-20 Cal 93 L R 19 I A 48-19 Cal 253.

—The Commissioner of Kumauns cannot go into a question of fact as an Appellate Court in a second appeal. A I R 1927 All 524-101 I C 695.

—As to power of the High Court to interfere with findings of fact under Madras Rent Recovery Act see 37 Mad 443 (P C) By S 584 of the Code of 1882 the High Court as a Second court of appeal was bound by the findings of fact of the District Judge—High Court could allow the appeal on grounds of law 43 Cal 1104-37 I C 223-43 I A 172-1916 P C 126-20 M L T 235-20 C W N 1245-(1916) 2 M W N 175-4 L W 251-14 A L J 1009-18 Bom L R .838-24 C L J 296-31 M L J 745. (P C)

—Findings on issues referred to a Lower Appellate Court in second appeal are just as much findings of fact as the findings in the original suit and are binding on the High Court in second appeal 40 I C 128.

—No second appeal not permitted by code can lie merely for reason that lower Appellate Court Could not hear the appeal A I R 1921 Lah 156-3 Lah L J 463-62 I C 986.

## (2) Attestation.

—The question whether the attestation of a document implied assent to the forms of the document is a question of fact and must be determined with reference to the circumstances of each case, and the High Court cannot entertain such a question in second appeal. 51 I C 621.

—So also whether a scribe is an attesting witness, is a question of fact. A I R 1926 Cal 150-90 I C 774.

—Attestation by Hindu reversioner if implies assent to alienation by widow —Question of fact—No interference in second appeal. see 37 All 350-29 I C 218-13 A L J 616.

## (3) Abandonment.

—As to abandonment of plea see under the heading-New Plea infra. The findings on question of abandonment are strictly speaking findings of fact, and consequently, a second appeal only on matters of legal principles. arising out of these facts, can be taken up 41 P R 1919-51 I C 396-82 P L R 1919.

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (3) Abandonment (Concl'd)

—Thus second appeal lies on a question of effectiveness of the abandonment in law on the facts found. A I R 1921 Lah 229-3 Lah L J 26-66 I C 935.

—Abandonment is a question of fact. A I R 1929 Cal 120-48 C L J 390-Ind Rul (1929) Cal 217-114 I C 153.

See also 88 I C 1032-4 Pat 838-6 P L T 500-(1925) Pat 320-A I R 1924 Pat 741.

See also A I R 1924 Cal 366-71 I C 304. See also 32 I C 355.

—Therefore, a decision that there was abandonment cannot be challenged in second appeal. A I R 1921 Lah 162-3 Lah L J 445.

—Question whether a person has abandoned a particular trade mark is one of fact. A I R 1928 Lah 924-9 Lah 487-29 P L R 615-113 I C 228.

—Similarly as to abandonment of holding 17 C W N 802-20 I C 198.

See also 32 I C 355. and A I R 1926 Cal 751-91 I C 493. or as to non-abandonment A I R 1921 Lah 162-3 Lah L J 445. but finding as to abandonment of right in house is question of law. A I R 1930 Lah 215-Ind Rul (1930) Lah 588-125 I C 188.

—Similarly finding regarding renunciation based on inference is question of law. A I R 1928 Cal 891-32 C W N 1111-Ind Rul (1929) Cal 242-114 I C 482.

## (4) Acquiescence

—See 15 (1) (b) Inferences.

## (5) Adverse possession

—See 22 (2) Mixed questions of law and fact.

## (6) Ancestral property

—See 11 (40) Nature of property

## (7) Benami

—Question of benami is purely finding of fact and cannot be raised in second appeal. A I R 1929 Oudh 83-5 O W N 1122-4 Luck 265-Ind Rul (1929) Oudh 211-12 R D 762-115 I C 99.

See to the same effect A I R 1931 L 591-32 P L R 298-133 I C 553; and I R 1931 L 776.

—But the Patna High Court has held that a question of benami or fraud is not a question of pure fact; it is a mixed question of fact and law and if the Court proceeds on a mere suspicion and draws inference from facts proved such as no reasonable man would

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (7) Benami. (Concl'd)

draw, then the Court committed an error of law and the High Court may interfere in second appeal. 3 Pat L W 339-43 I C 49.

## (8) Bonafides.

—A finding that the conduct is bona fide is usually a finding of fact being an inference of fact from facts. Where, however, there are no facts and no evidence from which to make an inference of bona fide conduct, the finding is not binding in second appeal. 1932 P C L 456 (459) (Civ)=33 P L R 263-136 I C 710=I R 1932 L 246=A I R 1932 L 322=A L R 1932 L 456 (Civ.)

—Question regarding plaintiff's bona fide mistake is one of law, A I R 1925 Cal 152-29 C W N 51-82 I C 638.

—A finding as to absence of reasonable care and good faith is a finding of fact. A I R 1927 Nag 41= 97 I C 988.

—So also a finding that a document was genuine 108 I C 412.

—As also the finding as to the bona fides of a party in taking a certain action A I R 1925 Lah 505 =7 Lah L J 358-26 P L R 641-92 I C 602.

—The question whether consent of plff's father was given bona fide or not was one of fact and could not be reopened in second appeal. 63 P R 1916-160 P W R 1916-35 I C 555-3 P L R 1917.

Whether other proceedings were prosecuted diligently and in good faith within s. 14 of Lmt Act is a question of fact and cannot be interfered in second appeal A I R 1927 Lah 909= 102 I C 628.

—But the Oudh J. C. Court has held that this question is a mixed question of law and fact. 13 O C 367-3 O L J 387= 36 I C 702.

—Finding is a finding of fact where the lower appellate Court on examination of the facts and circumstances bearing on the matter has recorded a definite finding that the party acted in good faith. The finding cannot in such a case be challenged in second appeal 138 I C 646= 33 P L R 740=I R 1932 L 515=A I R 1932 L 531.

## (9-10) Compensation.

—The question as to what is reasonable compensation is a question of fact and cannot be interfered with in second appeal by the High Court. 17 Ind Cas 517 relying on 26 M 111 and 31 A 333.

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (11) Compromise

—A finding on the factum of compromise, which is a question of fact, cannot be challenged in second appeal, although it does not seem to be satisfactory. A L R 1934 L 181; see also A L R 1933 L 505.

—Finding legally proved, that compromise in good faith exists is one of fact and cannot be questioned in second appeal. Ind Rul (1930) Lah 195=121 I C 291.

—Question whether there was a bona fide compromise in a pending litigation is one of fact and finding thereon cannot be challenged in second appeal. 109 I C 776.

—Workman's Compensation Act (1923) s. 30—If parties to suit agreed or not to a certain decree is pure question of fact. A I R 1929 Bom 68-30 Bom L R 1510=Ind Rul (1929) Bom 228=114 I C 372.

## (12) Concurrent findings

—Where the finding arrived at by both the lower Courts is one of fact, it is not open to question in second appeal. A L R 1933 L 1249. see also 38 P R 1866; and 169 P L R 1911-10 I C 338-95 P W R 1911. and 96 I C 283; and A I R 19 Lah 29165=Ind Rul (1929) Lah 701=117 I C 813 and A I R 1930 Lah 1010-11 Lah 393-31 P L R 755=Ind Rul (1931) Lah 21=128 I C 293. and A L R 1933 O 292.

—But concurrent finding of fact can be set aside by High Court if lower appellate Court had failed to realise the probative value of entry in documents. A I R 1923 Rang 196-1 R 135=76 I C 449. or where the findings are not based on evidence but on a wrong presumption 239 P L R 1914=144 P W R 1914=25 I C 278 and the appellate Court merely by endorsing finding of trial Court cannot render it final. A I R 1926 Lah 58-89 I C 662.

—Where the lower Appellate Court comes to a decision on basis of legal effect of documents forming part only of evidence in case the correctness of the decision though confirming that of the first Court can be questioned in second appeal. A I R 1928 Nag 153-11 N L J 21=111 I C 488.

—Where however, there is proper evidence in support of the concurrent findings no second appeal lies even if the finding is erroneous. A L R 1933 O 142=10 O W N 380.

—After there has been a decision of fact in the two Courts of original and appellate jurisdiction, the High Court



## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (12) Concurrent findings. (Contd)

cannot entertain a second appeal upon any question as to the soundness of the finding of fact by the Lower Appellate Court. If there is evidence to be considered, the decision of the second Court, however unsatisfactory it might be when examined, must stand final 42 Cal 888=19 C W N 1034=22 C L J 212=28 I C 245.

—Concurrent finding of necessity on circumstantial evidence if can be attacked See 186 P L R 1914=25 I C 511.

—It is not always an easy matter to separate a finding of fact from a question of law. It may often be open to argument that the materials which have been accepted by one court as establishing a certain conclusion were not in themselves sufficient for its support, if their legal weight had been properly measured and ascertained. A question of what constitutes exclusion from a joint estate may well, in many cases, be a question of law. Held, however, in this case, that the concurrent findings of the lower courts were finding of fact and there were no reasons for reversing their findings. 21 C W N 1142=(1917) M W N 642=42 I C 258 (P C).

—Concurrent finding upholding judgment and supported by evidence require appellant's case to be tried on these findings and review is not justified. A I R 1929 P C 205=31 Bom L R 1369=50 C L J 336=57 M L J 594=30 L W 825=Ind Rul (1929) P C 303 (P C)=118 I C 263.

—Concurrent findings of two lower courts as to fraud will not be interfered with by High Court in second appeal unless the lower courts have crossed the proper foundation for determination of such a question. A I R 1926 Bom 33=27 Bom L R 1318=91 I C 426.

—Both the two lower Courts finding that certain decree was concerning debts of the widow's husband's time and was not collusive or fraudulent—Finding cannot be interfered with in second appeal. A I R 1929 Nag 180=Ind Rul (1930) Nag 217.

—Concurrent findings of both Courts that a document is not proved, will not be interfered with but High Court in second appeal 8 A L J 1297=34 A 140=13 I C 19.

—Finding of fact whether concurrent or not cannot be challenged in second appeal. A I R 1928 Rang 303=6 R 586=Ind Rul (1929) Rang 106=114 I 538.

—So in the present case the Board refused to interfere with concurrent finding of separation in business when

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (12) Concurrent findings. (Contd)

the same was in accord with general probability and parties subsequent conduct. A I R 1931 P C 48=33 Bom L R 442=60 M L J 386=53 C L J 313=14 N L J 55=33 L W 43 9=35 C W N 438=Ind Rul (1931) P C 81 (P C)=130 I C 673.

—Concurrent findings of Indian Courts that certain persons were managers of certain property under power-of-attorney, were not disturbed by the Board when justified by ample evidence. A I R 1930 P C 232=34 C W N 849=59 M L J 134=52 C L J 54=32 Bom L R 1516=33 L W 129=Ind Rul (1930) P C 350=127 I C 542. (P C).

## (13) Conflicting findings

See 14 (9) Grounds for

## (14) Consideration.

—Finding that a pro-note is for consideration is one of fact. A I R 1924 Lah 39=5 Lah L J 198=71 I C 783.

—The finding as to the nature of the consideration is one of fact and cannot be assailed in second appeal. A I R 1927 Lah 530=28 P L R 388=7 Lah L J 319=103 I C 444.

—Finding to payment of the amount of hundi is binding in second appeal where it is one of fact, 1932 P C L 83 (85) (Civ)=33 P L R 19=A I R 1932 L 312=A L R 1932 L 83 (Civ).

—Finding as to passing of cash consideration for negotiable instrument is one of fact. 33 P L R 120=134 I C 121=A I R 1932 L 30 (2)

—The finding of the lower Appellate court as to the quantum of consideration is binding unless it is shown to have been based upon some error of law—Recital in the deed and admission of the mortgagor before Registration of the receipt of consideration are good evidence. A point not taken in the first Appellate court, nor in the memorandum of appeal to the second Appellate court cannot be raised. 21 I C 554.

—In second appeal, a finding; that a person is a mortgagee and has paid consideration cannot be challenged. 211 P L R 1915=168 P W R 1914=27 I C 446.

## (15) Contract,

—Question as to existence of natural love and affection is one of fact. 110 I C 408.

—In case of presumed contract decision determining its legal origin is question of fact A I R 1930 Mad 339=Ind Rul (1930) Mad 39=120 I C 743.



## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (15) Contract (Conold)

—Finding that defendant committed the breach of contract and not the plaintiff is one of fact and will not be interfered with by High Court in second appeal. 4 Lah L J 317.

—Whether time is or is not the essence of a contract is question of fact. 67 I C 157 (Lah).

See also. 27 M L J 482= 26 I C 121.

—Question as to reasonable time for examining goods in a contract for sale of goods is a question of fact. 135 I C 498= I R 1932 L 98= A I R 1932 L 52.

## (16) Costs.

—Question of costs cannot ordinarily be a ground for special appeal W R 1864, 215 see also. 8 O C 251, and 6 O C 39, and 6 O C 52

—But this does not mean that second appeal is not competent at all on question of costs. 53 P W R 1919=51 I C 622 see also 7 C W N 647 and 2 L L J 310; and 52 I C 16.

—High Court can in second appeal interfere with decision of lower. Appellate Court interfering with the discretion of trial Court in matters of costs. 3 U P L R (All) 55=64 I C 962.

—But a question of costs cannot be considered in second appeal, where the two Courts below have taken the same view and when no substantial point on the merits arises in the case. A I R 1926 All 419=93 I C 1008.

—In second appeal, the Court could not interfere with an order as to costs, unless the order is illegal. The court cannot examine the reasons and review the exercise of the discretion of the Lower Court in the matter of costs. Even if the discretion is exercised wrongly, that is not a sufficient reason for interfering in second appeal. 5 Bur L T 104=15 I C 429.

—The question whether a special appeal lies or not is largely an academic question, for each case must be decided after examining the merits. Second appeal will lie from a decision of lower Appellate Court interfering with non appealable order of trial Court, but not if it is appealable and is based upon a judicial discretion properly exercised. A I R 1928 Oudh 224=5 O W N 35= 107 I C 881.

## (17) Custom

—See 7-Custom.

## C P C (1908) Sec 100 (Contd)

## (11) Findings of fact. (Contd)

## (18) Damages

—Finding regarding amount of damages not fixed arbitrarily is one of fact and final. A I R 1923 All 199=80 I C 297.

—Question whether writing is defamatory—Quantum of damages—Question of fact. See 32 M L J 392.

—The question of the amount of damages is a question of fact, and it is not open to the High Court to interfere in second appeal upon such a question. 6 A L J 381=31 A 333=1 Ind Cas 760. See also 9 I C 984.

—But see 1 P R 1915=28 I C 273.

—Finding as to reasonable and probable cause in a suit for damages for malicious prosecution is one of fact. I R 1932 L 663 (1).

—Conclusion pursuant to discretion as to assessment of damages given by Contract Act s. 73 Expl. is a question of fact. 28 N L R 142.

—To sum up: the question of adequacy of damages is usually a question of fact, and in England, when such an action is tried by a jury the matter is left to them for that reason. Therefore, ordinarily no second appeal would lie. But a finding of fact may be vitiated in special circumstances by matters which raise questions of law. In the realm of tort, where we in India usually follow the English law, a safe guide to the circumstances in which interference would be justified will be found in those cases in which an English Court of Appeal would direct a new trial. 28 N L R 320 (321).

## (19) Decision in ejectment.

—A finding, in a suit for ejectment of tenant, on the question whether there was forfeiture of the tenancy by reason of the defendant's denial of the landlord's title is a finding of fact and cannot be interfered with in second appeal. A L R 1933 L 1222.

## (20) Discretion.

—Where the law leaves a matter within the discretion of a Court and the Court after proper inquiry and due consideration has exercised the discretion in a sound and reasonable manner, the High Court will not, in second appeal, interfere with that exercise of the discretion, even though it would itself have arrived at a different conclusion. 34 B L R 382=139 I C 44=I R 1932 B 463=A I R 1932 B 228=A L R 1932 B 802 (805).

—That is to say, the question as to the exercise of discretion is ordinarily one of fact. But such discretion must not

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (20) Discretion. (Contd)

be exercised arbitrarily but upon sound legal principles governing the exercise of such discretion. A I R 1926 Cal 677-921 C 1031.

—So where the law leaves a matter to the discretion of a Court and the Court decides to exercise that discretion and does exercise it, but bases its decision upon entirely erroneous grounds the discretion cannot be said to have been exercised in legal and proper manner and cannot be allowed to stand. 1 U P L R (B. R.) 11-52 I C 225.

—Where two Courts fully acquainted with the circumstances of a case and before whom evidence could be, but was not led, exercised a discretion, the High Court will not interfere with the exercise of such discretion. 54 I C 731.

—The High Court will not interfere with an order of the lower Appellate Court even if it did not exercise its discretion properly in utilising O XLI r. 33 A I R [1931] Lah 370-Ind Rul (1931) Lah 342-130 I C 774.

—Refusal of lower appellate Court to exercise discretionary powers under O XLI. r. 33 is no ground for second appeal. A I R 1930 Mad 707-Ind Rul (1930) Mad 455-123 I C 39.

—But the Lahore High Court has held that a finding of fact following local inquiry can be upset. A I R 1923 Lah 208-79 I C 808.

—Discretion of the Lower Appellate Court with regard to question of costs is not matter for interference by High Court in second appeal. 13 I C 201.

—Finding as to reasonable exercise of discretion vested under contract See 1 L W 818-27 M L J 447-(1914) M W N 715-25 I C 669.

—Personal decree against mortgager

—Direction to pay in instalments—Judicial discretion—Second appeal—See 15 C W N 1083.

—The question of the amount of damages payable in an action for damages for assault, is not a question of law. 9 I C 984.

—Relief for declaration being discretionary there can be no interference in second appeal, A I R 1930 All 620-Ind Rul (1931) All 174-129 I C 446.

—Judicial exercise of discretion in admitting appeal beyond time, cannot be interfered with in second appeal. Ind Rul (1930) Lah 287-123 I C 83.

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (20) Discretion. (Contd)

—An Appellate Court is always reluctant to interfere with the decision in a matter of discretion. A I R 1929 Rang 221-7 R 561-Ind Rul (1930) Rang 143-121 I C 815.

—Instalment decree will not be interfered with by High Court in second appeal in absence of strong grounds. A I R 1922 Lah 355-27 P W R 1922-5 Lah L J 135-66 I C 147.

—Discretion exercised by lower Appellate Court in refusing to allow a point not raised in memo of appeal to be raised at hearing cannot be challenged in second appeal unless improperly exercised. A I R 1928 Lah 536-107 I C 283.

—Interference by the High Court with the discretion of the trial judge in deciding a case at a late hour when defts were not ready to go on with the case See 3 L W 368-34 I C 547.

—The question of granting an adjournment being a matter of discretion the High Court will not interfere with the exercise of such discretion. 24 I C 206.

—Discretion exercise of—No ground for See 15 C W N 1083-11 I C 736.

—Quaere—Whether the question of custody of a document is a question of law with which the High Court can interfere it will not interfere with the discretion of the law Court. 23 I C 773.

## (21) Earnest money.

—In absence of written contract, question of earnest money must be decided on evidence on record as a point of fact. A I R 1922 All 478-20 A L J 742-68 I C 761.

## (22) Easement.

—Finding as to acquisition of easement is one of fact. A I R 1930 Lah 177-Ind Rul (1930) Lah 557-1240 I C 685; see also 9 M L T 445-(1911) 1 M W N 314-10 I C 63. and 11 W R 285.

—A finding that there has been no prescriptive enjoyment of an alleged easement for the statutory period is a finding of fact with which the High Court will not interfere in second appeal. Nor will it interfere in a case where the Lower Court has raised a presumption of fact in a particular case. 39 Mad 304-26 I C 723.

—But the question whether the enjoyment of easement is as of right is one of law. 12 L 741 (744-5)-A I R 1934 L 395.

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (22) Easement. (Concl'd.)

—Decision not presuming 20 years undisturbed user to have been as of right is open to second appeal. A I R 1925 Nag 270=81 I C 35.

—So also a finding whether right of easement has been acquired is question of law and can be called in question in second appeal. A I R 1929 All 862=Ind Rul (1929) All 817=118 I C 225.

—Whether a particular user of passage imposes additional burden on servient heritage under s. 23 Easement Act is a question of fact. A I R 1931 Mad 128=Ind Rul (1931) Mad 405=(1931) M W N 631=130 I C 661

—relying on 23 B 595; and 50 B 535.

—Whether the right of privacy in respect of a house has or has not been interfered with by neighbour, is a question of fact and cannot be disturbed in second appeal. A I R 1929 Oudh 535=Ind Rul (1930) Oudh 174=6 O W N 940=123 I C 222.

—Question whether an easement is one of necessity is a question of fact. A I R 1927 Mad 963=103 I C 862.

—A finding that two houses have a common entrance from the street is one of fact. A I R 1925 Lah 254=6 Lah L J 284.

—Finding that right of way was not granted is one of fact. A I R 1924 Lah 488=6 Lah L J 176.

Finding regarding diminution of light not putting user to inconvenience so as to entitle him to injunction is a finding of fact. A I R 1928 Lah 980=Ind Rul (1929) Lah 298=114 I C 698.

—Presumption of Bengal Tenancy Act. Ss. 6, 7 applied by lower Appellate Court—No interference, 16 C W N 725=14 I C 729.

## (23) Erroneous decisions

—An erroneous finding of fact, being a different thing from an error or defect of procedure, there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. 18 C 28=17 I A 122, P C=5 Sar 560. (14 C 740 and 17 C 291, F: 9 C 309 and 7 A 649, overruled.) See to the same effect. A I R 1927 Oudh 66=3 O W N (Sup) 282=99 I C 255. and A I R 1927 Oudh 89=99 I C 199. and A I R 1927 Mad 217=98 I C 869 and A I R 1925 Mad 823=48 M L J 467=22 L W 73=(1925) M W N 117=88 I C 646 and 3 Lah L J 103=64 I C 297 and A I R 1929 P C 152=(1929) A L J 702=33 C W N 725=31 Bom L R 866=30 L W 9=(1929) M W N 442=6 O W N 503=56 I A 223=52 M 538=50 C L J 30=57 M L J 64=Ind Rul (1929) P C 249 (P C)=117 I C 481 and 89 P

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (23) Erroneous decisions. (Contd)

R 1917=104 P W R 1917 =40 I C 772 and 52 I C 739 and Ind Rul (1931) Oudh 343=8 O W N 185=132 I C 79 and 9 O W N 1063 (1065-6) and 8 O W N 1005=Ind Rul (1931) Oudh 431=134 I C 1023 and 98 I C 1035 and A L R 1933 O 18=9 O W N 1063=142 I C 303=A I R 1933 O 102. All findings of fact, therefore, based upon admissible evidence must be accepted in second appeal. A L R 1931 O 330

—A second appeal should be entertained neither on the ground of an erroneous finding of fact however, gross or inexcusable the error may seem to be nor on any question as to the soundness of findings of fact by the court of first appeal, and if there is evidence to be considered, the decision of that Court however unsatisfactory it may be if examined, must finally stand. A L R 1933 O 498.

—Erroneous finding of fact is not the same as defect in procedure and hence wrongful finding of fact, if there is sufficient evidence cannot be interfered with. A I R 1929 P C 190=25 N L R 121=30 L W 443=50 C L J 197=57 M L J 205=31 Bom L R 883=56 I A 280=(1929) M W N 452=33 C W N 893=(1929) A L J 780=Ind Rul (1929) P C 233 (P C)= 117 I C 1.

—See also A I R 1928 Nag 329=Ind Rul (1929) Nag 70=114 I C 454 and A I R 1926 Oudh 257=13 O L J 176=91 I C 1046 and 9 O W N 1015 (1018).

—It has even been asserted that a finding of fact though grossly and inexcusably erroneous or based on insufficient evidence cannot be challenged in second appeal. 111 I C 376.

—See also A I R 1928 Oudh 354=5 O W N 510=100 I C 531.

—Even main evidence need not be mentioned by first Appellate Court and interference on this ground cannot be justified. A I R 1924 Nag 91=20 N L R 17=92 I C 327.

—In second Appeal a finding of fact cannot be questioned by the High Court even when the appellate court might be inclined to take a different view on the same evidence or even if the finding of fact is actually erroneous. A L R 1933 O 322.

—Possibility of second appellate Courts coming to different conclusion is no ground for interference. A L R 1933 N 81.

—Neither erroneous finding of fact nor amount of evidence required to prove the fact can be questioned in second appeal. A I R 1931 Lah 144=31 P L R 381=132 I C 379.

—Grossly erroneous finding of fact—Evidence considered by Appellate Court

**C. P. C. (1908) SEC. 100 (Contd)****(11) Findings of fact. (Contd)****(23) Erroneous decisions (Contd)**

cannot be challenged in second appeal. 3  
Lah L J 409= 67 I C 436.

See also 4 Lah L J 444.

—So also a finding entirely based on a mistake of fact cannot bind the High Court. A I R 1924 All 270=L R 4 A 138 Rev.=71 I C 1017.

—And a respondent first coming to know of erroneous order restoring appeal without notice can object to its validity in second appeal. A I R 1922 Pat 281 =6 P L J 625=3 P L T 117=(1921) Pat 337=63 I C 99.

—Findings of fact can be interfered with by High Court if they are based on unsatisfactory reasons. 1 L W 376.

—Findings of fact arrived at by the Court of first appeal cannot be interfered with in second appeal merely on the ground that, on the evidence adduced in the case, it would have taken a different view from that taken by the Court of first appeal. They can, however, be held to be not binding as valid findings of fact, if the Court of first appeal has omitted to take into consideration the most important evidence in the case or has taken an erroneous view of law, or has looked at the case from an erroneous point of view or where it has not arrived at that finding of fact after a fair, honest and full consideration of the evidence on the record. A I R 1926 Oudh 578=13 O L J 696=1 Luck 489=3 O W N 645=97 I C 853.

—Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law so also is the question of the admissibility of evidence and the question whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact. The High Court has no jurisdiction in second appeal to set aside the decree of the Lower Appellate Court on the ground that it had applied the wrong standard of measurement to land of which the rent was in question. 46 C 189= 23 C W N 345=9 L W 552=51 I C 760=45 I A 183.

—On a second appeal under S. 100 of the Code of Civil Procedure, 1908, the decision of the lower appellate Court is the only one which has to be dealt with under clauses (a) and (b) of the section and a reference to the original court's decision in the grounds of appeal is erroneous. The question whether a trustee

**C. P. C. (1908) SEC. 100 (Contd)****(11) Findings of fact. (Contd)****(23) Erroneous decisions. (Contd)**

can divest himself of trusteeship is a matter of law, 6 Bur L T 180=7 L B R 39=21 I C 232.

—Question of consideration—Finding based on recitals of document—Interference. See 21 I C 841.

(24) Estoppel.

See 15 (1) (b)—Inferences.

(25) Findings based on proper evidence.

—A finding of fact which is based upon legal evidence on the record cannot be questioned in second appeal. A L R 1933 L 1116.

—Where the finding of fact is based on admissible evidence and is not vitiated by any error of law or procedure, it is conclusive in second Appeal. A L R 1933 O 435.

See to the same effect. 9 O W N 945 (947)=140 I C 556. and 9 O W N 21 (23)=16 R D 62=136 I C 702=I R 1932 O 190= A I R 1932 O 144=A L R 1932 O 174. and 136 I C 719=33 P L R 161=I R 1932 L 255. and 138 I C 97=13 P L T 328=I R 1932 P 169=A I R 1932 P 218=A L R 1932 P 320 (321). and A I R 1931 Cal 666=53 C L J 264=Ind Rul (1931) Cal 846=134 I C 542. and A I R 1930 Pat 564=Ind Rul (1931) Pat 85=129 I C 133. and A I R 1927 Lah 845=99 I C 890. and A I R 1925 Lah 333=7 Lah L J 70=26 P L R 451=88 I C 588. and A I R 1923 Lah 21=79 I C 440. and A I R 1925 Pat 384=6 P L T 67=(1925) Pat 53=86 I C 141 and A I R 1925 Lah 377=7 Lah L J 129=26 P L R 167=88 I C 1019. And A I R 1928 All 289=50 A 754=26 A L J 696=Ind Rul (1929) All 435=115 I C 771. And A I R 1925 Cal 469=82 I C 822. And A I R 1927 All 377=100 I C 626. And 19 O C 166=3 O L J 244=34 I C 745. And 8 Ind Cas 728. And 240 P L R 1915=97 P W R 1915=30 I C 505. However unsatisfactory. 1932 P C L 714 (Civ)=I R 1932 L 666 (1)=A L R 1932 L 714 (Civ). And A I R 1926 Nag 192=90 I C 209. Or wrong. A I R 1925 Nag 111=80 I C 885. Or erroneous such finding may be. 136 I C 783=I R 1932 M 319=A I R 1932 M 173. And 3 Lah L J 409. And 5 C L J 55. And 3 O W N (Sup) 277=99 I C 183. And 13 O L J 530=100 I C 792. And A I R 1924 Nag 240=78 I C 887.

—Thus if lower Appellate Court has examined and discussed documentary evidence and pronounced it to be unreliable its value will not be discussed in second appeal though the finding of the Court as to relevancy of the evidence is erroneous. A I R 1921 Oudh 116=8 O L J 202=61 I C 781.

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (25) Findings based on proper evidence. (Contd)

—Where the finding was that the executants pardanishin ladies, managed their affairs like men of experience, and had independent and reliable advice and they executed the document intelligently and knew its consequences, held, that the finding of fact was based upon admissible evidence and could not be impugned in second Appeal. A L R 1933 O 498.

—So also when the finding of tenancy in favour of the plaintiff arrived at by the lower court was clearly tenable on the admissible evidence, even assuming that the deed of settlement so called was inadmissible for want of registration and must be excluded, held that no useful purpose could be served by remanding the case for a fresh finding. A L R 1933 Pat 497.

—But it should be noted that a finding of fact is binding in second appeal only when arrived at after due consideration of all evidence oral and documentary A I R 1927 Oudh 95=1 Luc 458=29 O C 333=3 O W N 352=13 O L J 586=95 I C 925.

—Therefore, a finding on fresh evidence allowed without stating reasons can be cast out in appeal. A I R 1923 All 413=79 I C 408.

—Though the High Court will not, in second appeal, disturb the findings of fact of the Lower Appellate Court, even where such findings are based on additional evidence taken for the first time by the Court of appeal on remand from the High Court. 27 I C 265.

—Where a Court proceeds on a wrong presumption in law but bases its finding on correct principles the question cannot be re-opened in second appeal. A I R 1927 Mad 33=52 M L J 100=25 L W 76=99 I C 981.

—Finding based upon evidence and not vitiated by any misapplication of substantive law or of any rule of procedure affecting the merits is binding in second appeal. 54 A 646 (684)=138 I C 465=1932 A L J 437=16 R D 427=1 I R 1932 A 418=A I R 1932 A 293 (F B).

—Finding of fact based on consideration of documentary evidence is no more open to attack in second appeal than one based on oral testimony, although an exception has been made in questions relating to the interpretation to be placed on documents of title. A L R 1932 L 975 (Civ) =I R 1932 L 628=1932 P C L 975 (Civ).

—And a finding is also binding even though the Lower Appellate Court makes mistake as to the meaning of the documentary evidence. 9 O W N 1063 (1066).

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## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (25) Findings based on proper evidence. (Contd)

—The question of what value should be attached to the evidence produced by the parties respectively is not a matter to be decided in second appeal. 21 I C 95.

—The fact that upon the evidence, the High Court would have come to a different conclusion is no ground for second appeal. It is precisely such revision of evidence which is excluded by the limited character of a second appeal. A I R 1926 Nag 192=90 I C 209.

—Finding based on consideration of entire evidence in case that the relationship of landlord and tenant exists between the parties and that the presumption raised by entry in Record of Rights has been rebutted, is one of fact and binding on High Court in second appeal. 64 I C 190 (Cal).

—Decision come to by lower Appellate Court on a consideration of the entire evidence in the case that a permanent tenancy had not been established is a finding of fact which the High Court cannot interfere with in second appeal. 4 Lah L J 311.

—Where the High Court is called upon to disturb findings of fact based entirely upon oral evidence it is bound to decline. A I R 1926 Mad 173=22 L W 786 =93 I C 670.

—Finding regarding entry based on evidence is one of fact and cannot be questioned. A I R 1925 Pat 795=6 P L T 801=3 Pat L R 109=88 I C 395.

—Finding based on entries in revenue paper indicating possession over certain land without interpreting any legal point is one of fact. A I R 1923 All 362=71 I C 369.

—Finding as to the extent of the proprietary rights based upon a review of the entire evidence is one of fact. 1923 A 358=45 A 53=74 I C 1004.

—A finding based on a consideration of the evidence and not on any presumption in favour of one party or the other ought not to be disturbed in second appeal. 6 O L J 86=50 I C 195.

—A finding of fact based upon some evidence on the record, although little cannot be questioned in second appeal. 4 O L J 456=42 I C 53 see also A W N 1890, 196 dissenting from 7 A 649.

—A High Court cannot in second appeal reverse a finding of fact arrived at by a lower Court merely because the evidence upon which the latter Court relied was not conclusive upon the issue of fact or that the finding is



## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (25) Findings based on proper evidence. (Contd)

erroneous, however gross or inexcusable that error may seem to be, if there is no substantial error or defect in the prescribed procedure followed by that Court and it had before it evidence legally admissible and proper for its consideration in support of the finding. 24 I C 633.

—Findings on proved and admitted evidence that sale was genuine and vendees had purchased bona fide, is one of fact and cannot be disturbed on second appeal. A I R 1931 Nag 67=27 N L R 8=131 I C 662.

—Finding as to, property appertaining to mosque based upon admissible evidence is binding in second appeal. 7 Luck 540=9 O W N 159 (165)=137 I C 170=I R 1932 O 218=A I R 1932 O 274.

—Finding as to date of birth based upon evidence is binding in second appeal, where lower appellate Court was under no misconception in the matter and did not misconceive the evidence. 28 N L R 127=140 I C 66 (2)=I R 1932 N 128=A I R 1932 N 117=A L R 1932 N 227 (228).

—In spite of statutory presumption findings of fact of first Appellate Court if based on sufficient evidence are final and conclusive. A I R 1929 P C 286=Ind Rul (1929) P C 352=30 L W 600=56 I A 388=51 C L J 1=34 C W N 1=57 M L J 849=32 Bom L R 114=120 I C 56.

—Where several points were urged, but where the Lower Court, after considering whole of the proof adduced by the parties, finds an adoption proved, the finding cannot be interfered with in second appeal. 62 P L R 1915=12 P W R 1915=27 I C 606.

—Where the lower appellate Court after discussing the evidence found that no consideration had been proved, the Chief Court will not interfere against the finding of fact. 111 P L R 1914=31 P W R 1914=23 I C 940.

—High Court will not interfere in second appeal where the conclusion arrived at by the lower Appellate Court is permissible on the facts established. 98 I C 876.

—High Court cannot interfere in second appeal on a finding of fact based on evidence. A I R 1927 Lah 574=103 I C 215.

—A finding of fact which has been arrived at after a fair, honest and full consideration of the evidence before the Lower Court will be treated as final in Second Appeal. 2 Pat L W 183=42 I C 397.

—Finding of fact even if based on circumstantial evidence is conclusive if not

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (25) Findings based on proper evidence. (Contd)

vitiating by mistake of law or procedure. 3 O L J 644=37 I C 439.

—Finding of fact based on evidence proper for consideration upon a question of fact will not be set aside in Second appeal even if it is grossly erroneous in absence of error or defect in the procedure. A I R 1925 Lah 150=78 I C 36.

—Findings based on other evidence and without considering delay occasioned objections against them are conclusive in taking. A I R 1930 Nag 11=Ind Rul (1929) Nag 309=119 I C 677.

—Where no question of misdirection or law arises finding of fact based on legal evidence by both lower Courts, cannot be questioned by Court in second appeal. A I R 1928 Mad 377=109 I C 771.

—The Chief Court will not in second appeal interfere with findings of facts, where they are not perverse i. e. where they are based on a consideration of all the material facts and evidence. 112 P R 1916=38 I C 62.

—Where the lower appellate Court has after full consideration of all the evidence including the terms of the sale-deed, found that the ancestor of the deft did not acquire a right of proportionate share in the shamilat, such finding is one of fact and not of law. 35 P R 1919=51 I C 378=78 P L R 1919.

—No second appeal lies on a finding based on full consideration of evidence. A I R 1922 Lah 356=3 L 389=6 Lah L J 513=70 I C 202, See also A I R 1922 All 283=69 I C 807; and A I R 1923 Cal 279=68 I C 500; and A I R 1922 Lah 140=16 P W R 1922=65 I C 475; see also A I R 1929 Oudh 402=Ind Rul (1929) Oudh 546=6 O W N 652=119 I C 886; and A I R 1926 Oudh 522=96 I C 14; and A I R 1930 Lah 677=Ind Rul (1930) Lah 217=121 I C 377; and A I R 1930 Lah 991=11 Lah 410=Ind Rul (1930) Lah 422=12 Lah L J 161=123 I C 278.

—Of the three witnesses to a deed one was dead at the time of suit, the other denied his signature and the third, who was illiterate, said he could not remember it. The plaintiff produced another man who had not signed the document as a witness and he proved execution. The Court of Appeal believing this witness decreed the claim. Held that there was evidence before the Court on which it came to conclusion that the deed was proved and the High Court could not interfere in second appeal. 11 A L J 400=19 I C 789.

## (26) Foreign Law.

—What a foreign law on a particular

C. P. C. (1908) SEC. 100 (*Contd.*)(11) Findings of fact. (*Contd.*)(26) Foreign Law. (*Concl'd.*)

point is a question of fact. A I R 1926  
Mad 218=22 L W 679=92 I C 112.

(27) *Fraudulent transfer.*

—See 11 (42)—Nature of transaction.

(28) *Inferences.*

—See 15 (3)—Inferences.

(29) *Injunction.*

—Where an injunction is granted on a finding of fact it cannot be reversed in second appeal. A I R 1926 Cal 536=91 I C 480.

(30) *Intention.*

Intention is not a matter of law but of fact. A I R 1928 All 61=50 A 208=25 A L J 970=107 I C 33.

—See also 3 P R 1917=36 I C 601.

—Thus a finding that parties intended and effected sale and not mortgage by conditional sale is finding of fact. A I R 1929 Lah 530=11 Lah L J 151=Ind Rul (1929) Lah 943=119 I C 767.

—So also a finding that no shamilat rights were sold with the proprietary land is one of fact and cannot be attacked in second appeal. 3 Lah L J 470.

—See also A I R 1931 Lah 220=31 P L R 195=Ind Rul (1930) Lah 385=123 I C 81.

—and A I R 1921 Lah 263=3 Lah L J 589=63 I C 746.

—As also the question whether there was intention to partition is a question of fact. A I R 1926 Oudh 614=96 I C 357.

—Whether transfer of his property was made a few days before application for adjudication with intent to defeat or delay creditors is merely question of fact. 107 I C 490.

—Similarly, the finding as to intention of parties to deed of transfer whether certain property should pass is one of fact and not open to challenge in second appeal. 63 I C 746.

—And the question of intention to create joint tenancy is one of fact, and so long as the Judge makes on inferences which are not justified in law, the finding of intention is one which cannot be questioned in second appeal. A I R 1926 Mad 33=49 M L J 358=22 L W 511=90 I C 880.

—Intention to dissolve partnership may be inferred from circumstances showing that a partner has in fact abandoned his interests in it and where

C. P. C. (1908) SEC. 100 (*Contd.*)(11) Findings of fact: (*Contd.*)(30) *Intention.* (*Concl'd.*)

the Court concludes from material before it that a partnership was dissolved in a certain year, the finding is one of fact and the question of limitation depending on such finding cannot be reopened in second appeal. A I R 1929 Lah 154=112 I C 375.

—The presumption is that the person paying off a mortgage intends to keep it alive if it is for his benefit to do so. But the presumption of law as to intention is not irrebuttable. The question of intention is a question of fact and cannot be re-agitated in second appeal. A I R 1925 Mad 1217=49 M L J 361= (1925) M W N 608=90 I C 767.

—Considerations which led to particular conclusion regarding intention of parties to contract cannot be reassessed. A I R 1930 Mad 590=Ind Rul (1930) Mad 860=126 I C 492.

—The question with what intention a person did a certain act can hardly be said to be anything but a question of fact. The question must be examined with reference to the subsequent acts of the person alleged to have a certain intention. 45 I C 303.

—The question whether it is the intention of the family that the brothers who take up their residence elsewhere should sever all connection with their ancestral land or whether it is the intention of the family that the member who remains a resident in the village should continue in charge of the ancestral land on behalf of the whole family, is one a finding of fact and cannot be altered on second appeal. 16 R D 195=13 U D 68=13 L R 97 (Rev).

(31) *Interest.*

—High Court cannot interfere with finding as to rate of interest unless thought arbitrary. A I R 1922 All 335=69 I C 758.

—Whether a payment of interest can be said to be made "as such" is a question of fact. A I R 1926 All 329=93 I C 295.

—Finding that rate of interest in mortgage bond is hard and unconscionable cannot in second appeal be disturbed. 61 I C 275 (C).

(32) *Legal Effect.*

—See 15 (1) (d)—Inferences.

(33) *Legal necessity.*

—Finding as to existence of necessity

**C. P. C. (1908) SEC 100 (Contd)****(11) Finding of fact. (Contd)****(33) Legal necessity. (Contd).**

is one of fact. A I R 1923 Lah 669=78  
I C 11.

—e. g. finding regarding necessity for  
sale. A I R 1924 Lah 685=6 Lha L J 3 13  
=98 I C 148

—See also A L R 1933 A 276(1)=  
I A W R 240.

—So also findings as to considera-  
tion and necessity are findings of fact  
and not challengeable in second appeal.  
A I R 1922 Lah 398=4 L L J 243.

—A finding that certain debts were  
contracted for legal necessity arrived at  
on consideration of admissible evidence, is  
one of fact and cannot be challenged in  
second appeal. A I R 1930 Oudh 144 (2)=8  
O W N 222=Ind Rul (1931) Oudh 271=132  
I C 271; see also A L R 1932 L 501.

—Similarly as to legal necessity for  
alienation. 1932 P C L 348 (Civ.)=A L R  
1932 L 348 (Civ.) see also I P L R 1915=  
27 I C 645=234 P W R 1915, and 3 Lah  
L J 137=66 I C 881.

—and 192 P L R 1914=24 I C 689.

—see also as to alienation of minor's  
estate. 33 P L R 607. and as to legal  
necessity for alienation by Hindu manager  
see 9 A L J 63=13 I C 945. and A I  
R 1921 Lah 304=3 L L J 491=63 I C 515.

—Question of necessity for alienation  
of joint family property—finding of fact  
when can be challenged in second appeal.  
See A L R 1933 L 254=34 P L R 113=  
A I R 1933 L 343.

—Alienation by Hindu widow—  
Second appeal—Court should not go into  
finding regarding its necessity. A I R  
1923 All 28=L R 3 A 376=70 I C 815.

—But question of sufficiency of  
inquest about legal necessity in alienation  
by Hindu widow is one of law. A I R  
1925 Oudh 557=27 O C 329=85 I C 489.

—The question as to the existence  
of necessity for alienation is a question  
of fact and whether a lender should see  
to the application of money is a  
question of law. A I R 1925 Oudh 740=  
90 I C 345.

—Question about necessity for trans-  
fer may be mixed question of fact and  
law but finding about necessity deduced  
from wrong principles is one of law. A I  
R 1923 Lah 41=79 I C 211.

—Finding as to the existence of  
necessity based on entirely wrong principles  
can be examined in second appeal. A I R  
1923 Lah 680=75 I C 919.

—See also A I R 1923 Lah 660=  
79 I C 980.

**C. P. C. (1908) SEC. 100 (Contd)****(11) Findings of fact. (Contd)****(33) Legal necessity. (Contd)**

—Finding as to necessity—Question  
of fact—Lower Appellate court ignoring  
important evidence bearing on the question.  
See 17 C W N 1917=38 I C 586.

—And the Nagpur J C Court has  
held that court can in second appeal  
examine a finding as to the existence of  
legal necessity. A I R 1926 Nag 486=  
96 I C 1006.

—Finding as to passing of considera-  
tion and existence of legal necessity is  
one of law. A I R 1924 Lah 689=75 I C 6 74.

—Finding as to portion of considera-  
tion only being for necessity—Interfer-  
ence—Minor. see (1915) M W N 8=26 I C 489.

**(34) Legitimacy.**

—A finding as to legitimacy is a  
question of fact. A I R 1927 All 410=100 I  
C 650. see also 2 Lah L J 505.

—But such finding though one of  
fact can be disturbed in second appeal if  
important pieces of evidence and strong  
presumption in favour of legitimacy is  
ignored. 60 I C 375 (1).

**(35) Market Value**

—Finding of market value is one of  
fact. A I R 1930 All 363=52 A 532=Ind  
Rul (1930) All 462 and 941=(1930) A L J  
561=127 I C 589=124 I C 30.

—See also A I R 1926 Oudh 68=90  
I C 672. and A I R 1929 Lah 137=111 I C  
814.

—Market value of a thing provided  
there is no legal mistake in determining it  
is pure question of fact. A I R 1929  
Oudh 244=6 O W N 264=4 Luck 683=Ind  
Rul (1929) Oudh 421=118 I C 85.

—Decision as to market value and  
amount paid in pre-emption suit, how-  
ever erroneous, cannot be challenged in  
second appeal, 3 Lah L J 108=64 I C 297.

**(36) Marriage.**

—A finding as regards the factum of  
marriage between the parties is a finding  
of fact. 5 Lah L J 117=84 I C 1039.

—See also A I R 1924 Lah 188=5 Lah  
L J 505=73 I C 896.

—The finding as to Karewa (a form  
of marriage) is a finding of fact. 111 I C  
712.

—But the question as to the form of  
marriage is a question of law. A I R 1929  
All 1=48 All 126=23 A L J 981=L R 6 A  
557 Civ=90 I C 358.

**(37.) Meaning of Words.**

—Sense of particular word in particular

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Finding of fact. (Contd)

## (37) Meaning of Words. (Contd)

place is question of fact. A I R 1925 Cal 1209=88 I C 377.

—In case of disputed trade mark whether a certain word has acquire a particular meaning is a question of fact and finding of Appellate Court supported by evidence cannot be disturbed on second appeal. A I R 1930 Lah 999=Ind Rul (1931) Lah 81=32 P L R 119=12 Lah 224=129 I C 1.

—A decision of an Appellate Court upon the ordinary meaning of a word in common use is final in second appeal 20 C W N 584=32 I C 240 see also 46 I C 194.

—But it should be noted that it is only the meaning of words that is question of fact, their effect is one of law. A I R 1923 All 337=75 I C 686.

—What the Commissioners resolved to do at their meeting, and what they meant in their resolution by the expression "assessment" is a question of fact. The meaning of words is a question of fact in all cases. The effect of the words is a question of law. A I R 1926 Cal 607=53 C 453=30 C W N 405=44 C L J 275=94 I C 231.

—And the Bombay High Court has held that even the meaning of a word is a question of law A I R 1922 Bom 416=24 Bom L R 416=47 B 18=67 I C 852.

## (38) Minority

—Question regarding party's minority cannot be re-agitated. A I R 1925 Pat 367=3 Pat L R 16=86 I C 856.

## (39) Nature of place.

—Whether a place is a town or a village is a question of fact cannot be considered in second appeal. A I R 1926 Lah 542=18 Lah L J 66=27 P L R 73=94 I C 127.

—Question whether a certain place is a town for the purposes of Punjab Pre-emption Act is one of fact A I R 1923 Lah 443=75 I C 610.

—But a question whether certain local conditions constitute a place, a town or village is one of law. A I R 1921 Lah 121=62 I C 808.

## (40) Nature of property.

—Finding regarding character of property is one of fact and cannot be challenged. A I R 1923 Lah 532=79 I C 543.

—The question what lands are included in the Permanent Settlement of 1793 is a question of fact and not of law. A I R 1927 Cal 457=100 I C 507.

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (40) Nature of property. (Contd)

—Nature of land inherited is a question of fact. A L R 1933 L 88 (1).

—So also question of relationship of the plaintiff and the ancestral character of the property in dispute are of fact and decision thereon is binding in second appeal. A I R 1921 Lah 380 (2)=30 P L R 1922.

—See also 3 L L J 414=67 I C 439 and A I R 1921 Lah 138 (1)=3 Lah L J 414=67 I C 439 and 94 P L R 1916 and 42 P L R 1919.

—Finding as to the ancestral nature of property is one of fact—Eligibility to sue is a finding on custom and cannot be questioned in second appeal. A I R 1924 Lah 263 (1)=5 Lah L J 449=76 I C 147.

—A finding that property is ancestral based upon the statement in the revenue record of 1882 that the common ancestor of the parties founded the village is not illegal. A I R 1931 Lah 704=32 P L R 55.

—Whether the self-acquired property of a member of a joint Hindu family has been thrown into the common stock or not is a question of fact. A I R 1926 Mad 963=51 M L J 167=(1926) M W N 635=96 I C 1051.

—But a finding as to the ancestral nature of certain property based upon mere conjectures and presumption can be set aside in second appeal. A I R 1926 Lah 659=8 Lah 30=8 Lah L J 485=27 P L R 721=97 I C 241.

—Question of ancestral nature of land is one of fact. But if such finding on it has been arrived at on no evidence whatever but on purely conjectural grounds it can be gone into by the High Court sitting in second appeal. A I R 1922 Lah 65=4 Lah L J 31=64 I C 428.

—Whether particular property still has character of grove is finding of fact. A I R 1924 Oudh 306=27 O C 26=11 O L J 565=79 I C 663.

—That a Dharmasala was always treated as private property is question of fact and is binding in second appeal. 3 Lah L J 514=A I R 1921 L 843.

—But finding as to communal character of land without applying correct principles is one of fact and law and can be disturbed in second appeal. A I R 1931 Mad 213=(1930) M W N 515=59 M L J 844=32 L W 978=Ind Rul (1931) Mad 294=129 I C 630.

—Question whether dedication is real or nominal is of fact and is of great difficulty but can be decided by noticing the conduct of founder or his successors. A I

## C. P. C. (1908) SEC. 100 (Contd.)

## (11) Findings of fact. (Contd.)

## (40) Nature of property. (Contd.)

R 1931 Lah 170=32 P L R 304=Ind Rul (1931) Lah 411=131 I C 283; see also 27 C 242; and 42 A 39; and 18 C 10 (P C).

—House in dispute—whether Dharmasala and dedicated to the public is a finding of fact. 1 P R 1919.

—Finding of lower Appellate Court as to character and dedication of property as wakf, will not on second appeal, be set aside, if not erroneous in law. A I R 1930 Lah 744=31 P L R 372=Ind Rul (1930) Lah 699=126 I C 17.

—See also 138 I C 215 (1)=33 P L R 288=I R 1932 L 434 (1); and A I R 1931 Lah 607=32 P L R 276=12 Lah 540=Ind Rul (1931) Lah 940=134 I C 492; relying on 100 I C 626.

—But the Oudh J C Court has held that the question whether a specified property is or is not wakf property is a question of law or at any rate a mixed question of law and fact. 16 O C 76=

17 I C 303.

—Whether certain property is sulka stridhan or not, is not a pure question of law. Property cannot be sulka unless it was intended to be the price of the bride or given to the girl for services mentioned in the texts. A I R 1929 All 25=26 A L J

1203=111 I C 165.

—Whether certain land is really debuttar or only nominally so and whether the shebaita put an end to his debuttar character by consent, are questions of act with which the High Court will not interfere in second appeal. 9 I C 650=20 C L J 315 N.

—Where the Lower Appellate Court had found that as a plot of land was held Revenue free by the Govt. it ceased to be a part of the Mahal, the question is one of mixed fact and law and can be interfered with in second Appeal 36 All 231=12 A L J 303=25 I C 162.

—Question whether property comprised in documents is dedicated to religious purposes is one of fact and not open to consideration in second appeal because documents requiring re-consideration are not documents of title. A I R 1930 Lah 1056=12 Lah L J 199=31 P L R 1618.

—Question whether property to which partners are jointly entitled, has been thrown into assets of partnership, is purely one of fact. A I R 1928 P C 135=47 C L J 292=30 Bom L R 762 (P C)=107 I C 453.

## C. P. C. (1908) SEC 100 (Contd.)

## (11) Findings of facts (Contd.)

## (40) Nature of property (Conclld.)

—A finding on the question as to whether a certain land formed part of a graveyard is one of fact and cannot be interfered with in second appeal. 12 L J 329.

—Question whether a particular house and the building materials are moveable or not being a question of fact will not be interfered with by High Court in second appeal. A I R 1922 All 45=L R 3 A 128.

—High Court will not interfere on a question whether a certain property is a private or public property, unless the lower appellate Court has wrongly inferred from the facts established in the case or has applied the law wrongly. A I R 1926 Oudh 578=13 O L J 696=1 Luck 489=3 O W N 645=97 I C 853.

—Question whether particular trees could or could not be removed with their roots is one of fact. A I R 1929 All 330=113 I C 405.

## (41) Nature of tenancy.

—The Calcutta High Court has held that whether tenancy is permanent or not is not a question of fact but one of legal inference from facts which can be raised in second appeal. 35 C W N 1017.

—See also 54 C L J 353=137 I C 658=I R 1932 C 350=A I R 1932 C 398 (400). and A I R 1928 Cal 597=32 C W N 771=55 C 1029=112 I C 180 and A L R 1933 Cal 765; and A I R 1924 Cal 465=73 I C 2; and 7 I C 785; and 8 C W N 774, F B. and 17 C W N 1073=20 I C 363.

—And that a question regarding landlord's recognizing a tenant can be re-agitated. A I R 1925 Cal 761=85 I C 636.

—So also a question whether relation of landlord and tenant exists is one of law. A I R 1925 Cal 1238=85 I C 757.

—Similarly, the Bombay High Court has held that, that a question of permanent nature of tenancy is legal inference from facts and therefore, ground for second appeal. A I R 1930 Bom 39=31 Bom L R 1279=Ind Rul (1930) Bom 204=123 I C 492.

—And the Lahore High Court that a finding that a tenancy is permanent being an inference from proved facts can be attacked in second appeal but the findings of facts forming bases of inference cannot be disturbed. A I R 1928 Lah 720=10 Lah

L J 251=111 I C 76.

See also A I R 1922 Lah 329=29 P W R 1922=72 I C 177.

—But the Madras High Court holds that a finding of permanent tenancy is



## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (41) Nature of tenancy. (Concl'd)

more or less one of fact and will not be interfered with in second appeal. A I R 1931 Mad 577=(1931) M W N 874 =Ind Rul (1931) Mad 721=133 I C 369.

—And the Allahabad Court that a finding regarding jointness of holding is one of fact. A I R 1924 All 231=21 A L J 859=L R 5 A 1 Rev= 79 I C 367.

—And that a question of land being parjaut is one of fact. 87 I C 368=A I R 1926 A 83.

—So also the Patna High Court has held that the question whether a tenant is a raiyat or a tenure-holder is a question of fact though a substantial question of law arises in determining it. A I R 1926 Pat 9=6 P L T 787=(1925) Pat 281=90 I C 895.

—The question whether the tenants are raiyats depends on the question of fact and Court should look to the attendant circumstances. Mere form of the kabuliyat or the use in it of the word "cultivator", is not important. Nor does the receipt of rent in which the tenant is described as a raiyat carry the matter any further. A I R 1927 Cal 413=100 I C 466.

—The nature and incidents of tenancy are mixed questions of law and fact. The question as to length of tenancy and fixity of rent and other matters are questions of fact, but where the court is invited to draw an inference as to the nature of the tenancy from the facts found, the question is one of law. 16 C W N 567 =15 C L J 220=13 I C 606.

## (42) Nature of transaction.

—The question whether a transaction evidenced by a deed is a mortgage or a sale is not always a question of law. Where the question is not dependent only on the construction of documents or on inferences from the found facts but is dependent on the appreciation of the evidence, the question is not one purely of law. 34 B L R 372 (373)=138 I C 204=I R 1932 B 351=A I R 1932 B 230=A L R 1932 B 782.

—Whether a particular transaction is a mortgage or sale is a question of fact. 26 P L R 799 =92 I C 42.

—Question if transaction is mortgage by conditional sale or out and out sale is mixed question of law and fact. A I R 1925 Mad 37=47 M L J 385=20 L W 338 =35 M L T 87=(1924) M W N 643=84 I C 505.

—Question whether a certain transaction was a mortgage or a sale is a

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (42) Nature of transaction. (Contd)

question of fact if it does not depend merely upon the construction of terms of document but also upon the surrounding circumstances. A I R 1928 Lah 667=110 I C 428.

—On contention that mortgage was extinguished by subsequent sale, question whether there was sale, is one of fact. A I R 1930 P C 91=(1930) A L J 292=32 Bom L R 380=31 P L R 145 =31 L W 321=11 Lah 199=57 I A 86=51 C L J 518=59 M L J 53=Ind Rul (1930) P C 124 (P C)=12 2 I C 316.

—But it is a question of law if transfer of occupancy rights under Punjab Pre-emption Act is sale or not. A I R 1930 Lah 141 =31 P L R 338=Ind Rul (1930) Lah 139=120 I C 683.

—Question whether transaction amounts to sale or exchange is a question of law. 100 P W R 1913=199 P L R 1913 =19 I C 301.

—The question as to whether two transactions are connected or independent is one of fact which has to be ascertained from the evidence. No question of legal presumption arises. A I R 1931 All 113 =(1931) A L J 571.

—Finding whether certain arrangement was disadvantageous to the minors and could not be said to have been made honestly and in good faith, is one of fact and not challengeable in second appeal. A I R 1921 Lah 291=4 Lah L J 40—Question —Good faith is one of fact in each case. A I R 1921 Sind 13=15 S L R 11=52 I C 507.

—Whether a guardian is justified in entering into a compromise is a question of fact. A I R 1925 Mad 1255=49 M L J 540=22 L W 560=91 I C 742.

—Question whether transaction is executed with intent to defeat or delay creditors is one of fact and not challengeable in second appeal. 63 I C 169.

See also 60 I C 527 (Lah).

—A finding of the lower Appellate Court based on a consideration of all facts that a sale was genuine, is one of fact and cannot be disturbed in second appeal. A I R 1931 Nag 67=27 N L R 8=131 I C 662.

—The question as to the genuineness of an agreement or a party's having notice thereof is a question of fact. A I R 1926 Oudh 257=13 O L J 176=91 I C 1046.

—Nature of gift—Question of fact —High Court cannot interfere. 4 Lah L J 453.

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (42) Nature of transaction. (Concl'd)

—Gift—whether genuine or fraudulent  
—A question of fact. A I R 1933 L 280  
=34 P L R 363.

—Whether a particular transaction is fraudulent is question of fact. A I R 1926 Oudh 501=94 I C 927.

—But the Nagpur view is that a question of fraudulent transfer being a mixed question of law and fact can be dealt with by High Court. A I R 1923 Nag 124  
=69 I C 193.

—Some grounds for findings of fact wrong. Sham transaction. see I L W 376=24 I C 924.

## (43) Negligence.

—Negligence—whether question of fact. see A I R 1933 L 163=34 P L R 110.

—The finding that there was no negligence is a finding of fact A I R 1928. All 166=L R 9 A 23 Rev=107 I C 707.

—The question of negligence is one of fact. A I R 1922 Cal 317= 71 I C 346.

See also A I R 1927 Oudh 478=1 Luck Cas 498=105 I C 565.

—Finding regarding intentional negligence is one of fact. A I R 1924 Lah 594=6 Lah L J 237=79 I C 428.

—Wilful neglect is a question of fact and cannot be challenged in second appeal. 94 I C 348.

—Wilful neglect is not a pure question of law and; therefore, an Appellate Court's finding of fact based on certain evidence and circumstances cannot be questioned in second appeal. A I R 1926 All 394=48 A 766=96 I C 1046.

See also A I R 1925 Mad 258=47 M L J 700=(1925) M W N 75=85 I C 812.

—A finding of gross negligence constitutes question of mixed fact and law. A I R 1922 All 421=70 I C 591.

—Suit by co-sharers against lambardar for profits—Question of negligence of lambardar is a question of mixed fact and law. A I R 1924 All 613=77 I C 1032.

—Question as to negligence of a solicitor is a question of fact. A I R 1927 Mad 443=(1927) M W N 213=53 M L J 375  
=39 M L J. 15=103 I C 31.

—Gross or culpable negligence on part of guardian is a question of fact. 54 A 646 (653)=138 I C 465=1932 A L J 437=16 R D 427=I R 1932 A 418=A I R 1932 A 293 (F B).

—Whether there was misconduct or negligence on lambardar's part within meaning of s. 164, Agra Tenancy Act, is

## C. P. C. (1908) SEC. 100 (Concl'd)

## (11) Findings of fact. (Contd)

## (43) Negligence. (Concl'd)

not pure question of fact and can be reopened in second appeal. A I R 1921 All 314=43 A 29=601 C 643.

—Interference with findings of fact—Railway Company—Suit for damages for loss of goods carried under Risk note B—Finding as to wilful negligence—Interference in Second Appeal—Practice. see 4 Pat L W 369.

—Whether party offering secondary evidence of document, not lost or destroyed, has sufficient reason for not producing it in reasonable time is question of fact. A I R 1930 All 550=(1930) A L J 1003=Ind Rul (1930) All 668=125 I C 460.

—But the question whether particular facts found constitute gross negligence is a question of law. A I R 1926 Mad 905=(1926) M W N 350=95 I C 707.

See also A I R 1926 Nag 399=9 N L J 111=97 I C 195.

—Question as to negligence is not necessarily in all cases a finding of fact, if the finding has not been approached from the proper legal standpoint. 136 I C 569=I R 1932 A 217=A I R 1932 A 139.

—Question, whether facts proved amount to wilful neglect or not is one of law, being a matter of inference from proved facts. A I R 1928 Lah 837=10 Lah 329=111 I C 523.

—High Court therefore is not bound by finding of negligence derived through wrong principles: 11 L L J 82=30 P L R 128=118 I C 655=A I R 1929 L 314.

—As "wilful neglect" is matter of inference to be drawn from facts and not a concrete fact to be proved by direct evidence. A I R 1928 Lah 774=10 Lah 360=30 P L R 541=112 I C 736.

—Lower Appellate Court's inferences regarding negligence are not binding on second Appellate Court. A I R 1929 Rang 17=6 R 643=Ind Rul (1929) Rang 150=116 I C 470.

## (44) Notice.

—Question as to notice is a question of fact. 54 A 557 (562)=1932 A L J 526=I R 1932 A 405=A I R 1932 A 540=138 I C 439=A L R 1932 A 831.

—High Court in second appeal cannot interfere with finding of fact that purchaser had or had not notice of charge on property. A I R 1929 Oudh 316=6 O W N 493=Ind Rul (1929) Oudh 341=117 I C 405.

—That the subsequent purchaser had notice and knew of contract of sale with

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (44) Notice. (Concl'd)

the plaintiff is question of fact. 3 Lah L J 447.

—Even the question of constructive notice is a mixed question of law and fact rather than of pure law. A I R 1931 Bom 430=33 Bom L R 499.

—So also notice under T. P. Act s. 40 A I R 1931 All 338=Ind Rul (1931) All 267=130 I C 299 (2) as also the one under Railways Act s. 140. A I R 1927 All 215=99 I C 622.

—But whether certain facts found amounted to giving notice within s. 70. Bengal Tenancy Act, or not, is a question of law. A I R 1926 Pat 95=(1926) Pat 258=8 P L T 221=98 I C 991.

—So also the sufficiency of service of notice annulling incumbrance under B. T. Act s. 167 is a question of law : 53 I C 570.

—The Madras High Court however, has held that whether notice is reasonable and sufficient is purely a question of fact and be raised in Letters Patent Appeal for first time A I R 1929 Mad 617=30 L W 583=Ind Rul (1929) Mad 775=118 I C 279.

## (45) Novation

—Creditor instead of actually being paid, taking renewed promise receiving some consideration as increased interest—Old debt is not paid off whether new debt is substituted in place of old is a question of fact. A I R 1927 Cal 538=45 C L J 233=31 C W N 703=102 I C 871.

## (46) Nuisance

—A finding as to the existence of a nuisance is one of fact. A I R 1925 Lah 424=7 Lah L J 192=90 I C 227. See also A I R 1926 Nag 50=89 I C 929.

—A decision, therefore that public lane is not narrowed and therefore, does not cause damage, being question of fact cannot be raised in second appeal. A I R 1929 All 504=Ind Rul (1929) All 872=118 I C 520.

—But a decision as to existence of nuisance is binding in second appeal provided principles of law have not been ignored or violated: 64 I C 169 (Lah).

—Finding as to whether particular business is or is not an actionable nuisance—Interference in Second Appeal See 7 L W 595.

## (47) Ownership and possession

—A finding as to possession arrived at by the lower appellate Court is one of fact and would not be set aside by the

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (47) Ownership and possession. (Concl'd)

High Court. (1931) A L J 12=Ind Rul (1931) All 322=130 I C 706.

See also I R 1932 L 628=A L R 1933 L 975 (Civ)=1932 P C L 975 (Civ). and A L R 1933 L 1275; and 96 I C 915=A I R 1926 M 1052; and 67 I C 152 (Lah).

—Findings of facts relating to title and possession which are the result of careful consideration of the case of both sides cannot be challenged in second appeal. A L R 1933 Pat 294.

—In a dispute between two purchasers of property from B and G respectively as to the interest of G in the property, the fact of G and B, who were Mahomedans, living together is not conclusive, but the real question is to determine the fact and nature of possession of G in the property. 19 C L J 539=25 I C 588.

—Question as to ostensible ownership is a question of fact. 36 All 308=25 I C 158=12 A L J 411.

—High Court cannot interfere with the question whether a particular place belongs to individual or to community as it is a question of fact. 113 I C 886.

—As to who is owner of land in suit and question as to nature of defendant's possession are questions of fact not open to objection in second appeal. A I R 1921 Lah 117=62 I C 809.

—In a suit for declaration of title and maintenance of alleged possession of certain lands the Lower Appellate Court differing from the Court of first instance found that the lands in suit belonged to the defendants, and were in their possession for more than twelve years, that the plaintiffs had not proved their possession within the period of limitation and dismissed the suit. In Second Appeal the decision was reversed; Held, on L. P. A. that the findings of fact arrived at by Lower Appellate were binding in Second Appeal. 14 A L J 1066=36 I C 427.

## (48) Presumption

—See (29)—Presumption.

## (49) Proof

—After admitting evidence for or against fact, it is purely question of fact whether fact has been proved. A I R 1930 Lah 1056=12 Lah L J 199=31 P L R 1018 see also A I R 1921 Oudh 349=11 O L J 77=L R 5 Oudh 78=27 O C 89=80 I C 327. and A I R 1931 Oudh 142=8 O W N 152=15 R D 112=L R 12 A Rev 391=131 I C 395. and 135 I C 693=L R 1932 O 53=A I R 1912 O 51 (52).

**C. P. C. (1908) SECTION 100 (Contd)****(11) Findings of fact. (Contd)****(49) Proof (Conclud)**

—Thus finding against proof of loss of original document is a finding of fact 1932 P C L 581 (Civ)=A L R 1932 L 581 (Civ).

—So also whether an alleged mortgage is not proved is a finding of fact which cannot be impugned in second appeal. A I R 1926 Oudh 546=96 I C 253.

**(50) Reasonable and probable cause**

—See 22 (8) Mixed questions of law and fact

—(51) Reference of issues of fact by High Court to lower appellate Court

—No Second appeal lies from affirming order of lower Court returning plaint. 31 P L R 178=Ind Rul (1931) Lah 3=128 I C 51.

**(52) Rent, rate of**

—Whether the tenant has held at a uniform rate of rent for more than 20 years or back to the time of the Permanent Settlement, is a question of fact and not a question of law. A I R 1926 Cal 359=90 I C 564.

—Question regarding some rent is one of fact. A I R 1925 Cal 632=29 C W N 500=41 C L J 135=86 I C 316.

—Question if rent dues have accrued for default of usufructuary mortgagee is one of fact and law. A I R 1924 All 877 =L R 5 A 225 Rev=84 I C 26.

—Whether one heir of deceased tenant represents whole tenancy is a question of fact. A I R 1926 Cal 517=91 I C 748.

—Finding that there had been no change of rent for 48 years and inferring fixity of rent can be examined in second appeal A I R 1924 Pat 373=i Pat I R 32 =71 I C 15.

—Finding that a certain charge is part of rent is a finding of fact. 25 I C 540.

—Decision that settlement of rent at higher rate claimed is not binding on defendant cannot be questioned in second appeal. A I R 1929 Mad 678=Ind Rul (1929) M 817=118 I C 497.

—But second appeal lies on a question whether rent is due. A I R 1925 Pat 294=78 I C 463.

—So also a second appeal would lie from a decision dismissing a rent suit on the ground that the suit lands were not comprised in the tenancy. A I R 1927 Cal 410=100 I C 525.

—Application for enhancement of rent for excess area—Order granting enhancement on ground of rise of prices of staple food crops whether second appeal lies, see 2 Pat L J 574

**C. P. C. (1908) SEC. 100 (Contd)****(11) Findings of fact. (Contd)****(52) Rent, rate of. (Conclud)**

—Finding as to amount of rent based on plaintiff supposed admission when there was none can be attacked in second appeal as Court is deemed to have made a mistake in law. A I R 1928 Oudh 333=108 I C 102.

**(53) Representation**

—Finding of lower Courts whether tenancy is correctly represented is one of fact and cannot be made ground of second appeal. A I R 1929 Cal 28=49 C L J 83=Ind Rul (1929) Cal 324=115 I C 180.

—Finding as to representation, must be accepted in second appeal. A I R 1923 Cal 165=68 I C 203.

—Whether a person by any representation or by conduct amounting to representation induced another to do a certain act is a question of fact, A I R 1926 Mad 39=49 M L J 396=(1925) M W N 596=90 I C 875.

—Whether son was effectively represented in a former suit is a question of law and not one of fact. A I R 1927 Mad 406=38 M L T 107=99 I C 539.

**(54) State of mind**

—A finding as to the state of mind of a person at the time when he performed a certain act may be said to be ordinarily a finding of fact and the High Court in second appeal is precluded from going behind the finding arrived at by the lower Appellate Court that a deed of gift was executed when the donor was in immediate apprehension of death, 8 A L J 1154 =12 I C 730;

—But soundness of mind—finding based on expert evidence—finding open to challenge in second appeal. see A L R 1933 L 312=34 P L R 297.

**(55) Status**

—Finding on the question of plaintiff's status is a finding of fact which cannot be challenged in second appeal. 29 P L R 162=109 I C 458.

see also A I R 1923 Lah 626=80 I C 264;

—But the status of public prostitutes is a question of law. A I R 1926 Lah 461 =93 I C 827

—And it is competent for the second Appellate Court to interfere with a finding as to the legal status of a party. A I R 1927 Nag 200=101 I C 252.

—High Court in second appeal ought not to interfere with a finding as to the status of a tenant except on the ground of some clear mistake of law. Mistake as

C. P. C. (1908) SEC. 100 (Contd.)

(11) Findings of fact (Conclud)

(55) Status. (Conclud)

to the area of tenancy, not being a mistake of law, is not to open to correction in second appeal. 46 I C 351.

—A tenant brought a suit claiming to be a ryot under the Madras Estates Land Act to set aside an alleged sale of his holding against an inamdar, both in the trial Court as well as in first Appellate Court. Held, the defendant could not in second appeal contend that he was a ryot and under-tenant under him and that the Madras Estates Land Act was not applicable as between them. A I R 1926 Mad 635=92 I C 1047.

—Question whether grant is made to one holding kudivaram being necessary for maintainability of suit is one of fact and hence cannot be raised in second appeal for revision. A I R 1929 Mad 259=116 I C 133.

—Status of person in possession of land—Interference in second Appeal by High Court. See 38 Cal 278=9 I C 394.

—Quære :— If questions determining status of tenure-holders are themselves question of law. A I R 1927 Pat 209=6 Pat 298=9 Pat L T 72 (F B)=105 I C 633.

(56) Sufficiency or weighing of evidence

—Sufficiency of evidence is question of fact A I R 1925 Cal 1133=88 I C 584.

—Question of the weight to be attached to documentary evidence is one of fact—Question whether a given document refers to a particular land is one of fact. A I R 1923 All 442=71 I C 702.

—So also whether the evidence adduced has or has not been sufficiently rebutted a question of fact. A I R 1924 All 146=74 I C 297.

—High Court in second appeal will not go in question of appreciation of evidence valued by the lower appellate Court 19 C W N 1015=31 I C 695.

—The amount of weight to be attached to the evidence in second appeal cannot be defined by High Court. A I R 1926 Cal 822=43 C L J 327=30 C W N 826=95 I C 334.

—High Court in special cannot interfere into question of credibility or weight of evidence. 17 W R 314.

See also 24 W R 13; and 10 I C 188.

—Finding of fact can be considered by High Court in second appeal to decide whether they are supported by evidence or not. A I R 1924 Pat 687=75 I C 928.

—While the credibility of evidence which has been accepted by the Courts

C. P. C. (1908) SEC 100 (Contd.)

(11) Finding of fact. (Contd.)

(56) Sufficiency or weighing of

evidence (Contd.)

below cannot be considered in second appeal, a Court is entitled to consider whether evidence amounts to an adequate proof. 1 O L J 470=25 I C 869.

—Although a finding is one of fact if it is based on insufficient evidence a question of law is produced and may be considered in second appeal. A I R 1928 Rang 152=6 R 175=110 I C 601.

—Finding as to alteration of figure based solely on Court's personal observation and not upon evidence is not final. A I R 1930 Lah 336=31 P L R 109=Ind Rul (1930) Lah 864=127 I C 368.

—Mere finding that a parnala is old is sufficient evidence to prove easement A I R 1921 Lah 171=3 Lah L J 58=66 I C 922.

—Question whether evidence supports finding of fact is one of law—High Court can interfere A I R 1922 Oudh 98=8 O L J 609=65 I C 398.

—Finding of lower Appellate Court on point of fact holding that there is no evidence on the point when there really is case to be attacked in second appeal A I R 1921 Cal 71=25 C W N 881=62 I C 647.

—Finding of fact not based on sufficient evidence or not following reasonably from evidence can be upset. A I R 1925 Lah 87=79 I C 107.

—Sufficiency of proof to establish marriage is one of fact. A I R 1921 Lah 201=5 Lah L J 117=84 I C 1039.

—The question of weight and sufficiency of evidence to be attached to recitals in deed is one of fact. A I R 1925 Oudh 367=12 O L J 134 86 I C 743.

—The weight or value to be given to evidence is not a subject for discussion in second appeal 18 O C 160=30 I C 279=2 O L J 283.

—Where the Lower appellate Court comes to a finding on a issue of fact after examination of the evidence, it is conclusive in second appeal, though the Court of first instance gives no finding on the issue. The question whether Wajib-ul-ara sufficiently proves a custom is a question of fact. 2 O L J 388=39 I C 503.

—Adjudication based solely on proof of handwriting by comparison of signatures—No error of law see 11 M L T 421=14 I C 741.

—No evidence of negligence—Question of sufficiency of evidence to justify inference of negligence one of fact 21 C L J 565=29 I C 26.



## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (56) Sufficiency or weighing of evidence (Contd).

See also 9 I C 427 and A L R 1932 L 682

—Sufficiency of evidence taken and decision of fact arrived the reform by lower Court is binding on High Court A I R 1929 Pat 98=10 P L T 10=Ind Rul (1929) Pat 226=115 I C 674

—It is for the court dealing with the evidence and not for the High Court to deal with weight of evidence 1 Pat L T 224=55 I C 922

—The question of the quantum of evidence required to prove an issue cannot be agitated in second appeal. Ind Rul (1931) Lah 893=32 P L R 248 (1)=134 I C 12.

—Where the lower appellate Court came to a finding of fact that there was no evidence which had been produced in the case by the plaintiff sufficient to justify him in shifting the burden of proof on to the other side the finding fact arrived at cannot be interfered with in second appeal. 92 I 670.

—Finding cannot be disturbed for weakness of evidence. A I R 1925 Nag 271 =8 N L J 29=86 I C 847.

—More importance paid to one piece of evidence than to other is not bad. A I R 1924 Oudh 265=10 O L J 643=80 I C 457.

—Appreciation of evidence High Court cannot interfere in second appeal 39 All 426=15 A L J 349=39 I C 666.

—Handwriting proved by comparison of signature—Finding based on such comparison cannot be set aside in second appeal A I R 1923 Lah 695=5 Lah L J 530 77 I C 872.

—Finding of fact cannot be disturbed in second appeal, even though there has been a error on the part of the court below in weighing the evidence. 53 I C 137=1 Lah 83.

—The weight to be attached to a statement in a rent receipt or any other document is a matter within the cognisance of the Court of first appeal with which the High Court in second appeal is not entitled to interfere 47 I C 780.

—It is not necessary in law for Appellate Courts such as the District Judge to refer in detail to every piece of evidence on the record so long every piece of evidence on the record as the judgment leaves no doubt that all the available evidence had been given due weight to his findings on questions of fact cannot be attacked in second appeal. Whether or not there had been complete separation is a question of fact 1 Lah L J 72.

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (56) Sufficiency or weighing of evidence. (Contd)

—Where an Appellate Court reaches a finding on evidence legally insufficient to support it and fails to give any reasons for the finding, the High Court will interfere in second appeal. 58 I C 432.

—In second appeal a court cannot go into question of sufficiency for insufficiency of the evidence adduced in proof of a particular matter and if there is evidence on the record to justify a finding on the point it will not be interfered with. 9 I C 427.

—When the Lower Appellate Court in determining a question of boundaries preferred certain Govt. Chittas of the year 1844 to the Thak map on the assumption made without enquiry that the Chittas were public documents held that if they were private documents it was impossible for the High Court to say to what extent the Lower Appellate Court was influenced by the idea that the Chittas were public documents and the case should be remanded for a finding as to whether the Chittas were public or private documents. 19 C W N 1015=31 I C 695.

—Finding of fact based on Credibility of witnesses and demeanour—unsuccessful party seeking to reverse decision has heavy burden of discharge—Burden not discharged but finding reversed—Privy Council restored trial Courts findings A I R 1930 P C 170=58 M L J 629=34 C W N 593=32 Bom L R 887=32 L W 51=1930 M W N 544= Ind Rul (1930) P C 189 (P. C.) =123 I C 557.

## (57) Sustainability.

—Mis-statement not affecting the main points is no ground for interference in second appeal. A I R 1927 Mad 1181=105 I C 375.

## (58) Tender.

—Finding regarding making of tender cannot be agitated. A I R 1925 Lah 353 =7 Lah L J 11=86 I C 250.

## (59) Will.

—Question whether oral Will was executed is one of fact. A I R 1922 Nag 46=5 N L J 183=66 I C 413.

See also A I R 1921 Oudh 256=65 I C 370=8 O L J 629.

—A finding of fact at which a lower Appellate Court arrived is binding on the High Court. The Privy Council decisions to the effect that a party setting up a nuncupative Will should be required to prove "with precision the words on which

## C. P. C. (1908) SEC. 100. (Contd)

## (11) Findings of facts. (Contd)

## (59) Will (Concl'd)

he relies with every circumstance of time and place " must be read subject to their own subsequent decisions requiring a strict interpretation of the provisions precluding a second appeal to the High Court in this country on a question of fact A I R 1922 Nag 46=5 N L J 155 =66 I O 413.

## (59) Will.

—See 11 (40) Nature of property.

## (60) Waiver.

—See 15 (1) (b) Inferences.

## (61) Miscellaneous.

—Where a suit was instituted on a mortgage made by defendant. Mortgagor who was appointed as a manager of the mortgaged estate under s. 95. of the Bengal Tenancy Act on his failure to redeem the mortgaged property, and the Manager contended that the suit was incompetent in the absence of two months previous notice. Held, that even if the defendant is a public officer within the meaning of Sec. 80 C P C no notice of the suit is required. The manager for the time had an option to pay in order to save the sale of mortgaged property, but failure to exercise that option is not in any sense a breach of duty. Nor can mere omission to pay either interest or principal could be an act purporting to be done by the manager in his official capacity, A L R 1934 p C 100.

—Delay in question of fact yet finding that he is thereby deprived of relief is one of law and is open to re-examination. A I R 1925 Nag 53=82 I C 105.

—Question whether vendees under one sale deed are jointly or severally liable for the price is one of fact to be decided from the deed and circumstantial evidence of parties intention. A I R 1930 Lah 896=31 P L R 291=Ind Rul (1930) Lah 427 =123 I C 283.

—Existence of antecedent debt is question of fact and cannot be disturbed in second appeal. A I R 1926 Oudh 33=90 I C 404.

—In a suit by a collateral for succeeding under S. 59, Punjab Tenancy Act, to an occupancy-holding, the question whether the land was occupied by a common ancestor is one of fact and cannot be raised in second appeal. 190 P L R 1914=92 P W R 1914=24 I C 687.

—Where no appeal lies to lower appellate Court, second appeal does not lie from the decision of the lower appellate Court. 23 C L J 235=31 I C 812.

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (61) Miscellaneous (Contd)

—No second appeal lies on a question whether the grant of a certain land by the Govt. was inconsistent with the general wishes and well-being of village community. 36 All 256=12 A L J 378=24 I C 119.

—Decision of District Court under S. 16 is not subject to second appeal. A I R 1925 Bom 241=49 B 442=27 Bom L R 345 (F B)=87 I C 588.

—No second appeal lies where appellate Court believes in certain statements not believed by trial Court. A I R 1925 Oudh 537=85 I C 407.

—Case under the Provincial Insolvency Act—High Court's powers of revision. see A I R 1933 A 189.

—High Court may interfere with finding that there was a partnership within Contract Act, as it is not a finding of fact. A I R 1922 Nag 96=69 I C 781.

—High Court cannot interfere on a question of justifiability of dismissal of servant if it is one of degree and not of principle unless the lower Appellate Court has not proceeded on the right principles in coming to the conclusion. A I R 1926 Mad 57=49 M L J 516=(1925) M W N 603=91 I C 525.

—High Court will not interfere in second appeal where the Court insisted on warrants to be issued on the witnesses who failed to appear in answer to summons disregarding the plaintiffs offer to bring them. A I R 1927 Lah 424=101 I C 257.

—High Court must decide the case on the facts found by lower Appellate Court where false case is set up by both the parties in their pleadings. 22 C W N 149=45 I C 795.

—Sufficiency of, for payment of debts of deceased—Findings as to—Held to be binding. 137 I C 632=9 O W N 315=1 R 1932 O 261=A L R 1932 O 259 (261).

—Whole arrangement or transaction or only portion of it—Question as to is a question of fact. 55 M 498 (414)=62 M L J 479=135 I C 903=1931 M W N 1169=A I R 1931 M 804=1 R 1932 M 231.

—Where the commissioner has been once appointed under O 26 C P C and he has submitted his report, the court has no right, unless it comes to the conclusion that the Commissioner has so misconceived his fundamental duties as to render his report useless, to appoint another commissioner. The contrary policy encourages a haphazard and careless selection of commissioners, subjects parties to unnecessary and avoidable expense, and encumbers the record with useless papers. A I R 1933 All 475.

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of fact. (Contd)

## (61) Miscellaneous. (Contd)

—No interference with finding against proof of loss on the ground that the criminal court had subsequently found the persons alleged to have robbed the books guilty and convicted them, 1932 P C L 581 (Civ.)=A L R 1932 L 581 (Civ.)=33 P L R 628.

—Books regularly kept in course of Business—Evidentiary value of—Decision of lower appellate court as to—No interference in second appeal with. 90 W N 532 (53/)=I R 1932 O 329=138 I C 716=A I R 1932 O 225=A L R 1932 O 470.

—The finding as to existence of certain persons as reversioners at a particular time of transaction and that a particular person was not born and hence having no locus standi is one of fact. A I R 1925 Lih 275=6 Lah L J 566.

—Alienation by Hindu widow—Consent of reversioner—Question of fact, if issues had been rightly framed. 17 P R 1917.

—The questions if property is sufficient to satisfy decree and if bona fides of transfer can be established from sufficiency are questions of fact. A I R 1929 All 458=Ind Rul (1929) All 639=117 I C 815.

—Finding if stipulation regarding future security is condition precedent is one of fact. A I R 1929 P C 63=31 Bom L R 700=33 C W N 675=29 L W 445=Ind Rul (1929) P C 138=115 I C 722.

—Presentation is a question of fact and does not require any formality. A I R 1924 All 799=46 A 743=22 A L J 700=L R 5 A 524 Civ=92 I C 345.

—The question whether a particular section of an Act does or does not apply is a question of law. A I R 1923 All 583=45 A 520=21 A L J 424=L R 4 A 234 Civ=74 I C 307.

—The date at which a particular holding first began to be held as a definite holding, is essentially a question of fact, and must depend on evidence. A I R 1923 P C 187=4 P L T 627=33 M L T 291 (P C)=45 M L J 663=(1923) M W N 832=25 Bom L R 1287=L R 4 P C 184=21 A L J 723=74 I C 482=40 C L J 16=29 C W N 131

—The question whether certain persons acted as heirs or administrators in contracting a certain debt, is a question of fact. A I R 1927 Mad 185=24 L W 842=97 I C 570.

—Whether certain persons are representatives of another tenant is a question of fact. A I R 1927 Cal 81=97 I C 489.

## C. P. C. (1908) SEC. 100 (Contd)

## (11) Findings of facts (Contd)

## (61) Miscellaneous (Contd)

—The question whether persons from members of a joint Hindu family when gone into by Appellate Court on principles of Hindu Law, is a finding of fact, High Court will not interfere. A I R 1921 Lih 267=3 Lah L J 552=67 I C 789.

—“Traffic in” s. 136, Transfer of Property Act, connotes something more than a mere sale but whether mere sale amounts to “trafficking in” in any given circumstances is a question of fact. A I R 1927 Pat 2=8 P L T 201=97 I C 373.

—Exclusion of lands from the assets in calculating peishchush is a question of fact. A I R 1924 Mad 117=18 L W 324=(1923) M W N 732=75 I C 465.

—Finding arrived at on the basis of opinions of experts is not necessarily one of fact. A I R 1924 All 116 =21 A L J 811=L R 4 A 561 Civ=75 I C 502.

—Whether or not a caste was split up is a question of fact. A I R 1926 Bom 69=50 B 124=27 Bom L R 1503=92 I C 549.

—Whether or not a particular illness constitutes marz-ul-maut is primarily a question of fact. A I R 1922 Cal 429=49 C 477=26 C W N 749=34 C L J 441=67 I C 77.

—Question of title need not be decided—But if decided appeal will lie. A I R 1922 All 258=44 A 151=19 A L J 937=65 I C 291.

—Question whether particular misrepresentation was such as to affect consent of person to whom it was made or not is one of fact. A I R 1921 Mad 193=13 L W 525=(1921) M W N 340=62 I C 764.

—Whether particular person is hereditary Joshi of a village entitled to exclude others from the duties is a question of fact not of law. A I R 1923 Nag 150=107 I C 911.

—A finding of fact, though not very clear, but sufficiently definite, cannot be interfered with in second appeal. The mere fact of a share-holder cultivating more than his admitted share in the shamilat is no inference of his having purchased a further share, especially when he has failed for a long time to get his deed of sale registered or his title recorded in the Revenue Record. 67 P L R 1915=20 P W R 1915=27 I C 620.

—The question whether an adjournment should have been granted to one of the parties, by the lower Court, is not a question of law justifying interference in Second appeal. 10 I C 214

C. P. C. (1908) SEC. 100 (Contd)

(11) Findings of facts (Concl'd)

(61) Miscellaneous (Concl'd)

—The finding that certain payments made by the mortgagors should be considered as payments made towards interest as such is a question of fact. A I R 1926 Nag 245 =91 I C 200.

—It is the duty of lower Courts on appeal to come to clear findings on facts, as they are final and the High Court cannot go behind them. 23 C W N 1048=53 I C 1067.

—Whether properties are correctly specified is question of fact. A I R 1925 Cal 1195=29 C W N 861=89 I C 207.

—Finding of fact—Questions under S. 41 of T P Act See 36 All 308=25 I C 158.

—The question as to the existence of an implied grant is a question of fact. A I R 1925 Pat 748=7 P L T 290=(1925) P 250=90 I C 356.

—Implied obligation—If a question of fact. See 40 Bom 646=35 I C 794=18 Bom L R 709.

—Question whether writing is defamatory of plff, is a question of fact. 32 M L J 392=40 I C 126=5 L W 598.

—In deciding an appeal on a technical point, the Dt. judge expressed opinions on various points that had arisen, but on which the decision of the appeal in no way depended. The defts preferred a second appeal objecting to these opinions. Held, that a second appeal was not competent. 51 I C 622=53 P W R 1919.

—The finding of a Lower Appellate Court that one of the parties to a suit for cancellation of a document executed it under undue influence is not open to question in second appeal where there is some evidence, however untrustworthy to show that pressure was put upon that party and that the other party in whose favour the document was executed obtained an unfair advantage. 40 I C 215.

—Secondary evidence once admitted cannot be cast out. A I R 1924 Oudh 306= 27 O C 26=11 O L J 565=79 I C 663.

—Correctness to be decided by the Appellate Court —Interference by High Court. See 39 Cal 766=15 I C 59.

—Case alleged not proved and case substituted by Court—Interference with finding. See 39 Bom 149=28 I C 921 =17 Bom L R 157.

(12) Forum.

—An appeal lies to High Court from order made by an Appellate Court rejecting an appeal for non-payment of deficit Court-fee, 51 I C 114.

C. P. C. (1908) SEC. 100 (Contd)

(12) Forum. (Concl'd),

—Decision of Dt-Court as a court of appeal under Mad. Forest Act; if appealable to High Court. See 39 Mad 617 (P C).

Calcutta Municipal Act. S. 142—High Court can, in appeal under S. 142, interfere on finding of fact as such an appeal is not a Second appeal within S. 100, but under Calcutta Municipal Act. A I R 1927 Cal 802=46 C L J 260=31 C W N 1040=55 C 228=103 I C 533.

—Application for partition—Decision of Deputy Commissioner—Appeal to Commissioner—Second appeal to High Court See 9 Ind Cas 202=13 C L J 412.

(13) Fraud.

—See also under findings of Fact —Nature of Transaction supra. Bengal Tenancy Act, s. 153—If no fraud is established, no second appeal lies. A I R 1927 Cal 845=54 C 1050=103 I C 705.

—Whether a debt is fictitious is a question of fact and finding can not be questioned in second appeal. 110 I C 432.

—Finding on question of fraud arrived at in an extraordinary manner—whether second appeal competent—see A I R 1933 L 407.

—Inference of fraud can be questioned in second Appeal. 17 C L J 209 =16 I C 811.

—Order rejecting an application to set aside sale on grounds of fraud and irregularity if made under old Code is a decree under s. 244 of the Old Code and as such is subject to second appeal and is not affected by subsequent passing of new Code: A consent order against a person who is named as executor in the will of the deceased and who had subsequently renounced executorship, is not binding on the person taking out letters of administration. 16 Ind Cas 690.

—An order passed by an appellate Court confirming an order of refusal to set aside execution sale on ground of fraud is not appealable under the Code of 1908.

—This is the case also where the right of appeal accrued after the commencement of the new Code. General allegations without particulars are insufficient to amount to averment of fraud. 14 Ind Cas 53. Payment to decree-holder before date of sale—Fraud in conduct or publication of sale—Second appeal—See 10 Ind Cas 625.

## C. P. C. (1908) SEC. 100 (Contd)

## (14) Grounds for.

(1) *Erroneous decisions on point of law.*

—See 9—Erroneous decisions on point of law.

(2) *Misconception of real questions at issue.*

—High Court in second appeal is not bound by finding based on mistaken view of pleading. A I R 1926 Oudh 353=13 O L J 536=3 O W N 460=94 I C 779.

—Judgment of appellate Court based on misconception as to the Nature of claim, can be interfered with by High Court in second appeal. A I R 1925 Lah 251=6 Lah L J 508.

—Where judgment is not clear High Court can interfere with it. 19 C L J 545=25 I C 576.

—Mis-direction by a Court to itself on question of fact raises a question of law. A I R 1930 Lah 443=12 Lah L J 21=Ind Rul (1930) Lah 266=121 I C 730.

—Finding of the lower Appellate Court based on misapprehension of the true controversy between the parties—Rehearing of the appeal by the Lower Appellate Court may be directed. A I R 1923 Lah 206=73 I C 756.

—Failure to realise true question in controversy is a defect in procedure within the meaning of S 100 14 I C 455 =22 C L J 380.

—Misapprehension of facts by the Lower Appellate court See 9 A L J 15 =131 I C 943.

(4) *Substantial error or defect in procedure.*

(a) *General* :—Finding not vitiated by error of law or procedure is binding in second appeal: 9 O W N 568=139 I C 365=A I R 1932 O 264=I R 1932 O 357=A L R 1932 O 505.

—See also A I R 1929 Oudh 524=6 O W N 921=13 R D 781=Ind Rul (1930) Oudh 308=125 I C 388.

—And A I R 1923 Oudh 26=9 O L J 497=70 I C 74 and 63 I C 575 (Lah), and 18 C W N 3 53=41 Cal 52=18 C L J 39=21 I C 431.

—Misconception of law and an error of procedure vitiate the finding of fact. A I R 1924 Pat 310=2 Pat 919=5 P L T 310=76 I C 347.

—see also A L R 1933 C 407= 37 C W N 143.

—Interference in second appeal—Lower Appellate Court reversing decision of trial Judge on a case not set out in the plaint nor in the grounds of appeal to the Lower Appellate Court—Improper procedure. See 43 I C 29.

## C. P. C. (1908) SEC. 100 (Contd)

## (14) Grounds for. (Contd)

(4) *Substantial error or defect in procedure (Contd)*

—Court cannot pass a decree on a plea not stated in plaint, or inconsistent with it. A I R 1929 Mad 349=30 L W 787 =Ind Rul (1929) Mad 787=118 I C 291.

—Irregularity or error in procedure is no ground for second appeal if it is not substantial and does not affect the decision on the merits. 31 M L J 870= (1917) M W N 143=20 M L T 520=38 I C 26.

—Where bald pleas of parties were recorded but parties were not examined on the points and hence real points in dispute were ignored the trial is vitiated and can be set aside in second appeal. A I R 1927 Nag 180=100 I C 855.

—Wrongful disposal of appeal while party is dead is covered by s. 100 (c). A I R 1929 Lah 119=10 Lah L J 497=30 P L R 13=Ind Rul (1929) Lah 681= 117 I C 665.

—Where a question of fact is raised in the pleadings but no issue is framed on the point and the importance of the question is also not realized by the first appellate Court there is substantial error or defect of procedure so as to bring the appeal within s. 100 (1) (c). A I R 1931 Rang 312.

—Decision given by lower appellate Court without hearing arguments on one side is irregular calling. 193 P L R 1915=140 P W R 1915=32 I C 312.

Finding may be set aside by the High Court on the grounds that it was not justified by the pleadings and was not supported by evidence of a relevant character. A I R 1931 All 583=(1931) A L J 390.

—Where the lower appellate Court fails to give effect to the admission of a party, it is an error which may be rectified in second appeal. A L R 1933 S. 291.

—Second appeal lies against a decision of lower appellate Court in defiance of admissions of the parties. 106 P W R 1917=119 P W R 1917=41 I C 163.

—Question of fact decided by Court holding itself bound by a previous decision of the High Court will be open to Special appeal as it committed a substantial error or defect in procedure. A I R 1927 Pat 209=6 Pat 298=9 Pat L T 722 (F B)=105 I C 633.

—Finding of fact—lower appellate Court not reiterating reasons—findings not vitiated. A L R 1933 N 129.



C. P. C. (1908) SEC. 100 (Contd)

(14) Grounds for. (Contd)

(4) Substantial error or defect in procedure. (Contd)

—(b) Defective Judgment:—The failure to write a legal judgment as required by O. 41 R 31 is a good and sufficient ground for interference under S 100. Where an appellate court concurs in the findings of an original court it is specially important that the Judgment of the appellate court should contain the points for determination and the reasons for the decision as required by law since the High Court is bound in second appeal to accept concurrent findings of fact. 11 I C 915-4 Bur LT 201.

—A finding of fact cannot be accepted even in second Appeal, where the greater portion of the judgment of the Lower Appellate Court in its support is taken up with a summary of (a) the pleadings (b) finding of the local Commissioner and of the 1st court and (c) a short statement of the argument of the parties' counsel, but does not refer to or deal with the evidence of the parties and concludes with a remark like the following. "In my opinion plff, has failed to prove the existence of the passage in suit of which there is no trace in Revenue Record" 100 P L R 1917-89 P W R 1917-42 I C 282.

—(c) Misconception of real questions at issue:—See 14 (2) Misconception of real questions at issue.

—(d) Misjoinder of causes of action or of parties:—Misjoinder of causes of action is an irregularity in procedure. (1912) M W N 50-11 M L T 25-22 M L J 225-13 I C 788 see also 2 C L J 602.

—(e) Misleading of evidence and judgment:—See 14 (7) Misappreciation of evidence.

—(f) Omission to consider evidence:—If evidence is not considered legally it can be re-agitated. A I R 1925 Oudh 384-12 O L J 130-2 O W N 10-86 I C 101.

—Or where the lower appellate court has failed to consider all the evidence on the record relating to that point. 5 O L J 564-47 I C 950.

—Or failed to consider the entire evidence. 5 O L J 179-46 I C 52.

—Or where the Lower Appellate Court has failed to come into close quarters with the evidence. (1920) M W N 163-10 L W 525-53 I C 308.

—Though failure to consider particular evidence is no ground for fresh consideration. A I R 1925 Oudh 631-88 I C 490 see also 11 Lah L J 381.

C. P. C. (1908) SEC. 100 (Contd)

(14) Grounds for. (Contd)

(4) Substantial error or defect in procedure. (Contd)

—Unless it is an important piece of evidence. A I R 1932 L 54 (55)=32 P L R 714.

See to the same effect—A I R 1930 All 401-123 I C 384; and 56 I C 40. and A L R 1933, M 873. and 1932 A L J 615-138 I C 406-I R 1932 A 401-A I R 1932 A 603 (606)=A L R 1932 A 931. and 112 I C 461. and A I R 1926 Cal 603-91 I C 1026 and 33 C 200. and 148 P W R 1917-42 I C 76. and 92 P L R 1917-42 I C 272.

—Thus where the lower appellate court rejected documentary evidence as regard minority which was admissible according to law, the Court being under a misapprehension as to its admissibility. Held, that the finding as regards minority, though a finding of fact was not binding on the Court in second appeal. A L R 1934 Nag 84.

—So a second appeal lies on a finding of fact if some documentary evidence is excluded from consideration on erroneous ground that it was inadmissible in evidence for want of registration. 29 P L R 287-108 I C 191.

—So also a decision rejecting document beyond suspicion on ground of late production can be interfered within second appeal A I R 1928 Pat 537-110 I C 821.

—But Order of lower appellate Court rejecting admission of documents cannot be interfered with by High Court in second appeal if no reason is shown for their non-production at the time they were rejected. A I R 1925 Cal 106-90 I C 602. and mere non-appreciation of evidence is no ground for second appeal: 4 L L J 426-A I R 1921 L 284.

—The finding of lower Court based on part only of evidence legally on record is not legal and is not binding in appeal.

A I R 1929 Lah 145-112 I C 385. See also 54 I C 768.

—Lower Appellate Court omitting to consider evidence relied on by trial court commits an error of law A I R 1922 Pat 562-J P L T 483.

—Findings of fact arrived at on consideration of documentary evidence only neglecting the oral evidence can be challenged in second appeal A I R 1921 Pat 18-6P L J 72-2 P L T 17-(1921) Pat 113-61 I C 102.

—So also a finding arrived at by ignoring oral evidence and without any legal evidence can be interfered with in

## C. P. C. (1908) SEC. 100 (Contd)

## (14) Grounds for. (Contd)

## (4) Substantial error or defect in procedure. (Contd)

second appeal; 149 P L R 1915=73 P W R 1915=29 I C 901.

—Decision arrived at by ignoring oral evidence, entirely proceeding on conjectures and by relying on inadmissible evidence, should be reversed in second appeal. A I R 1930 Lah 150=Ind Rul (1930) Lah 529=124 I C 337. A finding of fact that a deed is admissible arrived at without sufficient grounds and prejudicing the trial of the appeal can be interfered with in second appeal 60 I C 96 (All).

—When it is shown that the Court has decided the case upon part only of the evidence after rejecting the Commissioner's report. 23 C L J 600=34 I C 30

—Where a Commissioner's report is rejected by Court without giving him opportunity to meet objections by deft not appearing before him, or documentary evidence piecemeal by different Commissioners is allowed, or when a sketch map instead of a scientific one is relied upon, it is a defect in procedure 60 I C 434

—Where in deciding a question whether a person was a karnavan, trial Court fails to consider previous judgment of the District Judge wherein same person was referred to as karnavan, its judgment must be regarded as vitiated. A I R 1928 Mad 826=54 M L J 600=27 L W 827=110 I C 593

—Where a lower appellate Court has arrived at a finding of fact by too exclusive an attention to one particular piece of evidence, instead of forming a conclusion on the whole of the evidence in the case the finding will be set aside. 174 P L R 1914=76 P W R 1914=24 I C 880.

—But the mere fact that the Court of first appeal has not made special mention of a document which is a piece of relevant evidence is not sufficient to show that he has not considered it at all. 3 Pat L W 213=43 I C 857.

—And a mere omission of a Court to mention a document in its judgment is no sufficient proof that the Court failed to consider it. 22 O C 312=54 I C 353=6 O L J 551=2 U P L R (J C) 22

—(g) Admission or refusal to admit additional evidence by lower appellate Court—Finding of fact not based on additional evidence taken by lower appellate Court—Court giving no reasons—no interference on second appeal. A L R 1933 L 136=34 P L R 99.

## C. P. C. (1908) SEC. 100 (Contd)

## (14) Grounds for (Contd)

## (4) Substantial error or defect in procedure (Concl'd.)

—Discretion of lower appellate Court as to admission of additional evidence under, O 41. r. 27 cannot be interfered with in second appeal unless the discretion exercised by it was either perverse or contrary to law or against the well-recognized judicial principles. 136 I C 788=I R 1932 L 276=A I R 1932 L 93 see also 8 A L J 175=9 Ind Cas 265. and 9 A L J 59, and 42 Mad 737=37 M L J 125=26 M L T 246=(1919) M W N 523=16 L W 122=53 I C 274 (F B).

—Second appeal will lie on the ground of recording fresh evidence without stating its reasons or necessity. A I R 1925 Cal 98=39 C L J 261=81 I C 999.

—Rejection of fresh evidence, not with discretion but due to preapprehension of unsurmount difficulty can be agitated. A I R 1925 All 28=47 All 412=23 A L J 193=6 L R A 85 Civ=86 I C 761.

—Where the Court has exercised its discretion and refused to admit additional evidence, it cannot be said that a substantial defect in procedure has taken place so as to afford a ground for second appeal. A I R 1931 Lah 506=Ind Rul (1931) Lah 388=131 I C 228.

—Second appeal lies from an order refusing to admit document produced at a last stage. A I R 1924 Pat 208=72 I C 397.

## (5) Findings based on inadmissible evidence.

—A finding based on inadmissible documents can be set aside in second appeal. A I R 1931 Oudh 411=8 O W N 1019.

—Nor a finding arrived at by the lower Appellate Court on evidence not proper for its consideration. A I R 1931 Lah 139=Ind Rul (1931) Lah 569=31 P L R 1024=132 I C 397.

—Findings of fact, though very clear, but based on inadmissible evidence, are not binding in second appeal. A I R 1930 Lah 672=31 P L R 198=Ind Rul (1930) Lah 562=125 I C 50.

See also A I R 1926 Nag 99=89 I C 752 and 15 I C 459, and A I R 1925 Cal 302=80 I C 903, and A I R 1922 All 439=66 I C 313, and A I R 1923 Lah 150=71 I C 825 and A I R 1921 Lah 119=2 Lah 271=64 I C 929 and 63 I C 811 (1) (All).

—But where the lower Court in deciding the case has taken into consideration inadmissible evidence, the decision ought not to be upheld in second appeal unless

## C. P. C. (1908) SEC. 100 (Contd)

## (14) Grounds for (Contd)

## (5) Findings based on inadmissible evidence. (Contd)

it clearly appears that, even without such evidence, the lower Court would have come to the same conclusion on the other materials. 19 C L J 1=22 I C 714.

—Finding of facts not based on admissible or reasonable evidence can be set aside by second appellate Court A I R 1929 All 481=Ind Rul (1929) All 852= (1929) A L J 873=118 I C 372.

—No second appeal will lie if the finding is not solely based on legally inadmissible documentary evidence. A I R 1930 Lah 1067=31 P L R 214=Ind Rul (1930) Lah 429=123 I C 285.

—So, also a finding based partly on evidence inadmissible is not binding. 138 I C 399=33 P L R 225=1 R 1932 L 471.

See also 108 I C 264. and A I R 1927 Lah 448=8 Lah 651=29 P L R 74=103 I C 889. and A I R 1921 Lah 119=2 Lah 271=64 I C 929 and 19 C W N 1148=22 I C 654. and 3 B L R A C 258. and 16 C L J 1=22 I C 714.

—Where a judgment is based on inadmissible evidence the High Court will not in second appeal decide whether other evidence in the case is sufficient to support the findings. 5 Pat L J 410=1 Pat L T 702=57 I C 561.

—Nor uphold decision on admissible evidence excluding the inadmissible evidence. 25 C W N 1022=35 C L J 19=63 I C 954.

—But finding of fact on doubtful evidence is not subject to interference, unless there has been injustice or wrongful judging of evidence. A I R 1925 Oudh 658=87 I C 208.

—And as a rule inadmissibility of evidence cannot be re-agitated. A I R 1924 All 845=46 All 815=22 A L J 761=L R 5 A 536 Civ=80 I C 874.

—Finding following wrong evidence can be questioned. A I R 1924 Lah 470=6 Lah L J 204=80 I C 705.

—Finding can be impeached in second appeal on the ground of error as to the admissibility of evidence. A I R 1923 Cal 261=36 C L J 389=74 I C 383.

—Finding based on inadmissible evidence or disregarding evidence can be revised. 17 O C 1=20 I C 394.

—In a certain proceeding before a Collector the question was raised whether certain land the subject-matter of the proceeding, was the property of the owners of certain mouzah or whether it was land which formed part of no settled estate and on which the Government were, there-

## C. P. C. (1908) SEC 100 (Contd)

## (14) Grounds for. (Contd)

## (5) Findings based on inadmissible evidence. (Contd)

fore entitled. In that proceeding a map prepared by a Kanungo was used. Held, that the map did not fall within S. 35 or 36 of the Evidence Act and was inadmissible. 13 I C 459.

—The provisions of O. 41, R 27 are not intended to give a party a second opportunity of proving his case. Where a Judge upon appeal took further evidence which however was not of the kind expected by him and used it for the purpose of importing prejudice into the case, and punishing the appellant for refusing to come to terms held that the further evidence was improperly admitted, and a finding of fact resting upon such evidence was not binding upon the High Court in Second Appeal. 9 A L J 59=13 I C 131.

## (6) Findings based on no evidence

—Finding of fact to be binding on a Court of second appeal must be a judicial decision reached on a consideration of the evidence. When no reasons are given for such finding and no reference is made to the evidence, the finding is open to question in second appeal. 56 I C 529.

—Finding based on no evidence is not binding in second appeal. 1932 P C L 54 (56) (Civ.)=A L R 1932 L 54 (Civ.)

See also A I R 1930 Cal 815 =Ind Rul (1931) Cal 241=58 C 585=52 C L J 235 =35 C W N 133=129 I C 769. and A I R 1922 Lah 65=4 Lah L J 31=4 U P L R (Lah) 18=64 I C 428. and 2 O L J 354=30 I C 375. and 29 I C 563. and 24 P W R 1916=33 I C 987. and 1 A L J 637, P C=8 C W N 865=29 B 1=6 Bom L R 770=8 Sar 720. and A I R 1927 Mad 116=39 M L T 633=104 I C 781. and 2 Pat L W 12=41 I C 385. and 29 M L J 291=30 I C 713=39 M 597=18 M L T 220=2 L W 714=1915 M W N 586. and A I R 1926 Oudh 37=87 I C 959. and A I R 1925 Oudh 525=27 O C 331=35 I C 338. and A I R 1924 Mad 617=19 L W 560=83 I C 567. and 11 Bur L T 229=(1917) III U B R 23=42 I C 68; and 179 P L R 1911. and 25 W R 149. and 13 A 409=A W N 1811. 159. and 1 L W 100=24 I C 709.

—And no second appeal lies from an order setting aside first Court's judgment given without at all considering circumstances. A I R 1925 Oudh 313=84 I C 470.

—But it should be noted that existence of evidence to support finding and not weight of evidence is the question for consideration in second appeal. A I R 1922 Pat 384=3 Pat L T 313=1 Pat 246 =65 I C 175.

## C. P. C. (1908) SEC. 100. (Contd)

## (14) Grounds for (Contd)

## (6) Findings based on no evidence (Contd)

—Finding of fact without considering whole evidence is not binding in second appeal. A I R 1922 Pat 503-70 I C 853.

See also 68 I C 332-A I R 1922 Nag 276.

See also 65 I C 504. (Cal.)

See also 65 I C 497-A I R 1922 Lah 149.

—There is error of law if lower Courts arrive at finding when there is no evidence on point, and High Court can admit appeal and not only that particular error, but the whole case is open for consideration. A I R 1929 Rang 257-7 R 751-Ind Rul (1930) Rang 177.

—Findings supported by no evidence, though concurrent, can be challenged in second appeal. A I R 1931 Oudh 136-7 O W N 1079-14 R D 664-Ind Rul (1931) Oudh 107-129 I C 331.

—Where return of mortgage money to mortgagee is held proved on mere conjectures from circumstances of mortgage and purpose for which money was required, the question of the return can be re-opened in second appeal. A I R 1931 Lah 213-12 Lah L J 107-Ind Rul (1931) Lah 429-131 I C 301.

—Finding of fact based purely on presumption arising out of rule of Muhammadan Law is subject to appeal on ground that that rule does not apply. A I R 1930 Lah 97-Ind Rul (1930) Lah 79-120 I C 495.

—Finding not following evidence but based on presumption can be set aside. 5 Lah L J 106-79 I C 970.

—High Court can in second appeal interfere with a finding of fact regarding consideration not based upon circumstantial evidence, but on conjecture. A I R 1931 Lah 213-Ind Rul (1931) Lah 429-12 Lah L J 107-131 I C 301.

See also 5 Lah L J 106-79 I C 970.

—Findings as to undue influence based on no evidence can be interfered with by High Court in second appeal. A I R 1927 Mad 255-52 M L J 20-38 M L T 1-25 L W 550-99 I C 571.

—Finding of fact if material evidence is not considered is not binding. A I R 1924 Mad 447-21 L W 227-86 I C 919.

—Finding of fact must be supported by evidence and not based on surmise. A I R 1921 Pat 59-2 P L T 225-(1921) Pat 93-60 I C 308 see also 22 G W N 826-27 C L J 563-45 I C 660.

—Where the Lower court had found that a party was in possession without

## C. P. C. (1908) SEC. 100. (Contd)

## (14) Grounds for. (Contd)

## (6) Findings based on no evidence. (Contd)

evidence and upon surmises, the finding is not legal and can be set aside 1 Pat L T 184-57 I C 323.

—In deciding the question of succession to an occupancy holding under S. 59 of the Punjab Tenancy Act, conjecture must not be allowed to take the place of legal proof. Where, therefore, in a suit in which the plffs. claim to succeed to an occupancy holding on the ground that they are the collaterals of the deceased tenant, the findings of fact arrived at by the Lower Appellate Court are based on conjectures, they are not judicial findings and cannot be accepted as final in second appeal. 102 P W R 1918-45 I C 800.

—Where, on the death of an occupancy tenant, his collaterals claim to succeed to the tenancy, the onus lies on them to establish affirmatively that the common ancestor occupied the land. In such a case, conjecture cannot be accepted as a substitute for the proof. 33 P L R 1918-55 P W R 1918-44 I C 433.

—Where a Judge has made only a colourable pretence of considering the evidence, the High Court in second appeal will not accept his decision upon a question of fact as binding upon it. But it does not mean that the Judge must discuss all the evidence upon the record. If the evidence discussed is reasonably adequate for a decision, the judgment is a good judgment. 38 I C 561.

—A second Appellate Court can arrive at a finding of fact in case the Court of first instance comes to no definite finding on the point of fact, or even if it does, it has no evidence to support it and such finding is upheld by the first Appellate Court. 2 O L J 377-30 I C 380.

—A finding of fact based on no evidence or against express prima facie reliable evidence is liable to set aside in second appeal. 103 P L R 1915-41 P W R 1915-28 I C 555.

—Where the Lower Appellate Court gives a decree not based on evidence, this is a substantial error or defect in the procedure of that Court which entitles the High Court to interfere in second appeal. Courts are bound to see that plaints are signed by persons authorised to sign them and verifications are not treated as mere formalities. When parties do not get summonses served on their witness for them to appear on the day of hearing, the Judge should proceed to deal with the case on the materials at the time before him. 7 Bur L T 310-26 I C 240



## C. P. C. 1908 SEC. 100 (Contd)

## (14) Grounds for (Contd)

## (6) Findings based on no evidence (Concl'd)

—Where a decision is based on evidence not on record, the High Court will set aside the judgment. The admission of a Vakil in another suit cannot be considered unless regularly proved in the present case. 19 C L J 541=25 I C 571.

—Finding of fact based on conjectures can be interfered with by High Court in second appeal as they are legal inferences. 4 A 462=A W N 1882, 106.

—See also A I R 1928 Lah 737=29 P L R 410=112 I C 455.

—Findings of facts arrived on pure conjectures, unjustifiable assumptions and unwarranted inferences are not final in second appeal, A I R 1930 Lah 238=Ind Rul (1930) Lah 301=122 I C 109.

—So also findings of fact based on theories and assumptions can be questioned in second appeal. A I R 1927 Nag 392=99 I C 1046.

—High Court can in special appeal interfere with the decision of the lower appellate Court holding a person responsible for the signature of a person of whose authority there was no evidence. Marsh 556=2 May 663.

—A finding of fact, in order to be binding in second appeal, should be one that can reasonably be deduced from the evidence. If it is not such a finding, the High Court has authority to interfere with it. 48 I C 742.

## (7) Misappreciation of Evidence

—See also (18) Misconstruction of documents infra.

—Finding based on erroneous and unwarranted assumption of facts and misreading of material accounts, is open to objection in second appeal. A I R 1930 Lah 712=Ind Rul (1930) Lah 639=125 I C 623.

—Obitor—Even misreading of evidence by court of fact does not raise any law point. 113 I C 575.

—A finding of fact cannot be accepted by High Court when it is vitiated by errors of law, or misreading of the documentary evidence and based on inadmissible evidence. A I R 1926 Oudh 464=2 Luck 172=6 O W N 1227=13 O L J 61=96 I C 455

—Judgment of lower Appellate Court based on misreading of evidence can be set aside in second appeal. A I R 1926 Lah 541=95 I C 240

—High Court will interfere in cases where the lower Courts misread evidence or overlooked important evidence or relied for their conclusion upon inadmissible evidence, or where they misdirected the-

## C. P. C. 1908 SEC. 100 (Contd)

## (14) Grounds for (Contd)

## (7) Misappreciation of Evidence. (Contd)

mselves as to any questions of importance or where they relied upon personal knowledge or where they took a wrong view as to the onus of proof or where they decided points not raised by the parties, or where they misconstrued important documents. The misconstruction of an important document, is a ground for interference. A I R 1926 Mad 652=24 L W 81=93 I C 307.

—High Court, can in second appeal interfere with a finding of the lower appellate Court arrived at by misreading the evidence and misapplication of law. A I R 1923 Lah 585=76 I C 553.

—High Court may consider a finding of fact based on evidence which has been misunderstood. A I R 1921 All 212=19 A L J 149=61 I C 95.

—Misreading of evidence affords sufficient reason for Chief Court's interference in second appeal. 41 I C 456.

—Misreading of evidence is a good ground for second appeal. 81 P R 1916=35 I C 892=39 P L R 1917.

—Erroneous finding by lower Appellate Court owing to a misreading of the revenue records can be interfered with in second appeal. 4 Lah L J 307.

—Abandonment by an occupancy tenant or adverse possession by a landlord are not necessarily questions of fact and a finding on such questions may be considered in second appeal when the decision is based on no evidence or a misreading of evidence or is against express prima facie reliable evidence which by law is to be presumed to be correct in the absence of all evidence to contrary or which is based on a misconstruction of the Punjab Tenancy Act. 170 P R 1919=2 Lah L J 136=54 I C 873.

—There is considerable conflict of judicial opinion on the point whether a second appeal will lie where the lower appellate Court omits to consider evidence, or misreads, or misconstrues evidence. But the omission of the Court to make specific mention of a particular document and its contents does not amount to a substantial error or defect in procedure within the meaning of S. 100 of the Code of Civil Procedure. 113 I C 495.

—A misreading or misconception of evidence is not a ground for interference in second appeal. The remedy in such a case is by an application for review of judgment. If, however, there is no evidence in support of the finding of the Subordinate Court, the Court of second appeal



## C. P. C. 1908 SEC. 100 (Contd)

## (14) Grounds for (Contd)

## (7) Misappreciation of Evidence. (Contd)

would be entitled to interfere. 4 C L J 198. (17 I A 65=17 C 875 F).

—Finding of fact, by lower Court misdirecting itself as to conclusion from proved facts, is not binding in second appeal. A I R 1928 All 39=50 A 180=25 A L J 1014=108 I C 721.

—Where the lower Appellate Court has proceeded on wrong assumptions the decree can be set aside in second appeal. A I R 1927 Lah 614=103 I C 235.

—A finding on the question of fact which is based on misappreciation of true meaning of "sharing in cultivation" is vitiated. A I R 1926 All 465=94 I C 190.

—Reverse finding of lower Appellate Court due to misdirection of evidence is not binding. A I R 1926 Nag 129=89 I C 663.

—Appeal under Letters Patent—Onus on person raising contention to show from record that evidence has been disregarded or misinterpreted. A I R 1922 All 312=44 A 169=19 A L J 965=65 I C 371.

—Finding without correct valuation of evidence is not final. A I R 1925 Oudh 747=87 I C 104.0

—Finding on apprehension can be set aside. A I R 1924 Lah 465=6 Lah L J 127 =80 I C 329.

—Finding of fact rejected by lower appellate Court—reasons not given—finding based on misapprehension—power of High Court to interfere in second appeal. A L R 1933 L 328.

—Discrediting an evidence on merely general reasons, being an error of law afford ground for interference in second appeal. 29 I C 673.

—A second appeal lies on a question of fact in a case where evidence is disbelieved simply because the witness is a Patwari or relative of the party producing him. To discredit a witness merely for general reasons not affecting the particular credit of an individual deponent is to commit an error of law 1 O L J 383=25 I C 660.

—Where both parties had agreed to proceed on evidence both before Munsif and before commissioner second appeal will lie if lower appellate court tells a party that the case should proceed after discarding evidence before commissioner. A I R 1928 Cal 136=46 C L J 558=106 I C 841.

—Judge approaching evidence with strong prepossession and preconceived theorise—Erroneous procedure—Interference.

## C. P. C. (1908) SEC. 100. (Contd)

## (14) Grounds for (Contd)

## (7) Misappreciation of Evidence (Contd)

See (1911) 2 M W N 395=11 M L T 38 =12 I C-751.

—The mere fact that a court has not made any observation on a particular piece of evidence is not enough to show that the Court wholly ignored it and cannot form a ground of second appeal. 43 I C 525.

—The first Appellate Court who has omitted to notice material circumstances and the evidence and misdirected itself can be directed by High Court in second appeal to rehear the case. A I R 1927 Mad 493=100 I C 306.

—Misdirection or misappreciation by lower Appellate Court of material evidence is a good ground for High Court's interference in second appeal. 17 C W N 224=16 I C 618.

—Evidence—Witnesses being interested—Misconception as to—Finding based on—Not binding 135 I C 511 (1)=I R 1932 L 111 (1)=A I R 1932 L 128.

—The misconception about want of evidence has vitiated the judgment of the lower appellate Court. 55 C L J 569=139 I C 832=I R 1932 C 662=A I R 1932 C 870 =A L R 1932 C 1254.

—Finding of fact cannot be challenged on the ground that the lower Court had not properly construed the evidence A I R 1921 Lah 284=4 Lah L J 426.

—Surmises made independent of surrounding facts by singling out one fact, are very likely to mislead and cause a grave miscarriage of justice. 14 I C 95.

—Where the lower Court misdirects itself its finding is not binding on the Court of second appeal. A I R 1931 All 547=15 R D 439=L R 12 A 221 Rev=Ind Rul (1931) All 548=1931 A L J 411=132 I C 804.

—Misdirection by the Judge to himself in the consideration of evidence is a good ground for a second appeal. 17 C W N 224=16 I C 618.

## (8) Want of jurisdiction.

—An appeal from an order passed without jurisdiction lies in the same manner as if it was passed with jurisdiction. A I R 1931 Lah 96=32 P L R 293 (1)=131 I C 141 (1).

—Decision of appeal by Court incompetent to entertain and decide it, is contrary to law and second appeal lies A I R 1930 Lah 1065=32 P L R 90=Ind Rul (1930) Lah 258=121 I C 722.

—Interference on the question of jurisdiction is discretionary with the High Court A I R 1927 Nag 164=100 I C 37

## C. P. C. (1908) SEC. 100. (Contd)

## (14) Grounds for (Contd)

## (8) Want of jurisdiction (Concl'd)

—Where lower appellate Court admits an appeal without jurisdiction, a second appeal lies. A I R 1925 Cal 1082 =30 C W N 63=85 I C 576.

—An appeal lies against and appellate decree passed without jurisdiction as the decision is contrary to law within the meaning of S. 100 sub section (1) of the C P Code. 27 C L J 115=45 C 926=43 I C 758.

—Maintainability of—Order of lower appellate Court passed without jurisdiction—Right to appeal against See 49 I C 137=29 C L J 48.

—Primary Court having final jurisdiction—Appeal entertained by Appellate Court—Second appeal, if lies. See 24 C L J 235.

—Second appeal to the High Court—competency of—District Judge assuming jurisdiction which he did not possess. see A I R 1933 A 114=1933 A L J 103=1 A W R 827.

—Appellate decree passed without jurisdiction—Second appeal maintainable. 27 C L J 115.

## (9) Conflicting findings.

—There is a second appeal from a finding of fact if it contradicts other finding. A I R 1928 Lah 690=103 I C 521.

—High Court accepting finding of fact by lower Appellate Court that gift was made by a Hindu widow for benefit of deceased husband's soul and holding that no special benefit was to accrue to his soul—Findings are inconsistent and High Court must interfere in Letters Patent Appeal. 43 A 515=19 A L J 499=63 I C 221.

—It is open to hold different views upon a piece of evidence. In this case the High Court recognised the findings of the Lower Appellate Court, though there was some ground for saying that the findings were not in accordance with the weight of evidence. 17 C W N 1081=21 I C 382=14 Cr L J 590. see also 1 Pat L T 465 =57 I C 413.

## (10) Other questions of law.

—Whether Court's reducing period of redemption was justified is a question of law and ground for second appeal. A I R 1930 Lah 1960=Ind Rul (1931) Lah 249=130 I C 57.

—Reducing period for redemption by lower Court can be questioned in second appeal. A I R 1930 Lah 1960=Ind Rul (1930) Lah 34=120 I C 274.

## C. P. C. (1908) SEC. 100 (Contd)

## (14) Grounds for. (Contd)

## (10) Other questions of law. (Contd)

—Reduction by Court in a mortgage suit of the period of redemption, the decision qua the justifiability of allowing the reduced term to stand can be questioned in second appeal. A I R 1930 Lah 1060=Ind Rul (1931) Lah 249=130 I C 57.

—The question if the right to collect offerings made to certain deity is transferable or not is a pure question of law, and the answer to it in every case depends on a variety of circumstances which only can be proved by evidence A I R 1928 All 721=50 A 394=26 A L J 185=113 I C 242.

—The question of reversioner's consent to an alienation to be inferred from the established facts raises a point of law 18 M L T 521=(1916) 1 M W N 123=31 I C 487.

—Finding of fact based on that of law can be disturbed on second appeal. A I R 1930 All 510=(1930) A L J 1119=14 R D 416=Ind Rul (1930) All 943 =127 I C 591.

—Question of amount required to be deposited under decree—question of law see 20 I C 337.

—Whether personal liability has been taken by the executant of a pro-note having regard to its terms is a question of law to be decided with reference to those terms A I R 1928 Cal 123=46 C L J 566=32 C W N 125=106 I C 848.

—Second appeal—question of law depending on evidence cannot be raised A I R 1922 Bom 233=70 I C 417.

—Question of law depending on other question cannot be raised in second appeal A I R 1927 Mad 411=38 M L T 102=99 I C 367.

—If a tenant is entitled to occupy land appurtenant to his house is not a pure question of law. A I R 1927 Oudh 37=3 O W N 937=L R 8 A 20 Rev=98 I C 1044.

—Whether an ala mailk must be presumed to have rights in the shamilat is not a question of law. A I R 1926 Lah 21=26 P L R 605=90 I C 1047.

—The question as to an omission by judgment-debtor to certify payment under O XXI, r. 2 is not always a pure question of law. A I R 1926 Nag. 164=89 I C 1009.

—Question whether a subsequent suit can rectify a previous decree is a substantial question of law. A I R 1923 Cal 387=71 I C 371.

—The term 'Trespasser' is a term of law and High Court in Second appeal may examine whether the finding of a Lower

## C. P. C. (1908) SEC. 100 (Contd)

## (14) Grounds for (Contd)

## (10) Other questions of law (Contd)

Court is sufficiently evidenced 1 PAT. L J 47-34 I C 616.

—Finding that mere adjustment of his personal debt by means of the firm's debt, by a partner, is of itself prejudicial to the firm, is open to interference in second appeal. A I R 1931 Lah 136.

—Question whether correspondence discloses binding contract is one of law. A I R 1930 Cal. 113-50 C L J 208-57 Cal 170-Ind. Rul. (1930) Cal. 282-123 I C 250.

—Arbitrary decision—Appellate Court can come to independent decision A I R 1922 Lah 127-65 I C 454.

—A Second appeal lies from a decision of a Court holding a Sale being made where appellant had agreed to sell and had recovered advance, but had not transferred title deed. A I R 1925 Rang 68-2 R 459-86 I C 205.

—Finding of fact challengeable in second appeal, A I R 1922 Pat 503-70 I C 853.

—High Court can come to a finding that the executing witnesses had witnessed the execution A I R 1923 Mad 36-46 M 64-17 L W 661-32 M L T 9-43 M L J 745- (1922) M W N 708-71 I C 153.

—Second appeal lies from an order of lower appellate Court dismissing the suit but reserving liberty to plaintiff to institute a fresh suit. 37 I C 940.

—Disposal of case on preliminary point by lower Appellate Court—Power in second appeal to determine case on merits. See 32 I C 380.

—Appellate judgment setting aside preliminary decree for accounts can be contested in second appeal even though no decree is passed by lower Appellate Court. A I R (1930) Lah 125-31 P L R 386-Ind Rul (1930) Lah 548-124 I C 676.

—Orders passed on application for revival of suits under Act LIII of 1860, s. 2, are subject to second appeal. Marsh 38-W R F B 11-1 Ind Jur O S 5-1 Hay 90.

—Second appeal lies on a question of privacy constituting point of fact. A I R 1921 Sind 155-16 S L R 17-66 I C 833.

—Second appeal lies against a decision on a question whether legal right had determined. 15 O C 295-15 I C 857.

—Special Appeal—Vinchur Court—Decision See 38 Bom 340.

—A decision based on a finding of fact contrary to the case set up, can be examined in second appeal A I R 1926 Lah 535-95 I C 298.

## C. P. C. (1908) SEC. 100 (Contd)

## (14) Grounds for (Conclld.)

## (10) Other questions of law (Conclld)

—A second appeal lies on a question whether there was suppression of sale processes. A I R 1926 Cal 1219-44 C L J 167-98 I C 206.

—Question regarding amount of care required to be taken by bailer can be re-agitated. A I R 1924 Cal 92-27 C W N 1017-80 I C 279.

—Question whether grantees were tenants—Second appeal—See 15 C W N 266-9 Ind Cas 394-38 C 278.

—Question whether trustee could divest himself of his office is a question of law, 6 Bur L T 180-7 L B R 39-21 I C 232.

—Determination of legal rights is a question of law. 15 O C 295-15 I C 857.

—Question as to admissibility of evidence is a question of law. 135 I C 693-I R 1932 O 53-A I R 1932 O 51.

—Extinguishment of mortgage—Legal presumption of, when equity of redemption is sold in favour of mortgagee—Rising of—Propriety of—Open to challenge in second appeal. 135 I C 201-I R 1932 L 73-A I R 1932 L 56 (2).

—Second Appeal—Question of law—Question of merger or no merger. See (1917) Pat 337.

—Admission of pleader—Mistake of law—Second appeal—See 9 Ind Cas 621.

## (15) Inferences.

## (1) Questions of law.

—(a) General—Lower Appellate Court's inference that previous order of cash deposit was varied from Court's acceptance of security is not question of fact. A I R 1930 Lah 567-31 P L R 327-11 Lah 531-Ind Rul (1930) Lah 873-127 I C 713.

—Inference that certain women were public prostitutes from finding that they earned partly immoral livelihood, is one of law. A I R 1930 Lah 824-31 P L R 547-Ind Rul (1930) Lah 456-123 I C 336.

—That a woman has taken to a life of immorality is a finding of fact. 150 P W R 1915-31 I C 797 (1)-226 P W R 1915.

—Where in a suit on a mortgage instituted on the last day of limitation, there was no actual evidence of discharge, total or partial, but the courts below inferred that the bond should have been discharged on account of the fact that the suit was delayed till the last day of limitation. Held, the inference in question was not drawn from any evidence and the

## C. P. C. (1908) SEC. 100 (Contd)

## (15) Inferences. (Contd)

## (1) Questions of law. (Contd)

—Inference as to plea not raised is a mere opinion and not a finding of fact A I R 1923 All 75=20 A L J 756=69 I C 912.

—The finding of the lower Appellate Court that the grantees under a maintenance grant were not tenants was an inference of law from facts found and was therefore open to revision by the High Court in second appeal. 15 C W N 266=38 C 278-9 I C 394.

—Where a finding is based on inferences from incorrect construction the finding can be considered in second appeal. A I R 1927 Mad 1167=39 M L T 633=104 I C 781.

—Whether on the facts found by the Court below the proper inference has been drawn is a question of law. A I R 1923 Mad 54=43 M L J 556=16 L W 473 = (1922) M W N 639=71 I C 330.

—Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law; so also is the question of admissibility of evidence and the question of whether any evidence has been offered on one side or the other, but the question whether the fact has been proved, when evidence for and against has been properly admitted is necessarily a pure question of fact. The High Court has no jurisdiction in second appeal to set aside the decree of the Lower Appellate Court on the ground that it had applied the wrong standard of measurement to land of which the rent was in question. 45 I A 183=46 Cal 189=23 C W N 345=9 L W 552=51 I C 760 (P C) =1918 P C 92.

—Error of law—Conclusions of facts vitiated—Finding should be interfered with. A I R 1924 Oudh 154=10 O L J 412 =75 I C 227.

—The conclusion that a certain process was not scientific involves a question of law. A I R 1926 Nag 435=95 I C 614.

—Nature of possession is question of legal inference. A I R 1926 Nag 129=89 I C 663.

—High Court differing from the lower Courts not only in the estimate of the evidence, but also with regard to the inferences derivable from documents produced in the case and other circumstances Board dealt with the case on its merits. A I R 1922 P C 272=(1923) M W N 361=27 C W N 925=45 M L J 460=3 P L T 605=49 I A 399=36 C L J 499=32 M L T 1=2 Pat 38 (P C)=71 I C 984.

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## C. P. C. (1908) SEC. 100 (Contd)

## (15) Inferences (Contd)

## (1) Questions of law. (Contd)

—Whether inferences drawn correctly follow evidence given. can be challenged in second appeal. A I R 1929 Lah 198=10 Lah L J 455=Ind Rul (1929) Lah 501=116 I C 325.

—Inference that lambardari dues are never due derived from evidence that they are not paid, being wrong and can be questioned in second appeal. L R 10 A 155 Rev =13 R D 442=113 I C 746.

(b) Acquiescence, estoppel waiver—Whether a person has acquiesced in a certain building and is now estopped from claiming his legal rights is a mixed question of fact and law. A L R 1933 L 1075.

—The question of waiver, acquiescence or estoppel is question which can be examined by High Court in second appeal. A I R 1929 Cal 437=56 C 201=Ind Rul (1929) Cal 509=116 I C 733.

—Inference of acquiescence given rise to presumption of grant from proved or continued user for long period, is one of law. A I R 1928 Nag 87=23 N L R 192 =107 I C 522.

But see 57 I C 350 contra.

—Whether there has been a representation amounting to acquiescence or not is a question of fact. A I R 1927 Cal 220=44 C L J 434=100 I C 302.

—Acquiescence is not a question of fact but of legal inference from the facts found. A I R 1926 Nag 416=95 I C 636.

See also A I R 1925 Cal 288=82 I C 309

See also A I R 1921 Nag 167=73 I C 137.

See also A I R 1924 Nag 56=71 I C 942.

See also 69 P R 1917=103 P W R 1917 =41 I C 927.

—A finding as to acquiescence can be questioned in second appeal as that is a matter of legal inference to be drawn from the facts proved in the case. 69 P R 1917=103 P W R 1917=41 I C 927.

—Acquiescence is sometimes a pure question of fact, e.g. when the point is to be decided solely on the allegation that the party positively and in set terms gave consent, but it is a question of law when the point is whether the conduct of the party, not amounting to direct consent should be taken as waiver. 407 P R 1916 =36 I C 7.0.

—When the plaintiff values a suit at less than Rs. 10,000 and the Court overrules the plea of the defendant that it exceeds Rs. 10,000 and the defendant accepts the plaintiff's valuation, the plain-



## C. P. C. (1908) SEC. 100 (Contd)

## (15) Inferences (Contd)

## (1) Questions of law. (Contd)

tiff cannot subsequently contend that value exceeds Rs. 10,000. Ind Rul (1931) All 655 =133 I C 415.

—Plea of estoppel where facts are all admitted and the question is what consequence would flow from them, is pure question of law and can be raised in appeal, though not taken in trial Court. 110 I C 190 (Lah).

—Waiver, a question of fact. 9 I C 22=21 M L J 443=9 M L T 302.

—Whether there is a waiver in the case is question of fact and finding thereon is not challengeable in second appeal. 14 S L R 128=59 I C 607.

—(c) Inferences from facts:—Where the Court arrives at an erroneous inference from facts which can never lead to such inference, the High Court can interfere in second appeal. A I R 1931 Lah 136=12 Lah 270=32 P L R 583

—Correctness of inferences derived from facts is matter of law. A I R 1929 Nag 279=Ind Rul (1929, Nag 306=119 I C 674.

—Correctness of conclusions arrived at from finding of fact involve question of law and can be questioned in second appeal. A I R 1928 Lah 722=111 I C 645. Though finding of fact cannot be challenged in second appeal correctness of conclusions therefrom can be challenged. 24 O C 1=61 I C 144.

—Findings of facts must be distinguished from inferences or conclusions of law. 19 I A 228=20 C 93 P C.

—The question whether the inferences from facts are legal or not is a question of law. A I R 1926 Nag 332=9 N L J 70=95 I C 553.

—Where inferences are drawn from certain facts or circumstances they can be set aside, if it is shown that the lower Court has made some mistake in arriving at them. A I R 1926 Mad 511=50 M L J 251=(1926) M W N 344=94 I C 458.

—To hold a transaction to be fraudulent, the creditor need not have filed a suit and High Court will interfere in second appeal if the inference from proved facts is that the transaction is fraudulent. A I R 1926 Nag 494=96 I C 356.

—Correctness of conclusions drawn from findings of facts can be impugned in second appeal. A I R 1923 Lah 597 (2)=77 I C 473.

—Soundness of the conclusions from facts may involve matters of law and

## C. P. C (1908) SEC. 100 (Contd)

## (15) Inferences (Contd)

## (1) Questions of law. (Contd)

may be questioned by a Court of second appeal. A I R 1923 Lah 216=73 I C 795.

—Legal inferences from facts may be examined in second appeal. A I R 1922 Lah 392=3 Lah 257=68 I C 551.

—While findings of fact cannot be questioned, the soundness of conclusions drawn from any facts may involve matters of law and can be questioned in second appeal. The finality given by law to a finding of fact arrived at by a Court of first appeal, renders it necessary that the finding should be arrived at after due circumspection and be expressed in clear and definite terms. A I R 1926 All 130=90 I C 976.

—Question of inference to be drawn from certain facts is one of law. A I R 1921 Bom 385=45 B 1186=23 Bom L R 514 =63 I C 248.

—Validity of lower appellate Court's inferences from fact found proved can be considered by High Court in second appeal. A I R 1921 Mad 661=40 M L J 301=13 L 218=(1921) M W N 233=62 I C 534.

—Although an erroneous finding of fact cannot be challenged in second appeal unless it is shown that there is an error of procedure or that there is no evidence in support of the finding, yet inferences drawn from facts found might be questioned in second Appeal. 15 I C 509.

—Whether Rs. 100 is or is not a grossly inadequate consideration for house found by lower Appellate Court to be worth Rs. 200 is a question of law being an inference from proved facts. A I R 1929 All 872=Ind Rul (1930) All 356=118 I C 520.

—On second appeal, the High Court can make its own deductions from facts found without disturbing the findings of the Lower Appellate Court. 19 C W N 1330 =32 I C 119.

—If the facts found justify the legal inference of valid marriage is not a question of fact. A I R 1927 Lah 811=28 P L R 506=104 I C 702.

—Inference deducible from proved facts is an inference of law and may be examined in second appeal. 138 I C 282=I R 1932 A 385=A I R 1932 A 386=A L R 1932 A 894 (900.)

—Incorrect inference of law from facts admitted is subject to correction A I R 1925 All 796=87 I C 64.

—An inference from a proved fact is a question of law. A I R 1927 All 601=L R 8 A 229 Rev=106 I C 49.



## C. P. C. (1908) SEC. 100 (Contd.)

## (15) Inferences (Contd.)

## (1) Questions of law (Contd.)

—Inferences from facts proved are questions of law. A I R 1929 All 875=Ind Rul (1929) All 959=119 I C 111.

—Deducing agency from facts is question of law for second appeal. A I R 1930 Cal 815=52 C L J 235=35 C W N 133=Ind Rul (1931) Cal 241=58 C 585=129 C 769.

—Legal conclusion drawn from—Finding in case of, not one of fact and can be challenged in second appeal. A I R 1932 L 72.

—Question of inference drawn by lower Court from findings of fact is open to consideration in second appeal. 112 I C 847.

—Legal conclusion drawn from ascertained facts is question of law and can be questioned in second appeal. A I R 1929 All 767=Ind Rul (1930) All 308=122 I C 756.

—Question of law—reversioner's consent to an alienation—inference from facts established—High Court competent to deal in Second appeal. See 18 M L T 521=(1916) 1 M W N 123=31 I C 487.

—Question of law—Permanent tenancy—Inference from facts found or admitted. See 29 C L J 577=52 I C 825.

—Inference from admitted or proved facts is question of law. A I R 1928 All 381=26 A L J 887=Ind Rul (1929) All 513=116 I C 81.

—Drawing legal inference from admitted facts is a question of law. A I R 1930 Mad 449=58 M L J 581=53 M 510=31 L W 769=Ind Rul (1930) Mad 947 (S. B.)=127 I C 131.

—Inference from proved or admitted facts is not necessarily question of law and where it is based on balance of evidence, the question is one of fact. A I R 1930 All 218=Ind Rul (1930) All 938=127 I C 586.

—The question whether a Court is justified in drawing a legal inference from certain proved or admitted facts without any specific direct evidence on the point is a question of law for the purposes of second appeal under S. 41 of Act III of 1914. 8 P W R 1917=39 I C 717.

—(d) Legal effect—The question whether a fact has been proved when evidence has been properly admitted is a question of fact, though the proper legal effect of a proved fact is a question of law. A I R 1931 Oudh 142=8 O W N 152=L R 12 A (O) 94=15 R D 112=131 I C 395.

—See also A I R 1931 Lah 395 and 7 Luck 116=A I R 1932 O 283 (284) and A I R 1931 Oudh 19=7 O W N 1091=Ind Rul (1931) Oudh 111=129 I C 335. and A I R

## C. P. C. (1908) SEC. 100 (Contd.)

## (15) Inferences (Contd.)

## (1) Questions of law (Contd.)

1924 Nag 410=21 N L R 12=79 I C 884 and 11 A L J 713=20 I C 951. From circumstances proved, inference of fact of fraud can be drawn by Appellate Court. A I R 1929 All 861=Ind Rul (1929) All 861=118 I C 351.

—See also A I R 1928 Lah 774=10 Lah 360=30 P L R 541=112 I C 736.

—And also A I R 1928 All 39=50 A 180=25 A L J 1014=108 I C 721.

—Where the proper determination of a question turns upon the application of certain legal principles to the facts proved and the true conclusion to be drawn from those facts viewed in the light of those principles the question is one of law though it appears to be one of the fact. 8 O W N 1281.

—Question whether tenancy is permanent is legal deduction from facts and not a question of fact. A I R 1929 Cal 37=33 C W N 211=56 C 738=Ind Rul (1929) Cal 474=116 I C 378.

—See also A I R 1928 Nag 153=11 N L J 21=111 I C 488.

—See also A I R 1928 Cal 315=55 C 355=32 C W N 184=107 I C 81. and A I R 1927 P C 102=8 Lah 573=54 I A 178=52 M L J 663=29 Bom L R 870=31 C W N 677=(1927) M W N 481=39 M L T 161=25 A L J 959=28 P L R 658=26 L W 634 (P C)=101 I C 355.

—Finding if agreement is meant to quite existing disputes or is binding for future is question of law. A I R 1929 All 519=Ind Rul 1929 All 558=(1929) A L J 1083=116 I C 302.

[As the proper legal effect of proved facts is a question of law, the High Court in second appeal can interfere with them especially where the decision of the lower Appellate Court reverses the judgment of the lower Court and does not show marks of having come into close quarters with it and met the reasoning therein. A I R 1927 Nag 166=10 N L J 12=103 I C 486.

—Finding derived view regarding legal effect of document is not final. A I R 1926 All 75=23 A L J 869=L R 6 A 399 Civ=89 I C 617.

—Proper legal effect of a proved fact is a question of law. So also in the question of admissibility of evidence and also whether any evidence has been offered on one side or other. A I R 1922 Oudh 28=8 O L J 609=55 I C 398.

## (2) Mixed questions of law and fact.

—In a case of mixed question of fact and law this Court is bound to accept the facts as found in the lower appellate Court

## C. P. C. (1908) SEC. 100 (Contd)

## (15) Inferences. (Contd)

(2) Mixed questions of law and fact. (Contd)  
but is entitled to ascertain whether the inferences drawn from those facts are legitimate. 28 N L R 312. (315).

—It is not in every case that the question of implied contract is one of fact. It may be an inference of fact where we use the term as involving an agreement based on offer and acceptance. It may be a question of law when the question depends on inferences to be drawn from admitted facts or a number of documents. The term also includes cases where the law itself implies a contract or rather imposes one upon the parties. (1911) 1 M W N 6=9 M L T 191=9 I C 41.

## (3) Questions of fact.

—Inference drawn from Survey Record of Rights whether wrong or right will not be interfered in second appeal. A I R 1930 Pat 319=Ind Rul (1930) Pat 307=126 I C 303.

—Where only one inference from facts is legally possible, wrong inference is conclusion on question of law, but if alternative inferences are possible, it is a finding of fact. A I R 1930 Lah 936=31 P L R 662=Ind Rul (1931) Lah 39=128 I C 311.

—If one of two possible inferences is drawn from facts by lower Courts, no question of law arises. A I R 1930 Nag 200=Ind Rul (1930) Nag 155=122 I C 379.

—Inferences as to jointness or disruption of joint Hindu family are findings of fact and provided they are based on evidence, they are conclusive so far as the High Court is concerned. A I R 1926 Lah 443=27 P L R 223=97 I C 817.

—A decision of the lower Appellate Court drawing one out of two possible inferences cannot be interfered with in second appeal, A I R 1926 Nag 192=90 I C 209.

—Inferences from document of lower Court though not concurrent with appellate Court cannot be questioned. A I R 1925 Oudh 611=85 I C 967.

—Inferences regarding unreliability of entries cannot be disturbed. A I R 1924 Lah 719=6 Lah L J 311=85 I C 89.

—Inference regarding right of way as of right is not open to question. A I R 1925 Nag 168=7 N L J 232=85 I C 84.

—Even in case of two inferences possible from finding of fact inference of lower Court is final. A I R 1923 Lah 239=79 I C 814.

—Inferences from documents other than those of title are questions of facts. A I R 1925 All 39=78 I C 1016.

## C. P. C. (1908) SEC. 100 (Contd)

## (15) Inferences (Contd)

## (3) Questions of fact (Contd)

—Facts possible of inferences more than one—Inference drawn by lower Court will not be interfered with in second appeal. A I R 1924 Nag 160=78 I C 112.

—Inference of fraud drawn, based upon the facts so found. First Appellate Court refusing to draw an inference of fraud upon the facts so found. Decision cannot be questioned in second appeal, unless the facts found necessarily amount to fraud. High Court would not be entitled to disturb the findings of the first Appellate Court. A I R 1922 Pat 507=3 P L T 501= (1922) Pat 269 (Sup)=2 Pat 65=1 Pat L R 18=77 I C 957=4 U P L R (Pat) 71.

—Inferences from documentary evidence is a finding of fact. A I R 1924 Oudh 185=74 I C 811.

—Inferences from the facts that the consideration for a bond sued on was the withdrawal of a non-compoundable case—Correctness cannot be questioned in second appeal. A I R 1924 Pat 305=74 I C 843.

—A wrong inference from facts does not entitle the High Court to interfere—A finding as to a gift being incomplete for want of acceptance, at the time of its revocation, is one of fact. A I R 1924 Oudh 164=74 I C 818.

—Court in second appeal has not to decide whether conclusions by lower Court from facts are correct but has only to see if such conclusions can legally be drawn from evidence on record. Unless wholly unreasonable lower Court's inference of fact cannot be interfered with by High Court. A I R 1921 Sind 25=15 S L R 84=62 I C 1002.

—Inference of fact justified by evidence and not unreasonable cannot be disturbed in the second appeal; 15 S L R 84=62 I C 1002.

—The conclusion that the plaintiff as a full owner and not merely a dohldar is a finding of fact. A I R 1923 Lah 611.

—Where the sole question in a case is one of fact and the inference is to be drawn from facts, a second appeal is not competent. 54 P W R 1919=51 I C 620.

—In second appeal, it is not for the Court to decide whether the conclusions drawn by the lower appellate Court from facts are correct or not, but it has only to be satisfied if such conclusions are legally deducible from the evidence on the record. 7 S L R 11=20 I C 523.

—Findings of fact based on inferences drawn from documentary evidence cannot be challenged in second appeal, 3 O W N Sup. 277=99 I C 183.

## C. P. C. (1908) SEC. 100 (Contd.)

## (15) Inferences. (Concl'd)

## (3) Questions of fact. (Concl'd)

—Inference from entries admitted, unless illegitimate, being one of fact cannot be re agitated. A I R 1925 All 353=L R 6 A 139 Civ.=85 I C 584.

—Question of law—More than one possible inference from facts—Decision of lower court drawing one inference—No interference in second appeal. 46 I C 794.

—Where from admitted facts the only inference open to courts is a particular thing and the lower court fails to draw that inference the matter may be said to be one of law into which it would be competent to the High Court to enter. But where more than one inference is possible from the facts found, the fact that the lower court made one instead of another is no error of law. 21 M L J 156=9 M L I 329=9 I C 169

## (16) Interpretation of Documents

—See also (18) Misconstruction of documents. The construction of a document which might be the direct foundation of rights is a question of law, though where documents which are mere pieces of evidence are considered by the lower appellate Court in determining a question of fact, findings based on construction or inference drawn from such documentary evidence cannot be questioned in second appeal whether or not on a true construction of a deposition of the defendant it amounted to a denial of title of the plaintiff, is a question of law, when the plaintiff's suit, in ejectment was based on such denial of title. A L R 1934 All 301. Mere interpretation of a document standing by itself is rarely a question of fact unless it is ambiguous for the removal of which evidence may be given on both sides. A I R 1927 All 689=103 I C 255.

—Unless there is a question of the legal effect of a deed which may be treated as a document of title or embodies a contract or is the foundation of the suit, there can be no second appeal. A second appeal is not admissible merely because some portion of the evidence is in writing of which the meaning has been mistaken by the Lower Appellate Court. 21 C L J 45=25 I C 286.

—Though the misconstruction of a document which is the foundation of a suit or which is in the nature of a contract or document of title is a ground for second appeal a second appeal does not lie because some portion of the evidence is in writing and the judge in the Lower Appellate Court makes a mistake as to its meaning. 15 C W N 752=13 C L J 418=10 I C 325,

## C. P. C. (1908) SEC. 100 (Contd.)

## (16) Interpretation of Documents (Contd.)

—Question is one of law if it is one of interpretation of title deed. A I R 1926 Pat 49=88 I C 820.

—See also A I R 1925 Rang 255=4 Bur L J 27=88 I C 314. and (1914) M W N 595=25 I C 123, and A I R 1924 Nag 422=79 I C 621 and 161 P W R 1918=47 I C 351. and A I R 1930 Bom 317=32 Bom L R 610=Ind Rul (1931) Bom 3=128 I C 19 and 135 I C 693=I R 1932 O 53=A I R 1932 O 51 (52-3). and A I R 1931 Nag 25=Ind Rul (1931) Nag 39=130 I C 103, and 21 C W N 809 and A I R 1932 A 289, and A I R 1929 Lah 38=Ind Rul (1929) Cal 333=115 I C 77 and A I R 1929 Lah 833=Ind Rul (1930) Lah 52=120 I C 420 but see A I R 1924 Lah 260=5 Lah L J 541=80 I C 494. and see A I R 1923 All 362=71 I C 369. Construction of contract from the language is a question of law—Construction from external facts is a question of fact. A I R 1923 All 586=45 A 581=21 A L J 503=L R 4 A 433 Civ=77 I C 572.

—Construction of a document is a question of facts only when extrinsic evidence is needed for interpreting it. A I R 1825 Cal 656=29 C W N 353=85 I C 639.

—Interpretation of document or contract decides the question whether a payment is by way of penalty or compensation. A I R 1925 Mad 177=47 M L J 833=21 L W 54=85 I C 261.

—Right construction of document and of legal inference to be drawn from a document are questions of law. A I R 1928 Nag 289=111 I C 402.

—Construction of document depending on terms of written instrument and other evidence—Intention of parties, see 50 I C 288.

—Findings based upon construction of or inferences from documentary evidence cannot be challenged in second appeal. A I R 1928 Oudh 18=104 I C 760.

—Finding regarding deed based on its interpretation and also on other facts cannot be set aside. A I R 1925 Lah 344=7 Lah L J 74=26 P L R 110=85 I C 595.

—The construction of the report of a Commissioner under O. XXVI. r. 10 is a question of fact. A I R 1926 Oudh 151=90 I C 911.

—The misconstruction of a piece of documentary evidence is not a mistake of law upon which a second appeal will lie. 13 I C 206.

—Misconstruction of a document is not a ground for a second appeal if the document is merely a piece of evidence and not a document of title. Robokaries dealing with the right of assessment of rent

**C. P. C. (1908) SEC. 100 (Contd)****(16) Interpretation of Documents. (Contd)**

are merely evidence and not documents of title. 21 C L J 42=13 I C 425.

—Document, Construction of—Right of repurchase—Assignability—Question of law. see. 42 Bom 344=46 I C 731

—Document Construction of—Sale or exchange—Competency of second appeal. See 50 I C 288.

—Findings of fact are not binding if not properly arrived at through errors of record and misconstruction of documents. A I R 1929 Pat 433=9 Pat 425=Ind Rul (1930) Pat 358=123 I C 680.

—Finding of lower Appellate Court by interpreting documents, not one of title, cannot be upset on second appeal. A I R 1930 Lah 691=Ind Rul (1930) Lah 626=125 I C 610.

—Question of right construction of a document is one of law and can be raised for the first time in second appeal. A I R 1931 Nag. 25=Ind Rul (1931) Nag 39=130 I C 103.

—Construction of deposition is only what Court thinks is proved by it and is not a question of law. 63 I C 575 (L).

—No second appeal lies on the ground of construction of documents in one or two possible ways as it is a finding of fact. A I R 1922 Lah 240=65 I C 580.

—High Court can interfere with the decision involving right construction of or legal inference from a document. A I R 1922 Nag 52=18 N L R 163=5 N L J 25=69 I C 800.

—Where interpretation of document adopted by Courts below, is possible High Court is not justified in putting different interpretation in second appeal. A I R (1930) Lah 139=123 I C 531.

—Finding that the bond was penal under s. 74 Contract Act was not interfered with by High Court in second appeal even though it held construction showing non-penalty of bond. A I R 1931 Mad 137=(1930) M W N 1193=33 L W 540=130 I C 569.

—In order to see whether the meaning of documents upon which the lower courts mainly base their view that a custom was shown has been rightly interpreted or not, High Court can consider the construction thereof. A I R 1924 Pat 147=1 P L R Civ. 289=73 I C 629.

—Where the lower Court without taking evidence has arrived at a finding as to whether a document is one of mortgage or sale, from the construction thereof and surrounding circumstances, it is a legal inference, and its correctness can be considered in second appeal. A I R 1931 Bom

**C. P. C (1908) SEC. 100 (Contd)****(16) Interpretation of Documents. (Contd)**

371=33 Bom L R 633=Ind Rul (1931) Bom 449=134 I C 337.

—Whether a certain land is accretion is a question of fact. But where the question depends upon the construction of certain document, and inference to be drawn from them the High Court can go into the question in second appeal. A I R 1931 Cal 764=Ind Rul (1931) Cal 192=53 C L J 229=129 I C 416.

—No second appeal will lie on a question of construction of documentary evidence as it is a question of fact. A I R 1926 Lah 21=26 P L R 605=90 I C 1047.

—A question of fact founded upon the effect of a series of documents or of one document cannot be challenged in second appeal. If, however, the question is concerning the construction of the documents which are transfers and which are tendered to prove legal rights, then the finding of fact can be challenged in second appeal. A I R 1926 All 542=48 A 588=24 A L J 700=95 I C 532.

—Second appeal lies on a question of construction of a document necessary for deciding a material question. A I R 1926 Bom 493=28 Bom L R 467=95 I C 81.

—Question regarding importance given to Thak and revenue survey map is one of fact, decision thereon being final. A I R 1924 Cal 977=79 I C 1038.

—Lower Appellate Court's finding regarding proper execution of documents is finding of fact. A I R 1929 All 419=Ind Rul (1929) All 596=116 I C 740.

—The question that the Lower Appellate Court gave undue preference to a Thak map involves a pure question of fact and as such cannot be raised in second appeal. Halabadi ckittas cannot be called documents of title and, therefore, what effect is to be given to them in evidence is not a question of law which can be raised in second appeal. 32 I C 862.

—Finding that document is so written as to hide its true meaning is not its interpretation and hence not point of law. A I R 1929 Nag 343=Ind Rul (1929) Nag 330=119 I C 698.

—Finding that deed purporting to be of gift is really sale is one of law and hence subject to second appeal. Ind Rul (1930) Sind 24=120 I C 557.

—Question is one of law if it relates to relevancy and proof of document and is one of procedure if it is only of proof. A I R 1922 Pat 122=3 Pat L T 149=63 I C 625.

—Construction of a document includes two things namely—meaning of words and



## C. P. C. (1908) SEC. 100 (Contd)

## (16) Interpretation of Documents (Contd)

their legal effect and the former is a question of fact and the latter is one of law. A I R 1925 Lah 150=78 I C 36.

—The meaning of the words in a document is a question of fact in all cases; the effect of the words, the inference to be drawn from the words, in a document is a question of law. Inference from documents forming part of the evidence in the case held to be a question of law. 7 Luck 116 (121)=8 O W N 800=134 I C 411 =A I R 1932 O 283.

—Though the meaning of a term in common language is a question of fact, the effect of the use of the same in a document is one of law and second appeal lies on that ground. A I R 1926 Oudh 260=13 O L J 565=3 O W N 213=93 I C 927.

—In construction of a document meaning of words is a question of fact and its legal effect is one of law. A I R 1929 Lah 21=26 P L R 605=90 I C 1047.

—Interpretation of a document includes two things viz-meaning of words and the sense conveyed—the former is a question of fact and the latter one of law. A I R 1923 Lah 626=80 I C 264.

—Question if stipulation within s. 74 of Contract Act is by way of penalty is one of law. A I R 1925 Mad 84=47 M L J 605=(1924) M W N 861=82 I C 751.

see also 14 P L R 1922=64 I C 350= A I R 1921 L 212.

—On confiscation a zemindari does not merge in the permanent right of the Government, so as to create a new zemindari when the estate is re-settled with another. The question whether there was merger or not is a mixed question of law and fact, and should be determined upon a construction of the order of confiscation and upon various other matters. A I R 1927 Cal 136=98 I C 211.

—Whether a certain sum was paid before a certain date, or then remained unpaid, and what it was paid for, if paid at all, is a question of fact and is equally so whether an oral statement or a written record was made about it or whether an inference has to be drawn from circumstances of payment. Only when the legal obligation as to the date of payment is brought into question and the question becomes one of law. That a writing has to be read and understood in order to determine the question does not of itself make the question one of law. The question as to the proper construction to be put upon the entries in a jama wasil baki though the meaning of some of the entries is found to be a matter of some difficulty, is not a question of law. A

## C. P. C. (1908) SEC. 100 (Contd)

## (16) Interpretation of Documents. (Contd)

I R 1928 P C 243=55 I A 380=48 C L J 557=56 M L J 1=28 L W 847=111 I C 288.

—Question whether certain document is a Will or gift or family arrangement, depends upon its right construction and involves a question of law. A I R 1928 Nag 168=113 I C 373.

—Question as to what property is referred to by perfectly plain words cannot be construed as a question of construction of a document challengeable in second appeal 91 I C 423.

—Question is one of fact where it is one of intention of executant of power-of-attorney to be ascertained from terms of document and where interpretation does not depend on legal phraseology or legal effect. A I R 1929 Lah 90=30 P L R 168 =109 I C 380.

—Question to draw inference from the deed and other evidence as to the intention of parties to transfer and not simply to property construe a document is a question of fact. A I R 1928 Lah 930 =110 I C 762.

—Whether a certain land is accretion or formation in situ is question of fact. But where inference is to be drawn from documents it is a mixed one of fact and law. A I R 1930 Cal 764=53 C L J 229=Ind Rul (1931) Cal 192=129 I C 416.

—No findings can be interfered with in second appeal if they are based upon construction of or inferences drawn from documentary evidence. A I R 1927 Oudh 541=4 O W N 165=100 I C 631.

—Where an award has been interpreted in a particular manner by both the lower Courts, the High Court will not interfere with it in second appeal. A I R 1931 Lah 594=131 I C 126.

—When the deed of the sale is silent on the point, the question whether a pro rata share in the shamilat was intended to be conveyed to the vendee is not one of construction of the deed, and consequently cannot be gone into in second appeal. 36 P R 1919 =51 I C 380=79 P L R 1919.

—Entries in batwara papers are admissible in evidence. 2 P L T 343=(1921) Pat 343=63 I C 226.

—Question is one of law if it relates to construction of an entry in wajib-ul-arz as to whether it is a record of alleged custom or of a contract. A I R 1925 Oudh 64=75 I C 1021.

—A finding of fact based on a totally unwarranted reading of a passage in the Wajib-ul-arz of a village is liable to be set aside in second appeal. Presumption



## C. P. C. (1908) SEC. 100 (Concl'd)

## (16) Interpretation of Documents (Concl'd)

to be attached under S. 44 of Act XVII of 1887, to the correctness of the entries made in the settlement records prepared with great care cannot be rebutted by the ambiguous provisions of the Riway-i-am prepared in the settlement of 1852. The fact that the plffs have been grazing cattle and cutting grass from time to time on their land is not enough to prove their ownership. 54 P W R 1917=41 I C 755.

—If the Record of Rights is a document of title the Court in appeal can construe that document. And the High Court in second appeal can interfere with a decision based upon the Record of Rights if the decision is founded on something which the Record of Rights does not contain even if the Record of Rights is not a document of title but merely a document of evidence. A I R 1925 Pat 725=91 I C 735.

## (17) Limitation

—See also 24-New plea. The question as to limitation is a mixed question of law and fact. A I R 1927 Calc 30=79 I C 635.

—Whether the facts found attracted the operation of s. 14, Limitation Act is a mixed question of law and fact. A I R 1927 Pat 256=8 P L T 561=101 I C 674.

—Time between date when copies are ready for delivery and date of actual delivery cannot be excluded—Finding is one of fact. A I R 1923 Lah 636=73 I C 447.

—So also the finding as to time required for obtaining copies is one of fact and High Court cannot interfere. A I R 1922 Lah 423=67 I C 478.

—Finding as to "time requisite for obtaining copies" under s. 12 of Limitation Act is one of fact. 100 P R 1918.

—So also—Prosecution in good faith under Limitation Act, S. 14 (2) is a question of fact. A L R 1933 L 483=14 I 106.

## (18) Misconstruction of Documents

—Second appeal lies on a ground of misconstruction of Inam register and Inam patta being foundation of Inamdar's title in absence of original grant. A I R 1926 Mad 652=24 L W 88=93 I C 307

—High Court can reconsider a finding on document wrongly read or interpreted. A I R 1925 Mad 1226=83 I C 924.

—If by reason of a misconstruction of an important document the Courts below have come to an erroneous finding on a question of fact, the High Court can interfere with it in second Appeal. A L R 1933, M 721.

## C. P. C. (1908) SEC. 100 (Cont'd)

## (18) Misconstruction of Documents. (Cont'd)

—Decision based on wrong interpretation of document is not binding in second appeal. A I R 1929 Oudh 241=113 I C 367.

—In appealable cases the Courts below, should as far as possible, pronounce their opinions on all the points raised, so as to obviate any necessity for remand.

—Misconstruction of a document is a ground for second appeal. 1 L W 416=24 I C 87.

—If the question decided by the lower Appellate Court is a question to be decided on the construction of a deed, then the question is one of Law; but if it is to be decided not on the construction of the deed but on the deed combined with surrounding circumstances, then it is a question of fact. 120 P L R 1916=115 P W R 1916=37 I C 297.

—Unless there is a question of legal effect of a deed, which may be treated as a document of title, or embodies a contract or is the foundation of a suit, a second appeal does not lie 1 Pat L T 126=5 Pat L J 251=55 I C 179

—A question of the construction of a document, if it is a document of a title and not merely a piece of evidence in the case is a question of law and High Court will interfere in second appeal, where the lower appellate Court has misconstrued the document or has made no attempt to construe it. 52 I C 119.

—Where a lower appellate Court has misread and misinterpreted the document—evidence on the record, has misunderstood the real point for decision in the case, and its finding on a question of fact is based on no evidence at all, the Court of second appeal can interfere with that finding. 13 Ind Cas 629.

See also

13 I C 206.

—Misunderstanding documents—Question of law—Second appeal—See 13 C L J 418=15 C W N 752.

—In second appeal the High Court cannot go behind the findings of fact of the lower Appellate Court unless such findings result from the misconstruction of a document of title or the misapplication of law or procedure (19 C W N 270, followed.) Such findings cannot be assailed however gross and inexcusable the error therein if the lower appellate Court had before it evidence proper for its consideration in support of its finding. A I R 1926 Pat 9=(1925) Pat 281=6 P L T 787=90 I C 895.

—Second appeal will lie, on the ground of misinterpretation of a document. A I R 1926 Pat 49=88 I C 820.

## C. P. C. (1908) SEC. 100 (Contd)

## (18) Misconstruction of Documents (Contd)

—High Court can in second appeal interfere with a finding on misapprehension of document. A I R 1924 All 848=46 A 773=22 A L J 739=L R 5 A 533 Civ=80 I C 25.

—The misreading or ignoring of important documentary evidence amounts to a substantial error or defect in the procedure within the meaning of S. 100 (1) (c), 54 A 6 (15)=1931 A L J 757=A I R 1931 A 499 (F B).

—See also A I R 1931 All 499=(1931) A L J 757=Ind Rul (1931) All 789=134 I C 21.

—Where the lower Appellate court has reversed the finding of the first Court as to whether a party had notice at the date of his purchase of a registered instrument on a construction of the important part of the evidence in the case by approaching the consideration of the evidence from a wrong stand point, it has committed an error of law and justifies interference in second appeal 17 C W N 224=16 I C 618.

—A mistake in its meaning is not a misconstruction of a document upon which the special appeal will lie, if it is connected with other evidence affecting its construction. The misconstruction of a document which is the foundation of the suit; which is in the nature of a contract or a document of title is allowed to be a ground for a second appeal. A I R 1923 Cal 358=37 C L J 480=72 I C 35.

—Finding based on a misreading of first Court's judgment can be challenged in second appeal. A I R 1923 Lah 502=77 I C 475.

—Though interpretation of documents is a matter of law as a rule, a question of opinion as to the meaning of words employed in particular documents is not a pure question of law. A I R 1931 Bom 570=33 Bom L R 1443.

—Misconstruction of documentary evidence is no ground for interference in second appeal even though misconstruction of documents of title may justify interference. A I R 1931 Nag 189=27 N L R 213=Ind Rul (1931) Nag 161=134 I C 673. But see contra 35 M L J 304=23 M L T 85=(1918) M W N 231=7 L W 210=44 I C 523. and Agra (F B) 52=Ed. 1874, 39.

—A second appeal is not competent on the ground that some portion of the evidence might be contained in a document and the first Appellate Court has made a mistake as to its meaning. A I R 1931 Oudh 142=8 O W N 152=L R 12 A (O) 94=15 R D 112=131 I C 395.

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## C. P. C. (1908) SEC 100 (Contd)

## (18) Misconstruction of Documents, (Contd)

—The High Courts in India are not entitled in second appeal to go behind the findings of fact of the first appellate Court, unless such findings result from the misconstruction of a document or the misapplication of law or procedure. 37 M L J 199=17 A L J 1004=(1919) M W N 817=26 M L T 489=22 Bom L R 7=24 C W N 201=52 I C 497=11 L W 371 (P C).

—Where the Lower Appellate Court has completely misread a document and arrived at a finding of fact as the result of such misreading, a second appeal is competent and the Chief Court can consider the correctness of such finding of fact. 73 P R 1917=42 I C 218.

—High Court can take into consideration misinterpretation of document or misapplication of law or procedure. A I R 1930 Pat 171=10 P L T 630=Ind Rul (1930) Pat 4=120 I C 292.

—Finding of fact based on misconstruction of document is not purely one of fact. A I R 1930 Lah 139=Ind Rul (1930) Lah 453=123 I C 533.

—No second appeal will lie even on ground of gross misinterpretation of obscure settlement record. Ind Rul (1930) All 458=124 I C 26.

—No second appeal lies on ground of even grossly erroneous finding of fact or mistake as to meaning of document containing evidence. A I R 1931 Oudh 142=8 O W N 152=15 R D 112=12 L R A Rev 94=131 I C 395.

—Though the misconstruction of a document which is the foundation of the suit or which is in the nature of a contract or a document of title is a ground for the second appeal, a second appeal does not lie because the Judge in the court of appeal below has misunderstood the effect of documentary evidence. 13 C L J 418=10 I C 325=15 C W N 752.

—A second appeal is not maintainable merely on ground of misconstruction of a document, if it is not a document of title but merely a piece of evidence. 13 I C 425.

—Misconstruction of documents is no ground of second appeal if the documents are neither foundation of the suit nor embodying a contract, nor of title. 5 Pat L J 251=1 Pat L T 126=55 I C 179=2 U P L R (Pat) 31.

—High Court will not interfere on the ground of misreading of documents not of title and misconstruction thereof. A I R 1923 Pat 154=67 I C 435.

—No second appeal lies on the ground of misconstruction of a document alleged to contain an admission

## C. P. C. (1908) SEC. 100. (Contd)

## (18) Misconstruction of Documents. (Contd)

as it is not a question of law A I R 1922  
Cal 185=35 C L J 182=68 I C 1003.

—Second appeal lies on the ground of  
misconstruction of a document. 1 L W  
416=24 I C 87.

—The misinterpretation of a post-card,  
which is only a piece of evidence to prove  
authority to sell, is not such an important  
question of law as would justify the ad-  
mission of a petition for revision as a second  
appeal under s. 70 (1) (b) of the Punjab  
Courts Act. 14 Ind Cas 331=190 P W R 1912.

—Document—Misconstruction of a  
piece of documentary evidence—Second  
appeal. See. 18 C L J 548.

—The right construction of documents  
is a question of law which Judges in  
Second Appeal are not by Ss. 584, 585  
Civil Procedure Code (XIV of 1882) pre-  
cluded from considering by any finding of  
the lower Appellate Court, based upon  
such documents Where the lower Appel-  
late Court arrived at a finding by infer-  
ences drawn upon an incorrect construction  
of the vazib-ul-arz. Held. That the Judges  
in Second Appeal were not bound by the  
finding 17 C L J 1=23 M L J 330=34 All  
579=39 I A 247=16 C W N 1033=12 M L T  
413=(1912) M W N 1065=10 A L J 335=14  
Bom., L R 1090=16 I C 67 (P C).

—A wrong construction of a document  
coupled with a wrong inference from  
certain facts constitutes an error of law,  
where there is no other evidence accepted  
by the Court, and furnishes a ground for  
second appeal. 18 A L J 195=55 I C 366.

## (19) Misjoinder.

—See 14 (4) (d)—Grounds for

## (20) Misreading of evidence and judgment.

—See 14 (7) Grounds for

## (21) Mistake of Law

—See 9 (c)—Erroneous decisions on  
point of law

## (22) Mixed questions of law and fact

## (1) General

—The High Court must accept the  
facts found by the lower appellate Court  
and proceed to decide whether the law  
was correctly applied to those facts. 54 A  
628=1932 A L J 425=140 I C 653=A I R 1932  
A 393.

## C. P. C. (1908) Section 100 (Contd)

## (22) Mixed questions of law and fact (Contd)

## (1) General (Contd)

—Question of sufficiency of deposit—  
Mixed question of law and fact. See 19 C  
L J 388=20 I C 337.

—The findings that there was no  
proper investigation of a claim preferred  
under O. 21 R 58 C P Code, and that,  
therefore, no operative order can be passed  
against the claimant under O 21 R 21 C  
P Code, are findings of mixed law and  
facts, which can be questioned in second  
appeal. 19 O C 357=37 I C 92 (2)=30 L J  
519.

—The question of domicile under the  
Divorce Act is a mixed question of law  
and fact. A I R 1931 Cal 383=58 Cal 259=Ind  
Rul (1931) Cal 521 =132 I C 89.

—Amount of dower is mixed question  
of fact and law. A I R 1926 Oudh=89 I C 672.

—Pre-emption—Mixed question of  
fact and law—High Court will interfere  
if finding is erroneous in law or misinter-  
prets a document. L R 3 A 504.

—What can be classed as necessities  
is question of mixed law and fact. A I R  
1924 Nag 360=78 I C 380.

—What passes to a purchaser  
under a certificate is a sole  
mixed question of law and fact. A I R  
1927 Mad 311=52 M L J 68=99 I C 838.

—What the purchaser got at the Court  
sale is a mixed question of law and fact.  
A I R 1926 Mad 851=23 L W 349=94 I C 68.

—Question regarding material alteration  
in deed is one of law and fact. A I R  
1925 Nag 243=8 N L J 1=86 I C 185.

—Question, if Hindu family is joint is of  
fact and law both. A I R 1925 Nag 284=86  
C 1505

—Question as to jointness of Hindu  
family may be a mixed question of law  
and fact and opens to reconsideration in  
second appeal. A I R 1926 Nag 389=95  
I C 183.

—Per Madhavan Nair, J.—Agency is a  
mixed question of fact and law (1930) M  
W N 729=32 L W 615 =Ind Rul (1931)  
Mad 9=128 I 3 C 455.

—Question if person is agent or part-  
ner is question of mixed fact and law and  
can be attacked in appeal. A I R 1925  
Mad 768=48 M L J 518=21 L W 541=87 I  
C 663.

—Tenant of house if entitled to  
sell site is question of mixed fact and  
law. A I R 1925 All 718=87 I C 749.

—In finding of law and fact, if  
finding of law cannot be maintained it need  
not be regarded as finding of fact. A I  
R 1925 Cal 993=85 I C 540.

## C. P. C. (1908) SEC. 100 (Contd)

## (22) Mixed questions of law and fact (Contd)

## (1) General (Concl'd)

—High Court will interfere on a question whether the vendee has acted with reasonable care under S. 41. Transfer of Property Act only if strong reasons exist as it is a mixed question of law and fact.

A I R 1927 All 158=99 I C 1.

## (2) Adverse possession.

—A second appeal lies on a question of adverse possession where the contention raised on behalf of the appellants is that the legal conclusion drawn by the lower Court from the facts is erroneous. Ind Rul (1931) Lah 1037=32 P L R 727=134 I C 1037.

—A question of adverse possession not being purely a question of fact may be raised in second appeal. A I R (1931) Oudh 381=8 O W N 854=15 R D 424=L R 12 A (0) 193=Ind Rul (1931) Oudh 324=132 I C 772.

—Finding held to be one of fact binding in second appeal. 1932 P C L 825 (Civ.)=A L R 1932 L 825 (Civ.)

—The question whether the possession of a certain person had become adverse or not is a mixed question of law and fact. A I R 1931 All 323=Ind Rul (1931) All 264=130 I C 296.

—A finding as to adverse possession is not one of fact but a matter of legal inference. A I R 1923 Nag 65=6 N L J 70=74 I C 51.

—The question whether possession is adverse or permissive may often be one of legal inference from documents concurrent findings on which the lower courts will not be binding on the Privy Council. 42 All 152=46 I A 197=55 I C 486=38 M L J 259=18 A L J 235=(1920) M W N 3=24 C W N 394=11 L W 384=22 Bom L R 451 (P C)=27 M L T 200=2 U P L R 55.

—The question of adverse possession is a mixed question of law and fact and in dealing with this question the Appellate Court should consider the findings of fact arrived at by the lower Appellate Court and then to see whether the inference which that Court has drawn from these facts was proper or not. A I R 1926 Cal 881=94 I C 38.

—Adverse possession is a mixed question of fact and law. A I R 1922 Cal 54=26 C W N 870=68 I C 200.

—A finding as to the occupation of a house adversely to the landlord for more than 12 years is one of fact. A I R 1923 All 382 (1)=75 I C 672.

—Finding of lower Appellate Court that possession of party has not been

## C. P. C. (1908) SEC. 100 (Contd)

## (22) Mixed questions of law and fact. (Contd)

## (2) Adverse possession (Contd)

adverse for continuous period of 12 years is a finding of fact which cannot be attached in second appeal. A I R 1921 Lah 264=4 Lah L J 309.

—Finding regarding absence of adverse possession is one of fact. A I R 1921 Lah 264=4 Lah L J 309.

—Adverse possession is question of mixed law and fact and hence correctness of facts can be challenged in second appeal. A I R 1929 Oudh 337=6 O W N 536=Ind Rul (1929) Oudh 264=115 I C 440.

See also 8 A L J 877=11 I C 52 (F B)=33 A 757, But see 11 I C 185.

—Decision regarding adverse possession derived from inference of facts can be questioned in second appeal on ground of legality of conclusion. A I R 1929 Pat 590=Ind Rul (1929) Pat 452=117 I C 644.

—Permissive possession or adverse possession—Finding as to—Finding of fact, 135 I C 680=33 P L R 494=I R 1932 L 152.

—Where it was found that certain platforms against the defendants walls were erected in plaintiff's land and the platforms existed for more than 12 years and consequently the possession of the defendant was adverse, the finding cannot be controverted in second appeal. A L R 1933 O 532.

—Question of adverse possession being a mixed question of fact and law can be considered by High Court in second appeal. 24 C W N 1057=60 I C 298.

—Adverse possession being a mixed question of law and fact can be considered in second appeal in so far as it is inference from facts found by lower Appellate Court. 33 C L J 344=60 I C 298.

—Finding regarding adverse possession is not binding. A I R 1924 Oudh 266=10 O L J 646=27 O C 77=78 I C 895.

—Whether adverse possession has been established is a question of law. A I R 1926 Lah 482=27 P L R 89=98 I C 161.

—Mixed question of law and fact—Adverse Possession—Legal effect of possession. See 29 C L J 241=51 I C 123.

## (3) Custom

See 7 (b) Custom

## (4) Inferences

See 15 (2)—Inferences

## (5) Interpretation of Documents

See 16 Interpretation of Documents

## (6) Limitation

See 17—Limitation

## C. P. C. (1908) SEC. 100 (Contd)

## (22) Mixed questions of law and fact. (Contd)

## (7) Notice

See 11 (44)—Findings of fact

## (8) Reasonable or probable cause

—Where the facts are not in dispute and the only question is whether the admitted facts and circumstances constitute sufficient and reasonable cause or not, the question is one of law and not of fact 1932 P C L 77 (82-3) (Civ) =33 P L R 27=I R 1932 L 93=A I R 1932 L 183=135 I C 221=A L R 1932 L 77 (Civ).

—Question for determination whether injunction was obtained without reasonable and probable cause—question purely one of fact no second appeal lies. A L R 1933 L 310 (1)=14 L 46=A I R 1933 L 263.

—Both the question of reasonable and probable cause and the question of malice are questions of law in other words, to put them in the language of the English Bench and Bar, the question of reasonable and probable cause and the question of malice are questions for the Judge. But the facts from which an inference of want of reasonable and probable cause or an inference of malice are to be drawn must be found by the jury; in other words, they are questions of fact. 10 P 842=135 I C 526=I R 1932 P 46=A I R 1932 P 91 (92).

—Mixed question of law and fact—Malicious prosecution—existence of malice and reasonable and probable cause—depends on legal inferences. A L R 1933 N 132.

—The question as to what constitutes the existence or absence of reasonable and probable cause is a mixed question of law and fact the question whether there was reasonable or probable cause for the prosecution and whether there was malice depends on the legal inference to be drawn from the proved facts, that is to say, the legal effect of those proved facts which is essentially a question of law. 28 N L R 312 (315).

—In second appeal the Court has to discover what facts have been found upon the evidence and then decide whether upon those facts it can be said that the prosecution was instituted without reasonable and probable cause 35 L W 495 (496)=137 I C 829=A I R 1932 M 601=I R 1932 M 464=A L R 1932 M 464.

—Where the lower appellate Court after discussing each item of the consideration found that necessity had not been shown, the Chief Court in second appeal

## C. P. C. (1908) SEC. 100 (Contd)

## (22) Mixed questions of law and fact. (Contd)

## (8) Reasonable and probable cause. (Contd)

will not interfere with the finding. The fact that a previous mortgage was over 12 years ago, when there has been no mutation before 12 years is of no importance 111 P L R 1914=31 P W R 1914=23 I C 940.

—Inference of law—Malice and want of reasonable and probable cause—Question for decision by judge and not jury. See I Pat L J 149.

—In India balance of authorities favours the view that the question of existence of reasonable and probable cause in case of malicious prosecution is a mixed one of law and fact and may be examined by the High Court on second appeal. A I R 1930 Cal 392=57 C 2=Ind Rul (1930) Cal 587=123 I C 667.

—In a suit for damages for malicious prosecution the plaintiff's innocence and the defendants having no reasonable cause for complaint is a question of fact and cannot be questioned in second appeal. 91 I C 112.

—Whether there is reasonable and probable cause in suit for malicious prosecution is question of fact and hence High Court cannot interfere with it nor can certify case for Letters Patent Appeal A I R 1929 All 429=Ind Rul (1929) All 731=117 I C 619.

—Question of non-existence of reasonable and probable cause in malicious prosecution is one of fact. A I R 1925 Oudh 359=12 O L J 88=2 O W N 62=28 O C 387=86 I C 595.

—Whether there was reasonable and probable cause, is a mixed question of facts and law. The High Court in second appeal is bound to accept, the facts as found by the Court of Appeal below, but is entitled to examine whether the inference drawn therefrom is legitimate. 14 O L J 515=16 C W N 540=11 I C 729.

## (23) New Case.

—The plaintiff must be pinned down to the specific case he has set up in the plaint and must not be allowed to set up a new case in the second appeal for which there was no adequate investigation in the lower Courts. 96 I C 304 (A).

—Plea of settled account not to be converted into one of current and open account—appeal. See 19 O W N 768=29 I C 811.

—A party is not entitled to make a new case in second appeal 27 I C 810.



## C. P. C. (1908) SEC. 100. (Contd)

## (23) New Case (Contd)

—Where the plaintiff has sued only for partition between himself and the defendants, he cannot, in second appeal, be permitted to set up a new case in the nature of an easement, and ask for an injunction restraining defendants from interfering with his user of the property as a cattle pen. 6 Ind Cas 423=8 M L T 87 and 24 I C 860.

—A pure question of law arising out of the findings of the Courts below and one which is patent on the record can be raised for the first time in second appeal. 51 I C 588 foll.

—The nature of a suit cannot be changed in second appeal so as to make the suit for arrears of maintenance one for contribution. 2 Lah L J 255.

—New plea cannot be allowed to be raised in second appeal so as to change nature of suit A I R 1930 (1930) Oudh 389=7 O WN 541=Ind Rul (1930) Oudh 478=127 I C 254.

—Inheritance—Father's property—Inheritance to—Daughter's rights of, in absence of male collaterals, after death of his widow—Point as to—Not allowed in second appeal, where case had proceeded in Courts below on foot of her having such right. 1932 P C L 810 (Civ)=33 P L R 164=139 I C 110=I R 1932 L 569=A I R 1932 L 473 (474)=A L R 1932 L 810 (Civ).

—Urging of an alternative argument in such circumstances does not amount to the setting up of a new case. A I R 1932 A 289.

—A conclusion arrived at by the lower Appellate Court based on no pleadings cannot be accepted in second appeal A I R 1931 All 219=Ind Rul (1931) All 552=132 C 425.

—The High Court in second appeal would not entertain an objection involving the remand of a case to the Court of first instance to determine a question the first Court and in the of fact which was not specifically raised in the first Court and in the lower Appellate Court. 57 I C 883

—Where in a redemption suit, the debt pleaded that the mortgagor had transferred the equity of redemption to the mortgagee, but it having been found that no such transfer had been made, he pleaded in second appeal that there had been a foreclosure under the terms of the mortgage to which the parties had assented Held, that it was not open to the debt to take up such a plea and change his ground of defence at that stage. 190 C 166=3 O L J 244=34 I C 745.

—Where in a suit for the rent piffs, case in the Lower Court was not that a new

## C. P. C. (1908) SEC. 100 (Contd)

## (23) New Case (Contd)

tenancy had been created or that the parties had intended to create a new tenancy by the amalgamation of the old tenancy, he cannot be allowed to contend in second appeal that a new tenancy was created by the amalgamation, 37 I C 862.

—A point which ought to be, but is not, taken in the trial Court and in respect of which no direct evidence is given cannot be taken in second appeal, especially if it involves a question of fact. 56 I C 844.

—A party cannot be allowed to urge a new point in the final Court of Appeal which was not raised in any of the Lower Courts and on which no issue was proved, and where even the memorandum of Appeal to the Lower Appellate Court did not state that any issue in respect thereof was necessary and should have been drawn. 86 P W R 1916=33 I C 748.

## (24) New plea

## (1) General.

—A new plea which was not taken in the lower Court cannot be raised in appeal except (1) where the point may be described as involving a question of public policy e. g. (a) involving jurisdiction, (b) involving the principle of res judicata (c) where the decision on the point would prevent future litigation (2) Where the plaintiff discloses no cause of action on the written statement no ground of defence. The fact that it was omitted by an oversight in the Court below, or that the materials are all on record, and that the answer to the point is plain, is no ground for permitting the new point to be argued in appeal. A I R 1931 All 35=53 A 65=Ind Rul 1931 All 668=(1930) A L J 1601=133 I C 428 F B.

—but see A I R 1921 Lah 256 (2)=5 Lah L J 49=85 I C 92.

—A question, not raised in the pleadings or in the issues and which was not argued in the Trial court, cannot be raised in second appeal although the appellate judge discussed the question. A L R 1933 M 873. see also A I R 1929 Nag 343=Ind Rul (1929) Nag 330=119 I C 698, and 255 P L R 1913=163 P W R 1913=20 I C 22. and Nag 330=2 P L R 1915=27 I C 673=233 P W R 1915. and 3 P L R 1916=14 P W R 1915=27 I C 570. and 144 P L R 1915=61 P W R 1915=29 I C 761. and 13 L 31 (35)=137 I C 87=33 P L R 363=I R 1932 L 390=1932 P C L 240 (244) (Civ)=A L R 1932 L (Civ) 240. and 53 P W R 1914=47 P L R 1914=22 I C 403. and 222 P L R 1914=123 P W R 1914=24 I C 941. and A I R 1923 All 430=75 I C 612. and A I R 1922 Pat 68=1922 Pat (Sup)=3 P L T 623=65 I C 277. and A I R 1923 Cal 274

## C. P. C. (1908) SEC. 100 (Contd)

## (24) New Plea. (Contd)

## (1) General. (Contd)

=69 I C 530=49 C 1048=28 C W N 92 and A I R 1922 Mad 519=16 L W 620=31 M L T 454=44 M L J 596=69 I C 363 and A I R 1922 Bom 329=24 Bom L R 323=46 B 966=67 I C 322 and 62 I C 761 and 59 I C 316, and A I R 19 31 Mad 284=33 L W 681=133 I C 681 and 4 Lah L J 437. and 55 I C 375. and 32 C L J 75=59 I C 3. and A I R 1923 Cal 177=27 C W N 278=76 I C 213, and 8 Lah L J 430=27 P L R 628 and 1927 Mad 126=98 I C 268. and 24 C W N 53=31 C L J 78=54 I C 719. and A I R 1925 Cal 225=29 C W N 17=40 C L J 564=85 I C 875. and 15 B L R 67 P C=23 W R 208=2 I A 87=3 Sar 423=3 Suther 87 and 40 P L R 1919=48 I C 427, and 134 P L R 1911. 47 P L R and 7 M L T 311=6 Ind Cas 684=1910 M W N 613, and 5 M L T 210. and 6 Ind Cas 651=47 P W R 1910

—Whether new plea patent on record and hence could be raised should be allowed to be raised depends upon facts of case and nature of plea A I R 1930 Lah 937=12 Lah L J 203=Ind Rul (1931) Lah 305=130 I C 513.

—Points not raised in Trial Court and as such issues not framed cannot be raised for the first time in second appeal. A I R 1925 Lah 192=6 Lah L J 467. see also A I R 1923 Cal 285=67 I C 770.

—Objection taken in trial Court but not urged in the lower Appellate Court cannot be raised in second appeal. 19 A L J 511=43 A 555=63 I C 366.

—See also 1 C W N 530. and 5 M L T 214 and 10 A 28=A W N 1887 234.

—A plff cannot in second appeal be permitted to resile from the position he took up in the plaint 2 O L J 601=2 I C 740.

—Fresh plea or fresh relief cannot be raised or claimed for first time. A I R 1923 Lah 56=79 I C 990.

—A ground of attack mentioned in the plaint in respect of which no issue was drawn by the first court and which was not repealed either in the written grounds of 1st or 2nd appeal cannot be raised at the time of argument before the Chief Court. 217 P L R 1912=174 P W R 1912=17 I C 247.

—New plea cannot be taken for first time in second appeal if not purely question of law. 59 I C 3.

—A technical plea, should not be allowed to be taken for the first time in appeal A I R 1924 Lah 328=71 I C 826.

—New plea prejudicial to other party cannot be raised in second appeal. A I R 1923 Cal 292 (2)=65 I C 701.

## C. P. C. (1908) SEC. 100 (Contd)

## (24) New plea. (Contd)

## (1) General. (Contd)

see also 55 M 994 (927 8)=A I R 193 2 M 739=1932 M W N 767=63 M L J 949=A L R 1933 M 10.

—Point involving additional evidence cannot be urged in second appeal. A I R 1923 Bom 37=72 I C 993. see also 134 I C 275=I R 1932 C 83=A I R 1932 C 77 (79). and A I R 1927 All 763=L R 8 A 89 Rev.=101 I C 773.

—A point necessitating inquiry into facts cannot be raised for the first time in second appeal. A I R 1927 Mad 455=99 I C 691. see also A I R 1926 All 707=97 I C 342. and 65 I C 706.

—Questions of procedure dependent on facts cannot be raised for the first time in second appeal, 91 I C 417.

—Point included in plaint but never put forth before Judge cannot be raised for first time. A I R 1925 Cal 1184=88 I C 477.

—A point raised in the memorandum of appeal to the lower Appellate Court but not pressed before that Court cannot be raised in S. Appeal. 55 I C 441.

—Additional grounds filed too late not to be entertained. See 6 P L R 1915=6 I C 650.

—Ground of appeal taken in lower appellate Court but not argued there might be taken in second appeal Four day's notice was held to be insufficient in law 3 M L T 293. New facts indicating prima facie good claim can made ground of appeal. A I R 1923 All 176=45 A 59=89 I C 1041.

## (2) Abandonment of plea.

—Point even of law abandoned in lower Appellate Court cannot be again raised in second appeal. A I R 1930 Oudh 268=7 O W N 523=Ind Rul (1930) Oudh 481=127 I C 865.

—A mixed question of law and fact abandoned in the Court of first instance cannot be revived for the first time in second appeal. A I R 1931 Sind 170.

—A plea taken in the trial Court but abandoned in the first Appellate Court cannot be entertained in second Appeal especially where such plea depends for his decision upon a question of fact. 16 N L R 89=33 I C 481.

—Point expressly abandoned in Court below is not allowed to be taken up in second appeal. 69 I C 44 (1).

—See also A I R 1922 Oudh 102=55 I C 408=8 O L J 660. and 88 P W R 1911.

—Whether a certain provision in a lease is penal or not is a mixed question

## C. P. C. (1908) SEC. 100 (Contd)

## (24) New Plea. (Contd)

## (2) Abandonment of plea. (Concl'd)

of law and fact and if abandoned in lower Court competent to investigate questions of fact as well as of law cannot be raised in second appeal. A I R 1929 Pat 717=19 P L R 669=Ind Rul (1930) Pat 433=9 Pat 487=124 I C 625.

—Contention abandoned in lower Appellate Court cannot be raised again. A I R 1926 Nag 160=89 I C 18.

—Question of fact once given up cannot be raised again. A I R 1925 Oudh 510=85 I C 387.

—Plea intentionally abandoned cannot be raised again. A I R 1923 Lah 252=5 Lah L J 14=79 I C 462.

—See also 13 L 185=138 I C 185=I R (1932) L 425=33 P L R 421=A I R 1932 L 343.

—Appellant in second appeal cannot rely on grounds of appeal abandoned before lower appellate Court—See 6 Ind Cas 795. Parties are bound by admissions made by their Counsel, whether in the course of the trial in the first Court or in the course of the hearing of the appeal before the lower Appellate Court on questions of fact, though not on pure questions of law Issue of fact abandoned by Pleader in the lower Appellate Court cannot be challenged, in second appeal. Such abandonment being included in his general powers. A I R 1928 Mad 900=109 I C 173.

## (3) Abatement.

—The question of abatement of a suit, which was raised in the written statement of the defts. who were substituted in the place of the deceased deft but as to which no express issue was framed cannot be allowed to be raised in second appeal. An affidavit as to what was argued in a case, by a person who did not know the language in which the argument was made, is worthless. 41 I C 1.

## (4) Acquiescence, estoppel, waiver.

—Evidence—Objection to exclusion if waived in the lower Appellate court, not to be raised in second appeal. See 16 I C 213.

—New point in questions of fact or mixed questions of law and fact, (e. g. Limitation, Estoppel not to be raised for the first time in appeal. 8 S L R 272=27 I C 933.

## (5) Adverse possession.

—The question of adverse possession is a mixed question of law and fact and

## C. P. C. (1908) SEC. 100 (Contd)

## (24) New Plea. (Contd)

## (5) Adverse possession (Concl'd)

cannot be allowed to be raised for the first time in second appeal. 37 I C 942.

—Adverse possession is a mixed question of fact and law and cannot be allowed to be pleaded for the first time in second appeal. A I R 1927 Lah 522=102 I C 476.

## (6) Burden of proof.

—Where the plaintiff, accepting the burden of proof put upon him by the Court below, examined certain witnesses in order to prove execution of the deed: held that he was not entitled in second appeal, because the evidence of the witnesses he put forward had been disbelieved, to turn round and say that it was not his duty to call evidence at all and to ask the Court to disregard the evidence which had been given. 17 O C 134=25 I C 138=1 O L J 352.

—Burden of proof, question of, not to be raised in. See 21 C L J 42=13 I C 425.

## (7) Cause of action.

—A plea that the suit is based on a non-existent cause of action should be taken at the first hearing, and that ordinarily a party who has allowed a case to be decided in two Courts on the merits, should not be heard to raise such a plea as this on further appeal. A cause of action cannot be said to have been superseded by a new agreement, when the latter has not reached the stage of completeness and the parties have not finally consented to its terms. 2 P L R 191=9 Ind Cas 385=28 P W R 1911.

## (8) Court fee.

—Suit for ejectment—Court-fee paid under s. 7 (11) (cc)—Defendants raised question of title and Court decreed suit on the same—Defendants appealed but did not pay Court-fee on market value—There being no defect of jurisdiction the question of Court fee was not allowed to be raised for the first time in second appeal. A I R 1927 Nag 321=103 I C 337.

—Objection as to want of stamp cannot be taken for the first time in second appeal—See 10 C L J 41=2 Ind Cas 946=37 C 63=14 C W N 75.

## (9-10) Custom.

—Plea of customary right of burial or cremation of dead on land of another cannot be allowed to be raised for first time in second appeal, 1932 P C L 846 (Civ.)=33 P L R 157=133 I C 325=I R 1932 L 464=A I R 1932 L 256=A L R 1932 L 846 (Civ).

## C. P. C. (1908) SEC. 100 (Contd)

## (24) New Plea (Contd)

## (10) Custom (Contd)

—A finding that a marriage is valid by custom cannot in the absence of the certificate (under S. 40 of Act I of 1912, now S. 41 of Act III of 1914), be questioned in second appeal. A power of attorney authorizing to prosecute all litigation raising out of a suit impliedly confers upon the attorney the power to lodge and prosecute an appeal to the Chief Court. A party cannot ordinarily be allowed to raise a new point for the first time in appeal. 153 P L R 1915=80 P W R 1915=29 I C 895.

—Whether custom regarding right of tenant building house on village abadi, to transfer if it exists is one of mixed law and fact and can be agitated. A I R 1925 Oudh 239=11 O L J 738=82 I C 810.

—Fresh plea of special usage changing Hindu Law cannot be raised for first time. A I R 1925 Mad 260=47 M L J 686=20 L W 876=35 M L T 127=(1924) M W N 792=84 I C 973.

## (11) Intention.

—Question of intention of parties to sale or knowledge of that intention to preemptor is a question of fact and cannot be newly raised on second appeal. A I R 1931 Pat 72= Ind Rul (1931) Pat 149=130 I C 195.

## (12) Legal necessity.

—Failure to prove legal necessity for rate of interest cannot be raised for first time in second appeal. A I R 1922 Pat 356=1 Pat 612=3 Pat L T 367=1 P 600=67 I C 790.

—Where the appellant did not challenge in the Lower Appellate Court a finding by the first Court that certain sales by the guardian of a Hindu minor were not for legal necessity he cannot be allowed to challenge it in second appeal. 10 S L R 38=35 I C 551.

## (13) Limitation

—Points of limitation not taken in the Court below, should not be allowed to be raised in the High Court. A I R 1923 Mad 306=17 L W 169=72 I C 131.

—Question of limitation depending upon finding of fact if not raised in lower Court cannot be challenged in Court of Appeal. 10 P L T 53=Ind Rul (1929) Pat 232=115 I C 680.

—See also L B R 1893-1900, 539, and 28 M L J 115=28 I C 378, and 31 M 540=5 M L T 222=4 I C 1131, and 12 W R 215, and 13 A 580=A W N 1891, 166.

—Ground of limitation can and raised for the first time in second appeal but case should not be remanded to prove

## C. P. C. (1908) SEC. 100 (Contd)

## (24) New Plea (Contd)

## (13) Limitation. (Contd)

that claim is barred. A I R 1923 Cal 870=32 C W N 778=Ind Rul (1929) Cal 430=115 I C 606.

—Point of limitation though not raised in second appeal can be raised in Letters Patent appeal. A I R 1929 Rang 77=6 R 783=Ind Rul (1929) Rang 108=114 I C 540.

—Plea of limitation, though one of law, cannot be argued on second appeal, if it involves investigation of facts and was not taken below or in memo of second appeal. A I R 1930 Cal 385=57 C 114=Ind Rul (1930) Cal 559=125 I C 607, but see A I R 1922 Lah 240=65 I C 580.

—Plea of limitation will not be allowed to be raised in second appeal if it involves investigation of facts 9 O W N 1008 (1011-2)=16 RD 572, see also 4 Pat L W 136=43 I C 955, and 25 I C 354, and A I R 1929 Lah 432=11 Lah L J 91=30 P L R 296=Ind Rul (1929) Lah 327=115 I C 71, and 5 M L T 262, and 9 C W N 636=1 C L J 408=33 C 257.

—A plea, that the plaintiff had not been in possession within limitation, which has not been raised in any of the two lower Courts and which was not even raised in the memorandum of the appeal cannot be entertained in Second Appeal. A L R 1933 O 357.

—Plea of limitation cannot be raised for the first time unless it does arise on the pleadings and no fresh evidence is required. 38 Bom 227=16 Bom L R 111=24 I C 716.

—Limitation, plea of, taken for the first time in second appeal—Court's duty to recognise. See 17 M L T 18=26 I C 369.

—Facts necessary to support ground of limitation, if admitted, plea must be allowed in second appeal even if raised for first time. A I R 1928 All 689=(1929) A L J 229=Ind Rul (1929) All 270=114 I C 734.

—A point of limitation which was not taken in either of the Courts below, could not be taken for the first time before the Council since it is perfectly possible that there have been payments on account of the principal or interest secured by the equitable charge which would preclude the operation of the statute. 41 Bom 300=32 M L J 175=(1917) M W N 258=21 M L T 236=21 C W N 558=25 C L J 311=19 Bom L R 151=39 I C 62=44 I A 36 P C).

—Second appeal—Plea of limitation—Facts to be stated in written statement—Failure does not entitle party to acquire title by adverse possession or application of Art. 137 of Limitation Act. A I R 1922 Pat 398=1 Pat 23=3 P L T 795=69 I C 185.

## C. P. C. (1908) SEC. 100. (Contd)

## (24) New plea (Contd)

## (13) Limitation (Concl'd)

—A question of part-payments under s. 20 of the Limitation Act involves the determination of a question of fact. It cannot be allowed for the first time in second appeal. A I R 1923 Bom 82=47 Bom 128=24 Bom L R 1284=76 I C 115.

—Where the facts are not disputed a question of limitation can be raised for the first time in second appeal. A I R 1927 All 177=991 C 280

## (14) Misjoinder or Non-joinder.

—Question of misjoinder of parties cannot be raised in second appeal for the first time. A I R 1928 Mad 635=110 I C 548.

—Question if defendant is necessary party, can be agitated in second appeal provided no fresh evidence is required. A I R 1925 Lah 65=6 Lah L J 351=82 I C 603.

—Fresh plea regarding impropriety of substitution of legal representative cannot be raised. A I R 1925 Mad 207=81 I C 498.

—The decision of a lower Appellate Court was based upon findings of fact arrived at on a consideration of certain documents. On objection as to the mode of proof of those documents being taken for the first time in second appeal: Held, it could not be entertained in second appeal for the first time. An objection as to non-joinder of parties cannot be entertained for the first time in second appeal. 52 I C 463.

## (15) New defence.

—Plea not merely raised by the defendants in lower Courts, but which is contrary to and inconsistent with the position there taken up should not be allowed in second appeal. A I R 1923 All 358=45 A 53 =74 I C 1004.

—Question that defendants were entitled to shamilat land as natural accretion to proprietary land cannot be raised in second appeal for first time. 3 Lah L J 470.

## (16) Objection as to maintainability of suit.

—Appellate Court wrongly admitting an appeal against a non-appealable order and passing a decree therein. An objection to maintainability of the appeal in the lower Court can be raised for the first time in second appeal. A I R 1924 All 183 (2)=L R 4 A 447 Civ=75 I C 1053.

—In a suit for partition, objection to maintainability on the ground of its being for partial partition cannot be raised for first time in second appeal. A I R 1927 Mad 528=100 I C 202.

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## C. P. C. (1908) SEC. 100. (Contd)

## (24) New Plea (Contd)

## (16) Objection as to maintainability of

suit. (Concl'd)

—New plea of non-maintainability of suit cannot be raised in second appeal. A I R 1930 Cal 267=50 C L J 543=Ind Rul (1930) Cal 721=126 I C 401.

—New plea—Objection as to maintainability of suit—Cannot be allowed. A I R 1922 Lah 363=3 Lah 239=68 I C 557.

## (17) Objection as to want of notice.

—Absence of notice—Plea as to, cannot be raised for the first time in second appeal. A I R 1923 Lah 609=72 I C 779.

—Plea of want of notice—not raised in the written statement—not entitled to rely on in appeal See 15 I C 584.

## (18) Objection to admissibility of evidence.

—Question of admissibility and legal effect of evidence if not raised in first appeal cannot be agitated afresh. A I R 1924 All 709=22 A L J 153=L R 5 A 44 Civ =78 I C 221. but see A I R 1925 Cal 1034 =41 C L J 374=86 I C 714.

—An objection that a document that per se is not admissible in evidence, has been improperly admitted in evidence cannot be entertained in the Court of Appeal. A I R 1923 Cal 378=72 I C 985.

—Admissibility of a document is a question of fact—Where objection to admissibility is not taken in lower Courts it cannot be taken in second appeal. 97 I C 414 (Cal).

—An objection to the admissibility of a document cannot be taken for the first time in second appeal where an answer to the objection involves an enquiry into facts. 56 I C 816.

—Plff. sued for possession and to set aside an agreement which, she said, had been brought about by fraud and undue influence. The document was admitted without objection on her part in the first Court. Held, that under the circumstances it was quite too late for the plff. appellant to raise in second appeal questions as to the admissibility of the document which was received in evidence by the Court below. 34 I C 57.

—All objections as to the admissibility of evidence must be taken in the first Court. If the objection is not raised either in the first Court or in the lower Court, it cannot be taken in special appeal. 24 W R 296. see also A I R 1922 All 493=20 A L J 777=45 A 21=70 I C 953.

—Whether unregistered deed is will or deed of gift, being inadmissible and not being point of law cannot be called into



**C. P. C. (1908) SEC. 100 (Contd)****(24) New plea. (Contd)****(18) Objection as to want of notice (Concl'd)**

question in appeal for first time. A I R 1929 Lah 875 (2)=Ind Rul (1929) Lah 731 =117 I C 907.

**(19) Objection to document for want of registration.**

—Fresh plea of inadmissibility for want of registration or irrelevancy of document can be allowed at any stage. A I R 1925 Cal 370=82 I C 949.

—Whether the registration of a document is invalid is a question that cannot be allowed to be raised for the first time in second appeal. A I R 1927 Mad 92=25 L W 327=98 I C 195, see also 53 P W R 1915=29 I C 348.

**(20) Objection to jurisdiction.**

—Question of jurisdiction can be raised even for the first time in second appeal. A I R 1923 Lah 551=77 I C 532.

—Unless the case falls under S. 21 C P C see 2 A L J 156; and 19 B 43; and cases under S. 21. No inherent jurisdiction to the Judge over the subject-matter of suit—Parties by mutual consent cannot confer jurisdiction—Objections as to jurisdiction can be entertained even for the first time in second appeal. A I R 1923 Bom 321=47 B 843=25 Bom L R 945=77 I C 654; see also 1932 A L J 857=16 R D 564=13 L R A 357 (Rev.)=A I R 1932 A 701=A L R 1933 A 2; and 25 C 146=2 C W N 137; and 5 Ind Cas 525=12 C L J 53; and 6 Ind Cas 464=7 A L J 675; and 57 I C 206; and 8 C L J 116=12 C W N 1036; and 6 Ind Cas 384; and 22 W R 124; and 2 W R 257.

**(21) Plea of applicability of certain law**

—Plea of applicability of Mahomedan Law not raised in the courts below nor in the grounds of appeal cannot be allowed to be raised at hearing. 217 P L R 1914=127 P W R 1914=24 I C 678

—New point in—Assumption in Lower Court that Mahomedan Law applied—Question of application of Hindu Law not to be raised. See 37 Bom 116=17 I C 834

**(22) Plea of being an heir.**

—Where a plaintiff did not come into Court of first instance claiming as the heir of his father: Held, that he cannot be allowed to claim as such heir as it would be setting up a new case in second appeal A I R 1927 Lah. 426=28 P L R 181 =102 I C 426.

**C. P. C. (1908) SEC. 100 (Contd)****(24) New plea (Contd)****(23) Plea of lis pendens**

—A new plea of lis pendens cannot be allowed to be raised in the High Court in second appeal for the first time especially as the raising of it would entail a remand for further enquiry. 2 Lah I. J 230.

**(24) Plea of title.**

—Title alleged in plaint arising from purchase—Lower Court decreeing on title by prescription without objection being raised—Objection cannot be allowed to be raised in second appeal. A I R 1924 Mad 116=18 L W 553=75 I C 613.

—Landlord and tenant—Denial of title—Forfeiture of tenancy by reason of—Plea of, not put forward in plaint and based on an alleged recital of absolute title in a sale deed—Not allowed. 139 I C 680=33 P L R 626=I R 1932 L 603=A I R 1932 L 518.

—Possessory title—Plea of—Not allowed to be raised. 9 O W N 523 (528)=138 I C 808=A I R 1932 O 244=I R 1933 O 332.

**(25) Point of Law.**

—A point purely of law can be raised for the first time in Second Appeal. A L R 1933 L 852.

See also A L R 1932 S 98=27 S L R 41=A I R 1933 S 29 and 3 S L R 106=4 Ind Cas 599. and A I R 1930 Cal 616=52 C L J 68=Ind Rul (1931) Cal 440 and A I R 1925 All 783=47 A 932=23 A L J 856=L R 6 A 483 Civ=88 I C 1013. and A I R 1925 All 361=23 A L J 138=L R 6 A 19 Civ=47 A 324=86 I C 589 and 11 C W N 1127. and 24 I C 624.

—Even the Court of last instance should admit fresh law point following interpretation of document or from facts proved. A I R 1925 Nag 104=80 I C 607.

—But a new plea purely on construction of document cannot be allowed to be raised in second appeal. A I R 1924 Cal 353 (2)=69 I C 655.

—When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it was not only competent but expedient in the interests of justice to entertain the plea. 44 Cal 47=34 I C 869=20 C W N 1099=24 C L J 140.

—So a new point may be raised by a party for the first time in appeal if it is a pure question of law and does not take his opponent by surprise. But the new plea cannot be allowed in second appeal when the new plea raises question of fact or mixed question of fact or law. A I R 1923 Cal 247=36 C L J 336 =71 I C 849.

## C. P. C. (1908) SEC. 100. (Contd)

## (24) New plea (Contd)

## (25) Point of Law (Contd)

— And the new points of law can be argued only on facts found by lower Appellate Court. A I R 1921 Pat 326=2 P L T 285=60 I C 393.

— In other words questions of law depending on findings of fact cannot be allowed to be raised for the first time in second appeal. A I R 1927 Nag 351 =104 I C 584.

See also A I R 1926 Pat 401=5 Pat 759=8 P L T 124=(1926) Pat 225=96 I C 529. and A W N 1887, 213. and 51 I C 256. and 3 Pat L W 213=43 I C 857 and A I R 1922 Bom 148 and 7 S L R =20 I C 523.

— It is not right in second appeal to allow a point of law to be taken which was not taken in either of the Lower Courts and which involved questions of fact. 22 W N 156=44 I C 91.

— A new point may be raised for the first time in second appeal, provided it is purely a question of law arising on the findings of the Courts below and not affected by facts outside those findings 12 Bur L T 75=10 L B R 10=51 I C 588.

— Fresh law point if obvious on record can be raised. A I R 1923 Lah 491=83 I C 768.

— A plea in law which goes to the root of the plaintiff's claim and arises on the facts found by the Lower Appellate Court and is not affected by any facts outside those findings may be taken for the first time in second Appeal. 13 N L R 98=41 I C 45.

See also 2 Lah L J 255. and A I R 1927 Cal 393=54 C 424=45 C L J 191 =101 I C 130 and A I R 1922 All 124=4 U P L R A 104=66 I C 856.

— So a point was allowed to be raised that a suit for compensation for breach of a contract was not maintainable under S. 29 of the Specific Relief Act, where the plaintiff had previously sued for specific performance of the contract and his suit was dismissed. 1932 P C L 149 (Civ) (151-2)=A L R 1932 L 149 (Civ).

— And a new point of law as to the invalidity of a condition attached to a mortgage by conditional sale, can be raised in second appeal, if it is patent on the record. 31 P R 1918=27 P L R 1918=54 P W R 1918=45 I C 101.

— The point whether, in the absence of a written and registered document, creating a right of way in plaintiff's favour, his suit for a declaration of a right of way by grant must fail for want of legally

## C. P. C. (1908) SEC. 100. (Contd)

## (24) New plea (Contd)

## (25) Point of Law (Contd)

sufficient evidence to prove the grant can be opened by the depts. in second appeal, though it was not taken in the Courts below. 20 C W N 1158=34 I C 450.

— Where a point of law relating to the mode in which the lower Court ought to have considered the evidence and adjudicated upon it is raised for the first time in second appeal if it may be allowed see. (1914) M W N 488=24 I C 514.

— Point of law not involving question of fact can, but not question of jurisdiction under s. 21 can be raised in second appeal. A I R 1922 All 124=66 I C 856.

— A Judge who disposes of a suit on a point taken by himself on appeal, without affording the parties an opportunity of proving what is necessary to meet the point, commits an error of law. 11 Bur L T 1=43 I C 488.

— Point of law for right decision of which there is no material in pleadings and judgment cannot be raised in second appeal. A I R 1929 All 456=Ind Rul (1929) All 605=116 I C 749.

— New pleas even of law cannot be raised in second appeal, unless good cause is shown why they were not taken in the lower Appellate Court. A I R 1930 All 885=Ind Rul (1930) All 770=126 I C 18.

— Question of law raised for the first time in second appeal is not bound to be entertained but Court can itself take up the point or permit it to be argued if good cause is shown. 2 U P L R (A) 392=43 A 193=18 A L J 1033 (F B)=59 I C 116.

## (26) Mixed questions of law and fact.

— A mixed question of law and fact cannot be raised for the first time in second appeal. A I R 1927 All 59=97 I C 487.

See also A I R 1926 Nag. 164=89 I C 1009. and 4 Lah L J 432.

— In winding up of business question whether partner has authority to bind firm by his acknowledgment of debt, being mixed question of law and fact cannot be put forth in second appeal for first time. A I R 1929 Lah 265=Ind Rul (1929) Lah. 785 =118 I C 529.

— Whether a mortgage is properly executed is a question of mixed law and fact and cannot be raised for the first time in the second Appellate Court. M W N 559 (1926)=97 I C 611

— Whether a gift is bad as offending against the doctrine of *mushai* is a mixed

## C. P. C. 1908 SEC. 100 (Contd)

## (24) New plea (Contd)

## (26) Mixed questions of law and

fact (Contd)

question of law and fact and cannot for the first time be raised in second appeal A I R 1928 Cal 49=104 I C 126.

—Question relating to the rights of a tenant holding over—Not to be raised for the first time See 53 I C 12.

—A question which necessitates a remand and the taking of evidence, if not raised in the Courts below, cannot be raised for the first time in second appeal. The High Court refused to entertain an objection raised for the first time in second appeal to the jurisdiction of the Sub. Registrar in whose jurisdiction a certain lease deed had been registered, based on an allegation that a fictitious plot of land had been entered in the lease to give him jurisdiction. 51 I C 367.

—The High Court has jurisdiction to interfere in second appeal under S. 100 C P C with the decision of the lower appellate Court on questions of fact, only if the lower appellate Court has made a new case for the parties not warranted by the pleadings and evidence, or if the decision is arrived at without any evidence, to support the finding. A mixed question of fact and law ought not to be raised for the first time in second appeal. 22 I C 802.

(27) *Res judicata*.

—The question whether all the necessary requisites for the application of the rule of *res judicata* are established by the evidence on the evidence on the record is purely a question of law and a party should be permitted to raise it in the second appeal even if it was not raised in the courts below when it is patent on the facts appearing on the record. A L R 1933 L 1149. So a plea of *res judicata* not raised in memo of appeal, was allowed in second appeal, 5 L L J 163=74 I C 577=A I R 1923 L 560. see also 47 I C 685.

—Where a second appeal was preferred only against one of the two decrees made in cross appeals disposed of by a single judgment and the matter at issue in the second appeal was not directly and substantially at issue in the appeal left intact.—Held that, there had been no final decision of the question raised in the second appeal so as to operate as *res judicata* against the hearing of that appeal. 21 I C 264.

(28) *Other pleas*.

—If not complained against at earliest opportunity non-compliance by Court with O XIII cannot be pleaded in second

## C. P. C. (1908) SEC 100 (Contd)

## (24) New plea (Contd)

(28) *Other pleas* (Contd)

appeal. A I R 1928 Lah 704=108 I C 374.

—Whether in a suit on surrender by a widow the plea of insanity raised by the defendants in lower Courts failed, they cannot raise a plea in second appeal that the widow did not act with knowledge of what she was doing in effecting the surrender. A I R 1927 Nag 129=23 N L R 1=99 I C 187.

—Question whether document is materially changed is one of fact A I R 1929 Mad 622=Ind Rul (1929) Mad 968=119 I C 472.

—Plea that suit is barred by s. 47. Civil Procedure Code can be raised for first time in second appeal, being pure matter of law affecting the very validity of the suit. (1929) M W N 601=113 I C 547.

—Validity of imposition of the personal tax under s. 85, Municipal Act cannot be questioned for the first time in the argument in the High Court. A I R 1929 Cal 452 (2)=49 C L J 383=33 C W N 684=Ind Rul (1930) Cal 431=24 I C 335.

—Sufficiency of identifying description of property for registration, is a question of fact and cannot be raised as a new plea on second appeal A I R 1930 Cal 235=33 C W N 1211=Ind Rul (1930) Cal 555=125 I C 603.

—Plea that mere declaratory relief without possession could not be asked for cannot be taken in second appeal for first time. A I R (1930) Mad 541=126 I C 730. =Ind Rul (1930) Mad 922.

—Plea of in convenience in partition suit if not raised in lower Courts cannot be taken in second appeal. 23 O C 281=7 O L J 538=60 I C 433.

—Question of subrogation which cannot be determined without reference to facts cannot be raised in second appeal for the first time. A I R 1921 Cal 781=36 C L J 186=64 I C 266.

—Question whether parties constituted joint Hindu family cannot be introduced as a new plea in second appeal. 3 Lah L J 137=66 I C 881.

—Plea as to payment of interest being matter of fact cannot be raised or decided in second appeal. A I R 1921 Nag 94=59 I C 709.

—It is not open to the pliffs to ask in second appeal for a retrial on an issue of fact which had not been raised or considered in the Courts below. 43 I C 18.

—Where a landlord sued for injunction restraining certain tenants from improperly using the land the tenants after

## C. P. C. (1908) SEC. 100 (Contd)

## (24) New plea (Contd)

## (28) Other pleas (Contd)

unsuccessfully setting up permanent tenancy, cannot in second appeal embark upon the inquiry as to whether pecuniary compensation could be sufficient instead of an injunction 55 I C 951.

—Remand for rehearing on a new case raised—If decree as made correct on the issues raised and decided—Procedure in exceptional cases—Costs, party at whose instance new issue raised to pay costs 43 Cal 1104=20 C W N 1245=24 C L J 296=18 Bom L R 838=31 M L J 745=20 M L T 235=4 L W 251=(1916) 2 M W N 175=14 A L J 1009=37 I C 760=43 I A 172 (P C)

—Principal and Agent—Agent's heirs—Suit by principal against—Actual collections by deceased—Suit fought in courts below on foot of—Collections which deceased ought to have made—Plea in second appeal of—Not allowed 140 I C 106=1 R 1932 A 693.

—Sale-deed—Absolute rights in property conveyed by—Mortgagee rights only conveyed by or—Question as to—Not allowed to be raised 9 O W N 835 (838)=140 I C 182=1 R 1932 O 369=A L R 1932 O 591. Transfer of property Act—S. 41—Plea of bona fide transferee from ostensible owner under—Not allowed in second appeal for first time 34 B L R 354 (355)=137 I C 367=A I R 1932 B 255=1 R 1932 B 256=A L R 1932 B 229. Under-riyat—Plea of a person not being an—Not allowed. 36 C W N 89. Agreement—Consideration for—Absence of—Plea of—Not allowed, because plea not taken by defendant in his written statement and no distinct issue on that point asked for by him 137 I C 231=1932 A L J 9=1 R 1932 A 288=A I R 1932 A 174=A L R 1932 A 306 (311). No new point will be allowed to be set up in second appeal such as that a decree set off against another decree was not between the same parties which, if raised in the lower Court, would have induced the decree-holder to execute that decree and to pay himself 1 L W 431=23 I C 923

—Objections to finding and report of Commissioner not to be entertained for the first time in second appeal. See 34 P R 1915=26 I C 492

—Point not raised in the pleadings nor in the appeals not to be considered—4 L B R 371. The mere recording of certain findings of fact is not conclusive in second appeal unless the High Court is satisfied that the lower Court has applied its mind to the evidence before it. A mere general statement that on a perusal of all the evidence in the case the Court is satis-

## C. P. C. (1908) SEC. 100 (Contd)

## (24) New plea (Contd)

## (28) Other pleas (Contd)

fied as to a certain state of facts is not a sufficient judgment within the meaning of the law and the High Court is bound to interfere if it feels that their may have been a miscarriage of justice by the Court's failure to weigh all the evidence before it. Decision on an important point, e. g. Commissioner's report about identity of disputed plots, in a summary manner, without giving any reasons, condemned as involving a serious error in procedure. A contention not fairly arising out of the pleadings and not litigated in either of the Courts below cannot be allowed to be litigated on remand 2 Pat L J 8=1 Pat L W 188=1917 Pat 308=38 I C 599.

—Damages—Aggravation of—Matters in—Plea of—Permissibility See 28 N L R 320 (322)

—Attestation—Presence of attester at time of execution cannot be raised in second appeal for the first time see 24 M L J 534=19 I C 589.

—Even if it was competent to the High Court to remit a case for hearing on an issue not raised by the deft in the pleadings or suggested in the lower Courts, this might be done only in exceptional cases for good cause shown and on payment of all costs thrown away. That in this case the Govt. had shown no ground whatever for the indulgence they claimed, as they did not suggest that they had been in any way taken by surprise or had discovered fresh facts which they were unaware of when the case was before the Lower Courts. 43 C 1104=20 C W N 1245=24 C L J 296=18 Bom L R 838=4 L W 251=(1916) 2 M W N 175=14 A L J 1009=43 I A 172=37 I C 760 (P C)=31 M L J 745=20 M L T 235,

## (25) Objection to jurisdiction.

—See 24 (20)—New plea

## (26) Orders passed in execution Proceedings

(1) Orders confirming or Setting aside execution Sale.

—Dispute regarding execution sale may be decided under s. 47 read with O. XXI, r. 99 wherein it is subject to second appeal or under s. 151 wherein there is no second appeal. A I R 1924 Mad 778=47 M L J 549=(1924) M W N 842=84 I C 975.

—Where the lower Appellate Court found irregularity and inadequacy in price but also found that there was no evidence to connect them, it is not open to the High Court in Second Appeal to hold as



## C. P. C. (1908) SEC. 100 (Contd)

## (26) Orders passed in Execution (Conold)

(1<sup>st</sup>) Orders confirming or Setting aside execution Sale (Conold)

a matter of law that the inadequacy in price was the consequence of the irregularity. 16 C W N 227=13 I C 403.

—An order confirming or refusing to confirm a sale under O. 21, r. 92, is appealable only as an order and no second appeal lies. A L R 1933 All 480.

—Order of Lower Appellate Court setting aside execution sale—Whether appealable. See 15 C L J 89=16 C W N 736=13 I C 365.

—Order refusing to set aside sale—Decree-holder auction purchaser—Rent suit valued less than Rs 100 See 20 C L J 341=18 C W N 1266=27 I C 294.

## (2) Orders passed in execution of a decree in a Small Cause Suit.

—Small Cause suit—Execution proceedings is not appealable. A I R 1924 Mad 367=18 L W 739=33 M L T 125=45 M L J 651=76 I C 750.

—Small Cause suit—Order in execution—Only one appeal—No right of second appeal—See (1911) 2 M W N 585.

—No second appeal not competent in suit itself can lie in matters of execution. A I R 1921 All 55=43 A 403=19 A L J 72=60 I C 831.

—No second appeal lies in matters arising out of execution proceedings of a decree in a suit for less than Rs. 500 23 I C 939.

—There is no second appeal under S. 102, C. P. C., in matters arising out of execution proceeding if the decree in question is for less than Rs 500. 23 I C 939.

## (27) Pleadings

—Arguments opposed to pleadings cannot be entertained. 25 I C 697.

—Finding on point not pleaded at all cannot be accepted in second appeal. A I R 1931 All 219. A Judge of the Lower Appellate Court is not justified in disposing of an appeal on a ground which was not urged for the defence and in respect of which the plff had no opportunity to give evidence. 44 C 567=35 I C 638=22 C W N 190.

—Point relating to amendment of decree cannot be urged. A I R 1924 Cal 363=70 I C 173.

—Amendment of decree regarding calculation of interest allowed when time barred—Appeal filed thereafter without raising objection regarding interest. Second appeal is time barred. L R 3 A 27.

## C. P. C. (1908) SEC. 100 (Contd)

## (27) Pleadings (Conold)

—Amendment of plaint—When allowed See 7 M L T 225=6 Ind Cas 288 (1). and 6 Ind Cas 542 and 9 I C 774.

—A Court of second appeal cannot order amendment of a plaint, especially when the plff has not asked for it in both the Lower Courts and which amendment, if allowed would mean the trial of the case *denovo*. 59 P L R 1916=91 P W R 1915=30 I C 387.

—Omission to amend plaint to show cause of action against added parties—Point not taken in lower Court. See 1 L W 775=25 I C 607.

—Where a finding of fact is arrived at by a wrong construction of the pleadings, and upon no evidence, the finding is liable to be set aside in second appeal. 56 I C 466.

—Where the two Courts below exercised their discretion in granting the plff. a declaration somewhat different from that asked for in the plaint, without any formal amendment of the plaint, the Court of Second Appeal refused to interfere in the absence of good reasons justifying interference. 17 I C 315.

—Suit for rent as based on a compromise into suit for occupation without plff's consent not allowable. 8 A L J 1087=8 I C 570.

—Pleadings—Question as to cause of action—Practice, See 8 A L J 922=12 I C 111.

## (28) Practice and Procedure

See also cases under O 42, r 1.

## (1) General

—Finding of trial Court accepted on grounds of appeal cannot be examined in appeal though Counsel was careless in drafting the grounds 21 P W R 1921=59 I C 689.

—Objection to jurisdiction overruled in the Trial Court—Objections not pressed in Appeal—No bar to its being taken in second appeal. 52 C L J 247=A I R 1931 Cal 29.

## (1-a) Admission of fresh evidence

—No fresh evidence ought to be admitted in Second Appeal when the point in respect of which the evidence is sought to be admitted was not raised in the Lower Court. 38 Mad 535=26 M L J 449=25 I C 11.

—Appellant cannot be allowed to lead evidence in appeal. A I R 1922 Bom 147=77 I C 515.

—Evidence—Tender of fresh evidence—Practice of High Court not to receive or consider such evidence. See 19 C W N 287=22 I C 685.



## C. P. C. (1908) SEC. 100 (Contd)

## (28) Practice and Procedure (Contd)

## (1-a) Admission of fresh evidence (Concld)

—Admission of fresh evidence not permissible See 29 C L J 313=51 I C 652.

## (2) Consideration of evidence

—Consideration of evidence—Not allowed in second appeal A I R 1922 Pat 167=1 Pat 350=1923 Pat (Sup) 583=3 P L T 332=65 I C 666.

—Court will decide in second appeal only admissibility of the documentary evidence and not their evidentiary value. A I R 1923 Cal 727=92 I C 104.

—Where an appellate Court admitted certain documents in appeal but did not base its finding upon them, its finding of fact will not be disturbed in second appeal. A I R 1926 Mad. 864=92 I C 661.

—The High Court will in second Appeal satisfy itself with regard to the Lower Appellate Court having applied its mind to the evidence on record and pronounced its finding upon a consideration of the evidence (1912) M W N 175=15 I C 190.

## (3) Contents of Judgment of lower appellate court

—Judgment of Appellate Court must contain sufficient material to show High Court that it has considered the evidence and duly considered the reasons given by trial Court in its judgment for coming to a contrary decision. A I R 1923 Pat 275=2 Pat. L R 32 Civ=75 I C 780.

—Appellate Judge is bound to state clearly his findings. A I R 1923 Cal 278=67 I C 998.

—In setting aside lower Court's judgment Court of appeal must state grounds of disbelief in evidence and for not agreeing with finding. A I R 1925 Cal 408=79 I C 412. S. 359

## (4) Duty of Appellate Court

—Appellate Court must amend or uphold the decree according to the findings of fact A I R 1922 All 192=20 A L J 258=66 I C 866.

—Ex parte evidence being on both sides true must be considered by second Appellate Court. A I R 1925 All 24=47 A 243 =22 A L J 1045=L R 3 A 55 Civ=33 I C 27.

—Legal points considered by first Court and not by appellate must be noticed by High Court. A I R 1925 Oudh 506=12 O L J 382=2 O W N 529=89 I C 563.

## C. P. C. (1908) SEC. 100 (Contd)

## (28) practice and Procedure (Contd)

## (5) Powers of Appellate Court

—Question of law will not be dealt with by High Court in second appeal if it is depending on a finding of fact on evidence not led in the trial Court. A I R 1923 Bom 254=25 Bom L R 245=72 I C 326.

—The principle that a point of law can always be taken in second appeal is limited to cases where the point of law does not require a finding of fact to support it. A I R 1928 Pat 109=8 P L T 850=105 I C 33.

—Discretion of the trial Court as to admissibility of secondary evidence should not be overruled except in a clear case of miscarriage. A I R 1924 Lah 303=18 P W R 1923=71 I C 568.

—High Court can in second appeal deal with finding involving question of principle. A I R 1921 Cal 604=35 C L J 156=68 I C 600.

—High Court, every time it differs from the view of the court below on a question of fact, must not seek out flimsy pretexts for treating the question as one of law, if it does parties will be encouraged to file second appeals on questions of fact on the ground that evidence has been ignored, that sufficient weight has not been given to a particular document and so forth A I R 1921 Oudh 98=24 O C 221=64 I C 223.

—High Court can leave out of consideration findings of lower Court not definite and not necessary for the case. A I R 1929 Lah. 653=Ind Rul (1929) Lah 949=120 I C 5.

## (6-7) Practice.

—Where the first Court records that a party to a suit has closed his case, there must be conclusive evidence of the record being wrong before a party can attack the same successfully. The lower appellate court ought to dispose of all the grounds raised in the memorandum of appeal before it. 27 P L R 1914=3 P W R 1914=23 I C 352 (1)

—An appt. will not be allowed to raise for the first time in second appeal the contention that a decree obtained by one of his judgment debtors against the appt's father, on whose death the appt. was brought on the record as his legal representative, cannot be set off against a decree obtained by the appt. in his own right. I L W 431= 23 I C 923.

## (8) Sufficiency of evidence.

—See 11 (56)—Findings of fact.

## C. P. C. (1908) SEC. 100 (Contd)

## (29) Presumption.

—Finding of fact where presumption of possession by entry in Record of Rights is disregarded, can be set aside in second appeal. A I R 1928 Cal 751=110 I C 445.

—Finding by lower appellate Court by ignoring presumption arising from the habits of the people, is a substantial error in law within the meaning of S. 100. 1 Lah 206=113 P L R 1920 =56 I C 728.

—Ownership of blind alley may be presumed to vest in owners of adjacent houses, but the presumption is not one of law but an inference of fact. A I R 1928 Lah 709=108 I C 610.

—Presumption that plaintiff has continued possession arrived at by plaintiffs proving acquirement of possession under birth is conclusive. A I R 1925 Oudh 170=84 I C 588.

—Finding of fact can be interfered with in second appeal, if no presumption of the nature illustrated in s. 114, Evidence Act has been invoked by lower appellate Court. A I R 1928 All 16=50 A 145=25 A L J 833=106 I C 250.

—Presumption as to the correctness of entries in revenue records. I R 1932 L 623 (2).

—Rebutting correctness of Record of Rights is more a question of fact than of law. 65 I C 527 (Cal)

—Ignoring presumption under s. 114, Evidence Act, when document is with obligor, is ground for second appeal. A I R 1930 Lah 443=12 Lah L J 21=Ind Rul (1930) Lah 266=121 I C 730.

—Under presumption of facts referred to under S. 114, 111 (f) of the Evidence Act is to be drawn in a particular case or not is for the Court to decide. A I R 1921 Nag 116=17 N L R 25

—Presumption of probability drawn from evidence is one of fact. A I R 1930 Lah 557= Ind Rul (1930) Lah 599=125 I C 327.

—Whether evidence has rebutted statutory presumption is question of fact. A I R 1930 P C 91=(1930) A L J 292=32 Bom L R 380=31 P L R 145=31 L W 321=11 Lah 199=57 I A 86=51 C L J 518=59 M L J 53=Ind Rul (1930) P C 124 (P C)=122 I C 316.

—Whether evidence furnished by batwara proceedings is so valuable as to rebut presumption of the correctness of the Record of Rights is for the final Court of facts to decide. (1921) Pat 343=2 P L T 343=63 I C 226.

—Finding that presumption of correctness of entries in Record of Rights is rebutted is one of fact. A I R 1930 Lah

## C. P. C. (1908) SEC. 100 (Contd)

## (29) Presumption (Contd)

991=31 P L R 243=Ind Rul (1930) Lah 422 =11 Lah 410=123 I C 273.

—Where finding of fact is derived purely from presumptions, correctness of presumptions can be tested in second appeal. A I R 1930 Oudh 17=Ind Rul (1929) Oudh 472=118 I C 808.

—The High Court will not interfere in Second Appeal with a finding of fact by a Dt. Judge merely because he failed to indicate sufficiently in his judgment that he gave as much weight in defendant's favour and against the plaintiff to the presumption arising from the non-production of a rent deed as the Judges of the High Court would have given to it, had they been the Judges composing the Court of first appeal, especially when the finding is based upon other circumstances which in the opinion, of the Dt. Judge justified his finding. 1 L W 350=24 I C 383.

—Genuineness of document 30 years old—Presumption—Question of law or fact

—Finding of Lower Courts. See 26 I C 117.

## (30) Privy Council.

—Privy Council like the High Court is bound by a finding of fact by lower Appellate Court. A I R 1928 P C 219=28 L W 204=32 C W N 1146=48 C L J 415 =111 I C 240.

—Finding of fact based on credibility of witnesses and demeanour—Unsuccessful party seeking to reverse decision has heavy burden to discharge—Burden not discharged but finding reversed—Privy Council restored trial Court's findings. A I R 1930.

—Decision on a nice question of fact and law carries great weight—Execution sale—what passes. See 37 Mad 22=24 M L J 652=(1911) 2 M W N 328=10 M L T 298=12 I C 389.

—Privy Council—Concurrent findings of fact—principle of if applicable to a case where there is no evidence to support the evidence in the courts in India. See 41 Cal 972=41 I A 110 (P C).

## (31) Questions of fact.

—See 11—Findings of fact.

## (32) Refusal by lower appellate Court to extend time for filing appeal.

—Where the Judge of the Lower Appellate Court has not brought his mind to bear on the question whether there was sufficient cause for extending the period for presenting an appeal in his

## C. P. C. (1908) SEC 100 (Contd)

## (32) Refusal by lower appellate Court to extend time for filing appeal (Concl'd)

Court, the question can be considered in second appeal by the Chief Court. 77 P R 1917-147 P W R 1917-42 I C 343.

—Where the lower Appellate Court in the exercise of its discretion after considering the whole case refused to act under S. 5 Limitation Act and dismissed an appeal as time barred, no second appeal would lie. 9 A L J 292-14 I C 59, reversing 8 A L J 793.

—Where an order on petition of appeal was as under: "The appeal being time-barred is not admitted" the appeal should be held as dismissed and the order is appealable as a decree. A I R 1926 Cal 1105-44 C L J 44-30 C W N 926-98 I C 748.

—Appeal from decision of appellate Court rejecting an appeal as time-barred is a second appeal, 36 Bom. 613-16 Bom. L R 516-25 I C 369.

—Exercise of discretion in allowing extension of time under s. 5, Limitation Act, is a pure question of fact. A I R 1931 All 28=(1930) A L J 1256-Ind Rul (1931) All 298-130 I C 840.

—Where the lower Appellate Court's reasons for declining to extend time under s. 5 Limitation Act, are untenable, the High Court can interfere in second appeal, Ind Rul (1930) Lah 351-122 I C 575.

—Where an appellant's pleader falls ill on the day of hearing and time is given to engage another pleader, but the pleader so engaged does not argue the case but applies for time which is not allowed and the case is proceeded with, the order of the Court refusing to allow further time is not open to second appeal. 10 Ind Cas 214.

—Where the lower Court found that no case had been made out to extend time of limitation under s. 5 of the Limitation Act no point of law is involved in the appeal and there can be no interference in second appeal. A I R 1931 All 28 (1)=(1930) A L J 1256-Ind Rul (1931) All 298-130 I C 840 (2).

—Non-exercise of discretion under s. 5, Limitation Act after appreciation and consideration of such facts as are relevant and after application of right principles to those facts is a matter to be interfered with by High Court in second appeal. A R 1926 Lah 442-94 I C 396.

—Limitation—Excusing of delay in filing suit or appeal—Matter for the discretion of the Court below—No interference in second appeal. 83 P R 1916-132 P L R 1916-43 P W R 1916-35 I C 67.

Extending time—Whether sufficient cause existed or not—No interference in. See 20 C W N 1303-35 I C 888.

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## C. P. C. (1908) SEC. 100 (Contd)

## (33) Remand.

—Certain evidence, improperly rejected by lower Court, High Court to remand case. S. 103 widens power of High Court to determine issue not determined by lower Court. A I R 1922 Pat 117-3 P L T 303-65 I C 536.

—Inadmissible evidence which is at least material part of the basis of the finding, though it may not be the main part of it renders remand necessary. A I R 1923 Nag 107-18 N L R 182-77 I C 911.

—Omission by lower Appellate Court to consider report of Commissioner in boundary dispute justifies second Appellate Court in remanding the case. A I R 1922 Pat 562 (2)=3 P L T 483.

—Where the finding of a Subordinate Court is based on documentary evidence as well as in the statement of a witness and the High Court, on second appeal, finds that the documentary evidence does not support the conclusion, it will not act on the assumption that the Court of appeal would have come to the same conclusion apart from the document, but will remand the case for a fresh finding on the question. (1912) M W N 821-15 I C 103.

—Interference in second appeal is allowable when, in the opinion of the High Court, the findings were such that no one would have come to unless he was perverse. In such cases, the best course is to remand the case. 1931 M W N 102.

—Sufficiency of evidence necessary to arrive at finding cannot be generally questioned. Case cannot be remanded if decided by lower Court on other grounds. A I R 1924 Cal 1042-40 C L J 39-78 I C 219.

—Case must be remanded if certain evidence has been refused. A I R 1925 Cal 1034-41 C L J 374-86 I C 734.

—Challenge in second appeal of the finding of lower appellate Court on remanded issue is permissible. 13 L 31-137 I C 873-33 P L R 363-I R 1932 L 390-1932 P C L 240 (243) (Civ)=A L R 1932 L 240(Civ).

—Small question of fact such as damages can be dealt with to avoid remand. A I R 1931 Cal 129 (2)=34 C W N 951-Ind Rul (1931) Cal 332-130 I C 140.

—Where an appeal is remanded in second appeal, it is not open to the Lower Appellate Court to go behind the findings of fact, arrived at on the previous occasion which are not set aside by the High Court. 31 M L J 257-35 I C 98.

—The Courts below dismissed the plff's suit for possession of a certain land, having found that the plff's father had abandoned the same, for there was a mortgage by Plff's father in favour of the debt

## C. P. C. (1908) SEC. 100 (Contd)

## (33) Remand (Contd)

which he had failed to redeem. Held, that the alleged mortgage was not by plff's father, nor of his share, and even if the mortgage were by him, it would not establish abandonment within the period of limitation prescribed for redemption. The case having been decided on a misunderstanding of facts was remanded for redecision, 99 P L R 1916=36 I C 221=184 P W R 1916.

—In an appeal against an order of remand the appellant's only grounds to attack the judgment are those which would be available to him in second appeal. A I R 1926 Mad 475=91 I C 462.

—Competency of remand against Decree of lower Appellate court while confirming the decree of the first court dismissing the suit, but purporting to give liberty to bring a fresh suit—if appealable as an order of remand. 37 I C 940.

—An appellate Court is not bound in law to direct a fresh local investigation even where it is dissatisfied with the map and report of the Commissioner appointed for a local inquiry. And when, without remanding the case, the lower Court has on the evidence come to a decision, there is no error of law, and it is not open to be interfered with by the High Court. 23 C W N 593=27 C L J 599=45 I C 408.

—Where an Appellate Court decided an appeal, holding erroneously that a copy of a chitta, which was admitted without objection in the first court was not admissible in evidence. Held, that as the Appellate Court had come to a conclusion without considering evidence which was legally admissible, the case should be remitted for reconsideration. 41 I C 71.

—The Court will not remand a case for a fresh hearing in order that a Record of Rights which was published after the decision of the first Court might be taken into consideration. 2 Pat L J 564=43 I C 750.

—Where the lower appellate court does not appreciate or realise the legal effect of the admission by the pleader of a party, and decides the case against a party, the case must be remanded to that Court in order that the appeal thereto might be reheard on the footing that the admission in question was in fact made in the Trial Court. 44 I C 18.

—In a suit, on a mortgage by a Hindu father where the trial Court finds in favour of the mortgagee on the question of necessity, and there is an appeal by the son of the mortgagor, the appellant is entitled to have the opinion of the Appellate Court on the point and if

## C. P. C. (1908) SEC. 100 (Contd)

## (33) Remand. (Contd)

such Court fails to determine the point, the High Court will remand the case for redecision of the appeal. 55 I C 733.

—A decree was passed against B and C in favour of A only. B preferred an appeal against the decree. The Appellate Court dismissed the suit. A presented a Second Appeal against this order but he did not make C a party to the appeal. The decree of the Lower Appellate Court was reversed and the appeal was remanded for fresh disposal. After Remand, the Lower Appellate Court passed a decree in favour of A. C appealed against this judgment: Held, that the appeal by C was incompetent, that although the Lower Appellate Court had power, if it thought fit, to pass a decree in favour of C, it was bound to deal with the case except in so far as the parties to the appeal was concerned, and that C could not be said to be constructively a party to the appeal before the Lower Appellate Court. 61 I C 693.

—Remand in suit under Rent Act—Agra Tenancy Act—Maintainability. See 16 A L J 711.

## (34) Res Judicata, plea of

—See 24 (27)—New plea.

## (35) Review

—See also under O 47, r. 1

—Decision that a particular question is not in dispute cannot be attacked in second appeal—Proper procedure is review or the Pleader should bring it to the notice of the Court. A I R 1926 Cal 941=95 I C 300.

—High Court dismissing second appeal—Discovery of new evidence thereafter—Application for review of judgment cannot be entertained—Question whether the record has been rightly or wrongly framed is one of fact. A I R 1923 All 541=45 A 458=21 A L J 377=L R 4 A 416 Civ=73 I C 1016.

—Where finding of facts are set out in detail and are then summarised in the statement of an affirmative proposition, the affirmative proposition if not entirely a finding of law, but is a mixed finding of fact and law, and if the conclusion is one which could not be arrived at upon the findings of fact upon which it is based without misdirection in law it can be reviewed in second appeal. 36 I C 996.

—Where the Lower Appellate Court, though in a somewhat summary judgment,



## C. P. C. (1908) SEC. 100 (Contd)

## (35) Review (Contd)

came to the conclusion that the evidence was not sufficient to rebut the presumption of correctness of the entries in a record of right held that the conclusion was one within the exclusive competence of a final Court of fact and that the High Court having only a limited jurisdiction in second appeal, could not review that finding of fact.  
22 C W N 449=45 I C 65.

## (36) Revision.

—Second appeal cannot lie against order of lower appellate Court in matter not open to first appeal—Remedy is by way of revision. A I R 1921 Mad 612=41 M L J 54=14 L W 85=(1921) M W N 487=63 I C 730.

Decree for rent for less than Rs. 100 —No second appeal though case within S. 47, C. P. C.—Only remedy, interference in revision. See 18 C W N 1016=23 I C 981.

—And where a second appeal is preferred but does not lie under the law, it can nevertheless be treated as an application for revision. 40 L J 374=41 I C 125.

—So where a revision application was, altered into second appeal the Respt. took the objection that when the alteration was made, the appeal was barred. Held, that as the application presented to Court was within time and complied with all the requirements of law for a second appeal, the appeal might be taken to have been filed as on the date of the application and the insertion of the wrong section of law did not deprive the appellants of their right to appeal 34 I C 264=(1916) 2 U B R 106=10 Bur L T 10.

—So also where no second appeal lay from the order dismissing deft's cross objections, but that the cross objections having been dismissed on erroneous ground, there was a case for interference in revision. 20 P R 1918=44 I C 812.

—So also where a person who has a lien on property which is attached and proclaimed for sale, informs intending purchasers of such lien and a purchaser binds in spite of the warning, the purchase is subject to the lien. The decision of a lower Court which is arrived at after a due consideration of the facts and the law applicable thereto, even though erroneous, cannot be interfered in revision. 4 Bur. L T 142=12 I C 855.

## (37) Small Cause Suits

—See cases under S. 102.

—Original framing of the suit determines the question of maintainability of second appeal. 13 I C 493.

## C. P. C. (1908) SEC. 100 (Contd)

## (37) Small Cause Suits (Contd)

—Second appeal lies against a decision of lower Court on application for ascertaining mesne profits in so far as the Court declines to ascertain mesne profits and holds that the claim is beyond time. A I R 1928 Bom 236=52 B 360=30 Bom L R 503=109 I C 734.

## (38) Miscellaneous

—Appeal to the High Court under s. 142 (3), Calcutta Municipal Act, is not a second appeal under s. 100 C P C, and hence is not restricted to only question of law. A I R 1925 Cal 450=47 C L J 315=32 C W N 378=109 I C 618.

—Civil Courts have jurisdiction to partition houses in abadi. A I R 1927 Oudh 215=104 I C 910.

—Decision of District court on appeal from Forest officer—Second appeal to High Court—lies. See 39 Mad 617=43 I A 192=35 I C 902 (P C).

—Punjab Courts Act Ss. 39 (c) and 40—Order in winding up proceedings. See 45 P L R 1914=22 I C 250.

—Proceeding under s. 105 B T Act—Second appeal—See 9 Ind Cas 493.

—Appeals under s. 11, Burma Courts Act supplement those under s. 100, Civil Procedure Code. A I R 1931 Rang 56=8 Rang 485=Ind Rul (1931) Rang 50=128 I C 834.

—Official records—Evidentiary value—Interference in second appeal—See 22 M L J 393=14 I C 1007.

—Preemption suit—Further appeal—Jurisdiction—Value during pendency of suit—See 68 P W R 1912.

—Regulation IV of 1827 (Bombay) meaning of—Same as Second Appeal. Vinchur Court see 38 Bom 340=23 I C 617=16 Bom L R 75.

—Suit embracing two or more distinct subjects—Value for Court-fees and for appeal—Right of further appeal—See 41 P R 1910=65 P W R 1910=6 Ind C. 715=56 P L R 1910.

—Competency of second appeal against decision of the District Court in a suit for damages for illegal distraint under S. 213 of the Estates Land Act. See 38 Mad 655; 1 L W 89=24 I C 754.

—Order under S. 17 of the Chota Nagpur Tenancy Act—Decree of the Judicial Commissioner on appeal. Whether a Second appeal lies. See 39 Cal 241=13 I C 193.

—Decree against wrong representative—Execution and delivery of property—Substitution of rightful representative



**C. P. C. (1908) SEC. 100 (Contd)****(38) Miscellaneous (Conclld)**

Restoration of property. see 222 P L R 1914-123 P W R 1914-24 I C 941.

—Order directing abatement—See 12 A L J 1113-25 I C 643.

—Quaere: whether the question if from a long payment, a legal origin should be presumed not is a question of law or of fact. 13 M L T 351-(1913) M W N 86-18 I C 298

**C. P. C. (1908) SEC. 102***Synopsis.*

- (1) General Principles
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**(1) GENERAL PRINCIPLES.**

—Small Cause Court decree passed in review is appealable only on point of granting review and not merits. A I R 1921 Lah 124-3 Lah L J 166-60 I C 259.

—Second appeal barred in suit where value is below Rs. 500, and plaintiff discloses Small Cause Court nature. 5 O W N 240-108 I C 898.

—The amount claimed in plaint and character disclosed in plaint determines whether suit of the nature of Small Cause Court. A I R 1924 Cal 405-51 C 62-28 C W N 6-80 I C 317.

—Nor is the nature of the suit determined by the character which it may assume in the course of and after the trial by

**C. P. C. (1908) SEC. 102. (Contd)****(1) General Principles (Contd)**

operation of findings by the Court. A I R 1924 Mad 844-20 Mad L W 321-1924 Mad W N 691-82 Ind Cas 123

—See also 1931 All 595-132 Ind Cas 564 and 50 I C 629.

—In other words, the test in deciding whether a second appeal lies or not is to be found in the nature of the suit and not in the powers of the Court which tried the suit. Thus where the Munsif having Small Cause Court powers to try suits upto Rs. 250, tries the suit for Rs. 500, which was cognizable by a Court of Small Causes as Munsif, still no second appeal lies. A I R 1931 Oudh 49-Ind Rul (1931) Oudh 94-7 O W N 1112-129 I C 174. So too the course of appeal is determined by the character of the plaint as originally made and is not affected by the plaintiff subsequently dropping or being unable to seek relief with regard to a part of his claim. A I R 1928 Lah 764-Ind Rul (1929) Lah 442-115 I C 858.

—See also 49 B 596-27 Bom L R 637-A I R 1925 Bom 440-89 I C 59.

—So the withdrawal of a prayer for sale in a suit on a mortgage-deed does not in any way affect the question of the maintainability of second appeal. 22 M L J 47-10 M L T 528-(1911) 2 M W N 587-13 I C 174.

So that if a case is of a Small Cause Court nature, though for special reasons it cannot or has not been tried in a Small Cause Court, no appeal lies—7 Bom. 100; 12 All. 579; 15 Mad., 98; 15 Mad., 298; and 10 M L T 500-12 I C 957. e.g. a

Small Cause nature suit tried on regular side. A I R 1922 Mad 352-42 M L J 118-14 L W 349-66 I C 207.

—See also 21 I C 120-40 C 537 and 37 Ind Cas 92-39 All 101-14 All L J 984; and A I R 1928 Nag 136-107 Ind Cas 193; and A I R 1925 All 821-87 Ind Cas 659; and 1 I C 543-33 M 323-6 M L T 121-20 M L J 718; and 19 I C 362-11 A L J 360; and 3 I C 816-33 Bom 664-11 Bom L R 817.

—And a return of plaint by Small Cause Court does not convert the nature of suit—3 U P L R (J C) 18-8 O L J 391-65 I C 7.

See also A I R 1929 Mad 781-Ind Rul (1930) Mad 2-120 I C 370. and A I R 1928 Nag 136-107 Ind Cas 193.

—So also the transfer of a suit under s 23 does not and cannot change its nature which is the test under s. 102, Civil P C a second appeal is barred. A I R 1926 Mad 622-23 L W 518-94 I C 77, nor is the character of the suit altered

## C. P. C. (1908) SEC. 102 (Contd)

## (1) General principles. (Contd).

by the subsequent amending Act passed at the time of the second appeal: 45 Ind Cas 11=35 Mad L J 377=23 Mad L T 255=1918 Mad W N 238=8 Mad L W 374, nor by incidental determination of title A I R 1925 All 821=87 Ind Cas 859, see also 20 I C 974=37 Bom 675=15 Bom L R 773, and 16 I C 201=23 M L J 193=12 M L T 206=1912 M W N 810; and A I R 1921 C-1 380=33 Cal L J 384=63 Ind Cas 520, and A I R 1926 Mad 656=23 M L W 520=92 Ind Cas 899=1926 M W N 528 and 31 I C 5=11 N L 160.

—nor does the ultimate finding affect the nature of the suit as brought; 15 C L J 49=13 I C 907.

And a mere addition of a prayer for a relief by way of declaration does not alter the character of a suit which is of a nature cognizable by a Small Cause Court, so as to give a party a right of second appeal which is prohibited by the terms of S. 102 C. P. Code. Where all the reliefs which the plff. claims in a suit can be obtained without asking for a declaration, the mere addition of a prayer for a declaration does not prevent the suit from being a suit cognizable by a Small Cause Court. 41 I C 627.

—Whether prayer for mandatory injunction changes the nature of Small Cause suit see A I R 1922 All 241=66 I C 613.

—Suit does not cease to be a Small Cause Suit and no second appeal lies though incidentally a question of title was raised by the defendant and thence suit tried on original side. A I R 1929 Mad 389=Ind Rul (1929) Mad 498=30 I W 365=116 I C 114.

—Suit for rent or damages for use and occupation even if tried in original side as question of title raised—No second appeal lies. A I R 1929 Mad 525= Ind Rul (1929) Mad 930=119 I C 336.

—See also A I R 1928 Nag 136=107 I C 193.

—The section will, thus apply to a case in which the Court which entertained the suit had no jurisdiction to take cognisance of it as where a Small Cause suit is brought on the regular side. 26 A 353.

See also 32 I C 712.

—For the purposes of S. 102 C. P. C. the nature of the suit must be determined from the claim as laid, without regard to the nature of the defence. The suit being akin to one for damages against a trespasser, a second appeal was barred. 12 N L R 47=32 I C 993.

—In a suit filed in the Small Cause Court for the recovery of certain Mah-

## C. P. C. (1908) SEC. 102 (Contd)

## (1) General Principles (Contd)

brahmami offerings the plaint was returned to be presented on the regular side as the defendant denied the right of the plaintiff to receive the funeral offerings in dispute. The suit was tried as a regular suit and there was also an appeal before the District Judge. Held that the suit remained a suit of the nature cognizable by a Court of Small Causes and that under S. 102, no second appeal lay. 23 O C 117=57 I C 557.

—So the form of the suit at a subsequent stage does not affect; and so where a suit was brought for the sale of the hypotheca and a personal decree but the prayer for the sale was subsequently withdrawn, held: that a second appeal lay. 22 M L J 47=13 I C 174= (1911) 2 M W N 587=10 M L T 529.

See also

13 I C 493.

—Where a

plaint alleged a criminal offence under Chap XVII, Penal Code, and no question was raised in trial Court that it was not cognizable by the Court on the regular side. Held, s. 102 did not apply and second appeal lay. A I R 1931 Oudh 411=80 W N 1019. Plaint allegations coming under Act 35 (ii) of Act IX of 1887—Suit tried on regular side without objection by defendant—Second appeal lies, though plaint allegations subsequently appear to have been designedly made. 8 O W N 1019=135 I C 889=A I R 1931 O 411.

—Where plaintiff brought a suit for ejectment and recovery of rent below Rs. 500 but abandons case of ejectment, second appeal is not barred. A I R 1928 L 764.

—Small Cause Court nature suit decided by Munsif without objection being taken—Objection to second appeal cannot be raised. A I R 1931 Oudh 126=Ind Rul (1931). 107=7 O W N 1079=14 R D 664=129 I C 331.

—A suit excepted under Sch II of Pro. Sta. C C Act 1887 is not one of small Cause nature: 33 Ind Cas 768 All.

## (2) APPLICABILITY TO EXECUTION PROCEEDINGS.

—The term 'suit' in S. 102 of the Code of Civil Procedure is not used in a restricted sense. It includes not merely the proceedings in the suit up to the stage of decree but comprehends also the proceedings in execution of the decree. Execution is not completed till the sale has been confirmed. No second appeal lies under S. 102 of the Code of Civil Procedure against an order obtained in

## C. P. C. (1908) SEC. 102 (Contd)

## (2) Application to execution Proceedings

(Contd)

execution of a decree passed in a suit of the nature cognizable by the Court of Small Causes when the amount or value of the subject matter of the original suit does not exceed Rs. 500. The question as to the status of the decree-holder namely whether he can rightfully claim to be the representative of the original decree-holder is a question relating to execution of decree within the meaning of S. 47 of the Civil Procedure Code 16 C L J 96=16 I C 975.

—No second appeal lies against an order in execution of a decree in a suit, valued at less than Rs. 500, of the nature cognizable by a Court of Small Causes. 10 I C 412.

—For as a general rule no second appeal lies from any order made in the execution of a decree which is not itself open to second appeal. 11 N L R 99=29 I C 740. see also 12 C P L R 12 and (1911) 2 M W N 585=12 I C 959. and 18 I C 245 and 18 A 481 F B=A W N 1896, 160. and 23 I C 930. and (1917) M W N 93=5 L W 701=37 I C 673. and 1917 Pat. 80=3 Pat L W 132=43 I C 15. and 5 O L J 187=46 I C 82. and 54 I C 429 and A I R 1925 Mad 742=48 M L J 499=90 I C 794. and 46 A 73=21 A L J 861=L R 4 A 591 Civ=A I R 1924 All 263=79 I C 603. and 45 M L J 651=18 L W 739=33 M L T 125=A I R 1924 Mad 367=76 I C 750. and (1923) M W N 406=45 M L J 210=18 L W 17=A I R 1924 Mad 32=73 I C 956. and A I R 1926 All 345=95 I C 292. and A I R 1921 All 55=43 All 403=19 All L J 72=60 Ind Cas 831; and 42 Ind Cas 711=45 C L J 519=26 Cal L J 323=22 Cal W N 446 and A I R 1924 Mad 32=45 M L J 210=18 M L W 17=19 23 M W N 406=73 Ind Cas 956 and A I R 1924 All 263=46 All 73=21 All L 861=4 L R A (Civ) 591=79 Ind Cas 605 and 30 Bom 113=7 Bom L R 641 and 8 O C 405 and A. I. R. 1928 All 345=93 Ind Cas 292 and A. I. R. 1924 Mad 367=15 M L J 651=18 M L W 739=33 M L T 125=76 Ind Cas 750 and A I R 1927 All 740=103 Ind Cas 344 and A I R 1928 Bom 534=30 Bom L R 1447 and A I R 1921 Cal 242=34 Cal L J 477=67 Ind Cas 6 and 11 C W N 861 and 30 M 212=17 M L J 376

—Application under O XXI, r 71 for less than Rs. 500 is of a Small Cause nature and no second appeal lies therefrom. A I R 1921 Bom 229=45 B 223=22 Bom L R 1193=59 I C 192.

—In the case of execution proceedings the test of maintainability of second appeal is the value of the suit and not the amount sought to be recovered

## C. P. C. (1908) SEC. 102 (Contd)

## (2) Application to execution Proceedings

(Concl 1)

A I R 1922 Lah 290=3 Lah 141=28 P W R 1922=67 I C 718.

—Though the Court executing the decree would be supposed to have passed the decree second appeal would not lie on order in execution in case where Small Cause Court decree is transferred to regular Court for execution. A I R 1928 Bom 531=Ind Rul (1929) Bom 269=53 B 646=30 Bom L R 1447=114 I C 861.

—See also 103 I C 349=A I R 1927 A 740; and 67 I C 6=34 C L J 477.

## (3) Illustrations of suits which are and which are not Small Cause Suits,

## (1) Awards.

—A suit to enforce an award is not of a Small Cause nature. A I R 1924 Rang 192=1 R 700=79 I C 718.

—Suit for declaration of award being void for money subject of the award—Suit not of Small Cause Court nature owing to existence of awards—Second appeal lies. A I R 1928 Rang 173=6 R 238=111 I C 21.

## (2) Suit for Accounts.

—Suit for specific sum between Principal and Agent when accounts between them have yet to be settled, is suit for account within Art. 31. 3 M L W 143=(1916) 1 M W N 162=33 I C 16.

—Suit for partnership account with an alternative prayer for the dissolution of the partnership. see 13 A L J 58=27 I C 629

—As to what is a suit for accounts within art 31 of Pro. Sm. C C Act see 13 I C 159=1912 M W N 36=11 M L T 13. and 28 M 394 and 20 I C 518=24 M L J 633=14 M L T 46=1913 M W N 879 and 11 I C 15=195 P L R 1911=140 P W R 1911. and 33 Ind Cas 16=3 M L W 143=1 M W N 149.

—Suit for recovery of specific sum of money whether a suit for accounts because accounts have to be incidentally referred to. see 14 I C 786=8 N L R 36. see also 14 I C 573. A suit for account is not one of Small Cause nature 21 I C 537=18 C L J 260 see also 10 I C 883=24 C L J 187.

## (3) Suit for Contribution.

—Arts 41 and 42 exclude suits by co-sharers in joint property for contribution from the cognisance of a Small Cause Court; as also a suit by co-mortgagor see 4 I C 59 and 27 I C 56=19 C W N 458=20 C L J 200.

## C. P. C. (1908) SEC. 102 (Contd)

## (3) Illustrations of suits which are and which are not Small Cause Suits (Contd)

## (3) Suit for Contribution (Concl'd.)

—Property does not cease to be joint because enjoyed by the sharers separately—13 A L J 452=28 I C 587.

—The fact that the recorded tenant transferred his share before the whole amount sued for fell due, does not put the suit outside the scope of Art 41. 17 C W N 975=17 C L J 179=17 I C 902.

Suit by purchaser from a joint owner mortgagor. see A I R 1928 C 593=55 C 1193.

—Plff sued to recover from deft his landlord the whole amount paid by him to save the property denying all common liability or in the alternative for proportionate amounts which alternative claim was allowed, against which there was no appeal. Held, that this was a suit for contribution exempted under Art. 41 of Prov. S. C. Courts Act. 23 C L J 125=32 I C 203.

—Suit of Small cause nature—Contribution—Maintenance decree against three persons—Liability of other two on default of the former—Suit to recover amount paid by the former—Cognizable by Small Cause Court—No Second appeal. See 16 A L J 44.

—But a suit for amount of rent due by deft paid by plff is not a contribution suit and second appeal lies 18 C W N 1308.

—Suits for contribution not falling within arts 41 and 42 of Pro. Small C. C. Act are suits of small cause nature A I R 1926 All 456=94 I C 949. see also A I R 1924 Mad 790=19 M L W 547=1924 M W N 478=80 Ind Cas 353. and 28 A 292=1906 A W N 6=3 A L J 6 and 15 I C 218=1912 M W N 384=11 M L T 188 and 24 I C 28=1 O L J 244 and 4 A L J 543=1907 A W N 230 and 29 I C 245=13 A L J 632 and 30 M 212=17 M L J 376. Joint pronote—Suit for contribution see A I R 1925 M 970.

—So is a suit by the plaintiffs for recovery of money paid by them for the benefit of defendants see 18 C W N 1308=20 C L J 196=24 I C 259.

—Suit to recover the amount paid by a purchaser for incumbrance on property represented to be free incumbrance: 12 A L J 1279=26 I C 909.

—Decree against A and B—A to be primarily liable—B to be liable on A's default see 40 A 135.

A and B mortgaging only the property of A, B, having no interest in it—Suit

## C. P. C. (1908) SEC. 102 (Contd)

## (3) Illustrations of suits which are and which are not Small Cause suits. (Contd)

## (3) Suit for damages (Contd)

for contribution is small cause. see A I R 1924 A 787.

—Joint decree for mesne profits see 62 I C 504.

## (4) Suit for damages.

—Section 102 applies to all suits of a Civil nature of which the value does not exceed Rs. 500 except those which are contained in Sch. II of the Provincial Small Cause Courts Act. No second appeal lies on a suit for damages for breach of contract where the damages awarded fall below Rs. 500 A I R 1931 Oudh 49=7 O W N 1112=Ind Rul (1931) Oudh 94=129 I C 174.

—No second appeal lies in a suit for damages below Rs. 500 whether the damages are on account of moveable or immoveable property: 11 W R 369; and 6 W R 7; and W R 1864 237. No second appeal lies in suit for damages for infringement of monopoly. A I R 1923 Lah 244=69 I C 431 nor in a suit against President, District Board for damages. A I R 1923 Mad 689=46 M 808=45 M L J 125=18 L W 82=32 M L T (H C) 378=74 I C 223 nor in a suit by a landlord for damages for use and occupation against tenants holding over. A I R 1925 Mad 890=48 M L J 701=22 L W 528=90 I C 401.

—A suit for damages for cutting fruit trees where there is no allegation of criminal intention and the amount claimed is Rs. 100, is cognizable by a Small Cause Court (1950) A L J 1247=Ind Rul (1931) All 273=130 I C 481.

—The plff. sued for cancellation of a kabuliyata against 1st deft. and damages for Rs. 25 against 2nd deft. In second appeal the deft. claimed damages only. Held, no second appeal lay as against him as the claim for damages was a matter cognizable by a Court of Small Causes exclusively. 34 I. C. 909.

—Act done by officer of Government—Failure of Government to perform a contract—Suit for damages Suit of a small cause nature—Second appeal. See 37 MAD. 53.

—A zur-i peshgi lease of Sir land was executed by M in favour of B. The sum advanced was Rs 125 and the period fixed was 5 years. There was a covenant that the mortgagee should remain in possession after the expiry of 5 years if his money was not paid out of the usufruct The heirs of M sued B for ejectment in the Rev. Court and B was ejected. B then brought a suit in the Civil Court to recover Rs. 125 with interest. Held that



## C. P. C. (1908) SEC. 102 (Contd)

(3) Illustrations of suits which are and which are not Small Cause suits (Contd)

(4) Suits for damages. (Contd)

if the suit be one for damages for breach of contract, no second appeal lay the suit being of the nature cognizable by a Court of Small Cause; that if the deed was a mortgage-deed, the right of the mortgagee was to get rent assessed on M as an ex-proprietary tenant B had no cause of action for the suit. 15 A. L. J. 534-40

I. C. 578.

—It is doubtful whether there is any right of second appeal in a suit for damages for damage caused to land by flood water flowing from dells lands through a culvert 21 I C 393.

—Wrongful attachment of crops See 9 I. C. 537-8 A L J 187 and 18 I C 695-11 A L J 91

—Attachment—Wrongful Liability of creditor. 9 I. C. 317-33 A 306-8, A. L. J. 92.

—Threat to assault if injury to the person within the section See 15 I. C. 595-36 Bom 443-14 Bom L. R. 323 Suit for damages between date of payment of mortgage money and date of possession 14 C W N 1001 = 6 I C 336; see, however, 19 I C 427.

—Damages for Causing pollution. see 32 I C 236-12 N L R 7.

—Obstruction or diversion of water Course see 25 I. C. 44-1914 M. W. N. 497

—Damages for offences against property see 31 I. C. 5-11 N. L. R. 160 and 11 I. C. 31-35 M. 726-21 M. L. J. 442-2 M. W. N 189 and (1927) All 288-25 All L. J. 287-100 Ind Cas 38-49 All 440 And 69 Ind Cas 330-1923 Lah 39-5 Lah L. J. 92. And A I R 1928 Lah 887-10 L. L. J. 226-109 C. 571 and 1924 All 430-22 A L J 70-5 L R A (Rev) 34-79 Ind Cas 599 And A I R 1928 Cal 776 and A I R 1931 All 595-132 Ind Cas 564.

(5) Suit for declaration and share of produce or value.

—A suit for declaration and share of crops or value is of Small Cause nature. 11 A L J 599-21 I C 638.

See also 10 Bom L R 733-32 B 560. and 30 M 101-1 M L T 314 =16 M L J 477 F B.

—Suit for half share of income from tenancy based on contract is Small Cause suit—No second appeal lies. A I R 1921 Lah 173-3 Lah L J 419-67 I C 841.

—So also no second appeal lies in a suit for produce or value wrongfully raised by defendant. A I R 1927 Rang 262-5 R 388-104 I C 818.

—Nor in a suit by co-sharer for value of share of produce below Rs. 500. A I R 1930 Lah 613-Ind Rul (1931) 124; 31 P L R 699-129 I C 124.

## C. P. C. (1908) SEC. 102 (Contd)

(3) Illustrations of suits which are and which are not Small Cause Suits (Contd)  
(6) Suit for Maintenance.

—A second appeal is competent in a suit for arrears of maintenance though the value is below Rs. 100. A I R 1931 Bom 286-33 Bom L R 510.

—A suit for arrears of fixed maintenance against deceased husband's brother, because the defendant took the property by his father's will, subject to a charge of maintenance, is not cognizable by the S. C. Court. 40 All. 52-15 A L J 857-42 I C 903.

—See also 16 I C 13 =10 A L J 185; and 2 A L J 697-1905 A W N 137. and 22 I C 39-38 M 553-1 M L W 19.

—A suit by the guardian of the person of a minor against the guardian of the property to recover the money ordered by Court is not for maintenance. 32 I C 547.

(7) Suit for mesne Profits

—Deposit of mortgage amount in court—suit for mesne profits by mortgagor between date of deposit and possession. see Maintainability. 6 I C 336-14 C W N 1001 =12 C L J 620.

(8) Suit for profits or income

—A suit for participation in the income of an endowment, even if it is a part of the regular income is not excluded from the cognizance of Small Cause Court 19 I C 628 not following 28 M 202.

—Suit for specific sum as half share of the profits of land see 10 L W 200-26 M L T 245-52 I C 631

—Suit for emoluments and nivedhanam by a hereditary pujari secured under a trust deed see 2 M W N 589-13 I C 183.

(9) Suit for rent

—A suit for rent of land is not a "land suit" within the meaning of s. 2 and therefore no second appeal lies. A I R 1926 Rang 19-3 R 390-91 I C 639.

—Rent due to a landlord which tenant promised to pay to landlord's creditor—Whether such rent is rent for land see 4 Bur L T 142-12 I C 855.

—A suit for rent of certain lands from which plaintiff was a registered tenant but not for any interest in the land is Small Cause. 14 I C 735.

—Suit for recovery of a certain sum of money for occupation of land let for the purposes of building houses is not a suit for 'rent' under s. 3 of the Madras Estates Land Act. 31 I C 185

—Suit for value of crops on account of the use and occupation of lands. see 16 C W N 89-13 I C 29.

—The agreement to pay rent having been pleaded the mere omission to raise it in the grounds of appeal



## C. P. C. (1908) SEC. 102. (Contd.)

(3) Illustration of suits which are and which are not Small Cause Suits. (Contd.)

## (9) Suit for rent. (Contd.)

cannot alter the nature of the suit which remains a suit for rent and ejectment. A second appeal is therefore maintainable. 137 I C 253 =33 P L R 956-I R 1932 L 325-A I R 1932 L 388.

—Per Sadasiva Aiyar and Napier, JJ Mirasi right is an interest in the village lands and the thunduwaram payable to the mirasdar is not of the nature of "rent" (like jodi) but comes under the general expression "dues" in Art. 13 of the Provincial Small Cause Court Act. A second appeal therefore lies in a suit for the recovery of thunduwaram, though the amount sought to be recovered is less than Rs. 500. 41 Mad 374=34 M L J 104 =23 M L T 44=(1918) M W N 350=7 L W 243=44 I C 699 (FB).

—Claim to grazing rights under a village Custom. See 12 N L R 83=34 I C 695.

—Suit to recover the consideration agreed upon for the right of fishing in a certain tank See 14 N L R 35=43 I C 962.

—Suit for recovery of cases and damages See 47 CL J 595=109 I C 277=A I R 1928 C 709.

—Suit for arrears of rent in respect of forest lands leased out. See 20 C L J 227=19 C W N 415=26 I C 380.

—A suit to recover less than five hundred rupees as grazing fee is not one for rent and no second appeal lies in it. 32 C L J 83=59 I C 595.

—Suit for arrears of rent cognisable by Revenue Court only—Not of small cause nature—See 12 A L J 93.

—Where the prayer for declaration of right to receive melwaram is only incidental to the prayer for recovery of rent and no separate court fee was paid in respect of the declaration no Second Appeal is competent in the case. 23 M L J 517=17 I C 704.

—Suit for rent, other than house rent, for less than Rs. 500—Second appeal—Maintainability. See 19 C W N 1030.

—Suit for arrears of rent (other than house rent)—No bar See 20 C L J 494.

—Suit for enhanced Kattubadi of less than Rs. 500 in amount—Suit of Small Cause nature—No second appeal. 31 I C 871.

—A suit was framed in the alternative, for recovery of rent or of damages for use and occupation. The sum claimed was less than Rs. 100. Held, that no second appeal lay to the High Court. If the suit be treated as one for rent, the appeal was

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## C. P. C. (1908) SEC. 102 (Contd.)

(3) Illustrations of suit which are and which are not Small Cause Suits. (Contd.)

## (9) Suit for rent (Contd.)

barred under S. 153 of the B. T. Act. in the absence of the special grounds mentioned in that section; and if on the other hand, if it be treated as one for damages for use and occupation, it was barred under S. 102. 22 C L J 561=33 I C 346.

—Where there would have been no second appeal if two different suits had been instituted for the recovery of rent and the recovery of damages, for breach of a contract, it could not be evaded by amalgamating the two claims in one suit for rent. 23 C L J 557=34 I C 697.

—A suit to recover arrears of rent of a holding is not cognizable by a Small Cause Court and a second appeal in such a suit is not barred by S. 102. C. P. Code. (1917) Pat 287=3 Pat L W 270=37 I C 930.

—A suit to recover Rs. 250 as rent was brought in the Court of a Subordinate Judge of the second class who was invested with the jurisdiction of a Small Cause Court only up to a limit of Rs. 50. On Second appeal, a preliminary objection was taken that the suit being of small cause nature no appeal lay. Held, upholding the preliminary objection, that the suit was of a nature cognizable by a Court of Small Causes notwithstanding the fact that the judge trying the case was invested with the jurisdiction of a Small Cause Court up to Rs. 50 only. 41 Bom 367=19 Bom L R 83=38 I C 881.

—Suit for Katihari cess cognizable by Court of Small Causes. See 1 Pat L W 541=39 I C 949.

—Suit for rent—Malik Makbuza tenure—Small cause nature—No second appeal. See. 56 I C 845.

## (10) Suits for cess or other dues.

—Suit for haq chaharum is open to second appeal. 19 A L J 719=63 I C 292.

—Suit to recover arrears of kattubadi. No second appeal lies, A I R 1922 Mad 352=14 L W 349=42 M L J 118=66 I C 207.

—A claim for jodi russums and road cess which is not of the nature of the cesses mentioned in cl. 13, no second appeal lies. A I R 1925 Mad 1196=49 M L J 185=90 I C 496.

—No second appeal in suit to recover choutarji dues. A I R 1927 Mad 670=52 M L J 706=38 M L T 385=(1927) M W N 748=103 I C 120.

—Second appeal lies in a suit for arrears of chaukidari tax: 22 C 680 or for arrears of malikana allowance 9 A 591. A suit for damages for wrongfully cutting and

## C. P. C. (1908) SEC. 102 (Contd.)

(3) Illustrations of suits which are and which are not Small Cause Suits. (Contd.)

## (10) Suits for case or other dues (Concl'd)

carrying trees is one of a Small Cause nature even though it involves a question of title and is on that account tried on the regular side and does not come within any of the exceptions to the 2nd Schedule of the Prov. S. C. C. Act 26 ref 21 B 248; 24 C 558, appr 15 M 98 foll (Spencer and Krishnan, J (J) 20 M L T 281= 4 L W 245=(1916) 2 M W N 215 =36 I C 202.

## (11) Suits relating to immoveable property.

—A suit for determination of any right to or interest in immoveable property is not one of small cause nature 18 Ind Cas 282=35 All 156=11 All L J 133.

See also A I R 1928 Mad 21=53 M L T 727=39 M L T 490=26 M L W 676=1927 M W N 826=106 Ind Cas 5. and 8 Bom L R 369, and 5 I C 322 and A I R 1927 Rang 90=5 Bur L J 206= 100 Ind Cas 327.

—Allegations in plaint of debt wrongfully receiving profits of immoveable property ousts the small cause nature of the suit but that of wrongful appropriation of share due to plff does not: 31 I C 797.

—A hut is immoveable property, and a suit for a declaration in respect of a hut is not cognizable by the Small Cause Court, and, therefore, s. 102 of the Civ. Pro. Code does not apply, and a second appeal lies in such a suit. 9 Ind. Cas. 1.

—Standing trees are not moveable property for the purposes of the Provincial Small Cause Courts Act. 9 Ind. Cas. 133.

Mortgagee abandoning mortgage—right—Suit for money alone is small cause. see 78 I C 652=A I R 1925 A 205.

—Suit by an hereditary orchaka of temple to recover from the defendant, the trustee the amount which was due to him in respect of his office. see 45 Ind Cas 414=41 Mad 528=7 Mad L W 524=23 M L Tim. 288.

—Suit by alutta allowance. see 1912 M W N 537=16 I C 107.

—Suit by an Inamdar for the recovery of sums payable by a khatidar in respect of certain immoveable property held by him under the Inamdar as his superior holder. see 16 Bom L R 746=39 B 131.

—Suit by a zamindar for the recovery of land-cess from the Inamdar. 21 M L J 819=36 M 18

—A suit for the recovery of dues according to plaintiff by reason of his

## C. P. C. (1908) SEC. 102 (Contd.)

(3) Illustrations of suits which are and which are not Small Cause suits (Contd.)

## (11) Suits relating to immoveable property (Concl'd)

hereditary office as purveyor of ghee to a temple for a fixed annual allowance see 30 I C 351.

—A suit by Malguzar to recover the value of manure under a Wazib-ul-arz. see 11 N L R 100= 29 I C 815.

—Suit for rent and cesses. see 36 M 126. Suit for the recovery of unpaid purchase money. see 9 M L T 372=10 I C 267.

—Suit for money see 1923 All 420 =21 All L J 312=73 Ind Cas 217=4 L R A (Civ) 539.

—Suit for cesses improperly collected. see 92 I C 779=A I R 1926 L 276.

—Suit for recovery of purchase money by a vendee after the sale falls through. see 89 I C 933=A I R 1926 N 65.

—Suit for recovery of document. see 1925 Lah 335=6 Lah 33=88 Ind Cas 574=26 Pun L R 156.

## (12) Suits relating to moveable property or value.

—Where the plff. brought a suit to recover a certain sum of money on the allegation that a particular tank was the joint property of the parties and that the debt, had caught fish from the said tank and appropriated the entire fish by selling them for his own benefit. Held, that the suit was one of the nature cognizable by the Small Cause Court and that therefore no second appeal lay. 31 I C 797.

—A suit for price of coal supplied under an agreement is in the nature of a Small Cause suit. 59 I C 188 (2) (C).

—Suit for declaration of title to fish and for damages is Small Cause suit No second appeal lies. A I R 1923 Cal 321=68 I C 626.

—Suit for wrongful removal of trees without criminal intention is not excepted by Art. 35 and therefore, no second appeal lies. A I R 1923 Cal 568=27 C W N 469=77 I C 77.

—Suit for damages for cutting fruit trees and for removing fruits valued Rupees hundred is Small Cause suit in absence of allegation of offence—No second appeal lies. Ind Rul (1931) All 273= (1930) A L J 1247 =130 I C 481.

—No second appeal lies in suit for loss caused without committing offence. A I R 1926 Cal 1230=44 C L J 190=97 I C 556.

—Account papers relating to a mahat  
—Preparation of—Contract for—Suit for recovery of papers on foot of, or for

## C. P. C. (1908) SEC. 102 (Contd)

(3) Illustrations of suits which are and which are not Small Cause suits (Contd)

(12) Suits relating to moveable property or value. (Concl'd)

recovery of sum of money as compensation

—Suit of small cause nature is not.  
See 59 C 352 (353-4).

—Claim for crops harvested and removed before delivery of possession is one for account and is triable only by regular Courts—Claim for subsequent cutting and carrying away of crops is claim for damages and cognizable by Small Cause Court. 31 M L J 839=20 M L T 512-5 M L W 443=38 I C 1.

(13) Suits relating to trust.

—Suit to recover offerings to shrine wrongfully mis-appropriated refers to trust and not Small Cause suit—Second appeal lies. A I R 1926 Lah 228=92 I C 731.

see also 5 I C 912=33 M 494=20 M L J 146=8 M L T 67=1910 M W N 503. and 15 I C 273.

(14) Suit to recover marriage presents or damages for breach of contract of marriage

—Suit, after the death of bride and bridegroom, for return of moveables presented on occasion of marriage, valued less than Rs. 500 is a Small Cause suit. 23 M L J 282= 12 M L T 308=1912 M W N 887=16 I C 542=37 M 538.

see also 19 I C 700=38 M 274 =13 M L T 497=1913 M W N 637.

—Suit for recovery of presents made on promise of marriage—Not a suit of a small cause nature 14 I C 837.

(15) Suit to recover money

—No second appeal lies in suit for money wrongly distributed under s. 73 Civil P C, A I R 1923 All 310=21 A L J 248=45 A 359=74 I C 836.

—Money paid to applicant for rateable distribution and afterwards property purchased by decree-holder—Sale set aside—Suit to recover money paid is excepted from Small Cause Court—No second appeal lies. A I R 1923 All 310=21 A L J 248=45 A 359=L R 4 A 146 Civ=74 I C 836.

—Suit for recovery for excess amount paid in a decree through fraud and cheating—Second appeal lies. A I R 1928 Cal 776=Ind Rul (1929) Cal 405=115 I C 581.

—Absurd and fictitious prayer for injunction to retain transfer of immoveable property does not oust Small Cause Court's jurisdiction in suit on simple money-bond. Second appeal does not lie. A I R 1930 All 702=Ind Rul 1931 All 465=(1930) A L J 1043=132 I C 33.

## C. P. C. (1908) SEC. 102 (Contd)

(3) Illustrations of suits which are and which are not Small Cause suits. (Contd)

(15) Suits to recover money. (Contd)

—A suit to recover from Govt. a sum less than Rs. 500 under a contract for repair of a tank is one of Small Cause nature 12 M L T 299=1912 M W N 954 =23 M L J 132=16 I C 400=37 M 533.

—Plff, as heir of his wife, sued to recover a certain amount of money from the deft. The deft. put forward a will alleged to have been executed by the plff's wife: Held the suit fell within the purview of Art. 28 of Sch II to Pro. Sm. C C Act and was not, therefore, a suit of Small Cause nature, 87 I C 354 =A I R 1925 M 110.

—Subscribers of an unregistered body contributing on death of fellow members and dividing the amount between assignee of deceased the body itself was held to be an insurance company and the suit by a member to recover the benefit could not be entertained by a Small Cause Court. 20 I C 155.

—Lease—Possession not given as per covenant—Suit for recovery of money—Second appeal—See 6 Ind Cas 704. Failure of consideration—Suit by auction purchaser for refund of purchase money—see 12 Bom L R 723=7 Ind Cas 955. Suit to recover money made over by Magistrate acting under s. 517 Crim Pro. Code—Suit of Small Cause nature—see 9 C W N 495=1 C L J 355. Agreement for sale of land to secure money for marriage expenses of minor—Suit for recovery of money advanced—No second appeal see 2 Pat L J 627. Occupancy tenancy—Transfer of Money bond and lease of holding—Suit for money due—Small cause suit—No Second appeal See 17 I C 522.

—A suit to recover plaintiff's share in a Culkarni Vatan received by the defendant (also a sharer who had not paid the plaintiff her share for a certain number of years) is a suit for money had and received by the deft for the use of the plaintiff or of a small cause nature. 15 Bom L R 803=21 I C 181=37 B 700.

—Plff sued for Rs 40 advanced by him for the purpose of a partnership business which had since ceased to exist and also for Rs. 9 as approximate profits arising out of the dealings with the money put into the business. Held, that no second appeal lay as the value of the suit was under Rs. 500 and the suit, not being one for the balance of partnership accounts did not fall within the description of suits given in clause (c) of Art 29 of the Prov Sm. C C Act 51 I C 435.

## C. P. C. (1908) SEC. 102 (Contd)

(3) Illustrations of suits which are and which are not Small Cause suits (Contd)

(15) Suits to recover money (Contd)

--A suit to recover a sum of money forcibly taken out of the possession of the plff by defendant is cognisable by a Court of Small Causes, and where the amount involved is less than Rs. 500 there is no second appeal. 57 I C 505-2 U P L R (All) 212.

--No second appeal lies under S. 102, C P Code for recovery of less than five hundred rupees claimed as grazing fee. There can be no claim for rent unless there is a tenancy and there can be no tenancy unless a right to the land has been given to the grantee. 32 Cal L J 83-59 I C 595.

--Though precise amount could be ascertained only by the examining accounts. 12 A L J 230-23 I C 424.

--A party who sues for money has usually to establish, or to clear away something, and his money-decree does not become a declaratory decree because the judgment in his favour is preceded by some sort of declaration. A declaratory decree within the mischief of Art. 19 of Sch II to the Provincial Small Cause Courts Act is a decree in a suit of the nature described in S 42 of the Specific Relief Act. 35 L W 70-1932 M W N 142-139 I C 620-A I R 1932 M 226-I R 1932 M 751-A L R 1932 M 693. A suit to enforce an award is not the same as one to enforce a contract. 1924 Mad 485-46 M L J 51-19 M L W 210-1924 M W N 46-76 Ind Cas 843. On bailment see 1908 P R 9-98 P L R 1903-28 P W R 1903- Suit for tax illegally levied see A I R 1924 Loh 619-75 Ind Cas 737. Suit for moiety of cess paid see 5 I C 438-7 M L T 362. Suit by a landlord against his tenants to recover costs of sweepers employed under municipal orders to keep the premises clean, see 12 A L J 931-26 I C 77.

--Suit for money paid in excess of rent due see 2 Beng L R (A C) 172-11 Suth W R 30. --Suit by a mortgagee or the recovery of the balance of the mortgage money not paid to him see 29 I C 621-21 C L J 532-19 C W N 133-43 I C 59.

--The fact that the plaintiff cannot obtain a decree until the order of the Taluk Board is cleared by way of declaration does not make the suit one for a declaratory decree within Art. 19 of Sch II to the Provincial Small Cause Court Act. 35 L W 70-1932 M W N 142-139 I C 620-A I R 1932 M 226-I R 1932 M 751-A L R 1932 M 693.

--Where a suit for return of professional tax illegally levied, which according to

## C. P. C. (1908) SEC. 102 (Contd)

(3) Illustrations of suits which are and which are not Small Cause suits (Contd)

(15) Suits to recover money (Contd)

value of claim, was triable as a Small Cause Case, was coupled with a prayer restraining debt from levying the tax for succeeding two years it was held that the suit was not triable as a Small Cause suit as the prayer for injunction was not an ancillary, but an independent relief. 36 L W 659-A L R 1933 M 1166-I R 1932 M 836-140 I C 273-1932 M W N 1248.

--A suit for family provision made in favour of a daughter for the performance of her marriage see 24 I C 943-38 M 788.

--Suit by a school master who had been a regular subscriber to the school master pension fund for his removal see 25 I C 41.

--Suit for share in Dhurat collected by S. 102 defendant-Nature of see 18 I C 532-120 P R 1912-64 P W R 1913-193 P L R 1913.

--Suit to recover money payable under award see A I R 1924 Mad 485-46 M L J 51-19 M L W 210-1924 M W N 46-76 Ind Cas 843.

## (16) Other Suits.

--No second appeal lies in suit for interest only on mortgage money due. 65 I C 235 (Lah)

--Suit for arrears of hereditary allowance--Not of a small cause nature --second appeal. 18 M L T 163.

--Suit by company against shareholder for compelling payment balance of unpaid share capital is a suit of small cause nature. 59 C 1186 (1191)-36 C W N 589-140 I C 252-I R 1932 C 694-A I R 1932 C 716-A L R 1932 C 1155.

## (4) ORDERS, SECOND APPEAL FROM

--No appeal lies against an order of remand in a suit of a nature cognisable by a Court of Small Causes and valued less than Rs. 500, as no second appeal is allowed against the decree of the Lower Appellate Court in such a suit. 22 C L J 97-30 I C 894.

--No appeal lies from an order of remand passed by the Lower appellate Court in a suit of the nature cognisable by a Small Cause Court. 36 I C 396.

--There is no second appeal in a suit of a small cause nature of the value below Rs. 500. An order of remand therefore in such a suit is not open to appeal. 42 - All 200-18 A L J 167-2 U P L R (H C) 69-54 I C 432.



**C. P. C. (1908) SEC 102 (Concl'd)****(4) Orders. second appeal from (Concl'd)**

—Order of remand under O. 41, r. 23  
—Further appeal—If lies. 11 I C 315  
=50 P R 1911=210 P L R 1911=137 P W  
R 1911.

—Order of remand on point of  
custom when appealable. 23 I C 817=85 P R  
1914=120 P W R 1914=162 P L R 1914.

—Order of remand—Final order—See  
21 I C 430.

—An order, granting a review of a  
judgment, itself not appealable, is appeal-  
able, subject to O. XLVII, r. 7. An order  
granting a review for sufficient grounds  
is not appealable. 1 P L J 193=35 I C 15.

—Compensation, order for—Second  
appeal if lies, against. See 21 I C 756.

—No second appeal in execution  
matter when there is none in the suit  
itself. 60 Ind Cas 831=1921 All 55=43 All  
403=19 All L J 72.

**(5) PECUNIARY LIMIT.**

—A second appeal lies against a  
decree for mesne profits valued at less than  
Rs. 500, in a suit in which the claim inter-  
alia was for a declaration of title: S. 102  
is no bar in such a case. A court is not  
bound by any technicalities in regard to  
the form of the statement of claim. 26 C  
L J 105=41 I C 842.

—It is not open to the plaintiffs in  
their appeal to put a higher value on  
their suit than in the plaint without an  
application to amend the plaint and such  
valuation did not have the effect of  
increasing the value of the subject matter  
of the suit. 15 C W N 454=7 I C 778.

**C. P. C. (1908) SEC. 103**

—1 These words were substituted for  
the words "but not determined by the  
lower appellate Court" by s. 2 of the  
Code of Civil Procedure (Amendment)  
Act, 1926 (VI of 1926)

—The section as amended gives power  
to the High Court on second appeal to  
determine any issue of fact not only  
where that question has not been disposed  
of by the lower Court, but also where it  
has been wrongly determined by such  
Court by reason of any illegality, omission,  
error or defect such as is referred to in  
sub-s (1) of s. 100. A I R 1927 Pat 167=8  
P L T 74=102 I C 391.

—See also 31 C W N 32=99 I C 189=  
A I R 1927 Cal 1.

—For rulings under the unamended  
section see 93 I C 550=A I R 1926 Nag 319.

—To avoid gross miscarriage of justice  
resulting from the omission by the lower  
Appellate Court to determine any issue

**C. P. C. (1908) SEC. 103 (Cont'd)**

of fact or to come to definite conclusion  
on a set of facts, the High Court has the  
power of determining the issue left undeter-  
mined by the lower Appellate Court on  
the evidence on record, or of remitting  
the case to the lower Court for a finding  
on that issue with liberty to the parties  
to adduce additional evidence. A I R  
1922—P C 292=45 M 586=43 M L J 640=  
(1922) M W N 749=16 L W 102=49 I A  
286=31 M L T (P C) 54=37 C L J 199=27  
C W N 245 (P C) =68 I C 538.

—Section 103, C P Code thus enlarges  
the power of Appellate Court to go into  
evidence and determine any issue not  
determined by the lower Court. A I R  
1922 Pat 417=3 P L T 303=65 I C 536.

—Where the Trial Court did not  
decide a question of fact and the evidence  
on record was sufficient for the purpose  
the High Court decided the fact itself.  
A I R 1923 All 134=21 A L J 33=45 A  
191=76 I C 12.

—Where the lower Court fails to  
consider documentary evidence, High Court  
can give a finding itself. A I R 1923 All  
71=82 I C 772.

—And if the second Appellate Court  
considers the lower Appellate Court's  
finding unsatisfactory based on inadmis-  
sible document, a fresh finding on the  
rest of the evidence should be called for.  
A I R 1926 Mad 1003=24 L W 227=  
97 I C 785.

—But where the decision of the  
lower Appellate Court is partly based on  
improperly admitted evidence s. 103 does  
not apply. A I R 1924 Cal 1042=40 C L J  
39 =78 I C 219.

—Where however the lower Appellate  
Court has improperly admitted addi-  
tional evidence but evidently arrived at  
its conclusion on other grounds, the High  
Court can itself dispose of the case. A I  
R 1927 Cal 140=98 I C 129.

—Where the lower Appellate Court  
approaches the case from a wrong stand-  
point of burden of proof and fails to  
appreciate the value or importance of  
certain documents, and under-estimates  
their bearing on the question in issue the  
Court of second appeal may come to an  
independent finding on the question. A I  
R 1926 Nag 489=9 N L J 152=98 I C 236.

—In second appeal from dismissal  
of a suit for profits instituted in the  
Revenue Court the fact of a declara-  
tion granted by the Civil Court prior to  
the filing of the second appeal is bound to  
be taken notice of by the High Court as  
the matter opens up completely on second  
appeal. A I R 1927 All 694=103 I C 349.

—High Court will itself determine  
question of concealment and removal of



**C. P. C. 1908 SEC. 103 (Contd)**

property by judgment debtor, in second appeal, where lower Appellate Court applied O XXI r 40 without determining the question, A I R 1929 Pat 728-Ind Rul (1929) Pat 504=118 I C 312.

—High Court will take notice of error of fact such as the lower Court's holding a mortgage proved on the conclusion that there was a mortgage, where the mortgagee alleged loss of the deed and failed to prove terms of the contract. A I R 1930 Mad 65=57 M L J 789=30 L W 1045=Ind Rul (1930) Mad 685=124 I C 301.

—Where fresh finding is called for by it but is not given by the lower Appellate Court, the High Court is perfectly entitled to determine the issue as one of fact under s. 103. A I R 1930 Mad 489=Ind Rul (1930) Mad 958=127 I C 142.

—High Court will examine the finding the lower Appellate Court arrived by misplacing onus of proof. A I R 1930 Cal 591=51 C L J 465=Ind Rul (1931) Cal 28=128 I C 108.

—New plea argued for the first time in lower Appellate Court, will be allowed to be argued in High Court, if it requires no fresh evidence. A I R 1930 Lah 1010=11 Lah 393=31 P L R 755=Ind Rul (1931) Lah 21=128 I C 293.

—High Court will go into radical question of fact, as necessary for dealing with law, if the same is not definitely found by lower Appellate Court. A I R 1931 Rang 29=8 R 425=128 I C 366.

—High Court has power in second appeal to determine small question of fact and avoid remand. A I R 1931 Cal 129=34 C W N 951=Ind Rul (1931) Cal 333=130 I C 140.

See also 7 Pat 260=107 I C 821=A I R 1928 Pat 318.

—Question of title whether of fact or of law if left undetermined by the lower Court can be decided by Court of second appeal. A I R 1924 Oudh 266=10 O L J 646=27 O C 77=78 I C 895.

—High Court in second appeal cannot remand the case for re-hearing upon an issue already raised and determined. A I R 1922 Pat 575=1 Pat 639=67 I C 494.

—Question of fact not decided by lower appellate court—Evidence on record sufficient for determination of question—High Court can, in second appeal and, in Letters Patent appeal from decree in second appeal, determine question itself, instead of sending the case back for a finding from one of the lower courts. 62 M L J 573=36 L W 687=1932 M W N 506=A I R 1932 M 466 (2)=A I R 1932 M 546=A L R 1932 M 533.

**C. P. C. (1908) SEC. 103. (Contd)**

—Under S. 103 of the Code of Civil Procedure the High Court has power to decide issues of fact on a consideration of the documents exhibited in the case, when that issue which is material to the decision is left undecided by the lower Court. A L R 1933 P 179.

—When the finding of tenancy in favour of the plaintiff arrived at by the lower Court was clearly tenable on the admissible evidence, even assuming that the deed of settlement so called was inadmissible for want of registration and must be excluded, held that no useful purpose could be served by remanding the case for a fresh finding. A L R 1933 P 497 (498)=A I R 1933 P 636=145 I C 944 (2).

—The High Court, under s. 103, Civ. Pro. Code, can consider the evidence on any point, which was taken in the grounds of appeal, but which was not referred to by the lower appellate Court. 5 M L T 288=4 I C 1143 (1) or dispose of a question of fact not determined by a lower Appellate Court. 11 A L J 255=18 I C 878. see also 1 L W 249=28 I C 673.

—Second appellate Court—When can determine point of fact—Evidence not considered. See 47 I C 950.

—The High Court can determine a question of fact in second appeal when all the evidence is before it and when the lower appellate Court has not given any finding thereon. 38 M L J 476=18 A L J 707=27 M L T 102=11 L W 399=22 Bom L R 578=(1920) M W N 61=56 I C 117=47 I A 76 (P C) [On appeal from 24 M L J 571]=20 I C 374.

—A court of second appeal is within its rights, in cases where the appropriate issue has not been framed but in which there is sufficient evidence on the record for deciding that issue in raising and deciding such issue itself. 47 Cal 107=24 C W N 81=17 A L J 700=21 Bom L R 920=15 N I L R 97=10 L W 310=(1919) M W N 505=37 M L J 36=17 A L J 700=51 I C 177=46 I A 140 (P C).

—Certain property was sold. The pre-emptor and the vendee were co-sharers with the vendor and the pre-emptor was the brother of the vendor. In the suit for pre-emption the vendee pleaded, among other defences, that the pre-emptor had acquiesced in the sale being made to him. It was admitted by the pre-emptor that he was indebted, that he had no money and that at the time of the sale he was also selling the property. The Court of first instance held the custom of pre-emption proved; but that the facts did not give rise to an inference of acquiescence on the part of the plaintiff. The suit was decreed but the lower appellate court

## C. P. C. (1908) SEC. 103 (Concl'd)

held that the custom of pre-emption was not proved but did not decide the issue of acquiescence. The suit was dismissed. Held, that the lower appellate court not having decided the issue of acquiescence, it was open to the High Court in second appeal to decide the question; held also that the facts proved that the plaintiff knew of and acquiesced in the sale 16 A L J 779=47 I C 400.

## C. P. C. (1908) SEC 104

*Synopsis*

- (1) Scope of the section
- (2) Orders appealable under this section
- (3) No second appeal from order under this section.
- (4) Appeal from orders expressly for in the Code see O 43, r. 1.
- (5) Appeal from orders expressly provided for by any other law
- (6) Residuary non-appealable orders.

## (1) Scope of the Section.

—In a Letters Patent appeal against the judgment of a single Judge of the High Court in an appeal preferred under O 43, r. 1 cl. 15, it was contended that having regard to the provisions of S. 104, no further appeal lay from the order passed in such an appeal. Held, that the prohibition contained in the Code of Civil Procedure related only to the entertainment of a further appeal by another Court of high grade (other than the High Court) in such cases, and that the provisions of the Letters Patent conferring a right of appeal from the judgment of one Judge of the High Court to the same Court were not in any way interfered with by the provisions of the Code of Civil Procedure, as the latter does not control the sections of the former. A L R 1933 M 323=A I R 933 M 570=145 I C 449=38 L W 96=1953 M W N 850=1 R 6 M 70 (F B)

—Appeal from the original side of the High Court, whether lies under the Code. See Letters Patent (Cal) Cl. 15 and 43 Cal 857=20 C W N 594=34 I C 634 Art. 15 of the Letters Patent is not restricted by ss. 588 and 591 C P C. 1882 25 Mad 555.

## (2) Orders appealable under this section

## (a) Order superseding arbitration:—

Unless an award is superseded under Schedule 11 para 8 of the C. P. C S. 104. (1) (a) bars an appeal; but if the Court has in superseding an award, adopted a procedure not authorised by law, and there is no other remedy available, the Chief Court will interfere on revision, 37 P R 1895 foll. When matters in dispute are referred to

## C. P. C. (1908) SEC. 104 (Cont'd)

## (2) Orders appealable under this

## section. (Concl'd)

## (a) Order superseding arbitration (Concl'd)

arbitration through the Court and an arbitrator is deliberately selected a plea that the reference was bad by reason of the parties being minors and sanction of the Court not having been granted under O 22, r. 7 of the Code, has no force. 17 I C 388=251 P W R 1912=125 P R 1912,

(b) Order modifying or correcting an award:—No appeal lies against an order, under the Arbitration Act, setting aside an award. A I R 1925 Sind 218=79 I C 920.

—Where during trial of a case parties referred matter to arbitration and the arbitrator awarded costs to the plaintiff, but the Court refused to allow them in terms of the award, though award was accepted: Held, that the order falls within s. 104 (1) (c) and second appeal is not competent. A I R 1926 Oudh 370=13 O L J 144=93 I C 272.

—After an award was signed by arbitrators one of them added the words "Rest of the plaintiff's claim should be dismissed with costs." When the award was filed the Court remitted it to arbitrators, finding that award was not clear as to costs who amended the award by which parties were to pay their own costs. The Court ignoring both the interpolation by one of the arbitrators and the amendment after remission passed a decree with proportionate costs: Held, the order fell under s. 104 (1) (c) and an appeal was competent. A I R 1926 Lah 519=7 Lah 327 =8 Lah L J 460=27 P L R 541 =98 I C 336.

—Appeal from decree based on modified award converted into appeal from, where party misled by only reported decision on the point. 36 C W N 1069=138 I C 848=I R 1932 C 589=A I R 1932 C 713.

—An appeal lies from a decree passed in terms of an award, only in so far as it relates to modifications and corrections made in the award and on no other ground. A I R 1930 Lah 26=31 P L R 668=Ind Rul (1930) Lah 531=11 Lah 342=124 I C 339. See also 10 Lah 688=122 I C 90=30 P L R 722=A I R (1930) Lah 102.

—The true effect of the clause is to allow an appeal against the order only in so far as it modifies or corrects the award. 17 C W N 617=15 I C 519.

—(c) Order filing or refusing to file agreement to refer to arbitration:—Where an application for reference to arbitration is made in a pending case and the court finding one of the debts, unwilling to have the case sent to arbitrators rejects the

## C. P. C. (1908), SEC. 104 (Contd)

## (2) Orders appealable under this

section. (Contd)

## (c) Order filing or refusing to file agreement to refer to arbitration (Contd)

application, despite plff's readiness to discharge the unwilling defendant from the array of the parties, no appeal lies from such an order of rejection. 27 I C 721

—Agreement to refer to arbitration—Order passed on it is appealable under the old as well as new Code. 36 Mad 353=10 M L T 248=21 M L J 990=12 I C 372.

—An application was made under para 17 Sch II C P Code, for filing an agreement to refer to arbitration and when the award was filed the parties filed objection, the Court allowed only those filed by the defts. and declared the award invalid on the ground of misconduct. Against this order the plff, appealed under S. 104 C P Code. Held, (1) that neither clause (d) nor clause (f) of S. 104 C P Code applied to the case and therefore, no appeal lay as an appeal from an order; 117 P R 1916=107 P W R 1916=70 P L R 1917=34 I C 192.

—(d) Order staying or refusing to stay a suit:—Section 104 (e) is confined to orders under Sch. II, para 18 C P C and does not give right of appeal from orders under section 19, Arbitration Act. A I R 1931 Lah 644=Ind Rul (1931) Lah 690=132 I C 850.

—An appeal lies against an order granting stay of suit pending arbitration. A I R 1925 All 154=47 A 179=22 A L J 1031=L R 5 A 756 Civ=85 I C 341.

—Under S. 104 (e) of the C P Code an appeal lies from an order granting or refusing stay of a suit, where there is an agreement to refer to arbitration whether under the C P Code or under the Arbitration Act. 12 S L R 34=48 I C 434.

—Agreement to refer disputes to arbitration, set up by one party and denied by another—Power of court to decide—Appeal. See 39 I C 508.

P L R 1906.

—(e) Order filing or refusing to file an award out of Court:—Order refusing application to set aside award where the reference is in a suit pending before the Court, is not appealable, but as such an order is analogous to an order filing an award under cl (21), Court-fee stamp of Rs. 4 is sufficient A I R 1929 Lah 369=111 I C 145.

—Order filing or refusing to file an award on arbitration without the intervention of Court cannot be regarded as a decree. A I R 1928 Lah 137=9 Lah 380=107 I C 756.

## C. P. C. (1908) SEC. 104 (Contd)

## (2) Orders appealable under this

section. (Contd)

## (e) Order filing or refusing to file an award out of Court (Contd)

—Appeal from order under s 104 (f) is governed by Art. 11, Sch II Court Fees Act, for Court-fees. A I R 1928 Lah 137=9 Lah 380=107 I C 756.

—For appeal against order filing an award without the intervention of the Court, the Court-fee stamp is of eight annas. A I R 1927 All 771=25 A L J 741=103 I C 315.

—Under s. 104 (1) (f) only final orders are contemplated and order remitting award to the arbitrators directing them to make fresh award in compliance with the agreement of reference does not amount to refusal to file award and is not appealable. A I R 1926 Lah 658=96 I C 779.

—The right of appeal to file an award is not barred by the pronouncement of judgment and drawing up of decree. A I R 1925 Pat 810=4 Pat 670=7 P L T 644=93 I C 261.

—Where under para 17, Sch. II, C P C order filing an agreement is made but on unwillingness of arbitrators to act the order of reference is revoked and the suit dismissed, the order is not appealable. A I R 1926 All 55=48 A 27=23 A L J 891=L R 6 A 575 Civ=89 I C 404.

—Where at the hearing of an application for filing an award a decree is passed in accordance with the award, the decision of the Court dismissing the objection of the opposite party amounts to an order filing an award though there is no express order to that effect. A I R 1925 Lah 321=7 Lah L J 91=26 P L R 466=88 I C 533.

—Where by a single order an award directed to be filed and a decree in accordance with the award is passed an appeal therefrom is in substance an appeal from an order directing award to be filed, and can, therefore, be maintained. A I R 1925 All 404=47 A 743=23 A L J 440=L R 6 A 350 Civ=88 I C 76.

—Where there was arbitration with the intervention of Court and defendants after filing objections were absent on an adjourned date and decree was passed in the terms of the award and the application to set aside the award was dismissed; Held, no appeal lay against the order and that s. 101 (f) was inapplicable the arbitration being with the intervention of the Court. A I R 1924 Pat 603=(1924) Pat 170=3 Pat 839=6 P L T 212=83 I C 26.

## C. P. C. (1908) SEC. 104 (Contd)

## (2) Orders appealable under this section. (Contd)

## (e) Order filing or refusing to file an award out of Court. ((Contd))

—Order refusing or allowing the award to be filed is appealable under s. 104 (1) (f). Appeal does not lie against the lawful award of the arbitrators. Court's power as regard the interference with the award is limited to three questions whether there has been a reference; whether there has been award and whether any grounds under paras 14 and 15 Second Schedule exist. A I R 1923 Rang 199-I R 265-76 I C 504.

—Appeal lies from an order filing the award passed after the objections have been disposed of even if the decree is thereby reversed. In cases such as this s. 104 (f) applies and not para 21 (2), Sch II of the Code. A I R 1924 Lah 231-73 I C 820.

—Order refusing to file an award is appealable and in absence of any rules made by the High Court under s. 20, Civil Procedure Code, is to be followed. A I R 1921 All 273-19 A L J 132-43 A 348 =61 I C 269.

—Order refusing or allowing the award without the intervention of the Court to be filed is appealable, but an order filing an award in reference by Court and under para 19, Sch II is not appealable. 60 I C 590.

—Where part of a private award is outside the scope of arbitration the decision of Court on application to file it is an order and is appealable. No second appeal can lie from decision in appeal. 66 P R 1915-146 P W R 1915-31 I C 80.

—An appeal lies against an order filing or refusing to file an award in an arbitration made without the intervention of Court. The fact that a decree has been drawn up after the passing of the order cannot take away the right of appeal against the order. 42 All 185-18 A L J 78-1 U P L R (H C) 177-54 I C 443.

—Clause (f) of S. 104 of the C. P. Code refers to cases where a matter has been referred to arbitration without the intervention of the Court 154 P W R 1918 =47 I C 171.

—Under S. 104 (1) of the C. P. Code no appeal lies from an order refusing to set aside an award made and filed under the provision of, the Arbitration Act. S. 104 (f) of the C. P. Code does not apply to proceedings under clause (2) of S. 11 of the Arbitration Act. The Court, however, has Jurisdiction to hear the appeal under clause 15 of the Lettess Patent. 45 Cal 502-46 I C 687.

## C. P. C. (1908) SEC. 104 (Contd)

## (2) Orders appealable under this section. (Contd)

## (e) Order filing or refusing to file an award out of Court. (Contd)

—No appeal lies from an order passed in execution of a decree under S. 9 of the specific Relief Act. Therefore an order passed in execution of such a decree directing the arrest of the judgment debtor is not appealable either as a decree or as an order under S. 104 (1) cl. (h) of the C. P. Code. 5 P W R 1917-18 P L R 1917-39 I C 379.

—Application to file a award—Order in, open to appeal. See 38 All 297-14 A L J 332-33 I C 80.

—An order filing an award in arbitration without the intervention of the Court is appealable under S. 104 (f) C. P. C. The mere fact that the Court below has passed a judgment and a decree upon the award cannot take away the right of appeal from the order filing the award. If the order filing the award is set aside, the judgment and decree based thereon must also fall to the ground. 38 All 380 =14 A L J 481-35 I C 833.

—In the course of the hearing of an application to file an award under para 21 of Sch II of the C. P. Code, the matter was referred to an arbitrator who decided that the award was to be filed. One of the parties objected but failing to appear on the day fixed for hearing objections a decree was made ex parte in terms of the award. An application to set it aside was refused. Held, that an appeal lay under C. 43, R. I (d) the question as to whether the decree is or is not in terms of the award being one on the merits, this is a case open to appeal under S. 104 (cl), (1) (j). 38 All 297-14 A L J 332-33 I C 80.

—Award on private arbitration—Matters outside scope of reference decided

—Right to file award in Court See 30 P R 1914-31 P L R 1914-23 I C 422.

—On an application under para 20 of Sch, II of C. P. Code, an award was filed in part (to the extent it was held to be valid) by the first court but on appeal, the application was dismissed on the ground that the award could be filed in toto or not at all. Held, by Chief Court that no second appeal was competent from the order of the Appellate Court passed in appeal under S. 104 (f) C. P. Code vide Sub-S. (2) of S. 104. 66 P R 1915-146 P W R 1915-31 I C 80.

—Where a court of 1st. instance refuses to file a private award and that order is set aside on appeal, the appellate order is not appealable. 25 I C 7-7 L B R 277-8 Bur L T 44.



C. P. C. (1908) SEC. 104. (Contd.)

(2) Orders appealable under this section. (Contd.)

(e) Order filing or refusing to file an award out of Court. (Contd.)

—Pending an appeal before a District Judge, the parties referred their disputes to arbitration without the intervention of the court. An award in which the pendency of the appeal was set out was passed and on application by the successful party it was made a decree of Court by the District Munsiff. In an appeal against the order filing the award the District Judge set aside the award on the ground that a private reference pending an appeal before him was incompetent and the award thereon was invalid. In revision before the High Court objection. Held (i) that the objection to the legality of the award was found in the award itself. (ii) that an appeal lies under S. 104. cl. 2 from an order filing the award. (iii) the appeal is however confined to irregularity of the arbitration and the validity of the award. (iv) para. 21. cl. 2 and S 104. cl. 2 are not inconsistent. 22 I C 690.

—An appeal lies against an order filing an award passed on arbitration without the intervention of the court under S. 104. cl. (f) C. P. Code, although a decree may have been passed in pursuance of the award. If the order directing the filing of the award be set aside on appeal, the decree passed on the award will also be vacated, the validity of the decree depending on that of the order filing the award. 18 C W N 381-22 I C 391.

—Notwithstanding there is no appeal from a decree made in accordance with an award obtained without the intervention of the Court an appeal is competent under S. 104 (f) from an order filing an award. 176 P W R 1913-310 P L R 1913 =21 I C 298.

—No material alteration or innovation made by the new code in the law. See 18 A L J 960-69 I C 626.

—Private award Decree on the basis of award—Order filing award appealable, though decree has been passed. See 19 C W N 948-21 C L J 273-23 I C 557.

—S. 104 (1) (f) applies only to arbitration under the Code. 17 I C 902.

—Quere—Whether failure to give 10 days' time to file objections is a ground for entertaining an appeal from a decree in terms of an award. A I R 1931 All 453- (1931) A L J 442-Ind Rul (1931) All 575 =133 I C 31.

—Court fee payable in appeal from order filing award is Rs. 2. 6 Luck 703.

C. P. C. (1908) SEC. 104 (Contd.)

(2) Orders appealable under this section. (Contd.)

(e) Order filing or refusing to file an award out of Court. (Contd.)

—Award filed under S. 11 of the Indian Arbitration Act—Objected to—Objections overruled—Appeal lies A L R 1933 L 2-33 P L R 1048 =14 L 249-A I R 1933 L 44-I R 5 L 57-141 I C 64.

—Order under, directing filing of award in an arbitration without intervention of Court—Appeal from—Lies under S. 104 (1) (f) notwithstanding that pursuant to that order a decree is subsequently passed in accordance with the award. 7 Luck 128-A I R 1931 O 345-8 O W N 789.

—An appeal lies, under s. 104 (f) of the Code of 1908, from an order filing an award made in an arbitration without the intervention of the Court, in spite of the fact that the Court has, under cl. 21 (1) of the second schedule to the Code, proceeded to pronounce judgment according to the award. 172 P L R 1911-10 I C 512.

—Order directing award to be filed is appealable, but not decree following the award. 2 M W N 1911, 223.

—The words "without the intervention of the Court" in S. 104 (1) (f) of the C P C refer only to those proceedings which are taken under paragraphs 20 and 21 and not to proceedings taken under paragraphs 17 to 19 of the second schedule to the Civil Procedure Code. Therefore a decree passed in accordance with an award as the result of proceedings under paragraphs 17 to 19 is not appealable. 248 P L R 1913 =9 P R 1913-16 I C 996.

—A reference to arbitration was made in a pending litigation through court and the arbitrator's award was challenged, under 2nd Schedule, clause 15 (1) (a) on the ground of misconduct, of the arbitrator. After making an inquiry into the allegations of misconduct the Court disallowed the objections and passed a decree in accordance with the award. Held, that no appeal lay from the order disallowing the objections or from the decree passed on the basis of the award. 18 A 422 A W N (1916) 37 followed. 16 I C 595.

—Though no appeal lies from a decree in terms of the award qua decree except in so far as it is in excess of or not in accordance with the award yet an appeal so filed may be treated as one from the order filing an award under S. 104, Cl (f) C P C. 21 M L J 1005-(1911) 2 M W N 223-12 I C 269.



## C. P. C. (1908) SEC. 104. (Contd)

## (2) Orders appealable under this section (Contd)

—(f) Order under S. 95 :- Order under s. 95 granting or refusing compensation for improper arrest or attachment is appealable 26 I C 359.

see also 25 M L T 46-49 I C 86.

—But no second appeal lies from such order 36 M L J 435-50 I C 886 see also 4 Bur L T 604-11 I C 917; and 21 I C 756.

—(g) Order imposing fine or directing arrest or detention in civil prison :- Both an order of arrest and of attachment before judgment are appealable, an order of arrest is not enumerated in O. XLIII, r. 1, the right is specifically given by s. 104, and being a statutory right given by the body of the Code is not a matter of procedure and cannot be taken away by rules contained in the schedule. Its omission from O. XLIII does not mean that it does not exist. A I R 1924 Rang. 361-2 R 362 =3 Bur L J 159-84 I C 270.

—Arrest or detention in civil prison of a person otherwise than in execution of decree—Appeal from—Competent. 136 I C 367-1932 A L J 221-I R 1932 A 191 =A I R 1932 A 524-A I R 1932 A 524-A L R 1932 A 508.

—Appealability of order declining to arrest judgment-debtor in execution of decree. See 53 I C 68.

—Refusal to take action under O 39, R 2 Appeal, if lies, See 39 Mad. 907-19 M L T 314-30 M L J 523-34 I C 588.

—Small Cause decree—Transfer to ordinary court for execution—Order directing arrest of surety. See 30 I C 684.

—(i) Order made under rules from which appeal is expressly allowed by rules; See cases under O 43 r. 1. Appeal lies from an order in a matter under a particular rule in an appeal therefrom is permitted by the rule 45 B 99-22 Bom L R 1126-59 I C 421.

## (3) No Second Appeal lies from Orders under this section.

—No second appeal lies against order falling under S 104 C P C. A L R 193r N 17 (18)=16 N L J 8-29 N L R 92-142 I C 162-I R 5 N 99-A I R 1933 N 72.

—Thus no second appeal lies from the appellate order upholding modification of the award A L R 1933 L 572 (573)=34 P L R 34-A I R 1933 L 139-1 R 5 L 63-141 I C 72;

## C. P. C. (1908) SEC. 104 (Contd)

## (3) No Second Appeal lies from Orders under this section (Contd)

—Execution sale—Order refusing to set aside—Second appeal from—Not competent, where case does not come under S 47 1932 P O L 755 (Civ)=33 P L R 625-A I R 1932 L 530-A L R 1932 L 755 (Civ).

—But the prohibition against second appeal under the section does not apply to orders under S. 47 A L R 1933 A 27 (28)=54 A 1031-A I R 1933 A 57-143 I C 420-I R 5 A 255-1932 A L J 1036.

—Execution—Sale applications by different decree holders on different decrees—Order directing prior application to issue—Not appealable. A L R 1933 A 415 =A I R 1933 A 10-138 I C 686.

—Order of remand—Jurisdiction—Appeal—Revision—see 147 P L R 1911-10 I C 36.

—Where a case is remanded on appeal from an order returning plaint for presentation to proper Court, no further appeal from the order of remand can lie. Nor can there be any revision. Ind Rul (1930) All 725-125 I C 581.

—Second appeal does not lie from the result of appeal under O. XLIII, r. 1 (a).

—The Court cannot by framing order as one passed under O. XLI, r. 23, allow an appeal which would not otherwise lie A I R 1930 All 122-(1930) A L J 454-Ind Rul (1930) All 161-121 I C 545.

—Second appeal cannot lie from result of appeal under provisions of O. XLIII, r. 1 (j) A I R 1930 Lah 208-11 Lah L J 546-31 P L R 57-Ind Rul (1930) Lah 142-120 I C 684.

—A decree in accordance with award modified under para 12 Sch II is in accordance with an award within the meaning of para. 16, Sch. II, and no second appeal lies therefrom there being no decree in excess of award. A I R 1930 Lah 219-31 P L R 337-Ind Rul (1930) Lah 129-120 I C 673.

—There is no appeal against the appellate order of the District Judge, dismissing an application to file an award. A I R 1929 Lah 507-Ind Rul (1930) Lah 37-120 I C 277.

—An appeal lies from an order recording compromise, forming basis of a consent decree, and is the proper procedure for a party challenging validity of compromise on ground of want of consent. A second appeal in such cases cannot however lie. A I R 1929 Lah 472-Ind Rul (1929) Lah 886-119 I C 422.

—Where an order allowing application for filing an award is reversed in appeal

## C. P. C. (1908) SEC. 104 (Contd)

## (3) No Second Appeal lies from orders under this section (Contd)

A revision lies and the Court-fees of Rs. 4 is sufficient. A I R 1929 Lah 367=110 I C 302.

—Second appeal against order setting aside or refusing to set aside a sale cannot lie even if the matter is one between the decree-holder, auction purchaser and judgment-debtor. A I R 1927 Cal 657=45 C L J 557=104 I C 188.

—Second appeal against order of Appellate Court, confirming or refusing to set aside a sale under O. XXI, r. 92 is not maintainable. A I R 1926 Lah 204=91 I C 213.

—A second appeal from order returning plaint cannot lie. A I R 1926 Lah 141=89 I C 384.

—A second appeal against an order reversing order of lower Court and setting aside sale under O. XXI, r. 90 is not competent. A I R 1924 Pat 803=5 P L T 443=78 I C 315.

—Sub s. 2 of s. 104 deals with internal appeals within the limits of British India. The application to file an award may be made to the Subordinate Judge. If the amount at stake is below certain figure, the appeal would lie from him to the District Judge, and if above that figure, it would lie to the High Court. The provision is intended to prevent any appeal beyond the District Judge where the sum in dispute is small. In this respect it runs parallel with s. 100, which limits second appeals from appellate decrees by District Judges. That section deals only with decrees while the decision on arbitration questions are termed orders. Section 104 does not therefore take away the general right of appealing to the Crown given by s. 109. A I R 1924 P C 95=L R 5 P C 216=(1924) M W N 79=7 N L J 62=34 M L T 62=19 L W 549=20 N L R 33= 51 I A 72=22 A L J 386=51 C 361=46 M L J 628=26 Bom L R 586=28 C W N 977 (P C)= 83 I C 531.

—No second appeal lies from an appellate order under O XLIII, r. 1 (a) and remanding the case for trial on merits. 2 Lah L J 587=68 I C 304 See also 62 I C 986 =3 Lah L J 463=A I R 1921 Lah 156.

—Under s. 104 (2) no second appeal lies from the order specified in sub s. (1) but it cannot take away the right of appeal conferred by special provisions in the Letters Patent A I R 1922 Lah 380=3 Lah 188=67 I C 383.

—Interlocutory order is not appealable but it has been admitted that no second

## C. P. C (1908) SEC. 104. (Contd)

## (3) No Second Appeal lies from orders under this section (Contd)

appeal lies, A I R 1921 Lah 265=82 P L R 1922=67 I C 278.

—No second appeal lies from an appellate order under O XLIII r. 1 (a) nor does the remedy by way of revision lie. 43 A 334=19 A L J 110=61 I C 36.

—Application to set aside sale on the ground of fraud—Second appeal if lies, 14 I C 53=17 C W N 524 see also 15 I C 679 and 54 I C 941.

—No second appeal lies against an order passed in appeal upon a petition by an auction purchaser to set aside a sale on the ground that the judgment debtor had no saleable interest in the property. 45 I C 701.

—Under the present C P Code no second appeal lies from an appellate order reversing an order of the first court setting aside an execution sale under O 21, R 92. 41 I C 751.

—An order passed under O 21, R 92, C P C is not open to second appeal. 4 O L J 372=41 I C 121.

—The character of the decision of a question within the scope of R. 90 of O 21, of the C P Code is not altered by an allegation of fraud of a more comprehensive scope. No second appeal by a decree-holder lies under S 101 (2) of the C P Code against an order based on the ground of fraud in the publication of sale, although there was allegation of fraud of a wider scope imputed to the decree-holder, viz, that the decree-holder had taken out execution though his decree had been satisfied in full out of Court. 25 C L J 399=49 I C 426.

—Order disallowing an application under O 21, R 89. Second appeal whether lies—change in the law. See 38 Cal 333=14 C L J 224=15 C W N 844=10 I C 343.

—No second appeal lies from an order passed in appeal preferred against an order made on an application under O 21, r. 89, Civ Pro Code 1908. S 104, sub-sec. 2, Civ Pro Code 1908, has taken away the right of second appeal from cases under s. 310. A read with s. 244, Civ Pro Code, 1882, in which such appeal was allowed under the Code of 1882. 38 C 339=14 C L J 224=10 I C 345=15 C W N 844.

—No appeal lies from the order of an appellate court setting aside a sale in execution. 13 A L J 351=23 I C 270. Order refusing to set aside sale by App. Court—Review—District Judge setting aside sale—No second appeal. See 6 P W R 1915=27 I C 589.

## C. P. C. (1908) SEC. 104 (Contd)

## (3) No Second Appeal lies from Orders under this section (Contd)

—An order passed by the appellate court under R. 20 of Sch II, C P Code directing the filing of an award and the passing of a decree in accordance therewith is not appealable under S 104 (2). Quare. Whether the order is subject to revision? 143 P W R 1914-280 P L R 1914-27 I C 332.

—No second appeal lies from an order passed under O 21, R 19 of the Civil Procedure Code 1908 even if the auction purchaser is the decree holder himself. 44 Bom 472-22 Bom L R 383-56 I C 597.

—Record of compromise by court—Objection by other party—Appeal See 27 M L J 173-25 I C 56.

—No appeal lies from an order remanding a case passed on appeal from an order under rule 10, of Or. 7 C P C the remand being on the ground that the first court had jurisdiction to try it. Nor can there be revision from such an order. 119 P R 1912-101 P L R 1913-48 P W R 1913-18 I C 529.

—Execution sale under the old Code—Application to set aside after the new Code came into force—If governed by the New Code—Second appeal barred. See 16 I C 436.

—Application to set aside sale on the ground of fraud—Dismissal of—No second appeal. See 15 A L J 920-43 I C 522.

—Clause (w) of R. 1 of O 43 of the Civil Procedure Code has to be read along with R. 7 O 47: and there is no appeal from an order granting a review of an ex parte judgment passed on appeal except on any of the grounds mentioned in R 7 of O 47. 14 I C 39.

—No second appeal lies from an appellate order setting aside a sale under O. 21, r. 90. But the High Court may entertain an appeal or a revision, if the case calls for further consideration. 13 I C 147.

—Order of remand for trial on the merits—Appeal against, if competent. See 10 I C 35.

—No appeal lies from an order passed in appeal remanding for trial on the merits a case in which the plaint was returned by the court of first instance for presentation to a proper Court. 9 I C 666-33 A 479 =8 A L J 12.

—Application to set aside an ex parte decree—Dismissal of Order—No appeal See 9 I C 55-9 M L T 269.

—Second appeal does not lie where first appeal is not permitted. A I R 1921 Lah 156-3 Lah L J 463-52 I C 986.

## C. P. C. (1908) SEC. 104 (Contd)

## (3) No Second Appeal lies from orders under this section (Concl'd)

—No appeal is competent from the order of an appellate court remanding for fresh decision a case on appeal against an order setting aside or refusing to set aside a sale in execution of a decree because there is no second appeal from the final decision of such court as is laid down by S. 104 (2) of the C P Code. Where the real point of limitation has not been duly considered by the lower court the Chief Court is competent to and should interfere with, its decision if wrong. In the case of a wrong decision of the lower court when no appeal lies, the Chief Court has power to interfere, and can convert an appeal into a revision. 29 P L R 1919-2 P W R 1919-50 I C 610.

## (4) Appeal from Order Expressly Provided for.

See cases under O. 43, r 1

## (5) Appeal from orders expressly provided for by any other Law

—Appeal lies against order refusing to execute award under the Co-operative Societies Act, holding it to be a mere nullity. A I R 1926 Lah 547-8 Lah L J 310-27 P L R 706-97 I C 288.

—Appeal lies from order under Succession Act passed by the District Judge to High Court and is governed in procedure by provisions of the C. P C relating to appeals. A I R 1929 Rang 109-Ind Rul (1929) Rang 241-118 I C 401.

Execution sale—Application to set aside—Dismissal—Appeal dismissed by a Judge of High Court—Letters Patent appeal incompetent. See 39 All 19.

## (6) Residuary non-appealable orders, instances of.

—No appeal lies under S. 104 C P Code against an order under S. 73 of the Code refusing rateable distribution as it will affect other decree-holders. 36 B 156, dist, 1 L W 234-23 I C 422.

—The Code does not provide for an appeal from an order passed under s. 151, and cannot, therefore, be maintained. A I R 1930 Lah 789-31 P L R 477-12 Lah L J 71-Ind Rul (1930) Lah 294-122 I C 102.

—Amendment, order allowing—Not appealable. See 42 I C 453.

—Order dismissing suit under O. 9, R. 2 not appealable—Proper remedy—Fresh suit or application under O. 9, R 4. See 14 A L J 347-33 I C 737.

## C. P. C. (1908) SEC. 104 (Contd.)

## (6) Residuary non-appealable orders instances of (Contd.)

—Order refusing withdrawal of execution case is appealable. A I R 1922 Pat 525 =1 Pat 232=3 P L T 445=65 I C 122.

—No appeal lies from an order giving or refusing leave to bid at an execution sale. A I R 1929 Mad 903=Ind Rul (1930) Mad 292=122 I C 161.

—Order granting interest on mortgage money for period during which sale-proceeds of mortgaged property are lying in Court, is not appealable but is open to revision. A I R 1929 Rang 127=Ind Rul (1929) Rang 256=118 I C 416.

—Separate appeal stamped as an appeal from an order cannot lie against order removing the names of persons from record who admittedly died before filing suit. A I R 1926 Lah 513=8 Lah L J 324=27 P L R 735=97 I C 192.

—An order allowing a suit to be withdrawn with liberty to bring a fresh suit is not appealable. A I R 1926 Oudh 185=88 I C 1029.

—No appeal lies from an order which is either conditional or provisional and does not result in a final decree. A I R 1924 All 376=L R 5 A 238 Civ-46 A 372=22 A L J 345=79 I C 363.

—Order staying a suit under s. 19 of the Arbitration Act is not appealable. A I R 1923 Sind 25=82 I C 81. See also 81 I C 759=17 S L R 195=A I R 1923 Sind 38.

—No appeal lies from an order granting leave to sue a Receiver for damage caused by his negligence, laches, etc. 22 Bom L R 1126=59 I C 421.

—Order for delivery of possession —Not appealable, See 16 A L J 150=42 I C 936.

—An order passed under O. 9, r. 4 refusing to restore a suit dismissed for default of appearance of both parties under O. 9, r. 3, is not appealable. 250 P W R 1911=9 I C 238.

—An order setting aside an ex parte decree is not appealable and as such cannot be questioned in an appeal from the final decree passed after restoration. 13 A L J 1089=30 I C 2.

—Order dismissing for default—Application under s. 311, C P C See 14 C W N 573=5 Ind Cas 493. Order passed under O XXI, r. 90 can be interfered with by the High Court where the application is a combined application under O XXI, r. 90 and O XXI, r. 22, if appeal lies from the decision under O XXI, r. 22. A I R 1921 Pat 145=2 P L T 491=6 P L J 319=(1921) Pat 181=61 I C 823.

## C. P. C. (1908) SEC. 104 (Contd.)

## (6) Residuary Non-appealable orders, instances of (Contd.)

—Order permitting withdrawal of a suit under O XXIII, r. 1 does not amount to a decree and hence is not appealable. A I R 1922 Lah 267=65 I C 719.

—Award-Decree-Appeal-Provision as to, not applicable to matters outside reference. See 32 I C 881.

—Order rejecting appeal under O. 41, R 10 (2) C P Code-Refusal to set aside-No appeal from order of refusal-Revision-Interference rare see 32 I C 83.

## C. P. C. 105. Clause (1)

General:—Ss. 105 and 99 are not mutually destructive. A I R 1927 Rang 150=5 R 80=102 I C 379.

—S. 629 C P C 1882 is not controlled by S 591 of the same Code. In an appeal from a decree the appellant is entitled to challenge it on the ground of any error, defect or irregularity in any order affecting the decision of the case, and it is for the court to which appeal is referred to consider what points the appellant is entitled to urge in such an appeal. The same principle applies to appeals to the Privy Council. A L R 1933 B 336 (338) =35 B L R 415=A I R 1933 B 251=I R 6 B 64=145 I C 258.

—S. 105 C P Code does not apply to appeals to His Majesty in Council and does not operate to give a new meaning to the word 'final' in S. 109 or supply a guide to the interpretation of that section 33 A 391, foll. 26 M L J 96=38 M 509 = (1914) M W N 64=14 M L T 530=21 I C 842.

—In s. 105 (1) "save as otherwise expressly provided" means except as provided in Acts other than the Civil Procedure Code. A I R 1924 Rang 237=2 R 117=80 I C 746.

—The right conferred by S 105 of the C P C is unqualified and by complying with the directions or findings of an intermediate order a plff. is not deprived of the right to arise in appeal the question of the propriety of such order and to attack its correctness. 1 Lah 54=53 I C 644.

—Decision as to legal representation—No appeal—Hence can be attacked in the appeal from the decree in suit. 39 I C 371.

—Amendment of pleading introducing new cause of action—Expiry of limitation period objection to amendment can be taken in appeal. See 27 I C 144.

—A person who is aggrieved by an order of remand and is prejudicial under S. 105 (2) C P. C., from disputing its

## C. P. C. (1908) SEC. 105 (Contd)

## Clause (1) (Contd)

correctness only if an appeal lies to the Privy Council against the order. Where no appeal lies to the Privy Council under S. 109 (a) on the ground that the decision of the High Court is not a "final order" or a "decree" passed on appeal by the High Court, S. 105 (2) would have no application. 35 Bom L R 458=144 I C 916 =A I R 1933 B 260=A L R 1933 B 352.

**Affecting the decision of the case:—**  
 'Affecting the decision of the case' means affecting the decision of the case on the merits. A I R 1931 All 329=Ind Rul (1931) All 374=131 I C 518.

—The word 'affect' predicates that error, defect or irregularity has influenced the conclusion so that unjust result has been arrived at. Hence 'affecting the decision of the case' means 'affecting the decision of the case on merits'. A I R 1931 All 294=(1931) A L J 377=Ind Rul (1931) All 577=133 I C 129.

—In s. 105 (1) "decision of the case" means decision of the case on merits. A I R 1925 All 610=48 A 175=24 A L J 56=L R 6 A 601 Civ (F B)=90 I C 180.

—But it has been held by the Rangoon High Court that it is not necessary to read into s. 105 additional words "on the merits." A I R 1927 Rang 150=5 R 80=102 I C 379.

—Order for substitution—Not liable to be questioned in appeal from the decree. A L R 1933 C 861=37 C W N 138=A I R 1933 C 498=145 I C 170.

—It is true that no second appeal lies from an order, but an order may be questioned in second appeal if it "affects the decisions of the case." Where therefore an abatement is not set aside, the result is that certain parties are dismissed from the case, and so far as the parties go out of the case, the other party has no remedy left, the decision is not given on the merits but on a purely technical ground, and such an order refusing to set aside the abatement may be questioned in second appeal. A L R 1933 A 340 (341)=1933 A L J 561=1 A W R 977=A I R 1933 A 294=I R 5 A 386=144 I C 133.

—Abatement—Order setting aside—Does not affect the decision on merits—Cannot be questioned in appeal. (Broadway C J and Abdul) A I R 1933 L 366.

—Substitution of legal representatives—Order allowing—Correctness of—Challenge of, in appeal from decree in suit—Not permissible. 37 C W N 138 (141).

—Abatement of suit—Order setting aside—Correctness of—Challenge of, in appeal from decree in suit—Not permissible. 37 C W N 138 (141).

## C. P. C. (1908) SEC. 105 (Contd)

## Clause (1) (Contd)

—An order extending time fixed for payment by a preliminary decree in a fore closure suit may be impeached in an appeal from the final decree as the question is one affecting the decision of the case. 7 N L R 162=12 I C 795.

—Affecting the decision of the case means an unjust result has been arrived at in the decision of the case on merits. A I R 1931 All 294=1931 A L J 377=133 I C 129=53 All 612.

—See also 32 C W N 1020; 115 Cal 183. and A I R 1926 Cal 126.

—Where an order setting aside an abatement does not affect decision of a case on merits, s. 105 (1) does not apply. If it affects merits s. 105 (1) applies. A I R 1925 All 426=47 A 555=23 A L J 444=L R 6 A 297 Civ=87 I C 211.

See also A I R 1925 Cal 473=40 C L J 5:8=85 I C 100; A I R 1925 Cal 7 66=52 C 472=29 C W N 675. and A I R 1923 Lah 230=71 I C 587.

—Order of lower Appellate Court setting aside abatement is such as affects merits and can be made ground of appeal as per s.

105 (1). A I R 1923 Lah 230=71 I C 587. See also 65 I C 745 (Lah). See also 63 I C 845 (Cal). See also 53 I C 644=1 Lah 54. See also 46 I C 816. See also 46 I C 922. See also 70 I C 893=1 Bur L J 231=4 U B R 93=A I R (1923) Rang 29. See also A I R 1923 Pat 45=2 Pat 207=3 P L T 765=(1922) Pat 321=68 I C 363. See also 20 C W N 43=32 I C 866. See also A I R 1925 Nag 185=80 I C 626.

—Any error, defect or irregularity in any non-appealable interlocutory order, affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal. A I R 1922 All 118=44 A 534=20 A L J 349=66 I C 920.

—S. 105 (1) does not apply to order refusing permission to withdraw with liberty to bring fresh suit as the order is such as does not affect merits. A I R 1925 Cal 711=41 C L J 186=86 I C 1029. "Affecting the decision of the case." See 10 A L J 130=34 A 592=16 I C 1.

—Defect in procedure affecting the decision of the case, is a good ground of appeal. A I R 1923 Pat 609=10 P L T 589=Ind Rul (1930) Pat 16=120 I C 304.

—Appeal must be from decree:—Question of custom can be agitated in second appeal from final decree if certificate is obtained. A I R 1923 Lah 535=5 L L J 392=73 I C 630.

—Where no appeal is preferred against final decree, it will remain effective. A I R 1923 Bom 200=25 Bom L B 237=72 I C 401.



## C. P. C. (1908) SEC. 105 (Contd)

## Clause (1) (Contd.)

## Appeal must be from decree (Concl'd)

—Partition suit—No appeal from preliminary decree—Duty of Appellate Court is to see whether preliminary decree was capable of enforcement. A I R 1924 Cal 80=38 C L J 111=75 I C 319.

—An aggrieved party can challenge in appeal from decree any findings on preliminary issues regarding jurisdiction or limitations. A I R 1921 Bom 220=23 Bom L R 92=45 B 627=60 I C 885.

—Arbitration Award:—Decision of a case cannot be superseded by an order superseding arbitration and it cannot be set forth as a ground of objection in appeal from final decree A I R 1921 Lah 145=3 Lah L J 59=38 P L R 1921=59 I C 676.  
See also. 38 I C 206.  
See also. 37 I C 844.

—Order setting aside an award is non-appellable but can form ground of objection in appeal if it affects merits. A I R 1928 Lah 753=110 I C 748.

—S. 105 (1) enables an order superseding an award to be a ground of attack in appeal from a final decree. A I R 1925 All 566=47 A 916=23 A L J 656=L R 6 A 459 Civ=89 I C 173.

—Order setting aside the award is one affecting the decision of the case, therefore, on appeal from the final decree, such an order can be questioned. A I R 1929 Cal 322=56 C 21=Ind Rul (1930) 163=121 I C 675.

See to the same effect A L R 1934 O 19=10 O W N 1177.

—Decision on the merits—Supersession of award, whether affects—Award made within time but filed beyond it.  
See 37 I C 844.

—An order of a court setting aside an arbitration award and superseding the arbitration proceedings is an order affecting the decision of the case within the meaning of S. 105 of the C P Code and an appeal lies against such an order. 37 All 456=13 A L J 653=29 I C 411.

—When an appeal is finally preferred against a decree of a Court of first instance, which Court has, in the course of the suit, set aside an award of the arbitrators on the ground of misconduct, the order setting aside the award can be traversed in the appeal against the whole decree. 97 P R 1912=106 P W R 1912=133 P L R 1912=15 I C 62.

—Orders remitting the award to arbitrators for re-consideration and the subsequent order superseding arbitration are not open to challenge in appeal, inasmuch as these orders do not affect the final decision on merits. A L R 1933 L 1194=A I R 1933 L 530=146 I C 334=I R 6 L 94.

## C. P. C. 1908 SEC. 105 (Contd)

## Clause (1) (Contd)

—Error, defect or irregularity:—Under s. 105 (1) a ground of objection may be preferred, not from the order but from an error, defect or irregularity affecting the decision of the case on the merits. A I R 1931 All 329=Ind Rul (1931) All 374=131 I C 518.

—An appeal against an order is different from advancing a ground of appeal about defect or error in the order. A I R 1931 All 294=(1931) A L J 377=Ind Rul (1931) All 577=133 I C 129.

—The words error, defect, or irregularity in S. 105 C P Code mean error, defect, or irregularity affecting the decision of the case on the merits. Hence the validity of an order under O 22 R 9 (2), C P C cannot be questioned under S. 105 C P C. 14 A L J 610=35 I C 209.

—Error, defect or irregularity in preliminary order affecting merits can form ground of objection in appeal against final order. A I R 1925 Mad 199=48 M 267=47 M L J 710=21 L W 136=85 I C 333.

—Error, defect or irregularity in order making a person party in appeal though non-appellable can be made a ground of attack in appeal under s. 105 (1). A I R 1925 All 768=47 A 853=23 A L J 757=L R 6 A 386 Civ=88 I C 493.  
Error, defect or irregularity in an interlocutory order though partly in favour of an unsuccessful party, can be made a ground of objection in appeal if it affects merits. A I R 1927=Cal 733=46 C L J 51=104 I C 151.

—Defect or irregularity mentioned in s. 105 must be of law or procedure and not of fact. A I R 1930 Pat 266=9 Pat 102=Ind Rul (1930) Pat 488=125 I C 136.  
See also 32 C W N 1020=115 I C 184=A I R 1929 Cal 26.

—Ex-parte decree or order:—Propriety of an order setting aside an ex-parte decree cannot be set forth as a ground of objection in the memo of appeal from the decree in the suit. A I R 1931 All 294=(1931) A L J 377=Ind Rul (1931) All 577=133 I C 129.

—Order setting aside an ex parte decree merely ensures a hearing on merits and as such does not come under the operation of s. 105, but where it is set aside only against some of the defendants and should have been set aside against others the order affects the decision of the case and s. 105 can be resorted to. A I R 1930 Pat 266=Ind Rul (1930) Pat 488=9 Pat 102=125 I C 136.

—Order setting aside an award is the same thing as setting aside ex parte

## C. P. C. (1908) SEC. 105 (Contd)

## Clause (1) (Contd)

## Ex-parte decree of order (Concl'd)

decree and therefore can be objected to in appeal from final decision whether it affects decision on merits or not. A I R 1929 Lah 174=Ind Rul (1929) Lah 770=118 I C 434.

—S. 105 (1) does not apply to order setting aside ex parte decree when such order does not affect merits. A I R 1927 Bom 455=51 B 495=29 Bom L R 925=103 I C 262.

—See also A I R 1923 Lah 425=72 I C 410, See also A I R 1924 All 929=L R 5 A 335 Civ=79 I C 69.

—When an order setting aside ex-parte decree affects merits, s. 105 (1) applies. A I R 1927 Rang 150=5 R 80 =102 I C 379.

—Court improperly refused adjournment and passed ex parte decree. Application to set aside ex parte decree was dismissed order refusing adjournment can be set forth as a ground in appeal from ex parte decree according to s. 105. A I R 1925 Pat 534=7 P L T 381=1925 Pat 199=91 I C 167.

—S. 105 (1) applies to order setting aside ex parte final decree as that order affects merits. A I R 1924 Mad 890=47 M L J 641=35 M L T 131=(1924) M W N 884=20 L W 954=85 I C 808.

—An order setting aside an ex parte decree cannot subsequently be questioned under S. 105 (1) C P Code, in appeal from the decree passed after restoration, as that order does not affect the decision of the case with reference to its merits. 3 O L J 231=34 I C 713.

—While an appeal lies under O 43 R 1 (d) of the C P Code against an order refusing to set aside a decree passed ex parte no appeal lies against an order setting aside such a decree. Under S. 105 (1) of the Code, any error etc, made by a Court in setting aside an ex parte decree is not an error, etc, "affecting the decision of the case" and therefore, cannot be set forth as a ground of objection in the memorandum of appeal. 40 P R 1916=133 P W R 1916=31 I C 914.

—Interlocutory Orders:—Though interlocutory order is not appealable it can be objected to in an appeal on error, defect or irregularity in the final order. A I R 1930 Pat 266=Ind Rul (1930) Pat 488=9 Pat 102=125 I C 136; see also A I R 1930 Mad 988=33 M L W 391=60 M L J 79=Ind Rul (1931) Mad 207=1930 M W N 644=129 I C 63.

—S. 105 (1) does not apply to an order passed after decree as the order is

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## C. P. C. (1908) SEC. 105 (Contd)

## Clause (1) (Concl'd)

## Interlocutory Orders (Concl'd)

not interlocutory order. A I R 1928 All 194=26 A L J 166=Ind Rul (1929) All 233=114 I C 41.

—Appeal does not lie from order assigning administration bond, 13 I C 690.

—S. 105 contemplates two things, there being a regular appeal about something else, and in that appeal the insertion of a ground of objection under s. 591. Where, therefore, an appeal was made ostensibly against a decree in the suit, while the sole ground of the appeal was against an interlocutory order passed therein, held that the appeal was not maintainable. 22 A 366=A W N 1900, 109.

Applicability of S. 105 to orders and interlocutory orders leading up to the final order—Grant of leave to sue, appealable. See 35 I C 74.

—Second Appeal:—Arbitrary exercise of discretion by the lower Courts—Only and not proper exercise of discretion can be questioned. A L R 1933 A 340 (342)=1933 A L J 561=1 A W R 977=A I R 1933 A 294=I R 5 A 386=144 I C 133.

## Clause. ( 2 )

—The view that the right of miscellaneous appeal against the remand order merged in the larger right of regular appeal against the final decree, though correct under the Code of 1882, is obsolete now in view of change in law introduced by the new Code. 8 N L R 42=14 I C 673.

—S. 105 (1) does not apply to a remand order returning plaint by Appellate Court as it does not affect merits. A I R 1926 Mad 900= 51 M L J 119 =(1926) M W N 613=24 L W 630 =97 I C 790.

—S. 105 gives finality to remand orders. A I R 1923 Cal 385=72 I C 588.

—If a party is aggrieved by an order of remand from which an appeal lies, he must appeal therefrom or else he shall be precluded thereafter from disputing its correctness. A I R 1923 Mad 67=(1922) M W N 657=43 M L J 340=16 L W 552=31 M L T 465=69 I C 673.

—Order of remand if not appealed against precludes disputing its correctness thereafter. A I R 1928 Cal 325=55 C 506=110 I C 347. See also A I R 1925 Mad 1019=22 L W 450=85 I C 996. See also A I R 1926 Nag 164=89 I C 1009; See also A I R 1923 Nag 283=82 I C 645; See also A I R 1925 Pat 530=6 P L T 805=(1925) Pat 185=88 I C 495. See also A I R 1923 Rang 29=4 U B R 93=1 Bur L J 231=70 I C 893; and A I R 1928 Rang 297=6 R

## C. P. C. (1908) SEC. 105. (Contd.)

## Clause (2) (Contd.)

506=113 I C 803; and A I R 1928 Mad 430=27 M L W 483=109 I C 130; and A I R 1926 Cal 509=91 I C 287; and 302 P L R 1913=210 P W R 1913=20 I C 761; and 57 I C 52; and 10 N L R 28=23 I C 238.

—On second appeal from the decree of the L. App. Court decreeing the claim it was contended that finding as to demise could not be gone into. Held. that S. 105 (2) did not apply to this case, as the test is not whether a decision has been given in the Civil Mis. appeal but whether the party availed himself of the appropriate remedy of appealing against the order. 29 M L J 772=2 L W 509=29 I C 386.

—An order of remand is appealable only in which the decree which would have been passed by the Appellate Court, had the court, instead of remanding the case under O. 41 R 23 decide the whole suit and passed a decree is appealable. 50 P R 1911=210 P L R 1911=137 P W R 1911=11 I C 315

—But an aggrieved party can dispute correctness of remand order in second appeal if he be otherwise entitled to do so. A I R 1926 Mad 900=51 M L J 119= (1926) M W N 613=24 L W 630=97 I C 790.

—And although a party cannot refer question decided before order of remand, Court can re-open same if necessary. A I R 1926 Mad 830=94 I C 226.

—It should also be noted that S. 105 does not control Art 15. Letters Patent. Hence order of remand can be attacked in an appeal under Art. 15 against the final decree. A I R 1929 Mad 349=30 L W 787=Ind Rul (1929) Mad 787=118 I C 291. S. 105 (2) does not apply to Privy Council appeals. A remand order of High Court which is not final order cannot be appealed against in Privy Council. A I R 1925 Nag 349=22 N L R 132=88 I C 69.

—See also A I R 1925 Rang 147=3 Bur L J 248=84 I C 519. See also A I R 1924 Mad 701=46 M L J 357=19 L W 458=(1924) M W N 380=34 M L T 112=78 I C 938.

—Lower Court dismissing suit by s. 33, Madras Act of 1894—Appellate Court reversed and remanded the case dealing also with s. 27 (4) of Madras Act and holding the suit not barred by it—No appeal from this. In second appeal after remand defendants could not contend that s. 27 (4) was a bar. A I R 1925 Mad 916=86 I C 608.

—An order of the Court returning a plaint for amendment is not appealable under S. 105 C P C but the plff could challenge the correctness of the order in his appeal from the decree notwithstanding

## C. P. C. (1908) SEC. 105 (Contd.)

## Clause (2) (Contd.)

ing that he had complied with the order and that he could have allowed his suit to be rejected and appealed from the rejection. 1 Lah 54=53 I C 644.

—Where the court of first instance goes into the evidence and records findings on all the issues but dismisses the suit as not maintainable, the disposal, is on a preliminary point and an appellate court remanding the suit for retrial acts under O 41 R 23 though the appellate Court might frame certain additional issues and send them also for trial. Such an order of remand if appealed against under S. 105, becomes final. 4 Pat L J 645=(1920) Pat 91=52 I C 125.

—Under S. 105 (2) of the C P Code a lower court cannot treat order of remand of the appellate court as a nullity owing to the want of jurisdiction in the latter to pass it. A party who omits to raise the question of the jurisdiction of the appellate court at the hearing of an appeal and to appeal from the decision reached cannot be allowed to object to that decision in the subordinate court to which the matter in dispute is remanded. 47 I C 886.

—Decision on interlocutory matter—Failure to appeal against, effect of—Appeal. See 40 I C 621.

—There can be no appeal from the order of remand on the question of the existence or non-existence of custom. But where the parties were admitted governed by Customary Law, the proper course was to set aside the order of remand and send back the case to the Dt. Judge in order that he might pass a decree for what the plff. was entitled to by custom. 109 P L R 1917=76 P W R 1917=39 I C 775.

—No appeal lies to the High Court against an order of remand passed by a Dt. Court in a suit under Ss. 112 and 114 of the Madras Est. Land Act. 1 L W 667=25 I C 425.

—Final order remanding on question as to pleading or as to bar under S. 43 of C P Code, 1882—Interlocutory Judgment—No appeal to Privy Council See 26 M L J 66=14 M L T 591=22 I C 9.

—Suit of Small Cause nature for less than Rs. 500—Order of remand not appealable. See 22 C L J 97=30 I C 894.

—Remand by Appellate Court for findings on issues not tried—No appeal. See 20 C W N 43=32 I C 866.

—Remand order is conclusive only regarding points decided by it. A I R 1925 Oudh 27=85 I C 468.

## C. P. C. (1908) SEC. 105 (Contd)

## Clause (2) (Contd.)

—Remand order on one point raised. Decision on other point also must be thought to be confirmed by remand order. A I R 1922 P C 51=26 C W N 739=31 M L T (P C) 38=16 L W 447=(1922) M W N 671=74 I C 597.

—Pending suit Court remands case for finding on undecided issues. The Court can disregard, when finally deciding case reasons for remanding case. But decision on law points by Court of co-ordinate jurisdiction is final regarding setting aside decision of lower Court and laying down law on remand. A I R 1923 Pat 226=4 P L T 35=76 I C 136.

—Remand proper where decision is affected on merits. But remand order improper under r. 23 of O XLI unless the case has been disposed of without entering into full merits by reasons of decision on law of fact preventing case from being tried to the end. A I R 1923 Oudh 177=26 O C 10=10 O L J 36=73 I C 591.

—Objection as to amendment of plaint must be taken before order of remand. A I R 1922 Cal 255=26 C W N 73=35 C L J 2 5=65 I C 39.

—Point of law decided as the order of remand cannot be re-opened at the time of appeal from the decree in the suit in which the order of remand was made 40 M L J 528=14 L W 236=62 I C 703.

—Points decided by order of remand cannot be re-considered by lower Court. A I R 1921 Nag 129=61 I C 575.

—Remand order under O XLI, r. 23 by single Judge of High Court—No appeal taken—Order cannot be questioned in appeal from order passed after remand. A I R 1921 27 All 6=19 A L J 139=43 A 377=60 I C 975.

—Order of remand is appealable if Appellate Court confirms dismissal of suit in part and remands the case as to the other part. A I R 1921 Lah 154=3 Lah L J 426=2 Lah 252=63 I C 776.

—Where a suit has been remanded on appeal, an appeal from the order after the suit has been taken up by the first Court on remand and finally disposed of is incompetent. S. 105, cl. (2) of the new Civ. Pro. Code has no bearing from this question but applies to the converse case. 15 C W N 830.

—Where a suit has been remanded under O 41 R. 23 the fact that before the appeal against the order of remand is filed, the order of remand has already been carried out by the First Court, is no bar to the hearing of the appeal. 15 I C 191.

## C. P. C. (1908) SEC. 105 (Concl'd)

## Clause (2) (Concl'd.)

—A Court hearing an appeal against an order of remand has power not only to decide whether the order of remand is in accordance with law or not but also whether the decision is correct or not and to dispose of the suit accordingly. 15 O C 53=15 I C 181.

—An order of remand is not a decree or final order within the meaning of S. 109 of the present Code of Procedure. Hence, where an application was made for leave to appeal to His Majesty in Council from an order of the High Court reversing the decree of the lower court on a preliminary point and remanding the cause for trial on the merits, held that the order was an interlocutory order and therefore an application for leave to appeal to His Majesty in Council did not lie—33 A 391=3 A L J 192=9 I C 932.

## C. P. C. (1908) SEC. 106

—Order in appeal returning plaint—Appealability—Suits Valuation Act, S. 11—Under-valuation—Trial on merits—No prejudice—Duty of appellate Court. See 35 All 58=12 A L J 21=22 I C 614.

## C. P. C. (1908) SEC. 107

## (1) Powers.

## (a) To remand a case.

—An appellate Court has an inherent power to remand a case under conditions other than those referred to in O 41, R 2-3 of the Civil Procedure Code. 36 Mad 492 and 49 Cal 929 foll. Where a case is remanded in the exercise of the Court's inherent jurisdiction no appeal lies from the order of remand. 37 M L J 536=10 L W 359=53 I C 417.

See also 3 Pat L J 253=4 Pat L W 450=43 I C 959 and 20 C W N 547=32 I C 791=43 C 938.

—Whether justice requires a Court to invoke such powers of remand in its inherent jurisdiction must be determined with reference to the particular facts of the case and subject to the rule that if the Code does contain specific provisions which would meet the necessities of the Case in question such provisions should be followed and the inherent jurisdiction should not be invoked, 44 Cal 929=21 C W N 877=26 C L J 49=41 I C 598 (F B).

—Section 107 of the New Code read with O 41, R 23 does not give the Appellate Court wider powers of remand than under the old Code. An improper remand is merely an irregularity under S. 99 of the Code. 41 Cal 108=18 C L J 613=20 I C 39.



## C. P. C. (1908) SEC. 107 (Contd.)

## (1) Powers (Contd.)

## (a) To remand a Case (Concl'd)

—Party abusing process of Court by remaining absent and by not adducing evidence inspite of Court's indulgence. Case should not be remanded, A I R 1929 Lah 444=30 P L R 93=Ind Rul (1929) Lah 452=116 I C 180.

—The Appellate Court has power to amend a plaint by adding new parties, and when this has been done, the added as well as the original defts, have right to file fresh written statements and to have the whole case re-opens. In such circumstances the Appellate Court has power to remand the case for trial independently of O 41 Rr, 23 and 25 of the C P Code. 43 Cal 938=20 C W N 547=32 I C 791.

—Application to set aside ex parte decree by non-appealing defendant. Appellate Court—jurisdiction and powers of—See 42 I C 972

—A decree was passed against B and C in favour of A only B preferred an appeal against the decree. The Appellate Court dismissed the suit. A presented a second appeal against this order but he did not make C a party to the appeal. The decree of the lower Appellate Court was reversed and the appeal was remanded for fresh disposal. 16 I C 693

—In cases where a judge states, and wrongly states, what the law is and applies wrong legal principles to the facts of the cases the Appellate court will intervene and correct the erroneous principles of law which the judge has applied and remand the case for re-hearing with a correct exposition of the law. 35 I C 392.

## (b) To take additional evidence

—See O 41 r 27 and A I R 1931 P C 136=(1931) A L J 458=53 C L J 390=58 I A 173=33 Bom L R 988=35 C W N 811=Ind Rul (1931) P C 197=(1931) M W N 733=34 L W 175=53 A 190=61 M L J 665=132 I C 613 P C

—Section 107 should be read with O XLI rr 27, 28 The Appellate Court may admit additional evidence for substantial cause the power should be used sparingly by Courts. Where it is not possible to decide the case without taking additional evidence and there is no lacuna or defect to be filled up or remedied and no substantial cause for taking the evidence the evidence so received should be left out of consideration in disposing of the case A I R 1931 Oudh 298=8 O W N 627=Ind Rul (1931) Oudh 259=132 I C 259

—The Judge of an Appellate Court is

## C. P. C. (1908) SEC. 107 (Contd.)

## (1) Powers (Concl'd)

## (d) To take additional evidence (Concl'd)

competent to examine any of the parties for ascertaining the facts of the case, if he considers it necessary to do so for the ends of justice. 42 All 48=52 I C 239=17 A L J 945.

## (2) Powers akin to those of original Court.

—As to powers of Appellate Court of passing the order which the court of first instance ought to have passed. See 39 Mad 907=(1916) 1 M W N 328=19 M L T 314=30 M L J 523=34 I C 588.

## (3) Duty of Appellate Court.

—The appellate Court must form independent conclusions on evidence. 28 P W R 1916=33 I C 1002.

—And should deal with material facts before recording findings especially when findings are to be accepted in second appeal. 34 I C 942.

—As to duty of appellate Court with regard to local inspection see. 11 I C 596=16 P W R 1911.

—So also where deft's evidence is imperfectly taken by the first Court the Appellate Court must examine the deft and record reasons. 13 W R 85. or must comply with the appellant's application to summon witness where first Court has refused such application. 11 W R 418. and must afford opportunity to produce evidence. 21 P L R 1915.

—But it should be slow to differ from the primary court on a question of estimate of oral testimony. 30 C L J 475. see also 24 C W N 972=30 C L J 433. and L B R 1872=1892, 416. and 43 Cal 707.

—But it will interfere where the trial Judge has approached the evidence from a wrong stand-point or has applied to that evidence wrong standards of probability or improbability. 24 C W N 800=58 I C 879.

—If an Appellate Court disagrees with the finding of the trial Court, it should come to an independent finding of its own upon the evidence on the record. 56 I C 218.

—As to duties and functions of the appellate Court in reversing a conclusion of fact—see 43 Cal 883; see also 43 Cal. 305=20 C W N 240.

—Per Seshagiri Iyer, J. The question which an Appellate Court has to put before itself on a question of fact is not what its decision would have been had



## C. P. C. (1908) SEC. 107 (Contd)

## (3) Duty of Appellate Court (Concl'd)

it been the trial Court, but whether there are sufficient grounds for not accepting the conclusion of the trial Court. (1919) M W N 52=9 L W 385=25 M L T 204=49 I C 929.

## (5) Objections.

## (A) Withdrawal of suit improperly permitted.

—A plaintiff appellant is not as a matter of right, entitled to withdraw his suit, the affect of granting, when the application would be to nullify the decree of the Court below and to deprive the defendant of the benefit of an adjudication already made in his favour. 20 I C 17.

—An Appellate Court has no power under O 23 R 1 (2) of the Code to allow a suit to be withdrawn in appeal as distinguished from the appeal itself, with liberty to institute a fresh suit as that would be tantamount to setting aside the decree in the suit. 13 S L R 72=51 I C 579.

—Leave to withdraw suit with liberty to bring fresh suit when reversing the decree of the first Court—Power to grant. 40 Mad 259 (F B)=32 M L J 477=21 M L T 82=37 I C 414

—Dismissal of plaintiff's suit—Appeal—Withdrawal of suit with liberty to institute fresh suit in respect of the subject matter of suit—Appellate Court's power to sanction withdrawal. See 27 M L J 244=16 M L T 186=25 I C 383=1 M L W 613.

—Leave to withdraw suit with liberty to sue again—Power to grant. See C P Code O 23, R 1, 22 Bom L R 1183=46 Bom 396=64 I C 1000.

## (B) As to stamp, court-fees and under valuation.

—When a memorandum of appeal is presented within the time allowed by the law of limitation but is insufficiently stamped it is not open to the court to reject the appeal without giving the appellant time to make up the deficiency. 15 Bom L R 902=38 Bom 41=21 I C 337.

—Powers of appellate Court to raise plea of bar by Specific Relief Act S 42 suo motu. See 14 I C 776.

## (C) As to jurisdiction

—The question of jurisdiction in respect of a first appeal must be determined with reference to the claim made, and not with reference to the decision upon the claim. There is a distinction between first appeals under S. 39 and further appeals under S 40 of the Punjab Courts Act. 16 I C 865=274 P W R 1912=3 P L R 1913.

## C. P. C. (1908) SEC. 107. (Contd)

## (5) Objections (Concl'd)

## (D) As to want of notice (Concl'd)

—Per Mukerjee, J. When a question of law is raised for the first time in a Court of last resort, upon the construction of a document or upon facts either admitted or proved beyond controversy it is not only competent but expedient in the interests of justice to entertain the plea. 28 C L J 123=48 I C 78.

—Forum rightly selected on decree of first court—Appellate Court's powers to find and pass decree exceeding its jurisdiction as to appeal—14 I C 78.

—Death of sole plff. respondent to suit to recover stridhan property—Whether court can declare that the suit as distinct from appeal has abated. 17 A L J 306.

—Consolidation in Land Acquisition Cases—No request for consolidation in lower Court—Whether Appellate Court can order consolidation see 34 M L J 279.

—To extend time fixed by first court for payment of pre-emption money—Not to be granted if conduct of pre-emptor not bona fide. 26 I C 433.

—Power to decide in favour of a party—On a plea not raised in first court, if exists. See 45 P W R 1915.

—It is opposed to sound practice for an appellate court to substitute its own discretion for that of the court from which an appeal has been preferred. 42 Bom 380=35 M L J 262=23 M L T 400=8 L W 53=5 Pat L W 25=20 Bom L R 714=22 C W N 601=16 A L J 513=27 C L J 623=12 Bur L T 91=45 I C 568=45 I A 61 (P C).

## (6) Power to reverse, affirm or modify decree or order.

See cases under O 41 r 31 and r 33.

—The grant of a declaratory decree is discretionary, no doubt, but when such a decree has been given by the Court of first instance and has been accepted by some of the defendants, an Appellate Court is (speaking generally) not justified in recinding it as against these defendants, who do not profess to appeal on behalf of any one but themselves. 80 P L R 1913=18 I C 758=109 P W R 1913.

—Sanderson, C J—Where the documentary evidence is conflicting great weight should be given to the opinion of the learned Judge who has seen and heard the witnesses. Mookerjee, J—The burden lies on the appellant to satisfy the Court that the finding of the trial Court which he assails is not supported by the evidence on the record: 48 I C 561=23 C L J 06 (F B).

C. P. C. (1908) SEC. 107 (Contd)

(6) Powers of reverse affirm of modify

decree or order (Concl'd)

—Power of appellate Court to set aside *ex parte* decree in suit—Decree—Liability, several—Appeal by one—Applicant not made party to appeal. see 1917 M W N 808.

—Power to entertain an independent application to set aside an *ex parte* decree when first Court dismissed application see 39 I C 140.

—Powers to correct mistake—Confirmation of partition proceedings—Though no appeal against partition proceeding. see 32 I C 832.

—Appellate Court can reverse judgment if a party suppresses evidence or raises inconsistent pleadings A I R 1929 P C 95=(1929) A L J 261=49 C L J 308=33 C W N 430=29 L W 501=6 O W N 423=31 Bom L R 721=57 M L J 565=11 P L T 101=Ind Rul (1929) P C 104 (P C)=114 I C 592.

(7) Limitation

—Plea of limitation raised first time in appeal—Court bound to give effect to the plea, if borne out by facts on record. 29 I C 36.

(8) Add or substitute parties.

—Appellate Court may strike out name of wrong defendant and substitute proper defendant in the memorandum of appeal if the mistake be *bona fide*. A I R 1930 All 131=Ind Rul (1930) All 440=123 I C 824.

—Appellate Court can make a respondent an appellant if necessary. A I R 1930 All 786=(1930) A L J 926.

—Both under S. 107 of the C. P. Code and under its inherent powers, an Appellate court has power to add as parties to the suit persons who were not parties in the first court. 3 Pat L J 469=5 Pat L W 216=(1918) Pat 276=46 I C 398; see also 41 I C 65; but see *contra*. A I R 1929 Bom 353=53 B 598=31 Bom L R 672=Ind Rul (1929) Bom 526=119 I C 654.

—The fact that the time for preferring an appeal has expired does not preclude the appellate court in a fit case from adding a party to the suit whom the appellant has failed to bring in as respondent or as a party respondent under O. 41, R. 20. 38 C 913=16 C W N 49=11 I C 943. see also 2 A 107.

—When an appeal was filed by a person not aggrieved by an order in insolvency the Court acting under

C. P. C. (1908) SEC. 107 (Contd)

(8) Add or substitute parties (Concl'd.)

powers given by S. 107 and O. 41, R. 10, cls. (2) and (3) and O. 41, R. 33 added a person really aggrieved to be made a party, 40 Bom 461=17 Bom L R 989=31 I C 507.

—Appellate Court—Powers to add party and remand See 26 M L J 86 (P C)=21 I C 928.

—Before deciding an appeal it is the duty of the Appellate Court to bring on the record all the necessary parties to the appeal. Where, therefore, a decree for sale was passed in a suit in which a necessary party under O. 34, R. 1 of the C. P. Code was knowingly omitted from the array of parties in appeal Held, that the decree could not be allowed to stand. 31 I C 814.

—Parties—Ejectment suit—Some co-sharers joining as *plffs.* and others as *defts.*—Decree in favour of all—Appellate Court, duty of to maintain decree of first Court by arraying co-sharer *Defts* as *plff*. 43 Cal 660 (P C)=18 Bom L R 418=24 C L J 1=20 C W N 522=33 I C 452.

(9) Review.

—See cases under O. 47.

—A creditor sued the principal debtors and the surety. The suit was dismissed against the debtors but decreed against the surety, who appealed. The creditor also appealed but failed, to make the principal debtors respondents to his cross-appeal which was dismissed. The appeal of the surety was allowed, and the suit of the creditor was dismissed. The creditor appealed the High Court, joining the principal debtors as well as the surety as respondents. Held that the creditor, by reason of his omission to join the principal debtors as respondent to his cross appeal, made it impossible for the lower Appellate Court or the High Court to review the decision of the original court in favour of the principal debtors, and that therefore, he could not claim a decree against the surety. 16 I C 337.

(10) Dealing with findings of fact.

—There are cases in which in face of the irrefragable testimony of contemporary written communications or a course of business an appellate tribunal may bring their knowledge of life and business to bar, and say confidently and rightly, that evidence given about them at the trial cannot be true be the Trial Judge's impression of the witness what it may. 34 I C 273 (P C).

## C. P. C. (1908) SEC. 107 (Contd)

## (10) Dealing with findings of facts (Concl'd)

—As to functions of appellate Court as regards appreciation of evidence see 6 O L J 178=51 I C 419.

—Finding of fact of court of first instance based on credibility of witnesses

—Interference with Distinction between trial courts in India and in England see 39 All 426=15 A L J 349=39 I C 666.

—Interference with finding by lower court when lower Court has not believed the witness—Genuineness of will—Mental condition of testator. see 12 I C 393=10 M L T 304=(1911) 2 M W N 330.

—Opinion of trial Judge as to credibility and demeanour of witness—Appellate Court not to lightly ignore findings of trial Judge see 39 Bom 386 (P C)

## (11) New points.

—A lower appellate court is not entitled to allow an appellant to raise a new case which is dependent for its determination on the facts which have not been investigated and to which the parties have not directed their evidence. 11 I C 940; see also 21 A 386=A W N 1899, 133; and 22 W R 352; and 23 M 227=27 I A 17=4 C W N 228=10 M L J 1. P. C.=2 Bom L R 640=7 Sar 661; and 4 O C 207; and 5 M 163; and W R 1864, Act X Rul 133; and 5 M L T 79=2 Ind Cas 618; and 21 W R 333; and 24 W R 318; and 51 I C 761.

—But a point not urged in the Court below but which depends on the construction of a statute can be raised on appeal. 1 Pat L T 269=(1920) Pat 193=58 I C 749.

—Crossobjection against a co-respondent, not related to matter in appeal—Whether Appellate Court can allow. see 28 C L J 123.

—But a pure question of law not depending on the determination of a question of fact, though not raised in the primary Court nor mentioned in the memorandum of appeal, and is not one of jurisdiction in the sense of competency of the Court to entertain the suit can be raised at the hearing of appeal, if it goes to the root of the matter and raises the question whether the Court was competent to grant the relief claimed by the plaintiff. 47 C 733=31 Cal L J 259=56 I C 571.

—A court of appeal must have a discretion whether it should allow a new point to be raised in appeal or not. If the new point goes to the jurisdiction of the Court below or where a statute has

## C. P. C. (1908) SEC. 107 (Contd)

## (11) New Points (Concl'd.)

been contravened, the Court of appeal may properly consider it. 50 I C 322.

## (12) Subsequent events.

—It has been held in several cases that the appellate Court can take cognizance of matters which happened after the institution of the suit for the purpose, at any rate of moulding the relief which the plff, was entitled to. This will be done only in exceptional cases where it is necessary to avoid injustice or avoid multiplicity of proceedings. In cases where the plff, who had a title to relief at the inception of the suit, had subsequently lost it, or was entitled to a discretionary relief, such as injunction which the subsequent events make it unjust to grant or when a new defence to the claim had accrued to the deft, after the institution of the suit, or when the Court could not grant the relief which the plff, was entitled to, by events which happened subsequently owing to no faults of the parties Appellate Courts can and in some cases may be bound to take notice of events which happened subsequently. 19 M L T 360=(1916) 1 M W N 354=34 I C 411 see also 23 C L J 310. [See on appeal to Privy Council 42 Mad 813=37 M L J 11.]

—Events subsequent to suit—Power to take notice. see 119 P R 1919. and see 6 C L J 102.

—Events subsequent to institution of suit—Appellate Court can take notice of, to shorten litigation or to do justice between parties. 44 Cal 47.

## (13) Power to interfere

—An appellate court has no power to interfere with the decree of the first court with regard to matters with respect to which there was no appeal preferred to the appellate court. 9 I C 121.

—Admission in Evidence by first court—Discretion not to be lightly interfered with. 11 A L J 537.

—Discretionary matter—Costs—Order of first Court as to—No interference on appeal except when lower Court has proceeded on obviously erroneous principles. 22 C W N 372. see also 24 C W N 352. and 46 I C 544. and 13 Bom L R 1061. and 16 A L J 592. and 21 C W N 339. and A W N 1898, 130.

—Award of damages by trial Court Appellate Court will be slow to interfere with. 7 L W 415=23 M L T 312.

**C. P. C. (1908) SEC. 107. (Conold)****(13) Powers to interfere (Conold)**

—Interference with award of damages by trial judge—When justified—see 24 C W N 352.

—Appointment of guardian by first court—Appellate Court not to interfere lightly with discretion of first Court. 26 I C 300.

—Hearing of suit—Production of evidence—Delay in—Discretion exercise of—Propriety—see 27 C L J 119.

—Per Mookerjee, J.—An erroneous exercise of discretion may be open to correction by a Court of Appeal which however, on well established principles will be slow to interfere unless either of the parties has been manifestly and unfairly prejudiced. 45 Cal 138=22 C W N 204=28 C L J 498=44 I C 233.

**C. P. C. 1908 SEC. 109***Synopsis.*

- (1) Applicability and scope of the section.
- (2) Connected cases and consolidation of value.
- (3) Final Orders.
- (4) Interlocutory orders.
- (5) Leave to appeal under s. 109 (c).
- (6) Leave to appeal in forma pauperis.
- (7) Leave to withdraw.
- (8) Letters Patent clause 39.
- (9) Powers of Court.
- (10) "Public or general interest."
- (11) Remand order.
- (12) Who can appeal.
- (1) Applicability and Scope of the section.

—There is nothing in s. 104 to take away the general right of appealing to the Crown given by s. 109 A I R 1924 P C 95=(1924) M W N 79=7 N L J 62=34 M L T 62=19 L W 549=20 N L R 33=51 I A 72=22 A L J 386=51 C 361=46 M L J 628=26 Bom L R 586=28 C W N 977=L R 5 P C 216 (P C)=83 I C 531.

—But the powers under s. 109 (c) should be sparingly used A I R 1927 Pat 363=6 Pat 282=8 P L T 615=107 I C 313.

—So in order to entitle the appellant to appeal there must be not merely a question of law but a substantial question of law in the appeal which it is sought to prefer to His Majesty in Council. 106 I C 362.

—Cases between riparian owners as to the right to water in a channel often give rise to questions of law or to mixed questions of law and fact. A I R 1928 Pat 191=106 I C 538.

—The Code in express terms adopts for the purpose of ch 45 of the Code

**C. P. C. (1908) SEC. 109 (Contd)****(1) Applicability and Scope of the section***(Contd.)*

of 1882 definition of "decree" which is special and differs from the meaning that it bears elsewhere in the Act. The definition of "decree" in S. 2 is not applicable to ch. 45 of the Code of 1882. The word "decree" in the said chapter must be read as equivalent to "decree judgment or order," and includes orders under S. 588. The provisions at the end of S. 588 providing that orders passed in appeal under that section shall be final cannot restrict the provision that appeals may be brought to the King in Council from orders under Ss. 311, 312, C P C setting aside or refusing to set aside a sale, deal finally with the right of the parties and are appealable to his Majesty in Council under S. 595. 17 C W N 637=40 C 635=25 M L J 140=(1913) M W N 487=11 A L J 517 =17 C L J 573=15 Bom L R 515=14 M L T 37=40 I A 140 =19 I C 296 (P C.) See also 40 C 66.

—An appellate order even of a single Judge of the Punjab Chief Court is appealable to their Lordships of the Privy Council if it fulfills the conditions laid down in Ss. 109 and 110 of C P Code. The rule enunciated in S. III of the Code under which an appeal from the Order of a Single Judge is competent to the Privy Council applies only to orders of a Judge of a High Court established under the Royal charter. Held, also, that a final order passed on appeal falls within the purview of S. 109 of Act V of 1908 although the appeal has been rejected as barred by limitation 127 P W R 1917=131 P L R 1917=42 I C 893.

—Ordinarily an appeal which prima facie falls under S. 109 (a) cannot be converted into one under S. 109 (c) merely because it fails to reach the money value required by S. 110. In exceptional circumstances the High Court may adopt the exceptional procedure of certifying under O. 45, r. 3 appeals from its own final decision. In the absence of such circumstances the High Court will not do so. A I R 1933 O 394 (2).

—The subject-matter of a suit and of appeal are not necessarily identical with the subject-matter in dispute between the parties. The subject-matter in dispute may not always be capable of being measured in terms of money, even in cases where the subject-matter of the suit or the appeal has an appreciable money value. A L R 1933 A 502 (505).

## C. P. C. (1908) SEC. 109 (Contd)

## (2) Connected cases and consolidation of value.

—Different suits involving substantially same questions—Separate judgment in the first Court—Same judgment on appeals—Review of one appeal—Original appellate judgment upheld—Leave to appeal to Privy Council in latter case and for consolidation for valuation. Held, that consolidation could not be ordered. Fact that leave to appeal was given in the other case does not bring the latter case within the terms of s. 109 (c) of the Code. A I R 1923 Mad 602=44 M L J 424=73 I C 217.

—Where a number of rent suits are decided by a single judgment and the amount recoverable under all the decrees exceeds Rs. 10,000 : Held that the condition as to pecuniary value for issuing a certificate of fitness for leave to appeal to Privy Council is satisfied. Even otherwise, as there was more than one wide-reaching question of law involved, their Lordships certified the cases "as otherwise fit for appeal." (1914, M W N 162=22 I C 390.

—For the purpose of granting leave to appeal to the King in Council under S. 110, C. P. Code. (Ss. 595, 596, old Code). in a batch of suits, either the amount or value of the subject matter of each suit in the Court of First Instance must be Rs. 10,000 or upwards, or the decree on each suit must directly or indirectly involve some claim of like amount or value. That a common judgment was pronounced in all the suits and that the aggregate value of all the suits exceeds ten thousand rupees are no grounds for the grant of leave. 2 L W 916=30 I C 895.

—High Court's order holding that the appeal had abated so far as one respondent was concerned and finally dismissing the whole appeal on the ground that it could not proceed against the other respondent alone as the decree in favour of the two respondents was one and indivisible—The order is a final order affirming the decision of the court below within the meaning of S. 110. C. P. C. though not for the very grounds mentioned by trial court. A L R 1933 L 666 (668)=14 L 609=A I R 1933 L 690=144 I C 18

## (3) Final Orders.

—Order of Subordinate Court dismissing a partition suit—High Court's order setting it aside is a final order. 2 P L T 155=6 P L J 116=60 I C 479.

—Order dismissing appeal as barred and refusing to extend time under Limit-

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## C. P. C. (1908) SEC. 109 (Contd)

## (3) Final Orders. (Contd)

tation Act, s. 5. It is one passed on appeal which involves substantial question of law. A I R 1921 Cal 415=33 C L J 128=62 I C 216.

—The decision of the High Court on a cardinal issue in the suit is a final decree within s. 109. A I R 1921 Cal 177=25 C W N 896=62 I C 776.

—Order refusing application under s. 45, Specific Relief Act of the Special Bench of the High Court—Appeal lies to Privy Council. 26 B 396 and 28 B 253, relied on. A I R 1921 Bom 378=23 Bom L R 1132=64 I C 959.

—Sembles High Court on appeal reversing decision of the Court below and directing accounts to be taken for determining liability. The order is a "final order" from which an appeal would lie to His Majesty in Council. A I R 1922 P C 237=49 C 560=43 M L J 41=16 L W 536= (1922) M W N 364=26 C W N 954=35 C L J 498=L R 3 (P C) 133=30 M L T 228=20 A L J 409=24 Bom L R 700=49 I A 108 (P C)=67 I C 124.

—Where in a suit for dissolution of partnership and accounts, liability to account is declared such order is final. A I R 1922 Mad 510=16 L W 718=43 M L J 758=31 M L T 385=71 I C 334.

—The determining factor is not the effect on the suit a decision of the trial Court in favour of the applicant would have, if the proposed appeal to the Privy Council was successful, but the immediate effect on the suit of the order sought to be appealed against. An order is a "final order" within the meaning of s. 109 (a) when it decides, or has the effect of deciding the cardinal issue in the suit, and thus disposes of the rights of the parties in the litigation. A matter of procedure can never be treated as a cardinal point in the suit. Nor can an issue, which does not dispose of the rights of the parties belong to that category. A I R 1924 Lah 571=5 L 329=6 Lah L J 240 (F B)=80 I C 366.

—An order by which a decree of dismissal of a suit for default under O. 9 R. 8 of the C. P. Code, has been set aside, is a final order within the meaning of S. 109 of the Code. 21 C L J 279=28 I C 567.

—An order passed by the High Court upon an appeal made to it under S. 86 of the Prob. and Admn. Act is final and is not open to further appeal to the Privy Council. See 40 Cal 21=16 I C 188. 12 Bur L T 87=10 L B R 22=51 I C 596.

—Order extending time for presenting appeal to High Court under s. 5 of the



## C. P. C. (1908) SEC. 109 (Contd)

## (3) Final Orders. (Concl'd)

Limitation Act, is not a final order within the meaning of s. 109 Civil P. C. An order refusing such extension would amount to a final order. A I R 1926 Pat 102=7 P L T 256=90 I C 723.

=A decree of the High Court in a testamentary matter is appealable to His Majesty in Council where the case is that if it were an ordinary civil case it would be appealable under s. 109. A I R 1926 Mad 986=49 Mad 954=51 M L J 299=(1926) M W N 931=97 I C 836.

## (4) Interlocutory Orders.

—Order directing final decree to be passed in accordance with the preliminary decree passed by the Privy Council—Appeal to Privy Council does not lie and such order is not a final decree. A I R 1925 Mad 187=20 L W 753.

—Award of single judge on the original side of High Court under Part III of Land Acqn. Act—No appeal. 28 I C 260.

—Order dismissing an appeal in default of appellant's compliance with certain Court rules—No appeal lies from such order. A I R 1921 Pat 83=1921 Pat 97=2 P L J 719=60 I C 285.

—No appeal lies to Privy Council from order, dismissing application for restoration of the appeal dismissed for default it not being decree or final order passed in appeal nor an order passed in the exercise of the original civil jurisdiction of the High Court A I R 1924 Rang 208=2 Bur L J 294=79 I C 504.

—A refusal to appoint a Receiver—It is not a final order under s. 109. Two Receivers appointed by different High Courts for same property—Conflict of jurisdiction therefrom—It is not sufficient to require the exercise of jurisdiction under s. 109. A I R 1925 Pat 173=6 P L T 119= 82 I C 178.

—Order that rejects application to appeal as pauper is not a final order. A I R 1925 Oudh 548=2 O W N 393=88 I C 575.

—Order that an alleged compromise should not be recorded and that the suit should proceed as usual way is not a "final order" A I R 1925 Cal 857=29 C W N 332=89 I C 94.

—An order by the High Court in its revisional jurisdiction under s. 115 is not an order passed "on appeal" A I R 1926 All 202=48 A 226=23 A L J 997=90 I C 904.

—Scheme suit for removing defendant trustee—Defendant trustee dying—Order

## C. P. C. (1908) SEC. 109 (Contd)

## (4) Interlocutory Orders. (Contd)

holding the suit not to abate as regards settling of scheme. The order is not final order. A I R 1926 Mad 748=50 M L J 552=23 L W 695=94 I C 966.

—Order refusing stay of execution is not final order. 13 C L J 681=10 I C 444.

—An order appointing receiver is not a final order. 13 C L J 507=10 I C 439.

—High Court decree affirming decree for redemption of lower Court but fixing a later date for redemption and allowing interest at bond rate to run from the expiry of date fixed by the lower Court till date fixed by High Court, does not make the decision one of reversal. A I R 1928 Pat 190=9 P L T 393=106 I C 243.

—Order which directs that a compromise decree be set aside and the suit proceeded with, from the stage at which the compromise was filed, is not a final order. A I R 1927 Pat 363=6 Pat 282=8 P L T 615=107 I C 313 nor is the order deciding competency of Land Acquisition Judge to review certain portions of an award. 9 I C 183=15 C W N 818=13 C L J 90.

—Nor an order rejecting an application for review 16 O C 264=22 I C 259, nor order granting review A I R 1923 Mad 57=16 L W 623=43 M L J 559=(1922) M W N 731=32 M L T 98=69 I C 977.

—Order was passed on the civil extraordinary application, but it did not finally dispose of the rights of the parties, it was not a final order within the meaning of s. 109 (a). A I R 1923 Bom 39=79 I C 210.

—An order of High Court refusing to set aside an order of the lower Court restoring to file a suit is not a final order. A I R 1924 Mad 701=19 L W 458=46 M L J 357=34 M L T 112=(1924) M W N 380=78 I C 938.

—An order is final when it finally disposes of the rights of the parties. An order which merely decides that an incorporated body is a juridical person legally competent to discharge the functions of an executor and as such to apply for probate but which leaves outstanding the question whether being competent to apply it is entitled to grant of probate is not a final order. 23 O C 324=60 I C 208.

—Decree upon compromise. On appeal decree set aside and lower Court directed to proceed with suit in the ordinary course, as if there had been no compromise. Plaintiff asking for certificate for leave to appeal to the Privy Council from order. The order was not final order but only

## C. P. C. (1908) SEC. 109 (Contd)

## (4) Interlocutory Orders. (Contd.)

an interlocutory order 'Final' means an order which puts an end to the litigation between the parties. A I R 1922 Bom 383=47 B 106=24 Bom L R 925=69 I C 80.

—Interlocutory order of general importance—"Order" is not merely a final "order" but includes any order. Where there is involved a matter of real importance namely, as to whether the Court has jurisdiction to make an order, the case is a fit one for appeal to the Privy Council under s. 109 (c). A I R 1922 Cal 130=26 C W N 819=70 I C 519.

—An order setting aside a compromise is an interlocutory and not a final order within s. 109. Appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only where their decision will practically put an end to the litigation and finally decide the rights of the parties. A I R 1926 All 311=48 A 329=24 A L J 331=92 I C 1027.

—Appeal against decisions of Special Tribunals cannot be filed further, than to these Special Tribunals. A decree of the High Court under S.91 (3) of the Rangoon City Municipal Act is not a final judgment, decree or order within the meaning of Art 37 of the Letters Patent or s. 109 of the Civil P C and is not appealable to His Majesty in Council. A I R 1927 Rang 88=4 R 508=6 Bur L J 1=99 I C 994.

—Chatterjea, J.—The power of the Court under cl. (c) of s. 109 should be exercised only in exceptional cases of great public or private importance Rankin, J.—Interlocutory orders are within the ambit of cl. (c) of s. 109. The desirability of taking interlocutory orders on appeal to England involves practical considerations of a special character. A I R 1927 Cal 481=31 C W N 540=103 I C 561.

—Decision as to locus standi of an applicant in probate is not a final order 23 O C 324=60 I C 208. nor an order refusing stay of execution 21 C L J 281=28 I C 569. nor an order rejecting application for restoration of appeal dismissed for default 37 I C 832, nor an order refusing to stay proceedings under S. 19 of the Arbitration Act 39 M L J 27=12 L W 15=24 C W N 721=18 A L J 591=22 Bom L R 606=2 U P L R 94=(1920) M W N 407=28 M L T 87=56 I C 302=47 I A 124 P C

—Expression "final order passed on appeal"—Meaning of—Order dismissing an application for restoration of a first appeal dismissed for default—Order not a final order passed on appeal—No appeal lies to the Privy Council. A L R 1933 A 304 (305)=1933 A L J 255=A I R 1933 A 453 (1)=145 I C 534=I R 6 A 114.

## C. P. C. (1908) SEC. 109. (Contd)

## (4) Interlocutory Orders (Concl'd)

—Order refusing the appointment of a Receiver—Not a final order within the meaning of S. 109 (a)—No appeal to Privy Council. A L R 1933 P 255 (256)=12 P 723=14 P L T 302=A I R 1933 P 293=144 I C 457.

—When a suit was dismissed by the Subordinate Judge as barred by res judicata but his decision was reversed by the High Court who remanded the case held that leave to appeal to Privy Council should not be given, 42 All 174=18 A L J 83=1 U P L R (HC) 168=54 I C 504.

—An order directing the executing court to hear and determine the question in dispute in execution, is not an order which finally disposes of any of the rights of the parties. 4 Pat L J 461=52 I C 461.

## (5) Leave to appeal under s. 109 (c)

—When a decree passed by the High Court on review is not open to objection on some ground recognised by O XLVII, r 7 the case cannot be certified as a fit case A I R 1926 Oudh 17=90 I C 332.

—The contention that decreed in s. 52 (3) of the Madras Estates Land Act (1908) means decreed under that Act is not of sufficient weight to justify granting leave to appeal. Certificate granted under O. XLV should show on its face on what grounds it has been granted or that discretion under s. 109 was exercised. A I R 1921 P C 25=44 M 293=48 I A 31=19 A L J 161=23 Bom L R 718=33 C L J 277=25 C W N 630=40 M L J 229=13 L W 321=(1921) M W N 119=29 M L T 418 (P C)=60 I C 85.

—Special leave cannot be granted where a decision upon the construction of a section of Tenancy Act only incidentally affects the rights of tenure-holders. A I R 1921 Pat 33=6 P L J 125=2 P L T 657=61 I C 663.

—Order as to validity of order of lower Court recording compromise—It is not order by consent and a certificate can be issued in respect thereof. A I R 1922 Pat 256=3 P L T 61=6 P L J 171=(1921) Pat 193=62 I C 235.

—Execution case—Order to join other decree-holders—Order confirmed by High Court—The order was not a final order and leave to appeal to Privy Council should not have been granted. A I R 1922 Pat 611=3 P L T 781=(1922) Pat (Sup) 296=67 I C 991.

—High Court refusing to enrol a person as legal practitioner. It is disciplinary or administrative order and no leave to appeal to His Majesty can be

## C. P. C. (1908) SEC. 109 (Contd)

(5) Leave to appeal under s. 109 (c) (Contd)  
granted. A I R 1922 Pat 603=1 Pat  
590=4 P L T 229=70 I C 172.

—To grant special certificate the questions involved must be substantial and of great public or private importance. The powers of co-heirs and the doctrine of lis pendens are not matters of such importance as to make the case a fit one for appeal A I R 1923 Rang 71=11 L B R 335=1 Bur L J 62=68 I C 690.

—The question whether the permanent tenures known as Karamkuri and Adimayavana in Malabar have the incident of forfeiture on alienation attached to them by custom is a substantial question of law and one of general interest in Malabari. Grant of leave to appeal to the Privy Council even the valuation is less than Rs. 10,000 can be made. A I R 1923 Mad 443=17 L W 545=72 I C 918.

—The effect on a particular case of s. 17, C P C is not a question of law of general interest. Leave granted in other similar cases involving the same question as the one in question, does not render it a fit case. A I R 1923 Mad 602=44 M L J 424=73 I C 217.

—Substantial question of law—Question of general importance. For leave to appeal to the Privy Council where the valuation is not above Rs. 10,000. Application must show that the questions involved are generally important affecting a large number of persons. A I R 1923 Nag 272=73 I C 221.

—Where a question of procedure with some what unusual character is involved and it is possible that a higher tribunal might take a different view in respect thereto, the High Court ought to certify the case as fit one for appeal. S. 109 (c) imposes no limitations on the power of the Court to certify a case as a fit one though the power ought to be used very sparingly. A I R 1924 Pat 463=5 P L T 17=L R 2 Pat 48 Civ =75 I C 58.

—The ruling provision as to certificates of value applicable, at the time the appeal was filed, was No. 2 of Schedule to Order in the Council of 10th April, 1888. It was to the effect that the certificate should be deemed conclusive of value and not liable to be questioned on appeal by any party. A I R 1922 P C 257=16 L W 18=45 M 475=31 M L T 31=43 M L J 323=49 I A 211=27 C W N 1=20 A L J 937=36 C L J 450 (P C) =74 I C 584.

—Suit decreed but in appeal dismissed. Review of appellate decree and suit again decreed. Privy Council on appeal holding that the decree of the

## C. P. C. (1908) SEC. 109 (Contd)

(5) Leave to appeal under s. 109 (c) (Contd)

High Court in appeal should be restored and the suit dismissed with costs throughout. Leave to appeal to Privy Council to plaintiffs granted by High Court holding that order of Privy Council merely held the review application to be incompetent. The appeal to Privy Council must be dismissed as it was an appeal from a non-existent suit. A I R 1925 P C 174=26 Pat L R 526=L R 6 P C 128=89 I C 185.

—Where a decree by nature is not appealable no leave would be granted for an appeal to Privy Council against such a decree of the High Court. A I R 1926 Oudh 17=90 I C 332.

—A caveat filed in the Court of first instance. Opposite party recognizing applicant to be proper party to probate proceedings. Opposite party appealing to High Court and making the applicant party respondent to the appeal. The opposite party succeeding in appeal the applicant applied for leave to appeal to Privy Council. The High Court was not competent to enter upon the question whether the applicants had any locus standi to maintain the application A I R 1925 Pat 712=7 P L T 287=(1925) Pat 337 =91 I C 763.

—Where there is Privy Council decision setting the law on a point, the case cannot be certified as a fit case involving substantial question of law. 92 I C 1013.

—Point of law settled by Full Bench so far as the Court in which leave for appeal is prayed. The fact that there is conflict between that Court and some other High Court does not render the case fit one for appeal to Privy Council. A I R 1928 Mad 448=109 I C 167.

—Cases to which cl. (c) of s. 109 applies are where the subject-matter in dispute cannot be reduced into actual terms of money. Suit for defamation. Special leave should be refused as case is not one of great importance to the general public. A I R 1928 Rang 187=6 R 43=109 I C 697.

—Where value of claim is less than Rs. 10,000 and no question of general principle is involved a certificate should not be granted unless justified by exceptional circumstances. A I R 1929 Oudh 243=6 O W N 211=Ind Rul (1929) Oudh 320=116 I C 208.

—Under s. 109 (c) the High Court must be satisfied that the case is a fit one for appeal. The mere fact that the point raised in the appeal affects third parties is no ground for enabling a person,

## C. P. C. (1908) SEC. 109 (Contd)

## (5) Leave to appeal under s. 109 (c) (Contd)

whose case is devoid of merit, to further agitate the question. A I R 1929 Mad 696=Ind Rul (1929) Mad 995=119 I C 595.

—Right to open two small windows in a loft or gallery in a house. It is not a fit case to be certified. A I R 1929 Bom 341=53 B 552=31 Bom L R 632=Ind Rul (1929) Bom 558 =119 I C 782.

—Question of limitation—No serious divergence of judicial opinion on the points. It is not a fit case for appeal to the Privy Council. 31 P L R. 17=Ind Rul (1930) Lah 250=121 I C 506.

—High Court affirming judgment of lower Court—High Court ignoring rule regarding recitals in ancient documents—Petition for certificate under s. 109 may be granted. A I R 1923 Mad 827=Ind Rul (1930) Mad 488=123 I C 344.

—Leave to appeal under that section can be granted when the subject-matter in dispute is also such as cannot be reduced into actual terms of money. A I R 1930 Nag 91=12 N L J 170=Ind Rul (1930) Nag 206=123 I C 430.

—The High Court cannot grant leave to appeal to His Majesty in Council from an order of the High Court under s. 65 (3) refusing to require the Commissioner to state a case. A I R 1930 Rang 274=8 R 435=Ind Rul (1930) Rang 377=127 I C 473.

—Plaintiff knowingly valuing claim at certain figure—Court-fee paid on that basis in all Courts—Leave to appeal to Privy Council cannot be granted on ground that real value of suit was over Rs. 10,000. A I R 1930 Cal 737=Ind Rul (1931) Cal 28=34 C W N 671=128 I C 108.

—When the High Court in its judgment on a reference under S. 66 (2) of the Indian Income tax Act answered the first question in the negative as it considered that the matter admitted of no doubt and in fact the counsel for the Commissioner had practically conceded that the contention of the assessee was correct, the second question in favour of the assessee having regard to the terms of the award and the third also in his favour in view of the certain decisions of the Privy Council. Held, in an application by the Commissioner under S. 66 (a) of the Act for leave to His Majesty in Council that the case was not a fit one for appeal to the Privy Council. A L R 1933 L 758=A I R 1933 L 637.

—The power of granting leave to appeal to the Privy Council under S. 109 (c) C.P.C. should be sparingly used and in order to entitle a party to the benefit of this section the case should involve not only a question of law but must also

## C. P. C. (1908) SEC. 109 (Contd)

## (5) Leave to appeal under s. 109 (c) (Contd)

involve matters of principle which not only affect the parties to the litigation but are likely to concern a large class of persons who are or may be in the same situation as the parties to the appeal in question, and in whose case the decision of the Privy Council is sure to be a guiding precedent. A L R 1933 A 502 (504)=54 A 459=A I R 1933 A 4=143 I C 312=1 R 5 A 223.

—Clause (c) of S. 109, C.P.C. is only intended to meet special cases—Such as those in which the point in dispute is not measurable by money, though it may be of great public importance. It requires that the case must be certified to be a fit one for appeal to His Majesty in Council. A L R 1933 B 352=25 B L R 458=144 I C 916=A I R 1933 B 260=1 R 6 B 18.

—Legal practitioner suspended from practice—Application for leave to appeal to the Privy Council—High Court can grant leave. A L R 1933 A 390 (391)=1933 Cr. C 387=55 A 246=A I R 1933 A 225=145 I C 853=I R 6 A 179=1933 A L J 273.

—Order refusing the appointment of a Receiver during the pendency of a mortgage suit—Suit ripe for hearing—Leave to appeal to the Privy Council would not be granted under S. 199 (c). A L R 1933 P 255 (256)=12 P 723=14 P L T 302=A I R 1933 P 293=144 I C 457.

—S. 109 (e) of the Procedure Code has a very limited scope and must be applied with considerable discrimination and caution. A L R 1933 A 502 (504)=54 A 459=A I R 1933 A 4=143 I C 312=1 R 5 A 223.

—Suspension of an advocate is a fit case for appeal to Privy Council. A L R 1934 All 326.

—In a case, the value of the subject matter of which is over Rs. 10,000 and the High Court has recovered the decision of the lower Court an appellant is entitled to a certificate for leave to appeal to the Privy Council. The certificate cannot be refused on the ground that in accordance with the provisions of C.P.C. no appeal lies against a judgment pronounced in accordance with an award and a decree following it. Such provisions affect only appeals in India and do not affect the appeals to His Majesty in Council. 15 O C 51=15 I C 2.

—An application was made under the Provincial Insolvency Act praying to be adjudged as an insolvent. The District Judge dismissed the petition and held that there had been an abuse of the process of the Court. There was no express decision as regards the abuse of



**C. P. C. (1908) SEC. 109 (Cont'd)****(5) Leave to appeal under s. 109 (c) (Cont'd)**

the process by the High Court. On appeal to the High Court having been dismissed under O. 44, r. 11 of the code of Civil Procedure Held, that there was no Concurrent finding as to an abuse of the process of the Code Held also, that it was a case which could properly be certified to be a fit one for appeal to His Majesty in Council as there was a substantial question of law. 17 C L J 547-40 C 685-17 C W N 752-19 I C 435.

—Under S. 109 (c) certificate for leave to appeal to His Majesty in Council should be granted only in cases in which the decision will be of general importance or affects any large body of persons or threatens the religious or Civil rights of any class of the community and not where it is to serve as a prece- dence for similar subsequent cases. 23 I C 793-7 S L R 92,

—Order in revision by the High Court—Reversing orders of lower courts refusing to set aside an order of dismissal for default—Appeal to Privy Council—Special certificate if can be granted. See 24 I C 620. Where special leave to appeal to the King in Council is sought in a case which is below the appealable value, such leave will not be granted by the High Court under S. 9 (c) and O. 45, Rr. 2 and 3, C P Code, unless some substantial question of law of general interest is involved in the case. 18 M L T 366-(1915) M W N 916-2 L W 992-31 I C 46.

—Under S. 109 (c) C. P. C. a High Court can if persuaded that a case is a fit one for appeal to the Privy Council grant leave to appeal in any case even upon a question of fact. The words "any decree or order" in S. 109 (c) C P C do not mean any decree or order other than a decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction. Where two judges have arrived at diametrically opposite conclusions on the vital question on which the suit should be decided the case is a fit one for appeal to His Majesty in Council. 6 O L J 664-54 I C 828.

—When the condition as to the value of the subject matter in dispute in the Court of first instance and in the appeal to the Privy Council prescribed by Ss. 109, and 110 of the Code of Civil Procedure is not satisfied, the court ought not to grant leave to appeal to the Privy Council merely on the ground that there is a substantial question of law involved in the appeal. The class of cases contemplated by S. 109 cl. (c) C P Code or those

**C. P. C. (1908) SEC. 109 (Cont'd)****(5) Leave to appeal under s. 109 (c) (Concl'd)**

involving questions of public importance or which may be important precedents governing numerous other cases or in which the right in dispute is not exactly measurable in money, but is of great public or private importance. 21 I C 783-15 Bom L R 1021.

**(6) Leave to appeal in forma pauperis.**

—An application in forma pauperis for leave to appeal to Privy Council is not maintainable. Ind Rul (1929) Mad 496-115 I C 832.

—see also 3 Pat L J 179-44 I C 731. and 17 A L J 443-50 I C 79.

—And an order refusing leave to appeal in forma pauperis is not a final order. A I R 1927 Pat 175-6 Pat 67-100 I C 886.

—An order passed by the High Court in the exercise of its revisional jurisdiction, reversing that of the court of the first instance allowing the applicant to sue in forma pauperis is an order passed on appeal within the meaning of cl. (a) of S. 109. Two essential elements are to be considered in deciding whether an order is passed on appeal within the meaning of cl. (a) of S. 109 viz (1) whether there exists the relation of the superior and inferior court; and (2) whether there exists the power, on the part of the superior tribunal, to review, affirm, modify, or reverse the decision of the inferior tribunal. 13 C L J 90 foll An order of the High Court based on the ground that the allegations in the application to sue in forma pauperis do not disclose any cause of action, is a final order, within the meaning of cl. (a) of S. 109. 13 C L J 688-15 C W N 879-11 I C 65.

**(7) Leave to withdraw.**

—Appellate Court can grant permission to withdraw or abandon part of a claim with leave to prefer fresh appeal. A I R 1921 Bom 278-45 B 206-59 I C 210.

—Appellate Court can allow adjustment or withdrawal of suit if it sets aside first Court's decree. A I R 1926 Nag 444-95 I C 424.

**(8) Letters Patent clause 39.**

—The words "original jurisdiction" in cl. 39 of Letters Patent (Bom.) are used in contradistinction to the words "made on appeal" The appeal is competent if the decision and order of the High



## C. P. C. (1908) SEC 109 (Contd)

## (8) Letters Patent clause 39. (Conclud)

Court under s. 51 of the Income Tax Act are within cl. 39 of the Letters Patent. It must be either a final judgment or a final decree or a final order. A final judgment as understood in English litigation is nothing more than that there should be a proper *litis contestatio* and a final adjudication between the parties to it on the merits. Where a case is stated for the "opinion" of the Court, the order made by the Court is only advisory. Where the case is referred for the "decision" or "determination" of a question, there is a *prima facie* difficulty in holding that the order embodying this determination or decision is advisory, but the use of these words or one of them is not decisive. The decision judgment or order if made by the Court under s. 51 of the Income Tax Act is merely advisory and not final, and an appeal from it will not lie. A I R 1923 P C 148=L R 4 P C 170=(1923) M W N 603=25 Bom L R 908=21 A L J 675=50 I A 212=45 M L J 295=18 L W 372=47 B 724=39 C L J 16=28 C W N 307=33 M L T 301 (P C)=74 I C 469.

—Final decree of Division Bench of High Court—Appeal to Privy Council, certificate as to—Letters Patent, High Court, 1865—Calcutta, ss. 39, 15, see 9 C W N 566=32 C 963. see also 16 Bom L R 195=38 Bom 421=23 I C 373.

## (9) Powers of Court.

—High Court can add a party or make an appellant a respondent and vice versa A I R 1927 Cal 37=44 C L J 243=98 I C 822.

—Appellate Court can admit additional evidence if justice requires. A I R 1926 P C 34=49 M 435=53 I A 84=3 O W N 568=(1926) M W N 495=24 L W 115=44 C L J 67=28 Bom L R 1391=31 C W N 1=51 M L J 570=94 I C 767.

—Appellate Court affirms the decision of the Court below when the decree is affirmed, though the Appellate Court reaches the same conclusion on different grounds. A I R 1923 Oudh 49=25 O C 277=70 I C 283.

—Appellate Court can return memorandum of appeal for presentation to proper Court. A I R 1923 Nag 310=8 N L J 63=74 I C 93; See also 74 I C 33.

## (10) "Public or general interest."

—Clause (c) of s. 109, C P C deals with special cases, whether a case is of great public or private importance, is left entirely in the discretion of the Court.

## C. P. C. (1908) SEC. 109 (Contd)

## (10) "Public or general interest." (Contd)

The discretion vested in the Court should be very sparingly used. A I R 1924 Oudh 81=10 O L J 289=71 I C 339.

—Where the question is concerning the parties alone and no general interest is involved S 109 does not apply. A I R 1921 Oudh 30=8 O L J 1=61 I C 131.

—Whether the decision of the Inam Commission were binding on the owners of those estates and of the adjacent lands. The case did not involve any question the decision of which might result in a precedent governing numerous other cases or in which the right in dispute is of great public or private importance. A I R 1923 Mad 125=(1922) M W N 683=16 L W 517=31 M L T 335=43 M L J 728=69 I C 385.

—Appeal to Privy Council—Subject matter below Rs. 10,000—No exceptional circumstances or question involving general principle—No certificate can be granted that the appeal is a fit one under S. 109 (c). A L R 1933 O 456=A I R 1933 O 394 (2)=10 O W N 953.

—Appeal to the Privy Council—Substantial questions of law of sufficient public or private importance—Appeal to be allowed. A L R 1933 A 385 (387)=A I R 1933 A 8=54 A 431=140 I C 418.

—Private importance means importance to both the parties and not to one—Where matter is of small value, leave to appeal to Privy Council should be refused. A I R 1923 Mad 232=44 M L J 217=32 M L T 126=17 L W 775=(1923) M W N 415=72 I C 250.

—A question of public importance or private importance to both parties will render a case fit under s. 109 but a mere question about construction of agreement will not. A I R 1924 Mad 231=45 M L J 514=18 L W 348=(1924) M W N 3=76 I C 811.

—Question of inadmissibility of unstamped acknowledgment is not a question of public importance and will not create a precedent which would govern numerous cases. A I R 1924 Mad 616=46 M L J 239=19 L W 372=34 M L T 1=(1924) M W N 319=78 I C 165.

—"Substantial question of law" means question of general importance and does not include the question of the construction of a document in which the parties alone are interested. 3 O W N 841=93 I C 164.

—The intention of the Legislature in adding s. 66-A to the Income Tax Act was to enable an appeal to His Majesty in Council in cases in which the High Court could certify that the question of law involved was one of great private or

**C. P. C. (1908) SEC. 109 (Contd)****(10) "Public or general interest." (Concld)**

public importance. A I R 1927 Lah 181-8  
Lah 269-28 P L R 443-100 I C 97.

—A case involving the question as to the necessity of registering the documents giving an option of re-purchase is a fit case for appeal to Privy Council. A I R 1927 Bom 19-50 B 753-28 Bom L R 1437-100 I C 143.

—Where a community is assessed for its income and reference is answered against the community and leave to appeal to the Privy Council is sought, the legal question being whether constitution of the community amounts to a trust or wakf leave should be granted. A I R 1928 Nag 202-109 I C 129.

—Determination of two Abidi years to be previous year for the purpose of assessment. Objection to such assessment and sum in dispute over Rs. 20,000. It was not shown that there were other assesseees who took as their previous year a year which is consistently less than calendar year. The point in dispute was not of great public or private importance and the case could not be certified to be otherwise fit for appeal to Privy Council. A I R 1929 Nag 336-Ind Rul (1930) Nag 41-120 I C 409.

—A declaration that Muhammadans should be authorized to take out a procession is a matter of general importance and is a fit case for appeal to His Majesty in Council. A I R 1930 All 121-Ind Rul (1930) All 239-52 A 329-122 I C 415.

—Matter of general importance—Question of law involved settled definitely by a judgment of the Privy Council. The case should not be sent to Privy Council for a fresh decision on the same point. A I R 1929 All 339-(1929) A L J 241-Ind. Rul (1930) All 381-123 I C 333.

—It is well settled that the mere fact that the appeal involves questions of law does not bring the case under S. 109 (e); it must involve decision of matters of public or private importance. 1 P L T 239-(1920) Pat 209-56 I C 615.

**(11) Remand Order**

—On the face of it an order which remands a case for further consideration prima facie does not purport finally to dispose of the rights of the parties. But if the effect of the order is that the Court has finally determined the cardinal issue in the suit and only subsidiary and subordinate issues remain to be decided the remand order is a final order within Cl. 27, Letters Patent, and appealable as such. 10 R 499 (501)=A I R 1932 R 189. see

**C. P. C. (1908) SEC. 109 (Contd)****(11) Remand Order. (Contd)**

also A I R 1925 Rang 147-3 Bur L J 248-84 I C 519. and 33 All 391-8 A L J 192-9 I C 932.

—An order of remand is a final order and capable of appeal if it has the effect of finally deciding some cardinal point in the suit. 23 A 220 (P C), relied on. A I R 1921 Lah 203-2 Lah 106-65 P L R 1921-60 I C 522. see also A I R 1931 Nag 24-Ind Rul (1931) Nag 38-130 I C 102.

—But an order of remand necessitating further trial, final determination of rights of parties not being made is not a final order. A I R 1924 Oudh 81-10 O L J 289-71 I C 339. see also 10 R 335 (340-1)=A I R 1932 R 137-1 R 1932 R 238-140 I C 420. and (1918) Pat 81-3 Pat L J 339-5 Pat L W 45-45 I C 192. and 56 P R 1888. and (1918) M W N 844-48 I C 132.

—Thus where the cardinal issue was whether or not the will was governed by the Succession Act (39 of 1925) and the Court of appeal held that, inasmuch as the testatrix was a Chinese Buddhist, her will was not governed by the Succession Act but by the personal law to which Chinese Buddhists in Burma are subject it follows that the Court by the remand order finally disposed of the alleged right of the applicant to set aside the bequests of the property in Sch. C. upon the ground that such bequests were null and void by reason of S. 118, Succession Act. 10 R 499 (502-3)=A I R 1932 R 189.

—Whether the order of remand passed by High Court in any particular case operates as a final order or not depends on its own facts. The order should finally dispose of rights between parties. Leave cannot be granted in a case where the order of remand decides an important point of law but leaves another equally important point undecided. A I R 1930 Sind 254-Ind Rul (1930) Sind 87-123 I C 231.

—Where it is not certain whether the remand order of the High Court is final or not but where it goes to the root of the case a certificate under s. 109 may be granted. A I R 1924 All 119-45 A 741-21 A L J 686-L R 4 A 577 Civ-79 I C 87.

—Appellate Court will not insist on deciding suit finally if the party be satisfied with remand order. A I R 1926 Lah 65-7 Lah 179-27 P L R 50-8 Lah L J 13-93 I C 344.

—A remand order which directs a lower Court to re-hear the application to set aside an abatement of a suit is not a final order. A I R 1925 All 263-23 A L J 12-47 A 345-L R 6 A 175 Civ-86 I C 161.

## C. P. C. (1908) SEC. 109 (Contd)

## (11) Remand Order (Contd)

—Where a suit is dismissed due to plaintiffs' want of locus standi and on appeal a prima facie case is held as made and case is remanded for further hearing the order is not final. A I R 1925 Cal 374=78 I C 117.

—Original Court holding evidence irrelevant—Appellate Court holding it relevant—Remand. is on a preliminary point A I R 1922 Mad 505 (F B)=45 M 900=16 L W 425=43 M L J 354=(1922) M W N 589=31 M L T 268=69 I C 828.

—Where a case is remanded for effecting partition on another basis the remand order is not final and no appeal lies to the Privy Council. A I R 1925 Nag 349=22 N L R 132=88 I C 69.

—Pre-emption suit dismissed on the ground that the right of pre-emption could not be claimed under Muhammadan Law in Burma. On appeal High Court holding remanded the suit to be decided on merits. The High Court dismissed appeal. The application for leave to appeal filed not only on the points decided on last date but also on the points decided on first date of appeal to High Court. It was not competent for the petitioner to challenge the correctness of the order on the first date and that leave to appeal on this ground could not be given. A I R 1928 Rang 132=6 R 169=110 I C 386.

—Scheme suit under s. 92 dismissed by trial Court on ground that suit temples were private temples, High Court finding that temples were public, case remanded to trial Court. The decision of the Court was not final adjudication. A I R 1929 Mad 508=Ind Rul (1929) Mad 684=117 I C 300.

—Remand is improper on the ground that circumstances of the particular case were not considered. A I R 1926 Mad 1065=(1926) M W N 5. The first Court held that the transaction was fraudulent and dismissed the suit. The High Court remanded the suit to the Court below on the finding that the mortgage did not participate in the fraud. The debt, applied for leave to appeal to the Privy Council. Held that the decision of the High Court was not a final order within S. 100 C. P. C. and an appeal did not lie to the Privy Council from the decision. But the question whether the fraud of the mortgagor would vitiate registration and disentitle the mortgagee to enforce his mortgage was a substantial question of law and therefore the case was fit for appeal to the Privy Council. 42 All 176=18 A L J 137=54 I C 528=2 U P L R (H C) 99.

## C. P. C. (1908) SEC. 109 (Contd)

## (11) Remand Order (Contd)

—High Court remanding a case on preliminary point the remand order is not a final order 38 Mad 509=26 M L J 96=(1914) M W N 64=14 M L T 560=21 I C 342. see also 19 O C 36=33 I C 756.

—On an appeal from the order of the Lower Court refusing to file an agreement to refer to arbitration on the sole ground of its invalidity owing to the contract not bearing the seal of the plff's company the High Court remanded the case for the other issues being tried. Held, the order of remand in the present case could not be called "a final order" 38 All 150=14 A L J 50=32 I C 360.

—Where the High Court on appeal remanded a case and directed that debts who had been sued in their individual capacity should be sued as executors as well and that one of the debts should be sued as residuary legatee and heir, and on such amendment of the suit being made, the questions between the parties should be adjudicated upon. Held per Sanderson, C. J.—That this was not a final order within the meaning of S. 109 of the C P. Code. 22 C W N 640=46 I C 681.

—Where the High Court set aside the decision of the lower Court on the ground that the trial of the suit was barred by the rule of res judicata and remanded the suit for retrial on the merits. Held, that it was an ordinary order of remand which does not decide any of the questions in dispute between the parties and no leave to appeal could be granted. (1918) Pat 1=4 Pat L W 342=45 I C 290.

—Where the insolvency proceedings out of which the case arose had been annulled the Court was functus officio and could not pass any order. A fresh application was made to the High Court seeking to revive the former application alleging that the order remanding the case had become final in view of the fact that the Court below had finally disposed of the matter. Held, that the application was untenable as being barred by limitation for having been made after the normal period of 90 days. Held, also, that as there had been no appeal from the order of the lower court the provisions of S. 109 (a) had no application. A L R 1933 L 23=A I R 1933 L 82=145 I C 131=1 R 6 L 60 (2).

—Decree or order under—Order of remand passed by High Court—Appeal against—Test of finality—Whether suit is still alive and parties' rights undetermined—No appeal to Privy Council. A L R 1933 P C 44 (46)=60 I A 76=11 R 58=A I R 1933 P C 58=142 I C 328=I R 5 P

## C. P. C. (1908) SEC. 109. (Concl'd)

## (11) Remand Order. (Concl'd)

C 59=10 O W N 195=37 L W 331=1933  
M W N 166=64 M L J 307=37 C W N  
405=1933 A L J 244=35 B L R 331=57 C L  
J 136 (PC).

—“Final order” under the section—  
Decision of the High Court on a point  
of limitation—Remand of suit for  
decision of other points—Not appealable  
to Privy Council. A L R 1933 B 352=35  
B L R 458=144 I C 916=A I R 1933 B  
260=I R 6 B 18

—To entitle a party to appeal to  
Privy Council against an order remanding  
a case, the order must be final. “A final  
order” under s. 109 (a) denotes a finality  
in relation to the suit itself. An order  
of remand under which an order of a  
Revenue Court returning the plaint for  
presentation to the Civil Court is set aside  
being not final cannot be made the  
subject of application under s. 109 (a) S.  
109 (a) does not require that the order  
from which permission is sought for  
appeal to the Privy Council should be final  
provided the case involves questions of  
considerable public importance. A L R  
1934 All 140

—Where the High Court by an order  
only purported to send down an issue  
for a finding under O. 41, r. 25 and  
although by an interlocutory judgment  
says “we allow the appeal,” and mentions  
that costs were to abide the final decree,  
it does not in terms set aside the decree  
of the lower court: that order cannot be  
a “final order” within the meaning of S.  
109, C. P. C. A L R 1933 B 336=35 B L  
R 415=A I R 1933 B 251=I R 6 B 64=1  
45 I C 258.

—A plea of limitation was taken as  
one of the main defences in a case.  
The trial Court accepted this plea and  
dismissed the suit. The Court of the  
Judicial Commissioner sitting in appeal  
reversed the decision of the lower  
court on this point and remanded the case  
for trial on the merits. 21 O C 336=6  
O L J 70=49 I C 520.

—Where in a suit for the winding  
up of a partnership business, the first  
Court directed an account to be taken,  
and the High Court on appeal disagreed  
with that Court in respect of the respec-  
tive liabilities of the parties and re-  
manded the suit for a fresh taking of  
the accounts: Held, that the decision  
of the High Court on this cardinal  
question as to the respective liabilities of  
the different parties is such a decision  
as to constitute such a final decision on  
the points in issue as to a mount to a  
decree in suit. 15 C W N 60=7 I C 622.

## C. P. C. (1908) SEC. 109. (Concl'd)

## (12) Who can appeal.

—Defendant neither filing written  
statement, nor taking any part in  
defending the suit, or the appeal to High  
Court, cannot file a separate appeal to  
Privy Council other than what is filed  
by the rest of the defendants, A I R  
1921 Pat 134=(1921) Pat 129=2 P L T 1  
73=60 I C 500.

## C. P. C. (1908) SEC. 110

## Synopsis.

- (1) Applicability and scope of the section
- (2) Affirms the decision of the Court below
- (3) Certificate of value, whether can be questioned
- (4) Connected suits or appeals
- (5) Consent Decree
- (6) Cross-appeals
- (7) Directly or indirectly
- (8) Easements
- (9) Final order or decree
- (10) Interest or mesne profits, whether can be included in value
- (11) Leave to appeal in forma pauperis
- (12) Mortgage suits
- (13) Order in execution
- (14) Substantial questions of law
- (15) Under-or—Over—Valuation
- (16) Valuation
- (17) Value of appeal
- (18) Value of the subject-matter of the suit
- (19) Who can appeal

## (1) Applicability and scope of the section:

—S. 110 is in effect a proviso to s.  
109 and must, therefore, be strictly  
construed. 35 L W 206 (215)=139 I C  
54=I R 1932 M 616=A I R 1932 M 46=A  
L R 1932 A 279.

—Where two conditions were  
satisfied Viz value of the subject-matter  
and substantial question of law e. g.  
interpretation of document supradnama  
appeal lay to P. C. A L R 1933 A 149  
(150)=A I R 1933 A 561=145 I C 549=I R  
6 A 118=1933 A L J 172.

—Where the value of the subject-  
matter of the suit in the Court of the  
First instance or of the projected  
appeal to the Privy Council was Rs.  
10,000 or upwards a certificate for leave  
to appeal can be granted as a matter of  
right. A L R 1933 A 502=A I R 1933  
A 4=143 I C 312=I R 5 A 223=54 A 459.

—Requirements of the section—Decree  
involving a question respecting property  
exceeding Rs. 10,000—Lower Court's



## C. P. C. (1908) SEC. 110 (Contd)

## (1) Applicability and scope of the section. (Contd)

decision reversed by the High Court  
—Proper case for leave being given. A L R 1933 O 406=A I R 1933 O 397=10 O W N 880.

—The Privy Council will as a rule refuse to disturb concurrent findings of the Courts below. A I R 1931 P C 68=8 O W N 330=Ind Rul (1931) P C 173=61 M L J 456=131 I C 781 (P C).

—But leave can be granted even in case of concurrent findings of fact where the decree of High Court is not an affirming decree and the value of the subject-matter is Rs. 10,000 or upwards. 35 L W 206=139 I C 54=I R 1932 M 616=A I R 1932 M 46 (52)=A L R 1932 M 279.

—A person whose claim has been enhanced on appeal to the fullest extent on that particular claim cannot make that decision a basis for a further appeal on grounds unconnected with or rather dissociable from those on which he had succeeded, and on which the Courts were of one mind. 28 N L R 142=140 I C 68 (2)=I R 1932 N 126=A I R 1932 N 118 (120)=A L R 1932 N 263.

—In a case in which the High Court had dismissed a suit brought by the appellant against the respondent for Rs. 2,000 odd as rent for the year 1919-20 under a Kabuliya, the High Court granted leave to appeal to the P C on the ground that since the suit the appellant had brought suits to recover rent for latter years, and that consequently, if the proposed appeal succeeded, he would make good a claim to an amount over Rs. 10,000. The High Court was also of opinion that the case might be viewed as one of a recurring liability and that the capital value of the rent was over Rs. 10,000. Held, by the P C that there was no right of appeal under the Code. 59 I A 29=59 C 1012 (1015)=36 C W N 221=55 C L J 72=35 L W 112=9 O W N 119=16 R D 95=24 B L R 481=62 M L J 336=1932 M W N 275=13 L R 271 (Rev) =136 I C 398=A I R 1932 P C 28=I R 1932 P C 94=A L R 1932 P C 112 (P C.)

—The second paragraph of section 110 is intended to deal with property other than that forming part of the actual subject-matter in dispute and which would be affected by the final decree or order. A I R 1921 L B 48=11 L B R 152=66 I C 606.

—Must involve, directly or indirectly, some claim or question to or respecting property of upwards of Rs. 10,000 in value" in s. 110 refer to questions arising

## C. P. C. (1908) SEC. 110 (Contd)

## (1) Applicability and scope of the Section (Contd)

between parties to the suit and not to questions affecting the title of one of the parties to the suit or suits that can hereafter be brought and not pending. A I R 1922 Mad 34=15 L W 140=30 M L T (H C) 42=42 M L J 78=(1922) M W N 46=66 I C 686.

—Where it is not clear from the record whether resumption by several strangers were for exactly the same grounds as those in suit, the case does not involve questions of wide public importance. A I R 1923 Cal 451=27 C W N 204=84 I C 581.

—No real mischief can arise if s. 110 is not liberally construed because such cases, if worthy of being tried by a higher tribunal, can always be dealt with under sub-s (c) of s. 109. A I R 1925 P C 159=22 L W 255=30 C W N 98=27 Bom L R 867=49 M L J 20=52 C 650=52 I A 207=41 C L J 623=88 I C 445.

—Leave to appeal to Privy Council cannot be granted, where valuation of subject-matter in trial Court is neither challenged in appeal nor by cross-objections to reopen that question. A I R 1926 Rang 138=4 Rang 92=5 Bur L J 23=96 I C 107.

—Whether the inheritance of the cash allowances known comprehensively in Berar as "lawa jama" is governed by the Panch Rules or by the law relating to ordinary pensions, is a question of considerable public importance. A I R 1927 Nag 63=96 I C 751.

—Concurrent findings as to question of fact though for different reasons it is still a finding of fact, and leave to appeal to the Privy Council will not be granted. A I R 1927 Mad 443=39 M L T 15=53 M L J 375=(1927) M W N 213=103 I C 31.

—Para 2 s. 110 relates not only to claims to property of Rs. 10,000 in value but to questions respecting property of the like amount. A I R 1928 Pat 191=106 I C 518.

—Leave cannot be granted where the applicant's appeal to the High Court is dismissed for want of prosecution. A I R 1926 Rang 111=3 R 658=94 I C 464.

—Certificates should make plain upon their face that the discretion has in fact been exercised. A I R 1921 P C 123=2 P L T 132=29 M L T 156=13 L W 365=(1921) M W N 87=62 I C 120.

—The conditions imposed by the first paragraph of the section are meant to apply to all cases where nothing is involved in the decision except the subject-matter of the suit. In such cases the second paragraph of the clause does not



## C. P. C. (1908) SEC. 110 (Contd)

## (1) Applicability and scope of the section (Contd)

apply and both the conditions imposed by the first paragraph must be complied with. 44 C 119 explained 39 M 843; relied on. A I R 1921 Pat 229=2 P L T 463=(1921) Pat 229=6 P L J 596=62 I C 959.

—A case should be of larger importance and the principle when finally decided by their Lordships of the Privy Council, should be of benefit not only to the people directly involved in the litigation, but to a considerable body of other people for grant of leave. Misapplication of law to the particular facts of the case is not a fit ground for granting leave. A I R 1928 All 220=50 A 640=26 A L J 336=108 I C 238.

—“Immediately below” in s. 110 do not mean “subordinate to.” Where a Division Bench of the High Court affirms a decision of a single Judge, and the case involves no question of law, no leave can be granted. A I R 1928 Lah 537=109 I C 863.

—The question whether an assessee has an absolute option to decide in what year a debt becomes bad and therefore to affect an amount of profits received in that year is of great public importance and the case is “otherwise” fit for appeal to the Privy Council. A I R 1929 Nag 265=Ind Rul (1929) Nag 321=119 I C 689.

—The words “to be a fit one for appeal to the Privy Council” coupled with the words “so far as may be” in para. 8, s. 66-A exclude from any right of appeal cases which fall within the requirements of s. 110 of the Code and are operative to confine that right to cases which are certified to be otherwise fit for appeal to the Privy Council. A I R 1929 Nag 336=Ind Rul (1930) Nag 41=120 I C 409.

—Under cl. (1), s. 110 “and” cannot be read as “or”. The value of the subject-matter in dispute on appeal to His Majesty in Council at the date of the decree from which the appeal to His Majesty in Council is to be made, must therefore be taken into consideration besides the value of subject-matter at institution of the suit. A I R 1929 Nag 75=Ind Rul (1930) Nag 313=124 I C 697.

—Where special leave to appeal is granted on ex-parte application the Board is not precluded from going into question of competency on appeal of facts being known. A I R 1931 P C 22=33 L W 74=59 M L J 444=(1931) M W N 286=32 Bom L R 1576=52 C L J 423=35 C W N 33=57 I A 279=10 Pat 86=12 P L T 1=Ind Rul (1931) P C 68=130 I C 612.

—Where a Letters Patent appeal varied the judgment of a Division Bench, and appeals to the Privy Council were pre-

## C. P. C. (1908) SEC. 110 (Contd)

## (1) Applicability and scope of the section (Contd)

ferred from both the judgments, their Lordships expressed a desire that in some manner both cases should not be certified. A I R 1931 P C 104=35 C W N 583=(1931) M W N 620=Ind Rul (1931) P C 117=131 I C 309.

—There is no right of appeal when the two Courts differ only as to costs. 10 O C 65 dissenting from 8 C W N 294.

—Where the subject-matter in dispute was under Rs. 10,000 but a certificate was asked for, on the ground that the present suit to set aside a decree obtained by fraud was brought by a person who was not a party to the suit in which that decree was passed. Held, that the ground raised was not one of such public importance as to justify the issue of a certificate under S. 110. Strangers may impugn decisions obtained by fraud or collusion. 5 Burma L T 13=14 I C 626.

—“Jurisdiction” in cl. 39 of the letters patent, if includes disciplinary jurisdiction—appeal to Privy Council. See 22 I C 324.

—Where two appeals arose out of the same suit and the amount of both the appeals exceeded Rs. 10,000 and the same question was involved in both the appeals. Held, that leave to appeal to the P C should be granted, in spite of the fact that the High Court reversed the decree of the Lower Court in one appeal and affirmed it in the other. 37 All 124=13 A L J 57=27 I C 378.

—Leave to appeal to P C—Applicability of S 12 of Lim. Act. See 42 Cal 35=18 C W N 1066=24 I C 273.

—In a case where the subject-matter is less than Rs 10,000 in value and the sole question upon which the decision of the case rests is one of evidence the point is not one of general interest and importance to justify the grant of a certificate that the case is a fit one for appeal to the Privy Council. 54 I C 463.

—The value of the subject-matter in a suit exceeded Rs. 10,000 and the decision of the first Court was affirmed on appeal by the High Court. The appellant applied for leave to apply to His Majesty in Council, taking up a position that was not taken up in the argument of the appeal in the High Court; Held, that the case was not a fit one for the grant of a certificate for leave to appeal to His Majesty in Council. 58 I C 179.

## (2) Affirms the decision of the Court below.

—An appeal lies from the decree and not from the judgment which is only the expression of the reasoning of the

## C. P. C. (1908) SEC. 110 (Contd)

(2) Affirms the decision of the Court below.  
(Contd)

Court for making that decree. It is open to an appellate Court to affirm a decree on its own reasoning and in disagreement with the reasoning of the trial Court. A I R 1933 P 703 (S B).

—The question of whether the judgment of the High Court is a judgment of affirmance or not within the meaning of S. 110 C P C does not depend upon whether the appellant is the plaintiff or the defendant; it depends upon whether the judgment is one affirming the judgment of the lower Court and that can be seen by considering the position of the parties after the judgment. A L R 1933 P 278 = A I R 1933 P 262.

—Costs are matter of discretion and a variation in this matter alone does not affect the question of whether the judgment of the High Court is or is not one of affirmance. A I R 1933 p 703 (S B).

—In order to "affirm the decision of the Court below" the decree should be affirmed though the affirmation may not proceed on the grounds on which its judgment was passed. A I R 1921 Oudh 111=24 O C 164=63 I C 292.

—In a suit by a principal against his agent for an account for the period of his agency, the claim in the suit was valued at Rs. 40,000. A decree was passed in plaintiff's favour for a sum of Rs. 5,000 odd with interest. Against that decree, the agent preferred an appeal to the High Court, and the plaintiff preferred a memorandum of objections claiming a decree for a further amount and valuing his memo of cross-appeal at Rs. 20,000. The High Court allowed the agent's appeal in part and reduced the amount decreed by the Court below by about Rs. 4,000 and dismissed the cross-appeal except to the extent of about Rs. 150. Held, that the decree of the High Court was not affirming decree within the meaning of S. 110. 35 L W 206=139 I C 54=A I R 1932 M 46=I R 1932 M 616=A L R 1932 M 279.

—Modification of a pecuniary nature in appellant's favour on matter to be deleted before P. C—case on of variation of decree and not of affirming decree. 28 N L R 142=140 I C 68 (2)=I R 1932 N 126=A I R 1932 N 118 (119)=A L R 1932 N 263.

—S. 110 merely says "affirms the decision of the Court" and does not say "affirms the decision of the Court on the merits." 54 A 390=1932 A L J 254=140 I C 125=I R 1932 A 618=A I R 1932 A 312=A L R 1932 A 469.

## C. P. C. (1908) SEC. 110 (Contd)

## (2) Affirms the decision of the Court below (Contd)

—Where the question involved is one of fact and the Division Bench affirms the finding of the Single Judge on that question, the applicant is not entitled to leave as of right. 13 L 338=32 P L R 833=135 I C 605=I R 1932 L 141=A I R 1932 L 121 (2)=1932 P C L 839 (Civ)=A L R 1932 L 839 (Civ).

—Where an appeal is dismissed and a cross-objection is allowed, the decree of the Appellate Court is not one which affirms the decision of the Court below and the person whose appeal has been dismissed has a right of appeal to the Privy Council. (1931) A L J 968.

—Appellate Court not wholly affirming Judgment of lower Court—Variation in one particular—Value above Rs. 10,000, If, entitled to a certificate as a matter of right See 9 I C 1040.

—"Decision" means the decree or order passed and not the reasons given for passing such decree or order. Affirming decree does not mean affirming judgment, where there are no concurrent findings of fact yet cl. 3 of s. 110 may apply and in that case some substantial questions of law will have to be shown to have been involved in the appeal. Where the Appellate Court allows an issue which had been given up to be re-opened and permits further evidence be taken that not by itself is not a sufficient substantial question of law especially where the applicant was in no way prejudiced by the procedure adopted by the Appellate Court, A I R 1924 Pat 468 =5 P L T 17=2 P L R 48 Civ=75 I C 58.

—Where a High Court decree confirmed the lower Courts finding as to the defendant's liability but slightly altered the amount due the decree was held not to be one of affirmance. Where the decree of High Court does not affirm lower Court's decree, Court cannot consider the extent to which the said decree has been modified. A I R 1921 All 270=19 A L J 3=43 All 220=64 I C 3.

—Where the High Court entirely confirms the decision of the lower Court on the merits of the case except as to costs its decree merely affirms the decision of the Court below within the meaning of s. 110. A I R 1922 Cal 316=34 C L J 299=66 I C 407.

—Where the decree of the High Court is one of affirmation except as regards a variation made in the lower Court's decree with the consent of the person trying to appeal to the Privy Council, those persons have to show that a substantial question of law is involved. A I R 1921 Cal 81 (2)=25 C W N 775=66 I C 621.

## C. P. C. (1908) SEC. 110 (Contd.)

## (2) Affirms the decision of the Court below (Contd.)

—Where the High Court varied a decree of the lower Court at the instance of the Vakil for all the appellants. One of appellants was benefited at the expense of all the appellants. It was not suggested that the Vakil in making the application made any reservation as to the rights or position of the other appellants. Held, that the decree was a decree of affirmance. 25 C W N 775=66 I C 621.

—Modification is in favour of the applicant. Adverse concurrent decision of both of the Courts as regards the portion of the claims which is decided against him. Decree of the High Court is an affirming decree A I R 1922 All 243=66 I C 721.

—The decision of the Appellate Court affirms the decisions of the Court below if the decree is affirmed even though on different grounds. A I R 1923 Oudh 49=25 O C 277=70 I C 283.

—Decree which affirms the decree of the lower Court with variation is not a decree of affirmance. A I R 1923 Cal 215=26 C W N 651=70 I C 933.

—“Decision” means the decision of the suit by the Court. It is immaterial that Appellate Court, comes to a different conclusion on the question of fact, if the conclusion is affirmed A I R 1923 Rang. 55=11 L B R 410=1 B L J 215=77 I C 400.

—Where the High Court in dismissing an appeal proceeds, in some respects, on grounds different from those adopted by the trial Court, the decision of the High Court affirms the decree of the first Court. A I R 1925 Oudh 219=83 I C 90.

—To affirm the decision of the lower Court it is sufficient for the Appellate Court to affirm the decree. A I R 1927 Oudh 535=4 O W N 613=102 I C 433.

—Where High Court and lower Court are at one upon the matter which is to be in debate before the Privy Council, it is a case of a decree which affirms the decision of the Court immediately below. In partition suit, lower Court granting certain share, increased in appeal by High Court—Plaintiff having no further grievance in the matter must show a substantial question of law to litigate upon other points on which both Courts agree. A I R 1927 Cal 543=45 C L J 426=31 C W N 572=103 I C 65.

—Decree varied partly—Application for leave only from that part affirming the lower Court's decree. The decision of the Appellate Court is one affirming the decision of the lower Court within s. 110 A I R 1926 Nag 245=91 I C 200.

## C. P. C. (1908) SEC. 110 (Contd.)

## (2) Affirms the decision of the Court below. (Contd.)

—If the High Court maintains the decree of the lower Court, it affirms the decision of the lower Court although the two Courts differ in their findings on certain issues. 26 P L R 614=92 I C 479.

—The judgment is an affirming one where some trifling account adjustments are made in the matter of interest and the like, but the judgment on all essential points agrees with the findings of the Court below on the merits. A I R 1929 Nag 85=110 I C 855.

—Suit for setting aside wakf —Allegations that deed was executed under undue influence that wakf was illusory and that there was no transmutation of possession and that certain house belonged to wakf—Court of first instance deciding all questions in plaintiff's favour and decreeing suit and also granting decree for mesne profits against the mutwali—On appeal High Court holding that house did not belong to wakf and that mutwali was entitled to remain in possession until matter was determined by Court and setting aside decree as to mesne profits—On main question Court affirming decree of trial Court but setting aside finding as to undue influence and on question of deed being illusory—Court agreeing that there was no transfer of possession as required by law—The lower Court's decree cannot be said to have been affirmed. A I R 1928 Pat 699=9 P L T 731 =Ind Rul (1929) Pat 317=116 I C 541.

—A decree which substantially alters the decree of the Court below cannot be said to be a decree affirming that decision. In construing a decree as to whether it is one of affirmance or of reversal or variation one should look to the substance of the decree and see what is the subject-matter of the appeal to His Majesty in Council A I R 1929 Pat 561=Ind Rul (1929) Pat 401=117 I C 193.

—Appellate decree affirming part of the decree of the lower Court and at variance as to a part—Appeal is not limited to part at variance only. A I R 1929 Pat 561=Ind Rul (1929) Pat 401=117 I C 193.

—Decree of High Court partly affirming and partly varying decree of lower Court—Appeal against item of Rs. 18,000 refused by both lower Courts on which leave was asked—No question of law having been involved leave could not be granted A I R 1929 Bom 359=31 Bom L R 619=Ind Rul (1929) Bom 547 =119 I C 771.

## C. P. C. (1908) SEC. 110 (Contd)

## (2) Affirms the decision of the Court below. (Contd)

—Decree on award not in conformity with award as part unenforceable due to lapse of time being omitted—On appeal decree made in conformity with award—No substantial alteration—In substance appeal being a decree of affirmance and as there was no question of law involved leave could not be granted. A I R 1930 Lah 102=10 Lah 688=30 P L R 722=Ind R 1 (30) Lah 282=22 I C 90.

—No leave can be granted in case of concurrent findings of fact unless plff. could show to the High Court that there was a substantial question of law involved, 16 A 274, P C see also 177 P L R 1905=39 P R 1905 and 43 P R 1934, and 23 M L J 210=16 C W N 889=39 I A 156=10 A L J 364=16 C L J 613=14 Bom L R 1055=34 A 455=12 M L T 331= (1912) M W N 976=15 O C 271=16 I C 197 (p C), and 2 O L J 214=30 I C 239.

—Where a decree of the Chief Court affirms the decision of the court below and the decision of both Courts is based on facts found to be established, no certificate for leave to appeal to His Majesty in council can be granted, even though the decision incidentally involves a decision on the question of the interpretation to be put on certain documents, as this cannot be regarded as a "substantial" point of law "directly involved" in the case. 129 P W R 1917 =133 P L R 1917=41 I C 781.

—Where decrees are concurrent but the reasons are divergent, leave to appeal to His Majesty in Council cannot be granted unless the applicant shows that some substantial question of law is involved in the appeal. 13 C L J 501=11 I C 159.

—An order dismissing an appeal as out of time is an order affirming the decision of the lower Court 23 M L J 219=16 I C 486=12 M L T 260=(1912) M W N 962.

—Where a Chief Court affirms in part the decree of a Dt. Judge it is a decree of affirmance within the meaning of S. 110 of the C. P. Code for the purposes of appeal to the Privy Council. 22 P R 1915=66 P L R 1915=19 P W R 1915 =26 I C 432.

—An order dismissing an appeal for default is an order affirming the decree of the court below and the case cannot be certified to be a fit one for appeal to the Privy Council, unless some substantial question of law is involved. 13 A L J 623=29 I C 469.

## C. P. C. (1908) SEC. 110 (Contd)

## (2) Affirms the decision of the Court below. (Concld)

—A variation made on the merits in petitioner's favour as also a variation as to costs not touching the merits of the case against the appellant cannot make the decree in appeal any the less an affirming one A I R 1923 Mad 30=16 L W 262=30 M L T 337.

—Partial reversal of a decree does not mean confirming of a decree. Benefit of doubt goes to the petitioner. 18 M L T 387= (1916) 1 M W N 122=31 I C 272.

—Where the decree of the Chief Court affirmed the decision of the Court below and the decision, of both Courts was based solely on facts which were held to be established though there was a question of limitation in respect of a small portion of property their lordships declined to grant to leave to appeal to P C. 64 P R 1916=35 I C 583=15 P L R 1917.

—Court immediately below—Single judge of High Court, if subordinate to High Court—Order of single Judge setting aside decree of lower appellate court—Order set aside by Division Bench—Effect of—If amounts to affirming decision of court below see 43 Cal 90=33 I C 745.

—A decree of the High Court dismissing an appeal on account of insufficiency of Court-fee is one affirming the decree of the first Court within S. 110 C P C. A refusal by the High Court to show any indulgence under S. 149 C P C is not a question of law. 1 P L R 1920=1 Lah L J 69=2 U P L R (L) 27=16 P W R 1920=54 I C 400.

—Decree awarding additional relief—Not an affirming judgment—Certificate that the case is otherwise fit for appeal—Inconsistent decision, avoidance of, see 23 C W N 582=50 I C 760.

## (3) Certificate of value, whether can be questioned

—The ruling provision as to certificates of value applicable, at the time the appeal was filed, was No 2 of Schedule to Order in the Council of 10th April, 1838, which was to the effect that the certificate should be deemed conclusive of value and should not be questioned on appeal by any party. A I R 1922 P C 257=16 L W 18=45 M 475; 31 M L T (P C) 31=43 M L J 323=49 I A 211=27 C W N 1=20 A L J 937=36 C L J 450=74 I C 584.

## (4) Connected suits or appeals

—Cause of action against one and defendant distinct and different from



## C. P. C. (1908) SEC. 110 (Contd)

## (4) Connected suits of appeals. (Conclld)

causes of action against other defendants. Fact that a joint suit is brought cannot make value of subject-matter of appeal against him to Privy Council higher than what is decreed against him. A I R 1923 Mad 30=16 L W 262=30 M L T 337.

—Two suits involved substantially the same questions for determination, and in the High Court were heard together and decided by one judgment. But one appeal was re-heard on review and another judgment was given. Held, the suits cannot be said to be decided by one judgment, though the judgment on review did not in any way modify the other portion of the earlier judgment in any way. A I R 1923 Mad 602=44 M L J 424=73 I C 217.

—High Court's decree confirming that of lower Court, cross-appeal allowed and lower Court's decree modified. This mere fact does not give the right of appeal to the appellant who otherwise would not have that right. A I R 1926 Mad 1024=51 M L J 295=24 L W 455= (1927) M W N 65=97 I C 592.

—On two connected suits where the points are identical but one only exceeds Rs. 10,000 in value and is certified as fit for appeal to the Privy Council the other suit should also be certified though its subject-matter is less than Rs. 10,000 in value, 2 U P L R (A) 411=43 A 223 =18 A L J 1119=59 I C 794.

—Ten suits were filed to declare the ownership of ten different plots of land which were sold by ten different sale deeds each of them being for an amount below Rs. 100. The suits were tried together and were valued in all at Rs. 27,200. One of the suits was valued at Rs. 5,800 and others at less than Rs. 5,000 each. The First Court held that the sales were one transaction and the sale deeds being unregistered dismissed the suits on appeal the High Court reversed the decree of the First Court. Upon an application for leave to appeal to P. C. held that the decree did not involve directly or indirectly some claim or question to or respecting property of Rs. 10,000 or upwards 13 A L J 1075=33 I C 369.

## (5) Consent decree

—High Court order as to whether an order recording a compromise is valid is not a consent order and if it otherwise complies with the requirements of law forms a fit subject for appeal to His Majesty in Council A I R 1921 Pat 256=1921 P H C C 193=6 Pat L J 171=62 I C 235.

## C. P. C. (1908) SEC. 110 (Contd)

## (5) Consent decree. (Conclld)

—A consent decree for money created charge on immoveable property—Execution was to be by appointment of receiver—Appeal from order appointing Receiver was dismissed with additional direction to Receiver—No substantial question of law was involved for granting leave to appeal to the Privy Council A I R 1931 Cal 174=51 C L J 270=Ind Rul (1930) Cal 767=126 I C 719.

—An appeal does not lie to the Privy Council from a consent decree even where such decree reverses the decree of the first court and where the value of the subject-matter of the appeal is above Rs. 10,000 5 Pat L J 383=57 I C 245.

—Whether two parties have agreed or not to a certain decree is not a substantial question of law but is pure question of fact. A I R 1929 Bom 68=30 Bom L R 1610=Ind Rul (1929) Bom 228=114 I C 372.

—No appeal lies against a consent decree to His Majesty in Council and leave to appeal cannot be granted. (1920) Pat 349=5 Pat L J 383 =1 Pat L T 599=57 I C 245.

## (6) Cross appeal

—Separate appeals which are filed in the High Court are separately numbered and ordinarily separate decrees are passed and prepared in them. In such cases it may not be possible to show that although the appeal has been dismissed the decision of the Court below has not been affirmed by the decree passed in appeal. 54 A 146=1931 A L J 968=135 I C 234=A I R 1932 A 65 =1 R 1932 A 58=A L R 1932 A 185 (F B).

—Where there is an appeal & a cross objection filed in that appeal there is only one decree. For the purpose of preparing a decree the cross objection is never treated as an independent & separate appeal. When the appeal has been dismissed & the cross objection allowed the decree of the Court below is varied & this is so where the variation is only as to the costs of the Court below and even though the variation may be in favour of the applicant himself. 54 A 146=1931 A L J 968=135 I C 234=A I R 1932 A 65=I R 1932 A 58=A L R 1932 A 185 (F B).

—The memorandum of objections can be treated as a separate cross appeal only if the appeal & the memorandum of objections are such as must be treated as forming two independent proceedings relating to distinct sets of facts Plaintiff suing trustee for general account alleging eight specific charges of malversation—These charges forming subject-matter of trial in lower Court—Some charges de-



## C. P. C. (1908) SEC. 110 (Contd)

## (6) Cross appeal. (Concl'd)

cided in favour of & Some charges against trustee—Appeal by trustee & cross-objections by plaintiff—High Court holding that no liability for general accounts lay on trustee & dismissed the whole suit—In such case appeal & cross objections could not be treated as independent appeals because charges of malversation were not independent but were particulars of claim for general account & High Court decree could not be split up so as to say that one part was affirming while other was reversing the judgment. A I R 1929 Mad 429=(1929) M W N 304=52 M 521=56 M L J 476=29 L W 623=Ind Rul (1930) Mad 112= 121 I C 16.

—Mortgagee succeeding in his mortgage suit except on question of interest—Both mortgagee & mortgagor appealing to High Court—Mortgagors appeal dismissed & that of mortgagee accepted—Mortgagor applying for leave under s. 109—As the variation in appellate decree took place in mortgagee's appeal & not mortgagor's mortgagor was not entitled for certificate unless he showed that a substantial question of law was involved A I R 1930 Lah 554=31 P L R 236=Ind Rul 1930 Lah 443 = 123 I C 523.

—Cross appeals to High Court no substantial question of law no leave can be granted 16 A L J 861=48 I C 124

## (7) Directly or indirectly.

—The words 'must involve directly or indirectly some claim or question to or respecting property of upwards of Rs. 10,000 in value,' in S. 110 of the C P C refer to questions arising between the parties to a pending suit and not to questions relating to the title of only one of the parties which might be made the basis of a prospective suit. A L R 1933 A 385 (387)=A I R 1933 A 8=140 I C 418=54 A 431.

—The expression "involving directly or . . . or upwards" refers to suits in existence and not to suits in gremio futuri. The words refer to questions arising between parties to a pending suit and not to questions relating to the title of one only of the parties which might be made the basis of a prospective suit. 54 A 431 (435-6) —I R 1932 A 645=140 I C 418.

—The mere possibility of similar litigation in this Presidency will not entitle the applicant for leave to appeal to add to the value unless the other litigation will be affected by the doctrine of res judicata in which case it helps. 55 M

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## C. P. C. (1908) SEC. 110 (Contd)

## (7) Directly or indirectly (Contd)

106 (117)=61 M L J 692=34 L W 817=135 I C 449=A I R 1932 M 125.

—Where there was no more than an incidental finding in the judgment of High Court as regards the boundary line except in so far as it determined the ownership of the plots which were directly in dispute; Held, that because of such a mere incidental finding the decree or final order cannot be said to involve indirectly any question regarding the larger extent. A I R 1923 Mad 125=(1922) M W N 683=16 L W 517=31 M L T 335=43 M L J 728 =69 I C 385.

—"Directly or indirectly" do not cover a claim distinct in its character and to which there is an irrelevant reference in the plaint. They refer to suit in existence and not to suits in gremio futuri. A I R 1926 Rang 128=5 Bur L J 45=95 I C 377.

—A suit does not involve claim "indirectly" simply, because similar questions may arise in other estates or in connection with other like things in the same province. If the decision of an issue in a particular case makes the decision of the same issue in other cases res judicata, or some such similar connection can be shown, then alone the value of others disputed matters may be taken into account: A I R 1929 Mad 780=(1929) M W N 602=57 M L J 477=3 L W 946=Ind Rul (1930) Mad 392=122 I C 448.

—The plaintiff claimed under a deed of gift, the validity of which was denied by the defendant. Certain other claimants who were donees under the gifts were also parties as defendants: the value of the property, the subject matter of the deed of gift far exceeded Rs. 10,000. The value of the subject-matter of the suit and the proposed appeal, however did not exceed Rs. 10,000. Held, that under the circumstances that the decree indirectly involved a question respecting property of the value of upwards of Rs. 10,000 and that the case was a fit one for appeal to the Privy Council. 16 I C 431.

—Under S. 110 the question directly or indirectly involved must be one between the parties to the suit and not one between one party to the suit and other persons who are not parties thereto. 90 P R 1913=340 P L R 1913=229 P W R 1913=21 I C 624.

—A claim for a smaller sum could be said to involve indirectly a claim or question relating to property over ten thousand rupees in value when the smaller decree has the effect of estopping either

## C. P. C. (1908) SEC. 110 (Contd)

## (7) Directly or indirectly (Concl'd)

by the rule of res judicata or otherwise, the party from claiming rights under the larger claim. 32 M L J 400= 37 I C 502.

## (8) Easements.

—In the case of an easement, the value of which falls much below Rs. 10,000 appeal does not lie although it affects property worth over Rs. 10,000. A I R 1921 Bom 266=23 Bom L R 374= 61 I C 588.

—The second clause of s. 110 would apply if the matter in dispute is incapable of valuation as in the case of easements. A I R 1926 Rang 138=4 Rang 92=5 Bur L J 23=96 I C 107.

—After institution of B's suit L brought a cross-suit to establish his right to an easement. L's suit was later than B's suit. At the time when L brought his suit, the period of 20 years had elapsed and it was held that it was not open to him to add on to the period which had expired at the time of the institution of the opponent's suit, subsequent period after the institution of that suit. Held that although there was a point of law it was not a substantial question of law. A I R 1929 Bom 341=53 B 552=31 Bom L R 632=Ind Rul (1929) Bom 558=119 I C 782.

—In case of easement to light and air, leave to appeal to Privy Council it is not the value of the whole property which is to be taken into consideration but the value of the easement. A I R 1929 Bom 241=53 Bom 552=31 Bom L R 632=Ind Rul (1929) Bom 558=119 I C 782.

—Per Sadasiva Iyer, J.—The word "property" in the second paragraph of S. 110 means rights in property inferior to full ownership where such inferior rights alone are the subject-matter in dispute. The suit must, to satisfy its conditions, involve claims and rights to property which rights & claims are worth Rs. 10,000 and upwards. Per Spencer, J.—In enacting the second paragraph of S. 110 the legislature could not have intended that when some subsidiary interest, such as an easement of considerable value attached to property of great value, is in dispute, the value of property affected rather than the value of the subject-matter of the suit should determine the right of appeal. The claim must be one "to or respecting property" of Rs. 10,000 in value, not a claim merely affecting property of such value. 33 M L J 481=6 L W 12=(1917) M W N 414=40 I C 680.

## C. P. C. (1908) SEC. 110 (Contd)

## (9) Final order or decree.

—No leave to appeal to the Privy Council can be granted against an order suspending a Vakil from practice, which is a disciplinary matter and not a judgment. A I R 1922 Mad 440=43 M L J 382=31 M L T 173=16 L W 328=(1922) M W N 530 (F B) =69 I C 290.

—High Court's judgment granting probate is a final decree, and an appeal lies to Privy Council. A I R 1927 Rang 56=5 R 119=5 Bur L J 176=99 I C 759.

—A High Court order setting aside an order dismissing the suit for want of prosecution is a final order. A I R 1921 Pat 37=6 P L J 116=2 P L T 155=60 I C 479.

## (10) Interest or mesne profits, whether can be included in value.

—Determining value of subject-matter mortgage suit interest pendente lite and future interest up to dies datus can be included A L R 1933 N 52 (53)=28 N L R 345=15 N L J 154=141 I C 42=I R 5 N 24=A I R 1933 N 22.

—Interest accruing subsequent to suit cannot be deemed to form part of the subject-matter in dispute on appeal to King in Council. Value of suit as stated in plaint alone to be deemed subject-matter in dispute in appeal to Privy Council from the decree of High Court dismissing the decree of lower Court. A L R 1933 M 391 (392-3)=56 M 883=A I R 1933 M 401=143 I C 139=37 L W 491=61 M L J 496=1933 M W N 260=I R 5 M 280.

—Where interest up to the date of the decree and further interest to the date of payment is claimed in the plaint, and the amount by which the amount said to be due on the date of the suit fell short of Rs. 10,000 by Rs. 224, and this amount represented interest for about 3½ months, and there was no possibility of a decree being granted within 3½ months: Held the amount for which a decree was asked amounted to Rs. 10,000. A I R 1923 Nag 239=72 I C 395.

—For purposes of a Privy Council Appeal by one of two co-mortgagors, the value of the subject-matter is the value of entire claim of the mortgagee at the date of suit together with interest and not only the share of the co-mortgagor seeking to appeal, when that co-mortgagor is not claiming a title paramount to the mortgagee. A I R 1923 Cal 387=71 I C 371.

—For s. 110 interest from the date of the plaint to the decree can be included for ascertaining value of subject-matter.

## C. P. C. (1908) SEC. 110 (Contd)

## (10) Interest or mesne profits whether can be included in value (Contd)

A I R 1923 Mad 135=1922 M W N 652=16  
L W 682=43 M L J 622=32 M L T 1=74  
I C 596.

—Subject-matter of the suit includes interest pendente lite. A I R 1923 All 78=45 A 133=20 A L J 903=69 I C 645.

—No distinction lies between interest and mesne profits in respect of claims to include them in the subject-matter of the suits. For s. 110, interest from the date of institution of the suit to the date of the decree can be included in the subject-matter for leave to appeal. A I R 1926 Rang 45=3 Rang 405= 91  
I C 647.

—To compute the value of the subject-matter in suit the amount of interest accruing subsequent to the decree of the trial Court should not be taken into consideration. A I R 1921 Pat 229=2 P L T 463=(1921) Pat 229=6 P L J 596=62  
I C 959.

—Value of suit—Mesne profits to be added are those awarded by the Court whether actually accrued at the date of suit or later A I R 1921 Pat 115=2 P L T 675=6 Pat L J 246=63 I C 492.

—Mesne profits subsequent to the date of the High Court decree, and awarded to the decree-holders cannot be taken into consideration in making an estimate of the value under para 2. A I R 1926 Bom 265=50 B 160=28 Bom L R 454=94 I C 755.

—Mesne profits claimed up to the date of the suit as also the future mesne profits up to the date of the decree of the trial Court should be taken into account in arriving at value of suit for s. 110. 107  
I C 828.

—For valuation of subject-matter of a suit, involving a claim for mesne profits, the mesne profits which might be awarded by the Court, whether they had actually accrued at the date when the suit was instituted or whether they were future mesne profits should be taken into consideration. A I R 1929 Pat 547=Ind Rul (1929) Pat 397=117 I C 189.

—Where a suit for property even including pro-notes on their face value amounts to less than Rs. 10,000, interest up to date of decree cannot be added to make up deficiency. A I R 1930 P C 44=34 C W N 235=58 M L J 184=1930 M W N 193=51 C L J 168=32 B L R 517=53 M 167=57 I A 56=11 P L T 698=31 L W 292  
=Ind Rul (1930) P C 49=121 I C 513.

—The amount of interest to be given by Court in its discretion but not claimable as of right, cannot be included in the value under, s. 110. A I R 1929 Nag 75=Ind Rul (1930) Nag 313=124 I C 697.

## C. P. C. (1908) SEC. 110 (Contd)

## (10) Interest of mesne Profits, whether can be included in value (Conclud)

—The Patna High Court, following in this respect the practice of the Calcutta High Court, will permit an applicant for leave to appeal to His Majesty in Council to add to the actual value of the property in suit the amount of mesne profits accrued up to the date of the appellate court's decree. 3 Pat L J 377=5 Pat L W 327= (1918) Pat 246=46 I C 137.

—A plaintiff claimed a sum which, with principal and interest amounted to more than Rs. 10,000. He obtained in the court of first instance a decree for less than Rs. 10,000 with interest. The defendants, however, appealed to the High Court and the plaintiff's suit was dismissed. The plaintiff applied for leave to appeal to His Majesty in Council. Held, that the plaintiff could not bring his appeal above the statutory limit by adding to the amount decreed to him by the court of first instance interest at the rate given by that Court. 42 All 445=2 U P L R 142  
=18 A L J 445=55 I C 976.

## (11) Leave to appeal in forma pauperis.

—High Court cannot grant leave to appeal to Privy Council in forma pauperis especially when the petition for leave is on behalf of a whole community. Ind Rul (1929) Mad 496=115 I C 832.

—Leave to appeal to Privy Council, in forma pauperis cannot be granted. 3 Pat L J 179=44 I C 731.

—Application for leave to appeal in forma pauperis—No power to grant. See 44 I C 731: see also 42 Mad 32=47 I C 646.

## (12) Mortgage Suits.

—Suits based on a mortgage stand on a different footing in respect of interest pendente lite and up to the date fixed for payment which is a definite date. By Transfer of Property Amendment Act of 1929, O. 34, r. 11, of the C. P. C. definitely provides for interest. Such interest may be taken into consideration for determining the value of claim before the Privy Council where in a mortgage suit the claim in the trial Court exceeded Rs. 10,000 but the amount decreed was only Rs. 8,974-11-0. Held, the interest awarded till the date fixed for payment can be taken into account in ascertaining the value of the claim before Privy Council of the subject-matter, A L R 1933 N 40 (42)=15 N L J 154=A I R 1933 N 22=141 I C 42= 28 N L R 345 = I R 5 N 24

—S. 110 does not speak of the valuation of the suit as put in the

## C. P. C. (1908) SEC. 110 (Contd)

## (12) Mortgage suits (Contd)

plaint but of the value of the subject-matter in dispute or of the value of the property affected by it. 1932 A L J 858-A L R 1932 A 1159 (1161).

—Costs of original suit cannot be taken into account but interest from date of suit until the *deus datus* can be added to the amount due under the mortgage decree. By the Transfer of Property Act (Amending Supplementry Act of 1929), O. 34, r. 11 of the Civil Procedure Code, provides definitely for the payment of interest. 28 N L R 345.

—Decree for redemption and for Rs. 7,000—Appeal by mortgagee claiming Rs. 2,000 due to himself. It not being alleged that the appeal affected a question relating to property exceeding Rs. 10,000 in value no leave to appeal could be granted under s. 110. A I R 1922 Oudh 214-73 I C 407.

—When the High Court in a mortgage-suit, affirmed the decree of the lower Court as to the substance, but merely changed the rate of interest in favour of applicant. Decree being one of affirmance leave to appeal to the Privy Council could not be granted. A I R 1922 All 89-44 A 200-20 A L J 9-44 I C 916.

—Suit for rectification of a mortgage-decree—High Court and lower Court decreeing it—One of the defendants seeking leave to appeal—Claim of plaintiff against that defendant being part and parcel of mortgage transaction and no paramount title having been set up by that defendant, the value of appeal to P. C. was not the value of the share of that defendant but was the entire value of the mortgage suit whether the plaintiff was entitled to have the decree rectified was a substantial question of law. A I R 1923 Cal 387-71 I C 371.

—Where an appeal is preferred against a preliminary mortgage decree, a decision by the Appeal Court dismissing the appeal renders the mortgagor liable to larger sum and much more so when the period of grace is extended. But the order of the High Court cannot be regarded as an order of reversal for purposes of s. 110. A I R 1927 Pat 379-103 I C 703.

—Mortgage claim amounting to over Rs. 10,000 against several properties. Subsequent mortgagees of a certain plot worth less than Rs. 10,000 denying that it was covered by the plaintiffs' mortgage. High Court on appeal holding that the plot was not included in the plaintiffs mortgage. Plaintiff applying for leave to appeal to the Privy Council. Held,

## C. P. C. (1908) SEC. 110 (Contd)

## (12) Mortgage Suits. (Contd)

that the subject-matter in dispute was really the whole debt for purposes of valuation for Privy Council appeal. A I R 1927 Pat 391-103 I C 831.

—Whether a mortgage not registered according to provisions of s. 109 of Companies Act can be repudiated by company itself while it is a going-concern is not a substantial question of law, as the law on the question is perfectly clear namely that such a mortgage cannot be repudiated by the company itself. A I R 1927 Rang 288-6 Bur L J 160-5 R 585-104 I C 326.

—Although for purposes of Court fees the value of suits for redemption is "the principal money expressed to be secured by the instrument of mortgage." the mortgage-money is not the basis of the valuation for purposes of jurisdiction. In such cases the value of the mortgaged property should be the basis. A I R 1927 Rang 304-5 Rang 499-103 I C 412.

—Whether a prior mortgagee in possession can apply under O. XXI, r. 89 to set aside a sale in pursuance of a decree in favour of a subsequent mortgagee of a simple mortgage in a suit to which the prior mortgagee was not a party and whether cl. (b) of s. 72, Transfer of Property Act applies to such a sale are substantial questions of law. A I R 1925 Oudh 17-2 O W N 860-91 I C 93.

—Whether mortgaged property is Ghatwali and inalienable is a point of law as depending upon construction of documents on the record A I R 1929 Pat 561-Ind Rul (1929) Pat 401-117 I C 193.

—Appeal & cross appeal regarding interest in a mortgage decree The appellate Court by a single decree modifying decree of the lower Court in favour of the mortgagee & to the prejudice of the mortgagor appellants. The decree of the lower Court as to interest was not affirmed but modified & the decree of the appellate Court from which an appeal to His Majesty in council was sought was a decree not of affirmance but of reversal on the question of interest involved in litigation. A I R 1929 Pat 561-Ind Rul (1929) Pat 401-117 I C 193.

—In a suit to enforce a mortgage security where the proceedings are entirely in rem and the mortgagor is not sought to be made personally liable the value of the subject matter in dispute is the amount claimed when such amount falls short of the value of the mortgaged property while it is the value of the mortgaged property when the amount due under the mortgage exceeds the value of the property. 13 O L J 505-10 I C 990.

## C. P. C. (1908) Section 110 (Concl'd)

## (12) Mortgage Suits (Concl'd)

—The question of the construction of documents, as, whether the transactions evidenced by the documents, do or do not amount to a mortgage by conditional sale, is a substantial question of law, within the purview of S. 110. 14 I C 269.

—Claimant adverse to mortgagor, appealing to Privy Council if value of claim to be considered see 20 C W N 1279-38 All 488 (P C)=14 A L J 1002-18 Bom L R 850-24 C L J 303= 20 M L T 211=35 I C 939.

## (13) Order in execution.

—Further applications for execution were time-barred and the sum realised in execution as to which there was dispute between joint decree-holders was only 1300 though the unsatisfied balance under the decree executed was Rs 10,000 Held, leave could not be granted to appeal to the Privy Council A I R 1922 Pat 611=3 Pat L T 781=(1922) Pat (Sup) 296-67 I C 991.

## (14) Substantial questions of law.

—The principle underlying the provisions of S 110 is clearly that when two Courts have concurred in a finding of fact that finding cannot be attacked. 13 L 338= 32 P L R 833=135 I C 605=I R 1932 L 141=A I R 1932 L 121 (2)=1932 P C L 839 (Civ.)=A L R 1932 L 839 (Civ.)

—Where the grounds of appeal raise questions of law which are not substantial in the sense that they are debatable, of general interest or without previous decisions of their Lordships of the Privy Council to guide Indian Courts, leave cannot be granted. A I R 1925 Oudh 545 =85 I C 469.

—A point of law to be substantial should be such as to impress the Judges that it is debatable in view of the authorities or that the authorities themselves may require reconsideration. Exhibition of patience in hearing and care in the judgment or statement and examination in detail does not establish that a point is substantial. A I R 1933 P 703 (S B.)

—The question whether the widow of a yeoman tenant who acquired the status of a proprietor on payment of the necessary instalment could treat the property as self-acquired having been decided in the affirmative by a uniform course of decisions did not involve any substantial question of law and was not fit case for granting leave to appeal to the Privy Council. A L R 1933 L 1272=A I R 1933 L 1044 (2).

## C. P. C. (1908) SEC. 110 (Cont'd)

## (14) Substantial questions of law (Cont'd)

—The words "substantial question of law" in the last clause of S. 110, C P C., mean a substantial question of law as between the parties in the case involved and not a question of general importance. A L R 1933 O 409=10 O W N 879.

—Where the judgment of the High Court is a confirming judgment, the main point for decision in an application for leave to appeal to His Majesty-in-Council is whether there is a substantial question of law within the meaning of S. 110 of the Civil Procedure Code. The words "substantial question of law" do not mean a question of general importance but a substantial question of law as between the parties in the case involved. A L R 1933 M 838=A I R 1933 M 221=142 I C 711=1 R 5 M 238.

—Where the principles of law on a particular point are well settled and the only question is the application of these principles to a particular set of facts it cannot be said that a substantial question of law arises within the meaning of s. 110 C P C Ind Rul (1931) Lah 998-32 P L R 599 =134 I C 790.

—Whether question as to proceeding amounts to arbitration or compromise is a substantial question of law 1932 A L J 730=138 I C 670=I R 1932 A 481=A L R 1932 A 1035.

—Conclusion reached pursuant to direction as to assessment of damages given by s. 73 Expl of Contract Act is a question of fact, not of law: 28 N L R 142.

—Question of intention of parties to a document not a document of title from phraseology employed as well as all surrounding circumstances and not really of construction of words used is not a substantial question of law 13 L 251 (253)= 32 P L R 599=A I R 1931 L 753.

—Legal principles well settled—Misapplication of, to particular set of facts is not a substantial question of law 13 L 251 (252)=32 P L R 599=A I R 1931 L 753.

—Decision of limitation dependent on facts found is not a substantial question of law: 13 L 251 (253)=32 P L R 599= A I R 1931 L 753.

—Mahomedan law—Divorce under Hanafi law—Urdu words used by husband if sufficient to effect, inspite of admitted fact that there was no intention to divorce on the part of the husband—Question as to, one of law but not a substantial question of law. 9 O W N 103=A I R 1932 O 134=138 I C 630 (1)=A L R 1932 O 173.



## C. P. C. (1908) SEC. 110. (Contd)

## (14) Substantial questions of law (Contd)

—“Substantial” does not mean “important”. A substantial question of law is one on which there may be a difference of opinion. Where the question is one of the application of the law to the facts of the case, the case does not comply with the requirements of S 110 33 P L R 299=132 I C 2=A I R 1932 L 56 (1).

—Substantial questions of law are those that affect a large number of persons. A I R 1923 Nag 272=73 I C 221.

—Construction of particular document cannot be treated as a question of general importance or a substantial question of law. A I R 1922 Oudh 214=73 I C 407.

—The question whether the permanent tenures known as Karamkari and Adimayavana in Malabar have the incident of forfeiture on alienation attached to them by custom or not is a substantial question of law and one of general interest in Malabar. Leave may be granted in these cases under s. 109 (c). The question whether a custom has been established or not is a question of law though it has to be inferred from the facts proved. A I R 1923 Mad 443=17 L W 445=72 I C 918.

—Whether a suit was not maintainable, because a previous action commenced by the predecessor in interest of the plaintiff had abated under O. XXII, r. 9, is not a substantial question of law. Suit by widow.—Subsequent adoption reserving right of management to widow. Adopted boy not impleaded. Held: the question whether the widow could be allowed to proceed with the suit was not a substantial question of law. A I R 1924 All 66=45 A 667=21 A L J 665=L R 4 A 238 Civ=75 I C 100.

—Question of procedure disallowing a new plea in second appeal is not a substantial question of law and a certificate should not be granted in such case. A I R 1923 All 463=76 I C 516.

—Refusal to grant leave under cl. 12 of the Letters Patent to file an additional written statement is not a substantial question of law. Whether discretion has been rightly or wrongly exercised by the High Court may in some cases involve a question of law but not a substantial question of law. A I R 1922 Bom 11=24 Bom L R 196=77 I C 941.

—Whether the evidence produced to establish certain custom is sufficient is not a substantial question of law justifying grant of certificate. A substantial question of law is one in respect of which there may be a difference of opinion. A I R 1924 Lah 473=5 Lah 260=6 Lah L J 180=78 I C 417.

## C. P. C. (1938) SEC. 110 (Contd)

## (14) Substantial questions of law (Contd)

—Leave should be granted where the interpretation of documents involves a substantial question of law of general interest. A I R 1924 All 559=46 A 227=L R 5 A 158 Civ=79 I C 213.

—Whether the interpretation of a document amounts to a substantial question of law depends on the circumstances of every document. A I R 1925 Oudh 219=83 I C 90.

—The revival after 1871 of a claim barred by limitation before 1871 is not a substantial question of law. A I R 1924 Pat 271 (1)=1 Pat L R 314=85 I C 8.

—For purposes of appeal to Privy Council no substantial question of law need be involved if there is a small variation by the Appellate Court in the lower Court's decree. A I R 1925 P C 60=51 C 969=51 I A 319 (P C.)= 86 I C 504.

—Whether an application made for substitution to a Court to which execution is transferred is according to law, is a substantial question of law. A I R 1925 Oudh 728=88 I C 552.

—Whether the legatee signing the Will as witness did not intend to attest the Will does not amount to a substantial question of law. A I R 1925 Oudh 541=2 O W N 394=88 I C 579.

—For leave to appeal to the Privy Council, the High Court must be satisfied that a substantial question of law is involved in the case. A I R 1926 Nag 5=89 I C 941.

—Whether the evidence as to the custom of the adoption of a daughter's son in the City of Nagpur amongst the Maharashtra Brahmins was sufficient is not a substantial question of law within s. 110. A I R 1926 Nag 215=90 I C 270.

—A question of law in respect of which there may be a difference of opinion is a substantial question of law within s. 110. A I R 1926 Nag 215=90 I C 270.

—Whether there is a time limit for a decree holder to certify adjustment under O XXI, r. 2 is not a substantial question of law when a Full Bench of Bombay High Court (11 B 6 F B) has specifically decided it and its judgment is obviously correct. A I R 1927 Oudh 43=3 O W N 987=98 I C 1059.

—Whether mistakes, which though not material, are sufficient to entitle the Court to re open a settled account, is a question of law. A I R 1927 Pat 311=102 I C 752.

—“Substantial question of law” means a substantial question of law as between the parties in the case involved. A I R

C. P. C. (1908) SEC. 110 (Contd)

(14) Substantial questions of law (Contd)

1927 P C 110=2 Luck 93=54 I A 126=31  
C W N 495=4 O W N 515=26 L W 70=  
(1927) M W N 519=102 I C 889.

—The following cases must be taken to be overruled by this decision: 11 Cal W N 218 Note=10 Oudh Cas 318; 1922 Oudh 214; 1926 Jour 154; 1926 Oudh 381; 1924 All 559 and 56 Ind Cas 526.

—Construction of an indemnity bond is a mixed question of law and fact; and as regards the law it is a substantial question. A I R 1927 Mad 443=(1927) M W N 213=39 M L T 15=53 M L J 375=103 I C 31.

—Whether certain documents executed by a Hindu widow were binding on the estate and the reversioner is not a substantial question of law and the case is not fit for appeal to His Majesty in Council. A I R 1928 All 19=103 I C 654.

—Where a case involves a substantial question of law the question should be of general interest. A I R 1928 All 19=103 I C 654.

—Where the decision of a certain fact is based on inferences from other facts it cannot be said that a substantial question of law is involved. A I R 1928 Nag 76=23 N L R 156=106 I C 366.

—“Substantial question of law” is such a question as between the parties in the case involved. A I R 1928 Nag 76=23 N L R 156=106 I C 366.

—“Substantial question of law” is one as between the parties to the proceeding and not merely one of general importance. A I R 1928 Nag 114=101 I C 531.

—A substantial question of law is a question of law in respect of which there may be a difference of opinion. 92 I C 479=26 P L R 614.

—The decisions of the Rangoon High Court as regards the rights of an inferior or lesser wife when living apart from her husband should be regarded as settling the law on the point and is not a substantial point of law. A I R 1926 Rang 111=3 R 658=94 I C 454.

—If an affidavit that the decree involves a claim respecting property exceeding ten thousand rupees in value, is filed and there is no counteraffidavit the High Court may assume that petitioner's affidavit is correct. A I R 1926 Lah 416=26 P L R 123=94 I C 554.

—The exercise of discretion under s. 90 of the Evidence Act does not involve any substantial question of law. A I R 1921 Oudh 30=8 O L J =61 I C 131.

C. P. C. (1908) SEC. 110 (Contd)

(14) Substantial questions of law (Contd)

—Whether the High Court was right in dismissing the appeal in the exercise of its discretion is not a substantial question of law. A I R 1921 Calc 94=33 C L J 131=62 I C 205.

—The Court can grant or refuse to grant time for making up deficient Court-fee, and whether a Court has used proper discretion in a particular case is a substantial question of law 63 I C 222 (1) (Lah).

—Where authoritative decisions of the Privy Council exist on a matter that matter does not remain a substantial question of law. A I R 1926 Oudh 381 F B=1 Luck 265 =29 O C 215=3 O W N 557=93 I C 193.

—The law point for granting leave for appeal to Privy Council must be a question of law and not merely a proposition of law. A I R 1926 Oudh 381=1 Luck 265=29 O C 250=3 O W N 557=93 I C 193.

—The application of well defined legal principles to a particular set of facts is not a substantial question of law. A I R 1928 All 61=50 A 208=25 A L J 970=107 I C 33.

—The principle that, although the point of law may be obviously untenable, if the decision in the case turns upon it, that point would be a substantial point of law, is not tenable. A I R 1928 Mad 233=39 M L T 655=107 I C 643.

—A substantial question of law, under last clause of s. 110, does not mean a substantial question of general importance, but a substantial question of law as between the parties in the case involved. A I R 1928 P C 172=55 C 944=55 I A 235=32 C W N 817=29 P L R 429=48 C L J 119=28 L W 66=5 O W N 668=30 Bom. L R 1384=26 A L J 1215=55 M L J 651=(1928) M W N 917 (P C)=109 I C 723.

—Where the trial Court, in its discretion, refuses to extend the time for putting in Court-fees, it can hardly be said that the question is a substantial question of law arising between the parties to the case. It is more a question between the Court and the plaintiff. A I R 1928 Lah 560=110 I C 179.

—A substantial question of law must be a question of law in respect of which there may be a difference of opinion. A I R 1929 Lah 55=9 Lah 581 =29 P L R 529=110 I C 258.

—Interval of a minute between the time when pre-emptor heard of the sale and the time he made the demand—Whether it was an immediate demand was a substantial question of law and leave should be granted. A I R 1928 Rang 132=6 R 169=110 I C 386.

## C. P. C. (1908) SEC. 110 (Contd)

## (14) Substantial questions of law (Contd)

—The law of pre-emption applies to estate part of which is moveable property is a substantial point of law. A I R 1928 Rang 132-6 Rang 163-110 I C 386.

—Point not directly decided by any Courts in India, but well established upon principles laid down in such cases, it is no substantial question of law for decision by a higher tribunal. A I R 1928 Pat 581-110 I C 483.

—Findings of law, immaterial to the decision of suit not involving any question of law—No appeal lies to the Privy Council. A I R 1929 Nag 85-110 I C 855.

—Reasonable discretion in granting decree for specific performance and right of such discretion involve a substantial question of law and satisfy the requirements of s. 110. A I R 1923 Nag 292-112 I C 430.

—Although subject-matter of a suit may be above Rs. 10,000, if the decree of the lower Court is affirmed by the High Court and there is no variation of any kind in the substantive portion of the decree except the awarding of costs in original suit unless the suit involves a substantive question of law there is no right of appeal to the Privy Council. A I R 1929 Oudh 43-5 O W N 1076-Ind Rul (1929) Oudh 144-114 I C 320.

—Though particular law point is not laid down by Privy Council it is still material question of law though cases involving somewhat similar points have been dealt with by the Privy Council and a party should be given leave to appeal to Privy Council in such cases. A I R 1929 Rang 283-7 R 271-Ind Rul (1929) Rang 298 (P C)=119 I C 218.

—No substantial question of law is involved in a question as to the construction of a decree so as to sustain this grant of leave to appeal to the Privy Council. A I R 1931 Cal 174-Ind Rul (1930) Cal 767-126 I C 719.

—A substantial question of law does not mean a substantial question of general importance but a substantial question of law as between the parties in the case involved. A I R 1930 Bom 509-32 Bom L R 1189-Ind Rul (1931) Bom 78-128 I C 622.

—The last clause of s. 110, requires a substantial question of law and not mere question of law. A I R 1923 Mad 30-30 M L T 337 (H C)=16 M L W 262.

—The words "substantial question of law" do not include a question of the construction of a document in which the parties alone are interested. 10 O C 308

—Presentation of document for

## C. P. C. (1908) SEC. 110 (Contd)

## (14) Substantial questions of law (Contd)

registration is not a substantial question of law. 18 I C 125.

—Where on a question of law there has been a difference of opinion between the various High Courts and there has also been a difference of opinion among the Judges of one and the same Court, the question involved must be considered to be a substantial question of law within the meaning of S. 110. The question whether a second suit for redemption can be brought when a previous one has been decreed and this former decree has not been executed is a substantial question of law. 18 I C 327.

—Where the appellant was ordered by the High Court to furnish security for costs of the appeal on his failing to do so his appeal was dismissed. Held on an application for leave to apply to the Privy Council that as the proposed appeal did not involve a substantial question of law permission could not be granted. 36 All 325, =12 A L J 451 =23 I C 532.

—Allowing 9 per cent interest is not an arbitrary and unwarrantable exercise of discretion so as to involve a substantial question of law 66 P L R 1915-19 P W R 1919-26 I C 402=22 P R 1915.

—Whether the person holding Succession Certificate to collect debt is a trustee is a substantial question of law' 38 All 188-14 A L J 143-33 I C 345.

—A question of law will not be deemed to be involved in an appeal under S. 110, C P. C. if it be not necessary to decide it for the disposal of the appeal and if such question is likely to arise only in certain contingencies. The word "involved" as used in S. 100 implies a considerable degree of necessity 19 O C 131=36 I C 807.

—Question whether or not upon certain given facts or data a tenancy is to be regarded as one at will or one of a permanent nature is a mixed question of law and fact: 21 C W N 530-24 C L J 350=35 I C 605=44 C 119.

—The question whether S. 48 of the C. P. Code of 1908 applies to a decree passed under the Code of 1882 is not a substantial question of law within the meaning of S. 110 of the Code. 39 I C 141.

—The construction of a document is not a substantial question of law within S. 110. 40 I C 110.

—Where the only questions of law involved in a case were questions which had been considered in several cases by the Privy Council and by the High court and the point for decision was only as to the applicability of the law

## C. P. C. (1908) SEC. 110. (Contd)

## (14) Substantial questions of law (Concl'd)

to the particular facts of the case held. that case did not satisfy the conditions of para (3) of S. 110. 33 M L J 481=6 L W 12=(1917) M W N 414=40 I C 680.

—Whether a Hindu widow qua executrix can compromise is not a substantial question of law. A I R 1926 Ca 711=43 C L J 206.

—Question as to merger is a substantial question of law 5 Pat L W 309=1917 P H C C 337=43 I C 449. Having regard to the state of authorities in India on the question of the applicability S. 10 of the Lim Act to a suit by a minor against the administrator of his estate for accounts the question is a substantial question of law within S. 110 of the C P Code 45 I C 182.

—Question as to the effect of non-joinder of parties is not a substantial question of law. 54 I C 450.

## (15) Under or over-Valuation.

—The defendant who adopted the plaintiff's value cannot prevent the plaintiff from showing that the market-value is higher than the Court-fee value, but, where the plaintiff wants to appeal and is content with the Court-fee value, the defendant who adopted it for his own purpose cannot say the real valuation is lower than the Court-fee value. 55 M 817=61 M L J 692=135 I C 449=34 L W 106=A I R 1932 M 125.

—Deliberate under-valuation of suit in lower Court—Plaintiff cannot, for purposes of leave to appeal to the Privy Council be allowed to repudiate that valuation and show the real market value of the subject-matter. A I R 1923 Mad 125=43 M L J 728=31 M L T 335=16 L W 517=(1922) M W N 683=69 I C 385.

—Plaintiff is not estopped for leave to appeal to Privy Council by his putting low valuation on plaint and High Court has power to go into question of real value where higher valuation would not mean that trial should have been in different Court. A I R 1927 Cal 225=44 C L J 572=31 C W N 268=99 I C 921.

—Where the defendant acquiesces in plaintiff's under-valuation his suit the case cannot be referred for a report under O. XLV, r. 5 at the instance of the defendant. A I R 1927 Cal 418=45 C L J 225=101 I C 901.

—The costs of the suit ought not to be added to the value of subject-matter to bring the valuation up to the app-

## C. P. C. (1908) SEC. 110 (Contd)

## (15) Under-or-over-Valuation (Concl'd)

calable amount. A I R 1927 Pat 328=8 Pat L T 714=6 Pat 441=134 I C 267.

—Plaintiff knowingly under-valuation his claim and not paying additional Court-fees will not be allowed to change that valuation at the time of leave to appeal to the Privy Council. A I R 1930 Cal 737=34 C W N 671=Ind Rul (1931) Cal 28=128 I C 108.

—The plff. brought a suit for declaration and injunction valuing at Rs. 135. The claim was decreed by both the Lower Courts but dismissed by the High Court. On an application for leave to appeal to P C. Held, that the claim being one for declaration and injunction the plff. by suing in the second class subordinate Judge's Court, must not be deemed to have made either directly or indirectly any sort of representation to the deft. as to the real or market value of the property to be affected, as distinguished from the fiscal value which, as the law allowed him to do, he placed upon the reliefs which he was seeking. 40 Bom 477=18 Bom L R 469=37 I C 371.

—For the purposes of S. 110 of the C P Code the value of the subject-matter of the suit is the real market value of the property and consequently the fact that a plff. in a suit for cancellation of a deed of sale fixed his own valuation of the claim at less than Rs. 10,000 for purposes of jurisdiction and court-fees by virtue of the right conferred by the provisions of the Court-fees Act, does not deprive him of his right to appeal to the Privy Council and it is open to him to show that for the purpose of the said appeal the value exceeds Rs. 10,000. (1917) M W N 422=5 L W 542=39 I C 911.

—Where the plffs. valued their suit at Rs. 7,590 but at the time of the application for leave to appeal to His Majesty in Council plff swore that the value of the property had increased and would be about Rs. 12,000. the High Court held that it would not be sufficient to bring the case within the provisions of S. 110 of the C P Code. (1919) Pat 241=51 I C 975.

## (16) Valuation.

—To satisfy the requirements of section 110 the subject-matter in the Court of 1st instance must be Rs. 10,000, and in addition the amount or value of the subject-matter on appeal must also be Rs. 10,000 or upwards or the decree must involve some claim or question to or respecting property of like amount or value. The amount or value of the subject-matter

## C. P. C. (1908) SEC. 110. (Contd)

## (16) Valuation (Contd)

of a suit is clearly the amount the plaintiff claims together with, at most interest that had accrued up to date of decree. A I R 1923 Rang 71=11 L B R 335=1 Bur L J 62=68 I C 690.

—Date for determining is the date of decree or order sought to be appealed against. 1932 P C L 986 (Civ)=33 P L R 647=138 I C 37=I R 1932 L 407 (2)=A I R 1932 L 526=A L R 1932 L 986 (Civ.)

—Where a decree allotted a portion of certain premises for the residence of a Hindu widow with direction that in the event of sale becoming necessary the widow should receive certain sum per mensem the value of the subject-matter of the appeal is really the premises which the widow is required to vacate and the subject-matter of the appeal is not merely the difference between the premises in the occupation of the widow and the amount per mensem which she would get when she vacated the premises. As the value of the portion of the premises in the occupation of the widow exceeded Rs. 10,000, the case was held to fall within the last words of the first paragraph of S. 110. 56 B 526=34 B L R 834=A I R 1932 B 543=I R 1932 B 589=A L R 1932 B 877.

—A party who sues in or appeals to a Court which would have no jurisdiction if the value of the land exceeded Rs. 1,000 cannot at a later stage claim to have the value of the subject-matter of the suit in the Court of first instance treated as exceeding Rs. 10,000 for the purpose of appeal to Privy Council. A I R 1931 Cal 417=58 C 66=Ind Rul (1931) Cal 622=132 I C 910.

—Defendants accepting the value of property for purposes of jurisdiction cannot be heard to question that value subsequently. The value of the property is a question of fact. It is not proper for a party by an admission as to lower valuation to suffer an appeal to be heard by a single Judge and then to claim a higher valuation for the purpose of obtaining an appeal to the Privy Council. A I R 1923 Oudh 93=9 O L J 531=26 O C 24=74 I C 214.

—Where the applicant's interest in the property is less than 10,000 but the property in dispute is worth over 10,000 leave to appeal should be granted. A I R 1923 Bom 176=25 Bom L R 77=72 I C 127.

—Market-value of the subject-matter and not valuation under Suits Valuation Act is to be taken for purposes of s. 110. A I R 1924 Lah 82=6 Lah L J 44=4 Lah 185=75 I C 520.

—Where the matter in dispute between the parties is solely of the nature of the

## C. P. C. (1908) SEC. 110. (Contd)

## (16) Valuation (Contd)

tenancy of the site buildings on site should not be taken into account involving subject-matter. The second paragraph of s. 110 means that the suit must satisfy its conditions to involve rights and claims to property which rights and claims are worth Rs. 10,000 or upwards not that the rights affect properties whose value is Rs. 10,000 or more. A I R 1923 Lah 286=6 Lah L J 78=75 I C 654.

—Whether a suit is a partition suit or a partnership suit does not make a difference for valuation for purpose of Privy Council appeal. Value of the appellant's share and not the whole of the property determines the value of the subject-matter. A I R 1925 Bom 137=49 B 149=26 Bom L R 1261=85 I C 191. Where a petitioner prays for leave to appeal to Privy Council in respect of a decision involving a claim of Rs. 3,900 the petition cannot be granted. A I R 1925 P C 159=22 L W 255=30 C W N 98=27 Bom L R 867=49 M L J 20=52 C 650=52 I A 207=41 C L J 623 (P C)=88 I C 445.

—A party taking advantage of the valuation put upon the subject-matter by the other party, cannot be permitted to allege that the original valuation was incorrect. A I R 1927 Mad 862=104 I C 577.

—The plaintiff is not absolutely precluded from saying that his valuation in the plaint is wrong. The Court will treat his admission as a strong piece of evidence against him. A I R 1927 Mad 862=104 I C 577.

—Suit for declaration without consequential relief. Value given in plaint for purposes of jurisdiction must be held to be the market-value of subject-matter the suit for leave to appeal to Privy Council. Where it has been stated to be Rs. 10,000 the defendant having accepted the valuation so given plaintiff cannot show that the value of the subject-matter is less than Rs. 10,000. A I R 1925 Mad 1223=49 M L J 309=91 I C 572.

—In estimating the value of an Inam wet land for purposes of Privy Council appeal, house sites in the vicinity should be excluded from consideration and only cultivable lands in the vicinity should be relied upon. A I R 1923 Mad. 448=109 I C 167.

—Where during the pendency of a suit for specific performance of a contract of sale, new machinery is brought on the premises in suit, and not mentioned in the pleadings or in evidence, or even at argument, its value cannot be taken into account. A I R 1929 Nag. 75=Ind Rul (1930) Nag. 313=124 I C 697.



## C. P. C. (1908) SEC. 110 (Contd)

## (16) Valuation (Contd)

—Suit mainly for specific performance of contract of sale, and for ancillary relief of possession—Relief for specific performance need not be separately valued. A I R 1929 Nag. 75=Ind Rul (1930) Nag. 313=124 I C 697.

—The question whether a decree involves indirectly a claim respecting property of the value of Rs. 10,000 or upward within s. 110 (2) must be determined with reference to the actual circumstance at the time and not to a mere possibility. Where the tenant who had constructed building to the value of Rs. 25,000 on land demised the value of which was only Rs. 4,000, brought a suit for the specific performance of an agreement for renewal but only got a decree entitling him to hold the land for his life. Held, the question involved a claim to the land itself worth only Rs. 4,000 and that the requisites of s. 110 were not complied with. The possibility of the removal of the structures at some future time if and when the landlord chooses to evict him was too remote. A I R 1930 Bom. 509=32 Bom. L R 1189=Ind Rul (1931) Bom. 78=128 I C 622.

—For leave to appeal to His Majesty it is not necessary to inquire into the question as to whether the property actually handed over to defendant applicant is worth Rs. 10,000, or not, if it is clear that the whole of the property as to which the question arose in the appeal and in respect of which the decree has been passed in High Court is worth more than Rs. 10,000 and certificate to appeal must in such cases be issued. A I R 1923 Bom. 59. Value of the subject-matter of the suit must be taken to be the amount or value which the plaintiff either obtained or, had he been successful would have obtained in his suit at the date when the decree was passed. 2 P L T 340=60 I C 521.

—In determining the value of the subject-matter of a suit for the purpose of S. 110 (2), C. P. Code is value at the date of the decree from which the appeal is to be made to His Majesty-in-Council, and not the value at the institution of the suit, is to be taken into account. 44 Cal 119=21 C W N 530=24 C L J 350=35 I C 605.

—Value once determined during trial for assessing pleader's fees cannot be re-opened during application for leave to appeal. 20 Bom L R 418=42 Bom 609=46 I C 4.

—Counter claim value of more than Rs. 10,000—Appeal to Privy Council, competent. 22 C W N 282=46 I C 576 (P C).

—The original valuation of a suit exceeded Rs. 10,000, but on appeal by

## C. P. C. (1908) SEC. 110 (Contd)

## (16) Valuation (Contd)

one of the debts to the High Court the contest was for a sum less than Rs. 10,000. Held that the case for the purpose of leave to appeal to his Majesty in Council did not come within S. 110 C. P. C. 54 I C 450.

## (17) Value of appeal.

—A suit was brought to recover a zemindary in the possession of different persons under deeds of sale in execution of decree. The value of the property was as stated in the plaint, Rs. 14,325. The Sudder Court upheld the sales so far as related to the claims of some of the defendants. The other defendants applied for leave to appeal, but it was refused on the ground that the value of their portion was only Rs. 8215; but the Privy Council seemed to hold that the words of the old order. "The value of the matter in dispute in any such appeal to Her Majesty in Council" related to the whole matter involved in the suit which was the subject of judicial enquiry in the Courts and allowed the appeal—7 Moo. I. A, 261; 6 W R, Mis 4: but see 19 W R 191.

—High Court held that there was legal necessity for a portion, lower Court had allowed the whole claim in favour of the plaintiff reversioner on the ground that the sale was without legal necessity. The defendant-purchaser applied for leave to appeal to His Majesty in Council. Held no question of law arose and value of the appeal is value of the property as to which legal necessity was proved. A I R 1922 Pat 555=3 P L T 550=68 I C 603.

—Under cl. (2) s. 110 the value of the property should be determined with reference to the date of the decree from which the appeal to His Majesty in Council is to be made. A I R 1929 Nag 7=Ind Rul (1930) Nag 75=124 I C 697.

## (18) Value of the subject-matter of the suit

—Subject-matter of the suit should be of the value of Rs. 10,000. A L R 1933 P C 299 (1) 14 P L T 725=A I R 1933 P C 232=12 P 679 (P C).

—Where the value of the suit property is above Rs. 10,000; but the value of the applicant's share is only Rs. 7,348, the section does not apply. A I R 1231 Rang 138=9 R 52=Ind Rul (1931) Rang 168=132 I C 280 Distinguishing 10 C W N 564.

—But where the pliffs claim was for the partition of the whole house and

## C. P. C. ( 1908 ) SEC. 110 (Contd.)

## (18) Value of the subject-matter

## of the suit (Contd.)

the claim could not be decreed without considering the value of the entire house and the method in which the partition should take place, it is very difficult to say that the decree does not at least indirectly involve a question respecting the whole house which is admittedly of the value of Rs. 10,000. There is a difference between the language of the first paragraph and that of the second paragraph of S. 110 C. P. C. In the first the words used are the amount or value of the subject matter in dispute," whereas in the second we have "respecting property of like amount or value." Such "property" need not necessarily be the subject matter in dispute in the suit. 1932 A L J 730-138 I C 670-I R 1932 A 481-A L R 1932 A 1035.

—The words "the decree must involve, directly or indirectly, some claim or question to or respecting property of like amount or value," in section 110 refer to some specific property and do not contemplate property which a party may be desirous of acquiring. The valuation for purposes of jurisdiction is not always the real value of the subject-matter of the suit for purposes of section 110. A I R 1922 Lah 131-26 P L R 1922 =2 Lah 297-116 P L R 1921-65 I C 239.

—In an ejectment suit it was found that the value of the property was over Rs. 10,000, held that the certificate to appeal to His Majesty from the decree in the suit must be granted A I R 1923 Bom 23-24 Bom L R 350-67 I C 938.

—S. 110 applies to the value of the annuity sought to be recovered, and not to the value of the property upon which that annuity is charged A I R 1923 P C 102-26 Bom L R 731-(1923) M W N 590-45 M L J 253-18 L W 146 =26 O C 216-28 C W N 289-33 M L T 232-10 O L J 288-75 I C 502.

—In a suit to recover enhanced rent of occupancy holding, the subject-matter of the suit is not the holding but only the plaintiff's claims to the enhanced rents. A I R 1925 Cal 414-82 I C 744.

—Where it is not clear on the record whether the judgment will govern other similar deeds like the one in suit, the property covered by the other deeds is not part of subject matter. A I R 1923 Cal 451-27 C W N 204-84 I C 581.

—When in a partition suit the decree affects the interests not only of the plaintiffs who are appealing but of some of the defendants, the value of the subject-matter is the value of the property and not that of the plaintiff's

## C. P. C. ( 1908 ) SEC. 110 (Contd.)

## (18) Value of the subject-matter

## of the suit (Contd.)

share therein. A I R 1921 Pat 502-2 P L T 386-60 I C 844.

—Real claim in suit not more than Rs. 10,000—Court recording finding relating to other property worth more than Rs. 10,000 not at all necessary for the decision of the suit. It does not make subject matter of suit, worth more than Rs. 10,000. A I R 1929 Nag 85-110 I C 855.

—Claim to right of way over part of survey number valued at Rs. 10,000 plaintiff having right to fence the way from remaining land. Dispute could not be said to relate to whole of the survey number and therefore plaintiffs claim was not of the value of Rs. 10,000 A I R 1928 Mad 785-111 I C 795.

—"Subject-matter" and "property" used respectively in cls. 1 and 2 cannot be treated as synonymous terms. "Property" in cl. (2) indicates property not in suit or dispute, which may be, directly or indirectly, involved. A I R 1929 Nag. 75-Ind Rul. (1930) Nag 313-124 I C 697.

—Value of the subject matter of the suit in the Court of First instance being the value at the date of the institution of the suit, certificate to appeal to P C should be granted to the applicant in as much as the amount claimed in a suit to which he was impleaded as defendant exceeded Rs 10000 although on appeal the decree passed against him was for Rs 9182-6-3 A L R 1934 Rang 59.

—But where in execution of a decree in a partition suit involving property of the value of Rs. ten lakhs, the applicant disputed their liability to 4/6 this of an item of Rs. 11,709 Held that such a case did neither satisfy both the conditions set forth in S. 110 Cl. 1 of the Code nor did it fulfil the conditions mentioned in the second clause of that section and so no leave could be granted. 140 P L R 1915-60 P W R 1915-29 I C 759.

—For the purposes of appeal to His Majesty in Council under S 110 of the Civil procedure Code the value of the share which the appellant claims and not the value of the entire family property is the test. Such value ought to be taken as at the date of the decree of the High Court under appeal. 44 Bom 104-22 Bom L R 243-55 I C 972.

—The several debts filed separate appeals of the High Court as regards the properties in their possession but High Court in accordance with R 105 of the Civil Rules of Practice. On an application

## C. P. C. (1908) SEC. 110 (Contd)

## (18) Value of the subject-matter of the suit (Contd)

for leave to appeal to the P C against the decision of the High Court in each of the appeals. Held that leave could be granted only in those cases whose subject-matter was of the value of Rs 10,000 or upwards under S. 110 of the C P Code 42 Mad 228=36 M L J 119=25 M L T 190=10 L W 13=49 I C 434.

—The value of the subject-matter of a suit was upwards of Rs. 10,000 and it raised a question of the validity of an arbitration award relating to property far exceeding Rs 10,000 the High Court involved a question relating to the property of value exceeding Rs 10,000 and leave could be given to appeal to Privy Council although the value of the subject matter of the proposed appeal was less than Rs 10,000. 11 A L J 654=35 A 445=21 I C 617.

—The mere fact that the history of the property in dispute was the same as that of the other land in the mahal valued at more than Rs 10,000 did not involve claim for the amount required by S. 110 so as to give the applicant a right of appeal to the Privy Council 26 I C 6 distinguishing 35 A 445.

—The suit out of which the appeal arose was instituted in the court of the Second Class Subordinate Judge the limit of whose pecuniary Jurisdiction was Rs 5,000 The suit was one for accounts and the plain tiff valued his claim for purposes of Court-Fees and Rs 101 Held that the plaintiff could not be allowed to show that the value of the subject-matter of the suit was in excess of Rs 5000 which was the limits of the pecuniary jurisdiction of the Court in which the suit was instituted and that therefore the case did not come within the first para of S. 110 and leave could not be given 21 I C 783=15 Bom L R 1021.

—The value of the subject-matter of the suit in the trial Court must also be Rs 10,000 or upwards 39 M 843=30 M L J 317=18 M L T 450=2 L W 1057= (1915) M W N 941=31 I C 296

—Suit for recovery of less than Rs. 10,000 on account of pension from assets of deceased—Defence that no pension was payable and that no property of deceased is in defendant's hands—Leave to appeal if can be granted see 3 Pat L J 317=4 Pat L W 240=44 I C 475.

—In order to determine the value prescribed by S. 110 of the C P Code the decree has to be looked at as it affects the interest of the parties prejudiced by it and where the detriment to the party seeking relief is estimated at less than Rs 10,000 then the value of the matter in

## C. P. C. (1908) SEC. 110 (Concl'd)

## (18) Value of the subject-matter of the suit (Concl'd)

dispute on appeal is not of the prescribed value and the decree itself does not involve any claim or question to or respect in property of the prescribed value and the case does not fulfill the requirements of the Code 4 Pat L J 415=(1919) Pat 257=52 I C 723.

—Plaintiff sued for recovery of Rs 8,740 being the balance of monies advanced for the purchase of sleepers and not accounted for and also claimed Rs 7,789-15-6 as damages for breach of contract. Plff obtained a decree for Rs. 4,783 on account of the advance and Rs. 11,908-4-0 as damages. The High Court on appeal upheld the decree for Rs 4,783 but the claim for damages was dismissed. Held, that the decree for Rs. 4,783 having been upheld, that sum could not be questioned on appeal. As the subject-matter in dispute on appeal to the Privy Council was not more than Rs. 7,789-15-6 the amount claimed on account of damages the proposed appeal did not satisfy the conditions laid down by S 110 57 I C 40=2 U P L R (A) 155.

## (19) Who can appeal.

—Where a party transfers her interest in subject-matter of a suit leave cannot be granted unless a substantial point of law has been involved A I R 1926 Rang 111=3 R 658=94 I C 464.

—Where the value is less than Rs. 10,000 and would be appellant to His Majesty in Council has lost his case in both the lower Courts he cannot get a certificate though a substantial question of law is involved 10 L B R 307=62 I C 71.

—A person in contempt cannot be heard in prosecution of his own appeal until he purges his contempt, and his appeal, as it is not proper to keep the other party before the Court for an indefinite period can be dismissed. A petition, therefore for leave to appeal to Privy Council against such dismissal cannot be maintained A I R 1929 Mad 672=(1928) M W N 462=Ind Rul (1929) Mad 708=117 I C 724.

—A defendant having no interest in the prosecution of the suit and leaving it entirely to his co-defendant cannot separately prefer an appeal to His Majesty in Council. A I R 1921 Pat 134=1921 Pat 129=2 P L T 173=60 I C 500.

## C. P. C. (1908) SEC 111

—By s. 44 of Letters Patent, the Letters Patent are subject to Imperial Legislature —S 39 of Letters Patent fails as against s. 111 Civil Procedure Code—

**C. P. C. (1908) SEC. 111 (Conold)**

—No appeal lies to Privy Council from judgment of single Judge of High Court in appeal or revision. S. 111 overrides cl. 39 Letters Patent (Bombay). A I R 1931 Bom 503=33 BOM L R 1106

—Leave to appeal to Privy Council in pauperies—No jurisdiction to grant See 3 Pat L J 179=44 I C 731 & See also 35 M L J 258=42 M 32=47 I C 646

—No appeal lies from order of single Judge of a High Court disposing of application under s. 622 Civ Pro Code 1882. A W N 1905, 218=28 A 133

—But an appeal lies to the Queen in Council from the decision of a single Judge of the Sudder Court, upon the admissibility of a special appeal. The Bomby Act 111 of 1843, enacts that such refusal is final yet not having received the sanction of the Crown Held that its finality was confined to sudder Court and did not affect the prerogative of the Crown or deprive the subject of his right of appeal to the Queen in Council. 4 W R 94 P C=6 M I A 448

—Oudh Chief Court is not a High Court within S 111. A I R 1932 O 163

—“Single Judge” meaning of—Rule applicable only to order of a Judge of a High Court established under a Royal Charter See 42 I C 893.

**C. P. C. (1908) SEC. 112**

**General:**—Under r. 9 of the Privy Council Rules, the High Court has the jurisdiction to change the form of the Security besides that for extending time for deposit of security. And the—High Court should be reluctant to change the form of security except for good cause, because the form of personal bond provided by r. 111 of the Bombay High Court Appellate Side Rules is not in all respects as effective as the deposit of cash or Government securities. A I R 1931 Bom 278=33 Bom L R 487=Ind Rul (1931) Bom 326=132 I C 438.

—Where no appeal lies to an appellate Court, the Court has no jurisdiction to deal with the case and to make a reference to the High Court under R. 1, O. 43, C. P. C. Reference cannot be made where the referring judge entertains no reasonable doubt on the point of law on which opinion is required. 123 P L R. 1913 =117 P W R 1913=61 P R 1913=18 I C 314.

**C. P. C. (1908) SEC. 113**

—There is no analogy between a reference and an appeal. An appeal is preferred by an aggrieved party where as a reference is made not by a party but by a Court. The decision of the subject matter of appeal is by the Court entertaining the appeal where as the decision of the matter about which a reference is

**C. P. C. (1908) SEC. 113 (Conold)**

made is not necessarily by the Court deciding the reference. 1932 A L J 816=140 I C 123=I R 1932 A 615=A I R 1932 A 651=A L R 1932 A 1083.

**C. P. C. 1908 SEC. 114**

See under O. 47

**C. P. C. (1908) SEC. 115**

*Synopsis:—*

**(1) General Grounds:—**

- (a) Exercise of Jurisdiction not vested in the lower court by law.
- (b) Failure to exercise jurisdiction which the Lower Court has.
- (c) Il'egal exercise of jurisdiction.
- (d) Material Irregularity in exercising Jurisdiction.

**(2) What kind of orders the High Court can pass.**

- (a) General
- (b) Particular kinds of orders.

**(3) Where no appeal lies.****(4) High Court powers of apart from the section.**

- (a) General.
- (b) Under Letters Patent.
- (c) Section if exhaustive.

**(5) Change of Case.**

- (a) Appeal into revision.
- (b) Revision into appeal.
- (c) Miscellaneous.

**(6) High Courts' power to act suo moto.****(7) High Courts' power to act on the motions made by persons not parties.****(8) Meaning of “Subordinate Court.”**

- (a) General.
- (b) Particular Cases,
  - (i) Collector's orders.
  - (ii) Aden Court of Resident.
  - (iii) Other Court Cases.
- (c) District Registrar's Court.
- (d) Zanzibar.

**(9) Where there is remedy by suit or otherwise.****(10) “Case” Meaning of.****(11) Single Judge's decision.****(12) “Jurisdiction” Meaning of****(13) Particular orders and decision.****(1) Discretionary orders.**

- (a) General Principles.
- (b) Particular orders.

**(2) Interlocutory orders.**

- (a) General.
- (b) Appealable orders.
- (c) Non-appealable orders.
- (d) Miscellaneous.

**(3) Orders amending decrees and orders.****(4) Orders as to “Court-fees and valuation of suits”****(5) Orders in arbitration proceedings and awards.****(6) Orders granting review.****(7) Orders refusing review.**

## C. P. C. (1908) SEC. 115 (Contd)

- (8) Pauper proceedings orders in.
- (9) Sanction to prosecute.
- (10) Orders as to issue of commission.
- (11) Injunctions orders as to
- (12) Discovery and Inspection of Documents, orders as to.
- (13) Orders allowing or refusing withdrawal of suit or proceeding.
- (14) Orders as to adding parties or their representatives or omitting them from case.
- (15) Orders in matter of suits by or against minors.
- (16) Stay of suit or proceeding.
- (14) Laches.
- (15) Miscellaneous Cases.

## (1) General Grounds.

## (a) Exercise of Jurisdiction not vested in the Lower Court by law.

—Chartered High Courts and Court of Judicial Commissioner. Sind—distinction between—powers of revision. A I R 1933 S 37=26 S L R 402.

—No revision lies unless it be shown that Appellate Court without jurisdiction had made order of remand. A I R 1927 Mad 1111=39 M L T 120=109 I C 287.

—Mistake in assuming jurisdiction and thereby requiring case to be referred to arbitration is open to revision. A I R 1929 Lah 369=111 I C 145.

—Error caused by appeal disposed off by inferior Court where parties are prejudiced can be corrected in revision. Ind Rul (1929) Lah 280=114 I C 440

—Lower Court assuming jurisdiction on wrong view of law—Revision lies. A I R 1923 Mad 490=18 L W 299=44 M L J 344=(1923) M W N 199=72 I C 449.

—An application under rr. 5 and 6 of O. XXXIII must be granted or refused first and then evidence should be taken upon the question of the plaintiff's title. Otherwise it would amount to exercising jurisdiction not vested by law within s. 115. A I R 1923 All 577=45 A 548=21 A L J 441=L R 4 A 252 Civ=73 I C 538.

—When a lower appellate Court erroneously decides in the exercise of its admitted jurisdiction as an Appellate Court, that the Court of first instance has or has not jurisdiction to entertain a suit High Court can revise the order. A I R 1923 Bom 412=76 I C 1010.

—To assume jurisdiction to do an act by taking an erroneous view of the law, when there is really no jurisdiction raises a case for interference under s. 115. C P C. A I R 1923 Mad 192=44 M L J I=16 L W 848=(1923) M W N 133=46 M 536=71 I C 1039.

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (a) Exercise of Jurisdiction not vested in the Lower Court by law. (Contd)

—Where lower Appellate Court entertains an appeal, where no appeal is competent as for example an appeal against an order under O XXI, r. 101, High Court can set aside the decision of that Court in revision A I R 1923 Bom 214=25 Bom L R 147=72 I C 256.

—Order in the matter of execution of scheme of management without jurisdiction is revisable. A I R 1926 Mad 659=91 I C 794.

—High Court has power in revision to revise the order of lower Appellate Court acting under assumed jurisdiction. A I R 1926 All 401=94 I C 1.

—High Court has power to revise the order passed on wrong assumption of jurisdiction 1926 Bom 266=50 B 215=28 Bom L R 443=94 I C 742.

—Court granting a payer contained in a time-barred application acts with illegal assumption of jurisdiction A I R 1926 Lah 329=7 Lah 161=8 Lah L J 267=27 P L R 321=95 I C 124.

—On an appellate Court entertaining an appeal against non-appealable order High Court should interfere in revision. A I R 1926 Cal 123=97 I C 306.

—Order, where jurisdiction is assumed without making enquiry for the same can be upset in revision. A I R 1927 Mad 188=24 L W 839=99 I C 383.

—An erroneous decision, whether on a point of fact or on a point of law, is not sufficient reason for revision. Irregular exercise of jurisdiction is necessary. A I R 1925 Oudh 373=12 O L J 112=86 I C 918.

—High Court will interfere in revision if in a claim case under O. 21 r. 59 an order in favour of the claimant's title is passed without going through the judgment-debtor's possession. 24 I C 62.

—Trial of a small cause suit by a judge not empowered to try the same is exercising jurisdiction not vested by law. 12 A L J 109=22 I C 909.

—If the lower Court assumes jurisdiction which is not vested in it, the High Court can in its revisional jurisdiction interfere and examine evidence. 41 All 602=I U P L R (H. C.) 120=17 A I J 718=51 I C 331.

—An order made by a Court dismissing the suit even though the conditions under O 9 rr 2 and 8 are not fulfilled is revisable by the High Court 53 I C 41.



## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds. (Contd)

## (a) Exercise of Jurisdiction not vested in the lower court by law (Contd)

—Revision under s. 115 C P C lies only when there is a wrong or irregular exercise of jurisdiction. Mere materiale irregularity and illegality is not enough. (1919) 3 U B R 179-54 I C 501.

—The High Court has jurisdiction to interfere in revision where a Civil Court has wrongly entertained a suit cognisable by a Revenue court. 56 I C 946.

—Revision lies from an order passed without jurisdiction in proceedings under Land Acqn. Act 31 M L J 827-5 L W 472-38 I C 373.

—An order made by a court without jurisdiction and without considering the merits of the case, can be revised by the High Court even though the parties have not contested their claim in the lower Court. 49 I C 981.

Costs, order as to—Suit dismissed—Some findings in favour of plff—Revisable for want of jurisdiction 20 C W N 354

—Taking an erroneous view of the law does not amount to the exercise of a jurisdiction not vested in him by law, nor to exercise of jurisdiction illegally or with material irregularity. 19 I C 594.

—Effect of order of lower Court leads to exercise of jurisdiction not possessed. 18 C W N 1016.

—The High Court can interfere in revision when the lower court wrongly assumes jurisdiction. 30 I C 38.

—Where a trial Court entertains a suit when it has no territorial jurisdiction to do, High Court can in revision set aside that interlocutory order refusing defendant's objection as to jurisdiction. 60 I C 481.

—Fixing valuation in sale proclamation date earlier than that fixed for hearing parties in that respect without hearing parties amounts to acting without jurisdiction. A I R 1923 Pat 102-3 P L T 342-65 I C 360.

—Entertaining an appeal from an interlocutory order amounts to assumption of jurisdiction not vested in the Court. 2 Lah L J 673-67 I C 278.

—An order dismissing an execution application without notice to decree-holder is without jurisdiction within the meaning of s. 115. A I R 1923 Pat 180-4 P L T 204-68 I C 337.

—Issuing notice by the District Judge under Regulation XVII of 1806, which was not in force, is exercise of jurisdiction

## C. P. C. SEC. 115 (Contd)

## (1) General Grounds. (Contd)

## (a) Exercise of Jurisdiction not vested in the Lower Court by law (Contd)

not vested in him by law and revision will lie. A I R 1929 Pat 537-10 P L T 787-Ind Rul (1930) Pat 278-122 I C 822.

—Where the lower Court decided wrongly the question of jurisdiction and on such wrong decision gave itself jurisdiction, the High Court will interfere. A I R 1929 Cal 159-Ind Rul (1929) Cal 460 =116 I C 172.

—Dismissing suit for want of prosecution sent for effecting partition ordered by High Court is acting without jurisdiction and revision lies. A I R 1924 P C 198-5 P L T 623-35 M L T 143-5 L R P C 171-20 L W 491-4 Pat 61-51 I A 321 =22 A L J 990-26 Bom L R 1129-40 C I R J 439-29 C W N 391-(1924) M W N 707-47 M L J 441-81 I C 747.

—No revision lies when a suit partly not triable by Small Cause Court but tried on merits without objection. A I R 1925 All 51-L R 5 A 685 Civ-81 I C 870.

—Filing award by Court having no jurisdiction is revisable A I R 1924 Sind 29-17 S L R 164-83 I C 539.

—Where the lower Court without jurisdiction sets aside an ex parte decree and returns the plaint for presentation to a proper Court for trial de novo revision will lie. A I R 1930 All 873-(1930) A L J 997-52 A 947-132 I C 35.

—Where no appeal is maintainable but the lower Court entertains an appeal, the High Court can interfere in revision and hold that the appeal is incompetent. 12 Lah L J 89-132 I C 180.

—Where the Court wrongfully cancels a lease granted by a guardian which was perfectly within his competence, the order is made without jurisdiction and must be set aside. A I R 1930 Lah 1017-12 Lah L J 167-31 P L R 984-132 I C 203.

—Exercise of jurisdiction in absence of material supposed to exist being act of jurisdiction is revisable. A I R 1927 All 704-25 A L J 870-103 I C 229.

—Lower Court through mistake of law assumed to have jurisdiction upsets decision of its lower Court as being without jurisdiction. Reversal of decision is open to revision A I R 1927 Mad 786-53 M L J 131-(1927) M W N 420-39 M L T 25-104 I C 415.

—Mere defect of jurisdiction is not a ground for revision unless, failure of justice has directly resulted from such a defect. A I R 1921 Lah 265-82 P L R 1922-67 I C 278.

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (a) Exercise of Jurisdiction not vested in the lower Court by law (Contd)

—To justify interference by the High Court under s. 115, on the ground of want of jurisdiction the facts ousting jurisdiction must be patent on the face of the record. A I R 1922 Sind 1=15 S L R 165=65 I C 50.

—If the particular circumstances necessitate the determination of question of title, apart from possession the Court cannot be held to have exceeded its jurisdiction in going into the question of title. A I R 1929 Pat 747=Ind Rul (1929 Pat 603=11 P L T 59=119 I C 555.

—The District Judge could not exercise jurisdiction not vested in him by law and hear an appeal from an order in execution passed in an unclassified suit of the value of less than Rs. 500 before the new Punjab Court's Act came into force. 78 P L R 1915.

—Revision lies from an order of a court setting aside an ex parte decree on an application five years after the passing of the decree without considering the question of limitation. Even if the application is treated as a review, the court should see whether the applicant had sufficient cause for not applying sooner. 13 A L J 482=29 I C 975.

—A right of appeal being a substantive right cannot be deprived by a court without jurisdiction. A I R 1930 All 873=(1930) A L J 997=52 A 947=132 I C 35.

—Revision lies when a court orders arrest without complying with the provisions of O XXI r. 22 on an execution being taken out one year after decree. A I R 1929 Rang 161=7 R 110=Ind Rul 1929 Rang 181=117 I C 245.

—A compromise was made by which assets in A's hands were liable but the court passing a decree made A personally liable as well. Held that the court had acted without jurisdiction. A I R 1929 Lah 254=Ind Rul (1929) Lah 562=116 I C 706.

—A court exercises jurisdiction not vested in it by law if it allows the deposit of the amount of the decree for rent obtained against a Hindu widow to be made by the reversioners under Bengal Tenancy Act. A I R 1922 Cal 95=26 C W N 167=70 I C 127.

—Misconstruction of a portion of documentary evidence is no ground for interference in revision. If the appellate court makes a mistake of law as to jurisdiction revision lies under s. 115 C

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds. (Contd)

## (a) Exercise of Jurisdiction not vested in the lower Court by law. (Contd)

P C, but if the jurisdiction depends on a finding of fact, revision is not allowed unless that finding is without any evidence. 31 I C 209.

—Disposal of pauper application without following correct procedure is without jurisdiction and hence open to revision. A I R 1927 Cal 464=100 I C 726.

—Admitting application after it is barred is without jurisdiction and hence open to revision. A I R 1927 Lah 342=100 I C 936.

—Trial Court disposing of the question of substitution of claimants in its judgment and not by a separate order—Order by Appellate Court separately on the point is without jurisdiction and must be vacated. A I R 1926 Oudh 158=2 O W N 857=91 I C 366.

—A declaration not necessary for the suit and made beyond what is prayed for, can be expunged in revision. A I R 1923 Cal 321=68 I C 626.

—The trial of a suit by an incompetent court cannot be ordered by the appellate court. Otherwise it acts without jurisdiction and illegally. A I R 1930 All 713=(1930) A L J 1233=Ind Rul (1930) All 898=14 R D 612=L R 11 A 349 Rev=127 I C 434.

—Admission of appeal in nonappealable case is revisable. A I R 1926 All 55=48 A 27=23 A L J 891=L R 6 A 575 Civ= 89 I C 404.

—Claim Petition allowed after property was sold—court acted in excess of authority. 16 C W N 1029=15 I C 53.

—The High Court cannot interfere in revision when the lower court refuses to set aside the sale because the deposit under O 21 r. 89 C. P. C. is not made in court but in the treasury during the vacation. 16 A L J 433=40 All 425=45 I C 773.

—If there is no failure of justice the High Court will not interfere in revision where at the hearing an objection as to jurisdiction is not raised before the Appellate Court. 106 P L R 1913=18 I C 251=116 P W R 1913 The election court can interfere with the decision of the Returning Officer as regards the validity of votes and thereby it does not exercise jurisdiction not vested in it by law. A I R 1925 Mad 1207=49 M L J 381=22 L W 507=90 I C 771.

—A decree passed against a wrong person is liable to be set aside in revision for want of jurisdiction [32 Cal 296 followed] A I R 1931 Cal 673=53 C L J 415=Ind Rul (1931) Cal 801=134 I C 305.

## C. P. C. (1908) SEC. 115. (Contd)

## (1) General Grounds (Contd)

## (a) Exercise of Jurisdiction not vested in the lower Court by law (Contd)

—Section 115 applies to jurisdiction alone the regular exercise or non-exercise of it or the illegal assumption of it. The High Court will interfere only when it is satisfied that either grave injustice or great inconvenience would otherwise be the result, 40 M 793; referred to. A I R 1931 All 72=(1931) A L J 13=Ind Rul (1931) All 938=134 I C 454.

—Where the Court wrongly cancelled a valid lease executed by a guardian who was competent to make it held that the order being made without jurisdiction, revision is competent. A I R 1930 Lah 1017=31 P L R 984=12 Lah L J 167=132 I C 203.

—An order of the trial Court extending time for paying deficient Court-fee after decree is passed is one made without jurisdiction and must be set aside in revision. A I R 1931 All 318=Ind Rul (1931) All 220=129 I C 732.

—The High Court can interfere in revision when the lower court entertains an appeal without jurisdiction. 36 L W 646=1932 M W N 1244=139 I C 167=I R 1932 M 632=A I R 1932 M 714 (716).

—The High Court can set aside in revision the order made by the lower court in entertaining an appeal without jurisdiction. 140 I C 48=33 P L R 463=I R 1932 L 681 (1)=A I R 1932 L 416=1932 P C L 844 (Civ)=A L R 1932 L 844 (Civ). If a party instead of bringing a suit under O 21 r. 103, brings it under s. 9 of specific Relief Act, the court should not pass a claim decree without going into the plaintiff's right to possession because it has no jurisdiction to do so. 1932 A L J 812=139 I C 363=I R 1932 A 560=A I R 1932 A 703=A L R 1932 A 1093.

—An order allowing the landlord's right of pre-emption under s. 182 and s. 26(f) of the Bengal Tenancy Act was revisable as it was made without jurisdiction. 36 C W N 788=139 I C 765=A I R 1932 C 857=I R 1932 C 649.

—Error as to conclusions of law or fact not enough for interference in revision. Section applies to jurisdiction alone, the irregular exercise or the non-exercise of it or the illegal assumption of it. A I R 1932 A 140.

—If a court disregards an injunction issued by another competent court, it acts without jurisdiction. 33 P L R 67=A I R 1932 L 515=139 I C 342=I R 1932 L 575.

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds. (Contd)

## (a) Exercise of Jurisdiction not vested in the Lower Court by law. (Contd)

—A District Judge has jurisdiction to decide under the Rural Self-Government Act, 1921, whether the irregularity in not recording the votes at the election was likely to have affected the result of it. 10 R 517=A L R 1932 R 399 (F B).

—High Court can interfere in revision when the lower court exercises jurisdiction not vested in it by law. 138 I C 335=A I R 1932 L 328 (330)=I R 1932 L 460.

—Pending suit—dispute is referred to arbitration—Scope of the inquiry must be the scope of the suit itself—Arbitrators exceeding their duties and Court passing a decree are acting in excess of their jurisdiction. A L R 1933 M 1189 (1191).

—Where a Subordinate Court decides the suit on a point not in issue between the parties, the order is without jurisdiction and can be revised. L R 3 A 219 (Rev)=4 U P L R (B R) 47.

—To extend the period of limitation against law is to pass an order without jurisdiction, and therefore is revisable. A I R 1931 Cal 319=52 C L J 23=Ind Rul (1931) Cal 250=129 I C 778.

—If in a decree based upon an award there is no excess or defect of jurisdiction or irregularity in the exercise of jurisdiction—High Court would not interfere in revision. A L R 1933 M 559 (565)=A I R 1933 M 697=38 L W 330=65 M L J 376=1933 M W N 831.

—Court exercising jurisdiction rightly & properly—No interference. A L R 1933 C 343 (344)=A I R 1933 C 17=37 C W N 871=140 I C 376.

—Appointment of fresh arbitrators by Court without complying with the conditions of Sch. II, Cl (5) C P C is exercising jurisdiction not vested in the court by law. A L R 1934 O 31=10 O W N 1207.

—Revision lies against an appellate decree if the lower Appellate Court has entertained an appeal from a decree in a suit of Small Cause nature. A L R 1933 R 234=A I R 1933 R 261=146 I C 333 (2).

—An order restoring a suit, (dismissed for default) to file in the exercise of inherent jurisdiction under s. 151, was open to revision as the question was whether the Court has jurisdiction to make the order. A I R 1930 Nag 48=26 N L R 30=Ind Rul (1930) Nag 115=121 I C 659.

—Where the decision of the Court is the very basis and foundation of the jurisdiction in its limited sense as

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (a) Exercise of Jurisdiction not vested in the Lower Court by law (Concl'd)

distinguished from the powers it has got held, that the case comes within the scope of s. 115. A I R 1924 Pat 506=75 I C 856=5 P L T 107=83 I C 599

—A decision by the Judge based on private opinions is without jurisdiction. A I R 1926 Mad 166=22 L W 837=91 I C 651.

—Held, the order restoring case suit as against all the defendants when it is decreed ex parte against some and after contest against others is an order passed without jurisdiction. A I R 1921 Oudh 141=24 O C 282=64 I C 303.

## (b) Failure to exercise jurisdiction which the lower Court has.

—Where a Court refuses to add parties in lieu of one of several defendants who was dead at the institution of suit, it is a case of failure to exercise jurisdiction vested by law and the High Court can set aside the order in revision. The order in question amounts to a "case" "decided" within the meaning of s. 115 C P C. A L R 1934 All 252.

—Omission to consider the question of costs when allowing plaintiff to withdraw suit if it results in injustice to defendant is a failure to exercise the jurisdiction vested in the Court 15 A L J 10 Rev.=31 I C 617.

—Refusal to entertain an application under O. XXI, r 89, on the ground that the petitioner has no locus standi, amounts to failure to exercise a jurisdiction vested in it by law. A I R 1921 Mad 157=44 M 554=40 M L J 497=13 L W 498 = (1921) M W N 272 (F B)=63 I C 937.

—Failure to treat a suit as an application for execution can be rectified in revision. A I R 1921 Nag 130 =59 I C 477.

—Erroneous decision of a Subordinate Court on the point of limitation involving a refusal to deal with a petition made to it amounts to a failure to exercise a jurisdiction vested in it by law. A I R 1923 Mad 435=44 M L J 100=17 L W 705 =46 M 938 =70 I C 888.

—In a suit by a co-sharer landlord for his share of the rent or for the whole rent, refusal to consider whether the plaintiff was entitled to a decree for the whole rent amounts to refusal to exercise a jurisdiction vested in it and a revision lies. A I R 1923 Pat 41=4 P L T 39=(1922) Pat 355.

—Omission to consider a certain part of the defence owing to an erroneous

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds. (Contd)

## (b) Failure to exercise jurisdiction which the Lower Court has. (Contd)

view of law is failure to exercise jurisdiction vested by law. 10 O C 8.

—The High Court can interfere in revision when the lower Court refused to accept the plaints and the District Judge on appeal confirmed the decision of the first court. A I R 1929 Lah 605=11 Lah L J 282=Ind Rul (1929) Lah 897=119 I C 481.

—Staying execution proceedings by wrongly applying Civil P C, s. 10, is refusing to exercise jurisdiction and revision will lie. A I R 1929 Lah 634=Ind Rul (1929) Lah 904=119 I C 488.

—Holding particular evidence as inadmissible is different from failing to exercise jurisdiction vested by law. A I R 1929 Pat 633=11 P L T 581=Ind Rul (1930) Pat 229=122 I C 581.

—Failing to exercise the inherent power to restore a suit dismissed for default may in a proper case become a ground for revision. Ind Rul (1930) Pat 233=122 I C 585.

—Failure to allow a party to take advantage of a particular procedure to which he is entitled is failure to exercise jurisdiction vested by law. A I R 1929 Nag 179=Ind Rul (1930) Nag 208=123 I C 432.

—Where a Court refuses to exercise a jurisdiction vested in it by law upon a misapprehension of the law or an erroneous construction of Statute the High Court will interfere in revision. 34 C W N 733.

—Refusal to hear objections to award, as being out of time when they are filed in time, is refusal to exercise jurisdiction vested in Court justifying revision under s 115. 2 L W 1115=31 I C 536.

—A revision can lie where a decree-holder is deprived of his just remedy by an erroneous view of the Court. A I R 1930 Lah 512=31 P L R 105.

—Appellate Court finding or denying jurisdiction for suit in Civil Courts is a matter for revision, but it is not so when jurisdiction is based on finding of fact or evidence. 31 I C 209.

—Dismissal of an application for setting aside an ex parte decree under O XXXIV, r. 6 on the erroneous ground that the application is not maintainable amounts to failure of exercise of jurisdiction vested in the Court by law. A I R 1930 All 841=(1930) A L J 1200=52 A 839 =Ind Rul (1930) All 585=124 I C 729.

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds. (Contd)

## (b) Failure to exercise jurisdiction which the Lower Court has. (Contd)

—The court disposing of the application before the day fixed for evidence under O. XXXIII r. 6, fails to exercise jurisdiction vested in it by law. A I R 1930 All 758=(1930) A L J 901=Ind Rul (1930) All 753=52 A 927=126 I C 1.

—Refusing to consider an application which the court has jurisdiction to entertain is failure to exercise jurisdiction within the meaning of s. 115 C P C. A I R 1930 All 477=(1930) A L J 1166=Ind Rul (1930) All 766=126 I C 14.

—Revision will lie where the Judge wrongly thinks an appeal is untenable. A I R 1930 Nag 207=13 N L J 4=Ind Rul (1930) Nag 124=121 I C 668.

—Exercise of inherent power by refusing to exercise such power is no ground for revision. 9 P L T 659=108 I C 804.

—Refusal to exercise jurisdiction under s. 10 is open to revision. A I R 1928 Oudh 355=5 O W N 604=3 Luck 650=111 I C 161.

—Where on an erroneous view of law a Court refuses to exercise powers vested in it High Court can interfere in revision. A I R 1923 Mad 230=16 L W 988=44 M L J 80=(1923) M W N 51=31 M L T 423=72 I C 839.

—An order of an Appellate Court in dismissing the execution application on the ground that it was made to a Court not having jurisdiction amounts to declining jurisdiction within the meaning of s. 115. A I R 1924 Mad 32=45 M L J 213=18 L W 17=(1923) M W N 406=73 I C 956.

—A refusal to accept deposit tendered for the purpose of setting aside a sale under O. XXI, r. 89, is a refusal to exercise jurisdiction. A I R 1923 Pat 490=2 Pat 715=74 I C 102.

—Where a subordinate Court invents a novel form of procedure and makes a non-appealable order the High Court can revise the order. A I R 1924 Oudh 11=10 O L J 209=74 I C 335.

—Refusal to receive evidence in support of application for restoration of a suit dismissed under O. XVII, r. 2 is a refusal to exercise jurisdiction within s. 115. A I R 1923 Pat 530=1 Pat L R 281=74 I C 693.

—An erroneous order based on misconstruction of the law amounts to refusal to exercise jurisdiction and is revisable A I R 1924 Pat 506=83 I C 599=5 P L T 107=75 I C 856.

## C. P. C. (1908) SEC 115 (Contd)

## (1) General Grounds (Contd)

## (b) Failure to exercise jurisdiction which the Lower Court has (Contd)

—Refusal of the Commissioner under income Tax Act, to pass order on an application to state a case makes that order liable to revision by High Court. A I R 1924 Lah 662=76 I C 139.

—Failure to entertain a plea of illegality suo motu amounts to failure to exercise jurisdiction vested. A I R 1924 Mad 169=(1923) M W N 566=45 M L J 531=76 I C 306.

—On an allegation of the applicant for probate that through mistake certain trust properties are included in the schedule and that therefore they should be excluded, the court must go into the matter otherwise he will fail to exercise the jurisdiction. A I R 1925 Cal 357=78 I C 901.

—Refusal to exercise inherent powers vested under ss. 151 and 152 amounts to a refusal to exercise jurisdiction within s. 115. A I R 1925 Cal 420=79 I C 536.

—A palpably erroneous decision amounting to improper refusal to exercise jurisdiction prejudicing the party can be revised. A I R 1924 All 263=46 A 73=21 A L J 861=L R 4 A 591 Civ=79 I C 605.

—An erroneous decision on a question of limitation can be revised if the order results in an improper refusal to exercise jurisdiction e. g. to execute a decree. A I R 1924 All 263=21 A L J 861=L R 4 A 591=9 O & A L R 989=46 A 73=79 I C 605.

—Failure to examine to ascertain real points in dispute justifies interference in revision. A I R 1924 Nag 191=79 I C 614. An order under O. XXIII, r. 1 can be revised where the lower Court has failed to exercise a judicial discretion. A I R 1925 Oudh 140=11 O L J 351=79 I C 1031.

—Where a party is directed to pay ad valorem fees on the amount at stake in his miscellaneous appeal, an order directing the dismissal of such appeal if the Court-fee is not paid is a refusal to exercise jurisdiction and is therefore revisable. A I R 1923 Mad 270=(1922) M W N 831=17 L W 623=71 I C 173.

—Lower Court failing to decide the pleas of jurisdiction and limitation raised—Revision lies. 95 I C 4 (Lah)

—A Court cannot refuse to exercise his jurisdiction and act at the same moment in the exercise of it with material irregularity. A I R 1926 Cal 772=53 C 679=30 C W N 570=96 I C 705.



## C. P. C. (1908) SEC. 110 (Contd)

## (1) General Grounds (Contd)

## (b) Failure to exercise jurisdiction which the lower Court has (Contd)

—If the first court as well as the District Court in appeal refuses to exercise jurisdiction vested in them by law, revision would lie against their orders. A I R 1925 All 267=47 A 140=L R 6 A 79 Civ=85 I C 470.

—Failure to exercise jurisdiction vested by the Calcutta Rent Act is contemplated by s. 115 A I R 1922 Cal 514=26 C W N 711=49 C 928=86 I C 227.

—Where the lower Court refuses to order partition at the instance of any of the defendants in a partition suit such a refusal amounts to a failure to exercise jurisdiction. A I R 1926 Cal 184=86 I C 765.

—Revision under s. 115 lies when a court fails to decide a question which it ought to decide. 28 M L J 327=29 I C 228.

—Finding of fact cannot be revised by the revisional court. 18 A L J 1104.

—Dismissal of an application to set aside execution sale under O 21 r. 90 on the ground that the applicant had no locus standi amounts to failure to exercise jurisdiction vested by law. 23 C W N 619.

—Amendment of a petition presented to the lower court after the period of limitation cannot be allowed in revision. Per Sadasiva Iyer, J.—A Court which dismisses a suit or application under an erroneous view of the law that the party or applicant has no right of suit or application does not decline to exercise jurisdiction and that no revision lies to the High Court against such decision under S. 115 C. P. Code. 38 Mad 775=15 M L T 98=(1914) M W N 147=1 L W 59=22 I C 193.

—Where an Application for attachment of a debt is made, the court is not bound to satisfy itself as to the existence of the debt and if it appoints a Receiver under R. 189 of the Civil Rules of Practice (M. Iras) it does not fail to exercise a jurisdiction vested in it by law or act with material irregularity in the exercise of its jurisdiction, within S. 115 C. P. Code. 27 I C 812

—Failure to draw up a decree—Dismissal of appeal—Revision—Mistake of fact see 116 P W R 1914=191 P L R 1914=23 I C 902.

—Failure to pass such further decree or order as the case may require, High Court if will interfere in revision. see 21 I C 767.

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds. (Contd)

## (b) Failure to exercise jurisdiction which the Lower Court has (Contd)

—Revision lies when the appellate court fails to exercise jurisdiction under O 41 r. 33, 21 I C 767=1913 M W N 1024.

—Declining to act under s. 151 whether a ground for revision. 25 P W R 1914.

—A court refusing to accept the deposit made in time to set aside the execution sale, fails to exercise jurisdiction. 52 I C 344.

—Dismissal of an appeal without proper notice to parties and refusal to exercise the inherent power to restore it is a ground for revision. 52 I C 540.

—The failure of a District judge to decide a plea amounts to a refusal to exercise jurisdiction and his decision is liable to be set aside in revision. 54 I C 662.

—Revision lies when a court refuses to entertain an application on the erroneous ground that it does not lie. 38 M L J 322=27 M L T 99=11 L W 225=(1920) M W N 270=55 I C 267.

—Order returning plaint under s. 23 of the prov. Sm. C. C. Act. whether failure to exercise jurisdiction. 57 I C 602.

—Postponement of the trial of a suit by a receiver appointed to recover property amounted to a refusal to exercise jurisdiction. 8 L W 436=48 I C 139.

—An order dismissing a suit on the ground of discrepancies between the pronote & plaint is open to revision. 9 I C 32=21 M L J 451=9 M L T 268.

—A court fails to act in the exercise of its jurisdiction when it omits to form any opinion as to the intention of parties in splitting up the tenancies as well as to prevent the landlord from suing for rent on the original jama. 14 C L J 110=6 I C 501.

—Misapprehension of true effect of provision is refusal to exercise jurisdiction. 14 C L J 50.

—The collector rejecting an application for reference on the ground of absence of interest in compensation fails to exercise jurisdiction. 36 M L J 95

—An application by some defendants to be made plaintiffs on withdrawal by plff in a partnership suit being refused it was held that revision lies as the court failed to exercise the jurisdiction under o. 1 r. 10 to transpose parties. 20 C W N 752=34 I C 186.

—Dismissal of an application as

C. P. C. (1908) SEC. 115 (Contd)

(1) General Grounds (Contd)

(b) Failure to exercise jurisdiction which the Lower Court has (Contd)

barred amounts to failure to exercise jurisdiction within the meaning of s. 115  
21 M L J 1020 = 10 M L T 281=(1911) 2  
M W N 239=12 I C 75.

—A Judge in omitting to deal with the merits of an appeal fails to exercise a jurisdiction vested in him by law 17 C L J 593=40 C 518=20 I C 420.

—The High Court can interfere in revision if the lower court without enquiring into the question of limitation refuses on the ground of that it has no jurisdiction 9 N L R 35=19 I C 425.

—Denial of right to sue where it is available is a matter which comes under s. 115 (b) A I R 1929 Bom 467=53 B 773=31 Bom L R 1042=Ind Rul (1930) Bom 86=122 I C 54.

—Mere omission to consider expropriation the question whether limitation does not run against a person by reason of some special law does not amount to failure to exercise jurisdiction 17 C W N 667=18 I C 391.

—Exclusion of a document as evidence in a case is a failure to exercise jurisdiction The question of admission of a document is not a question of jurisdiction but a question of law 25 I C 204.

—Revision lies when an appellate court without looking to substance dismisses an appeal filed from a non-appellable order and does not treat it as a review. A I R 1928 Lah 811=Ind Rul (1929) Lah 446=115 I C 862.

—High Court will not interfere in revision with refusal to exercise inherent powers under s. 151, unless such refusal is perverse or illegal A I R 1923 Lah 506=75 I C 487.

—Application to set aside rent rate—Refusal to issue summons to witnesses—Remedy—Interference in Revision (1919) Pat 60.

—The refusal to admit secondary evidence when the loss of a document is not proved to the court does not amount to a refusal to exercise jurisdiction or to exercising jurisdiction with material irregularity. A I R 1929 Nag 288 = Ind Rul (1930) Nag 65 = 121 I C 33.

—Where the Small Cause Judge returned a plaint which had been first presented to, and returned by the Munsif to be presented before the former High Court can interfere in revision A I R 1922 Pat 368=2 P L T 739=64 I C 496.

C. P. C. 1908 SEC. 115 (Contd)

(1) General Grounds. (Contd)

(b) Failure to exercise jurisdiction which the Lower Court has. (Contd)

—A refusal by the District Judge to grant leave to institute a suit under Religious Endowments Act (XX of 1863) s. 18 amounts to a failure to exercise jurisdiction vested by law 11 P 594= 138 I C 331=13 P L T 256=I R 1932 P 178=A I R 1932 P 177=A L R 1932 P 246 (250) Refusal to amend a plaint is a failure to exercise Jurisdiction. A L R 1933 A 397 (399)=55 A 256=A I R 1933 A 374=145 I C 859=1933 A L J 268=I R 6 A 177 In an application under O 1 r 8 refusal by Court without proceeding to give notice amounts to a refusal to exercise a jurisdiction vested in Court A L R 1933 P 253 (254)=14 P L T 361=A I R 1933 P 302=145 I C 387.

—Where a lower Court refuses to direct a suitable amendment it fails to exercise a jurisdiction vested in it by law and High Court can interfere in revision and allow the amendment. A L R 1933 A 384=A I R 1933 A 102=140 I C 113.

—Objections to an award being filed in time—Refusal to consider objection as time barred Amounts to failure to exercise of jurisdiction vested in Court A L R 1933 R 98 (99)=A I R 1933 R 38=142 I C 835.

—It is illegal to levy execution against the legal representatives of a deceased judgment-debtor without giving them notice under O 21 r 22 C P C The Court in such a case has inherent jurisdiction under S. 151 C P C to order restitution of any moneys paid to save the warrant being effected, if the Court fails to exercise the power, the High Court will interfere, in the exercise of its revisional powers, whether an appeal lies against an order under S. 151 or not. A L R 1934 L 45. Refusal to allow—Amendment of plaint—amounts to refusal to exercise jurisdiction—and so Revision is competent A L R 1933 O 228. Dismissing an application for execution for default even though the decree holder was present amounted to a failure to exercise jurisdiction vested in the court by law, A L R 1933 O 358=A I R 1933 O 225=10 O W N 263=143 I C 189

—A refusal to enquire into a question of limitations by the lower court amounts to a failure to exercise jurisdiction vested in the Court by law 9 N L R 35= 19 I C 425

—Jurisdiction—Misapplication of time effect of statutory provision—Refusal to exercise jurisdiction. 14 C L J 50=15 C W N 872=10 I C 527.

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (b) Failure to exercise jurisdiction which the Lower Court has (Conclud)

—Revision lies against a general order of remand by an Appellate Court which misunderstands its own duties and in substance declines jurisdiction. 63 I C 885.

## (c) Illegal exercise of Jurisdiction.

—Illegal exercise of jurisdiction is a ground for interference in revision. 1 P R (Rev.) 1911-8 I C 733.

—Revision can lie only if the Court has acted illegally or with material irregularity in relation to the question of jurisdiction. A I R 1923 All 392-21 A L J 313-45 A 425-L R 4 A 402 Civ-74 I C 778.

—Revision does not lie simply on an error of law e. g. on the question of limitation. A I R 1924 Lah 666-76 I C 14.

—Dismissal of suit on wrong preliminary ground amounts to acting illegally in the exercise of jurisdiction and the order is revisable. A I R 1925 Lah 68-76 I C 125.

—Wrong interpretation of law as applied by trial Court and not deciding legal point are good grounds for revision. A I R 1927 Lah 808-28 P L R 130-101 I C 520.

—The High Court can interfere in revision if an application under O. XXI, r. 89 has been wrongly admitted. A I R 1923 Mad 659-17 L W 680-76 I C 853.

—Where lower Court disregards the admissions in the pleadings and decides the case against the pleadings, High Court can interfere in revision. A I R 1924 Nag 101-7 N L J 13-21 N L R 6-77 I C 46.

—In the absence of injustice or hardship though the order of the lower Court may be illegal it cannot be revised. A I R 1924 Nag 238-78 I C 746.

—Acting illegally does not merely imply the committing of an error of procedure such as acting with material irregularity does. A I R 1924 Cal 633-83 I C 438-51 C 690-28 C W N 559-39 C L J 434-78 I C 958.

—A mere error of law is not necessarily an illegality and an aggrieved party is not entitled to apply for revision. 91 I C 379 (Lah).

—An order based on a wrong interpretation of a rule in the exercise of jurisdiction is revisable. A I R 1925 Mad 1201-48 Mad 676-49 M L J 366-22 L W 606-92 I C 300.

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (c) Illegal exercise of Jurisdiction (Contd)

—Dismissal of application as barred by limitation disregarding the provisions of s. 6 (1) of the Lim Act is revisable. A I R 1925 Rang 381-4 Bur L J 146-92 I C 775.

—Decision in favour of the applicant even though the application was declared as time barred is illegal exercise of jurisdiction. A I R 1926 Lah 344-8 Lah L J 170-27 P L R 710-94 I C 117.

—Appellate Court entertaining appeal from a non-appealable orders—Order is without jurisdiction and is revisable. A I R 1925 Pat 525-4 Pat 718-6 P L T 795- (1925) Pat 183-94 I C 217.

—Court not considering the evidence in the case but basing his decision on personal inspection—Proceedings are illegal and materially irregular, and are revisable. A I R 1926 Rang 205-4 R 221-97 I C 1025.

—An appellate court deciding on a question of fact not at all raised in the original court exercises jurisdiction illegally. A I R 1926 Rang 214-4 L 202-98 I C 1029.

—Decision not on merits but on questions not supported by law shows illegal exercise of jurisdiction and therefore revision lies. 44 C L J 565-99 I C 946.

—Ex-parte decree set aside as matter of grace is ground for revision. A I R 1925 Mad 209-20 L W 829-48 M L J 152-85 I C 499.

—Mere error of fact or law is no ground for revision. Perversity in the decision is necessary i. e. a conscious departure from some rule of procedure. 16 M L T 156-(1914) M W N 614-26 I C 106.

—Improper exercise of jurisdiction by a Court below is not a ground for revision. 29 C L J 362-51 I C 233.

—Ordering execution on an application put in more than three years after the last application whether illegal. U B R 1905, Civil Procedure 26. Decree for rent—Ejectment, 15 days' notice: not given—Grave and palpable error of law. 32 I C 755.

—Wrong decision on a law point amounts to illegality or material irregularity if it is followed by an action forbidden by law. 15 O C 234-15 I C 523.

—A decision on facts not admitted by parties and based on impossible and forced construction of facts is illegal exercise of jurisdiction A I R 1923 Nag 108-65 I C 881.

—Erroneous decision of law not a ground for revision 13 N L R 116-41 I C 883.

## C. P. C. (1908) SEC. 115 (Contd.)

## (1) General Grounds (Contd.)

## (c) Illegal exercise of jurisdiction. (Contd.)

—Abuse of Judicial process. 38. Bom 638.

—Court passing a decree on a void contract acts illegally in the exercise of its jurisdiction. 15 I C 35.

—Refusal to correct accidental slip or omission in a decree on application is illegal exercise of jurisdiction. 13 A L J 449

—Decree leaving certain points to be decided in execution—Execution of decree only to be allowed on such proof illegal. 12 I C 136=10 M L T 567.

—Wrong exercise of jurisdiction is no ground for interference. A I R 1922 Mad 3=15 M L W 245=41 M L J 378=(1921) M W N 507=64 I C 493

—What is illegal or materially irregular must be decided on the merits of each case. A I R 1921 (U B) 27=4 U B R 16=63 I C 838.

—Deciding a case on wrong assumption as to existence of facts which are necessary to be proved but are not proved amounts to acting illegally. A I R 1921 U B 27=4 U B R 16=63 I C 838.

—An order under O. XVI, rr. 10 or 12 if illegal is open to revision under s. 115. 29 M L T 95=61 I C 967

—Revision is not maintainable when the Court exercises jurisdiction improperly the aggrieved party can apply to the Court to review its order. A I R 1929 All 957=(1930) A L J 235=Ind Rul (1930) All 81=121 I C 97.

—The High Court has power to interfere in revision when the order of the lower court has the effect of nullifying the provisions of the Civil Procedure Code. 3 C L J 29=33 C 487.

—A court executing a decree dismissed an application for certification of certain amount as time barred and after the dismissal was enquired into, the receipt was filed by the judgment debtor Held that the action of the Court was ultravires. A I R 1931 Lah 105=32 P L R 46=32 Cr L J 46=131 I C 216.

—An application to the High Court to set aside an order of the appellate court declining to refund the Court fee on remand, was allowed under s. 115 C. P. C. though not falling within the scope of it. 42 Bom 363=20 Bom L R 348=45 I C 552

—A Court dismissing a suit for possession by the plaintiffs appearing to sue in their personal capacity from the heading of the plaint but in representative Capacity from the body of it, was held to have exercised its jurisdiction illegally. 9 I C 132.

## C. P. C. (1908) SEC. 115 (Contd.)

## (1) General Grounds (Contd.)

## (c) Illegal exercise of jurisdiction. (Contd.)

—The High Court can revise the order of the lower court superseding the award of an arbitrator—empowered under the reference to make private inquiries simply on the ground of misconduct of the arbitrator making private enquiries. A I R 1922 All 69=20 A L J 125=64 I C 934.

—Following one view of law is neither acting illegally nor irregularly. A I R 1929 Bom 198=31 Bom L R 331=Ind Rul (1929) Bom 345=116 I C 249.

—The contravention of an express provision of law is not merely an erroneous decision but is an illegality. A I R 1930 Oudh 9=Ind Rul (1929) Oudh 469=118 I C 805.

—The High Court can interfere in revision when the lower court passed a decree in a suit for the recovery of the lease money and sold after attaching the right to receive lease money before the period for which the lease money was payable had expired. A I R 1929 Nag 228=Ind Rul (1929) Nag. 305=119 I C 673.

—Wrong decision on a law point by a court having jurisdiction is no ground for revision. A I R 1929 Pat 633=11 P L T 581=Ind Rul (1930) Pat 229=122 I C 581.

—Indispensable party not brought on record Court acts illegally in the exercise of its jurisdiction or at least there is material irregularity in the exercise of jurisdiction and a revision can lie. A I R 1929 All 761=Ind Rul (1930) All 305=(1930) A L J 223=122 I C 753.

—Where the lower Court acts in a way amounting to a denial of justice, High Court can interfere in revision. A I R 1930 Rang 142=Ind Rul (1930) Rang 335=126 I C 655.

—An order which contravenes provisions of O. XXI, rr. 89 and 92, is an illegal exercise of jurisdiction and is a material irregularity within s. 115 (c). A I R 1930 All 843=Ind Rul (1921) All 114=128 I C 818.

—When a Judge delivering a perverse judgment is exercising his jurisdiction illegally. A I R 1930 Rang 324=Ind Rul 1931 Rang 64=128 I C 848.

—Where the lower Court applies its mind to the question of law and follows authority, it does not act illegally or with material irregularity. 59 M L J 351=32 L W 347=Ind Rul (1931) Mad 171=128 I C 875.

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (c) Illegal exercise of Jurisdiction (Contd)

—Disregarding a High Court decree through an accident is a ground for revision and amounts to an illegal exercise of jurisdiction. A I R 1931 Cal 27=58 Cal 111=34 C W N 515=Ind Rul (1931) Cal 148=129 I C 308.

—A mere error of law is not necessarily an illegality though a perverse and wilful error of law or fact may be. (1921) 4 U B R 16=63 I C 838.

—A revision lies where Court which passed the decree on award has committed an error in procedure. A I R 1921 Lah 396=22 P L R 1922=64 I C 363.

—If the lower Court has failed to take in to account some proposition of law or some material fact in evidence, it has acted illegally and its decision may be reversed. A I R 1929 Rang 145=7 R 339=Ind Rul (1930) Rang 67=120 I C 899.

—Exercise of jurisdiction in absence of circumstances supposed to exist is revisable. A I R 1927 All 704=L R 8 A 130 Cr=8 A I Cr R 287=25 A L J 994=28 Cr L J 965=103 I C 229.

—Appellate Court reversing trial Court's decision without assigning any reason whatsoever acts illegally in the exercise of jurisdiction. A I R 11926 Cal 530=91 I C 839.

—Omission to issue notice under s. 24 (1), Civil P. C. is an illegality or material irregularity. A I R 1921 All 17=23 A L J 948=L R 6 A 355 Civ=90 I C 287.

—The denial of the right of fair trial by refusing to summon witnesses in an application to set aside sale under s. 215 of Chota Nagpur Tenancy Act amounts to illegal exercise of jurisdiction. (1919) Pat 60=49 I C 389.

—An order of a court suspending the payment of fund in court to the attaching decree-holder is illegal. 42 Mad 692=50 I C 925.

—Setting aside sale without the proof of substantial injury under the proviso of O. 21, r. 90 C. P. C. is illegal and is a ground for revision (1918) Pat 284=5 Pat L W 15=46 I C 84.

—The High Court has jurisdiction to interfere with the wrong exercise by the Courts below of power vested in them under O. XXI rr. 89 to 92 dealing with confirmation on setting aside auction sale. 67 I C 286 (Cal).

—Where the executing Court acts ultra vires in enquiring into the matter before it under s. 476 Cr P Code a revision under s. 115 is competent. A I R 1929 Lah

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## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (c) Illegal exercise of Jurisdiction (Contd)

676; 5 P L R 1908 Cr, followed. 40 C 477, not followed. A I R 1931 Lah 105=32 Cr L J 647=3 P L R 46=(1931) Cr Cas 169=131 I C 216.

—The High Court can interfere in revision with an order setting aside a decree in defiance of the provisions of O. IX r. 13, 14 I C 221; 107 I C 395, followed. A I R 1931 All 294=(1931) A L J 377=Ind Rul (1931) All 577=133 I C 129

Overruling A I R 1922 A 341.

—Setting aside a sale under O. 21 r 86 even though the auction-purchaser came to the Court to deposit purchase money on the 15 day but could not do so owing to the obstruction caused by the delay in following through the Court's procedure, was held to be illegal and irregular. 140 I C 68=13 P L T 559=I R 1932 P 282=A I R 1932 P 342=A L R 1933 P 94.

—The trial of a suit as a small Cause suit by the successor of a Munsif even though the suit was ordered to be tried in the ordinary jurisdiction by the first Munsif was illegal and incompetent even though within his jurisdiction. 27 I C 751.

—Taking a perverse view of the point arising for decision in a case is ground for interference in revision by the High Court. A judge acts illegally and irregularly in the exercise of his jurisdiction, if the result of his decision deprives a party of the fruits of prior proceedings. The words acting illegally or with material irregularity in the exercise of jurisdiction cover cases in which a court has failed to arrive at an obvious conclusion which the facts found, necessitate or has so misapplied the principles of law as to result in a perversion of justice. 16 M L T 156=(1914) M W N 614=26 I C 106 and see 2 L W 230=28 I C 189.

—Remand order not justified by O 41, r. 23 and therefore ultra vires—Revision from—Competent. 138 I C 62 (2)=33 P L R 634=I R 1932 L 391=A I R 1932 L 538.

—An order allowing fees to a Legal Practitioner against the rule of High Court having force of law is an order passed by the Court in the exercise of jurisdiction illegally. 54 A 490 (494. 5)=1932 A L J 272=136 I C 817=I R 1932 A 247=A I R 1932 A 337=A L R 1932 A 716.

—Order for interim sale of moveable property under O. 39 r. 6 C P C made when the conditions prescribed by the rule were not satisfied, held to be revisable, though of an interlocutory nature. 33 P L R 235=134 I C 118=A I R 1932 L 51.



## C. P. C. (1908) SEC. 115 (Concl'd)

## (1) General Grounds (Concl'd)

## (c) Illegal exercise of Jurisdiction (Concl'd)

—The decision of the Lower Court being contrary to the decision of the superior Court on a question of law, there was illegal exercise of jurisdiction. 140 I C 325=1932 M W N 1338=1 R 1932 M 853

—Allowing fees to a legal practitioner against the rule of High Court having the force of law is illegal exercise of jurisdiction. 54 A 490 (494-5)=1932 A L J 272=136 1 C 817=1 R 1932 A 247=A I R 1932 A 337=A L R 1932 A 716.

—Rejection of a valid objection to an award by a Court is an illegality or material irregularity in then s. 115 C P C. A L R 1933 L 572 (573)=34 P L R 34=A I R 1933 L 139=141 I C 72=1 R 5 L 63.

—The High Court will interfere in revision if substantial injury is caused to a party by the President of the Calcutta Improvement Tribunal acting on the report of an expert without giving the parties any opportunity to cross-examine the expert. A L R 1933 C 37 (40)=1 R 5 C 5

—Revision is competent in the case of a summary rejection without giving an opportunity to explain the delay in filing objections under o. 21, r. 58 C P C. A I R 1933 A 751 (1).

—A finding of the lower court based on evidence is not a ground for revision if it is not perverse. A L R 1933 L 530=34 P L R 414=A I R 1933 L 229=142 I C 654=1 R 5 L 233=1933 Cr. C 349=34 Cr. L J 375

—The High Court can interfere in revision with the illegal and irregular exercise of jurisdiction by the lower court in not following the superior Court. A I R 1933 M 912 (2)=1932 M W N 1338=A I R 1933 M=140 94 I C 325.

—It is illegal to levy execution against the legal representatives of a deceased judgment-debtor without giving them notice under O 21 r. 22 C P C. The court in such a case by exercise of inherent powers under s. 151 can order restitution of any paid to save the warrant being effective. In case it does not proceed under s. 151, the High Court will interfere in revision, no matter whether an order under S. 151 is appealable or not. A L R 1934 Lah 45.

## (d) Material Irregularity in exercising jurisdiction.

—Even if it be held that the court of the lowest jurisdiction is to deal with such an application, the passing of the order by the District Judge would not be a material irregularity justifying interference by High Court under S. 115. A L R 1934 Cal 181,

## C. P. C. (1908) SEC. 115 (Concl'd)

## (1) General Grounds (Concl'd)

## (d) Material Irregularity in exercising Jurisdiction (Concl'd)

—Mere error of law is not a ground to justify interference by High Court unless it is shown that the court acted with material irregularity in the exercise of its jurisdiction or illegally. The jurisdiction can be exercised suo motu without application by the parties and in favour of a non-petitioning party. A L R 1934 All 241,

—A summary dismissal of objections to an attachment without hearing objector's reasons or explanation is open to revision by the High Court on the ground of material irregularity. A L R 1934 All 256 (1).

—Where the Court appoints fresh arbitrator without complying with the provisions of Sch. II para 5, it acts without jurisdiction or at least its action is tainted with material irregularity and will be set aside in revision under s. 115 C. P. C. 41 All 578; 51 All 501; 53 All 778 referred to. A L R 1934 Oudh 31.

—Revision does not lie on the ground of technical irregularity. 198 P L R 1915.

—giving compensation for improvements in ejectment suit under Punj Ten. Act. is an irregularity. 1 P W R (Rev.) 1916.

—Failure to decide question raised being material irregularity is open to revision, 108 I C 604 (Lah).

—Disposal of a case by a second Court without deciding the question of jurisdiction is irregular within the meaning of s. 115 C P. C. when the first Court decided that it had no jurisdiction. A I R 1928 Cal 237=55 C 836=47 C L J 277=10 A I Cr. R 167=29 Cr. L J 483=109 I C 211.

—Refusal to admit evidence taking certain facts as correct is irregularity in exercise of jurisdiction and is open to revision. A I R 1928 Mad 815=51 M 860=55 M L J 565=(1928) M W N 49=28 L W 513=110 I C 490.

—Misappreciation of evidence can be ground of revision. A I R 1929 Mad 204=113 I C 36.

—Entirely altering a judgment after once it has been delivered in Court even though orally amounts to material irregularity. A I R 1923 Mad 663=(1923) M W N 354=18 L W 105=72 I C 688.

—Decision of a suit on grounds not raised by parties and to which no evidence is directed amounts to substantial error of defect of procedure and revision lies. A I R 1924 Pat 341=73 I C 41.

## C. P. C. (1908) SEC. 115 (Contd.)

## (1) General Grounds (Contd.)

## (d) Material Irregularity in exercising Jurisdiction (Contd.)

—Transfer of a suit at the instance of a party but without notice to the other does not amount to material irregularity sufficient to justify interference in revision. A I R 1923 Oudh 240-26 O C 62-74 I C 249.

—An order to furnish security for mesne profits is not without jurisdiction but passing such an order amounts to material irregularity within s. 115. A I R 1924 Oudh 11-10 O L J 209-74 I C 315.

—A finding directly opposed to evidence justifies interference in revision on ground of material irregularity. A I R 1924 Nag 44-19 N L R 165-75 I C 993.

—Misapplication of law in an appeal from order refusing to set aside ex parte decree amounts to material irregularity in exercise of jurisdiction vested in Appellate Court. A I R 1924 Lah 603-75 I C 1020.

—Material irregularity consists in mistake of fact or law occasioned by wrong assumption or refusal of jurisdiction, or in refusal to exercise of jurisdiction or exercising illegally and irregularly. A I R 1923 Mad 254-44 M L J 69-44 M 123-(1922) M W N 813-16 L W 898-72 I C 902.

—An improper order passed after investigation or failure to investigate a claim, under O. XXI, r. 63 amount to material irregularity and revision lies. A I R 1923 Rang 195-I R 276-2 Bur L J 134-76 I C 677.

—Parties to a suit residing in one place outside jurisdiction have a right to be examined on commission if the plaintiffs are so examined, otherwise there will be material irregularity. A I R 1924 Mad 541-46 M L J 131-34 M L T 314 -(1924) M W N 191-78 I C 407.

—An appellate Court acts with material irregularity if it remands a case for further evidence to be taken by the trial Court that had dismissed the suit under O. XVII, r. 3 A I R 1924 Rang 177-I R 636-79 I C 482.

—An order purporting to be passed under O. XXIII, r. 1, but made in disregard of the procedure presented therein is irregular exercise of jurisdiction and deserves revision. A I R 1925 Oudh 291-27 O C 231-11 O L J 613-79 I C 1033.

—Reversing judgment of a lower Court on a new question not raised by the parties and without sufficient materials for so doing amounts to acting with material irregularity. A I R 1925 Mad 357-80 I C 724.

## C. P. C. (1908) SEC. 115 (Concl'd)

## (1) General Grounds (Contd.)

## (d) Material Irregularity in exercising Jurisdiction (Contd.)

—Non-joinder of Receiver in execution proceedings for sale amounts to material irregularity. A I R 1923 Mad 144-43 M L J 211-(1922) M W N 745-16 L W 322-31 M L T 290-47 M 47-71 I C 293.

—Coming to certain conclusion without evidence and omitting to consider point of law required by the law to decide, amounts to material irregularity. A I R 1923 Mad 503-(1923) M W N 159-32 M L T 293-44 M L J 409-72 I C 137.

—Granting an application to bring on record the legal representative of a deceased defendant even though out of time amounts to material irregularity if no cause for the belated application is shown. A I R 1923 Mad 503-(1923) M W N 159-32 M L T (H C) 293-72 I C 137.

—Erroneous decision on a point of law is not an irregularity or illegality. —Decision on a question of onus is not revisable. 26 P L R 783-92 I C 46.

—Lower Appellate Court entirely misreading the findings submitted to it on a remand acts with material irregularity. A I R 1926 All 604-92 I C 555.

—Lower Appellate Court misreading a ruling of the Court and refusing to entertain an application of a party which is really maintainable—Material irregularity is committed. A I R 1926 All 305-48 A 286-24 A L J 286-92 I C 567.

—Lower Court acting with irregularity in the exercise of its jurisdiction in not paying heed to the provisions of s. 99—Decision is liable to be set aside in revision. A I R 1926 Lah. 402-93 I C 938.

—Coming to a finding on question of fact without taking any evidence, especially in the absence of an affidavit or agreement on subject between parties amounts to material irregularity. 94 I C 85.

—Court proceeding on misunderstanding the pleadings—Revision lies. A I R 1927 Lah 44-95 I C 294.

—A finding not based on the evidence on record amounts to material irregularity and is revisable. A I R 1926 Lah. 566-95 I C 247.

—Section applies strictly to cases of material irregularity—It is wrong to utilize the section to correct errors of law and not merely errors of procedure. A I R 1926 Cal 1112-30 C W N 928-98 I C 751.

C. P. C. (1908) SEC. 115 (Contd)

(1) General Grounds (Contd)

(d) Material Irregularity in exercising

Jurisdiction (Contd)

—Decision without impleading necessary party is material irregularity and revision lies. A I R 1926 P C 142=54 C. 338=53 I A 271=25 A L J 61=25 L W 90=3 O W N 989=(1927) M W N 84=38 M L T (P. C.) 43=29 Bom. L R 755=45 C L J 274=31 C W N 413=28 P L R 113=8 P L T 251=52 M L J 368 (P. C.)=99 I C 749.

—Revision would not lie even if suit of small cause nature is tried on regular side. A I R 1927 Nag 164=100 I C 37.

—Rejecting application for restoration without considering record or without taking evidence being material irregularity is revisable. A I R 1927 Lah. 239=100 I C 677.

—If limitation for setting aside abatement is not considered, it will be ground for interference. A I R 1926 Cal 444=87 I C 173.

—Revision lies where issues are ignored to the prejudice of a party. A I R 1925 Mad 884=48 M L J 685=87 I C 695.

—Acting on not proved or inadmissible evidence amounts to material irregularity or illegality in the exercise of jurisdiction. A I R 1926 A L J 161=23 A L J 961=L R 6 A 553 Civ.=89 I C 22.

—Mere technical defects will not justify interference in revision unless some injustice is caused. A I R 1926 Oudh 28=12 O L J 626=2 O W N 543=89 I C 275.

—Order of dismissal of suit for absence of plaintiff at defendant's evidence is not material irregularity. A I R 1925 Oudh 933=2 O W N 432=89 I C 418.

—Sale in execution of a decree after the judgment-debtor is adjudicated an insolvent & in spite of the objection of the Official Receiver is tainted with material irregularity & is liable to be set aside in revision 30 M L J 611

—Revision under s. 115 C P C will lie if a notice under O. 41 r. 10 is defective in not giving reasonable time to furnish security 29 I C 59

—Finding of a fact without any evidence on record and wrongly throwing burden of proof on the other side amount to material irregularity 29 I C 61

C. P. C. (1908) Section 115 (Contd)

(1) General Grounds (Contd)

(d) Material Irregularity in exercising

Jurisdiction (Contd)

—No succession certificate is necessary in a suit on a pro-note assigned by an undivided son of the payee. The proper procedure for a suit on a promissory note in appeal is not to dismiss it for want of certificate but the plaintiff should be allowed to produce the same within reasonable time. 29 I C 234.

—Disregarding the provisions of s. 74 of the Contract Act assessing damages is a material irregularity within s. 115 C. P. Code. 27 I C 885.

—Material Irregularity — Omission to decide material point — Revision see 28 M L J 327.

—Material Irregularity — Lower Court disregarding High Court's civil circulars. 38 Bom 638=16 Bom L R 517 = 25 I C 371.

—A court rejecting an application without hearing the applicant acts with material irregularity. 24 I C 694.

—Material irregularity and illegality— Decision of Dt. judge under S. 153 of the B. T Act see 23 I C 844.

—Refusal by Court to go into question of possession. Revision by. see 24 I C 62.

—Setting aside an ex parte decree by the Court of the Subordinate-Judge while the final orders on application to transfer proceedings and with notice of the same are pending in the District Court, amounted to material irregularity. 19 C L J 258=25 I C 79.

—A finding of fact not based on the evidence on the record is revisable. In appeal a District Judge reducing the claimed amount on the ground that the plaintiff had exceeded his authority, acts with material irregularity. 93 P L R 1917.

—Examining witness without notice to party or pleader—Material irregularity. 22 I C 407.

—There is no material irregularity in the procedure of the lower Court in dismissing a suit of a decree-holder to recover money from another decree-holder who attached and carried away the money lying in Court by the sale of perishable property attached before judgment by the former who failed to execute his decree and thus confirm the previous attachment. 22 Bom L R 1407.

## C. P. C. (1908) SEC. 115. (Contd)

## (1) General Grounds (Contd)

## (d) Material Irregularity in exercising Jurisdiction (Contd)

—An application to record satisfaction of a decree should not be allowed to be withdrawn. Otherwise there will be a material irregularity in the procedure. 35 M L J 252=51 I C 411.

—Omission to decide a question of law and refusal to follow an act of the legislature will allow the High Court to interfere in revision. 55 I C 55.

—The attachment of a Provident fund against the provisions of s. 4 (1) of the Provident Funds Act (IX of 1897) is an error of law amounting to an usurpation of authority in violation of the statute. 46 Cal 962=24 C W N 288=54 I C 439.

—Omission to decide a material question by the Court amounts to a material irregularity within s. 115 C. P. C. 52 I C 992.

—If an *ex parte* decree is set aside on unsustainable grounds, the High Court can interfere in revision. 1 P L T 69=54 I C 945.

—Dismissal of a suit refusing to give an opportunity to amend the plaint is a material irregularity in the exercise of jurisdiction. 1 Pat L T 188=53 I C 445.

—A Court omitting to found its decision upon the basis of the evidence on the record, acts with material irregularity. 56 I C 892.

—The transfer of cross suits to another Court on a party's application without issuing notice to the opposite party amounts to material irregularity. 58 I C 667.

—If a Judge decides a case without considering the law and the evidence on the record, he acts with material irregularity and the procedure is illegal and is a ground for revision if the petitioner has suffered thereby. 47 I C 781=9 L B R 263=12 Bur L T 5.

—The High Court interfered in revision when the lower court dismissed for default an application for restoration of an application for setting aside an *ex parte* decree without considering merits of the same. 49 I C 745.

—Material irregularity—Adjournment to enable plaintiff to amend plaint—Failure to do so—Application for further time—Dismissal of suit—Revision against. 4 Pat L J 277.

—Costs—Decision of Court as to, without considering the merits—Revision. 8 L W 219.

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (d) Material Irregularity in exercising Jurisdiction (Contd)

—Omission to include one of the properties in schedule—Dismissal of petition, if valid—'Framed' meaning of—Provision for dismissal, if primitive—Interference in revision. 1 L W 1068.

—Material irregularities justifying interference in revision, what are—4 Ind Cas 314=18 P W R 1909.

—A Court failing to decide an application accs with material irregularity. It is bound to adjudicate in some form or other. A I R 1925 Nag 289=85 I C 779.

—Court overlooking provisions of a Legislative enactment—Material irregularity—Revision. 11 Ind Cas 849.

—Wrong interpretation of words—Material irregularity—Revision—125 P L R 1911.

—Omission to regard the qualification of an obligation created by law and to frame a definite issue in connection there with—Material irregularity—Revision—96 P W R 1911.

—Court overlooking relevant provisions of an Act—Material irregularity—Revision—157 P W R 1911.

—In a suit for declaration to pass a decree for possession is a Material irregularity—199 P L R 1911.

—In execution sale, if the sale-procedure is entirely illegal or if there is an irregularity in the proceeding causing serious loss to the applicant, the irregularity can be remedied in revision. A I R 1931 Pat 63=1nd Rul (1931) Pat 169=130 I C 265.

—Grounds for erroneous decision on point of law—Not material irregularity or illegality. 27 I C 371.

See also. 15 I. C. 547 = C. 855; 23 I. C. 975, But Contra. 15 I. C. 523.

—A finding of fact by an Appellate Court without fully considering and discussing the evidence for the parties is liable to be set aside even in revision under s. 70 of the Punjab Courts Act, IV of 1912 (S. 14 of Act III of 1914.) 120 P L R 1915=7 P W R 1915=27 I C 593.

—Grounds for—Ruling of higher Courts misunderstood and misapplied. 28 I C 282.

—Financial Commissioner—Technical irregularity—No substantial failure of justice. 4 P R (Rev.) 1914=25 I C 831.

C. P. C. (1908) SEC. 115 (Contd.)

(1) General Grounds (Contd.)

(d) Material Irregularity in exercising

Jurisdiction (Contd.)

—An erroneous construction of rules made by the High Court regarding costs is no ground for revision. A I R 1923 Pat 90=3 P L T 314=65 I C 375.

—There was a material irregularity in the procedure when the court gave time to the plaintiff to produce documents after close of the case and on the next day allowed him to withdraw the suit with liberty to bring a fresh one. 37 Bom 682=15 Bom L R 823=21 I C 23.  
—Grounds for revision by High Court—Moral as opposed to legal justice. 37 Mad 385= 26 I C 181.

—Clerical error if not rectified under s. 152 can be made ground of revision A I R 1929 Lah 400.

—Omission to consider the question of estoppel is a material irregularity justifying revision. A I R 1921 Lah 60=3 L J 181=60 I C 716.

—Wrong allocation of the onus of proof amounts to material irregularity, justifying interference in revision A I R 1921 Lah 166=3 Lah L J 417=64 I C 91.

—A decision omitting to take into consideration a material point which arises in the case is revisable 10 L B R 332=64 I C 361.

—A Court deciding objections to an award without notice to the objector of the date of hearing acts with material irregularity and its order is liable to be revised. 64 I C 394.

—Inconsistent conclusions or findings by the lower Court can be a ground for revision. (1930) M W N 1227.

—Amendment of sale certificate at the instance of auction-purchaser without notice to judgment-debtor amounts to acting with material irregularity. A I R 1922 Mad 63=16 L W 760=(1922) M W N 130=65 I C 732.

—Refusal to hear a party on the merits without just grounds, is a ground for interference in revision. A I R 1922 Bom 207=24 Bom L R 744=47 B 11=69 I C 169.

—When the defendant objects to the valuation of the plaint is a material irregularity for the Court to refuse to frame an issue and decide it. A I R 1923 Mad 134=(1922) M W N 692=69 I C 542.

—In a pre-emption suit assuming, as the value for purposes of jurisdiction, the market-value at the time of the suit instead of that at the time of the

C. P. C. (1908) SEC. 115 (Contd.)

(1) General Grounds (Contd.)

(d) Material Irregularity in exercising

Jurisdiction (Contd.)

sale is a material irregularity and revision lies. A I R 1924 Lah 380=69 I C 650.

—Where instead of allowing additional evidence under O. XLI, r.27, Civil Procedure Code an Appellate Court remands the case for retrial, the irregularity in procedure is not material 31 M L T 182 (H C)=16 L W 515=69 I C 826.

—An appointment of a guardian ad litem of the defendant alleged to be of unclouded mind only after examining him by the court is a material irregularity. A I R 1922 Cal 86=70 I C 307.

—Remand of the whole case by an Appellate Court after a finding on one issue only amounts to material irregularity. A I R 1923 Mad 113=16 L W 593=30 M L T 314= 70 I C 655.

—An order of a Sub-Judge on an election petition can be revised if he has acted with material irregularity or illegality. A I R 1923 Mad 360=44 M L J 161=32 M L T 114=(1923) M W N 78=17 L W 656=70 I C 987.

—If in an erroneous view of law as to limitation Court shuts out evidence offered, it acts with material irregularity justifying revision. A I R 1921 Cal 251=48 C 119=60 I C 801.

—Misconstruction of a material document and omission to consider the other evidence on the record is a sufficient ground for interference in revision. L R 4 A 248 Rev.

—Court helping arbitrators with advice and orders when they came to it in difficulty is not irregularity. 28 P R 1916 =11 P W R 1916=31 I C 700.

—An appellate court not deciding a question of limitation that has not been passed before it, does not act with material irregularity. 42 I C 536.

—The omission to state the formal defects which justify an order for permission to withdraw a suit with liberty to bring a fresh suit, amounts to a material irregularity within the meaning of S. 115 of the C. P. Code 11 S. L R 90=19 Cr. L J 330=43 I C 346

—Where an enquiry is ordered for later profits without specific notice to the opposite party it is competent to the High Court to interfere under S. 115 of the C. P. Code. 43 I C 458.

—Irregularity in the proceedings of the arbitrators is no Ground for revision



## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (d) Material Irregularity in exercising Jurisdiction (Contd)

of a decree on award but irregularity in the proceedings of the court is necessary. 45 I C 647.

—Disregarding point going to the very root of the matter. 12 I C 623.

—See also 12 I C 53.

—Grounds for—Lower appellate Courts, judgment sketchy—If sufficient 13 I C 102.

—Material Irregularity—Distinction between Contract and bailment not considered by lower court. 15 IC 431.

—No Prejudice to applicant—No Interference. 15 A L J 642.

—Decision on application of Transfer of Property Act, not in force in Punjab is not vitiated with material irregularity. A I R 1928 Lah 140=9 Lah 308=10 Lah L J 51=29 P L R 42=106 I C 901.

—Failure to take cognizance of important points is good ground for revision. A I R 1928 Lah 299=29 P L R 633=I L T 40 Lah 20=106 I C 226.

—Not considering material evidence being material irregularity is open to revision A I R 1927 Rang 302=6 Bur L J 147 =104 I C 321.

—Failure to consider material evidence is material irregularity and hence open to revision. A I R 1927 Rang 283=6 Bur L J 152=104 I C 316.

—A Court without looking to the provisions of O. XXXIII C. P. C. and rejecting a pauper application of a minor plaintiff, acted with material irregularity A I R 1929 Lah 746=Ind Rul (1930) Lah 221=121 I C 381.

—Failure to take into account a material fact is a ground for interference in revision but a wrong decision is not. 39 I C 424.

—An order releasing a surety on the death of principal debtor was held to be materially irregular and so could be set aside in revision because the liability of a surety to prevent attachment before judgment enures up to execution. 41 Bom 402=19 Bom L R 112=39 I C 88.

—Failure to apply law is a ground for revision. 35 I C 426 =10 Bur L T 29.

—An appellate court not dealing with a point of limitation arising in a case in its judgment, does not act with material irregularity. 3 L W 176=32 I C 785.

—Dismissal of an application for adjournment for producing evidence though certain objections to the award were filed

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (d) Material Irregularity in exercising Jurisdiction (Contd)

within time and passing a decree in the terms of the award on the ground that no evidence is produced by the objector amounts to a material irregularity. 14 A L J 425=33 I C 30.

—Material irregularity—Execution sale—Setting aside—Order against judgment-debtor to pay poundage without giving him notice—Revision—Interference. 3 L W 105=(1916) 1 M W N109=33 I C 235.

—Jurisdiction—Action in excess of—Order of Dt. Court suspending—Mahant of a public religious endowment, in the absence of suit under S. 92 C. P. C.—Revision. 16 A L J 742.

—An unnecessary amendment of decree is a material irregularity. 16 I C 933.

—The discretion of a judge in granting or refusing leave to institute a suit does not involve any question of jurisdiction. 17 I C 400=12 M L T 359.

—A judge acted with material irregularity in refusing to pass a preliminary decree in accordance with his decision on some issues in a suit for mesne profits, 37 Bom 60=14 Bom L R 916=17 I C 637.

—The interlocutory orders of subordinate courts can be revised by the High Court when material irregularities in procedure are patent C P C s. 115 and High Courts Act, s. 15 give power to the High Court to interfere if thereby it will save unnecessary expense or delay or multiplicity of proceedings 29 M L J 53=30 I C 41.

—A sale in contravention of the terms of a decree is materially irregular and can be set aside in revision. See 16 C L J 557=16 I C 235.

—The lower court acted with material irregularity in holding that a goldsmith to whom gold was given for making ornaments and which was lost by theft not caused by want of proper care, was liable for the same. Because the transaction being one of bailment, he was not liable for the loss under s. 148, and 151 contract Act. 5 Bur L T 106=15 I C 431.

—The failure by an Appellate Court under O 41 r. 25 C P C to frame issue not raised and tried by the original Court is a material irregularity. 16 C W N 424=14 I C 627.

—An erroneous allocation of the burden of proof is a material irregularity within S 115 C P Code. 4 Bur L T 156 =11 I C 774.

C. P. C. (1908) SEC. 115 (Contd)

(1) General Grounds (Contd)

(d) Material Irregularity in exercising Jurisdiction (Contd)

—A court, which overlooks the provision of a Legislative enactment, commits a material irregularity. 11 I C 849=4 Bur L T 181.

—Examination of witness without notice to other side—Material irregularity 19 C W N 903.

—Transfer of suit on application of party without notice to opposite side see 18 A L J 351.

—Where the Court below has not decided the question of limitation which was raised before it, the matter comes within the purview of S 115 of the C P C, 18 I C 392.

—Entertaining of an application being obviously out of time without deciding the question of limitation amounts to a material irregularity, 19 C W N 970=22 C L J 589=29 I C 476

—Under—Valuation of property in the proclamation of sale is not a material irregularity and the court has a right to sell the property even though situated outside jurisdiction. 29 I C 745.

—Per Stephen J:—(Chatterjee, J. Contra) In a suit on a promissory note the court found that the second defendant had no authority to bind the 1st defendant and that therefore the question of ratification was left undecided as being not necessary held that the Court did not act with material irregularity. 13 I C 675.

—Irregular preparation of the sale proclamation or Omission to issue notice to settle details to be stated in sale proclamation or Failure to promulgate order of attachment is an irregularity in publishing sale within O 21 r. 90 C P C a sale can be set aside for fraud even though the auction purchaser is no party to the fraud. An error of a court on this point being a question of law is not open to revision. 18 I C 715

—Where the Court disregards some provision of law, and has not applied its mind to that provision, then there is ground for revision. A I R 1924 Rang 349 =2 R 202=82 I C 658.

—Decision under serious error of procedure is material irregularity. A I R 1927 Rang 134=6 Bur L J 16=101 I C 200.

—Overruling an objection as to the judicial misconduct on the part of an arbitrator without inquiry and without admitting proper evidence is material irregularity. 22 C L J 237=31 I C 33.

C. P. C. (1908) SEC. 115 (Contd)

(1) General Grounds (Contd)

(d) Material Irregularity in exercising Jurisdiction (Contd)

—An error of law is not a material irregularity and is no ground for revision. 66 P R 1915=146 P W R 1915=31 I C 80.

—Where there is no irregularity or want of jurisdiction, the order of the lower Court even if erroneous, cannot be disturbed in revision. 11 O C 238.

—If the lower Courts have thrown out the plaintiff's suit on a question not arising in the case and having referred to certain provisions of law which had no application to it, revision will lie. A I R 1929 Lah 294=Ind Rul (1929) Lah 661=117 I C 229.

—A Judge arriving at a decision by following an obsolete rulings acts with material irregularity. A I R 1929 Lah 824=11 Lah L J 491=Ind Rul (1929) Lah 640=117 I C 96.

—If on the dismissal of an application under O. IX r. 9, a second application for restoration is also dismissed without hearing the applicant it amounts to a material irregularity in the procedure. A I R 1929 Lah 878=Ind Rul (1929) Lah 732=117 I C 908.

—Where by an error of law the Court excludes the main evidence in the case from consideration then there is material irregularity in the exercise of jurisdiction. A I R 1930 Lah 177=Ind Rul (1929) Lah 881=119 I C 417.

—Granting instalment is matter of discretion Omission to give reasons is irregularity but no revision lies on that ground. A I R 1925 All 218=L R 5 A 784 Civ=83 I C 133.

—Failure to decide the claim as laid and deciding it on other grounds not laid, is irregularity and hence revision lies. A I R 1921 Sind 159=16 S L R 207 (F B)=83 I C 360.

—Ignoring rule of estoppel is material irregularity. A I R 1921 Sind 159=16 S L R 207=83 I C 360.

—Deciding issue not arising out of pleading is irregularity and hence revision lies. A I R 1921 Sind 159 (F B) =16 S L R 207=83 I C 360.

—Effect of a prior decision not considered is a good ground for revision. A I R 1925 Rang 37=3 Bur L J 127=84 I C 199.

—Limitation for setting aside ex parte decree not considered—Revision lies. A I R 1924 Pat 36=4 P L T 545=84 I C 1028.

—Revision does not lie simply on a decision as to limitation although the case

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (d) Material Irregularity in exercising Jurisdiction (Contd)

is not decided on a question of fact. It will lie only when the Court has acted with material irregularity. A I R 1930 Lah 112=Ind Rul (1930) Lah 475=123 I C 571.

—Where the order of the lower Appellate Court over-looks the question of limitation in deciding the appeal a revision will lie. A I R 1929 Rang 304=Ind Rul (1930) Rang 196=124 I C 260.

—Where a Court having power to entertain an application rejects it on merits—Court cannot be said to have acted with material irregularity only because no detailed reasons are given for its view. A I R 1930 All 831=Ind Rul (1930) All 722=125 I C 578.

—An erroneous decision is no ground for revision. A I R 1930 All 702=(1930) A L J 1043=132 I C 33.

—If the lower Court's method of arriving at the conclusion is irregular and the point at issue is misconceived there is sufficient ground for High Court's interference in revision. A I R 1929 Rang 214=7 R 300=Ind Rul (1929) Rang 308=119 I C 740.

—High Court will interfere in revision if the lower court frames issues not arising in the plaint and dismisses an application to confine the issues arising in the plaint. A I R 1929 Nag 347=Ind Rul (1930) Nag 36=120 I C 404.

—No revision lies on a mistake of law even as regards limitation. A I R 1930 Nag 88=Ind Rul (1930) Nag 46=120 I C 414.

—Revision lies on findings of facts when not properly arrived at. A I R 1929 Cal 756=Ind Rul (1930) Cal 35=33 C W N 569=120 I C 431.

—Where a Court has overlooked the canon of interpretation that any statutory provision in the nature of a taxation clause should be interpreted literally in favour of the subject the High Court will interfere in revision. A I R 1929 Rang 210=Ind Rul (1930) Rang 58=120 I C 698.

—Revision lies in a matter of procedure where the Court has acted with material irregularity by granting leave to amend a plaint, where such leave should not have been granted. A I R 1930 Mad 322=30 L W 557=Ind Rul (1930) Mad 87=120 I C 887.

—The Court had acted with material irregularity in dismissing a suit by a Shebait of an idol as not maintainable because the suit was in his personal capacity as found from the heading of the plaint

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## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (d) Material Irregularity in exercising Jurisdiction (Contd)

when in reality it was in the representative capacity as was disclosed from the body of it. 9 Ind Cas 132.

—An error of law not connected with jurisdiction is not a ground for revision under s. 115 C P C. 9 O C 107.

—There is no material irregularity where a court held that the marking of the ballot papers by the polling officers secretly and without allowing the candidates or their agents to see how the marks were made was in contravention of r. 15 of the rules under Madras Act V of 1920 s. 303 (2) (b) for the conduct of elections. A I R 1929 Mad 257=Ind Rul (1929) Mad 897 (1927) M W N 838=119 I C 145.

—A mistake of law committed by the court not properly hearing the case is a ground for revision but merely because a mistake of law has been made while deciding a case is no ground for it. 31 Mad 458.

—Failure to adjudicate on a question before it, is a ground for revision. A I R 1929 All 683=Ind Rul (1929) All 1099=(1929) A L J 961=119 I C 859.

—Failure by the Appellate Court to frame a material issue not raised and tried by the lower court is a material irregularity within s. 115 C P C. 16 C W N 424.

—Wrongly placing burden of proof is a material irregularity. 11 Ind Cas 774.

—The dismissal of an objection of the judgment-debtor under O. XXI, r. 90, without allowing him to prove the same is a material irregularity curable under revision. A I R 1929 All 793 =Ind Rul (1929) All 845=51 A 1023=(1930) A L J 97=118 I C 139.

—To hold a de novo trial from the beginning of a case by the court to which it is transferred after passing of the preliminary decree for accounts is a material irregularity. A I R 1929 Lah 107=Ind Rul (1929) Lah 793=113 I C 537.

—The High Court should interfere in revision when the lower court has invented an unwarranted rule of procedure in deciding a case. A I R 1929 All 593=Ind Rul (1929) All 951=51 A 910=(1929) A L J 769=119 I C 103.

—A court should see that an election held against law would have been differently resulted if the irregularity had not occurred, and then it should set it aside, otherwise there will be a material

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (d) Material Irregularity in exercising Jurisdiction (Contd)

irregularity. A I R 1929 Mad 257=Ind Rul (1929) Mad 897=(1927) M W N 838=119 I C 145.

—A court acts with material irregularity if it fails to record a finding that ends of justice requires its interference in supersedes the arbitration even though it has inherent jurisdiction to do so under s. 151 C P C. A I R 1929 All 743=Ind Rul (1930) All 285=51 A 1010=(1929) A L J 918=122 I C 685.

—Rent decree executed as money-decree for want of proper parties. Attachment and sale proclamation issued simultaneously Judgment-debtor without notice under O. XXI, r. 66, encumbrance not mentioned in the proclamation, glaringly low price fetched inadequate. Such irregularities made this a fit case for High Court to interfere in revision. A I R 1929 Pat 588=Ind Rul (1930) Pat 289=123 I C 65.

—Where though the plaint has a defective signature or no signature neither the District Munsif (under s. 73, Village Court's Act) nor High Court will interfere unless the irregularity has resulted in some specific prejudice. A I R 1929 Mad 790=Ind Rul (1930) Mad 495=30 L W 499=123 I C 351.

—Placing the burden of proof on a wrong party is a ground for revision. Entire misunderstanding law on the subject is also a ground for it. A I R 1930 Lah 572=31 P L R 284=Ind Rul (1931) Lah 8=128 I C 56.

—A mere technical irregularity is no ground for revision. A court upon the transfer of territorial jurisdiction, dealing with a case without a formal order even though it had jurisdiction over the place where the cause of action of the suit arose, commits only a technical irregularity. A I R 1930 Mad 528=52 Mad 378=59 M L J 102=32 L W 329=Ind Rul (1931) Mad 496=131 I C 160.

—Misconstruction of section is not question of jurisdiction. A I R 1928 Mad 983=1928 M W N 479=112 I C 608

—An erroneous decision on a question of law is not open to revision. 11 N L R 99=19 I C 740.

—Error of law or fact is no ground for revision. A I R 1929 All 593=(1929) A L J 769=51 A 910=Ind Rul (1929) All 951=119 I C 103.

—Judicial proceedings—Order settling terms of sale proclamation—Revision—High Court—Jurisdiction. 1 Pat L W 111 (F. B.) 2 Pat L J 130 =37 I C 872.

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (d) Material Irregularity in exercising Jurisdiction (Contd)

—The High Court could interfere with a question of law or fact wrongly decided by the lower court only when a question of jurisdiction was involved therein. 16 A L J 717=40 A 674=48 I C 14.

—The High Court will not interfere simply on technical legal error of the lower court. 59 P W R 1912=120 P L R 1912=13 Ind Cas 720.

—An error of law is not a ground for revision. 5 Pat L J 263=1 Pat L T 701=56 I C 933.

—An erroneous decision of fact or law if it involves a question of procedure and jurisdiction, is revisable. 4 Pat L J 265=50 I C 62.

—Erroneous decision on question of law—Revision powers of—8 S L R 190=27 I C 371.

—Erroneous decision on a Question of law and fact.—No revision. 7 Bur L T 95=23 I C 975.

—An error of law in returning a plaint to be presented to the proper court is not revisable. 16 A L J 535=46 I C 99.

—Where substantial justice has been done, the Chief Court will not interfere in revision in spite of an erroneous decision by the Lower Court. 49 I C 311.

—An error in a conclusion of law is no ground for revision under S. 115 of the C. P. Code. 12 S L R 59=49 I C 160.

—Error of law is no ground for interference under S. 115 of the C P. Code or S. 107 of the Government of India Act. 35 M L J 604=24 M L T 48=(1918) M W N 716=8 L W 592=48 I C 38.

—A High Court cannot interfere under S. 115 of the C. P. Code with a decision on a point of law. 48 I C 614.

—A result arrived at after following a High Court ruling is revisable under s. 115 C P C if it is illegal or materially irregular. A I R 1929 All 593=(1929) A L J 769=51 A 910=Ind Rul (1929) All 951=119 I C 103.

—A Court summarily dismissing an application for leave to sue a Receiver acts with material irregularity in the exercise of its jurisdiction. A High Court is entitled in the exercise of its powers of superintendence under S. 107 of the Government of India Act to correct and supervise Subordinate Courts whenever they appear to have wrongly exercised their inherent powers. (1918) Pat 337=4 P L J 20=47 I C 719.

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (d) Material Irregularity in exercising Jurisdiction (Contd)

—Where the misunderstanding of the law by the lower Court has resulted in a totally erroneous decision, there is sufficient ground for interference in revision. 146 P W R 1918=46 I C 777.

—An error of law in receiving an additional evidence by an appellate court is not a ground for revision. 5 Pat L J 263=56 I C 983.

—A wrong decision of a question of limitation is no ground for interference in revision. 55 I C 871.

—The High Court Will not interfere under S. 115 C. P. C. with a mere error of law. 54 I C 757

—The dismissal of a suit in which a Commissioner is appointed before a report is made by the Commissioner is a material irregularity with s. 115 C. P. C. 54 I C 553.

—The assessment of rent by a Revenue Court having jurisdiction under S. 105 of the B. T. Act, will not allow the High Court to interfere in revision. 53 I C 411.

—The fact that a wrong issue was tried by the Pres. S.N. C. Court or that the burden of proof was placed on the other party or that the decision was without any support of evidence is no ground for revision unless the question of jurisdiction is involved. 23 C W N 759=52 I C 767.

—A mere wrong decision on a question of law is not a ground for revision under S. 115 of the C. P. Code. 52 I C 641.

—The High Court has no power to consider whether a particular order is right or wrong in the exercise of its revisional powers, 30 C L J 64=52 I C 4.

—Interference in entertaining claim under O. 21 R 58 C. P. C. in cases not coming under that rule. 23 P W R 1918=58 P R 1918=44 I C 986.

—In case of an Erroneous decision of question of law—High Court not to interfere. 22 I C 690.

—The order of a lower Court even though improper and irregular is not revisable under s. 115 if it does not affect court's jurisdiction 23 I C 907

—An error of law not affecting the jurisdiction of the Court is not a ground for revision under s. 115 C P C 18 C W N 1306=20 C L J 195=24 I C 259.

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (d) Material Irregularity in exercising Jurisdiction (Contd)

—An erroneous decision on a question of limitation by a court having power to decide that question is not one for interference under S. 115, C. P. Code. 16 M L T 438=1 L W 855=25 I C 647; see also 19 M L T 24=3 L W 36=32 I C 3.

—An erroneous decision on a question of law is not a ground for revision. 13 A L J 351=28 I C 270.

—The High Court has power to interfere, under s. 622 of the Code of 1877 with an order of confirmation of sale and set aside the order. 2 M 264.

—Erroneous decision on a question of law is no ground for revision if the Court had jurisdiction to try the case. A I R 1926 Oudh 31=90 I C 430; See also A I R 1926 Oudh 80=90 I C 373.

—Revision lies when numerous and various mistakes are committed. A I R 1925 Mad 614=48 M L J 268=21 L W 654=87 I C 216.

—Wrong procedure is no ground for revision if substantial justice is done. A I R 1926 Cal 245=86 I C 756 See also A I R 1925 Cal 1223=85 I C 750.

—A Court can construe its own order and the High Court would not interfere if there is no irregularity. A I R 1925 Pat 318=3 Pat L R Civ 100=6 P L T 481=(1925) Pat 4=86 I C 107.

—Misapplication of law is ground of revision A I R 1927 Rang 90=5 Bur L J 206=100 I C 327.

—Misapplication of law is no ground for revision A I R 1927 All 573=100 I C 76.

—Mistake of law is no ground for revision A I R 1927 Lah 862=100 I C 3.

—Misunderstanding the proper rule though justice is done, is not a necessary ground for revision. A I R 1926 Mad 1059=24 L W 443= (1926) M W N 713=97 I C 795.

—An erroneous decision on a point of law is not a ground for revision. A I R 1926 Nag 472=96 I C 251.

—Decision under an error of law cannot be interfered with in revision. 95 I C 838 (Cal).

—Lower Court deciding wrongly that the suit is barred by limitation or on the principle of res-judicata—High Court will not interfere. A I R 1926 Lah 355=93 I C 855.

—A revision does not lie against a decision on a pure question of law. A I R 1923 All 465=71 I C 472.



C. P. C. (1908) SEC. 115 (Contd)

(1) General Grounds (Contd)

(d) Material Irregularity in exercising

Jurisdiction (Contd)

—A wrong decision as to limitation or as to res-judicata or an erroneous construction of the sections of an act or the documentary evidence wrongly excluded or misunderstood is not a sufficient ground for revision. A I R 1924 Cal 493-28 C W N 292-80 I C 205.

—Gross errors of law are not revisable under s. 115. A I R 1924 All 691-L R 5 A 252 Civ-78 I C 434.

—An error of law is no ground for revision unless a question of jurisdiction is involved. 18 A L J 373-58 I C 182.

—An error of law is no ground for interference in revision unless a question of jurisdiction is involved. 4 Pat L J 340-51 I C 873.

—No interference in revision on an erroneous decision on a question of law if substantial justice is done. (1914) M W N 792-25 I C 927.

—The High Court does not interfere in revision on mere errors of procedure or technical defects. An order giving effect to an agreement prohibited by law can be set aside in revision. 37 Mad 385-76 I C 181.

—The High Court should not interfere in revision on mere Technicalities of procedure serving at the expense of manifest justice. A I R 1926 Pat 218-5 Pat 361-7 P L T 313-(1926) Pat 49-93 I C 939.

—An alleged wrong view of law by the Appellate Court regarding the correct provision of the Court Fees Act applicable to the suit, is not a ground for interference in revision. A I R 1922 Nag 264-71 I C 31.

—Erroneous decision on point of law will not attract application of s. 115. A I R 1923 All 465 (2)-71 I C 472.

—A decision on an erroneous view of the Law of Limitation, arrived at by Court with jurisdiction, cannot be revised under s. 115. A I R 1924 Pat 37-2 Pat 800-4 P L T 491-1 Pat L R 361-75 I C 430.

—Errors in conclusion of law or fact not involving questions of jurisdiction are not open to correction in revision. 30 P L R 230-113 I C 539.

—Error of law involving question of jurisdiction can be a ground for revision. A I R 1928 Bom 548-30 Bom L R 1391-112 I C 734.

—Finding of fact not on due consideration on law is open to revision. A I R 1928 Mad 481-109 I C 695.

C. P. C. (1908) SEC. 115 (Contd)

(1) General Grounds (Contd)

(d) Material Irregularity in exercising

Jurisdiction (Contd)

—Misapplication of law cannot be ground for revision. A I R 1927 Cal 965-46 C L J 527-106 I C 851.

—Mistake of law is no point for revision. A I R 1928 Loh 102-105 I C 629. Misconstruction of law on point of limitation is not alone ground for revision. A I R 1928 Cal 202-32 C W N 93-106 I C 561.

—Error of law is no ground for revision. A I R 1927 Cal 928-46 C L J 182-31 C W N 818-103 I C 458.

—A mere question of interpretation of the words in a document is not a ground for revision. A I R 1923 All 269-80 I C 313.

—A wrong decision by a court having jurisdiction is not a ground for revision. 73 I C 873.

—High Court will not interfere in revision on mere ground of wrong decision but want of jurisdiction is a good ground for revision. A I R 1923 Rang 192-1 R 265-76 I C 504.

—Per Cox J—(Per Tennon J. dissenting) The High Court not interfere in revision in the case of an error of law. A summary ejection for an application to deposit money to save sale by a purchaser of the holding in execution of a rent decree was a mere error of law. 11 Ind Cas 125.

—An error of law is no ground for revision 45 Cal 519-26 C L J 325-22 C W N 446-42 I C 711.

—An error of law is no ground for interference in revision 16 A L J 441-45 I C 761.

—A court cannot extend the time fixed by its decree for performance of an act, when there is a provision for dismissal of suit on default. 40 All 579-16 A L J 625-47 I C 4.

—Interference with extradition order when statutory condition not complied with, 41 Cal 400-18 C W N 869-21 I C 993.

—An error of law committed by the lower Court does not furnish any ground for interference in revision under S. 115 C P Code 3 O L J 452-37 I C 19.

—An erroneous decision is no ground for interference in revision. 38 I C 129.

—Even where the Lower Court has committed an error of law the High Court will not interfere in revision. 23 C L J 557-34 I C 697.

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (d) Material Irregularity in exercising Jurisdiction (Contd)

—Error of law on the ground of limitation is no ground for revision. 32 I C 982.

—Error of law—interference. 31 I C 80.

—The erroneous decision of the Full Bench of P. es. Sm. C Court on the question of limitation is not open to revision. 19 M L T 24=3 L W 36=32 I C 3.

—Error of law—interference in revision—Not justified. 12 M L T 264=(1912) M W N 993=16 I C 405.

—Revision it lies against an erroneous view of law. 15 M L J 98.

—A wrong decision on a question of Res judicata would ordinarily not be a ground for interference in revision under S 115 C P C=15 I C 33.

—No interference when substantial justice is done though findings are not clear. 13 A L J 683 =29 I C 1008.

—Error of law—No revision. 4 Bur L T 142=12 I C 355. but see 21 M L J 1013 =10 M L T 269=(1911) 2 M W N 253=12 I C 250.

—Misconstruction of S 87 Negotiable-Instruments Act is no ground for revision. 12 I C 138.

—The revisional power of the High Court is not meant to correct a mere error of a question of fact or law but is confined to the question of jurisdiction. A I R 1930 All 158=(1929) A L J 1157=Ind Rul (1930) All 526=124 I C 478.

—Error of law or error of fact is no ground for interfering in revision. A I R 1929 Cal 831=Ind Rul (1930) Cal 498=125 I C 274.

—An erroneous decision on an issue is no ground for revision when the suit is pending. A I R 1929 Rang 270=Ind Rul (1930) Rang 314=126 I C 538.

—The fact that the Court makes a mistake in law is not sufficient to warrant High Court's power in revision. A I R 1929 Rang 187=Ind Rul (1929) Rang 317=119 I C 749.

—The error in holding that period was inclusive of the first day without any error in computation of limitation is an error of law and is not sufficient ground for revision. A I R 1922 Pat 308. When an irregular procedure of the Court below does not cause injustice High Court will not interfere in revision. A I R 1922 Mad 63=(1922) M W N 130=16 L W 769=53 I C 732.

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (d) Material Irregularity in exercising Jurisdiction (Contd)

—Irregularity in the orders of the lower court is not a necessary ground for revision. 24 C 133.

—Failure to comply with Rule 98 of the Presidency Small Cause Court Rules is a ground for revision. 10 M L T 163=12 I C 97.

—Error of law or of fact is no ground for revision. 10 M L T 164=21 M L J 824=11 I C 835.

—Misappreciation of evidence is not a ground for revision the Civil Procedure Code 1903 is applicable to Berar and Central Provinces. 6 N L R 49=6 Ind Cas 429.

—Interference of a District Judge with judgment of Munsiff on question of law is a ground for revision. 9 C W N 492.

—In the case of dismissal of a suit as time barred, revision lies to the High Court only on the grounds mentioned in s 622 C P C 1882 A W N 1885 32. Erroneous decision by appellate Court as to jurisdiction of lower Court—Revision—45 P L R 1911=4 P R 1911=26 P W R 1911=9 Ind Cas 674.

—High Court will interfere in revision where it is satisfied that the order of the lower court was not supported by any consideration of justice or by any provision of law. A I R 1931 Cal 268=34 C W N 578=Ind Rul (1930) Cal 853=127 I C 459.

—Lower Court not inquiring into question of limitation. 19 I C 425.

—Error of law committed by lower Court—Construction of a statute—18 C W N 1290=21 C L J 187=27 I C 235.

—Order returning a plaint for amendment—Party refuses to amend—Order of Court without Jurisdiction—Proper Course to reject plaint or dismiss suit. 24 M L J 455=1913 M W N 399=19 I C 672.

—High Court—interference—Rejection by lower Court on the ground of limitation. 10 M L T 281=(1911) 2 M W N 239=21 M L J 1020 =12 I C 75.

—Judge unaware of existence of discretionary power—Interference. 12 I C 562.

—For the sake of substantial justice an error of law committed by the Court in allowing uncertified payment to be proved in execution will be a cause for interference in revision. 13 I C 21.

—Erroneous decision of the Lower Court, whether revisable. 15 M L T 98=22 I C 193.

C. P. C. (1908) SEC. 115 (Contd)

(1) General Grounds (Contd)

(d) Material Irregularity in exercising Jurisdiction (Contd)

—Passing a decree without deciding on the question of limitation is a ground for revision but a wrong decision on the question is not, 22 C L J 564=33 I C 346.

—Maintainability of a suit against a carrier without a notice under s 10 of the Carriers Act is a question of law and therefore is not a ground for revision 41 I C 919=27 C L J 291. Lower Court proceeding on mistake of fact—Revision 191 P L R 1914=23 I C 902.

—Judgment of a lower Court can be upset in revision on a point of limitation. A I R 1925 Oudh 34=11 O L J 513=79 I C 848.

—Where the Court below has committed an error of law in the construction it has put upon s. 108 Civ. Pro. Code, Revision lies under s. 622 Civ. Pro. Code 29 C 33.

—Revision lies where the lower court's finding is obviously incorrect. A I R 1922 Nag 104=19 N L R 131=5 N L J 1=67 I C 806.

—An erroneous order or decision is not a ground for interference in revision A I R 1929 All 683=1929 A L J 961=Ind Rul (1929) All 1099=119 I C 859.

—When lower court having jurisdiction decides point the High Court will not interfere with decision on a question of fact though it was wrong A I R 1931 Mad 83=60 M L J 191=33 L W 168=Ind Rul (1931) Mad 353=130 I C 177. Where in the exercise of its discretion the lower court has admitted certain documents though at a late stage of the suit the High Court cannot interfere in revision. A I R 1930 Pat 603=Ind Rule (1931) Pat 66=129 I C 82.

—Where a finding is arrived at by lower court upon evidence on a point arising from pleadings—No revision lies. A I R 1930 All 831=Ind Rul (1930) All 722=125 I C 578 (2).

—Company—Balance sheet—Failure of title—Penalty—Interference with lower court 37 P L R 1914=23 I C 458.

—A mistake of fact or law committed by the lower court without directing its attention to a statutory provision will be a ground for revision A I R 1929 Cal 225=49 C L J 51=Ind Rul (1929) Cal 362=115 I C 362.

—The High Court can use its revisional powers to correct the errors or illegalities of subordinate Court in proceedings under O. XXI r. 101 A I R 1931 Cal 385=58 Cal 55=Ind Rul (1931) Cal 583=132 I C 631.

C. P. C. (1908) SEC. 115 (Contd)

(1) General Grounds (Contd)

(d) Material Irregularity in exercising Jurisdiction (Contd)

—A mixed question of law and fact is not a ground for revision e. g. a finding as to whether a government pleader is a salaried officer A I R 1931 Mad 83=60 M L J 191=33 L W 168=Ind Rul (1931) Mad 353=54 M 627=130 I C 177.

—When a Court passes an order under a complete misconception of facts it is a proper case for revision. A I R 1931 Rang 111 (2)=Ind Rul (1931) Rang 224=132 I C 832.

—Illegal remand—Under inherent powers where a specific provision of the Code exists is a material irregularity justifying interference in revision. A I R 1931 Mad 791=(1931) M W N 710=Ind Rul (1931) Mad 717=60 M L J 475=133 I C 205.

—Where the lower Court has wrongly decided a question of res judicata, the High Court cannot interfere in revision. 32 P L R 130 (1).

—Error of law not affecting jurisdiction e. g., (error of limitation) is not ground for revision. 32 P L R 410=Ind Rul (1931) Lah 775=133 I C 439.

—Mere error of law not affecting jurisdiction is no ground for revision. A I R 1931 All 687=Ind Rul (1931) All 614=133 I C 404.

—Amendment of plaint so as to base it on time-barred cause of action is bad and High Court will interfere to prevent unnecessary trial A I R 1931 Mad 542=33 L W 648 =61 M L J 316=Ind Rul (1931) Mad 497=133 I C 497.

—There is material irregularity if a plaint is allowed to be so amended by an addition of a barred relief that the whole character of the suit is changed. A I R 1931 Mad 542=33 L W 648=61 M L J 316=Ind R (1931) Mad 737=133 I C 497.

—Revision held to be competent where order made without the conditions specified by O. 39, r. 6, for making of such an order being satisfied. 33 P L R 235=134 I C 118=A I R 1932 L 51.

—Omission to issue the notice before setting aside sale under O. 21, r. 92 is a material irregularity. 27 N L R 309=135 I C 403=A I R 1932 N 3=A I R 1932 N 21=A L R 1932 N 50 (52-3).

—There is no material irregularity if the Court in order to fix the valuation of property under O. 21, r. 66, sets forth the values given by two parties in the sale proclamation. 36 C W N 347 (351)=139 I C 225=A I R 1932 C 567=A I R 1932 C 576.

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (d) Material Irregularity in exercising Jurisdiction (Contd)

—A wrong decision on a question of law or fact is not a ground for revision. An order setting aside sale under O. 21, r. 90 is not open to revision unless the question of jurisdiction is involved. A I R 1932 A 140.

—Application under S. 73 (c) C P C in case of a mortgage decree—Order entertaining—Revisible. 33 P L R 975.

—An order disallowing rateable distribution under s. 73 C P C was revised as it was based on a wrong view of the meaning of "assets held by Court". 54 A 516 (517)=1932 A L J 359=138 I C 106 =I R 1932 A 369=A I R 1932 A 411=A L R 1932 A 546.

—There is material irregularity if the Court applies s. 48 (2) C P C in the absence of a finding as to fraud of judgment-debtor preventing execution of the decree within 12 years. 54 A 573 (581-2)=597 (604) (F B).

—When substantial justice is done —No interference in revision. 1932 P C L 434 (Civ)=138 I C 277=33 P L R 116=I R 1932 L 469=A I R 1932 L 305=A L R 1932 L 434 (436) (Civ).

—When an order is eminently just—High Court would be loath to interfere. 9 O W N 191=137 I C 151=I R 1932 N 222=A I R 1932 O 156=A L R 1932 O 208.

—When the Court below made an order within its jurisdiction, the fact that a wrong section of a statute is quoted is no ground for revision. 35 L W 57=138 I C 121=1932 M W N 72 (2)=I R 1932 M 514=A I R 1932 M 223=A L R 1932 M 501 (505-6).

—Subordinate Court not following Law—Whether a ground for revision. 1932 M W N 1338.

—Misapplication by subordinate Court of error of law only is not ground for interference in revision. 135 I C 231=I R 1932 A 55=A I R 1932 A 113.

—There is material irregularity in dismissing a suit for default by taking up the case on a day not fixed for hearing 1932 A L J 71=137 I C 263=I R 1932 A 291=A I R 1932 A 166=A L R 1932 A 147 (151-2).

—Consolidation of suits in cases which have very little in common and against the will of parties is materially irregular. 13 P L T 726=A L R 1932 P 769.

—Sending a suit for trial to the wrong Court is a—Material irregularity. 35 L W 64=1932 M W N 53=138 I C 136=I

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (d) Material Irregularity in exercising Jurisdiction (Contd)

R 1932 M 517=A I R 1932 M 217=A L R 1932 M 488.

—An order made under a wrong section of a statute is not a ground for revision. 35 L W 57.

—Erroneous decision on a question of res-judicata is not a ground for revision. 33 B L R 1596=135 I C 815=I R 1932 B 127=A I R 1932 B 81=A L R 1932 B 155 (157-8).

—Irregularity in procedure not a ground for interference in revision. 59 C 311=36 C W N 530=138 I C 96=I R 1932 C 420=A I R 1932 C 441=A L R 1932 C 696.

—The rules of procedure do not clothe the Court with jurisdiction to reject an application of the kind in question after issue of notice to the opposite party and in making the order the Court below acts with material irregularity in the exercise of its jurisdiction. 54 A 394 (398-9)=A I R 1933 A 11.

See also 139 I C 156=1932 A L J 418=I R 1932 A 534=A I R 1932 A 379=A L R 1932 A 634 (638).

—No interference in revision on the ground of an error as to the application of s. 19 of Limitation Act. 137 I C 513 (1)=33 P L R 330=I R 1932 L 345.

—Erroneous decision on question of limitation without inquiry into alleged facts bearing on that question is revisable. I R 1932 L 646.

—Misapplication of High Court ruling is an error of law only, and not ground for interference in revision. 135 I C 231 =I R 1932 A 55=A I R 1932 A 113.

—An order restoring a suit dismissed for default can be revised if it is made as a matter of grace and without sufficient cause. A L R 1933 L 598=34 P L R 88=A I R 1933 L 169=141 I C 188=I R 5 L 68

—When investigating claims under O. 21, r. 58—Court's failure to go into nature of possession by judgment-debtor is a Material irregularity—A L R 1933 R 241= A I R 1933 R 259.

—An order dismissing an application under O. 1, r. 8 made mala fide, should not be interfered in revision even though the order is wrong. A L R 1933 A 519 (521)=A I R 1933 A 154=144 I C 904=I R 6 A 7.

—The High Court will not interfere in revision to correct an award on technical point if the award is just and proper. A L R 1934 A 87=2 A W R 857.

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (d) Material Irregularity in exercising

## Jurisdiction (Contd)

—A wrong decision on a point of res-judicata is not a ground for revision if thereby locus standi is not denied. A L R 1933 M 848=A I R 1933 M 231 (1) =145 I C 380=I R 6 M 54 (2).

—Where the lower Court had jurisdiction to determine whether applicant was a pauper, appellate Court cannot scrutinize conclusions of law and fact unless a question of jurisdiction is involved. A L R 1933 S 49 (52)=A I R 1933 S 63=26 S L R 497.

—If the view of the court returning a plaint for presentation to another court is wrong, revision is competent. A L R 1933 L 878 (880)=144 I C 828=I R 6 L 28.

—A wrong order is no ground for revision. A L R 1933 L 1252 (1253) = A I R 1933 L 327=146 I C 258.

—If substantial justice is done, High Court is not bound to interfere in revision. A L R 1933 A 263 (264)=A I R 1933 A 924.

—A wrong decision of a court having jurisdiction is no ground for revision. A L R 1933 L 1135 (1)=34 P L R 966 (1)=A I R 1933 L 783=146 I C 505=I R 6 L 243 (2).

—An order enlarging the time for payment of costs being contrary to the terms of a decree is erroneous in law but it is not open to revision if justice is properly rendered thereby. A L R 1933 C 405 (406)=A I R 1933 C 20=36 C W N 869=140 I C 373.

—Where the court below has overlooked a new provision of law. Held, that it is a sufficient ground for interference in revision. A L R 1933 A 1 (2)=A I R 1933 A 49=143 I C 324=I R 5 A 232=1932 A L J 1035.

—If a court refuses to allow an amendment before issues are made, it acts with material irregularity in the exercise of jurisdiction. 37 C W N 1093.

—Ss. 41 & 62 of the Contract Act misapplied to a case—High Court can interfere in revision. A L R 1933 L 519 (520)=34 P L R 440=A I R 1933 L 335.

—It is the duty of the original as well as of the appellate court to take notice of events subsequent to the judgment. Otherwise there will be a material irregularity in the exercise of jurisdiction. A L R 1933 C 468=60 C 685=37 C W N 339=A I R 1933 C 534=145 I C 663=I R 6 C 129.

## C. P. C. (1908) SEC. 115 (Contd)

## (1) General Grounds (Contd)

## (d) Material Irregularity in exercising Jurisdiction (Contd)

—Confirming sale in execution of a decree even though an application to set aside the decree is pending, is a material irregularity. A L R 1933 A 480=A I R 1933 A 137=145 I C 732=I R 6 A 154.

—The High Court should interfere in revision when an order on claim petition under Government of India Act, s. 107 is so defective as not to constitute any legal ground for decision. A L R 1933 M 698 (699).

—Erroneous decision on a question of fact or law is not covered by S. 115. A L R 1933 S 411=A I R 1933 S 279=27 S L R 341 (F. B.).

—Finding on a mere point of law is no ground for revision. A L R 1933 A 670=A I R 1933 A 510= 1933 A L J 1004=2 A W R 271.

—A wrong decision on a question of limitation is no ground for revision but if the lower court passes an order in defiance of the law of limitation, the High Court can interfere in revision. A L R 1933 P 449=A I R 1933 L 327=146 I C 258.

—Dismissal of a suit contrary to the findings arrived at amounts to exercising of jurisdiction with material irregularity. A L R 1933 P 134 (185).

—Enhancement of commissioner's fees without a notice to the parties is an exercise of jurisdiction with material irregularity in a partition suit. A I R 1933 P 631.

—There is a material irregularity if the court does not properly consider the pleadings and the evidence on record. A L R 1933 N 93=A I R 1933 N 138=144 I C 844=I R 6 N 26=29 N L R 154.

—Refusal to allow a party to lead evidence on a matter on which the parties are at issue is a material irregularity. A L R 1933 P 194=14 P L T 300=A I R 1933 P 278=144 I C 451.

—Refusal to grant time to file objections to an award amounts to a material irregularity. A L R 1933 A 136=A I R 1933 A 313=145 I C 403=I R 6 A 62=1933 A L J 149.

—Revision lies if the lower appellate court rejecting appeal in forma pauperis after issue of notice to respondent acts with material irregularity. A L R 1933 A 400 (402)=54 A 394=A I R 1934 11=A 143 I C 321=I R 5 A 228.

—Trial Court not considering a matter to which its attention is drawn—exercises jurisdiction with material irregularity. A L R 1933 A 290 (291)=1933 A L J 519=A I R 1933 A 649.



## C. P. C. (1908) SEC 110 (Contd.)

## (1) General Grounds (Contd.)

## (d) Material Irregularity in exercising

## Jurisdiction (Contd.)

—Setting aside a sale when an auction purchaser tenders money on due date but delay is caused in passing the challans, is exercising jurisdiction with material irregularity. A L R 1933 P 4=13 P L T 559

—The High Court should not interfere in revision on a question of law even though difficult and obscure, when the petitioner is not entitled to equity and has other remedy open. A L R 1933 M 387 = A I R 1933 M 609=143 I C 833=1 R 5 M 333.

—An erroneous decision being appealable is no ground for revision. A L R 1933 R 307=A I R 1933 R 263.

—S. 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it. It is not directed against conclusions of law. A L R 1933 O 501=10 O W N 1008=14 L R 739.

—Ground for interference—Citing opponent as a witness see 21 I C 781.

—Error of law—Interference in revision 23 I C 975.

—Question whether land held without payment of rent is held rent free or without the consent of land-holder is question of fact. L R 1 A 199 Rev.

—Whether a party's pleader was authorized to state that his client would abide by the decision of the High Court in another suit, is one of fact on which no revision lies. A I R 1929 Mad 416=Ind Rul (1930) Mad 38=120 I C 742.

Entertaining application after time due to incorrect exercise of discretion is open to revision. A I R 1927 All 386=100 I C 727.

—Legal mistake or mis-construction of law—Construction where two views are possible ground for revision. A I R 1928 Lah 284=107 I C 273.

—Application to try preliminary issue of law—First question of jurisdiction—Refused of Court to try piecemeal—Irregularity—Provision of law mandatory—High Court—Revision. (See C P C O 14 R 2) A L R 1933 A 801

—Grounds for—Misapprehension of nature of claim and pleadings. See 19 I C 5.

—A technical error is not a sufficient ground for interference on revision unless injustice has been caused thereby or the petitioners have been prejudiced 67 I C 742.

—Where a lower Court decides a case on a question not arising in the case, a revision lies on that ground alone. A I R 1930 Lah 80=Ind Rul (1931) Lah 209=129 I C 689

## C. P. C. (1908) SEC. 115 (Contd.)

## (1) General Grounds (Contd.)

## (d) Material Irregularity in exercising

## Jurisdiction (Contd.)

—A subordinate Court acts with material irregularity if it does not follow the decision of a single Judge and preferably decisions of other High Courts. 11 P 616=140 I C 572=A I R 1932 P 346.

—A mere error of law is no ground for revision. A I R 1921 Cal 749=35 C L J 327=70 I C 541.

—Serious error in law is coming to a finding in a matter in which the Court had jurisdiction is not a ground for revision. A I R 1923 Cal. 280=68 I C 430.

—An error of judgment in exercise of jurisdiction vested in Court is not a matter upon which revision can lie, A I R 1922 All 441=66 I C 509.

—No revision lies where suit of small cause nature is tried on regular side and decree confirmed in appeal A I R 1922 Mad 352=47 M L J 118=14 L W 349=66 I C 207.

—Mere error of law does not give jurisdiction to interfere in revision. A I R 1923 Cal 322=65 I C 696.

—An error of judgment or of law does not give jurisdiction to interfere in revision. 65 I C 512 (Cal).

—High Court, in revision, can interfere with the order of the lower Appellate Court where by it erroneously decides that the Court of the first instance has jurisdiction to entertain a suit. A I R 1929 Mad 396=56 M L J 394=29 M L W 584=(1929) M W N 286=Ind Rul (1929) Mad 867=119 I C 35.

—Erroneous decisions by the lower Courts on points of law or fact are not open to revision if no question of jurisdiction is involved. Ind Rul (1929) Nag 180=116 I C 660.

—Where Court below acts within jurisdiction and there is no law point to be considered the fact that Court below acts wrongly would not invoke the revisional powers of the High Court. A I R 1930 All 122=(1930) A L J 454=Ind Rul (1930) All 161=121 I C 545.

—A wrong decision on a question of law or fact passed by a Court having jurisdiction is not open to revision unless a question of jurisdiction is involved A I R 1930 Sind 170=24 S L R 145=Ind Rul (1930) Sind 33=121 I C 161.

—If a Court has jurisdiction to decide the matter before it the High Court will not interfere with its order however wrong it may be on facts or law. A I R 1930 Nag 136=Ind Rul (1930) Nag 28=120 I C 332.

—An erroneous decision that a petition for restoration is not barred by

**C. P. C. (1908) SEC. 115 (Contd)****(1) General Grounds (Concl'd)****(d) Material Irregularity in exercising****Jurisdiction (Concl'd)**

limitation, when in fact it is so barred, is not an error in the exercise of jurisdiction under s. 115 of the C. P. Code. 3 Pat L.J 376=46 I C 176.

—A just decision, though under a wrong section, will not be revised. A I R 1924 Mad 586=19 L W 532=75 I C 888.

—Raising new questions in appeal and remanding the case for trial on those questions is a material irregularity within s. 115. A I R 1929 Mad 205=Ind Rul (1929) Mad 1009=119 I C 705.

—Manifestly a just and sensible order, will not be interfered with in revision though under wrong section of law A I R 1923 Oudh 18=9 O L J 543=72 I C 394.

—Order of a Court trying a suit without jurisdiction but without objection by any party, is not open to revision. A I R 1924 Nag 17=19 N L R 179=75 I C 769.

—No revision lies against a wrong decision on a question of res judicata. A I R 1921 Oudh 54=24 O C 213=64 I C 209.

**(2) What kinds of orders the High Court can pass.**

—The High Court has the power to call for the record of a case in which the question of jurisdiction is involved, even if it be in an interlocutory stage. A I R 1924 Bom 65=48 B 43=25 Bom L R 992=77 I C 241.

—Where owing to confession caused by Court's order, parties believed the matter to be pending, High Court ordered re-trial on revision. A I R 1925 All 202= L R 5 A 319 Civ=78 I C 1050.

—The High Court in revision could remand a case to the trial court to consider an application for the amendment of a plaint instead of allowing the plaint to be withdrawn without any ground and defect. 34 I C 934.

—The High Court reversing the order setting aside the ex parte decree declared that the appellate court ought to have dismissed the appeal for non-payment of costs by the defendant or should have allowed him to deposit the same within a particular time. A I R 1922 O 14.

—Local investigation should not be prevented simply on ground of waste of time and money but when it is likely to affect decision on improper basis and waste of time. A I R 1924 Pat 761=(1924) Pat 217=83 I C 124.

**C P.C. (1908) SEC. 115. (Contd)****(2) What kinds of orders the High Court****can pass (Concl'd)**

—The High Court has power to add caveat as party when he is disallowed to oppose the grant of probate in the lower court, in revision from the order being not appealable. 21 C L J 292=19 C W N 1169=28 I C 578.

—Where a case is transferred, the High Court in revision has authority to re-transfer it to the original Court even before the plaint is filed in the Court to which it was transferred. A I R 1923 All 249=21 A L J 86=L R 4 A 311 Civ=75 I C 495.

—The High Court in the exercise of its powers under S. 115 can make such orders as the justice of the case requires. 42 All 18=17 A L J 868=52 I C 263.

—Punjab Chief Court Dt. Magistrate framing list of Touts. 266 P L R 1914.

**(3) Where no appeal lies.**

—Where no appeal lies under S. 102 of the Code the judgment cannot be interfered with in revision by the High Court on the ground that it is erroneous in law. 22 C L J 113=30 I C 906.

—Case appealable to subordinate Court does not prevent revision to High Court. A I R 1926 All 58=48 All 168=24 A L J 83=90 I C 353.

—Application under s. 151. C P C for further final decree for mesne profits awarded by preliminary decree if treated as application for final decree, appeal lies against its dismissal and therefore no revision lies. A I R 1925 Mad 886=48 M L J 512=881 C 94.

—Where no second appeal lies first appellate decree is revisable A I R 1925 Cal 1237=85 I C 760.

—No revision where appeal to High Court lies. A I R 1925 All 267=47 All 140=L R 6 A 79 Civ=85 I C 470.

—Order of refusal of application under scheme to remove worshippers for misconduct not being appealable is open to revision A I R 1927 Mad 427=99 I C 425.

—Appeal being the proper course —Revision should not be entertained. 91 I C 334.

—Where there is a right of appeal, the High Court would not interfere in revision except on the ground of avoiding irreparable loss. A I R 1924 Pat 176=71 I C 911.

## C. P. C. (1908) SEC. 115 (Contd)

## (3) Where no appeal lies (Contd)

—No revision lies against an interlocutory order if the decree that might be passed in suit is appealable. 71 I C 911.

—High Court should not interfere on the revision side where order is appealable. A I R 1924 Lah 400=71 I C 160.

—If an appeal can lie against an order but has not been preferred revision cannot lie. A I R 1923 Pat 223=4 P L T 46=73 I C 373.

—The order rejecting a plaint is a decree. An order passed in appeal from that order that no appeal lies amounts to dismissal of the appeal and is a decree and is open to a second appeal and revision does not lie. A I R 1929 Cal 226=49 C L J 81=Ind Rul (1929) Cal 368=115 I C 368.

—If appeal is allowed there is no revision, but revision allowed even in presence of other remedies. A I R 1928 All 588=51 A 338=12 A I Cr. R 206=L R 10 A 125 Cr=(1929) A L J 62=Ind Rul (1929) All 277=114 I C 741.

—Appeal not competent—Revision can lie though other remedies might be open. A I R 1928 All 588=51 A 338=12 A I Cr R 206=L R 10 A 125 Cr=(1929) A L J 62=Ind Rul 1929 All 277=114 I C 741.

—Appeal does not mean first appeal only. A I R 1928 Mad 794=112 I C 231.

—Revision lies against non-appealable cases only. A I R 1928 Mad 794=112 I C 231.

—The decree in review is a new decree superseding the original one and, therefore, no appeal can lie from the decree originally passed. A I R 1928 Cal 418=107 I C 731.

—Court in appeal is not to revise an order which though not appealable can be called into question in appeal. A I R 1927 Bom 599=29 Bom L R 1355=107 I C 50.

—Scope of appeal and order is co-extensive. A I R 1927 Mad 859=103 I C 670.

—In exceptional cases appealable decrees passed without jurisdiction are open to revision. A I R 1927 Cal 578=31 C W N 789=103 I C 644.

—Unappealable order under r. 60 or r. 61, O. XXI is revisable A I R 1927 Nag 286=10 N L J 155=103 I C 12.

—Scope of words "in which no appeal lies thereto" is not restricted to cases where no appeal lies from order sought to be revised—Revision cannot be allowed unless party has fully utilised its right of appeal. A I R 1930 All 604=(1930) A L J 924=Ind Rul (1930) All 880=126 I C 832.

## C. P. C. (1908) SEC. 115 (Contd)

## (3) Where no appeal lies (Contd)

—When no appeal is possible to High Court it has jurisdiction in a fit case to deal with the matter under s. 115, even without an application on that behalf.

—23 C L J 235=31 I C 812.

—Appeal wrongly dismissed as for default—Remedy, by way of—Not appeal

—18 A 119=A W N 1896, 9.

—Where District Judge entertains an appeal from the order of a Revenue Court when appeal is not competent before him no revision lies. L R 2 A 166 (Rev.)

—Where a first Appellate Court entertains an appeal when no appeal is competent remedy is by way of revision and not second appeal. A I R 1921 Mad 612=41 M L J 54=14 L W 85=(1921) M W N 487=63 I C 730.

—No appeal lies either in the form of a first appeal or a second appeal from a decree or from an interlocutory order under s. 104 and O. XLIII and therefore revision lies therefrom. A I R 1931 All 294=(1931) A L J 377=133 I C 129.

—Where no appeal lies, the High Court can interfere in revision even though there is other remedy open to the applicant. A I R 1922 Nag 115=18 N L R 71=5 N L J 151=65 I C 351.

—The High Court can interfere in revision in the case of an order under s. 32 Land Acquisition Act, being not appealable. 12 C W N 1039=35 C 1104.

—An order of remand by the Appellate Court allowing amendment of the plaint by basing the plaintiff's claim though time-barred on another legal relation was held to be materially irregular and revision lay to the High Court because no appeal lay from the order. A I R 1931 Mad 1=33 L W 210=60 M L J 713=132 I C 311.

—No revision lay to the High Court from an order of the District Judge dismissing an appeal from a decree of a Revenue Court in an ejectment suit, on the ground that the appeal did not lie. 16 A L J 859=41 All 28=46 C 338.

—Appeal and revision compared. 28 P W R 1916=33 I C 1002.

—Exercise of the powers of revision where no appeal lies. See 3 P L J 40=(1917) Pat 285=42 I C 835.

—Where the execution application is time barred but the executing Court entertains it but the same is thrown out in appeal, assuming there is right of appeal it is not a fit case for interference in revision. A I R 1931 Cal 425=Ind Rul (1931) Cal 449=131 I C 561.

## C. P. C. (1908) SEC. 115 (Contd)

## (3) Where no appeal lies (Contd)

—The High Court can interfere in revision because no second appeal lies to it in the case of a rejection of an application to set aside sale under O 21, R. 89 on the ground that the applicant was a purchaser after the sale. 24 M L J 205-18 I C 579.

—Jurisdiction—Suit for arrears of rent—Second appeal to Collector—Revision. 14 A L J 281-35 I C 279.

—Rent suits—Appeal to District Court—no jurisdiction to entertain—Revision setting aside. 15 I C 669.

—The High Court will not ordinarily interfere in revision with an order refusing review of the order rejecting an appeal under O. 41, R. 10 (2) C P C, even though no appeal lies from it. 32 I C 80.

—Since the order of the Appellate District Court granting temporary injunction was not appealable, the High Court could interfere under s. 115. Held also that the order is revisable under s. 5 of Regu II of 1827 continued in force by s. 9 of the High Court's Act and saved from repeal by the General Repealing Act. XII of 1873 40 Bom 86-17 Bom L R 1097-33 I C 358.

—Appeal without jurisdiction Second appeal not competent—Appellate Judgment to be set aside in revision. 19 C L J 251-19 I C 916.

—Order from which no appeal lies—Revision only remedy. 42 Cal 351-25 I C 229.

—An order made under S 55 (4), C P Code rejecting an application for forfeiture of a security bond owing to the judgment-debtor's failure to file an application in insolvency and appear in Court, is appealable and no petition lies against it to the High Court under S. 115, C P Code. (1916) 2 U B R 103-34 I C 247-10 Bur L T 15.

—The High Court cannot interfere in revision when there is other remedy open. 30 M L J 496-34 I C 372. See 31 M L J 440-29 M L T 252-36 I C 483- (1917) M W N 130-4 L W 383-17 Cr L J 515-8 Cr L R 167.

—Per Piggot J—As an order of a Court in an ejectment suit adjourning it to an indefinite period till certain questions were decided by a Revenue Court, is appealable. revision cannot lie Per Walsh-J dissenting. 39 All 254-15 A L J 227-38 I C 828.

—A Court is not entitled indirectly to allow an appeal which is not given by the Code by treating the matter as one in revision. 43 I C 130.

## C. P. C. (1908) SEC. 115 (Contd)

## (3) Where no appeal lies (Contd)

—Order directing amendment—No appeal—Only revision. 10 I C 850.

—Where the Appellate Court decides correctly but without jurisdiction that appeal lies where appeal does not lie, High Court will not interfere in revision. A I R 1923 Rang 198-Ind Rul (1930) Rang 53-120 I C 693.

—As there is no right of second appeal to an auction purchaser, he can apply to the High Court for revision when the appeal to the lower Court was under s. 47 C P C. A I R 1923 Mad 84-Ind Rul (1922) Mad 725-117 I C 789.

—Where no appeal lies, the remedy is by way of revision. Revisional jurisdiction can be destroyed only by an express legislative enactment. A I R 1929 Oudh 389-6 O W N 661-4 Luck 539-Ind Rul (1929) Oudh 517 (F B)-119 I C 357.

—When the lower Appellate Court has postponed the consideration of an application for review, there is no appeal as the order cannot be construed as a final order. The only remedy is revision under s. 115 A I R 1929 All 375-Ind Rul (1929) All 1957-119 I C 551.

—An order amending a decree is appealable and no revision lies. 24 I C 56.

—Interference—Appeal allowed on other grounds. 2 L W 366-28 I C 707.

—An appeal erroneously entertained by the lower court can be set aside in revision. 55 I C 653.

—No appeal lies against an order calling upon a guardian to pay into court the balance due from him on settlement of accounts of the minor's property and therefore revision lies. 55 I C 587.

—Revision-petition to High Court direct from a decision of a Presy. Small Cause Court Judge, whether lies. 10 Ind Cas 551.

—Revision lies when no appeal is allowed i. e. either first appeal or second appeal. A I R 1931 All 294-(1931) A L J 377-Ind Rul (1931) All 577-134 I C 129.

—An order rejecting an application by a defendant for striking off of the plaint in a suit by an unsuccessful decree-holder under O. 21, r. 63, was not revisable, as it was appealable. 56 C L J 1-140 I C 445-I R 1932 C 716-A I R 1932 C 831-A L R 1932 C 1000.

—Revision is not competent in the case of a money decree under O 34, r. 6, C P C, because the remedy by appeal is open to the party, 54 A 428-1932 A L J 237-138 I C 361-I R 1932 A 394-A I R 1932 A 336-A L R 1932 A 631.

## C. P. C. (1908) SEC. 115 (Contd)

## (3) Where no appeal lies (Contd)

—Revision does not lie from an order under O. 20, r. 12, because an appeal lies from the final decree passed under it. 9 O W N 339=138 I C 30=1 R 1932 O 286=A I R 1932 O 271=A L R 1932 O 313.

—Revision is not competent, where petitioner, if ultimately unsuccessful has right to challenge order in appeal. 1932 P C L 92 (Civ)=A L R 1932 L 92 (Civ).

—An order sanctioning a marriage of a minor being not appealable under s. 43 of its revisable in a fit case. 56 B 71=34 B L R 83=137 I C 732 (2)=1 R 1932 B 319=A I R 1932 B 156.

—A decree in a regular suit wrongly tried by a Small Cause Court was set aside in revision even though it was appealable as a decree in a regular suit. I R 1932 L 637.

—Other remedy and especially an appeal being open, revision does not lie. 54 A 183 (186) (F B).

—No revision lay against a simple money decree under O. 34 r. 6 C P C because an appeal lay from such a decree. 54 A 428=1932 A L J 237=138 I C 361=1 R 1932 A 394=A I R 1932 A 336=A L R 1932 A 631.

See also 9 O W N 339, and 33 B L R 1596=135 I C 815=1 R 1932 B 127=A I R 1932 B 81=A L R 1932 B 155 (160).

—Revision against an order granting an application to restore to file the dismissed application to restore the dismissed suit, is not competent being appealable. A L R 1933 O 296=A I R 1933 O 331=10 O W N 1316=143 I C 222.

—An order raising attachment of the pay of a first class warrant officer in execution, being appealable is not open to revision. A L R 1933 B 256=35 B L R 360=144 I C 897=A I R 1933 B 185=1 R 6 B 16.

—The High Court can in a proper case interfere in revision against an order passed under s. 145 by the Sub-Judge even though the order is appealable. A L R 1933 R 202=A I R 1933 R 64=11 R 134=144 I C 163.

—A decree passed in terms of an award after the dismissal of objections is not appealable and therefore revision lies. A L R 1933 R 98.

—High Court has jurisdiction to revise an interlocutory order only when irremediable injury or serious miscarriage of justice is likely to occur and from which no appeal lies. A L R 1933 R 21=11 R 36=A I R 1933 R 49=143 I C 525.

## C. P. C. (1908) SEC. 115 (Contd)

## (3) Where no appeal lies (Contd)

—An objection in an application for review being overruled and a remedy by way of appeal being open to the party aggrieved, revision is not competent. A L R 1933 M 845=A I R 1933 M 217=145 I C 766=1 R 6 M 131.

—The High Court can revise the order of the executing Court confirming the sale even though the order is appealable. A L R 1333 L 611 (612)=34 P L R 233=A I R 1933 L 210=141 I C 421=1 R 5 L 116.

—An order refusing an amendment of an interlocutory order is revisable even though another remedy by way of appeal is open after the decree. A L R 1933 A 397=55 A 256=A I R 1933 A 374=145 I C 859=1933 A L J 268=1 R 6 A 177.

## (4) High Court powers of, apart from the section

## (a) General.

—Under Government of India Act ss. 106 and 130 Bombay High Court has revisional powers beside those given by s. 115, Civil Procedure Code under exceptional cases. A I R 1928 Bom 5=52 B 37=29 Bom L R 1551=106 I C 470.

—Power of High Court and Collector over Mamlatdars-Bombay. see 36 Bom 123=12 I C 709.

—Power of High Court-Agency tracts—Decree summarily dismissing an appeal. 36 Mad 128=12 I C 73.

—Interference by High Court Exercise of discretion. 39 I C 121.

—High Court Interference—Abuse of the Process of Law. 39 I C 480.

—When ruling of Chief Court misunderstood and misapplied. 45 P L R 1915=28 I C 282.

—In revision from decision of Small Cause Court, High Court can question decision on facts, if such decision is not justified by evidence. A I R 1923 Nag 292=19 N L R 72=7 I C 1055.

—High Court can interfere and correct gross and palpable errors of subordinate Court. A I R 1926 Cal 530=91 I C 839.

—Plaint returned by Small Cause Court as involving question of title—Interference by High Court. 1 Pat L J 465=20 C W N 1080=37 I C 129.

—Power of High Court to correct a mere error of law. 2 M W N 1911. 253=21 M L J 1013=12 I C 250.

—Civil cases—Question of law. 119 P L R 1911=11 I C 518.



## C. P. C. 1908 SEC. 115 (Contd)

## (4) High Court powers of apart from the section (Contd)

## (a) General (Contd)

—Where the complainant is avowedly the enemy of the accused and the offence is said to have been committed some two years ago the Chief Court in revision set aside a conviction by both the lower Courts for receiving stolen property. 168 P L R 1914=28 P W R (Cr.) 1914=25 I C 343=15 Cr. L J 591.

—No preliminary order—Copy not of fixed-Parties not misled or prejudiced—Interference by Chief Court. 68 P L R 1914=23 I C 487.

—The High Court enquiry as to the jurisdiction is not confined to the lower Appellate Court alone, it can also enquire whether the Court of first instance has failed to exercise its jurisdiction or not. A I R 1925 Oudh 163=80 I C 694.

—The High Court has power to entertain an original application under R. 5 of O 41 C P C or to revise the order under R. 6 if the lower court refuses to stay execution of the rent decree upon taking security. 15 C W N 482=9 I C 323.

—On an application being made, the High Court in the exercise of the powers under S. 107 of the Govt. of India Act should send for the record of a case to correct a gross error apparent on the face of it (1920) Pat 56=1 Pat L T 467=56 I C 155.

—High Court has power to revise interlocutory orders under S. 15 of the Charter Act if not under S. 115 C P C. 22 M L J 60=(1912) M W N 546=10 M L T 451=12 I C 719.

—By High Court—S. 15, Charter Act —15 C W N 863 =11 I C 207.

## (b) Under Letters Patent.

—Where the judges of a division Bench differ in a matter coming under S. 115 of the C. P. Code, the opinion of the Senior Judge prevails cl. 36 of the Letters Patent and not S. 18 cl. (2) of the C. P. Code being applicable. 18 M L T 591=17 Cr L J 42=32 I C 330.

—Difference of opinion between members of division bench—Opinion of senior Judge prevails. 27 C L J 418=44 I C 763

—Order under s. 115 declining to interfere—Appeal. 29 M L J 12= 29 I C 846

## (c) Section if exhaustive

—Decision under Madras Village Courts Act is open to revision A I R 1927 Mad 786 = 39 M L T 25 = (1927)

## C. P. C. (1908) SEC. 110 (Contd)

## (4) High Court powers of apart from the section (Contd)

## (c) Section if exhaustive (Contd)

M W N 420 = 53 M L J 131=104 I C 415.

—Order of Election Court under Madras District Municipalities Act not being persona designata is open to revision A I R 1927 Mad 921=54 M L J 269= (1927) M W N 646 = 26 L W 323= 105 I C 216

—No revision lies from an order under s 10 A I R 1929 Lah 662 High Court has no revisional powers to revise orders of Board of revenue passed under ch II or under s 205 Madras Estates Land Act A I R 1928 Mad 1032 = 55 M L J 798 = Ind Rul (1929) Mad 225 (F B) = 114 I C 161

—An application for revision to the High Court from the decision of District Judge under Oudh Rent Act is not maintainable A I R 1924 Oudh 16 = 10 O L J 191 = 5 L R Oudh 17=72 I C 1023.

—Decision of a Judge under s 33 Bombay City Municipal Act is not open to revision under s 115 A I R 1923 Bom 421=25 Bom L R 463 = 73 I C 133.

—The High Court cannot revise the order of a Collector refusing to refer the question of the apportionment of compensation to the district court in a land acquisition proceeding A I R 1923 Bom 290=47 B 699=25 Bom L R 398=73 I C 354

—The powers of the High Court under s. 25 of Provincial Small Cause Court Act are wider than those under Civil Procedure Code s 115 A I R 1928 Lah 274=Ind Rul (1929) Lah 421=115 I C 757

—High Court cannot revise decisions of the Board of revenue under Madras Estates Land Act A I R 1924 Mad 119=45 M L J 735=18 L W 849=47 M 250=33 M L T 92=79 I C 372

—Order of a District Judge acting as a Rent Court under Oudh Rent Act can be revised under s 115 A I R 1924 Oudh 349=27 O C 89=11 O L J 77=L R 5 Oudh 78= 80 I C 327.

—High Court should not interfere in revision with the proceedings of a lower Court during the pendency of a suit unless strong reasons are made good A I R 1924 Mad 846 = 47 M 93=47 M L J 460=20 L W 533=1924 M W N 863=80 I C 604.

—Orders passed by the Chief Judge of the Small Cause Court, Rangoon in the exercise of the powers conferred on him by s 14 of the Rangoon Municipal Act are not revisable A I R 1926 Rang 25=3 R 560 =4 Bur L J 202 (F B) = 91 I C 550

## C. P. C. (1908) SEC. 115. (Contd)

(4) High Court powers of, apart from the section (Contd)

(c) Section if exhaustive (Contd)

—Controller of rents acting under Rangoon Rent Act not a Civil Court—High Court is not competent to revise decisions either under s 115 or under s 107 of the Government of India Act A I R 1926 Rang 33=3 R 410 (F B) = 91 I C 627

—The High Court will not revise an error committed by a court in construing the election rules while disposing of an election petition A I R 1926 Mad 319=24 L W 208 = (1926) M W N 572=92 I C 119

—The High Court cannot revise an order refusing to set aside an election passed by the district Judge under Bombay District Municipality Act A I R 1926 Bom 344=50 B 357=28 Bom L R 519=94 I C 660

—High Court's power to interfere in revision with the orders of the Board of Revenue under ss 171 and 172 of the Madras Estates Land Act is doubted A I R 1926 Mad 1047=51 M L J 500=24 L W 416 = 97 I C 921

—Decision of the first Judge of the Rangoon Small Cause Court acting under the powers of Rangoon Rent Act cannot be revised by High Court A I R 1927 Rang 1=4 R 304=5 Bur L J 117 (F B)=98 I C 902

—The Madras High Court has no jurisdiction to entertain a revision against the order of the Chief Judge of the Small Cause Court acting under the Madras City Municipal Act A I R 1927 Mad 93=50 M 121=51 M L J 738 = 24 L W 773=(1926) M W N 986 (F B)=99 I C 148.

—No revision on any matter decided under Agra Tenancy Act A I R 1925 All 800=87 I C 351.

—Presidency Court of Small Cause—Revision—When to interfere 22 I C 241

—The High Court has no power, either under S. 115 of the Civil Procedure Code or under S. 439, Criminal Procedure Code, to revise an order passed by a Revenue Court under S. 476 Criminal Procedure Code, directing the trial of a person for an offence. 58 I C 913.

—In matters coming under the Agra Tenancy Act the power of revision has not been given to the Allahabad High Court. 16 A L J 839=41 A 28=46 I C 338

—Order of Full Bench under S. 88 of the Press Small Cause Courts Act 1882, Interference in very rare cases. 10 M L T 332=10 I C 551.

## C. P. C. (1908) SEC. 115 (Contd)

(4) High Court powers of apart from the section (Contd)

(c) Section if exhaustive (Contd)

—Whether High Court, a Court of revision for cases under S. 205, Mad Est. Land. Act. 3 L W 158=32 I C 567.

—Land Acquisition Act—Question under Ss 18 and 19 Not to be revised. 20 M L T 388=(1916) 2 M W N 348=36 I C 621.

—Proceedings under Act XIX of 1841—Revision when lies 65 P L R 1911=10 I C 820.

—S. 115 Should not be used in a narrow and technical way. It gives plenary powers of interference by the High Court which are to be exercised in harmony with the spirit of the provisions of S. 99 of Code. 13 N L R 203=42 I C 746.

—The High Court has no jurisdiction, under S. 115 of the C. P. Code of 1908, to interfere with an order passed by a District Judge under S. 4 of the Public Accountants' Default Act 1850 19 Bom L R 926=42 Bom 119=43 I C 465.

—Sonthal Parganas, Regulation (V of 1892) S. 27—Suit more than Rs. 1,000 in value—Execution—Sale—Sub-Judge order by—Revision—High Courts Act 1 S. 15—Superintendence. 41 Cal 876=18 C W N 662=22 I C 848.

—Religious Endowments Act—Order under S. 10—Revisability. 38 Mad 594=25 M L J 536=21 I C 451.

—Scope of Sp. R. Act—Revision 20 M L T 388=(1916) 2 M W N 348=4 L W 535=36 I C 621.

—Finding of fact—Interference rare. 34 I C 527.

—The decision of a Dt. Court under cl. (3) of S. 160 of the Bom. Dt. Municipalities Act is not revisable. 40 Bom 509=18 Bom L R 340=34 I C 21.

—In the absence of proof that an "adhar" in that part of the country was labourer, the decision of the Lower Court protecting his possession under S. 9 of the Sp. Rel. Act is not revisable. 19 C W N 1205=31 I C 579.

—The High Court has no power to interfere under S. 115 with an order under S. 36 of the Legal Practitioners Act. 13 S L R 212=56 I C 433.

—Section 25 of the Small Cause Courts Act is of the widest scope than Procedure Code. A I R 1924 Rang 54=1 R 372=2 Bur L J 154=26 Cr L J 523=85 I C 362.

C. P. C. (1908) SEC. 115 (Contd)

(4) High Court powers of, apart from the section (Contd)

(c) Section if exhaustive (Contd)

—In an election dispute the High Court can confine itself only to the question of jurisdiction and not to any question of fact in the exercise of revisional powers. A I R 1930 Mad 225=Ind Rul (1930) Mad 817=126 I C 97.

—S. 25 of the Small Cause Courts Act is of the widest scope then s 115 C. P. C. A I R 1930 All 832=(1930) A L J 1090 =Ind Rul (1931) All 94=123 I C 766.

—The High Court can interfere in revision or appeal only when substantial injury has been done. Ind Rul (1929) Lah 14=120 I C 174 (Lah).

—High Court will not ordinarily interfere in revision with orders passed under O. XXI r. 63, A I R 1929 Rang 297=7 R 466=Ind Rul (1930) Rang 28=120 I C 236.

—The acts of a District Judge under Act XIV of 1920 are open to correction by the High Court under its revisional jurisdiction. A I R 1929 All 581=1929 A L J 911=51 A 957=Ind Rul (1930) All 139=121 I C 267.

—High Court in revision cannot correct an error of judgment. A I R 1929 All 581=1929 A L J 911=51 A 957=Ind Rul (1930) All 139=121 I C 267.

—Questions of fact cannot be adjudicated upon in revision or second appeal. A I R 1929 Mad 259=Ind Rul (1929) Mad 517=116 I C 133.

—The High Court will not revise the order of the Agent to the Governor dismissing an appeal or a petition under s. 55 of the Agency rules because it was time barred and did not give satisfactory reasons. A I R 1929 Mad 489=Ind Rul (1929) Mad 960=119 I C 320.

—High Court can revise an order passed in connection with an election petition under the Municipal Election Rules. A I R 1929 Nag 282=12 N L J 82=Ind Rul (1929) Nag 314=119 I C 682.

—The High Court has power to set aside a decree on an award under s. 115, 22 Bom L R 1454=45 B 832=59 I C 811.

—No revision lies to the High Court from an order of remand passed by district Judge as a Court of appeal from the order of Assistant Collector under Agra Tenancy Act A I R 1921 All 236=19 A L J 596= 63 I C 891.

—High Court will not interfere in revision with a question as to the construction of a document. 64 I C 563.

C. P. C. (1908)-SEC. 115 (Contd)

(4) High Court powers of apart from the section (Contd)

(c) Section if exhaustive (Contd)

—High Court will not interfere in revision under s. 115 to quash the pending proceedings under s. 35 of the Legal Practitioners Act. A I R 1923 Mad 188 (2)=16 L W 795=23 Cr L J 705=44 M L J 437=69 I C 433.

—The High Court has no jurisdiction to interfere with orders passed by Sub Judge or District Judge enquiring into the validity of an election held under Madras District Municipalities Act. A I R 1923 Mad 169=44 M L J 39=(1922) M W N 818=16 L W 827=70 I C 780.

—In a suit by one partner against another, the validity of service is determined by provisions of O XXX. r. 3 or O. V. r. 13 and not O. V. r. 25 High Court will not interfere with the decision in revision. A I R 1922 Pat 376=(1922) Pat 76=3 P L T 29=1 Pat 48=62 I C 927.

—The powers of the High Court under s. 25 of the Small Cause Courts Act are wider than under s. 115. A I R 1921 All 325=19 A L J 555=63 I C 435.

—High Court cannot interfere in revision in cases cognizable by Revenue Courts. 61 I C 890 (A).

—Powers under s. 25 of Provincial Small Cause Courts Act are wider than those under s. 115. L R 3-A 17.

—A Court is not bound to interfere under s. 115 except in aid of justice A I R 1925 Pat 36=3 Pat 778=6 P L T 399=84 I C 320.

—Where High Court would not interfere even in second appeal it will not do so in revision. A I R 1929 Mad 259=Ind Rul (1929) Mad 517=116 I C 133.

—Revisionary jurisdiction over Talukdari Settlement Officer. 13 Bom L R 118=9 I C 943.

—The High Court has power under S. 115, C. P. Code to revise the decision of the Pres. Sm. C. Court if the question of jurisdiction is involved in it. Mere mistake in fact or law is no ground for revision. 29 M L J 353=18 M L T 164=(1915) M W N 728=2 L W 709=30 I C 353.

—A right to apply for a new trial being not in the nature of an appeal under s. 38 of the Pres Sm. C. C. Act, a revision petition to the High Court is competent without applying for a new trial. 18 M L T 254=(1915) M W N 907=2 L W 719=39 I C 488.

—Concurrent findings Case of a doubtful nature—Interference. 98 P L R 1914= 22 I C 752.

## C. P. C. (1908) SEC. 115 (Contd)

(4) High Court powers of apart from  
the section (Contd)

## (c) Section if exhaustive (Contd)

—High Court must exercise revisional powers to prevent multiplicity of suits. A I R 1928 Rang 83=5 R 742=109 I C 444.

—Court may or may not exercise revisional powers. A I R 1929 Cal 78=55 C 1084=113 I C 833.

—High Court should not refuse to interfere in revision at the cost of party's money and waste of public time A I R 1924 Nag 292=79 I C 168.

—An order under s. 34 (d) is open to examination by the High Court on the revision side. A I R 1923 Lah 89=4 Lah L J 272=79 I C 178.

—Power of revision should not be exercised except in aid of justice. A I R 1925 Pat 153=80 I C 575.

—Powers of Revision Order under S. 476 of Cr. P Code Revision 16 N L R 23=55 I C 286.

—The revisional powers are exercised by the Chief Court only to remedy patent injustice. 97 P L R 1917.

—High Court—Power to interfere in revision— 21 I C 767.

—The exercise of revisional jurisdiction is in the High Court's discretion. A I R 1925 Bom 341=49 B 535=27 Bom L R 423=87 I C 910.

—Revisional powers are discretionary. A I R 1925 All 264=L R 6 A 63 Civ=85 I C 660.

—High Court will interfere in revision only when irreparable injury would be caused if revision is refused. A I R 1927 Cal 1149=53 C 767=30 C W N 907=98 I C 615.

—High Court—Revisional jurisdiction. 13 Bom L R 118=9 I C 943.

—An erroneous order set aside on review should not be revised by the High Court. 12 Ind.Cas. 903.

—The revisional powers of the High Court cannot be exercised Ultra Vires and without authority 47 P R 1913=25 P L R 1913=17 I C 418

—High Court—Powers of interference. 31 M L J 827=38 I C 373.

—The High Court in the exercise of the revisional powers, has to see whether justice is rendered to the parties 9 A L J 207=14 I C 414

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## C. P. C. (1908) SEC. 115 (Contd)

(4) High Court powers of apart from the section (Contd)

## (c) Section if exhaustive (Contd)

—When grave injustice is done by interfering with the order of the lower court the High Court should not intervene even though the order is without jurisdiction. A I R 1930 Pat 279=12 P L T 249=Ind Rul (1930) Pat 670=126 I C 910.

—Interference in revision is discretionary and when likely to work, against the interests of justice, such a course should not be taken. A I R 1930 Lah 417=Ind Rul (1930) Lah 839=127 I C 215.

—In a suit for damages against railway company for consignment lost in transit High Court can interfere in revision and determine sufficiency of evidence to justify trial Judge in drawing the inference required by a "risk note" A I R 1930 Bom 129=31 Bom L R 1426=54 B 105=Ind Rul (1930) Bom 261=124 I C 229.

—Power of revision should be exercised in cases where there would be multiplicity of proceedings unnecessarily but for High Court's interference. A I R 1931 Mad 1=60 M L J 713=33 L W 210=Ind Rul (1931) Mad 663=132 I C 311.

—A right of appeal is a substantive right created by statute, while an application for revision is not so. Even when the appeal is dismissed, the Appellate Court exercises its jurisdiction. Where the High Court dismisses an application for revision it merely abstains from exercising the jurisdiction and allows the subordinate Court's order to stand. A I R 1931 Nag 17=Ind Rul (1931) Nag 49=130 I C 145.

order of Subordinate Judge directing Munsiff to try suit 8 O C 257.

—An order of a Revenue Court under s. 476 of the Cr. P Code, is open to revision under s. 115 A I R 1921 Pat 94=1921 Pat 240=6 P L J 178=2 P L T 609=22 Cr L J 403=61 I C 643.

—Order passed by District Judge under s. 177 of the Agra Tenancy Act; High Court has power to revise the order. A I R 1926 All 113=48 A 104=23 A L J 965=92 I C 282.

—Decisions of the Rangoon Small Cause Court under the Rangoon Municipal Act, 1922, are revisable. A I R 1925 Rang 367=4 Bur L J 161=92 I C 780.

—Order passed by the Rent Controller under Rent Act without jurisdiction is revisable. A I R 1926 Cal 708=30 C W N 236=93 I C 56.

## C. P. C. (1908) SEC. 115 (Contd)

(4) High Court powers of, apart from  
the section (Contd)

## (c) Section if exhaustive (Contd)

—Intervenor in proceedings under S. 130 of the Oudh Rent Act has no right to apply for revision. 57 I C 480.

—Rangoon Small Cause Court acting under s. 25 of Burma Act VII of 1920—Decision is not open to revision. A I R 1926 Rang 205=4 R 221=97 I C 1025.

—A judge of the Presidency Small Cause Court is bound to follow the High Court rules 10 M L T 163=12 I C 97.

—Religious Endowments Act S. 5—Order of Dt. Judge under—Revision. 18 A L J 897=58 I C 162.

—Per full Bench—Sind Judicial Commissioner's Court cannot interfere in revision with interlocutory orders even in exceptional circumstances Rupehand, A J C Contra. A I R 1930 Sind 265=Ind Rul (1930) Sind 289=24 S L R 277=127 I C 673.

—Where a plaint presented to the Subordinate Judge, First Class is returned for presentation to the proper Court and on appeal the District Judge affirms the order a revision does not lie against the appellate order 31 P L R 178.

—An order of a District Judge with regard to an election under the Madras Local Boards Act XIV of 1902, is revisable. A I R 1923 Mad 192=16 L W 848=(1923) M W N 133=44 M L J 1=46 M 536=71 I C 1039.

—A decree in a suit under s. 9 of the Specific Relief Act can be challenged in revision A I R 1930 All 205=L R 12 A 47 Rev=Ind Rul (1931) All 191=15 R D 185= 129 I C 559.

—Order under S. 476 Cr. P Code can be revised under s. 115 C P C or s. 15, High Courts Act. A I R 1931 Pat 411=12 P L T 671.

—Interference in revision is justifiable to prevent multiplicity of proceedings. A I R 1931 Mad 511=Ind Rul (1931) Mad 478=34 L W 531=131 I C 14. see 7 Bur. L T 95=23 I C 975.

—The High Court cannot interfere on a finding of fact. 51 I C 760=48 Cal 189. (P.C.)

—The High Court did not interfere in revision when a deposit of money under O 21, R. 89 was made in the lower court without any application to set aside the sale in execution of a decree, and when an application to the effect that the deposit should be considered as an application to set aside the sale was rejected by the Court. 43 Bom 735=21 Bom L R 835=53 I C 135

## C. P. C. (1908) SEC. 115 (Contd)

(4) High Court powers of apart from  
the section (Contd)

## (c) Section if exhaustive (Contd)

—The fact that plaintiff was cited as a witness is not a ground of revision for the High Court however much the practice may have to be condemned (1913) M W N 998=21 I C 781.

—Inferences of law and fact not involving questions of jurisdiction are no ground for revision A I R 1927 All 353=49 A 454=25 A L J 399=100 I C 638.

—Revision does not necessarily lie on score of exercise of jurisdiction. A I R 1927 Nag 164=100 I C 37.

—Jurisdiction of the Court to make order of reference attacked—High Court has power to revise. A I R 1927 Cal 52=44 C L J 224=98 I C 803.

—Judgment not properly expressed due to inexperience is no ground for revision. A I R 1926 Oudh 183=88 I C 577.

—Revision does not lie against decision on a preliminary issue as to jurisdiction of Court to entertain a suit. A I R 1923 Lah 414=5 Lah L J 140=11 P W R 1923=71 I C 487.

—The determination of one of the issues in the case does not afford a ground for revision unless the decision goes to the root of the jurisdiction of the trial Court to determine the remaining issues. A I R 1924 Pat 673=5 P L T 425=(1924) Pat 254=3 Pat 930=80 I C 667.

—Interference in revision in the case of decisions as to jurisdiction is only in exceptional cases. A I R 1923 Lah 565=77 I C 764.

—The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. A I R 1924 Sind 49=75 I C 1041.

—S. 115 applies to jurisdiction alone and is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. A I R 1923 Lah 506=75 I C 487.

—Section 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it and not to conclusion of law or fact, where question of jurisdiction is not involved. Ind Rul (1929) Nag 112=115 I C 176.

—An order of the trial Court having jurisdiction is not open to revision simply because the High Court cannot agree with it. A I R 1929 Oudh 26=Ind Rul (1929) Oudh 217=5 O W 873=4 Luck 93=115 I C 105



C. P. C. (1908) SEC. 115 (Contd)

(4) High Court powers of apart from the section (Contd)

(c) Section 115 exhaustive (Contd)

—Mistake regarding costs is no ground for revision. A I R 1928 Lah 800=10 Lah L J 401=109 I C 476.

—Absence of defendant—Discontinuance of pleader not instructed Decree passed amounts to exparte decree and no revision lies. A I R 1928 Mad 234= (1927) M W N 897=107 I C 815.

—Failure to mention importance of fresh evidence in review is no ground for revision. A I R 1927 Mad 641=50 M 891=52 M L J 682=39 M L T 11=26 L W 277 = (1927) M W N 806=103 I C 377.

—Fresh plea of limitation cannot be raised. A I R 1927 Lah 555=103 I C 69

—An order dismissing an application under O. 9, r. 4 C P C was set aside in revision. 13 I C 199=33 P L R 53=I R 1932 L 71=A I R 1932 L 176=A L R 1932 L 422 (Civ)=1932 P C L 412. O. 9, r. 4

—Application for restoration under—Order allowing—Appellate order reversing—Revision against—Maintainability of Quacore. 28 N L R 295 (297)

—The Code (O. 6, r. 17) directs that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Especially in suits of this character where in the Court has to deal with the statutory jurisdiction of a public body like the Religious Endowment Board, it is undesirable that it should without good reason close the door upon what may turn out to be valid objections to the exercise of that jurisdiction. 1932 M W N 290=A I R 1932 M 603 (604-5)=A L R 1932 M 237. O. 21, r. 101

—Order under—Revisable. 16 R D 169

—The High Court can interfere in revision against an order under s 10 C P C, on suitable grounds. 1932 P C L 441 (Civ)=33 P L R 787 =139 I C 48=I R 1932 L 558=A L R 1932 L 441 (Civ).

—Revision against order of Dist. Judge under proviso to S. 88 of Beng. Self Govt. Act 1919. see 35 C W N 641.

—This Court is always, on principle, to interfere with the decision of an interlocutory nature made by an inferior Court, particularly a decision where independent discretion has been exercised by the Court in question 59 C 329 (333)=138 I C 104=A I R 1932 C 448=I R 1932 C 415.

See 138 I C 822=I R 1932 A 499=A I R 1932 A 213 and 33 B L R 1596=135 I C 815=I R 1932 B 127=A I R 1932 B 81=A L R 1932 B 155 (157-160).

C. P. C. (1908) SEC. 115 (Contd)

(4) High Court powers of apart from the section (Contd)

(c) Section 115 exhaustive (Contd)

—The High Court will not interfere in revision so as to allow technicality to sacrifice justice. 35 L W 57=138 I C 121=1932 M W N 72 (2)=I R 1932 M 514=A I R 1932 M 223=A L R 1932 M 501 (506).

—Power of revision—Wide and large. 34 B L R 206=137 I C 603 (2)=I R 1932 B 303=A I R 1932 B 210=A L R 1932 B 671 (679), and discretionary 9 O W N 191 (195)=137 I C 151=I R 1932 O 222=A I R 1932 O 156=A L R 1932 O 208.

—Interference in revision is not obligatory except in cases where not doing so will cause grave injustice 36 L W 586=1932 M W N 1262=140 I C 226 =I R 1932 M 832.

—Revision against Subordinate Judge's order as election Commissioner is not competent. 1932 M W N 836=A I R 1932 M 560=I R 1932 M 582 (1)=138 I C 459=A L R 1932 M 1140. O. 46, r. 7

—Submission of case under—Application for—Rejection improper of—Revision against—Competent. 28 N L R 54=137 I C 88=I R 1932 N 51=A I R 1932 N 70=A L R 1932 N 114. Per Boys, J—

—In considering cl. (c) all that the Legislature requires is that the Court should consider whether the Court below having jurisdiction in the matter, did in the exercise of its jurisdiction act illegally or with material irregularity. If a question of jurisdiction is involved, the Court may act under Cl. (a) or (b).

The plain meaning of the clause seems to be that the Court having jurisdiction has exercised it but in so exercising it has acted illegally or with material irregularity. Where there is a wilful disregard or a conscious violation by a Judge of a rule of law or procedure, the High Court will have jurisdiction to interfere in revision. 34 B L R 1273 (1277, 1278)=A I R 1932 B 584=140 I C 381=I R 1932 B 604=A L R 1933 B 23.

—Revision is incompetent against an order of a District Magistrate hearing an appeal under S. 318 of the United Provinces Municipalities Act, 1916. 1932 A L J 816.

—Revision against order under s. 194 Succession Act 1925 35 C W N 871 (873).

—S. 115 does not apply to Revenue Courts. 1932 A L J 863=16 R D 481=13 L R 244 (Rev.)=A I R 1932 A 539.

—The High Court has power to revise a wrong order of the Subcourt in returning a plaint for presentation

## C. P. C. (1908) SEC. 115 (Contd)

(4) High Court powers of apart from  
the section (Contd)

## (c) Section if exhaustive (Contd)

to proper court. 28 N L R 54=137 I C 88  
=I R 1932 N 51=A I R 1932 N 79=A L R  
1932 N 114.

—Remand order set aside in  
revision in a case in which suit was held  
to be premature, in view of waste of  
time, trouble and inconvenience which  
would be caused by trial of suit. 1932  
M W N 348=A L R 1932 M 1050.

—Revision does not lie from an  
order of dismissal of a suit to recover  
debt—Contracted by an insolvent before  
order of adjudication but after pre-  
sentation of petition. 34 B L R 980=A  
I R 1932 B 511 (513).

—Matters of—Not all come within  
S. 115. 59 C 311=36 C W N 530=138 I C  
96=I R 1932 C 420=A I R 1932 C 441  
=A L R 1932 C 696.

—Discretion as to interference in  
revision not exercised in favour of a  
party consenting to illegal procedure in  
arbitration award. 1932 A L J 1037.

—Prior litigation subversion of by  
order of lower Court and confusion  
caused thereby—Interruption in revision  
pre-eminently justified in case of. 34 B  
L R 206=137 I C 603 (2)=I R 1932 B 306=A  
I R 1932 B 210=A L R 1932 B 671 (679).

—The High Court has power to  
interfere in revision with an order of the  
lower court even though affirmed on  
appeal. 54 A 573 (596)=1932 A L J 365=13  
R D 293=13 L R 199 (Rev)=138 I C 583  
(2)=I R 1932 A 467=A I R 1932 A 273=A  
L R 1932 A 272.

—The exercise of revisional  
jurisdiction is within the discretion  
of the High Court and there is no  
special rule to that effect. 54 A 516  
(517)=1932 A L J 359=138 I C 106= I R  
1932 A 369=A I R 1932 A 411=A L R  
1932 A 546.

—Practice of Lahore High Court  
as to, is not to interfere. 13 L 70  
(79-80)=1932 P G L 390 (Civ)=I R 1932  
L 379=137 I C 820=A I R 1932 L 281=A  
L R 1932 L 390 (Civ).

—No inflexible rule against inter-  
ference in such a case. 33 P L R 975.

—Madras Hereditary Village Office  
Act 1895—Revenue Board's orders made  
under is not revisable under S. 115,  
C P C, or under S. 107, Government  
of India Act. 55 M 942 (946)=63 M L J  
282=36 L W 122=1932 M W N 521=138  
I C 340=I R 1932 M 339=A I R 1932 M 519.

## C. P. C. (1908) SEC 115 (Contd)

(4) High Court powers of apart from  
the section (Contd)

## (c) Section if exhaustive (Contd)

—Revision from an order under  
Mussalman Wakf Act, 1923 is maintainable  
if requirements of S. 116 are complied  
with. 9 O W N 538=138 I C 725=I R  
1932 O 321=A I R 1932 O 210=A L  
R 1932 O 547 (553) (F B).

—Order of Board of Revenue under—  
Revision against. 55 M 883=63 M L J 460  
(499, 517-8) (F B).

—Revision does not lie against an  
order or decision of the Board of  
Revenue directing revision of proceedings  
of Revenue Officer under Chapter XI  
of Madras Estates Land Act. 55 M 883=63  
M L J 450 (F B).

—Transfer of portion of holding by  
ryot—Recognition by land lord of and  
acceptance of by him of transferee as  
ryot in respect of transferred portion  
—Finding as to is largely one of fact  
and will not be interfered with in  
revision. 139 I C 452=1932 M W N 1287=I  
R 1932 M 709=A I R 1932 M 716 (720).

—The order of the lower court  
should not be interfered with in case  
the interference is likely to cause  
irreparable loss and injustice to a party.  
36 C W N 869.

—No revision lies against an order  
dismissing an application to receive docu-  
ments in evidence after time. A L R  
1933 O 424 (1)=A I R 1933 O 345 (1)=10  
O W N 637=145 I C 810.

—Agreement to refer to arbitration  
—Finding on—Finding of fact—No  
interference in revision. A L R 1933 L  
309=34 P L R 247=142 I C 678=I R  
5 L 265. (1).

—Lower appellate Court remanding a  
case which was returned by the trial Court  
for want of jurisdiction holding that  
trial Court has jurisdiction—Revision is  
not competent. A L R 1933 L 1106=34 P  
L R 771=A I R 1933 L 940.

—An interlocutory order is not  
open to revision. A L R 1933 A 274  
(275)=I A W R 351.

—Revisional powers of the High  
Court should be exercised to subvert  
the ends of justice. A L R 1933 A  
519 (521)=A I R 1933 A 154=144 I C  
901=I R 6 A 7.

—Revision petition against order  
setting aside ex-parte proceeding is  
not maintainable. A L R 1933 L 399.

—It is purely discretionary with  
the High Court to interfere with the  
lower Court's decision in revision or

C. P. C. (1908) SEC. 115 (Contd.)

(4) High Court powers of apart from the section (Contd.)

(c) Section if exhaustive (Contd.)

not. The discretion can be rightly exercised to set right a grave injustice.

A L R 1933 N 247.

—Interference under S. 115 is within the discretion of the High Court. A party cannot go behind a decree passed in accordance with an award on a technical ground in revision. A L R 1933 O 302 (303)=A I R 1933 O 327= 10 O W N 669.

—No revision lies on a finding of fact. A L R 1933 O 598 (590)=A I R 1933 O 518=10 O W N 1105=145 I C 1001.

—Where the order of the lower Court in retaining the suit dismissed under O. 9, r. 9 was passed after the expiry of the period fixed under Art. 163 the High Court in its discretion is not bound to interfere with the order of dismissal under O. 9 r. 4 as premature and irregular. A I R 1933 P 557.

—Revision lies when the lower Court has mis-interpreted a document. A L R 1933 L 526 (528)=A I R 1933 Pesh 67=146 I C 363.

—Revision lies against an order returning a plaint for presentation in another Court. I R 6 L 28.

—Section must be read as a whole. A I R 1921 U B 27=4 U B R 16=63 I C 838.

—Danger of losing important evidence by postponement of a case is no ground for revision but can be relieved against under s. 151 Civil P. C. A I R 1925 Pat 674=7 P L T 82=(1925) Pat 294=89 I C 814.

—Following other High Court authority is no ground for interference. A I R 1925 Pat 372=6 P L T 504=3 P L R 18=(1925) Pat 43=86 I C 626.

—Rent-Enhancement-Decision of special Judge—Interference under S. 115. (1918) Pat 347=48 I C 930.

—A revision does not lie only on technical grounds. 63 I C 140 (All).

—Section 115 does not apply where there has been an error of law in deciding a matter the decision on of which was for the Court in the regular exercise of jurisdiction. Ind Rul (1921) Pat 493=118 I C 141.

—Revision does not lie against a mistake of law apart from a question of jurisdiction. A I R 1929 Lah 26=Ind Rul (1929) Lah 477=116 I C 221.

—Though error of law or fact after assuming jurisdiction would not be a ground for interference under s. 115,

C. P. C. (1908) SEC. 115 (Contd.)

(4) High Court powers of apart from the section (Contd.)

(c) Section if exhaustive (Contd.)

yet if it is the very basis and foundation of jurisdiction it at once comes within the purview of s. 115. A I R 1930 Pat 528=11 P L T 384=Ind Rul (1930) Pat 185=122 I C 153.

—Section 115 does not apply to conclusions of law or fact in which the question of jurisdiction is not involved. A I R 1929 Nag. 317=Ind Rul (1930) Nag 30=120 I C 491.

—Failure to consider a law point not raised by any party in a suit is not a ground for revision. A I R 1922 Bom 149=47 B 56=23 Bom L R 892=62 I C 952.

—An erroneous decision of an appellate Court that the original Court had jurisdiction is not open to revision by the Chief Court 204 P L R 1913=19 I C 237.

—Where the Appellate Court by placing a wrong construction on a rule holds that the First Court had no jurisdiction it is a matter coming within the purview of S. 115 C. P. C. 24 M L J 205=13 M L T 123=(1913) M W N 101=18 I C 579.

—An erroneous decision as to restitution of property sold in execution is not open to revision in as much as s. 115 C P C applies to jurisdiction alone. A I R 1930 Lah 468=Ind Rul (1930) Lah 831=127 I C 159.

—Per Sundare Aiyar J.-(Sadasiva Aiyar J. dissenting). Revision lies when an Appellate Court erroneously decides in the exercise of its admitted jurisdiction that the Court of first instance is or is not competent to entertain a suit. 24 M L J 112=13 M L T 60=39 M 195=18 I C 555 (F B).

—Revision lies to prevent a multiplicity of suits but simply an erroneous decision is no ground for revision. 56 M L J 273=29 L W 603=Ind Rul (1929) Mad 431=115 I C 351.

—An erroneous order regarding consolidation of suits whether open to revision. 17 C W N 526=16 C L J 591=15 I C 897.

—A revision lies where the finding is vitiated by an obvious error. A I R 1922 Nag 104=5 N L J 1=67 I C 806.

—No revision lies where there is no prejudice and the order complained against does not affect applicant's interests. 66 I C 127 (C).

—The High Court has jurisdiction to revise an order of the lower Court restoring a suit dismissed for default. A I R 1929 All 593=51 All 938=Ind Rul (1929) All 687=117 I C 111.

## C. P. C. (1908) SEC. 115 (Contd)

## (4) High Court powers of, apart from the section (Contd)

## (c) Section if exhaustive (Contd)

—Ordinarily orders in rateable distribution cases are not revisable unless they involve any question of jurisdiction. 14 L W 582=(1921) M W N 817=70 I C 20 (7).

—An order refusing a claim under O. XXI, r 58 to property, which has been ordered to be sold under a mortgage decree is not revisable. 26 C W N 50=68 I C 271.

—No revision lies against a wrong order relating to Pleader's fees based on misconstruction of the rules. A I R 1923 Pat 90=3 P L T 314=65 I C 355

—An order setting aside an ex-parte decree even if made without jurisdiction is not open to revision. A I R 1922 All 441=19 A L J 907=64 I C 527

—An order setting aside an ex-parte decree cannot be set aside by the High Court in revision. A I R 1922 All 441=19 A I J 907=64 I C 527.

—Erroneous decision about admissibility or otherwise of document is no ground for revision. A I R 1924 Rang 212 (2)=2 Bur L J 275=83 I C 334.

—An erroneous order if passed by a court having jurisdiction is not a ground for revision, the district Judge can set aside the order of the lower court granting a succession certificate even though probate is granted. A I R 1930 Lah 574=Ind Rul (1930) Lah 594=125 I C 322.

—An order setting aside an ex parte decree is revisable. A I R 1921 Oudh 14=24 O C 282=64 I C 303.

—Construction of portion of documentary evidence or ignoring of important evidence is no ground for revision. 35 I C 209.

—An erroneous order for rateable distribution is not open to revision. 17 I C 389=(1912) M W N 956.

—Revision from erroneous preliminary decision is bad and should be permitted in special circumstances only. 110 I C 78.

—An order setting aside an abatement cannot be interfered within revision on the ground of want of sufficient cause to pass the order. 63 I C 230 (All).

—Misinterpretation of document is no ground for revision. A I R 1928 Lah 713=108 I C 373.

—A decision under s. 173 (3) of the Bengal Tenancy Act is not revisable unless serious prejudice has been caused. A I R 1925 Cal 293=80 I C 703.

## C. P. C. (1908) SEC. 115 (Contd)

## (4) High Court powers of, apart from the section (Concl'd)

## (c) Section if exhaustive (Concl'd)

—Appellate Court setting up a new case—Revision lies from its decision. A I R 1927 Lah 71=98 I C 866.

—Interference—Ground for—Sufficiency of service of notice—Affixure is question of fact. I L W 351=231 C 219.

—No revision lies against order remanding case in due exercise of jurisdiction. A I R 1928 Mad 984=112 I C 710.

—An order passed by the High Court under S. 115, is an "order made or passed in appeal" within the meaning of S. 109 C P C. 15 C W N 848=13 C L J 90=9 I C 183.

## (5) Change of Case.

## (a) Appeal into revision.

—The High Court can convert a second appeal into a revision and interfere. 64 I C 712 (Cal).

—Where no appeal lies a petition of appeal to High Court may, in a proper case, be treated as an application for revision under s. 115. 33 C L J 381=63 I C 520.

—The High Court can convert a memorandum of appeal into a revision petition in a suitable case. A I R 1924 Mad 612=41 M L J 51=14 L W 85=(1921) M W N 487=63 I C 730.

—Where no appeal lies, but Court's error is one specified in s. 115, High Court can treat memo of appeal as petition for revision. A I R 1929 Mad 205=Ind Rul (1929) Mad 1003=119 I C 705.

—In a proper case the High Court will allow an appeal to be converted into a revision. 13 Bom L R 1017=36 B 105=12 I C 687.

—In absence of appeal memorandum of appeal may be treated as revision application. A I R 1927 All 563=49 A 812=25 A L J 606=102 I C 236.

—Regarding non-appealable orders, memorandum of appeal can be regarded as application for revision. A I R 1927 Cal 850=55 C 219=47 C L J 69=103 I C 844.

—Where no appeal lies an appeal to the High Court may be converted into an application for revision. A I R 1923 Oudh 177=26 O C 10=10 O L J 36=73 I C 591.

—An appeal can be converted into a revision petition for the sake of justice. A I R 1923 Cal 612=37 C L J 335=27 C W N 720=74 I C 575.

## C. P. C. (1908) SEC. 115 (Contd)

## (5) Change of Case (Contd)

## (a) Appeal into revision (Concl'd)

—Conversion of Civil miscellaneous appeal, to revision petition. (1916) M W N 109=33 I C 235

—The High Court has inherent power to convert an appeal into a revision petition subject to limitation and Court fee. 48 I C 779.

—Appeal may be converted into revision, where the Lower Court had made an order without jurisdiction. 25 M L T 153=9 L W 81=49 I C 629

—Application under s. 373, Civ Pro Code (1882)—Order—Appeal treated as application for revision 10 Ind Cas 346.

—Appeal treated as application for revision. 11 M L T 199=22 M L J 409=15 I C 367.

—An appeal can be converted into a revisional application in a proper case by the High Court without an application. 23 C L J 235=31 I C 812 see also 20 C W N 967=24 C L J 235=35 I C 348. see also 13 L 59 (69)=132 I C 850=A I R 1931 L 644=A L R 1932 L 247 (Civ)=1932 P C L 247 (Civ), and 33 P L R 634=A I R 1932 L 538=138 I C 62 (2)=1 R 1932 L 391. and 41 Mad 554=34 M L J 309=23 M L T 251= (1918) M W N 327=7 L W 508=45 I C 471. and 41 I C 125. and 38 Mad 256=25 M L J 507=21 I C 308.

—Treatment of Letters Patent Appeal as revision see. 54 A 573 (579, 581)=1932 A L J 365=16 R D 293=13 L R 199 (Rev.)=138 I C 583 (2)=I R 1932 A 467=A I R 1932 A 273=A L R 1932 A 272.

—Appeal against order granting review treated as petition for revision. A L R 1933 L 598=34 P L R 88=A I R 1933 L 169=141 I C 188=1 R 5 L 68.

—Memo of objections cannot be filed in a revision petition. A L R 1933 M 730 (731).

—An appeal being not possible a revision lies from an order refusing to substitute certain persons as legal representatives of a deceased plaintiff under O. 22, r. 3 C P C. 1932 A L J 308=140 I C 529=I R 1932 A 667 (2)=A I R 1932 A 466=A L R 1932 A 643. Order rejecting application for filing award in Court under s 525, Civ. Pro Code, 1882, appeal from—Memorandum of appeal to be treated as application for revision. 1 O C Sup 22.

## (b) Revision into Appeal

—Where an appeal lies, a revision application will not be entertained, but may be treated as an appeal. 29 I C 678.

—Application for revision may be regarded as memorandum of appeal. A I R 1927 Cal 581=31 C W N 653=102 I C 513.

## C. P. C. (1908) SEC. 115 (Contd)

## (5) Change of Case (Concl'd)

## (b) Revision into Appeal. (Concl'd)

—High Court can convert a revision into an appeal. 9 L W 596=50 I C 931. see also 13 C L J 467 and 18 C W N 1266=27 I C 294. and 33 B L R 1593=135 I C 812=I R 1932 B 124=A I R 1932 B 77.

## (c) Miscellaneous.

—High Court has no power in its revisional jurisdiction to treat an application under O. IX, as an application for review under O. XLVII. A I R 1926 Cal 735=43 C L J 285=94 I C 172.

## (6) High Court's power to act suo motu.

—High Court—Powers of to interfere in revision see. 19 C L J 292=23 I C 876.

—A petition to the High Court to interfere in revision is not necessary but it will interfere suo motu if the lower court had acted with material irregularity under serious misapprehension as to the actual facts. 15 C L J 114=9 I C 806.

—Under s. 115 High Court has power to act suo motu, to set aside orders without jurisdiction passed by lower Courts. A I R 1922 Pat 525=1 Pat 232=3 P L T 445=65 I C 122. by District Judge. 12 C W N 381=7 Cr L J 252=35 C 317.

—These powers of revision are exercised by High Court quite irrespective of any right on the part of the aggrieved party to move the Court and no time limit is placed on High Court's power of revision in either criminal or civil cases. A I R 1930 Oudh 401 =Ind Rul (1930) Oudh 363=7 O W N 663=(1930) Cr. Cas 941=31 Cr L J 1012=126 I C 395.

—Application by party interested not necessary for interference in revision. High Court can interfere suo motu. 36 L W 646=1932 M W N 1244=139 I C 167=I R 1932 M 632=A I R 1932 M 714 (716).

—Where no appeal lies, the High Court can interfere in revision without any application for the same. A L R 1933 L 1252 (1253)=A I R 1933 L 327=146 I C 258.

—No formal application is necessary to interfere in revision. (1914) M W N 142=14 M L T 314=25 M L J 507=38 M 256=21 I C 308.



## C. P. C. (1908) SEC. 115 (Contd)

(7) High Court's Power to act on the motions made by persons not Parties.

—Application by party is not condition precedent for exercising revisional jurisdiction A I R 1928 Mad 528=51 M 672=55 M L J 274=28 L W 297=110 I C 63.

## (8) Meaning of "Subordinate Court"

## (a) General.

—A Court holding an election enquiry is a Court subordinate to the High Court A I R 1923 Mad 254=44 M L J 69 =46 M 123=16 L W 898=(1922) M W N 813 =72 I C 902.

—High Court of Kumaun is not a Court subordinate to Allahbad High Court for purposes of revision A I R 1928 All 291=45 A 383=71 I C 991.

—Subordinate Court — Proceedings under S. (3) (160) of the Bom Dt. Municipal Act—Revision by Judicial Commissioner's Court—Competency of. 44 I C 363.

—A Rent Court in the exercise of cases in which the course of appeal lies to the High Court is a Court 'subordinate' to that Court within the meaning of s. 115. A I R 1923 Oudh 18=9 O L J 543=72 I C 394.

—The first Judge of the Court of Small Causes acting under the provisions of the Rangoon Rent Act is a Court subordinate to the High Court within the meaning of s. 115. A I R 1923 Rang 94 (F B)=Bur L J 138=11 L B R 387=70 I C 135.

—The authority of High Court to decide on a reference by a court—whether a test of subordinate Court. 1932 A L J 816.

—Subordinate Court means court over which the High Court has Judicial and not purely administrative power. 1932 A L J 816=140 I C 123=A I R 1932 A 631=I R 1932 A 615= A L R 1932 A 1083.

—An essential characteristic of a "Court" is the power to determine questions in dispute between the parties to a suit. 1932 A L J 769=A I R 1932 A 568 (569)=A L R 1932 A 964 (F B).

—District Judge acting under S. 15, Bombay City Municipalities Act is persona designata and not a Court—Revision under S. 115, C. P. C. is not maintainable. A L R 1933 B 230 (230-1)=35 B L R 89=A I R 1933 B 105=142 I C 378=I R 5 B 234.

## (b) Particular Cases.

—Collector's Orders—No revision lies against an order of the Revenue Divisional Officer acting under Act III of 1895. A I R 1922 Mad 337=14 L W 548=(1921) M W N 757=41 M L J 577=66 I C 566.

## C. P. C. (1908) SEC. 115 (Contd)

(8) Meaning of "Subordinate Court" (Contd)

## (b) Particular Cases (Contd)

—The dismissal of an application under Land Acquisition Act s. 18 by the Collector is not open to revision because the High Court is not competent to revise the order of the Collector. A I R 1930 Lah 242=31 P L R 158=Ind Rul (1930) Lah 871=127 I C 711.

-- An order under O. XXIII, r. 1 passed by Collector in rent case, is revisable by High Court. A I R 1924 Oudh 107=72 I C 1034.

—Collector in exercising discretion refusing to issue a certificate under s. 10 of the Bombay Hereditary Officers Act

—High Court's power to interfere in revision doubted. A I R 1926 Bom 308=28 Bom L R 456=94 I C 760.

—Revision lies when the lower Court referred a mortgage suit to the Collector under sub s. 3 of s. 9 of the Bundalkhand Land Alienation Act with a view to the Collector exercising powers under sub-ss. 1 and 2 of the section. A I R 1925 All 253 =L R 6 A 14 Civ =86 I C 208.

—The Collector being moved by an application set aside the order of refusal of the Sub-Deputy Collector to prosecute under s. 471 Penal Code and was acting as a Revenue Court. It was held that his order was revisable under s. 115 C. P. C. and also under s. 107 of the Government of India Act. A I R 1926 Pat 25=7 P L T 199=26 Cr L J 1565=90 I C 445.

—The High Court has power to interfere in revision with the orders of revenue courts under the Rent Act in cases where the course of appeal lies to the court of the District Judge and High Court. 14 O C 31=9 I C 747.

—Collector under the Mamlatdar's Act a Court.—14 Bom L R 947=37 Bom 114=17 I C 676

—Land Acquisition—Collector—S. 49—High Court's power to set aside in revision. 16 C W N 327=16 C L J 165=13 I C 470.

—The orders of a District Collector can be revised by the Board of Revenue. (1925) M W N 419=96 I C 768.

—The Collector is not a court subordinate to the High Court. 1932 A L J 769=A I R 1932 A 5680 (570)=A L R 1932 A 964 (F B).

—Land Acquisition Act. S. 18—Collector acting under is "Court" within meaning of S. 115, C P C 9 O. W. N. 234 (236)=16 R D 320=13 L R 148 (Rev) =137 I C 68=I R 1932 O 197=A I R 1932 O 180=A L R 1932 O 449.

## C. P. C. (1908) SEC. 115 (Contd.)

## (8) Meaning of "Subordinate Court" (Contd.)

## (b) Particular Cases (Contd.)

—Collector acting under S. 18 not a Court subordinate to High Court. 54 A

282=A I R 1932 A 598 (599).

—In passing the order if the Collector does not act judicially, he does not act as a "Court" much less as a Court "subordinate to the High Court." 1932 A L J 769=A I R 1932 A 568 (570)=A L R 1932 A 964 (F B).

—Revision to the High Court against a Collector's order dismissing a revision petition to him from the Deputy Collector dismissing a petition under O. 21. r. 101 in a summary suit, is not competent. A L R 1933, M 1000. Revision against a proceeding of the Board of Revenue under chap. XI of the Madras Estates Lands Act is incompetent. A L R 1933 M 1041=56 M 579=38 L W 353=65 M L J 423=1933 M W N 782.

—Collector's power to revise proceedings of mamlatdar. 35 Bom.487=12 I C 356.

—Powers of High Court on order of a Rev. Officer under the Mad. Estates Land Act. 4 L W 278=35 I C 640.

—Aden Court:—Order granting Letters of Administration by the Aden Court is a final judgment, being a Court of final appeal and is not revisable.—Appeal to the Privy Council lies. A I R 1926 Bom. 139=50 B 32=27 Bom L R 1460=92 I C 367.

—Revision lies from an order under s. 8 Aden Court's Act (11 of 1864) passed by the Resident Court that is subordinate to the High Court A I R 1929 Bom 190 =31 Bom L R 225=Ind Rul (1929) Bom 311=115 I C 407.

—Scope of—Decision under the Mandalay Municipal Electoral Rules—No revision lies therefrom. A L R 1933 R 71 (72)=A I R 1933 R 41=142 I C 80=11 R I.

—Order of the judicial Assistant of Aden—High Court has power to interfere in revision in a suitable case—Aden Court subordinate to the High Court for all purposes—Aden Act, S. 8. A L R 1933 B 237 (238)=35 B L R 271=A I R 1933 B 194 =144 I C 705=1 R 6 B 5.

—District Registrar's Court—Registrar not being Officer subordinate to High Court his order under s. 75 (4) is not open to revision. A I R 1928 Mad 475=54 M L J 595=51 M 245=27 L W 346=(1928) M W N 101 =109 I C 180.

—Consular Court at Zanzibar:—The Bombay High Court has no power of revision over civil cases tried by the Consular Court at Zanzibar, though it is authorized to hear appeals from the decision of that Court as a Consular Court as a District

## C. P. C. (1908) SEC. 115 (Contd.)

## (8) Meaning of "Subordinate Court" (Concl'd)

## (b) Particular Cases (Concl'd)

Court by the Zanzibar Order in Council of 1884. A power of revision is not an incident of appellate powers, but on the contrary can only be exercised where there is no appeal. 20 Bom 480. The High Court of Bombay has powers of revision over all the Civil Courts of Zanzibar, 36 Bom 105=13 Bom L R 1017=12 I C 687.

—Other Tribunals:—Calcutta Improvement Tribunal acting under Land Acquisition Act is a Court and its orders are revisable under s. 115 C P C 36, C W N 370=A I R 1932 C 660=I R 1932 C 610=139 I C 180.

—Madras Hereditary Village Offices Act, 1895—Revenue Board acting under —Not a Court subordinate to High Court. 55 M 942 (946-7)=63 M L J 282=36 L W 122=1932 M W N 524=138 I C 390=A I R 1932 M 529= I R 1932 M 559= A L R 192 M 1099.

—Calcutta Improvement Tribunal acting under Land Acquisition Act is a court subordinate to the High Court. 36 C W N 370.

—Under Burma Rural Self-Government Act, 1921—District Judge disposing of election petitions is a Court Subordinate to High Court within S 115 C P C. 10 R 517=A L R 1932 R 399 (F B).

## (9) Where there is remedy by suit or otherwise.

—High Court will not interfere in revision with a pure finding of fact when the aggrieved party has other remedies when the finding is not opposed to the evidence on record or is not based on meagre or little evidence or on disregard of evidence. A I R 1929 Nag 66=Ind Rul (1929) Nag 103=115 I C 167.

—When there is another remedy open to an appellant, the High Court will not entertain an application for revision. S L R 166=19 I C 450.

—Other remedy being open—No revision lies. 33 All 647=8 A L J 791=11 I C 814.

—The High Court interferes in revision only when the applicant has no other remedy open or has only an alternative remedy which is too expensive to follow. 17 I C 254=171 P W R 1912=176 P L R 1912.

—Other remedy being open no interference in revision. 99 P R 1915=207 P W R 1915=32 I C 250.

## C. P. C. (1908) SEC. 115 (Contd)

## (9) Where there is remedy by suit or otherwise (Contd)

—Other remedies being open—Practice is not to interfere. 38 Mad 15-24 M L J 73-16 I C 820.

—The High Court will not interfere in revision even though the lower court in the exercise of jurisdiction not vested in it by law, passed an order on the merits of the case and a remedy by way of suit was open to the party. 37 I C 348.

—Revision does not lie when an execution application is dismissed on the objection of a third party against whom a suit can lie under O 21 R 63 C P C and also when the order of dismissal is appealable. 38 I C 299.

—The High Court may interfere in revision to avoid multiplicity of proceedings even though other remedy is open to the petitioner. 40 All 216-16 A L J 150 42 I C 936.

—In the case of a wrong decision the High Court could not interfere under S 115 of the C P Code, as the judgment debtor had his remedy in review of judgment. 22 C W N 627-27 C L J 418-44 I C 763.

—Even though another remedy is open the High Court will interfere in revision when the applicant is clearly entitled to obtain possession under O 21 R 95 of C P C. 16 A L J 150-40 A 216 42 I C 936.

—Whether the High Court can interfere in revision when there is another remedy open. 22 M L T 323-43 I C 83.

—The High Court will interfere in revision only when the other remedy is not open to the party. 42 I C 74-11 Bur L T 123-3 U B R 13.

—Suit under s 9, Specific Relief Act being dismissed—Another remedy is open—Revision does not lie—8 A L J 791-11 I C 814.

—Other remedy open—No Interference in revision 1 Pat L T 296-5 Pat L J 415-57 I C 421.

—The High Court can revise a decision of Lower appellate Court on appeal from a non appealable order when no other remedy is open 2 L W 693-18 M L T 145-30 I C 380.

—The High Court can interfere in a proper case even though other remedy by way of suit is open 4 Pat L J 94-49 I C 150.

—Interference by High Court though other remedy open by way of appeal, 5 L W 207-39 I C 160.

—The common principle governing the revisional powers of the High Court under both S. 115 C P C and s. 15 of the

## C. P. C. (1908) SEC. 115 (Contd)

## (9) Where there is remedy by suit or otherwise (Contd)

Charter Act is that it should not interfere where other adequate remedy exists.

—An Order refusing to amend the pleadings can be corrected in an appeal from the decree in the suit and therefore is not revisable. 15 C W N 682-10 I C 308.

—It is not the practice of the judicial Commissioner's Court to interfere in revision when the applicant has the remedy of appeal open to him. 49 I C 382.

—No revision lies where an appeal is allowed. 19 I C 736.

—Another remedy being open to a party is not a bar to the Interference by High Court 4 Pat L J 94-(1919) Pat 81-49 I C 150 (F B).

—Other remedy open—Decision in suit under S. 9 of the Sp. Ref. Act—Revision—Interference by High Court 48 I C 433.

—Where other remedy is open to a party and when great injustice would not follow from a refusal to interfere in revision, the High Court does not interfere. 48 I C 415.

—The High Court will not interfere in revision when other remedy is open and when there is only an error of law. 47 I C 190.

—No revision lies in the case of an interlocutory order passed by a Court having jurisdiction when there is another remedy besides an appeal from the final decree in the suit. 46 I C 189.

—Summary proceedings are not open to revision because they do not finally decide the dispute and the High Court will not interfere in revision where a remedy by suit is open 44 Bom. 595-22 Bom L R 746-57 I C 432.

—A manifest error in the order even though a Remedy by suit is available can be set right in revision. A I R 1926 Mad 179-22 L W 744-(1926) M W N 27-49 M L J 753-91 I C 11.

—The existence of another remedy does not bar revision. A I R 1925 All 610-48 All 175-24 A L J 56-L R 6 A 601 Civ (F B)-90 I C 180.

—Obiter:—If a suit is not maintainable at all it might in some cases be advisable for the High Court in revision to interfere and thus to prevent further waste of time and money. A I R 1925 Mad 820-48 M L J 534-37 I C 194.

—See also 48 M L J 451-(1925) M W N 305-A I R 1925 Mad 707-87 I C 113.

—Consideration of question of Benami and fraud on creditors in claim case in presence of other remedies can be ground of revision. A I R 1927 Pat 316-8 P L T 677-103 I C 32.

## C. P. C. (1908) SEC. 115 (Contd)

## (9) Where there is remedy by suit or otherwise (Contd)

—Aggrieved party having another and adequate remedy. High Court will not interfere. A I R 1926 Cal 1149=53 C 767=30 C W N 907=98 I C 615.

—A more appropriate and far more complete remedy open. High Court will not exercise power of revision. A I R 1927 Cal 114=45 C L J 213=31 C W N 615=93 I C 89.

—High Court can interfere in revision in exceptional circumstances even though another remedy of suit is open. A I R 1926 Lah 612=8 Lah L J 423=27 P L R 644=96 I C 359.

—Another remedy open by way of appeal at a later stage of the proceedings—Revision does not lie 93 I C 173 (Lah.)

—An order disallowing interrogatories is not open to revision when there is a remedy by appeal from the decree 58 I C 721.

—High Court should not interfere in revision where another remedy is open to the aggrieved party and where no great injustice or inconvenience results. A I R 1926 Nag 290=22 N L R 30=94 I C 70.

—Another remedy by way of regular suit open to the aggrieved party—High Court will not interfere 93 I C 868 (Lah.)

—Partition of the whole property. One of the properties left unpartitioned by oversight—It is for the parties to draw the attention of the Court to the omission therefore Revision does not lie. A I R 1925 Pat 760=92 I C 684.

—Remedy by way of suit available. High Court will not ordinarily interfere in revision unless found unnecessary to drive the parties to another suit. A I R 1926 Mad 18=50 M L J 162=22 L W 448=(1925) M W N 762=92 I C 20.

—Another remedy open—Application for revision is not maintainable. A I R 1925 Oudh 666=2 O W N 658=91 I C 647.

—Except upon proof of irreparable injury the High Court will not interfere in revision under s. 115. When there is another remedy open to the applicant—A I R 1923 Pat 518=4 P L T 401=72 I C 143.

—Held, the proper course when a suit is dismissed for default is to apply for a review of the order or an order to set aside the order of dismissal and not to apply in revision. A I R 1923 Bom 395=89 I C 473.

—As the exercise of the power of revision is discretionary it must be adapted to the circumstances of each particular case and where necessary interfere

## C. P. C. (1908) SEC. 115 (Contd)

## (9) Where there is remedy by suit or otherwise (Contd)

nce may be made even though other remedy available. A I R 1925 Nag 17=79 I C 806

—Where justice requires interference even where another remedy is open revision will lie much more so where another remedy is barred. A I R 1924 Nag 298=79 I C 123

—Remedy by way of revision is to be resorted to only when there is no other remedy available to the aggrieved party. A I R 1924 Lah 191=78 I C 604.

—High Court will not interfere in revision with an order made in exercise of a jurisdiction wrongly assumed where aggrieved party has a remedy by suit. A I R 1924 Lah 471=6 Lah L J 137=78 I C 350.

—Revision does not lie when other remedy by suit is open. A I R 1925 Nag 31=76 I C 46.

—When no other remedy is available, s. 115 should be construed liberally. A I R 1924 Sind 49=75 I C 1041.

—High Court will not interfere in revision where the unsuccessful party has a right by suit. A I R 1924 Pat 134=4 P L T 718=1 Pat L R 370 Civ =74 I C 474.

—The High Court will interfere in revision when there is an exceptional case and it is doubtful whether another remedy is open or not. A I R 1923 Mad 663=18 L W 105=(1923) M W N 354=72 I C 688.

—Revisional powers are available in absence of other remedies only applicant's negligence to exercise right of appeal or other remedies does not give him right to apply for revision 113 I C 409

—The High Court should interfere only when irreparable loss would occur but for its interference and that too only in extreme cases. A I R 1928 Mad 794=112 I C 231.

—In presence of other remedies application for revision is barred. 9 P L T 659= 103 I C 804.

—Presence of effective remedies if they involve unnecessary trouble is no bar to revision provided conditions for revision are satisfied. A I R 1928 Mad 416=55 M L J 345 =51 M 664=27 M L W 286=103 I C 539.

—Proper remedy against order refusing to plead party is to appeal under O XL I r. 1, and not to apply for revision. A I R 1927 Cal 814=64 C 716=104 I C 842.

—In presence of other remedies generally there is no revision but this rule is not absolute. A I R 1927 Mad 799=25 L W 76=104 I C 137.

## C. P. C. (1908) SEC. 115 (Contd)

(9) Where there is remedy by suit  
or otherwise (Contd)

—Revision in special cases will lie even in presence of other remedies. A I R 1927 Lah 911-28 P L R 136-9 Lah L J 19-103 I C 595

—The High Court will not interfere with a decision, even where a question has been wrongly decided, when the petitioners have a remedy by suit. M W N 1912, 356 =17 Ind Cas 339.

—Revision should not be granted ordinarily where besides appeal some other remedy has been provided. A I R 1921 Nag 17-4 N L J 55-63 I C 46.

—Remedy by revision is discretionary and revision may be granted though other remedy is open. 4 N L J 55-63 I C 46.

—In cases where no suit lies such for example order in rateable distribution proceeding declaring a property as an asset liable to be distributed it is the practice of the High Court to interfere in revision. A I R 1922 Cal 19-26 C W N 169-70 I C 539.

—High Court will not interfere in revision when another remedy is open to the aggrieved party and no great injustice or inconvenience would follow from the refusal to act. A I R 1934 Nag 38-69 I C 719.

—Even when there is another remedy open to a petitioner High Court is not prevented from interfering in revision in cases where grave injustice may have been done. A I R 1922 Lah 63-4 Lah L J 71-67 I C 945.

—No revision lies when the aggrieved party has a remedy by suit open to him except in cases of very serious miscarriage of justice. 65 I C 476 (Cal).

—The exercise of revisional powers is discretionary, and High Court will be unwilling to interfere where an aggrieved party has other remedy open to him. A I R 1922 Pat 315-1 Pat 68-3 P L T 406-65 I C 135

—High Court will be slow to interfere in revision except where no remedy is open to applicant. A I R 1922 Sind 1 =15 S L R 165-65 I C 50.

—The powers under s. 115 should be interpreted liberally specially when the applicant has no other remedy. A I R 1921 Sind 80-15 S L R 135-65 I C 37.

—The High Court usually does not interfere in revision when there is a separate remedy open. A I R 1922 Mad 3-41 M L J 378-(1921) M W N 537-15 L W 245-64 I C 493.

—Where another remedy is open to a party the Court will not entertain an application for revision. 64 I C 469.

## C. P. C. (1908) SEC. 115 (Contd)

(9) Where there is remedy by suit  
or otherwise (Contd)

—Revision may lie in special cases even when another remedy is open to the party. A I R 1929 Lah 175-Ind Rul (1929) Lah 745-118 I C 393.

—Extraordinary powers of the High Court should not be invoked without exhausting the ordinary powers of the Court below which may give him all he wants. 30 Cr L J 862-Ind Rul (1929) Lah 730-117 I C 906.

—Order under O. XXI, r. 101, cannot be revised because another and better remedy by way of suit is open to the parties. A I R 1930 Cal, 348-34 C W N 577-Ind Rul (1930) Cal 856-127 I C 552.

—High Court will not interfere in revision when a remedy by a suit is open except in exceptional cases. A I R 1930 Bom 375-32 Bom L R 619-54 B 479-Ind Rul. (1930) Bom 367-125 I C 703.

—As the party aggrieved by order under that rule or r. 61 has a remedy under O. XXI, r. 63 High Court should not interfere in revision with the decision under. A I R 1930 Pat 394-Ind Rul (1930) Pat 543-125 I C 575.

—Power to interfere in, where other remedy exists. 5 M L T 125-19 M L J 307 =32 M 334-4 I C 509.

—An order returning a plaint for presentation to proper Court is not revisable as there is a remedy open to the plaintiff to proceed with the suit in the proper Court. Ind Rul (1929) Sind 161-118 I C 193.

—Other remedy by way of application under O. 46, r. 7, open—Revision is not competent. A L R 1933 N 265 (2)=A I R 1933 N 221 (1)=145 I C 261-1 R 6 N 43 (1).

—The High Court should not exercise revisional powers when there is a clear remedy open to the party. A L R 1933 S 155 /156).

—An interlocutory order of rejection of plaint under O. 7, r. 11, C P C being appealable, revision does not lie there from. 5 Pat L J 400-1 Pat L T 268-56 I C 649.

—An order rejecting a plaint under O. 7, r. 11 being appealable, the High Court should not revise an order directing the plaintiff to pay advalorem court-fee. 1 P L T 5-55 I C 786.

—An interlocutory order refusing to raise an issue at the instance of the defendant's pleader is not revisable as there is a remedy by appeal from the decree. 52 I C 411.



## C. P. C. (1908) SEC. 115 (Contd)

(9) Where there is remedy by suit or otherwise (Contd)

—Other remedy being open—No interference in revision. 107 P R 1919=53 I C 563.

—An order refusing the amendment of a plaint is not revisable if other remedy is open. (1914) M W N 98=14 M L T 588=22 I C 39.

—Revision does not lie when other remedy is open. 56 P R 1915=146 P W R 1915=31 I C 80.

—Other remedy by way of suit being open, revision does not lie 1913 M W N 856=21 I C 431.

—Refusal to allow amendment is not revisable under S. 115, C P C as there is other remedy open to the party aggrieved. 14 M L T 588=1914 M W N 98=22 I C 39.

—Other remedy being open—No revision lies 1 L W 232=24 I C 781. also (1914) M W N 368=23 I C 572

—Practice of the High Court is not to interfere in revision when other remedy is open. 24 M L J 73 at 74=16 I C 820.

—Other remedy by way of suit being open, the High Court does not interfere in revision except in very rare cases. A suit under s. 9, Specific Relief Act being dismissed, revision does not lie because a remedy by way of a regular suit is open to the party aggrieved. (1914) M W N 95=22 I C 279.

—An order setting aside an ex parte decree can be raised by the High Court even though appealable. 1 L W 234=23 I C 422.

—S. 115, C P C applies to Presidency Small Cause Courts which are subordinate to the High Court. It always applies when a question of jurisdiction applies but the High Court has discretion in cases coming under cl. (c), S. 115, when the party has another remedy open. 26 M L J 467= (1914) M W N 368=23 I C 572.

—The High Court will not interfere in revision against an interlocutory order when there is a remedy by way of appeal against the final decree that may be passed in the suit. But it will interfere when there is an improper exercise of jurisdiction or improper refusal to exercise the same by the lower Court. 23 I C 564.

—Even where another remedy is open the High Court will interfere in revision if the circumstances require it. 12 A L J 899=24 I C 897.

—The High Court will not interfere in revision with an order of the lower Court setting aside an ex parte decree when a remedy by way of appeal is open against the decree that may be passed eventually. 1 L W 233=24 I C 782.

## C. P. C. (1908) SEC. 115 (Contd)

(9) Where there is remedy by suit

or otherwise (Contd)

—The practice of the High Court is against entertaining an application in revision when other remedy is open to the party aggrieved except where special circumstances require it. 12 A L J 899=24 I C 897 and 26 I C 62.

—The High Court will not interfere in revision under S. 115 of the C P Code if the petitioner has a remedy by suit. 1 L W 905=26 I C 19.

—The High Court will interfere in revision even though other remedy is open if the parties cannot be put in the same position later on. 18 M L T 243=30 I C 845.

—An error of procedure is no ground for revision. The High Court has power to revise an order relating to rateable distribution even though a remedy by a regular suit is open, provided the rights of the parties are not affected. (1914) M W N 738=25 I C 592.

—Even though other remedy is open, the High Court can interfere in revision if the circumstances require. A I R 1931 Cal 385=58 C 55=Ind Rul (1931) Cal 583=132 I C 631.

—The High Court is reluctant to interfere in cases under the Deccan Agriculturist's Relief Act where the District Judge's revisional powers suffice. A I R 1931 Bom 284=55 B 411=33 Bom L R 476=Ind Rul (1931) Bom 319=131 IC 895.

—A remand order under s. 151, made without jurisdiction can be revised even though a remedy by appeal from the final decree is open. A I R 1931 Lah 302 (1)=32 P L R 169=Ind Rul (1931) Lah 751=133 I C 127.

—The High Court has discretion to interfere in revision in order to avoid unnecessary hardship and multiplicity of proceedings, even though another remedy opens. An order dismissing an application under O.9, r. 4, is revisable if a remedy by a suit is barred by time. 1932 P C L 422 (Civ)=135 I C 199=33 P L R 53=I R 1932 L 71=A I R 1932 L 176=A L R 1932 L 422 (Civ).

—If the Court below has acted without jurisdiction or with material irregularity and the applicant has been seriously prejudiced and interference is called for in the interests of justice, there is no reason why the applicant should be driven to a more circuitous remedy by way of a separate suit. 54 A 183 (186)=A I R 1931 A 632 (F. B.)

—An order of rateable distribution of judgment-debtor's assets among rival

## C. P. C. (1908) SEC. 115. (Contd)

## (9) Where there is remedy by suit or otherwise (Contd)

decree-holders is not revisable when other remedy is open. 171 P W R 1912 =176 P L R 1912=17 Ind Cas 254.

—Interference in revision is only in exceptional cases to save the rights of the parties and unnecessary expense of litigation, when another remedy is open. A L R 1933 R 241=A I R 1933 R 259.

—In the case of an order passed without consideration of the evidence under O. 21, r. 58 of the Code—High Court ought to interfere in revision though petitioner has got another remedy by way of suit. A L R 933 P 146 (147) =14 P L T 70=A I R 1933 P 158=142 I C 678.

—A remedy by way of regular suit being open and Judgment being sub-judice in regular appeal it is not proper for High Court to exercise extraordinary jurisdiction of revision. A L R 1933 L 278 (279)=14 L 51=34 P L R 289=A I R 1933 L 317 (2)=142 I C 738=I R 5 L 256.

—Even though other remedy is open, revision lies when circumstances justify. A I R 1933 Pesh 52=143 I C 87.

—The High Court may interfere in revision even though other remedy by a suit or appeal is open, provided circumstances justify. A L R 1933 R 202=A I R 1933 R 86=11 R 134 =144 I C 163.

—Sum in dispute not forming part of the assets liable to be rateably distributed S. 73 (2) does not apply so as to give the aggrieved party the right of suit. Therefore High Court can interfere in revision. A L R 1933 P 195 (196)=A I R 1933 P 277=145 I C 362=14 P L T 287.

—The High Court can interfere in revision to avoid serious injustice to a party even though other remedy is open. A L R 1933 L 1070=14 L 243=33 P L R 975=A I R 1933 L 48=142 I C 759=I R 5 L 267.

—Under the Mamltdars Courts (Bomby) Act, the defeated claimant has his remedy in a suit. If that right is denied by an order of the Collector, the High Court is bound to interfere in revision. A L R 1933 B 332 (334)=35 B L R 576=145 I C 405=A I R 1933 B 313=I R 6 B 79.

—No revision lies, if other remedy is open. A L R 1933 S 181 (182)=A I R 1933 S 329=27 S L R 190.

—The High Court interferes in revision as a matter of Practice in the case of rateable distribution of assets as there is no other remedy by suit. A I R 1922 Cal 19=26 C W N 169=70 I C 539.

## C. P. C. (1908) SEC. 115 (Contd)

## (9) Where there is remedy by suit or otherwise (Contd)

—The High Court can interfere in revision only when there is no other remedy open to the aggrieved party and when serious injury will result to him but for its interference Ind Rul (1929) Sind 161=118 I C 193 (Sind.)

—Even though a remedy by a regular suit under O XXI r. 63, is open, the High Court can interfere in revision in exceptional cases. A I R 1929 Nag 356=Ind Rul (1930) Nag 63=120 I C 735.

—Revision is not competent when other proper remedy is open to a party. A L R 1933 M 572 (576)=A I R 1933 M 485=144 I C 103.

—Revision does not lie when other remedy is open to the minors when sanction under O. 32. R. 7 on behalf of the minors is not received. 99 P R 1915=207 P W R 1915=32 I C 250.

—Revision is not competent when a surety, being held liable for debts of the principal debtor, had other remedies open against the latter. A I R 1929 Lab 777=Ind Rul (1930) Lab 333=122 I C 477.

—An error in the calculation of Vakil fees due to a party in a suit should be corrected by the court otherwise revision will lie but omitting to award proportionate costs is not open to revision a remedy by way of appeal is open to the party. 24 I C 878.

—Although ordinarily High court cannot interfere in revision in a matter respecting which there is another remedy shall, there is no hard and fast rule excluding the jurisdiction of the court absolutely in such a case. Where one of the decree-holders has been employing tactics all through to deprive the other decree-holders of their right to rateable distribution, the court would interfere in revision. A. L. R. 1934 Pesh. 2.

## (10) "Case" meaning of

—Where the order sought to be revised marked the definite stage of the termination of a proceeding in a suit a "case" should be deemed to have been decided so as to attract the application of S. 115. A L R 1934 All 252.

—Whether a decision on a preliminary issue is a "case decided" within s. 115 C. P. C. 3 L W 512=35 I C 88.

—'Case' meaning of—Proceedings under S. 10 Rel. Endowments Act XX of 1863—Revisonal power of the High

## C. P. C. (1908) SEC. 115 (Contd.)

## (10) "Case" meaning of (Contd.)

Courts. 40 Mad 793=33 M L J 69=44 I A 261=15 A L J 645=2 Pat L W 101=26 C L J 143=19 Bom L R 715=(1917) M W N 628=6 L W 501=22 C W N 50=11 Bur L T 48=40 I C 650 (P C).

—Order on application under S 127 of the Chota Nagpur Ten. Act is not revisable by High Court. 3 Pat L W 281=3 Pat L J 143=43 I C 933.

—An application under section 10 C P C for the stay of a suit is not a "case" and an order for stay passed on that application is not the decision of a "case" within S. 115 of the Code, and no revision lies from such an order. 18 A L J 431=53 I C 90.

—A District Judge acting under S. 10 of the Religious Endowments Act is a court and an order made in respect of an election made by the District Judge is an order made in a "case" and is open to revision under S. 115 C P C if the matter fulfils the other requirements in the section. 25 M L J 536=38 M 594=14 M L T 354=21 I C 451=1913 M W N 842. [See also 40 M 793=33 M L J 69 P C]=40 I C 650.

—Interference with order declaring wrongly that there was misjoinder of Causes of action. 12 I C 357=7 N L R 130.

—An order staying sale of property is not revisable as no case is decided within the meaning of S. 115 C P C 41

Cal 876= 18 C W N 662=22 I C 843.

—A case has been decided when a judgment is delivered but the decree is not prepared. But revision does not lie when the decree when prepared is appealable. 13 A L J 435=29 I C 176.

—Proceedings under O. IX. r. 13, Civil P. C. is a case and revision lies. A I R 1925 All 610=48 A 175=24 A L J 56= L R 6 A 601 Civ (F B)=96 I C 130.

—Proceeding consequent on an application for setting aside a decree ex parte involves the reversal of a final order and decree in a suit and are, in themselves a case. A I R 1926 Lah 379= 7 Lah 161=8 Lah L J 267=27 P L R 321=95 I C 124. see also A I R 1926 Lah 344=8 Lah L J 170=27 P L R 710=94 I C 117

—In a suit for partition among co-sharer, landlord's refusal to add tenants as parties, is no case for interference by the High Court. A I R 1923 Mad 690=13 L W 198=(1923) M W N 403=45 M L J 703=76 I C 207.

—The word 'case' does not in every case mean the whole case but may mean a particular branch of a case for which an independent remedy or a diffe-

## C. P. C. (1908) SEC. 115 (Contd.)

## (10) "Case" meaning of (Contd.)

rent procedure is provided by the Code. A I R 1923 Lah 615=73 I C 247.

—An order directing that the arbitration should continue and appointing another person as arbitrator is one deciding a case within s. 115 C P C. A I R 1929 All 144=Ind Rul (1929) All 387=51 A 501=(1929) A L J 182=115 I C 611.

—Case not involving question of jurisdiction is not open to revision. A I R 1929 Rang 21=6 R 667=Ind Rul (1929) Rang 111=114 I C 543.

—Case referred to arbitration without party's consent and without permitting him to file objection can be set aside in revision for want of jurisdiction A I R 1929 Lah 171=Ind Rul (1929) Lah 312=114 I C 712.

—Order resuming proceedings is "case decided" under s. 115. A I R 1928 Oudh 355=5 O W N 603=3 Luck 650 (F B)=111 I C 161.

—The word "decided" in S. 622 of the old Code, is similar in its purport to the word "decided" in s. 115. A I R 1922 Cal 58=70 I C 484.

—An order under s. 10 of Act (XIV of 1920) asking defendant to deposit money in Court is a "case" and revision lies. A I R 1924 Lah 408=68 I C 658. The refusal to issue interrogatories for the examination of witnesses is not "a case decided" within the meaning of s. 115. A I R 1923 Lah 282=69 I C 417. An order requiring the plaintiff to pay certain damages on condition of getting an adjournment, with an order that the case will not be taken up unless the amount is paid is not a case and no revision lies from it 24 O C 215=64 I C 211.

—An order of the Court determining the question of jurisdiction is not a decision of a case. A I R 1921 Lah 184=45 P L R 1921=59 I C 680. An order setting aside an ex parte decree is a case and is not an interlocutory order during the pendency of the suit. A I R 1931 Ali 294=(1931) A L J 377=133 I C 129.

—Refusal to issue a commission is not case decided within the meaning of s. 115. A I R 1929 Ind 92=23 S L R 403=Ind Rul (1929) Sind 97=116 I C 97.

—Whether proceedings relating to the setting aside of an award in a suit is a case within the meaning of s. 115 is doubtful so that the order refusing to set aside the award can be revised. A I R 1929 Lah 688=Ind Rul (1929) Lah 913=11 Lah L J 275=119 I C 721.

—Decision of a preliminary issue as to territorial jurisdiction against the defendant by a formal order in that behalf is

## C. P. C. (1908) SEC. 115. (Contd)

## (10) "Case" meaning of (Contd)

not a case decided within the meaning of s. 115. A I R 1921 All 1 (F B)=43 A 564=19 A L J 558=63 I C 15

—An order superseding the reference to arbitration amounts to an order deciding a case and is open to revision as no appeal lies. A I R 1929 All 743=(1929) A L J 918=51 A 1010=Ind Rul (1930) All 285=122 I C 685. A matter disposed off completely amounts to a case decided by a court. A I R 1929 All 581=51 A 957=(1929) A L J 911=Ind Rul (1930) All 139=121 I C 267.

—A decision to proceed or not to proceed with a suit or an issue does not amount to a case decided within s. 115 C P C A I R 1929 All 957=(1930) A L J 235=Ind Rul (1930) All 81=121 I C 97.

—An order refusing to allow a partner to file a written statement to resist the claim in a suit against the firm, being not appealable, amounts to a case decided within s. 115. A I R 1930 All 70=(1930) A L J 1213=52 A 951=Ind Rul (1931) All 470=132 I C 33.

—The use of the word "cases" instead of suit in s. 115 indicates that the section contemplates legal proceedings which are not suits in the strict sense but which are governed by the provisions of the Civil procedure Code. A I R 1930 Cal 744=34 C W N 730=Ind Rul 1931 Cal 175=129 I C 367.

—"Record of the case" means record of the legal proceeding decided although it is only a legal proceeding in the suit. A I R 1930 Sind 265=24 S L R 277=Ind Rul (1930) Sind 283 (F B)=127 I C 673.

—The order of Court overruling the contention that according to the law governing the parties an oral will is not valid, and directing further evidence to be produced with respect to the oral will is not tantamount to the decision of a "case" under s. 115. A I R 1930 Lah 448=Ind Rul (1930) Lah 839=127 I C 215.

—"Case" is more comprehensive than "suit." Where as all cases are not suits, every suit is at least a case. Case in s. 115 is a case which has been decided. A I R 1930 All 758=(1930) A L J 901=52 A 927=Ind Rul (1930) All 753=126 I C 1.

—Where the original Court having no jurisdiction sends the suit to District Judge for transfer, and the District Judge passes an illegal order for transfer there is a case decided and revision lies. A I R 1930 Lah 195=31 P L R 302=Ind Rul (1930) Lah 606=125 I C 334.

—The word "case" in S 115, C P C includes not only original cases but also first appeal "cases." A L R 1933 R

## C. P. C. (1908) SEC. 115 (Contd)

## (10) "Case" meaning of (Contd)

202=A I R 1933 R 64=11 R 134=144 I C 163.

—An interlocutory order does not decide a case within the meaning of the section merely because it may decide a branch of part of a "case." 13 L 59 (68)=132 I C 850=A I R 1931 L 644.

—Finding on an interlocutory matter followed by an order is not a case decided within s. 115 C P C 33 B L R 1596=135 I C 815=1 R 1932 B 127=A I R 1932 B 81=AL R 1932 B 155 (159-60).

—Wider than a suit—Mesne profits—Claim under O 20 'r. 12 for—Maintainability of—Decision in favour of—Not a case decided. 9 O W N 339 The "word" case in s. 115 is more comprehensive than term "suit" and includes other proceedings. 13 L 59 (68)=A I R 1931 L 644=132 I C 850.

—An order setting aside an arbitration award does not amount to the decision of a "case" within the meaning of S. 115. 53 A 1006=136 I C 568=A I R 1932 A 452=1 R 1932 A 216.

—An order setting aside an arbitration award is not a case decided within the meaning of s. 115 C P C and, therefore, no revision lies from such an order. (1931) A L J 842.

—Order superseding award is a case decided and is open to revision. A I R 1931 All 721=Ind Rul(1931) All 656=133 I C 416.

—An interlocutory order allowing to continue litigation in the exercise of jurisdiction not vested in the Court by law amounts to a case decided within s. 115 C P C [15 N L R 21, followed; 43 All 564; 50 All 276; 5 Lah 288, not followed; 14 Cal 768; 28 M L J 349; 3 Pat 930; 1 Rang 231; 7 N L R 130, applied.] A I R 1931 Nag 17=Ind Rul (1931) Nag 49=27 N L R 251=130 I C 143.

—An order setting aside an ex parte decree is a case and is open to revision. A I R 1931 All 294=(1931) A L J 377=Ind Rul (1931) All 577=133 I C 129.

—An order passed on an application made under O. 1, R 10 amounts to a case decided within s 115, and is open to revision if exercised improperly and illegally. 15 O C 304=16 I C 592.

—Held, that no application for revision will lie against an interlocutory order, which does not determine the case but which is made with the object of collecting materials upon which the case is to be determined there after. The word 'case' as used in s. 115 of Act V of 1908, must ordinarily mean the whole case. But where there are independent proceedings arising out of a case, such

## C. P. C. (1908) SEC. 115 (Contd)

## (10) "Case" meaning of (Concl'd)

as a proceeding to restore a case dismissed in default or to set aside a decree ex parte for which the Legislature has provided an independent remedy or a different procedure, such proceeding may be a 'case' within the meaning of the section. 12 O C 405

—Suit dismissed for default—Matter of grace and merits of suit—Whether proper grounds for restoration—Revision—Whether competent after decision of suit restored A L R 1933 L 598.

—An order allowing amendment of plaint after case was closed amounts to no "case decided"—A L R 1933 A 91-55 A 169=A I R 1933 A 189=146 I C 491=1933 A L J 27.

—A decision of a question under s. 10, C P C does not come within the meaning of "case-decided," A L R 1933 A 693 (1)=2 A W R 583 (1).

—An order debaring a party from proving a part of his claim—Whether amounts to a final decision, of a case. A L R 1933 A 397 (398)=55 A 256=A I R 1933 A 374=145 I C 859=1933 A L J 268=1 R 6 A 177.

—Revision is competent if there is a danger of abuse of the Courts process even though no case is decided. A L R 1933 A 284 (285)=1933 A L J 513=144 I C 298=1 R 5 A 407=A I R 1933 A 284.

—In a suit against a firm, an appearance being made by one partner by putting in a statement, the other partners have got a right to appear at any stage and conduct the case. An order refusing permission to appear amounts to a case decided and so is open to revision. A L R 1933 A 761=A I R 1933 A 523=145 I C 812=2 A W R 288=1 R 6 A 166=1933 A L J 1264.

—Per Rupchand A J C (Per Aston A J C Contra) An order in appeal revising the dismissed suit and disposing of the appeal is not a case decided but is an interlocutory order giving no finality to the suit. A L R 1933 S 411=A I R 1933 S 279=27 S L R 341(F B).

—Order of a Full Bench of Presidency Small Cause Court refusing to grant a new trial on a question of fact—Case where the High Court interfered under S. 115 of C P C. 18 C L J 578= 22 I C 187.

## (11) Single Judge's decision.

—A single Judge reversing judgment of the Lower Court is not subordinate to the High Court. 43 Cal 90=33 I C 745.

—Decision of single Judge of Chief Court acting under s. 10 of Oudh Courts

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## C. P. C. (1908) SEC. 115 (Contd)

## (11) Single Judge's decision (Concl'd)

Act, not being subordinate to Chief Court, is not revisable. A I R 1927 Oudh 59=2 Luck 1=3 O W N 952=99 I C 547.

—Order made by a single judge under S. 25 Punjab Laws Act. 12 I C 867.

—No appeal lies under cl. 10 of the Letters Patent Appeal (Pat) from the judgment of a single Judge in revision. 10 Pat 428=12 P L T 599=Ind Rul (1931) Pat 388=133 I C 676.

—A judge of the High court sitting singly has no jurisdiction to deal under S. 115 C P C with an order made in a suit of the value of over Rs. 1000, although the order itself may concern a suit of less than Rs. 1000. A. L. R. 1934 Cal 4 (2)

## (12) "Jurisdiction" meaning of.

—Fresh objection regarding jurisdiction cannot be raised. A I R 1927 Cal 388= 45 C L J 218=101 I C 688.

—Fresh question of jurisdiction can not be raised. A I R 1927 Cal 381=45 C L J 229=102 I C 125.

—Exercise of jurisdiction in a proper manner bars revisional jurisdiction of the High Court. 19 A L J 47=2 U P L R (A) 403; 1 R 2 A 5=60 I C 899.

—Remanding a case under O. LXI, r. 23 instead of under O. LXI r. 25 does not create a point of jurisdiction as to justify a revision. 64 I C 436.

—Order of a Court deciding that it has jurisdiction to entertain a suit is not revisable. 59 I C 680.

—S. 115 applies to jurisdiction alone and High Court will not interfere in revision unless grave injustice will otherwise be the result. A I R 1931 All 72= (1931) A L J 13=134 I C 454.

—A purchase by the decree-holder's Pleader for himself may be attacked on principle and certain case avoided, but it is not an error of law or jurisdiction if the Court does not avoid it. A I R 1929 Mad 624=Ind Rul (1929) Mad 711=117 I C 727.

—Granting leave to amend the plaint is within the jurisdiction of the Court, and is not open to revision. A I R 1930 Lah 559=Ind Rul (1930) Lah 604=125 I C 329.

—Revision lies on a decision upon a preliminary issue relating to jurisdiction. A I R 1930 Mad 216=58 M L J 104=31 L W 819=Ind Rul (1930) Mad 305=122 I C 337.



C. P. C. (1908) SEC. 115 (Contd)

(12) "Jurisdiction" meaning of. (Contd)

—The conduct of parties does not estop the raising of the question of jurisdiction, and an objection as to jurisdiction can be taken in revision even though objection is taken in lower Court at a late stage in the proceedings, A I R 1930 All 873=(1930) A L J 997=52 A 947=132 I C 35.

—A decision on a question of limitation is not a question of jurisdiction, and on objection as to the frame of suit cannot be allowed for the first time in revision. 2 L W 609=30 I C 264.

—An order of judge to make a partition of the property excluded from the previous partition being set aside by the successor of the Judge having jurisdiction, is not revisable by the High Court A I R 1931 Cal 52=34 C W N 731=Ind Rul (1931) Cal 239=129 I C 623.

—Sub-Divisional officer exercising jurisdiction under Sonthal Parganas Act —Revision 19 C L J 292=23 I C 876.

—see also: 39 C 473=15 I C 547. and 15 I C 680.

—Jurisdiction—Error of law 17 C W N 501=18 I C 298.

—In a mortgage decree the Court can extend time fixed for payment of money. 18 M L T 495=31 I C 200.

—A Civil Court has got the power to review an order dismissing for default an application under O. 21 R 89. (1912) M W N 547=22 M L J 148=12 I C 351=10 M L T 569. Jurisdiction, meaning of 13 A L J 58=27 I C 629. and 41 Cal 323=23 I C 977. and 19 C W N 84=26 I C 275. Jurisdiction Contra see 14 I C 52.

—In execution of mortgage decree the Court has no jurisdiction to allow any claim to the property under O R 58 C P C which applies to cases of money devies only 18 I C 215.

—Refusing an application on the ground of limitation or wrongly allowing it when it is not within limitation is a ground for interference in revision because a question of limitation is virtually a question of jurisdiction 14 I C 711.

—Objection as to jurisdiction of the first court if can be taken in revision. 9 Bur L T 119=36 I C 464.

—Rent suits—Powers of District Judge—15 C 327. The consent of parties can not confer jurisdiction to revise the order of the lower Court. 9 C W N 956=2 C L J 384.

C. P. C. (1908) SEC. 115. (Contd)

(12) "Jurisdiction" meaning of (Contd)

—A question of Limitation is not a question of jurisdiction 3 Pat L J 478=46 I C 569.

—Jurisdiction of collector under S 18 of Land Acqn. Act 42 Mad 332=36 M L J 95=49 I C 659.

—The plea of want of jurisdiction must be substantiated by evidence on record or by an affidavit if no evidence is on the record. 1 U P L R (H. C) 18=52 I C 32.

—Jurisdiction within S. 115 means local, pecuniary or personal jurisdiction or one with reference to the subject matter of the suit. 41 Cal 323=23 I C 977.

—Objections to its own jurisdiction can be determined by the same Court. 10 C W N 84=20 C L J 213=26 I C 275.

—Order passed in exercise of jurisdiction under s. 476 Criminal procedure Code, by a Civil Court cannot be revised A I R 1926 Sind 215=20 S L R 90=27 Cr L J 780=95 I C 316.

—Where Legislature states that the decision of a particular Court shall be final such a decision is open to revision. A I R 1924 Mad 561=47 M 369=46 M L J 201=19 L W 402=34 M L T 50=(1924) M W N 272 (F B)=78 I C 98.

—An Appellate order declaring particular Court to have jurisdiction is not revisable, A I R 1929 Lah 83=108 I C 597.

—Decision of Court regarding jurisdiction can be agitated in revision, A I R 1927 Sind 239=104 I C 342.

—Power to decide is jurisdiction A wrong decision on admission of application that it does not lie is not refusal to exercise jurisdiction A I R 1927 Cal 928=46 C L J 182=31 C W N 818=103 I C 468.

—Holding the Court has jurisdiction is not generally open to revision A I R 1927 Pat 251=6 Pat 347=103 I C 459

—A judge of the High Court sitting singly has no jurisdiction to deal under S. 145 C P C with an order made in a suit of the value of over Rs. 1000, although the order itself may concern a suit of less than Rs 1000. A L R 1934 C 4 (2). Revision against a finding on a question of jurisdiction is not competent in an ordinary civil suit 138 I C 347=1932 A L J 478=16 R D 413=I R 1932 A 390=A I R 1932 A 415.

—The word 'Jurisdiction' in cl (3) of S. 115 is used in much wider sense than

## C. P. C. (1908) SEC. 115 (Contd)

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is generally attributed to it and means the authority or power which a Court has, to do justice to the case, it must not be restricted to pecuniary local or other Statutory limits of a forum 16 M L T 156=1914 M W N 614=26 I C 106. see also 2 L W I C 189.

— Order of a Court on the application of an erroneous view of a section of Civil P. C. in a case under O. XXI, r. 58 is without jurisdiction and is revisable. A I R 1926 Nag 257=92 I C 40

—An erroneous decision as to jurisdiction is open to revision. A I R 1922 Lah 100=4 Lah L J 176=29 P L R 1922 =65 I C 282

—The Court has jurisdiction to grant an application for restoration made by an heir of the deceased plaintiff without any sufficient cause. 14 I C 221.

## (13) Particular orders and Decisions.

## (1) Discretionary orders.

(a) General Principles :—Regarding plea to be after thought is no ground to refuse application for revision provided order under revision was wrong. A I R 1928 Mad 528=51 M 672=55 M L J 274=28 L W 297=110 I C 63.

—In the case of a mistake in law coupled with misunderstanding the nature of the judicial discretion—Revision lies. A I R 1922 Mad 332=14 L W 642=(1921) M W N 799=42 M L J =79 M L T 30 172 =45 M 194=69 I C 961.

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—Discretion of Appellate court. 20 I C 203.

—Order perverse and unjust. 6 P W R 1915=27 I C 589, see also 17 I C 223.

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## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and decisions (Contd)

## (1) Discretionary orders (Contd)

—Finding arrived independently of inadmissible documents is not vitiated. A I R 1926 Pat 29=90 I C 329.

—Improper exercise of discretion is not a ground for revision. 29 C L J 362 =51 I C 233.

—Discretion of Lower Court—Interference. (1915) M W N 22=26 I C 366.

(b) Particular Orders :—Though an order refusing amendment of the plaint is an order made in the exercise of discretion by the lower court and will not ordinarily be interfered with in revision, yet it is not that in no case can it be revised either under s 115 C. P. C. or under s. 107 Govt. of India Act or under both the latter two sections. Amendment ought to have been granted where an application for amendment was made before issues were settled and the trial begun. A L R 1934 Cal 104.

—A revision lies on an order granting mortgagee interest on mortgage money for the time during which sale proceeds of mortgage property are lying in Court. A I R 1929 Rang 127=Ind Rul (1929) Rang 256=118 I C 416.

—Restoration of suit for the sake of justice and not as a matter of grace is a judicial exercise of discretion. A I R 1930 Mad 268=58 M L J 137=31 L W 30 =1930 M W N 50=Ind Rul (1930) Mad 481 =123 I C 337.

—Security for the full amount of the decree under O. XXI, r. 29 being within the discretion of the Court, no revision will lie unless the discretion was improperly used. A I R 1929 Sind 110=Ind Rul (1929) Sind 101=116 I C 101.

—No revision lies against an order granting adjournment on condition that plaintiff paid certain damages and that the case was not to be taken up unless the amount was paid. A I 1921 Oudh 23=24 O C 215 =64 I C 211.

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## (13) Particular orders and decisions (Contd)

## (1) Discretionary orders. (Contd)

—An order requiring the plaintiffs to elect between themselves as to who should proceed with the suit, and to amend the plaint accordingly is revisable. A I R 1921 Nag 9=4 N L J 58=63 I C 419.

—No application for revision of an order of dismissal of a suit under s. 9 of the Specific Relief Act will lie. 63 I C 809.

—Death of one of the plaintiffs during suit—Appeal dismissed. On review decree of lower Court declared nullity. Order of Appellate Court is bad and open to revision. A I R 1927 Lah 435=8 Lah 617=29 P L R 81=101 I C 606

—Order granting extension of time if benefit of order has been already availed of, need not be set aside for legal point in upsetting order would be of use for further proceedings only. A I R 1927 Mad 598=52 M L J 597=101 I C 646.

—Breach of contract—Damages, Assessment of—Court—Discretion of High Court—Revision. 39 I C 121.

—Amendment of plaint—powers of court—Leave to amend. 26 P R 1917=40 I C 65.

—The High Court will interfere in revision only when a serious miscarriage of justice has taken place in the case of an order refusing to restore an application to set aside the dismissal of an appeal. 40 I C 336.

—A grant of a sale certificate to an auction-purchaser is not within the discretion of the Court under O. 21, R. 94 which is mandatory. 1 Pat L T 446=38 I C 576.

—An order rejecting an application for amendment after issues are already framed is within the discretion of the Court and is not open to revision. 16 I C 404.

—The High Court can interfere in revision with an erroneous exercise of discretion when an application to set aside an ex-parte decree was dismissed for default of the pleader due to accident. 15 A L J 24=38 I C 673.

—A wrong exercise of discretion in refusing to allow an amendment of a plaint on the ground that it would change the whole nature of the suit is not a ground for revision unless there is a

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and decisions (Contd)

## (1) Discretionary orders (Contd)

material irregularity. 22 M L J 136=10 M L T 549=(1911) 2 M W N 257=12 I C 173.

—The mere fact that the lower Court erroneously refused to allow amendment of a plaint is no ground for interference. 22 M L J 136=(1911) 2 M W N 257 =10 M L T 549=12 I C 173.

—Order returning plaint for amendment within a specified time—If open to revision. 11 I C 231.

—Order of dismissal caused by not considering provisions of Limitation Act is not open to revision, question of jurisdiction being absent. A I R 1927 Mad 660=26 L W 15=101 I C 514.

—Order that case should be tried under Sikh Gurdwara Act and not by itself is revisable. A I R 1927 Lah 394=28 P L R 698=8 Lah 362=101 I C 171.

—Order for sale without a prayer, Court not purporting to act under s. 151, can be revised. A I R 1924 Mad 911=20 L W 488=(1924) M W N 547.

—The Court can extend the time for payment fixed by compromise decree if in its discretion it thinks that time is not of the essence of the contract and such an order is not subject to revision. A I R 1924 Pat 387=2 Pat 906=(1924) Pat 122=5 P L T 401=82 I C 505.

—A Pleador's unpreparedness to argue affords no ground to dismiss the appeal as if there was no appearance; he is bound to proceed to decide on merits otherwise a revision can lie. A I R 1925 Nag 236=83 I C 257.

—Setting aside sale as being illegal under r. 90 without substantial injury owing to irregularity is revisable. A I R 1924 All 698=22 A L J 413=L R 5 A 769 Civ=83 I C 1028.

—Order refusing to refer under s. 18, Land Acquisition Act, to Civil Court is not revisable by High Court. A I R 1924 Mad 442 (F B)=47 M 357=46 M L J 209=19 L W 445=34 M L T 18=(1924) M W N 224=84 I C 616.

—Order disallowing caveat to oppose grant of probate—Revisable. 19 C W N 1169=21 C L J 292=25 I C 578.

—Pre-emption decree—Extension of time for making deposit—Jurisdiction of Court. 20 C W N 860=34 I C 88.

—Order of a Civil Court—Revision. 1 Cr L R 232=40 Cal 477=17 C L J 245=14 Cr L J 197=17 C W N 647=19 I C 197.



C. P. C. 1908 SEC. 115 (Contd)

(13) Particular orders and decisions (Contd)

(1) Discretionary orders (Contd)

—Conditional order of adjournment cannot be interfered in revision. A I R 1924 Pat 529=1 Pat L R Civ 270=84 I C 1013.

—A Court cannot consolidate Civil Revision Petitions in cases disposed of by a single judgment of the lower Court so as to enable the party to file one vakalatnama in the petitions and pay one process fee for the common respondent A I R 1930 Mad 381=53 M 261=58 M L J 521=31 L W 294=Ind Rul (1930) Mad 542=123 I C 606.

—Dismissing a suit which is decreed and in which a date for further proceedings is fixed under the directions of the Appellate Court, is a wrong exercise of direction and a revision will lie over it. A I R 1930 Mad 158=Ind Rul (1930) Mad 717=30 L W 979=53 M 395=57 M L J 781=124 I C 605.

—The High Court should not interfere in revision with a discretionary order under s. 43 of the Provincial Insolvency Act granting extension of time for applying for discharge. A I R 1931 Mad 10=32 L W 446=59 M L J 710=(1930) M W N 673=Ind Rul (1931) Mad 180=129 I C 36.

—The order of the Court rejecting an application for restoration of suit dismissed under O. IX, r. 2 and 3 is not open to revision. A I R 1930 Lah 440=Ind Rul (1931) Lah 227=129 I C 755.

—Sale in execution of mortgage decree unnecessary attachment before sale  
—Effect—Court entertaining a claim when it ought not to—Revision. 23 P W R 1918=58 P R 1918=113 P L R 1918=44 I C 986.

—Small Cause Court assuming facts without evidence—Refusal to consider pleas of defendants—if ground for revision. 146 P L R 1914=54 P W R 1914=25 I C 26.

—Order allowing amendment of plaint in a suit by co-mortgagee against mortgagor and other mortgagees—Misjoinder. 12 I C 357.

—Adjournment to amend plaint omission to do so application for further time—Dismissal of suit—legality—Revision against. 4 Pat L J 277=51 I C 189.

—A refusal to grant an adjournment cannot be interfered with in revision because it is in the discretion of the court. 8 S L R 275=27 I C 942.

—Declining to entertain objections of the defendant in an application for

C. P. C. (1908) SEC. 115 (Contd)

(13) Particular orders and Decisions (Contd)

(1) Discretionary orders (Contd)

making the decree in a mortgage suit absolute, is not open to revision. 5 Pat L J 342.

—Extension of time—Power of Court  
—Limits of—Indiscriminate extension of time—Revision. 4 Pat L J 428=52 I C 439.

—Receiver removal of on insufficient ground—Revision. (1616) 1 M W N 10=31 I C 908.

—Pleader present but unable to argue case owing to physical disability—Dismissal of a suit for default—Revision. 9 Ind Cas 857.

—When Chief Court will interfere on—Order allowing claimants the share of their missing brother. 17 P W R 1911=9 Ind Cas 744.

—Amendment of pleadings and issues—Discretion—Revision 9 Ind Cas 267 = 51 P L R 1911

—A wrong decision of the lower appellate Court that a party's remedy is by an application and not by a separate suit is revisable A I R 1929 Nag 388

—Order refusing to restore a case dismissed for default is revisable. A I R 1926 Nag 409 = 9 N L J 145=95 I C 260

—Order setting aside an ex parte decree passed plaintiff's on accepting costs  
—Order will not be interfered with in revision A I R 1926 Lah 637 = 96 I C 782

—Order refusing to confirm the sale if not revisable — Order of refusal to confirm a sale without application under rr 89, 90 or 91 is revisable A I R 1927 Lah 71 = 98 I C 866

—Order refusing extension of time under s. 5 of the Limitation Act under error of law —Revision does not lie A I R 1927 Lah 43 = 98 I C 892.

—An order of refusal by a Civil Court to lodge a complaint being confirmed by the Appellate Court is not open to revision A I R 1927 Oudh 14 = 3 O W N 905 = 28 Cr L J 16 = 7 A I Cr R 47 and 240=99 I C 48.

—Refusing to admit application for wrong reasons is open to revision A I R 1927 Lah 134 = 99 I C 690

—Revision lies against order reducing interest without discretion A I R 1927 Lah 798 = 100 I C 75

—An appellate order admitting a complaint refused by the trial is revisable A I R 1927 All 334 = 28 Cr L J 296 = 25 A L J 569 = 49 A 536 = 100 I C 376

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (1) Discretionary orders (Contd)

—Appellate Court's order striking out rellet as not tenable is decision and order not being necessary in the ends of justice can be interfered in revision A I R Oudh 604=86 I. C. 703

—Allowing amendment of plaint to include consequential relief is no ground for interference. A I R 1925 Rang 199=4 Bur L J I=86 I. C. 509

—Revision will lie if a court rejects an appeal with an application for correction of a clerical error in the description of a property. Where security has been filed, A I R 1925 Oudh 402 = 12 O L J 83 = 86 I C 752

—Order of extending time under s 149 Civil P C is not revisable A I R 1926 Nag 156 = 89 I C 419

—Erroneous order of returning plaint where suit ought to be dismissed is ground for revision A I R 1926 All 58=48 A 168 = 24 A L J 83 = 90 I C 353

—Appellate order confirming return of plaint for want of jurisdiction is open to revision A I R 1929 Oudh 91 = 5 O W N 1117 = 4 Luck 347 = Ind Rul 1929 Oudh 155 = 114 I C 507

—Order refusing to correct arithmetical error is subject to revision, A I R 1930 Mad 421 = Ind Rul (1929) Mad 315=114 I C 635

—Proceedings in appeal transferred to Subordinate Judge under s 476 B Criminal Procedure Code can be in revision declared nullity A I R 1928 Oudh 494 = 5 O W N 882=4 Luck 155 = 30 Cr L J 382 = Ind Rul 1929 Oudh 204=114 I C 812.

—Rejection of evidence as inadmissible is no ground of revision A I R 1927 Bom 664 = 29 Bom L R 304=101 I C 385.

—Dismissal of suit for Pleadings default is not open to revision A I R 1927 Lah 791=28 P L R 204=9 Lah L J 80=104 I C 444.

—An order refusing to make reference under s. 18 Land Acquisition Act is not open to revision by the High Court. A I R 1923 Bom 290=47 B 699=25 Bom L R 398=73 I C 354.

—Refusal to make a reference—Revision does not lie A I R 1923 Bom 290=47 B 699=25 Bom L R 398=73 I C 354.

—An order disallowing an objection of a third party to the attachment of a house in execution of a decree was not revised because the court found possession in the judgment debtor and

## C. P. C. (1908) Section 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (1) Discretionary orders (Contd)

doubted the bona fide of sale A I R 1923 Oudh 208=10 O L J 139= 74 I C 546.

—Decision of a Court under O. XXI r 89 regarding locus standi of a judgment debtor to apply for setting aside the sale cannot be revised A I R 1923 All 392=21 A L J 313=45 A 425=L R 4 A 402 (F B) 74 I C 778.

—Where there is no direction as to mesne profits in the preliminary decree an order of the Court directing Commissioner to ascertain mesne profits before final decree cannot be revised A I R 1923 Mad 43 = 16 L W 312=1922 M W N 562=31 M L T 180=7 4 I C 812.

—An order permitting the additional evidence under O 41 r 27 being a discretionary order revision is not allowed against it. 137 I C 513 (1)= 33 P L R 330 = I R 1932 L 345.

—The High Court in revision under S. 115 C P Code cannot interfere with the discretion of a Subordinate Court as to whether it should or should not review its judgment. 40 I C 463.

—Revision does not lie against an order refusing to restore a suit dismissed for default even though application for restoration was also dismissed A I R 1922 Lah 290=3 Lah 79=77 I C 336.

—Where on an application to set aside a dismissal for default, the lower Court disbelieves the plaintiff's story and dismisses the application, there is no scope for revision. A I R 1922 Lah 290 (1)=3 Lah 79=77 I C 336.

—A revision lies against an order of an Appellate Court rejecting a suit on the erroneous ground of its not being maintainable. A I R 1925 Lah 174=78 I C 445.

—An order for transfer of a case is revisable. A I R 1925 Lah 189= 78 I C 614.

—An order for transfer made without notice to the other party can be set aside in revision. A I R 1925 Lah 189=78 I C 614.

—An order of a Court improperly refusing to permit a plaintiff to amend his plaint can be revised. A I R 1923 Mad 188=30 I C 278.

—Refusal of a Court to try the plea of res-judicata as a preliminary issue cannot be revised. A I R 1925 Oudh 179=80 I C 628.

—Revision lies against an order refusing to frame a necessary issue arising

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (1) Discretionary orders (Contd)

from pleadings without assigning any reason for so doing A I R 1923 Pat 518=4 P L T 401=1 Pat L R 89=72 I C 146.

—Revision will lie against an order of Appellate Court taking different view as to burden of proof without giving the party on whom it places the burden, opportunity to produce evidence. A I R 1923 Pat 295=4 P L T 245=(1923) Pat 269=72 I C 157.

—An order dismissing an execution because the judgment-decree-holder failed to obey the order to take steps for execution at once because the judgment-debtor failed to furnish security as ordered, was set aside in revision. A I R 1926 Cal 1017= 92 I C 298.

—Order granting application made to set aside abatement is order that suit has not abated and is not meant to give or take away the right to continue suit and is therefore subject to revision. A I R 1928 Mad 914=51 M 701=28 L W 164=(1928) M W N 434=55 M L J 253 (F B)=112 I C 116.

—Order refusing Pleader to appear made at opposite party's instance is open to revision. A I R 1928 Mad 592=110 I C 544.

—Order extending time for specific performance in wrongful exercise of discretion is alone open to revision. A I R 1927 Rang 311=5 R 615=6 Bur L J 216=105 I C 467.

—Order of restoration of suit dismissed for default not being interlocutory order is subject to revision. 107 I C 395.

—Revision against an order dismissing an application in mortgage decree under O. 38, r. 5 as premature—is not Competent A L R 1934 A 62=1933 A L J 1269=2 A W R 978.

—An arbitary discretion exercised in awarding costs by the lower court is open to revision. A L R 1933 A 515 (516)=A I R 1933=A 311=I R 5 A 361=144 I C 76.

—Order on application for payment of pre-emption money on appeal—Revision. 28 I C 379.

—A Revision Petition lies under S 115, C P Code against an order setting aside an ex parte decree. 16 M L T 101=1 L W 537=25 I C 191.

—The High Court will not interfere in revision with an order, though erroneous, refusing to amend a plaint at a late stage of the case. 1 L W 230=24 I C 779.

—An order of a Subordinate Court refusing to excuse delay in

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (1) Discretionary orders (Contd)

presenting an appeal is not open to revision, though the appeal was as a matter of fact presented in time. C 872. 241

—Order under O 21 R 60 without determining the question of possession —Revision. 24 I C 62.

—Order that application could be filed being no order at all can be revised. A I R 1928 Mad 215=51 M 244=27 L W 320=(1927) M W N 884=54 M L J 154 =106 I C 660.

—Dismissal of petition for revision does not bar fresh application. A I R 1928 Lah 550=110 I C 833.

—Extension of time for payment after decree for same is against s. 63 (3) Bengal Tenancy Act can be set aside in revision only. A I R 1929 Cal 140=112 I C 124.

—Amendment or alteration of issues made before passing of decree being discretionary cannot be made ground of revision (1928) M W N 836=113 I C 313.

—No revision lies from an order of remand by a lower Appellate Court. A I R 1923 Bom 401=25 Bom L R 452=75 I C 102.

—An executing court entertained an application for execution even though time barred but the Appellate Court dismissed it. It was held, that there was neither an appeal nor revision from the order (46 C L J 172, followed) A I R 1931 Cal 425=35 C W N 31=Ind Rul (1931) Cal 449=131 I C 561.

—Revisional powers are confined to matters of jurisdiction—Orders passed in discretionary matters, e. g. referring to appoint a person as a muttawalli as being not a desirable person cannot be revised. A I R 1931 Oudh 408=8 O W N 999.

—Service by affixture—Declaration of service proper—Interference by High Courts. 26 M L J 368=15 M L T 217=23 I C 14.

—Where an issue as to want of jurisdiction was raised by the Court at a late stage of a case the order returning the plaint in consequence of the decision on the issue is liable to be set aside in revision. Ind Rul (1931) Lah 431=32 P L R 737=131 I C 303 (2).

—An order based upon acceptance or rejection of any piece of evidence is not revisable A I R 1924 Pat 816=76 I C 60.

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions. (Contd)

## (1) Discretionary orders. (Contd)

—Order of the District Judge to his sub-ordinate to return the warrant of attachment is no judicial order and therefore no revision lies A L R 1933 A 53=2 A W R 174.

—Erroneous order allowing rateable distribution—Interference by High Court. 21 C L J 614=30 I C 38.

—It is the duty of the Court, to direct resale of the property on the death of the highest bidder. Declaration of next bidder as purchaser—Revision. 51 I C 805.

—Receiver Liability to account order directing submission of accounts Appeal —Revision—Interference. 5 P L J 97=(1920) P 121=55 I C 15.

—Probate—application for—by a stranger—Opposition by grandfather's daughter's son's Son—Order that caveator has locus Stand—Appeal—Revision. 24 C W N 316=31 C L J 81=56 I C 122.

—Suit by widow question—Will of husband with an application for interim maintenance—Order granting on the basis of what will gave cannot be revised A I R 1922 Pat 38.

—No revision lies from the decision on a preliminary issue, regarding the jurisdiction of the trying Court to entertain the suit A I R 1921 Oudh 176=24 O C 231=64 I C 92.

—A suit on a contract relating to badni-transaction was compromised by an unlawful agreement, but the court refused to pass a decree. Held that no revision was competent. 104 P R 1830.

—The High Court will not interfere under S 115 C P Code with an order awarding proper costs of adjournment. 57 I C 506.

—Order of refusal to appoint delay can be no ground of revision A I R 1927 Nag 253=10 I C 622.

—Incorrect decision regarding question of limitation is not revisable. A I R 1927 Nag 389=103 I C 113.

—Order on election application, if absolutely unjust is open to revision A I R 1927 Mad 935=103 I C 821.

—Order for written statement is specific Order requiring written pleas to be filed is discretionary and decree passed in default of which is open to revision. A I R 1927 Mad 1007=53 M L J 504=39 M L T 273=105 I C 288.

—An order setting aside an order rejecting an appeal for failure of the appellant to give security for costs, not

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (1) Discretionary orders (Concl'd)

open to revision when it is made in the interests of justice. 18 A L J 838=2 U P L R (All) 283=42 A 626=60 I C 81.

—Orders disallowing or allowing claims to rateable distribution are not revisable except in very exceptional circumstances. 60 I C 371 (Lah).

—Setting aside in appeal an order of the lower court without discussing points arising in the case is open to revision. A I R 1925 Cal 515=78 I C 149.

—An application under s. 195 of the Cr. P Code being dismissed for default, was restored again. The restoration can not be revised as its effect will be to perpetuate, a wrong order. 15 Cr. L J 71=22 I C 423.

—An order allowing a party to produce fresh evidence on an issue after closing the case was held as not open to revision. 17 P W R 1921=59 I C 450.

—An order refusing to amend a plaint can be set aside in revision. A I R 1922 Lah 394.

—An order directing that a plaint should be amended as being bad for misjoinder is revisable. 4 N L J 58=63 I C 419.

—Order refusing leave to amend pleadings—Practice. 34 All 348=14 I C 507.

—An order refusing to set aside an order of dismissal of a suit for default without considering the existence of sufficient cause for non-appearance of the plaintiff is open to revision. A I R 1923 Mad 177=(1922) M W N 822=16 L W 837=70 I C 38.

—An order refusing to restore a suit dismissed for default merely on the ground that it would fail on merits is revisable under s. 115. A I R 1923 Mad 177=16 L W 837=(1922) M W N 822=70 I C 38.

—Declining to entertain objection of defendant, before passing a decree absolute under O. XXXIV, r. 5 (2) does not call for a revision. 5 P L J 342. In the case of a dismissal of suit—Interference by High Court—Discretion. 33 M L J 509=6 M L W 742=43 I C 217.

## (2) Interlocutory orders

(a) General:—An order rejecting an application under O. I, r. 10. on the ground that it was made too late cannot be revised. 64 I C 563.

—High Court will interfere with an interlocutory order only when it is perverse or will result in irreparable injury to



C. P. C. (1908) SEC. 115 (Contd)

(13) Particular orders and Decisions (Contd)

(2) Interlocutory orders (Contd)

party A I R 1927 Mad 524=(1927) M W N 218.

—High Court will interfere in revision with an interlocutory order only in exceptional circumstances. A I R 1921 Lah 213=17 P L R 1922=64 I C 387.

—Revision lies in the case of interlocutory orders where otherwise, where other irremediable damage would result to the parties. A I R 1922 Lah 100=4 Lah L J 176=29 P L R 1922=65 I C 282.

—Putting the plaintiff to election regarding two causes of action joined in his plaint can be revised. A I R 1922 Mad 436=16 L W 173=(1922) M W N 453 =43 M L J 218=69 I C 966.

—Even when the order is not of an interlocutory nature the High Court should not interfere except in cases where the order is not a final order such as one under O. XLI, r 25. 67 I C 269.

—A revision lies where the lower Court has wrongly held a suit as bad for misjoinder of causes of action and directed the plaintiff to elect which cause of action he would proceed with in the suit. A I R 1922 Mad 436=43 M L J 319=(1922) M W N 453=16 L W 175=69 I C 966.

—The High Court has the power in revision to interfere with an interlocutory order only in extreme cases. A I R 1922 Mad 321=15 L W 667=(1922) M W N 521=68 I C 167.

—The Chief Court on revision would not interfere with an interlocutory order, where the Court passing it had jurisdiction to do so. 8 P L R 1902=31 P R 1902.

—Interlocutory order—Revision See 10 M L T 451=22 M L J 60=12 I C 719. and 9 M L T 273=21 M L J 484=9 Ind Cas 572, 15 C W N 682=10 I C 308. and 7 Ind Cas 436=12 C L J 525. and 1911-2 M W N 369=9 I C 672.

—An interlocutory order directing the issue of a warrant of attachment against the properties of witnesses, is not open to revision under S. 115 C P Code. 42 I C 42.

—Interlocutory orders will not be interfered with in revision, unless for the most cogent reasons and in order to prevent otherwise irremediable injury. 43 I C 684.

—An interlocutory order granting leave to sue is not revisable. 35 I C 74.

—Interlocutory orders cannot or, at any rate should not be interfered with in revision as a matter of course. 149 P W R 1916=35 I C 608=8 P L R 1917.

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C. P. C. (1908) SEC. 115 (Contd)

(13) Particular orders and Decisions (Contd)

(2) Interlocutory orders (Contd)

—The refusal to frame an additional issue being an interlocutory order is not open to revision ordinarily unless substantial injury would be caused to the party. 29 I C 876.

—Where the interlocutory order may cause a failure of justice or irreparable injury, the High Court can and will interfere. A I R 1925 Cal 204=40 C L J 191=28 C W N 991=82 I C 1008.

—An interlocutory order cannot constitute a "case" within the meaning of s. 44, Punjab Courts Act and Civil procedure Code's s. 115. A I R 1924 Lah 425

=5 L 288=6 Lah L J 558=84 I C 259.

—High Court will not interfere in revision with interlocutory orders except in special circumstances. A I R 1929 Cal 831=Ind Rul (1930) Cal 496=125 I C 112.

—An Interlocutory order is ordinarily not open to revision. 164 P W R 1911.

—An interlocutory order passed by a court without jurisdiction and likely to cause irreparable injury to a party may be revisable. 15 C W N 87=12 C L J 505=38 Cal 230=8 I C 107.

—The Chief Court will not interfere with an interlocutory order in the absence of special circumstance requiring such interference. 10 P L R 1915=27 I C 640.

—An interlocutory order should not be interfered with in revision save in exceptional circumstances where irreparable loss would otherwise occur. 20 P W R 1919=49 I C 470.

—It has been the established practice in the Calcutta High Court to interfere with interlocutory orders and that practice has been adopted by the Patna High Court. 4 Pat L J 195=50 I C 470.

—An interlocutory order causing irreparable damage is open to revision. 50 I C 797.

—Interlocutory orders—Revision from—Whether admissible, 9 I C 672=9 M L T 273=21 M L J 484.

—The High Court has power to interfere in revision with an interlocutory order in order to save time and litigation. 2 Lah L J 555.

—Interlocutory order—Whether can be attacked in appeal. 1 L W 232=24 I C 781.

—Jurisdiction—Interlocutory order—Interference. 58 P L R 1918=46 I C 554.

—An interlocutory order can be revised only in exceptional cases still however if waste of time money and



## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (2) Interlocutory orders (Contd)

trouble involved by the reopening of the proceedings could not be repaired, then it should be interfered with in revision. 77 P R 1919=52 I C 859.

—Interlocutory orders passed by a court in a pending suit are not open to revision and the record of the case cannot be called for by the High Court so long as the suit is pending. 22 Bom L R 801=57 I C 556.

—Interlocutory order provided it involves principle or question of jurisdiction is open to revision. A I R 1928 Nag 131 =106 I C 57.

—Interlocutory order is not subject to appeal. A I R 1928 All 97=50 A 276 =25 A L J 991=108 I C 735.

—Madras High Court can revise interlocutory orders or proceeding. A I R 1929 Mad 121=113 I C 646.

—Interlocutory orders cannot be revised unless some irreparable injury is caused to any party thereby. A I R 1923 Pat 411=73 I C 71.

—No revision lies against interlocutory orders. A I R 1923 Lah 301=75 I C 107.

—The Court will interfere in revision with an interlocutory order, only in such cases as where the Court below has acted perversely or in a manner as to cause irreparable loss to plaintiffs. A I R 1923 Mad 690=45 M L J 703=18 L W 198=9923) M W N=403=76 I C 207.

—It is not usual to interfere in revision in the case of interlocutory order. A I R 1925 Nag 62=79 I C 911.

—Interlocutory order passed without jurisdiction and lacking in the legal sanction are open to revision. Ind Rul (1931) Lah 886=134 I C 118.

—An order directing a defendant to sign pleas and verify them according to law is not open to revision unless it is coupled with an order that he should also pay certain sum as costs, 64 I C 207.

—An order allowing an amendment of a plaint without in justice to the defendant is not revisable. A I R 1922, Mad 321=15 L W 667=(1922) M W N 521=68 I C 167.

—In the case of interlocutory orders an obvious error in the record of a case and saving unnecessary expenses and undue delay are the considerations for interference in revision. (1918) Pat 223=4 Pat L W 281=44 I C 891.

—An interlocutory order is open to revision if it is arbitrary and unjustified. An order requiring the defendant decree holder in a suit under O. 21 R. 63 to

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions. (Contd)

## (2) Interlocutory orders (Contd)

deposit decretal amount is an arbitrary and unjustified order. 18 A L J 486=58 I C 729.

—The High Court can interfere in revision with an interlocutory order if otherwise it will cause irremediable injury to a party or if it is passed without jurisdiction. 55 I C 739.

—Interlocutory orders are open to attack in an appeal from final orders under s. 105 and therefore, not revisable. 24 O C 215=64 I C 211.

—In an appealable case an interlocutory order passed by a court can be made a ground of objection in an appeal from the final decree and therefore is not revisable. 41 I C 942.

—It is not the practice of High Courts to allow revision of interlocutory orders which can be questioned in appeal and revision will lie in such cases only when great inconvenience or injustice would otherwise result. A I R 1930 Nag 51=Ind Rul (1930) Nag 128=121 I C 672.

—An interlocutory order being a preliminary order cannot be interfered with in revision. 13 I C 800.

—Ordinarily, no revision lies to the Chief Court from an interlocutory order, where the final decree to be passed by the Court of First Instance would be appealable. 76 P L R 1916=36 I C 57.

—An interlocutory order is not open to revision when final order is appealable. 169 P W R 1911.

—Interlocutory orders are not revisable unless they dermine the case. 5 O L J 430=47 I C 676.

—(b) Appealable Orders:—Revision lies against an improper order of remand. A I R 1933 Mad 113=30 M L T 314=16 L W 593=70 I C 665.

—An interlocutory order deciding a preliminary issue in a suit is not revisable being open to appeals. 56 I C 248.

—An order returning a plaint for presentation to a proper court is revisable when it was the duty of the Appellate Court to transfer the case to a court having jurisdiction. A I R 1929 Lah 107=Ind Rul (1929) Lah 793=118 I C 537.

—An order of an Appellate Court reversing an order of the lower Court returning a plaint for presentation to the proper Court is open to revision. 7 P W R 1921=59 I C 2.

—Revision will lie from an order of the trial court returning a plaint for proper presentation if that order

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (2) Interlocutory orders (Contd)

is confirmed in appeal but not so when it is reversed by the appellate Court. Where a suit was dismissed by the trial Court for want of jurisdiction and the lower Appellate Court remanded the case for action under O VII r. 10 Remand and order is revisable. A I R 1923 Lah 524= 73 I C 755.

—An order returning a plaint for proper presentation is open to revision. A I R 1930 Lah 611=Ind Rul (1930) Lah 360=122 I C 488.

—An order of remand cannot be revised. A I R 1923 All 464=76 I C 525.

—High Court's power to interfere in, with order of restoration, 17 M L J 225=30 M 274.

—Revision does not lie against an order of an Appellate Court returning a plaint. A I R 1925 Oudh 70=79 I C 1024.

—Ordinarily no revision lies against an appellate order upholding an order of the trial Court returning plaint for want of jurisdiction. A I R 1924 Lah 349=71 I C 38.

—(c) Non-appealable Orders:—Interlocutory order against which no appeal can lie but the correctness of which can be challenged in an appeal against the final decree in the suit cannot be revised. A I R 1925 Nag 108=80 I C 375.

—Interlocutory orders which are not appealable but which can be made a ground of objection in appeal against the final decree are not revisable. 38 I C 206.

—If an Interlocutory order being not appealable can be made a ground of objection in an appeal against the final decree, it is not open to revision. 10 A L J 130=24 A 592=16 I C 1.

—If an interlocutory order is not appealable and if it is likely to cause irreparable loss to a party, it will be revised. A I R 1924 Pat 673=5 P L T 425=(1924) Pat 254=3 Pat 930=80 I C 667.

—Interlocutory order deciding practically the suit and making it incapable as a ground of appeal—High Court can interfere in revision. A I R 1925 Sind 260=92 I C 1019.

—Order setting aside order directing return of plaint for presentation to proper court. 18 I C 529.

—The High Court can interfere with order on interlocutory applications by way of setting it aside when no appeal lies directly from the order and sufficient grounds exist peremptorily calling for its interference even though the substance of the order may be one that could be

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions. (Contd)

## (2) Interlocutory orders (Contd)

brought up on appeal from the final decree in the suit. A I R 1921 L B 6=11 L B R 65=64 I C 821.

—Where the District Judge entertained an appeal from an interlocutory order, he exercised a jurisdiction not vested in him by law and therefore his order is bad, but the High Court is not bound to interfere on the revision side even when there is a defect of jurisdiction unless failure of justice has directly resulted from such a defect. 2 L L J 673.

—(d) Miscellaneous:—The High Court will interfere with an interlocutory order directing the trial of certain issues in a case before trying others. 2 P L T 154=60 I C 528.

—An order of a Subordinate Judge allowing a plaintiff to put in an application conditional on the payment of a certain amount of costs is not revisable. 24 O C 215=64 I C 211.

—In a suit for accounts an order appointing Commissioner to take account is not revisable unless it is proved that the Judge had given improper directions in his interlocutory order as to the mode of taking accounts to the Commissioner which unless varied or set aside would result in irreparable loss to the parties. A I R 1922 Pat 598=3 P L T 633.

—Order rejecting application to allow further evidence, without exercising judicial discretion can be set aside in revision. A I R 1924 Rang 318=3 Bur L J 125.

—The High Court can interfere with an order passed under O 9 R. 13 of the C P Code refusing to extend the time for payment of costs as a preliminary to the setting aside of the ex-parte decree and it is not necessary for the aggrieved party to wait until a former order is passed dismissing his original petition and then appeal against it. (1917) M W N 870=42 I C 961=23 M L T 7.

—Interlocutory order—Revision if lies doubtful—Order directing production of evidence to ascertain if compromise of suit under S. 92 C P C is lawful. 16 I C 3.

—Interlocutory order—Interference by High Court—Order passed under O 41 R 25 C P C nature of. See 2 Lah L J 662.

—High Court will not interfere with order of interlocutory nature unless for some special reasons. A I R 1926 Mad 1047. (F B)=51 M L J 500=24 L W 416=97 I C 921.

## C. P. C. (1908) SEC. 115 (Contd.)

## (13) Particular orders and Decisions (Contd.)

## (2) Interlocutory orders (Contd.)

—Order refusing a just prayer for amendment of plaint based on a mortgage-bond executed for the balance of the running accounts by the insertion of an alternative prayer for relief on the footing of the accounts—Order is liable to be set aside in revision. A I R (1926) Mad 1124 =24 L W 400=(1927) M W N 256-97 I C 936.

—Interlocutory order deciding a question as to place of trial can be interfered in revision. A I R 1925 Lah 72-86 I C 395.

—No revision lies against order under O VII r 11 C P Code, even if wrong. A I R 1925 Cal 814-29 C W N 627-86 I C 853.

—Order for security for costs in such not for money is revisable. A I R 1925 Rang 300-3 Rang 211-89 I C 620.

—Interlocutory orders of deciding case on preliminary issue or admission of evidence are not revisable. A I R 1926 Oudh 185-89 I C 772.

—Order refusing to extend time to pay costs rightly ordered to be paid before restoration of suit cannot be interfered in revision. A I R 1926 All 142-48 A 199-24 A L J 120=L R 6 A 586 Civ-90 I C 243.

—Order of returning appeal for proper presentation cannot be interfered in revision. A I R 1925 Pat 488=(1925) Pat 167-6 P L T 448-90 I C 321.

—Appellate Court deciding erroneously the lower Court's jurisdiction to hear a suit—Order is not revisable. A I R 1926 Lah 47-26 P L R 746-90 I C 1042.

—Order of insufficiency of security furnished is not revisable. A I R 1926 Oudh 160-90 I C 1051.

—Illiterate voter writing name of candidate instead of marking a cross as required by rules—Lower Court holding the rule, not to strictly apply to illiterate voters—Rule was held mandatory and order was held revisable. A I R 1925 Mad 1173-22 L W 14-90 I C 1055.

—An order for adjournment conditional on payment of a certain sum as costs thereof is an interlocutory order and no revision lies under S. 115 of the C. P. Code 12 A L J 460-75 I C 107.

—An order of remand is not an interlocutory order for purposes of revision. A I R 1923 Oudh 177-26 O C 10-10 O L J 36-73-1 C 591.

—Order under O. XXIII, r. 1 is not revisable even though admittedly wrong where Court has applied its mind to question of sufficiency of cause. A I R 1924 All 121-74 I C 112.

## C. P. C. (1908) SEC. 115 (Contd.)

## (13) Particular orders and Decisions (Contd.)

## (2) Interlocutory Orders (Concl'd)

—Order under s. 73, is not ordinarily revisable. 74 I C 140.

—An incidental order fixing the remuneration of a Commissioner appointed to examine accounts cannot be revised. A I R 1924 Oudh 348-76 I C 503.

—An order refusing to allow amendment of a plaint can be revised. A I R 1925 Nag 195-78 I C 510.

—An interlocutory order made with the object of collecting materials upon which the case is to be determined thereafter is not revisable. A I R 1925 Oudh 189-11 O L J 692-28 O C 78-80 I C 612.

—Application against appellate order sought to be revised can be regarded as application against order of trial Court. A I R 1927 Mad 687-38 M L T 358-26 L W 899-102 I C 700.

—An order under s. 476, Criminal Procedure Code, directing the trial of a person under s. 193 Indian Penal Code, is open to revision. A I R 1922 All 438-23 Cr L J 291-66 I C 515.

—An order setting aside an ex parte decree is not like a finding of the Court in a pending suit that it has jurisdiction to try the suit. A I R 1931 All 294=(1931) A L J 377-133 I C 129.

—An order by a Civil Court, enforcing on application the order made by a liquidator under s. 47 (2) (b) cannot be revised. A I R 1929 Rang 113-Ind Rul (1929) Rang 243-118 I C 403.

—Revision against an order dismissing application in mortgage decree under O. 38 r. 5 as premature, is not competent. A L R 1934 All 62.

—Order of the District Judge refusing the application for allowance of minor can be set aside by the High Court in revision under S. 115 C. P. Code. 41 I C 240.

—Interlocutory order directing certain issues to be tried first without taking evidence—Revision. See 20 C L J 426-26 I C 954.

## (3) Orders amending Decrees or orders.

—Where the interests of justice requires the amendment which was refused the High Court may interfere in revision. 67 I C 335.

—Power to set aside order refusing application for leave to amend—Revision. 26 P R 1917-40 I C 65.

—An amendment of an execution application should not be granted if it would deprive the opposite party of the plea of limitation. 32 I C 45.

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (3) Orders amending Decrees or orders (Contd)

—A decree not in variance with judgment cannot be amended. 25 P W R 1913=47 P R 1913=17 I C 418.

—Amendment in revision. 15 M L T 98=38 M 775=22 I C 193.

—Amendment—Lower Court—Interference—High Court. 10 M L T 188=12 I C 104.

—Refusing amendment of decree under s. 151, C P C, on ground of laches is not to be interfered in revision. A I R 1915 All 1=47 A 44= L R 5 A 733 Civ =82 I C 1030.

—A decree cannot be amended under s. 152 C P C, in a mortgage suit in which the judgment contained two contradictory directions as regards decree, and decree was passed in accordance with earlier and operative part of judgment. The proper course for the decree-holders is to renew their application under O. XXXIV, r. 6. A I R 1930 Lah 589=Ind Rul (1930) Lah 614=12 S I C 374.

—Order holding portion of claim not sustainable and directing amendment—Revision— 216 P L R 1911=11 I C 231.

—Order of Lower Court refusing to amend decree. 7 P L R 1915=27 I C 639.

—A judgment in a mortgage suit required the mortgage property to be sold but the sub-mortgage-amount due on sub-mortgage was ordered to be paid out of sale-proceeds first; while the decree directed sale of property both for mortgage money and the sub-mortgage amount. An application for amendment of the decree, being refused, held that revision was competent. 16 A L J 749=47 I C 830.

—Interlocutory order—Order amending decree. 2 Pat L W 205=41 I C 206.

—Amended decree superseding the original decree being appealable—Order amending the decree is not revisable. A I R 1927 Cal 114=45 C L J 213=31 C W N 615=98 I C 89.

—Order of refusal of amendment is not revisable unless discretion by the lower Court is exercised on entirely wrong lines. A I R 1926 Cal 1112=30 C W N 928=98 I C 751.

—Allowing amendment on erroneous supposition that the Court cannot refuse is ground for revision. A I R 1925 All 556=23 A L J 518=L R 6 A 423 Civ=83 I C 396.

—A court has no jurisdiction to amend a decree after it has been confirmed by the Appellate Court. 28 I O 586.  
—If there is no irregularity in rejecting an amendment application, revision does not lie. 26 R G. 898.

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (3) Orders amending Decrees or orders (Contd)

—Courts in India have inherent power to amend a decree even if it does not come under s. 152 C. P. C. If this power is improperly exercised revision is competent. 23 I C 906.

—There is no revision against order of amendment though wrongly passed in exercise of jurisdiction. AIR 1927 Lah 847=9 Lah LJ 357=103 I C 701.

—Omission of mortgage items in the plaint and decree in mortgage suit—Order correcting mistake 2 under s. 15 cannot be revised. A I R 1923 Rang 104=74 I C 1020.

—An order wrongly refusing amendment under s. 152 and leading to gross injustice can be revised. A I R 1924 Lah 621=76 I C 193.

—No revision can lie against an order refusing to grant leave to amend. A I R 1925 Oudh 254=77 I C 553.

—The High Court should interfere in revision only when the order of the lower court refusing to amend a decree under S 152 C. P. C. is unjust and wrong. A L R 1933 O 597 (598)=A I R 1933 O 425 =10 O W N 938.

—Order allowing full costs of appeal interfered with in revision though appellant erroneously applied to the Court below for amendment of the decree under S. 152 and it rejected the application as incompetent. The revision petition was against the order rejecting the amendment. 54 C L J 555=137 I C 474=A I R 1932 C 349=1 R 1932 C 322.

—Amendment after expiry of limitation is bad and High Court will interfere in revision to avoid new trial on time-barred cause of action. A I R 1931 Mad 512=33 L W 648=61 M L J 316=Ind Rul(1931) Mad 497=133 I C 497.

—The trial court cannot amend the decree of the Appellate Court 18 M. 214 =5 M. L. J 39.

—An erroneous judgement is no ground for the amendment of the decree being in conformity with it. 3 L. W 499=34 I C 717.

—Order under O. 21 Rr. 98, 99 and 101 cannot be allowed to be rectified. 10 I C 183.

—Revision against order of amendment of a decree being treated as an application for amendment made to High Court to obviate objection that decree of lower Court having been affirmed by High Court on appeal the application for amendment ought to be made to High Court. 54 A 490 (494)=1932 A L J 272=136 I C 817 = 1 R 1912 A 247=A I R 1912 A 337= A L R 1912 A 716.



C. P. C. (1908) SEC. 115 (Contd)

(13) Particular orders and Decisions (Contd)

(4) Orders as to Court fees and valuation of suits.

—An order of lower court refusing to grant a certificate for refund of excess court fees is open to revision by High court. The Revenue Authorities are not bound to make a refund to the party obtaining court's certificate not coming under SS. 13 to 15 court fees Act. In such cases the court will give a certificate that the applicant has paid excess court fee.

A. L. R. 1934 MAD. 26.

—No revision will lie on an order relating to a question of Court fee if it is favourable to the plaintiff and is the only ground of revision. A I R 1229 Mad 396-56 M L J 394-29 L W 584=(1929) M W N 286=Ind Rul (1929) Mad 867=119 I. C. 35.

—An erroneous decision as to court fee is revisable only in exceptional cases when no other remedy is open or irreparable injury might be caused. A I R 1929 Pat 427=10 P L T 464=Ind Rul (1929) Pat 574=119 I C 78

—A decision of a Subordinate Court on a question of valuation determining the amount of Court fee is not revisable. A I R 1922 Nag 128=65 I C 327.

—A court has no jurisdiction to fix valuation in a suit for accounts but the plaintiff should be asked to make a new valuation. 15 A. L. J. 794=39 A 723=42 I C. 891.

—An erroneous order for payment of additional Court-fee is revisable. 36 I C 831.

—Partition suit—Direction to deposit court-fee—Default—Dismissal of suit—Order without jurisdiction—Revision. 17 A L J 493=50 I C 886.

—A decision of a District Judge as to the valuation of a suit is open to revision if it is wrong and prejudicial to a party, and arbitrary. 17 C W N 160=15 I C 46.

—An order as to valuation of Court Fee is open to revision. 19 C L J 15=21 I C 771.

—Erroneous order about Court-fee is revisable. A I R 1924 Nag 105=7 N L J 91=81 I C 643.

—Lower Court's order that the Court -fee paid is correct cannot be revised. A I R 1931 Mad 8=32 L W 694=59 M L J 953=Ind Rul (1931) Mad 254=129 I C 254.

—Relinquishment of part of claim—Court fee. A W N 1900. 214.

—An order to pay deficient Court-fee is not to be revised by the Chief Court. 120 P R 1919=53 I C 427.

C. P. C. (1908) SEC. 115 (Contd)

(13) Particular orders and Decisions (Contd)

(4) Orders as to Courts fees and valuation of suits (Contd)

—An order though wrong in law but within jurisdiction of Court making it, is not revisable. A W N 1898, 74.

—Court fees Act. S. 12—order rejecting plaint—incidental decision of the question of rejecting plaint—4 Pat L J 57=49 I C 442.

—Order rejecting a plaint—Question as to valuation — Interference when justified. 4 Pat L J 57=49 I C 442.

—Court fees—Incorrect valuation of relief claimed—Order rejecting plaint under O 7 R 10 C P Code—Question of jurisdiction involved—Revision. 4 Pat L J 52. For order to pay, advalorem Court fee—Material irregularity—5 O C 319.

—Orders of lower Courts on question of Court fees can be interfered with by High Court in revision. A I R 1926 Mad 678=23 L W 581=51 M L J 67=96 I C 129

—High Court will interfere in proper cases in matters of amendments and Court fees. A I R 1927 Mad 212=38 M L T 33=98 I C 458.

—Finding that Court-fees plaid is sufficient is not open to revision. A I R 1925 Pat 703=85 I C 538.

—Interlocutory order in matter of Court fees and jurisdiction is revisable. A I R 1925 Cal 320=29 C W N 76=52 C 128=85 I C 870.

—Revision lies against a wrong decision in the matter of court fee. A I R 1925 Mad 713=48 M L J 63=21 L W 349=(1925) M W N 276=87 I C 660.

—A decision on merits as regards court-fee is not revisable. 21 I C 943.

—Order regarding Court-fee cannot be revised. A I R 1927 Mad 1162=102 I C 877.

—A remedy by way of an appeal being open to a party from the dismissal of a suit for non-payment of additional court fee, an order for payment of the same is not revisable. 51 I C 581.

—Order demanding additional Court -fees is open to revision. A I R 1927 Nag 256=10 N L J 106=103 I C 263.

—Order to pay Court-fees or granting time for its payment is not open to revision. A I R 1927 Mad 1021=53 M L J 452=39 M L T 220=104 I C 145.

—Revision lies against order refusing to proceed with suit for deficiency of Court-fee. A I R 1928 Mad 416=51 M 664=55 M L J 345=27 L W 286=108 I C 539.



## C. P. C. 1908 SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (4) Orders as to Courts fees and

## valuation of suits (Contd)

—Decision regarding Court-fees in plaintiff's favour is not subject to revision. A I R 1929 Mad 191=29 L W 42=56 M L J 302=Ind Rul (1929) Mad 362=114 I C 842

—Order of a Court fixing the fee of a Commissioner cannot be revised even if it be too high. A I R 1924 Oudh 348 =76 I C 503.

—An order directing appellant to pay ad valorem Court-fee is a case decided. High Court can revise it. A I R 1 923 Mad 270=17 L W 623=(1922) M W N 831= 71 I C 173.

—Lower Appellate Court holding the valuation reasonable under s. 7 sub-section (4) cl. (c) of the Court Fees Act—High Court will not interfere with the decision. A I R 1926 Pat 334=(1926) Pat 102=94 I C 103.

—An interlocutory order directing payment of an additional Court-fee is not revisable. A I R 1926 Mad 768=50 M L J 497=23 L W 752=(1926) M W N 444=94 I C 424.

—A decision as to court-fee is not open to revision. 13 P L T 590=A I R 193 2 P 319 (321). Valuation by plaintiff of suit—Amendment of plaint by increasing —Order for Court-fee during trial of suit—Illegal and materially irregular. 35 L W 846. If a Court's decision with regard to the valuation made by a plaintiff is arbitrary and without any evidence, revision is competent. 11 P 161 (164-5) =133 I C 187=12 P L T 556=A I R 1932 P 9=A L R 1932 P 215

—Where Court fixes an arbitrary valuation in the case of a suit for declaration and consequential relief and returns the plaint, the High Court can interfere in revision. 12 P L T 656=Ind Rul (1931) Pat 399=133 I C 687.

—No revision lies when a court holds that the plaintiff's valuation is correct. A L R 1933 M 455 (456)=36 M 744=A I R 1933 M 506=144 I C 517=38 L W 80=65 M L J 25=1933 M W N 737=I R 5 M 426.

—Revision is competent when a Court decides on a wrong principle the market value of property and when no other remedy is open to a party. A I R 1933 M 90.

—Revision is not proper against an order as to court-fee passed with proper care and undue exercise of jurisdiction. A L R 1933 N 42.

—The High Court has powers to revise the order of the lower Courts refusing to grant a certificate for refund of excess Court-fees. A L R 1934 M 26=38 L W 983=1934 M W N 7.

## C. P. C. ( 1908 ) SEC. 115 (Contd);

## (13) Particular orders and Decisions (Contd)

## (4) Orders as to Court fees and valuation of suits (Conclnd)

—The order to pay additional Court-fee is a case decided within the meaning of s. 115 and therefore revision is competent there from. A L R 1333 A 212 (215)=55 A 274=A I R 1933 A 350=1933 A L J 311.

## (5) Orders in Arbitration Proceeding and Awards.

—High Court will not interfere on account of legal technicalities if substantial justice has been done. Thus a decree passed in accordance with an award on reference with father's consent should not be interfered with by reason of the fact that the minor's mother represented the minor as guardian was no party to the reference, provided the award is just and proper. A L R 1934 All 87.

—No revision will lie in respect of order setting aside an award by the arbitrators as it is an interlocutory order. A I R 1929 Oudh 493=Ind Rul (1930) Oudh 176=6 O W N 813 =5 Luch 397=123 I C 224.

—When the procedure or jurisdiction of the Judge is not attacked but only his findings as to misconduct of the arbitrator no revision lies. A I R 1929 Lah 688=Ind Rul (1929) Lah 913=11 Lah L J 275=119 I C 721.

—Extending the time for filing an award does not amount to a material irregularity. 18 A L J 952=43 A 101 =59 I C 667.

—Where the Court does not allow a party the time which the law allows him under para. 16 to make objections, but proceeds to pass at once a decree in accordance with the award, the High Court may exercise its discretion under s. 115. A I R 1921 Bom 32=45 B 832=59 I C 811.

—No revision lies against an order superseding an award on misconstruction of terms of reference. A I R 1922 All 64=20 A L J 117=65 I C 779.

—No revision lies from an order filing an award superseding an objection as to its legality on the ground that no sanction of the Court was obtained for the sake of minors. A I R 1922 Sind 1=15 S L R 165=65 I C 50.

—A judgment of the lower appellate Court vitiated by inaccuracies and misunderstandings when entirely based upon them is open to revision though not in arbitration cases. 69 P L R 1922=67 I C 260.

—High Court can interfere in revision with a decree passed in terms of the award without a notice as required by para. 10. 63 I C 243.

C. P. C. (1908) SEC. 115 (Contd)

(13) Particular orders and Decisions (Contd)

(5) Orders in Arbitration Proceeding  
and Awards (Contd)

—Reversing the order of reference after the submission of award and setting aside the award on the ground of some supposed defect in the order, amounts to material irregularity and revision lies. 43 A 305-19 A L J 33-60 I C 857.

—Agreement to be bound by Court's decision after local inspection—Award—Appeal—Revision. 38 C 421-9 I C 296.

—In a case in which after reference to arbitration an application for supersession is made, the order superseding is one deciding a case, and is open to revision. A I R 1931 Lah 318-32 P L R 391-Ind Rul (1931) Lah 847-133 I C 879. see also 16 C 482; and 3 M 68.

—Revision is generally objectionable in cases of awards and a Court should not interfere unless it finds not only an illegality committed but some substantial harm resulting from that illegality. (1931) M W N 961-34 L W 725.

—Suits for declaration that certain documents are void and for injunction to restrain the defendant from proceeding to arbitration, being filed, the order of the Court staying suit and asking parties to proceed with arbitration is revisable. A I R 1931 Lah 66-Ind Rul (1931) Lah 337-130 I C 769.

—An order of a court overruling objections by an award even though the order was wrong, was not revised by the High Court because the party objecting had agreed to a different procedure even though reference was under registered agreement. 135 I C 280-1931 A L J 1087-I R. 1932 A 54-A I R 1932 A 154.

—Award—Decree thereon—No evidence of misconduct. 114 P L R 1914-23 I C 950.

—Award—Provisions of C. P. Code, Sch. II, cl. 16, not complied with—Interference. 17 I C 431.

—Award—Validity of arbitration. 115 P R 1916-33 I C 769.

—The High Court can rectify any illegality or material irregularity in the procedure of the Lower Court in dealing with the award. 9 S L R 183-34 I C 845.

—Claim against Military Officer—Reference to arbitration—Award and decree thereon. 38 Bom 638-16 Bom L R 517-25 I C 371.

—Award—Decree in accordance with—No appeal—No revision. 38 Mad 256-25 M L J 507-14 M L T 314-21 I C 308.

C. P. C. (1908) SEC. 115 (Contd)

(13) Particular orders and Decisions (Contd)

(5) Orders in Arbitration Proceeding  
and Awards (Contd)

—Material irregularity—Revision—Award Objection—Opportunity and adduce. 37 I C 400.

—Order rejecting award is not open to revision. 117 P R 1916-107 P W R 1916-34 I C 192.

—Against a Decree of Court passed in terms of award Revision is competent, if award vitiated by material irregularity. 28 P R 1916-31 I C 700.

—A decree in terms of an award is revisable if without jurisdiction and is not appealable. 31 I C 458.

—Revision is competent if the court refuses to hear any objections to an award as being filed out of time though as a matter of fact they are filed in time. 2 L W 1115-31 I C 536.

—If an award made out of court does not refer to the matter in dispute, the court should remit the same and should not admit it. (1912) M W N 1076-17 I C 33.

—No revision lies from an erroneous decision on question of validity of reference to arbitration—39 All 489-15 A L J 427-41 I C 357.

—In the filing of an award filed out of time, if no question of jurisdiction is involved, revision does not lie. 50 I C 52-4 Pat L J 265.

—Revision lies when there is any illegality or material irregularity in the procedure of the Lower court in dealing with the award. 12 I C 845.

—When an agreement to refer to an arbitration is signed by adult parties and guardians ad-litem of minor party but the application for order of reference is not signed by the latter, the award is still good. 43 Cal 290-20 C W N 137-14 A L J 97-18 Bom L R 308-30 M L J 67-32 I C 161.

—Award—Decree in accordance with—Revision. 18 C W N 626-18 C L J 35-17 I C 7.

—An award can be set aside in revision if it is the outcome of Coercion and threats by Court. 18 A L J 952-43 All 101-59 I C 667.

—Rejection of provivate award in toto where part of award is valid and inseparable is at most an error of law. 66 P R 1915-146 P W R 1915-31 I C 80.

—Refusing to hear objections to award calls for interference in revision. A I R 1924 All 788-46 A 686-22 A L J 676-L R 5 A 465 Civ-82 I C 16.

—Order directing the award to be taken off the file is revisable. A I R 1924 Sind 75-17 S L R 133-83 I C 353.

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decision (Contd)

## (5) Orders in Arbitration Proceeding and

## Awards (Contd)

—An award can be set aside in revision if the reference to arbitration has been made contrary to the provisions of law. A I R 1930 Sind 256, Ind Rul (1930) Sind 134=24 S L R 470=124 I C 374.

—Per Graham, J.—Where an award is tainted with misconduct but has done substantial justice and a decree is passed in terms of the award the High Court will not interfere in revision. A I R 1931 Cal 53=Ind Rul (1931) Cal 204=34 C W N 689= 58 C 269=129 I C 428.

—Where an award grants a joint decree against defendants as heirs of the deceased but the award is set aside one defendant not being party to reference the High Court will not interfere. A I R 1931 All 242=Ind Rul (1931) All 259= (1931) A L J 100=130 I C 791.

—Revision against a Judgment in terms of an award. 38 M 56=(1914) M W N 142=25 M L J 507=14 M L T 314= 21 I C 308.

—Judgment in terms of award—Revision more objectionable than appeal. 38 Mad 256=21 I C 308.

—Order of appellate Court filing award and directing decree in accordance

—Revision, if lies. 143 P W R 1914=27 I C 332.

—Award, objections to—Not properly inquired into. 30 P W R 1915=28 I C 427.

—The High Court can remit an award for reconsideration by the same arbitrators, if it was not based on evidence. 22 C W N 933=46 I C 195.

—Order disposing of objections against award—Appeal—Revision. 9 I C 385=1 P L R 1911.

—It is only when there is a gross and material irregularity that the High Court interferes in arbitration cases. 2 Lah L J 631.

—In arbitration proceedings—Appeal not allowed—Revision whether lies. 1 P L R 1911=9 Ind Cas 385=12 P W R 1911.

—Order filing an award not appealable under para. 16, Sch. II, is not revisable. A I R 1927 Pat 135=(1926) Pat 161=7 P L T 733= 95 I C 321.

—One of the arbitrators refusing to sign award is no ground for revision of decree passed in accordance of award. A I R 1927 All 573=100 I C 76.

—Small Cause Court's order superseding arbitration being final order is open to revision. 13 O L J 507=100 I C 429.

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (5) Orders in Arbitration Proceeding and

## Awards (Contd)

—Decision that application to set aside award is barred without reference to article or its wordings can be set aside. A I R 1927 Mad 436=52 M L J 357= 109 I C 634.

—No revision is maintainable from an order setting aside an award. A I R 1925 All 458=47 A 121=L R 6 A 22 Civ =83 I C 502.

—Revision lies on award decree also. A I R 1925 Bom 341=49 B 535=27 Bom L R 423=87 I C 910.

—Order superseding an award in a pending case and directing the suit to proceed on the merits is not revisable. A I R 1925 All 566=47 A 916=L R 6 A 459 Civ=89 I C 173.

—Award—Decree without allowing time for objections—No appeal—Revision. 22 Bom L R 1454=45 Bom 832=59 I C 811.

—Refusal of the court to examine an arbitrator on a charge of misconduct being made against him is an irregularity. 22 C L J 237=31 I C 33.

—Award under Land acquisition Act by Collector subjects to revision. 22 I C 632.

—Taking a mistaken view as to misconduct in an arbitrator, it is no ground for revision. 13 S L R 98=52 I C 864.

—Refusal to pass decree on valid partial award being interlocutory order is no ground of revision. A I R 1928 Cal 174=106 I C 93.

—Order setting aside order of trial Court and rejecting application to file award is open to revision. A I R 1929 Lah 367=110 I C 302.

—Erroneous decision of Court requiring award to be filed is open to revision. A I R 1928 Lah 550=110 I C 833.

—If award is impeached on reference being bad proceedings are open to revision. A I R 1928 All 740=50 A 955=26 A L J 1009=110 I C 881.

—Revision lies from order refusing to set aside award. A I R 1929 Lah 369= 111 I C 145.

—An order refusing to pass a decree in terms of award but continuing the hearing of the suit by the Court, instead is an interlocutory order and is not revisable. A I R 1923 Bom 402=25 Bom L R 443= 47 B 721=73 I C 464.

—A wrong decision on a question of law or fact, of a court having jurisdiction to decide an objection to an award is no ground for revision. A I R 1923 Lah 194=73 I C 558.

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (5) Orders in Arbitration Proceeding and Awards (Contd)

—Where the Court considers the objections to an award but arrives at a wrong decision regarding irregularity on the part of the arbitrator, no revision lies. A I R 1923 Oudh 235=26 O C 107=74 I C 401.

—A decree is revisable if it is based on a decision by arbitrators on points not referred to them. A I R 1926 Mad 201=49 M L J 523=91 I C 745.

—An order underfielded last portion of r. 17 (4), Sch. 11 directing a party to nominate an arbitrators passed without an order under earlier portion of the sub rule ordering an agreement to be field is liable to be revised. A I R 1926 Lah 505=94 I C 483

—Court's order disallowing objections to an award under Sch. II, Para. 15 C P C is not revisable. A L R 1933 L 516=34 P L R 651=A I R 1933 L 692=143 I C 309=I R 5 L 337.

—An order rejecting an application to have an award taken off the file even though reference was illegal is revisable. A L R 1933 S 18=A I R 1933 S 128=26 S L R 368.

—Revision against an order refusing to stay proceedings under s. 19 of the Arbitration Act of 1899 is maintainable 13 L 59(68-9).

—In an application to take an award off the file, the decision of the Court on point which affects its own jurisdiction is open to revision. 26 S L R 368=A I R 1932 S 128 (131)=139 I C 596=I R 1932 S 133.

—A decision as to an award, which is vague and not capable of being enforced is not revisable. 137 I C 807=38 P L R 934=I R 1932 L 354=A I R 1932 L 459=A L R 1932 L 899 (920) (Civ)=1932 P O L 899 (Civ).

—Revision does not lie against an order setting aside an award and directing trial of suit to proceed, 34 B L R 376=138 I C 215 (2)=A I R 1932 B 232=I R 1932 B 355=A L R 1932 B 799.

—A decision as to the validity or invalidity of an award is not a case within S. 115 and an order setting aside an award disposes of a proceeding during the pendency of the suit. 53 A 1006=1931 A L J 842=136 I C 568=A I R 1932 A 452.

—Revision lies against an order disallowing objections to an award where the order of reference itself is also challenged. 54 A 297=A I R 1932 A 665.

—Revision is not competent, even where validity of award is challenged on account of the invalidity of the reference. 13 L 528=136 I C 11=33 P L R 163=I R

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (5) Orders in Arbitration Proceeding and Awards (Contd)

1932 L 187=A I R 1932 L 230=1932 P C L 101 (Civ)=A L R 1932 L (Civ.) 101.

—Revision against a decree in accordance with award is not competent even where award is invalid. 9 O W N 191=137 I C 151=I R 1932 O 222=A I R 1932 O 156.

## (6) Orders granting Review.

—Where the lower court found that there was an error which may not be apparent on the face of the record but was of that nature the order would come under the heading "any other sufficient reason" as set forth in O 47, r 1 and consequently the lower court was not acting without jurisdiction in granting review. A L R 1934 All 139.

—A remedy by way of appeal being open, against an order granting review, the High Court should not question the sufficiency or otherwise of reason with which the lower Court grants a review. A W N 1905, 154=2 A L J 465=27 A 695.

—Interlocutory order—order granting review—Practice, 17 P L R 1913=16 I C 995

—The High Court will not interfere in revision where the effect of the order of the Lower Court under S. 114 was to set right a wrong order. 9 A L J 348=14 I C 810.

—An order granting a review may be revised if it is irregular and has led to a miscarriage of justice. 49 P W R 1911=12 I C 246.

—Revision is the only remedy open where order granting review is without jurisdiction. 19 C L J 225=18 C W N 22=20 I C 670.

—Entertaining an appeal against an order granting review on grounds other than those specified in O 47 R 7 is with out jurisdiction. 2 L W 366=28 I C 707.

—Revision will lie when an order allowing an appeal from an order granting review, is passed by the Court misconceiving the grounds on which an order granting review can be set aside and having confused the merits of the order passed on the admission of the application for review with the reasons entitling the Court to review its own order. 140 I C 409=28 N L R 221=I R 1932 N 150=A I R 1932 N 177.

—It is very doubtful if a Judge of the Patna High Court sitting singly can entertain an application in revision under S 115 when he is not empowered by the Chief Justice. 1 Pat L J 193=33 I C 15



## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (7) Orders refusing Review

—Rejecting an application for review of an order confirming auction sale, is revisable if it amounts to an usurpation of authority A I R 1929 Nag 305=Ind Rul (1929) Nag 517=116 I C 65.

—Even though another remedy is open, refusing to entertain an application for review based on the ground of fraud is revisable in as much as it amounts to a refusal to exercise jurisdiction vested in the court by law. A I R 1929 Cal 513=49 C L J 425=33 C W N 572=119 I C 371.

—Refusing to admit an application for review on the ground that an appeal has been made subsequently is open to revision. 43 All. 288=19 A L J 24=61 I C 334.

—Order refusing to restore an application for review dismissed in default is revisable. A I R 1925 Cal 430=81 I C 1017.

—Order refusing to grant review—Such order whether can be revised—2 M W N 1911, 252=10 M L T 283=12 I C 172.

—Order rejecting review is not revisable. A I R 1925 Oudh 594=12 O L J 443=2 O W N 419=88 I C 582.

—An order refusing to grant a review is not open to revision. A I R 1923 Oudh 153=9 O L J 623=74 I C 351.

—Revision does not lie against an order rejecting an application for review except where an obvious injustice is done. A I R 1924 Lah 400=71 I C 160.

—Order on the ground of "accidental slip under O XLVII, r. 2-is not revisable. A I R 1926 Mad. 1083=24 L W 447=97 I C 545.

—An order refusing to grant a review is open to revision if a proper discretion is not exercised. 10 M L T 283=(1911) 2 M W N 252=12 I C 172.

## (8) Pauper Proceedings orders; n.

—Although the finding of pauperism is one of fact when there is no evidence to support the finding, the High Court will interfere in revision. A L R 1933 M 1001 (1003)=38 L W 865=65 M L J 781= A I R 1933 M 883.

—In other words, an order rejecting application to sue in forma pauperis is revisable. A I R 1929 Lah 498=Ind Rul (1929) Lah 639=117 I C 95.

see also A I R 1927 Lah 56=98 I C 879. and A I R 1927 Mad 441=52 M L J 330=101 I C 18; and A I R 1927 Nag 340=104 I C 198; and A I R 1924 Nag 44=19 N L R 165=75 I C 993; as it is not an interlocutory order: A I R 1929 L 498; and is a "case" within s. 115. A I R

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (8) Pauper Proceedings orders in (Contd)

1923 Oudh 118=9 O L J 610=74 I C 344; and A I R 1931 Rang 318; and A L R 1933 S 49 (50-1)=A I R 1933 S 82=26 S L R 491; but see contra, the view taken by the Allahbad. High Court in. A I R 1922 All 1=20 A L J 55=44 A 248=65 I C 255; and A I R 1931 All 659=(1931) A L J 727=Ind Rul (1931) All 673=133 I C 465; following 32 A 623; and A I R 1926 All 446=48 A 493=24 A L J 557=94 I C 484; and A W N 1882, 39; and A W N 1882, 69.

—The same High Court, however has recently held that revision lies against rejection of application to sue as pauper where the procedure adopted is grossly improper and leading to denial of Justice. A L R 1933 A 121 (122)=55 A 216=A I R 1933 A 295=145 I C 437=I R 6 A 106=1933 A L J 110.

—The High Court can interfere only in cases which have been decided and in which no appeal lies to it. An order granting leave to sue in forma pauperis is not open to revision. 10 I C 471=7 N L R 49.

—Refusal of permission to sue as pauper on the ground that claim is barred by time is revisable. A I R 1925 Pat 30=3 Pat 275=(1925) Pat 134=6 P L T 209=83 I C 871; see also 134 P R 1918.

—Where the lower Court perversely refuses to permit the plaintiff to sue as a pauper the High Court will interfere in revision. A I R 1930 Rang 324=Ind Rul (1931) Rang 64=128 I C 848.

—An order admitting an application for leave to sue in forma pauperis is not revisable. A I R 1922 All 208=20 A L J 471=67 I C 611; see also 7 N L R 49=10 I C 471; and 7 A L J 741=6 Ind Cas 831; and A W N 1882, 92.

—Orders allowing application to sue in forma pauperis—Not question of jurisdiction—Not revisable under S 115. A L R 1933 O 600; but see contra A I R 1926 Mad 958=96 I C 175.

—Granting leave to sue as a pauper is within the discretion of the court and will not be ordinarily revisable. 37 I C 172.

—Quaere: Whether an order dismissing an application for leave to sue in forma pauperis under O. 33 R 15 is open to revision under S. 115 C P Code. 52 I C 562.

—Dismissing an application for leave to sue as a pauper on the ground that there is no cause of action is not revisable. A Court cannot however dismiss such an application on the ground that the claim



## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decision (Contd)

## (8) Pauper Proceedings orders in (Contd)

with regard to some properties cannot be sustained. (1912) M W N 38-16  
I C 612.

—An application for leave to sue in forma pauperis being rejected, no revision lies but the applicant can still file a suit in the ordinary manner.  
39 I C 942.

—An order directing a pauper appellant to furnish security for costs, under O. XLII, r. 10, is illegal and can be set aside in revision. A I R 1922 Lah 87-3  
Lah 30-68 P L R 1922-67 I C 256.

—Revision against an order rejecting an application for leave to sue in forma pauperis was refused by the Chief Court on the report of Tahsildar and on the ground that the applicant had paid a fee of Rs. 140 to a leading counsel engaged in the Chief Court. 39 P L R 1915-226 P W R 1915-28 I C 87.

—Pauper application—Joinder of unsustainable claims—Rejection—Interference by High Court. 26 M L J 343-32 I C 82.

—An order dismissing a pauper application for leave to sue in forma pauperis because the applicant was in possession of some ornaments more than six months before the date of application, was revised by the High Court holding the lower Court's procedure to be materially defective.  
24 I C 792.

—Material irregularity—Leave to sue in forma pauperis—Application for Dismissal on ground that petitioner is benamidar—Validity. (1919) Pat 233.

—Pending revision petition filed against rejection of pauper application and demand of Court-fees suit is dismissed for want of stay order. Original order regarding rejection is open to revision. A I R 1928 Nag 24-10 N L J 177-105 I C 30.

—Court acts within jurisdiction even if leave to sue is granted afterwards. A I R 1927 Rang 134-6 Bur L J 16-101 I C 200.

—Where on material before it Court finds that applicant under O. XXXIII, is not a pauper and refuses leave to sue as such, order cannot be revised. A I R 1924 Pat 667-5 P L T 606-2 Pat L R 276-(1923) Pat 287-79 I C 56.

—If a Court after proper exercise of jurisdiction comes to a conclusion and reject the application to sue as pauper under O. XXXIII, no revision lies, although the conclusion may be

## C. P. C. (1908) SEC. 115. (Contd)

## (13) Particular orders and Decisions (Contd)

## (8) Pauper proceedings orders in. (Contd)

wrong. A I R 1925 Oudh 74-11 O L J 568-79 I C 922.

—An application for leave to sue in forma pauperis being rejected, the High Court can in a proper case interfere in revision.

—Where there has been a conscious violation of the specific rules laid down in O. 33 resulting as it must in an injustice to an applicant, the High Court should not deny him the benefit of its revisional jurisdiction under S. 115. 34 B L R 1273 (1280) =140 I C 381-I R 1932 B 604-A I R 1932 B 584-A L R 1933 B 23. Revision against order rejecting application for leave to sue as pauper is maintainable where the Court below erred in law and that error involved an error of jurisdiction. 138 I C 335-A I R 1932 L 338 (330)= I R 1932 L 460

—Order under O. XXXIII, r. 1, Civil P C is revisable. But erroneous decision is no ground where no material irregularity or illegality has been caused. A I R 1925 Nag 343-88 I C 157.

—Order rejecting objections to a suit being registered in forma pauperis which is based on a misconception of facts or law on the subject, is open to revision under s. 70 of the Punjab Courts Act XVII of 1881 as amended by the Punjab Act of 1919. 58 P L R 1913-29 P W R 1193 =18 I C 491.

—An order of a Lower Appellate Court refusing to give leave to appeal as pauper is not open to revision unless it is shown that there was some illegality or irregularity in the exercise of its jurisdiction. The fact that the Lower Appellate Court formed an erroneous opinion of the merits of the judgment of the first Court is immaterial. 2 O L J 255-30 I C 86.

—Pauper suit—Application for leave—Return of, for presentation to proper Court—No jurisdiction—Interference in revision. See 52 I C 688.

—Plaint disclosing no cause of action—Trial court allowing plaintiff to sue in forma pauperis—High Court can interfere in revision. A L R 1933 P 206 (207)=A I R 1933 P 284-145 I C 307-14 P L T 338.

## (9-10) Orders as to issue of Commission.

—The refusal to issue a commission for the examination of a witness does not constitute a question in which jurisdiction was involved therefore no revision lies. A I R 1929 Sind 92-23 S L R 403-Ind Rul (1929) Sind 97-116 I C 97.

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (9-10) Orders as to issue of Commission (Contd)

—Order to examine a witness on commission granted on insufficient grounds—Order is revisable. A I R 1927 Mad 524 = (1927) M W N 218.

—An order wrongly refusing to grant commission for examination of witnesses, is revisable. A I R 1922 Cal 42=35 C L J 78=65 I C 9.

—Where a party files objections to the report of a Commissioner appointed to examine accounts and applies to substantiate the objections by examining certain witnesses but the Lower Court disallows the application, the Chief Court interfered in revision and directed the plaintiff to examine his witnesses in support of the objection. 42 I C 221.

—Commission—Refusing to issue—Revision—Interference by High Court. See 15 M LT 339=23 I C 522.

—Issue of commission is a question of jurisdiction and not one of mere discretion—Grounds alleged for issue of commission should be carefully examined. A I R 1924 Cal 971=39 C L J 598=84 I C 9.

—On an application under s 622, Civ. Pro Code, for revision of an order of the Subordinate Judge of Unao, directing the issue of a commission for the examination of a Hindu lady, one of the defendants in the suit, and refusing the prayer of the plaintiff that four preliminary issues of law should be forthwith decided upon the documentary evidence upon the record, held that he exercised his discretion in a proceeding which was not tainted with any irregularity and had jurisdiction to decide the question before him. 5 O C 151.

—An interlocutory order fixing a certain place to which a witness to be examined on commission is to be brought is an order which can be revised by the High Court. There is nothing in law to prevent the High Court from interfering with interlocutory orders of the nature, if it is calculated to do irreparable injury to a party in a suit. A I R 1925 Cal 1118=85 I C 619.

—Misconception of question or Commission of clear irregularity can be made ground for revision. A I R 1928 Mad 124=53 M L J 903=39 M L T 590=27 L W 238=(1928) M W N 50=107 I C 301.

—In the case of a witness not under the control of the party asking for the commission, who resides beyond the limit fixed under O. XVI r. 19 (b), a commission should issue as a matter of right, unless

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (9-10) Orders as to issue of Commission (Contd)

the Court is satisfied that a party is merely abusing its authority to issue process; and any order refusing issue of commission as above, is liable to be set aside in revision. A I R 1923 Mad 321=46 M 574=(1923) M W N 157=17 L W 251=44 M L J 202 =71 I C 530.

—Examination of witnesses—Application for the issue of commission for—Refusal of on the ground of its being too late being contrary to—Civil Rules of Practice, r. 57 cannot be the subject-matter of revision. A L R 1933 M 566=1933 M W N 648.

—Revision—Refusal to issue commission for examination of plaintiffs after settlement of issue—Whether amounts to a "decision" of the case under S. 115. A L R 1933 A 524 (525)=2 A W R 49.

## (11) Injunctions, orders as to.

—There is no revision against an order granting temporary injunction. A I R 1922 Mad 172=(1922) M W N 303=16 L W 238=70 I C 713 See also 12 C W N 521.

—Refusal to grant temporary injunction is no ground for revision. A I R 1928 Nag 222 =107 I C 908.

—Mandatory injunction on interlocutory application. See 38 Bom 381=16 Bom L R 288=24 I C 625.

—Revision against order for interim injunction does not lie. 138 I C 822=1 R 1932 A 499=A I R 1932 A 223.

—In granting or refusing to grant a temporary injunction a Court has a wide discretion under O. 39 r. 2 C P C. The exercise of that discretion should be in a judicial manner depending upon the circumstances of each case. If a Court grants or refuses to grant a temporary injunction on the ground of balance of convenience, it is not correct to say that the discretion has been exercised otherwise than judicially only because the Court of revision thinks that it would have passed a different order in the circumstances of the case. 1932 A L J 823 (808-9)=A L R 1932 A 1073.

—Order of Dist Judge restraining holding of election does not amount to an illegality or material irregularity even when it results in any inconvenience to the public; revision against such order is not competent. A L R 1933 A 544=A I R 1933 A 343=143 I C 143=1 R 5 A 193=1933 A L J 759.

## (12) Discovery and Inspection of Documents orders as to

—Where party insists on exhibiting certain documents inspected by other party

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions. (Contd)

(12) Discovery and Inspection of Documents  
orders as to (Contd)

on petition for discovery and the other party does not admit the genuineness or completeness and insists on proof, and also objects to their being exhibited without proof, an order allowing the documents to be exhibited amounts wrong view of burden of proof which can be set aside in revision. A I R 1923 Mad 607=(1923) M W N 292=18 L W 165=72 I C 459.

—High Court Power of to investigate acts in revision, limits of. See 19 C W N 84=20 C L J 213=26 I C 275.

—Order granting inspection of document—No revision. See 12 I C 506.

## (13) Orders allowing or refusing withdrawal of suit or proceeding.

See also cases under O 23, r. 1.

—An order granting leave to withdraw suit if improper it will be interfered with in revision. 61 I C 556 see also 17 I C 647.

—But an order made with jurisdiction permitting a plaintiff to withdraw a suit with permission to bring a fresh suit is not open to revision by the High Court under C. P. C 115. 58 I C 134.

—Where there was no formal defect or sufficient cause within O. 23 R. 1 C P Code, for allowing the plff. to withdraw the suit with liberty and that, therefore, the order could be set aside by the High Court in revision under S. 115 C. P. Code. 41 I C 934.

—Per Mullick. J.—Order of a Court granting leave to withdraw with permission to bring a fresh suit in controversy of the terms of O. XXIII, r. 1 can be revised under s. 115. A I R 1922 Pat 44 (F B)=1922 Pat (Sup) 17=3 P L T 80=1 Pat 90=64 I C 337.

—Granting an application for permission to withdraw it with liberty to bring a fresh suit, "for reasons and defects" not specified by writing simply one word 'allowed' without anything further amounts to not exercising jurisdiction as required by law. A I R 1922 All 185=20 A L J 90=64 I C 948.

—An order refusing decree-holder's application for withdrawal of execution application and proceeding to sell properties notwithstanding, such application can be set aside in revision. A I R 1922 Pat 525=65 I C 122.

—An order allowing withdrawal of a suit with liberty to bring a fresh suit, if improperly made, is open to revision. A I R 1923 Loh 37=53 I C 753.

## C. P. C. (1903) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (13) Orders allowing or refusing withdrawal of suit or proceeding (Contd)

—An order under O. XXIII, r. 1 allowing withdrawal of a suit is open to revision. A I R 1922 Cal 58=70 I C 434.

—An order allowing a plaintiff to withdraw a suit with liberty to institute a fresh suit, is a case decided and High Court can revise it under s. 115. A I R 1922 Nag 84=18 N L R 30=61 I C 584.

—Allowing a suit to be withdrawn on the ground of plaintiff's inability to produce important evidence is illegal and amounts to material irregularity justifying revision. A I R 1921 Pat 42=6 P L J 112=2 P L T 634=51 I C 639.

—Where the plaintiff's application for leave to withdraw has been made in the first instance to the trial Court and rejected by that Court and the suit is dismissed but the Appellate Court grants such leave on the ground that there was a formal defect in the frame of the suit and that there was otherwise sufficient grounds in law for allowing the plaintiff to withdraw and to institute a fresh suit on the same subject-matter, High Court will not interfere in revision. A I R 1921 All 65=19 A L J 47=60 I C 899.

—It is the established practice of the Patna High Court to interfere with orders passed by Subordinate Courts permitting a party to withdraw a suit with liberty to bring a fresh suit in fit cases. 3 Pat L J 630=4 Pat LW 233=44 I C 406 dissenting from 41 I C 682.

—The mere fact that the first court granted leave to a plff to withdraw from his suit with liberty to bring a fresh suit on the same cause of action on insufficient grounds is no ground for interference in revision under S. 115 C P Code, unless the lower court in granting leave acted without jurisdiction or with material irregularity in the exercise of its jurisdiction. 49 I C 77.

—Where a suit instituted in Jan. 1914 was allowed to be withdrawn in March 1916 with liberty to bring a fresh suit on the ground that the plff. was of opinion that the evidence let in by him was not sufficient. Held that the order was wholly improper and was liable to be set aside in revision on the ground that the Dt Munsif acted illegally and with material irregularity in the exercise of his jurisdiction. 6 L W 1=(1917) M W N 719=41 I C 281.

—Where a Lower Appellate Court made an order allowing an appellant to withdraw his suit with liberty to bring a fresh suit on a petition alleging that some

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (13) Orders allowing or refusing withdrawal of suit or proceeding (Contd)

persons not named in the petition were necessary parties but had not been made parties and it could not be shown from the record that plaintiff was in reality, defective : Held that the order could not be sustained as it was not justified upon the record. 32 I C 402.

—Where a Court can entertain an application under O XXIII r. 1 C P C and comes to the conclusion that there is some ground for allowing the suit to be withdrawn and direct the suit to be withdrawn by safeguarding the interests of the defendants as to costs, the order cannot be challenged under s. 115, even if Court exercised its discretion wrongly in favour of the plaintiff. 40 A 612, followed (1930) A L J 1209=Ind Rul (1930) All 724=125 I C 580.

—Where an Appellate Court sets aside its judgement on review and permits withdrawal of the appeal as well as the suit without granting permission bring a fresh suit then although the effect of this order is to deprive the defendant of the advantage of using the judgment in his favour as res judicata in subsequent case still it would be ground for interference under s. 115. A I R 1930 Cal 424=34 C W N 265

=Ind Rul (1930) Cal 823=127 I C 71.

—An order allowing the plaintiffs to withdraw their suits as against certain of the defendants can be revised. A I R 1930 All 863=Ind Rul (1931) All 123=128 I C 827.

—The permission with liberty to bring a fresh suit should not ordinarily be granted so as to cause much harassment of the opposite party, but should only be given when the Court is satisfied that the defect is not for any default of the plaintiff but discovery of certain facts renders the suit in its present shape so defective. Where the application stated that there were certain formal defects in the case and that therefore the Court should give permission and the Court passed an order to the following effect: "Heard Pleaders: The appellants are permitted to withdraw the suit with liberty to bring a fresh suit. The respondent will get his costs of the appeal." Held in revision that the order thought not one made without jurisdiction was one which cannot be supported as the procedure adopted was vitiated by material irregularity and that it should consequently be set aside. A I R 1931 Cal 107=Ind Rul (1931) Cal 334=34 C W N 812=130 I C 142.

—An order granting plaintiff permission to withdraw suit with liberty to sue

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (13) Orders allowing or refusing withdrawal of suit or proceeding (Contd)

again, without any reason, reasons for such order can be interfered with in revision on ground that the Court below has not applied its mind to the application and has therefore passed an order which could be revised under s. 115 A I R (1929) All 683=(1929) A L J 961=Ind Rul (1929) All 1099=119 I C 859.

—See also 39 C L J 371=A I R 1924 Cal 751=84 I C 372. See also 50 A 199=25 A L J 943=A I R 1928 All 98=106 I C 431.

—Orders refusing amendment of plaint or refusing permission to withdraw suit on the ground that it is defective in form are not open to revision being interlocutory orders. A I R 1930 Lah 589=31 P L R 456=Ind Rul (1930) Lah 297=122 I C 105.

—An order passed under O. 23, R. 1 of the C P Code giving the plaintiff permission to withdraw the suit with liberty to bring a fresh one is open to interference by the High Court in revision. 117 P W R 1918=46 I C 181.

—Plaintiff sued to recover some property on the allegation that he was the adopted son of the last owner. The defendant denied the adoption. Plaintiff then applied to withdraw the suit on the ground that the defendant's allegations made it necessary for him to set forth all the grounds on which he was entitled to sue. The application was granted Held, in revision that the omission by the plaintiff to include in his plaint all his causes of action which are inconsistent with each other cannot be said to constitute a formal defect in the suit and is not a sufficient ground within the meaning of O. 2, R. 1 (b).

—Held also that the dismissal of a suit to recover property on the basis of an adoption will not operate as a bar to a suit to recover the same property on the basis of a will. 12 A L J 441=25 I C 175.

—Order of withdrawal of suit by reason of defect in substance is one without jurisdiction and is revisable. A I R 1926 Mad 863=23 L W 525=94 I C 933.

—Permission to withdraw the suit—Plaintiff given time after close of evidence to produce documents to counteract defendant's documents—Non-production of documents—Suit cannot be allowed to be withdrawn with permission to file a fresh suit. 15 Bom L R 823=37 B 682=21 I C 23.

—Discretion illegally exercised—Leave to withdraw suit with liberty—Revision. See 27 M L J 480=16 M L T 253=(1911) M W N 832=1 L W 726=2 I C 57.



## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (13) Orders allowing or refusing withdrawal of suit or proceeding (Contd)

—An order allowing withdrawal of a suit with liberty to sue afresh, manifestly unjust and on the face of it contrary to provisions in O. XXIII, r. 11, is open to revision under s. 115. 9 O & A L R 3=72 I C 1034.

—An order allowing withdrawal of suit without complying with condition in O. XXIII, r. 1 is an order without jurisdiction and can be set aside in revision. A I R 1925 Oudh 61=78 I C 121.

—Liability of suit for dismissal on a question of technicality—Order of withdrawal of the suit on appeal—Order will not be interfered with in revision. A I R 1926 All 294=24 A L J 313=92 I C 558.

—Withdrawal of suit with liberty—Order of appellate Court allowing—Revision against—Not entertained. 137 I C 804 (1)=33 P L R 391=I R 1932 L 355 (1).

—No revision lies against such an order, where and if the trial Court gives a considered decision that there is a formal defect in the plaint and that if the plaintiff is not permitted to withdraw the suit with liberty he will be denied justice, however erroneous in law or fact its decision may be. *Semble*—The trial Court does not record a definite finding that there is a formal defect, the High Court will go into the question in revision. 13 L 537=136 I C 1=33 P L R 275=1932 P C L 686 (Civ)=I R 1932 L 177=A I R 1932 L 360=A L R 1932 L 686 (Civ).

—The High Court could not revise the order allowing the withdrawal of a suit on the ground of formal defects even though the case was closed and only the judgment was left undelivered; because there was no material irregularity. 26 I C 203=41 Cal 362.

—Withdrawal of with liberty—suit for possession of three plots—plff permitted to withdraw with liberty in regard to one of the plots—Sale certificate giving a wrong number—Withdrawal proper—No revision lies. A L R 1933 O 355=A I R 1933 O 255=10 O W N 311=145 I C 222.

—Exercise of discretion under O. XXIII r. 1 is not open to revision. A I R 1927 All 750=25 A L J 838=103 I C 372.

—Order under O. XXIII, r. 1 passed exercising discretion—Order cannot be revised. A I R 1926 All 548=24 A L J 721=96 I C 480.

(14) Orders as to adding parties or their representatives or omitting them from case.

See also cases under O. 1, r. 10.

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (14) Orders as to adding parties or their representatives or omitting

them from case. (Contd)

—Preliminary decree against A personally declaring him to be a partner with P and for rendition of partnership accounts. Pending suit A died and P prayed to substitute son and brother of A alleging that A entered into partnership as manager of the joint Hindu family. No allegation that the brother had given his consent to A for carrying on business with P Court substituted son and not brother of A: Held, that the order refusing to substitute brother could be revised. Held further, that the Court was correct in refusing to substitute the brother as legal representative. A I R 1930 Nag 10.

—Orders as to (1) misjoinder of parties (2) non-joinder of parties and (3) misjoinder of parties and cause of action can be revised. A I R 1922 Mad 174=(1922) M W N 316=16 L W 186=43 M L J 277=70 I C 484.

—Refusal to make a person defendant can be revised under s. 115. A I R 1929 Oudh 148=6 O W N 118=Ind Rul (1929) Oudh 298=116 I C 58.

—Omission to implead one of the landholders in tenant's appeal in an ejectment suit and obtaining judgment without him is too technical a mistake and does not justify an interference in revision. L R I A 60 Rev.

—Order refusing application to implead party as co-respondent under Indian Divorce Act is not open to revision. A I R 1928 Cal 114=54 C 1038=107 I C 475

—The order of the District Judge who decides the case without joining a necessary party on an erroneous view of the law is open to revision. A I R 1928 Lah 414=10 Lah L J 161=103 I C 391.

—Although High Court in revision should not interfere with trial Court's order refusing to add a defendant, still if such person is necessary to avoid likelihood of conflicting findings High Court should setting aside trial Court's order, add that person defendant. A I R 1929 Mad 403= Ind Rul (1929) Mad 476=115 I C 812.

—If objection to an award on ground of non-joinder is not taken in memorandum of objection to the award nor is it shown that parties not joined were necessary High Court will not interfere in revision with the decision of lower Court on these points. A I R 1923 Mad 502=44 M L J 359=17 L W 424=32 M L T 298=(1923) M W N 296=73 I C 202.

—An interlocutory order rejecting the claim of a person to be legal repre-



## C. P. C. (1908) SEC. 115 (Contd)

(13) Particular orders and Decisions (Contd)

(14) Orders as to adding parties or their representatives or omitting them from

case (Contd)

representative of a deceased plaintiff is revisable. A I R 1924 Mad 813=47 M L J 370=35 M L T 82=(1924) M W N 763=80 I C 942.

—Lower Court refusing in the exercise of its jurisdiction to add a party as plaintiff—Section does not apply—Possibly s 107 of the Government of India Act might apply to cases of denial of the right of fair trial. A I R 1926 Pat 207=4 Pat 723=7 P L T 499=93 I C 932.

—The right to file a revision depends upon the fulfilment of the condition that no other remedy by suit by application or by appeal is available to the applicant. An order striking off a party being in substance a decree and appealable no revision lies against it. A I R 1931 All 333 (2)=(1931) A L J 181=Ind Rul (1931) All 388=141 I C 548 relying on 7 Lah 407.

—Rejection of application to be impleaded as legal representative—Refusal to adjourn for production of documents—Revision does not lie no material irregularity—Jurisdiction. A L R 1933 743=2 A W R 736.

—In a suit or an appeal the points to be decided ordinarily are those on which the parties are at variance. A revision application stands on a different footing. It is a matter between a higher Court and a lower Court; in fact revisional powers may in certain cases be exercised without an appeal or application by any of the parties concerned. In revision, however the Court has the same rights under O. 1, r. 10 to have the proper parties before it as in a suit or an appeal. A L R 1933 S 177 (178-9)=A I R 1933 S 200=144 I C 833 (2)=1 R 6 S 12.

—If the Court fails to follow this procedure of taking evidence for deciding the rightful legal representative the High Court will interfere. A I R 1925 Mad 456=21 L W 21=86 I C 178

—Finding that heirs of ex-parte decree-holder not necessary parties to proceedings for setting aside decree cannot be interfered with. A I R 1926 Pat 29=90 I C 329

—Order, bringing not-contesting defendants on record at instance of contesting defendants on application to restore suit being wrong can be revised. A I R 1924 Cal 814=39 C L J 567=83 I C 958.

—A person, in a rent suit was alleging that he had purchased the holding and was so recognised by the landlord by the

## C. P. C. (1908) SEC. 115 (Contd)

(13) Particular orders and Decisions (Contd)

(14) Orders as to adding parties or their representatives or omitting them from cases (Contd)

acceptance of rent and applied to be impleaded as party. Held in revision that the Court ought to have impleaded him. A I R 1930 Pat 323 Referred to A I R 1930 Pat 592=11 P L T 628=Ind Rul (1931) Pat 54=128 I C 790.

—Persons applied to be made defendants to a suit brought for specific performance of a contract of sale of certain field on the ground that they were members of a joint Hindu family along with the defendants and were interested in the field. The application was dismissed. Held the only inconvenience sought to be avoided was a possibility of multiplicity of judicial proceedings which was not sufficient to call for extraordinary interference. A I R 1930 Nag 51=Ind Rul (1930) Nag 128=121 I C 672.

—Where an application under O. 1, R. 10 of the C. P. Code asking that a certain person be added as a party deft to the suit and praying for permission to amend the plaint accordingly is rejected no appeal lies against the order rejecting the application. Where however it appears that the Court has exercised wrong discretion in rejecting the application, the High Court can interfere in revision under S. 107 of the Government of India Act, 47 I C 725.

—Where on the addition of new defendants the plaint was not amended so as to set forth the cause of action against them and both parties proceeded with the trial just as if the plaint had been amended and the added defendants were not prejudiced by the omission. Held under the circumstances the irregularity was not such as justified interference by the High Court. 1 L W 775=25 I C 607 following 19 I C 50.

—High Court's power of revision legal representatives brought on record after six months. See 1 L W 232=24 I C 781.

—An order allowing joinder of persons claiming adversely to each other is illegal and of a kind which falls within the purview of S. 115 of the C P Code. 57 I C 784.

—In a suit by a widow as the administrative of her husband for the recovery of moneys due to him, another person claiming as adopted son of the husband applied to be made a co-plff. on the ground that the widow was guilty of laches and collusion. The widow admitted the fact of adoption but denied authority from her husband. The first Court refused the application. Held, that the applicant ought to have been joined as co-plff. and the

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## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (14) Orders as to adding parties or their representatives or omitting them from case (Contd)

High Court could interfere under S. 115 of the C P Code or S. 107 of the Government of India Act. 44 I C 564.

—Any order which has the effect of depriving a party of all rights of redress either in the suit or in subsequent proceeding must be deemed to have been made illegally in the exercise of a Court's jurisdiction and is a proper case for interference under S. 115 of the C. P. Code and S. 107 of the Govt. of India Act. Where an application for joinder as a party deft. in a suit under S. 92 was rejected on the ground that the Court had no power to do so the High Court set aside the order under S. 115, C P Code, and S. 107 of the Govt. of India Act 1915.

—Scheme suit-addition of parties. See 6 L W 9=(1917) M W N 550=38 I C 133.

—Interlocutory order—Order adding party in appeal—No revision. See 31 I C 978.

—A court has jurisdiction to decide the question of misjoinder and to order the plaintiff to strike out one of two sets of defendants as he may elect and an order so passed by the Court is not open to revision under S. 115 of the Code of Civil Procedure. If the plaintiff declines to elect the court may strike out of the parties improperly joined or make such other order as the law may allow. 14 M L T

511=(1913) M W N 993=21 I C 604.

—The High Court should not under S. 115 of the C P Code revise the lower Court's discretion in regard to excusing the delay in applying under O 22 R 9 or for a review. (1918) M W N 888=25 M L T 116=9 L W 166=49 I C 268.

—High Court—jurisdiction to revise such order—Board of Revenue powers of C P Code O 22 R 3—Dispute as to who is the proper legal representatives—Duty of Court to inquire and decide. See Mad Estates Land Act Ss. 192 and 205. 42 Mad 76=35 M L J 632=9 L W 26=1919 M W N 107=49 I C 11.

—Material irregularity—Failure to add trustees as parties to scheme suit—Revision—Interference in See 50 I C 58.

—Proceedings in revision—Applicability of O 22 R 3. See 21 I C 407.

## (15) Orders in matters of suits by or against.

—No Revision lies from the order of the Judge in which defendant is held to

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions. (Contd)

## (15) Orders in matters of suits by or against (Contd)

be major and defendant refuses to produce as evidence to minority. A I R 1922 All 334.

—Guardian and Ward—Application for custody of minor—Rejection of application by Dt. Judge for want of jurisdiction—Interference by High Court in Revision. See 37 All 515=13 A L J 742=29 I C 416.

—The High Court can interfere in revision where the lower Court refuses a party leave to adduce evidence in a guardianship proceeding. A I R 1931 Cal 759=130 I C 444.

—O 32, R. 4 (2) of the C P Code requires that when a guardian has been appointed by a competent authority, that guardian is alone entitled to represent the minor unless the trial Court considers that the appointment of another guardian will be to the welfare of the minor. The appointment of a guardian of a minor for purposes of suits is really a question of procedure and an error in matters of procedure is not generally revisable under S. 115 of the C P Code. 5 Pat L W 92=46 I C 316.

—Laying down procedure to be followed in sale of minor's property is final although without jurisdiction. A I R 1925 Cal 1160=85 I C 667.

—Capability of person for appointment of next friend is subservient to suit and decision is open to revision. A I R 1929 Lah 357=30 P L R 17=11 Lah L J 130=113 I C 901.

## (16) Stay of suit or proceeding

—An application under s. 10 for the stay of a suit is not a "case" and an order for stay passed thereon is not revisable. A I R 1922 Lah 54=4 Lah L J 425=67 I C 870.

—No revision lies against an order staying the trial of a suit. A I R 1923 Lah 69=33 P W R 1922=69 I C 111.

—An order refusing to adjourn the case for enabling the defendant to pay Court-fee fixed on his counterclaim is not revisable. A I R 1923 All 118=20 A L J 1005=45 A 218=L R 4 A 40 Civ=69 I C 921

—Order refusing to stay the suit in contravention of s. 10 though interlocutory, is open to revision. An order refusing to stay a suit when the same question is in issue between the parties in two different suits is revisable. A I R 1923 Mad 88=16 L W 607=70 I C 5.

—Where, an order having been made for the sale of certain holdings in execu-

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions (Contd)

## (16) Stay of suit or proceeding (Contd)

tion of decrees for rent the Court refuses the judgment-debtor's application under O XLI, r. 6 (2) of the Civ. Pro. Code, to stay execution pending the hearing of appeals preferred by them against the decrees, the High Court may, on the judgment-debtor's application under O XLI, r. 5, stay execution, provided it appears to it that the conditions mentioned in cls. (a), (b) and (c) to that rule have been fulfilled. But the High Court may also deal with the order of the lower Court under s. 115 of the Code, and direct the execution to be stayed on the judgment-debtor furnishing sufficient security, in terms of O XLI, r. 6 (2). 15 C W N 432-9 Ind Cas 323.

—Order of refusal to stay suit under s. 10 C P C is revisable. A I R 1925 Lah 144=82 I C 234.

—Dismissing stay of execution on sole ground of delay is irregularity and revision lies. A I R 1925 Cal 254=82 I C 435.

—Stay of suit—Case not coming within S. 10 C P C—Revision. See 50 I C 212.

—Jurisdiction—Stay of execution conditional on furnishing security within period fixed by Appellate Court—No power to first court to extend time—Revision—Interference if justifiable. See 24 C W N 265=57 I C 382.

—Wrongful staying of suit for being referred to arbitration is open to revision. A I R 1928 Bom 275=52 B 420=30 Bom L R 661=111 I C 641.

—An order staying a suit under s. 10 of the C P C is not "a decision of a case" within the meaning of s. 115 and no revision lies again it. A I R 1923 Lah 615=73 I C 247.

—No revision lies against an order refusing to stay a suit under s. 10. A I R 1924 Lah 567=75 I C 191.

—Where the only interlocutory order passed is to adjourn the matter to give the defendant time to reply even if the order was inexpedient, the Court cannot interfere. A I R 1924 Nag 417=7 N L J 183=78 I C 969.

—Order granting adjournment without fixing time for payment of process-fee followed by an order of dismissal for want of prosecution is a wrong order and can be set aside in revision. A I R 1924 Nag 298=79 I C 123.

—It was prayed in a suit under s. 92 to remove the defendant from office of trustee and for appointment of new trustee. The District Judge ordered that the par-

## C. P. C. (1908) SEC. 115 (Contd)

## (13) Particular orders and Decisions. (Contd)

## (16) Stay of suit or proceeding. (Contd)

ties agreed that the suit stands over till a competent Court decides the nature of the trust. Held, that the District Judge acted wrongly in refusal to exercise his jurisdiction he alone having jurisdiction to try the suit and that the consent of the parties did not affect his jurisdiction. A I R 1931 All 332=Ind Rul (1931) All 267=130 I C 299

—(1). An order staying the suit and asking the parties to proceed with arbitration in a suit for declaration and to restrain defendant from proceeding to arbitration is a final order so far as the trial Court is concerned and a revision is competent against the order. A I R 1924 Lah 425 distinguished A I R 1927 Lah 394 A I R 1928 Bom 275, referred to. A I R 1931 Lah 66=Ind Rul (1931) Lah 337=130 I C 769.

—Order refusing stay of proceedings under s. 19, Arbitration Act, is not appealable but is open to revision. A I R 1931 Lah 644.

—Stay of suit under S. 10 Interlocutory order—No revision lies. A L R 1933 L 585=34 P L R 86=A I R 1933 L 191=I R 5 L 71=141 I C 177 (1).

—Order refusing to stay proceedings under S. 10 Revision against—Not maintainable. A L R 1934 A 30 (2)=2 A W R 275.

—Preliminary decree passed by Munsiff—Suit valued at Rs 800—Commissioner subscribing report showing value beyond the jurisdiction of District Munsiff—Application to stay of passing of final decree by defendant—Rejected revision Provisions of—Non-Compliance with—jurisdiction of High Court in revision. A L R 1934 L 64 (1).

—An objection under O XXI r. 58 being filed by a party to a suit must be looked upon as being under S. 47 and is therefore not revisable. A I R 1929 Pat 141=8 Pat 717=10 P L T 95=Ind Rul (1929) Pat 247=115 I C 695.

## (14) Laches.

—Where a petitioner applying simultaneously for copies of lower court's judgments fails to get a copy of trial court's judgment in time, he may be allowed extension of time to get that copy under s. 5 of Indian L. Act provided he attaches to the petition the copy already obtained and satisfies the Court of his having simultaneously applied for the copies. A L R 1934 Pesh 21.

—Revision application should not be admitted beyond the time allowed for

## C. P. C. (1933) SEC 115 (Contd)

## (14) Laches (Contd)

appeals except for special reasons. A I R 1930 Oudh 496=Ind Rul (1931) Oudh 67=7 O W N 894=14 R D 531=L R 11 A 308 Rev=126 I C 739.

—Delay in applying for revision unless good cause shown is fatal. A I R 1929 Oudh 383=L R 10 A 204 Rev.

—The High Court has discretion in excusing the delay in preferring revision after three months. A I R 1922 Mad 63=16 L W 760=(1922) M W N 130=65 I C 732.

—A High Court will refuse to interfere in revision where there has been undue delay. A I R 1921 Oudh 141=24 O C 282=64 I C 303.

—Delay—No interference unless required by justice of case. 36 All 30=12 A L J 9=22 I C 266.

—Mere speedier course not having been resorted to is no ground for revision. 13 A L J 60=27 I C 922.

—But where a lower Court does not apply its mind to the question of limitation, the High Court has the power to interfere in revision. 9 L B R 71=39 I C 154=11 Bur L T 73.

—Revision is a privilege and not a right. Speaking generally it corresponds to the remedies in England known as certiorari and mandamus. The invariable rule is that the party aggrieved must come to the High Court for relief at the earliest possible moment and also must come with no ulterior purpose. 10 P L R 1917=39 I C 57; See also 33 I C 30.

—When a suit which is exclusively triable by a court of small causes is tried without objection by the parties by a Munsiff having no powers of a Small Cause Court Judge, and appeals are preferred by both parties to the Subordinate judge who decides after full consideration of the merits in favour of the plffs, the High Court declined to exercise its discretionary powers under S 115 of the C. P. Code. 1 Pat L W 232=37 I C 991.

—Where a plaint was directed to be returned for re-presentation to the proper Court, and the plff. applied for revision of the trial Court's order long after the dismissal of his appeal by the lower Appellate Court, the High Court refused to interfere in revision on account of plff's laches. 4 O L J 551=43 I C 470.

—Time for filing revision is 45 days in C. P. & Berar. A I R 1926 Nag 65=89 I C 933.

—Delay of three years without good reason is fatal to revision. A I R 1925 Oudh 608=86 I C 329.

—Delay in filing an application for revision is by itself a sufficient ground

## C. P. C. (1908) SEC 115 (Contd)

## (14) Laches (Contd)

for declining to interfere. A I R 1926 All 228=92 I C 993.

—An application for revision made more than a year after the order will not be accepted except for good reason explaining delay. A I R 1923 Oudh 272=10 O L J 205=77 I C 115.

—Mistake regarding the question of limitation is not necessarily ground for revision. A I R 1928 Cal 189=47 C L J 62=107 I C 733.

—Dismissal of suit as time-barred is no ground for revision. A I R 1927 Oudh 615=4 O W N 1123=107 I C 191.

—There is no revision against order where after application to set aside sale, total amount was not deposited within prescribed time and there was no absolute acceptance by decree-holder. A I R 1929 Nag 10=106 I C 568.

—The revisional jurisdiction of the High Court is discretionary and the Court will not interfere in revision at the instance of applicants who do not show reasonable diligence in prosecuting their cases. 1 Pat L J 165=37 I C 639=18 Cr L J 271.

—Legally a revision is not governed by any laws of limitation, where according to the practice of a court a petitioner in revision is required to file copies of the judgments of the two lower courts, time taken in obtaining these copies should be deducted in favour of the petitioner. Where a District Judge in ignorance of the fact that Act No 11 of 1932 (the Public Suits Validating Act) had been in existence on that date accepting an appeal pending before him dismissed a suit without giving the party the benefit of an appeal, a revision was held to be competent. A I R 1933 Pesh 51.

—Application for grant of copies of judgement and decree—No direction as to payment of advance—Time intervening between completion and despatch should be excluded. A L R 1933 L 855.

—Where there has been a long delay by the defendants in referring the matter to arbitration the Court was justified in refusing to enforce the clause as the matter was one of discretion and no sufficient reason was made out so that the High Court could not interfere in the matter. A I R 1933 L 1007 (1).

Delay for no fault of applicant is no bar to revision application. A I R 1928 Mad 528=51 M 672=55 M L J 274=28 L W 297=110 I C 63.

—Revision does not lie against an order allowing attachment of property in execution of a decree even though the



## C. P. C. (1908) SEC. 115 (Contd)

## (14) Laches (Concl'd)

property was already attached before judgment by a holder not her decree-how did not execute his decree sooner and even though no notice of attachment was served on him. A I R 1921 Bom 219=45 B 360=59 I C 713.

—Small Cause Court Judge refusing to summon witnesses—Failure to apply for revision on the order does not bar his right to apply in revision when the case is over. A I R 1926 Pat 575=97 I C 335.

—High Court, power of—Delay in filing—Self-contradictory decrees of lower Court See 19 C L J 9=22 I C 801.

—Long delay in application—Interference on terms—Decision of lower Court contrary to settled rule. See 23 I C 939.

## (15) Miscellaneous Cases.

—Where there is no question of jurisdiction involved in the case no revision lies against an order of remand not covered by O. 41 r. 23. A L R 1934 Pat 46.

—Erroneous decision on point of law not involving point of jurisdiction—Revision not competent. A L R 1933 O 203 (204)=A I R 1933 O 240=10 O W N 259=142 I C 616.

—Proceedings of civil court under S. 476 B Cr. P. C. A L R 1933 M 825=38 L W 940=1933 M W N 1476.

—S. 151 & O. 21. r. 92 —Execution sale—Purchase by decree-holder in auction—Objection petition to sale by judgment-debtor—Decree holder and judgment debtor absent at date of hearing—Dismissal of execution petition of decree-holder and objection petitioner by judgment-debtor for default—Court's duty to confirm sale automatically—Court has inherent power to restore petition dismissed for default. A L R 1933 L 111=13 L 761=34 P L R 70=A I R 1933 L 99=142 I C 686=I R 5 L 259.

—O. 6. r. 17—Amendment of plaint—Order allowing—Revision by defendant against—Not unsustainable where defendant has withdrawn costs direct to be paid to him by order allowing amendment. 1932 M W N 1118.

—An application for revision is not barred by the mere fact that the petitioner has satisfied the decree out of Court. The plaintiff can succeed by the strength of his own title and not by the weakness of the defendant's case, 35 P L R 1912=168 P W R 1912=14 Ind Cas 793

## C. P. C. (1908) SEC. 115 (Concl'd)

—An objection that a plff. is not the agent of a particular person on whose behalf he has sued to recover money cannot be taken for the first time in the High Court in revision. 27 I C 807.

—A plea of estoppel cannot be entertained for the first time in revision. A I R 1925 Nag 77=22 N L R 118=80 I C 946.

—No new plea of law or facts can be raised in revision. A I R 1925 Pat 461=6 P L T 295=87 I C 381.

—If time can be extended on review granted extension without review appeal is not acting without jurisdiction. A I R 1925 Pat 452=(1925) Pat 151=90 I C 79.

—A question involving a consideration of the terms of the contract was not allowed to be raised in revision though it involved consequently a question of jurisdiction. A I R 1924 Cal 1036=40 C L J 197=84 I C 685

—In revision fresh points can be considered. A I R 1927 Rang 134=6 Bur L J 16=101 I C 200.

—Point as to res judicata cannot be raised for the first time in revision. A I R 1921 Mad 532=13 L W 289=62 I C 480.

—Discretion as to—Procedure illegal—Party objecting to—Discretion not exercised in favour of, because he had himself consented to such procedure—1931 A L J 1087.

—Claim barred by limitation—Oral acknowledgment—Decree given by lower Court—Revision—Interference with order doing substantial justice—See 228 P L R 1911=11 I C 445

—In civil cases, interference on the revision side is permissible only where a final decree or an interlocutory order is so unjust and is likely to put things into so inconvenient a position that irreparable harm would be done to the applicant. Where a suit is withdrawn and the court has expressly refrained from adjudicating upon any question or issue in the case, the rule of res judicata will not apply to a suit subsequently brought by the same plaintiff against the same defendant upon the same cause of action. 149 P. W R 1911=11 I C 831.

## C. P. C. (1908) SEC. 117.

—Unless specifically excluded or superseded by rules, the provisions of the Code apply to original jurisdiction of Chartered High Courts: 27 L W 760=54 M L J 262=109 I C 173=A I R 1928 M 385.

—Provisions of C P C apply to chartered High Courts in the exercise of their Appellate Civil jurisdiction, including



## C. P. C. (1908) SEC. 117 (Concl'd)

jurisdiction in Letters Patent Appeals. [48 C 481 P C relied on. 1 A L J 509; 16 A L J 964; held overruled by 48 C 481 (P. C.)] A I R 1931 All 244=(1931) A L J 187-Ind Rul (1931) All 456=132 I C 24.

--High Court can entertain an application for security for costs, in an appeal against an order in insolvency. 14 A L J 97=20 C W N 137=18 Bom L R 308 =30 M L J 67=32 I C 161.

## C. P. C. (1908) SEC. 118.

--The section is not restricted to admission or professional conduct: 109 I C 206= A I R 1928 M 472.

## C. P. C. (1908) SEC. 120

--S. 120 does not apply to High Court on original side. 1922 M W N 841=72 I C 982=A I R 1923. M 272

## C. P. C. (1908) SEC. 122.

--Rules made by the Patna H. Ct. are not ultra vires by reason of the same not having been submitted to the rules committee as these sections do not apply to Patna. H Ct. 2 Pat L T 112=5 P L J 749=(1921) Pat 97=60 I C 285.

--S. 122 does not apply to Patna H. Ct. and therefore r. 6 of chap. 7 of the rules of that H. Ct. cannot be said to have been made under s. 122, hence a second appeal is not barred if copy of first Court's judgment not filed in time. A I R 1921 Pat 509=(1923) Pat 19=74 I C 330.

--The rule of the Lahore high Court which requires that a memo of second appeal should be accompanied with a copy of the first court's Judgment is valid. A I R 1921 Lah 73=2 Lah 227=63 I C 33.

--See to the same effect:--as to the rule 2 Ch. 3 of Allahabad High Court. A I R 1921 All 23=43 A 660=19 A L J 598=63 I C 338.

--The period of Limitation cannot be modified by a rule under this section. A I R 1923 Lah 96=63 I C 777.

--The powers of High Court to make rules extends merely to regulate the procedure of Civil Cases. A I R 1926 Rang 1=3 R 546=4 Bur L J 185 (F. B.)=93 I C 124

--It is therefore ultra vires of the High Court to frame a rule which is contrary to the provisions of the Code itself. A I R 1925 Oudh 492=28 O C 169=85 I C 455.

--It is within the powers of the High Court to frame a rule under s. 122 C. P. C. by which the provisions of s. 5 of the Limitation Act are made applicable to petitions under Or. 9. R. 13. regarding setting aside an ex parte decree. (Krishnan

## C. P. C. (1908) SEC. 122 (Cont'd)

J. dissenting). A I R 1925 Mad 14 (F B) =47 M 824=47 M L J 409=20 L W 332=35 M L T 43=(1924) M W N 682=80 I C 877.

--Held also to the same effect regarding extension of s. 5 Limitn Act to applications under O-9 R. 9 and held that this would not change the applicability of S. 164. A I R 1929 Bom 262=52 B 453=31 Bom L R 484=Ind Rul (1930) Bom 108=122 I C 76.

See A I R 1925 Bom 521= 27 Bom L R 1150=90 I C 610.

--Power of High Court to limit or extend the period fixed by Limitation Act. See 15 A L J 835 (F. B.)=42 I C 855.

--Rules of High Court and Supreme Court Bombay. see 9 Bom L R 1138=32 b 14

--Rules made in contravention of the provisions of the Civil Pro. Code or of the Letters Patent are ultra vires. A I R 1930 All 558=(1930) A L J 1126=Ind Rul (1931) All 30=123 I C 238.

--Rules under s. 221 apply both to the original as well as appellate side of High Court unless expressly excluded. A I R 1928 Bom 123=52 B 459=30 Bom L R 402=108 I C 794

--Where the rules of the Calcutta H. C. were Published and these were adopted by the Patna H. C. by a rule of the latter which also was published, it was held that all the rules of the Cal H. C. were not necessary to be published. A I R 1921 Pat 428=2 P L T 45=61 I C 666.

--Oudh Chief Court is High Court. A I R 1928 Oudh 89=40 W N 1114. When the H. C. substituted a new rule instead of this rule by which the mortgagee's right to interest was limited to six months The new rule was held to be ultra vires, as it affected the substantive right of the mortgagee to receive interest at mortgage rate for the whole period allowed for redemption. 12 I C 18=4 Bur L T 207.

--An application to set aside an ex parte decree is not within s. 5 of Limitn Act, but H. C. can make a rule applying this sec. to such applications. 32 I C 975.

## C. P. C. (1908) SEC. 125.

--Rule requiring parties to file processes papers duly filed with their application for re-hearing is not ultra vires. A I R 1921 Pat 428=2 P L T 45=61 I C 666.

## C. P. C. (1908) SEC. 126.

--Local Gov't sanction is not necessary for rules made by High Court for Conduct of its own business or regulation of pleaders. A I R 1928 Mad 72=109 I C 206.

## C. P. C. (1908) SEC. 128.

--No notice is necessary before a

**C. P. C. (1908) SEC. 128. (Contd)**

warrant in case of a village headman.  
(1930) M W N 1215 (1)

—Rules under the old Code, delegating judicial powers to ministerial officers if valid. See 42 I C 623.

—Rules referred to in this sec. are rules made under the new Code under advice of the committee constituted under s. 123. A I R 1929 Mad 611=52 M 563=29 L W 823=57 M L J 264=116 I C 343

—Bond for production of live stock—Court-fee. see 24 M L J 637=20 I C 775. (F. B)

—Clause (2) f, applies to suits for Negotiable instrument and therefore art. 5 applies to such suits. A I R 1927 Sind 90=21 S L R 257=98 I C 78.

**C. P. C. (1908) SEC. 129.**

—Letters Patent referred to is letters Patent of 1865. A I R 1924 Cal 1025=51 C 905=28 C W N 916=81 I C 1048.

—Rule 725 of the Bombay H. C. framed under this sec. for deposit of Rs. 500 as security for costs is mandatory. 37 Bom 572=14 Bom L R 1106=17 I C 739.

—Rules made under this sec. need not be consistent with the Code as this power is devised for elasticity of procedure. A I R 1930 Cal 685=Ind Rul (1931) Cal 133=57 C 676=129 I C 181.

**C. P. C. (1908) SEC. 132.**

—Applicability :—The provisions of S. 132. are not restricted to the examination of witnesses. They apply also to parties, to suits or proceedings before the Court 11 I C 668.

—S. 132 C P Code covers the case of a Hindu lady of the class and position in society of a lady who has not abandoned entirely the protection of the purda. Such a lady claiming the privilege ought not to be made to pay the costs of the commission but the costs of the commission will be the costs in the cause. 22 C W N 147=44 I C 157.

—And such right of pardanashin lady to be examined on commission is absolute. A I R 1928 Cal 814=Ind Rul (1929) Cal 111=114 I C 95.

—The words "personal appearance" in S. 132 C P C means "personal attendance". They cannot be so interpreted as to compel pardanashins to attend court by wearing a veil or burka with their faces covered so as not to be visible to public gaze. Although the court can exclude pardanashin's evidence by reason of her being tutored by a person behind the curtain during her examination on com-

**C. P. C. (1908) SEC. 132 (Contd)**

mission, it cannot enforce her personal attendance in Court on that ground. A L R 1934 All 66.

—Pardanashin lady cannot refuse to be examined on commission at any place other than place of her choice. A I R 1921 Cal 229=48 C 448=64 I C 228.

—Appearance meaning thereby compelling to come forth into view or become visible to public gaze is exempted not from attendance. A I R 1929 Cal 528=33 C W N 681=56 C 865=Ind Rul (1930) Cal 139=121 I C 635.

—Examination on Commission can be allowed only on grounds in Code and order issued otherwise than on those grounds is without jurisdiction and revision lies. A I R 1927 Mad 524=(1927) M W N 218

—Previous appearance of pardanashin lady in criminal court to institute complaint whether deprives lady of statutory protection. 26 C L J 319= 45 Cal 697= 41 I C 610.

**C. P. C. (1908) SEC. 135-A.**

—Exemption from arrest can be granted under the section only on the party satisfying the Court that his attendance in the Court is bona fide in relation to the matter pending before that Court. The duration of the period is always a question of fact. The exemption is liable to forfeiture if in going to or in returning from the Court, there is unnecessary or excessive deviation sufficient in the opinion of the Court to forfeit the privilege. (5 H L C 671; 4 M H C R 145; 32 All 3; 11 East 439; 46 A 603 followed.) A I R 1931 Bom 175=33 Bom L R 44=Ind Rul 1931 Bom 291=55 B 612=131 I C 467.

—A reasonably wide construction must be given to S. 135, sub-sec. (2) of the Civil P C. It is not the intention of the legislature that a person holding a warrant of arrest on a Civil Court process should be able to pounce upon a person against whom the warrant has been issued the moment the Court that the person has been attending rises for the day. The slightest deviation for the purpose of business or refreshment does not rob a party to a litigation of the protection which sub-sec. (2) gives him. 35 C W N 1071=1933 Cr. C 31=141 I C 605=A I R 1933 C 11.

—Judgment-debtor arrested in execution of decree and present before Court not exempt from arrest in execution of second decree. A I R 1924 Mad 909=17 M L J 673=35 M L T 102=(1924) M W N 781=84 I C 513.

—Protection forfeited if person adopts circuitous route or considerably

## C P. C. (1903) SEC. 135. A (Contd)

deviates from straight route. A I R 1924 All 676=22 A L J 638=L R 5 A 94 Cr=26 Cr L J 240=34 I C 64

—Warrant under s. 483, Criminal P C though entrusted to Civil bailiff does not come within s. 135. A I R 1929 Lah 785=30 Cr L J 783=(1929) Cr C 417=Ind Rul (1929) Lah 670=117 I C 238.

—Person coming to appear as accused cannot be arrested and he is entitled to refund of money paid to secure his release from arrest A I R 1929 Oudh 426=6 O W N 809=Ind Rul (1929) Oudh 527 (F B)=119 I C 367.

—No case pending or set down for hearing—Exemption cannot be invoked. A I R 1930 Lah 733=31 P L R 183=Ind Rul (1931) Lah 3=128 I C 51.

—Each case of exemption from arrest under Civil Process depends on its own facts and circumstances what period reasonable is a question of fact and further exemption is forfeited if party indulge in unnecessary deviation—Conditions under which exemption can be claimed stated. A I R 1931 Bom 175=33 Bom L R 44=Ind Rul (1931) Bom 231=131 I C 467.

—Complainant a party to a suit in a Munsiff's Court, was arrested on his way from the Munsiff's Court to the Local Board Office situated in the same compound as the Munsiff's Court at least an hour after the Munsiff had concluded the business of the day. No explanation was furnished how the complainant occupied himself in the interval. It was not said that he was returning from the Munsiff's Court and there was no evidence that the Local Board Office was on the way from the Munsiff's Court to complainant's residence. Held that the complainant was not covered by S. 135 (2). He certainly was not going to the tribunal when he was arrested; nor can it be that he was at the time attending such a tribunal for the purpose of a matter pending before it. 36 C W N 1071 (1972)=1933 Cr. C 31=141 I C 605=A I R 1933 C 11.

—Exemption from arrest—Person on his way to the Income-tax officer in response to a notice under S 23, cl. 2, Income-tax Act—Can claim exemption—Income-tax officer or 'tribunal' A L R 1933 L 703 (704)=34 P L R 177=A I R 1933 L 214=I R 5 L 129=14 I C 463.

—Arrest of judgment-debtor while returning from Court—Wrongful confinement—Liability of decree-holder and of bailiff—Offence under S 342 I P C. 121 P L R 1916= 36 I C 493.

—A deft who appears in Court to defend his suit is exempt from arrest under S 135 of the C P Code, A surety

## C P. C. (1903) SEC. 135 A (Concl)

for the appearance of the deft. cannot therefore claim to initiate proceedings under O. 38 R 3 of the C P Code with a view to obtain his discharge when the deft. appears in Court to defend his suit. Nor does the appearance of the (dft) on that occasion amount to a 'voluntary surrender' within the meaning of O 38 R 3 of the Code. 37 M L J 435=10 I W 533=53 I C 367=43 Mid 272.

—Warrant for arrest of witness Pro-priety. see 24 I C 513.

## C. P. C. (1903) SEC. 136.

—Section 136 (1) enables a party to enforce an order of injunction against a person outside the local limits of the jurisdiction of the Court passing the order. A I R 1931 Cal 279=57 C 1280=Ind Rul (1931) Cal 380=130 I C 252.

—Attachment before judgment of property in the jurisdiction of another Court—Order should be sent to the District Judge of the place and not to be sent to the Nazir of the Court A L R 1933 A 593=2 A W R 174.

—Whether High Court Judge on original side can direct District Judge within appellate jurisdiction to execute warrant of arrest for contempt is doubtful—Proper course is to direct to issue injunction and arrest might be ordered for breach of same bringing case within pale of s. 136. A I R 1928 Cal 462=55 C 777=32 C W N 114=107 I C 65.

—Order of High Court in appellate jurisdiction disobeyed—Person residing out of ordinary Civil Jurisdiction of High Court but within limits of appellate jurisdiction—Warrant of arrest can be transferred to District Judge for execution. A I R 1926 Mid 574=50 M L J 401=95 I C 196.

## C. P. C. (1903) SEC. 139.

—Power of District Judge to appoint Commissioners to administer oath in affidavit generally without reference to a particular area—Affidavit sworn to be Sharishtdar of the Munsif of Hajpur can be the foundation of a complaint under S. 476 Cr. P C by the District Judge of Muzaffarpur. A L R 1933 P 548 (549)=14 P L T 635=A I R 1933 P 713.

## C. P. C. (1903) SEC. 141.

*Synopsis*

Scope and Applicability of the Section

(1) General

(2) S 141 does not confer any right of appeal not expressly provided for else where

## C. P. C. (1908) SEC. 141 (Contd)

- (3) Applications under the Bengal Tenancy Act
- (4) Applications under the Guardians and Wards Act
- (5) Applications under the Religious Endowments Act
- (6) Applications under the Succession Certificate Act
- (7) Applications for restoration of suit dismissed for default
- (8) Dismissal for default of application to restore suit—Fresh application whether maintainable
- (9) Arbitration proceedings
- (10) Execution proceedings
- (11) Proceedings under the Companies Act.
- (12) Proceedings under Legal Practitioners Act
- (13) Proceedings under the Lunacy Act
- (14) Pauper applications
- (15) Probate proceedings
- (16) Restitution proceedings under S. 144
- (17) Other miscellaneous proceedings

## Scope and Applicability of the Section

## (1) General

—S. 141 C. P. C. is applicable only to proceedings in original suit. A I R 1924 Pat 346=4 P L T 735=79 I C 594.

—“Proceedings” means original matter in nature of suits not execution proceedings. A I R 1921 Bom 463.

—S. 141 extends ss. 10 and 11 to civil miscellaneous proceedings. A I R 1922 Sind 6=16 S L R 79=66 I C 796.

—“Suit” includes appeal. A I R 1928 Lah 468=110 I C 374.

—The word “Suit” includes execution. S. 141 C P C is intended to apply to other proceedings in civil courts such as probate, etc. 25 M L J 367=38 M 199=1913 M W N 685=14 M L T 196=21 I C 32.

—Section deals with procedure alone and not substantive law of arbitration A I R 1928 Rang 137=6 Rang 563=112 I C 451.

(2) S. 141 does not confer any right of appeal not expressly provided for elsewhere

—Order returning memorandum of appeal for proper presentation—No appeal lies, 32 C W N 693=Ind Rul (1929) C 60=117 I C 849.

—Setting aside ex-parte decree proceedings—Order bringing legal representative of party on record is not appealable, A I R 1925 All 431=23 A L J 442=L R 6 A 361 Civ=47 A 741=88 I C 95.

—Applicability—Order dismissing application for restoration of application to set aside ex parte decree—Order not

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## C. P. C. (1908) SEC. 141 (Contd)

## Scope and Applicability of the Section (Contd)

(2) S. 141 does not confer any right of appeal not expressly provided for elsewhere (Contd)

appealable. A I R 1924 All 682=46 A 538=22 A L J 427=L R 5 A 331 Civ=79 I C 323.

—Application for restoration of application under O. IX—Order dismissing it is appealable. A I R 1923 Nag 293=19 N L R 119=75 I C 589.

—Application for restoration of suit dismissed under O IX.2 r. —There is no appeal against order of dismissal. 72 I C 547.

—Order dismissing second application under O IX r. 9 subsequent to one already dismissed is not appealable since s. 141 cannot operate to give appeal from order not otherwise appealable. A I R 1922 Cal 572=36 O L J 184=69 I C 1003.

—S. 141. does not give a party to a proceeding which is not a suit, a right of appeal. 21 M L J 613=(1911) 2 M W N 13=36 Mad 16=10 I C 879.

—Order rejecting an application to set aside the order dismissing for default application for restoring suit dismissed for default is not appealable. 19 I C 97=9 N L R 33.

—Order dismissing an application to set aside sale dismissed for default is not appealable. 19 C W N 25=27 I C 492.

—Order refusing to set aside order dismissing an application for setting aside the sale in default is not appealable. 10 O C 353.

## (3) Applications under the Bengal Tenancy Act.

—No application to application under s. 105 Bengal Tenancy Act. A I R 1924 Pat 104=3 Pat 67=(1923) Pat 273=2 Pat L R 163=5 P L T 591=79 I C 5.

—Applicability Proceedings under s. 105, Bengal Tenancy Act are not governed by s. 141. A I R 1924 Pat 104=(1923) Pat 273=3 Pat 67=79 I C 5.

## (4) Applications under Guardians and Wards Act.

—Court can in proceedings under the Guardians and Wards Act pass an order by way of injunction restraining the giving away of a female minor in marriage to an unsuitable husband. 28 N L R 332 (336)=A I R 1933 N 62=141 I C 170.

—Surety bond by guardian and surety under ss. 45 and 43, Guardians and Wards Act—Execution cannot issue suo motu. A I R 1927 Sind 262=103 I C 493.

## (5) Applications under the Religious Endowments Act.

—Religious Endowments Act—Order under s. 10—Provisions of Code by way



## C. P. C. (1908) SEC. 141 (Contd)

## Scope and Applicability of the Section (Contd)

## (5) Application under the religious Endowment Act (Concl'd)

of appeal or revision do not apply. 29 M L J 671=18 M L T 469=2 L W 1099=31 I C 502 (This is no longer law) See 40 M 793=44 I A 251=40 I C 650=33 M L J 69 (P C)

—S. 141, does not enable Court to review its own order passed under s. 10 of the Religious Endowments Act 37 M L J 162=54 I C 56.

—Proceedings to fill up a vacancy in Temple Committee—Power as to taking evidence etc. 29 M L J 671=31 I C 502 But see 40 Mad 793 (P C)=40 I C 650

—Applicability under Succession Certificate Act—Section does not apply except in so far as introduced by ss. 19 (3) and 26(3). A I R 1924 All 376=46 A 372=22 A L J 345=L R 5 A 238 Civ=79 I C 363.

—Any express provision in Succession Certificate Act confirming rights of appeal, revision or review does not render provisions of Civil P C regarding procedure inapplicable to it. A I R 1927 Sind 187-101 I C 166

## (7) Applications for restoration of Suit dismissed for default

—Suit dismissed for default—Restoration of—Application for—Maintainable under S. 141 *if*. See C. P. C.—O. 9, r. 13 and S. 141. 28 N L R 83.

—Application under O. IX R. 9 applies. A I R 1926 Mad 325=50 M L J 75=23=L W 409=92 I C 802.

—O. IX and O. XLIII, r. 1 apply to application to set aside dismissal order for default. A I R 1923 Nag 293=19 N L R 119=75 I C 589.

—Application under O. XXI, r. 90 disposed of *ex-parte*—S. 141 and O. IX do not apply and it can be restored under inherent jurisdiction. A I R 1921 Sind 55=17 S L R 105=83 I C 749.

## (8) Dismissal for default of application to restore suit—Fresh application whether maintainable.

—Application for restoration of suit dismissed for default—Second application is competent. A I R 1927 Lah 71=27 P L R 564=99 I C 1055.

—Restoration application dismissed for default—Subsequent application can be made under O. IX read with s. 141 or under S. 151. A I R 1925 All 773=47 A 878=23 A L J 817=L R 6 A 412 Civ=89 I C 350.

—Restoration application under O. IX dismissed for default—Dismissal can be set aside under O IX, r. 9 and s. 141.

## C. P. C. (1908) SEC. 141 (Contd)

## Scope and Applicability of the Section (Contd)

(8) Dismissal for default of application to restore suit—Fresh application whether maintainable (*Contd*)

A I R 1923 Oudh 146=9 O L J 627=9 O & A L R 32=74 I C 380.

—Application to set aside dismissal of an application to set aside an *ex-parte* decree dismissed is competent Even if such an application be held incompetent, the court has inherent power under S. 151 C. P. C. to deal with such cases. A L R 1934 Rang 21.

—Where application to restore suit dismissed for default is itself dismissed for default, fresh application to restore *liis*. 1 P L R 1919=10 P W R 1919=50 I C 401; see also 1 Lah L J 188=1 Lah 339=58 I C 748.

—Where an application to set aside an order dismissing a suit for default is itself dismissed for default, an application for its re-admission can be entertained under the provision of S. 141. 7 N L R 32=10 I C 705.

—Application to set aside execution sale not being in the nature of execution proceeding but an original proceeding is governed by S. 141 and as such, if dismissed for default, it can be restored under O. 9, r. 9. 19 C W N 758=29 I C 395.

—On the 4th July 1919 *defts*, applied to set aside an *ex-parte* decree passed on 18th January 1919 but the application was dismissed for default on the 16th October. On the 21st November *defts* made a fresh application. Held, that the application of the 25th November should be treated as one for the restoration of the application of the 4th July and as such was entertainable, the procedure laid down in O 9 R 13 C. P. C being applicable to it by the operation of S 141 of the Code, and (2) that the application was governed by Art 181 of the Lim. Act and was within time. 2 Lah L J 627=56 I C 25.

## (9) Arbitration proceedings

—S. 141 extends provisions of s 10 to arbitration proceedings. A I R 1922 Sind 6=66 I C 796.

—Agreement to refer to arbitration—Arbitrators not named effect of—Ambiguity—Power of Court to appoint—Three agreements to refer arbitration relating to one transaction—One application for order of reference sufficient—Different causes of action, joinder of—Contract terms of parties cannot resile from—Punjab Courts Act S. 70 (1). (a)—Material irregularity—Express provisions of contract and imperative provisions of law ignored by lower court—Revision 35 P R 1911=85 P L R 1911=70 P W R 1911=9 I C 655.



C. P. C. (1908) SEC. 141 (*Contd*)Scope and Applicability of the Section (*Contd*)

## (10) Execution proceedings

—The same procedure that applies to High Court decrees in appellate jurisdiction, must also be applied under s. 647, to the High Court's order in revisional jurisdiction—16 Bom. 550 S. 141 is not applicable to execution proceedings. A I R 1923 Lah 506=75 I C 487. see also A I R 1922 Nag. 267=18 N L R 152=4 N L J 118=64 I C 420. and 63 I C 855 and A I R 1921 Lah 67=64 P L R 1921=60 I C 720. and A I R 1926 Lah 109=89 I C 360 and 26 I C 890. and A L R 1933 A 711 (712)=2 A W R 574. and A L R 1933 N 138=A I R 1933 N 176=143 I C 584=29 N L R 176=I R 5 N 180. and 18 B 429.

—Execution proceedings should be excluded from those proceedings to which provisions relating to suits are extended by s. 141 A I R 1925 Cal 812=29 C W N 886=42 C L J 26=87 I C 633. S. 373 C P C 1881 does not apply to an application for execution dismissed for non-payment of process fees—15 Mad 241. Section does not make provisions of Code applicable to execution proceedings. A I R 1926 Cal 773=53 Cal 679=30 C W N 570=96 I C 705. S. 141 is not applicable to execution dismissed for default A I R 1922 Nag 267=4 N L J 118=18 N L R 152=64 I C 420.

—S. 141 does not apply to execution proceedings and application for restitution not being an application in execution is covered by s. 141. A I R 1930 Lah 961=Ind Rul (1931) Lah 140=129 I C 204.

—Execution proceedings—Section, not applicable—Decree for possession and mesne profits—Separate execution, competent—O 2 R 2—No bar 2 L W 688=30 I C 246.

—Successive applications for execution are allowed by the C P Code of 1908, and the mere fact that a previous application was dismissed for default, is not sufficient to bar a subsequent application 12 C L J 6=7 I C 241 dist; 13 C L J 532=11 I C 385

—An application for execution dismissed for default can be restored 3 P W R 1912=82 P L R 1912=13 I C 859

—Execution application dismissed for want of prosecution—Order refusing restoration is not appealable. A I R 1923 All 460= 45 A 148=21 A L J 135=73 I C 453.

—Provisions of O IX r 9 do not apply to execution proceeding. A I R 1925 Mad 126=47 M L J 269=20 L W 192=1924) M W N 672=81 I C 841.

—Application by stranger for releasing property from attachment or execution—Dismissal for default—power to restore.

C. P. C. (1908) SEC. 141 (*Contd*)Scope and Applicability of the Section (*Contd*)(10) Execution proceedings (*Contd*)

see 4 Pat L W 102=3 Pat L J 250=43 I C 951.

—Execution proceedings—O 9 C P C not applicable. see (1918) Pat 265=4 Pat L J 330=47 I C 154

—S. 141 of the Civil Procedure Code has not the effect of making all the procedure provided by the Code applicable to proceedings in execution. O 9 R 13 does not apply to a proceeding in execution. Therefore where a claimant makes an application under O 21, R 100 and the application is granted under R 101, in the absence of the decree-holder, the Court has no jurisdiction to set aside the *ex parte* order under O 9 R 13, 41 Cal 1=18 C W N 343=19 I C 683.

—Striking off execution proceedings—If can be restored under O 9—Inherent power of court see. 29 I C 592.

—An application for re-hearing of execution proceedings is maintainable under O IX r 9 and is not barred under O XXI r 103. S. 141 of the new Code has deliberately changed the provision of the old Code as in S. 647. 12 C L J 6=7 Ind cas 241.

—Section does not operate to apply O IX r 4 and cognate provision to execution proceedings. A I R 1923 Pat 239=1 Pat L R 134=2 Pat 372=4 P L T 93=(1923) Pat 78=71 I C 484.

—S. 141 does not extend provisions of O IX r 9 to execution proceedings. Execution application dismissed for default—Application cannot be restored under O IX A I R 1923 Nag 18=68 I C 643.

—Execution petition dismissed for default can be restored or *ex parte* order in execution proceeding can be set aside only under inherent powers and O IX r 13 does not apply. A I R 1929 All 485=Ind Rul (1930) All 168=121 I C 552.

—Dismissal of execution petition for failure to take necessary steps for prosecution—Order is not appealable. A I R 1923 Pat 180=4 P L T 204=68 I C 337.

—Proceedings under O XXI rr. 97 and 100 form part of execution proceedings and O IX does not apply to them unless proceedings also fall within s. 47. A I R 1929 Mad 757=57 M L J 381=30 L W 424=52 Mad 899 (F B)=Ind Rul (1930) Mad 23=120 I C 567.

—*Ex parte* orders and order of dismissal for default in course of—Remedy of aggrieved party. see 21 C W N 769=41 I C 586.

## C. P. C. (1908) SEC. 141. (Contd)

## Scope and Applicability of the Section (Contd)

## (10) Execution proceedings (Concll)

—After the execution has been closed and the decree satisfied, no application can be made by a judgment-debtor to reopen a matter, which might have been discussed or argued in the course of the execution-proceeding. Hence a judgment-debtor could under such circumstances, only apply for a review of the order which declared the decree to be satisfied and struck off the execution-proceedings under s 617 of the Civ Pro Code 1882. 10 C 538. S. 141 C P C is intended to apply to original proceedings in Civil Courts such as probate etc. 35 Mad 199-25 M L J 367-14 M L T 196-(1913) M W N 685-21 I C 32.

## (11) Proceedings under The Companies Act.

—Proceedings under the companies Act—Applicability of the provisions of the C. P. Code. 55 I C 820-1 Lah 187

## (12) Proceedings under Legal Practitioners Act.

—The words "any Court of Civil jurisdiction" in S. 141 of the C P. Code include the Court of a District Judge holding an enquiry under the Legal Practitioner's Act, and order may be legally made by the District Judge in such a proceeding calling for the production of a document under O. 16, R 12 of the C P. Code. 23 C W N 560 =50 I C 83 6.

—Applicability to proceedings under Legal Practitioners Act. 1 Pat L J 576-37 I C 484.

## (13) Proceedings under Lunacy Act

—Under S. 141 of the C. P. Code the provisions of the Code are applicable to proceedings under the Lunacy Act, and consequently, a Dt Judge is competent to take proceedings on the basis of an application under S. 62 of the Lunacy Act if such application, is duly verified as provided for in the C. P. Code. 22 C W N 547-27 C L J 205-43 I C 511.

## (14) Pauper applications

—O. 9, read with S 141, applies to the case and the Court has power to restore the application on proof of sufficient cause. 36 L W 586-140 I C 226-1932 M W N 1262 =I R 1932 M 832=A L R 1932 M 1375.

—S. 141 extends provisions of O. 9, R 17 to pauper application. 26 M L J 343-1914 M W N 327-23 I C 82.

—Where a petition to be allowed to sue in forma pauperis is not accompanied by a schedule of the moveable and immoveable properties of the applicant together

## C. P. C. (1908) SEC. 141 (Contd)

## Scope and Applicability of the Section (Contd)

## (14) Pauper Applications (Concll)

with the estimated value thereof, the application ought to be rejected under R. 5 of O. 33, as being not framed in the manner prescribed by R. 2. In view of the express provisions of O. 33, R. 5, S 141 cannot be held to apply in the case of pauper applications though they are a kind of miscellaneous proceedings. 6 Bur L T 141-7 B L R 60-20 I C 640.

## (15) Probate proceedings.

—C. P. C. applies to applications for probate. 8 C 832; See also 18 B 237 but see A I R 1928 M 66.

—Probate proceedings involving interest of minor—Every rule in O XXXII is not strictly and legally applicable. 24 C W N 541-59 I C 664.

—Probate proceedings—Minor—Service of citation on—Provisions of O 32, how far applicable. See 24 C W N 541-59 I C 664.

—Probate proceedings—Compromise of—Dismissal of application without deciding on genuineness of will improper —O 28, R. 3 not applicable. See 1 Pat L W 41-37 I C 12.

—Probate proceeding—Dismissal for default— Application for restoration See 52 I C 939.

—Probate proceedings—Provisions of —O. 11, C. P. C. appealable See 43 Cal 300-23 C L J 480-34 I C 227.

—Probate and Admu. proceedings—Provisions of C. P. Code not to be applied strictly. see 37 All 380-13 A L J 441-29 I C 133.

## (16) Restitution proceedings under s. 144.

—S. 141 applies to proceedings under s. 144 A I R 1922 All 223-20 A L J 226 =44 A 407-66 I C 144.

—Redemption decree varied in appeal by increasing compensation for improvement—Defendants entitled to interest or other compensation under s. 144. A I R 1924 Mad 87-45 M L J 323-18 L W 30-33 M L T 45-(1923) M W N 508-73 I C 1041.

## (17) Other miscellaneous proceedings.

—Application for personal decree against mortgagor is not application in execution of decree and O. IX r. 9 applies to it A I R 1930 Rang 257-8 Rang 316-Ind Rul (1930) Rang 328-126 I C 643.

—Preliminary decree for sale with liberty to apply for personal decree for balance—Separate personal decree has to be subsequently passed and application for such second decree is continuation of

## C. P. C. (1908) SEC. 141 (Concl'd)

## Scope and Applicability of the Section (Concl'd)

## (17) Other miscellaneous proceedings (Concl'd)

suit and O. IX, r. 9 applies to it. A I R 1930 Nag 188=26 N L R 154=Ind Rul (1930, Nag 265=124 I C 249

—Permission to mutawalli to lease wakf property—Order is under s. 141. A I R 1924 Cal 327=38 C L J 358=77 I C 907.

—Proceedings followed in connection with District Judge authorising mutawallis to execute lease is not suit but merely proceeding governed by s. 141. A I R 1924 Cal 327=38 C L J 358=77 I C 907.

—Deliberate delay in bringing legal representatives of deceased opponent—Application may be rejected under O. XXXIII, r. 9 (a) read with s. 141 or under s. 151. A I R 1929 Sind 136=Ind Rul (1929) Sind 111=116 I C 111

—Applicability of s. 141 is doubtful where procedure clearly laid down is no matter under O. XXXIV, r. 5. A I R 1930 Mad 105=30 L W 551=(1929) M W N 867=Ind Rul (1929) Mad 1032=120 I C 72.

—Power to make supplementary orders for the protection of creditors—The Court has the same inherent powers as any Court exercising civil jurisdiction. A L R 1933 P 180=12 P 163=A I R 1933 P 84=141 I C 836=I R 5 P 98= 13 P L T 775

—Applicability—S. 141 is inapplicable to objection under O. XXI. A I R 1925 Cal 510=41 C L J 286=79 I C 351.

## C. P. C. (1908) SEC 144

## Synopsis.

- (1) Appeal
- (2) Applicability, Scope and legislative changes
- (3) Application for restitution
- (4) Attachment before judgment
- (5-6) Bar to suit
- (7) Bona fide auction—purchaser
- (8) Compensation
- (8-a) Compromise see—(12) Decree varied or reversed
- (9) Construction
- (10) Court-fee
- (11) Decree awarding Costs
- (12) Decree varied or reversed
- (13) Dependent Judgment
- (14) Execution
- (15) Evidence
- (16) Ejectment suit
- (17) Ex parte decree
- (18) Inherent power
- (19) Interest
- (19-a) Limitation
- (20) Jurisdiction
- (21) Mesne Profits
- (22) Money taken in execution
- (23) Parties

## C. P. C. (1908) SEC. 144 (Cont'd)

- (24) Partition Decree
- (25) Possession
- (26) Powers and Duties of Court
- (27) Principle of restitution
- (28) Procedure
- (29) Refund of money or costs
- (30) Revenue officers
- (30-a) Separate suit
- (31) Successive applications
- (32) Miscellaneous Cases

## (1) Appeal.

—Where a Court acting under s. 151, exercises the same jurisdiction which s. 144 gives it, the order passed under s. 151 is appealable, A I R 1931 Cal 779 (2)=53 C L J 49=35 C W N 105.

See also 11 P 553 (557)=140 I C 482=A I R 1932 P 317=A I R 1932 P 619, but see 20 I C 203=10 P R 1914=25 P W R 1914=217 F W R 1913= 273 PL R 1913 Appeal from order under s. 144 Court fee on memo appeal. see 21 C W N 544= 39 I C 640.

## (2) Applicability, Scope and legislative Changes.

—The present section has been re-drafted and so framed as to include all kinds of reversals whether in appeal, review, revision or otherwise. Moreover, sub-section (2) has been newly added so as to clear away the doubts as to whether a separate suit lay for the purposes of obtaining any restitution (See 5-6 Bar of suit infra). S. 144, C P Code, is very wide in its terms and is not confined to cases where restitution is claimed on the reversal of a decree in first or second appeal. Provided, the decree is varied or reversed, the section applies, however the reversal or variance has been effected. 40 M 299=30 M L J 396=19 M L T 235=(1916) 1 M W N 155= L W 236=33 I C 379

—The section applies only to cases where in execution of a decree passed by one Court a benefit is received by the defendant and that decree is reversed or set aside subsequently by a competent Court. It does not apply to a case where the plaintiff sues for redemption of four items of property and pays the full amount due into Court but one of the items is refused by the first Court and decreed to him only by the appellate Court. The plaintiff seeking to recover the mesne profits for the interval between the two judgments

## C. P. C. (1908) SEC. 144 (Contd)

## (2) Applicability Scope and legislative changes (Contd)

should have applied to the lower Appellate Court at the time of the judgment. Section 144 is not his remedy. A I R 1931 Mad 81=60 M L J 219=33 L W 259=Ind Rul (1931) Mad 371=130 I C 451.

(See also under-27 Principle of Restitution infra.)

—But the principle of s. 144 is not confined exclusively to matters in execution. The power of restitution is inherent in Court. A I R 1930 Mad 988= (19 0) M W N 644=60 M L J 79=33 L W 391=Ind Rul (1931) Mad 207=129 I C 63.

—And it should be noted that neither S. 144 Civil Procedure Code nor the inherent power of the Court conferred any new substantive rights; they merely provided a more convenient procedure. A party who cannot get a relief by a suit cannot get the same relief under S. 144 Civil Procedure Code otherwise. 16 C L J 83=16 I C 965.

—Where an execution sale is set aside under O. XXI, r. 92, and restitution or mesne profits are to be allowed, s. 144 has no application, but such restitution can be granted in exercise of the Court's inherent powers under s. 151. A I R 1931 Cal 779 2)=35 C W N 105=53 C L J 49.

—After passing of an ex parte mortgage-decree—Mortgagee on purchasing mortgaged property was put in possession the decree was set aside—On retrial decree was passed in favour of mortgagee with reservation to apply for profits taken by mortgagee under s. 144—Mortgagee again on purchasing property in execution could not challenge maintainability of application under s. 144. A I R 1931 Cal 42=52 C L J 505=34 C W N 746=Ind Rul (1931) Cal 364=130 I C 236.

—A sum of money was put in deposit in District Court in execution of decree—Plaintiff claimed it, and on being asked brought suit in Sub-Divisional Court for declaration that he was entitled to it—Suit was decreed in favour of another who withdrew it from District Court—On remand by Appellate Court the suit was decreed in favour of plaintiff—Plaintiff applied to District Court in execution proceeding for refund of that money—He is entitled to the refund—"Court of first instance" is Court which does the act which turns out to be wrong. A I R 1931 Rang 21=Ind Rul (1931) Rang 97=130 I C 353.

—S. 144 Even applies to a case in which a decree has been reversed by the Privy Council. A I R 1926 Lah 488=7 L 232=8 Lah L J 338=27 Pat L R 400=93 I C 954.

## C. P. C. (1908) SEC. 144 (Contd)

## (2) Applicability Scope and legislative changes (Contd)

—One P held a money-decree against A and in execution attached certain property. Before that attachment A had died and the plaintiff had been impleaded as his legal representative. The plaintiff objected to the attachment contending that it did not belong to A. Her objection was finally allowed in appeal. Meanwhile the property attached had been sold by auction in execution of that decree and purchased by the defendant; plaintiff then sued for the recovery of possession of that property or in the alternative for the recovery of the value of the property: Held, that s. 144 C P C. had no application but the plaintiff should be allowed to obtain possession of the disputed property after refunding to the defendant the amount obtained by her out of the sale proceeds. A I R 1924 All 273=L R 4 A 526 Civ=75 I C 238.

—S. 144 applies only when a decree has been set aside in appeal or otherwise. A I R 1924 All 64=73 I C 602.

—When a decree is neither varied nor reversed but execution thereof has taken place under a mistake and the judgment-debtor seeks restitution, s. 144 will not apply. A I R 1923 Oudh 16=72 I C 879.

—Plffs. who obtained a decree merely for an injunction entered into possession of the property in dispute with the aid of the police. The decree was reversed in appeal. Defts applied for restitution of possession and for removal of a superstructure erected by the plff over the property. Held, that S. 144, C P. Code, did not apply, inasmuch as plffs possession was not under the decree, but in opposition to it. 6 L W 631=39 I C 933.

—Under the words of s. 144, or under the general jurisdiction of a Court the rights or benefits acquired by third parties strangers to the decree or order that has subsequently been varied or reversed cannot be interfered with by an order or restitution because restitution is not always meant to be a complete remedy and because these sections apply only to the parties or their representatives and not to strangers. In proceedings relating to restitution only a summary inquiry is contemplated and hence the complicated questions of a stranger's rights should not be gone into. [Case law discussed]. A I R 1931 Cal 499=35 C W N 483=134 I C 906=58 C 1070.

—The obvious intention of S. 144 of the Code of Civil Procedure, Act V of 1908, is to place the successful litigant so far as possible in the position in which he

## C. P. C. (1908) SEC. 144 (Contd)

## (2) Applicability-Scope and legislative Changes (Concl'd)

would have been had the original decree not been passed against him and the unsuccessful party is also liable for the delays of the Court. A claim for compensation for loss due to non-cultivation caused by wrongful ejectment is also to be allowed. 16 R D 503=13 L R 293 (Rev)=13 U D 145.

—There is no right of restitution in case of absence of prejudice resulting from erroneous decree: 59 C 647=35 C W N 1298=54 C L J 293=1 R 1932 C 283=137 I C 269=A I R 1932 C 303=A L R 1932 C 729

—Property not in actual possession of a party and not taken out of his possession and made over to a third party under decree subsequently reversed on appeal—Restitution of, to former from latter—Not permissible under S. 144. 11 P 553 (555-6)=140 I C 482=A I R 1932 P 317=A L R 1932 P 619

—Proportionate restitution—Appeal by some of defendants in suit only—Portion of costs of suit decreed against all defendants deposited by appellants as a condition of stay—Restitution of amount of, on reversal of decree in appeal—Right to refund of entire amount deposited and withdrawn by decree-holders. Held that the appellants-defendants were entitled to a refund of the entire amount and not merely to a proportionate refund. 137 I C 294=1 R 1932 C 300=A I R 1932 C 313 (314-5).

—Inquiry in—Summary inquiry only contemplated—Stanger's rights acquired in the meantime—Adjudication of complicated questions as to—Inquiry wholly unsuited for. 58 C 1070=35 C W N 483=134 I C 906=A I R 1932 C 29 (34)=1932 Cr C 66

## (3) Application for restitution.

—An application under s. 144 is one for execution of a decree passed in appeal when that decree varies or reverses the decree of the Court of first instance. It is an application made for seeking the aid of the Court in working out the final decree. A I R 1931 Oudh 51=7 O W N 1153=Ind Rul (1931) Oudh 126=130 I C 78.

—Where a sale is set aside under O. XXI, r 92, and restitution is granted under s. 151, the questions that arise in such proceedings are questions which come within the purview of s. 47. A I R 1931 Cal 779 (2)=35 C W N 105=53 C L J 49.

—An application for restitution under S. 144, C. P. C. must be treated as an application for execution of a decree and

## C. P. C. (1908) SEC. 144 (Contd)

## (3) Application for restitution (Contd)

the article applicable is Art. 182, Limitation Act, i. e., the starting point for the purposes of limitation is the date of the decree of final Court of appeal. A L R 1933 R 345=A I R 1933 R 180=11 R 275. See also 8 A 545.

—If the Article of the Limitation Act applicable to an application for restitution under S 144, C. P. C. be Art. 181, Limitation Act, the limitation begins to run from the date of the decree of the final Court of appeal and not from the date of the decree of the trial Court. A L R 1933 R 345=A I R 1933 R 180=11 R 275.

—Application for—Restitution Lim. Act, Art. 182 applicable. 41 I C 301.

—An application under S. 144 of the C P Code for restitution is not in the nature of an application to execute any decree and therefore Art. 181 of the Lim. Act applies to such an application. 8 Bur L T 165=8 L B R 262=30 I C 6=0. see also 59 C 337.

—Where on an application for restitution a Court directed delivery of actual possession under O 21 R 35 of the C P Code and the applicant accepted such delivery as satisfying his claim, on a subsequent petition being filed praying for execution in restitution. Held, that the final order of the Court on the previous application could not be treated as a nullity and that the second application, was barred as the process for delivery is sued on the order passed on the first application had been carried out. 32 I C 46 following. 29 M L J 504.

—Plaintiffs sued to set aside a decree in execution of which they had paid money to the decree holder. The decree was declared to be null and void. Plaintiffs then applied for restitution of the amount paid by them under S 144 Civil Procedure Code. Held, that S 144 applied. There is no restriction in S 144 as to the manner in which the decree has been varied or reversed. 13 S L R 153=53 I C 552.

—Applications made to obtain restitution under S 583 of the C P Code, 1882, are proceedings in execution of the appellate decree, which the successful party has the right to treat as containing a direction to the other party to restore whatever benefit the latter has derived through execution under the reversed decree. 29 I C 380

—But a proceeding for restitution under S 144 of the Code is neither a suit nor a proceeding in execution. It is a miscellaneous proceeding to which the rules



## C. P. C. (1908) SEC. 144 (Contd)

## Application for restitution (Concld)

applicable to execution proceedings do in substance apply. The provisions of O. 2, R. 2 of the Code are not applicable to such a proceeding. 3 Pat L J 367=47 I C 47.

## (4) Attachment before judgment.

—Attachment before judgment—Order without jurisdiction Realisation of debt payable to debt—Withdrawal by decree-holder in pursuance of illegal order—Duty to refund with interest at 3½ p. c. 34 I C 457.

## (5-6) Bar to suit

—Under the present Code S. 144 exhausts the remedies which a litigant against whom a decree has been given, has when his property is sold under the decree and the decree is subsequently varied, to have restored to him the property sold in excess of what should have been sold. He has no other right of action in cases where the sale is not void ab initio. A I R 1931 Mad 713.

—Plaintiffs obtained an order for restitution of the property and obtained possession. Subsequently they filed a suit for recovery of mesne profits; Held, that restitution having been granted by Court under inherent jurisdiction, the later suit was not barred by s 144 (2) A I R 1931 Cal 517=Ind Rul (1931) Cal 860=58 C 465=134 I C 572.

—The right of restitution arising out of the reversal of a decree of an Appellate court is enforceable in execution and no separate suit lies for the purpose. 22 M L J 148=10 M L T 568=13 I C 179.

—When an application for restitution is refused as time-barred, a suit for same relief is barred under s. 144 (2). A I R 1931 Cal 14=34 C W N 707=Ind Rul (1931) Cal 179=129 I C 403.

—Question of liability of a mortgagee in a redemption suit for alleged waste by him while in possession of the mortgaged property must be settled only at the time of the preparation of the decree for redemption. It cannot be gone into in an application for restitution under s. 144, nor can a separate suit lie for it. A I R 1925, Oudh 654=83 I C 529.

—Where the filing of a suit involves as a necessary consequence an injury to property which cannot be compensated by the grant of costs in the action, a subsequent suit by defendant, for damages is not barred. Where defendant, after agreeing to have a dispute as to the property settled by arbitration, resiled after the award had

## C. P. C. (1908) SEC. 144 (Contd)

## (5-6) Bar to suit (Concl)

been made, and instituted a suit against plaintiff who was consequently deprived for a certain period of all rights to enforce the payment of certain debts due to her deceased husband with the result that their payment in certain instances became impossible owing to the Law of limitation. Held that as she could not recover compensation by way of costs or under s. 144, the suit was not barred. A I R 1922 All 465=L R 3 A 408=14 A 687=20 A L J 616=69 I C 173.

—An application for restitution must be made to Court which passed the decree which is reversed. A separate suit for the same is not maintainable. A I R 1922 All 71=44 A 283=20 A L J 33=L R 3 A 97=63 I C 789.

—Applicability of—Restitution, suit for—Ex parte decree—Execution, Sale—Purchase by decree-holder—Harvest of crops—Decree set aside—Suit for value of

## (7) Bona fide auction purchaser.

—Restitution cannot be obtained under S. 144 of the C P Code as against a bona fide purchaser for value at an auction sale held by a Court which had jurisdiction to hold the same 16 O C 225, foll. 38 All 240=14 A L J 302=34 I C 303.

## (8) Compensation.

—The ultimate decree-holder can get compensation for any loss caused to him by reason of the execution of the decree of the lower Court, but is not entitled to recover mesne profits for a period prior to the execution of such decree as the object of s. 144 is to place the finally victorious party in a position which he would have occupied if the erroneous decree had not been executed. A I R 1921 Lah 234=4 Lah L J 333=58 I 807.

## (9) Construction.

—The meaning of the words that the restitution should as far as possible place the parties in the position which they would have occupied but for such decree is that restitution should clear the account between the parties and leave no claim on either side. A I R 1931 Oudh 12=7 O W N 1075=14 R D 660=Ind Rul (1931) Oudh 102=129 I C 326.

—“Or otherwise” immediately following “restitution” provide for cases where

## C. P. C. (1908) SEC. 144 (Contd)

## (9) Construction (Contd).

it is not possible to make restitution in the sense of restoring the very property lost to the petitioner. A I R 1931 Mad 81 = 60 M L J 219 = 33 L W 259 = Ind Rul (1931) Mad 371 = (1930) M W N 1245 = 130 I C 451.

—“Restitution” implies that a party who applies under s. 144 should prove that he was in possession of something, the restitution or restoration of which he seeks. A I R 1931 Mad 81 = 60 M L J 219 = (1930) M N N 1245 = 33 L W 259 = Ind Rul (1931) Mad 371 = 130 I C 451.

—The Court to which a decree has been transferred for execution has under S. 42 of the C P C the same powers in executing such decree as the Court of 1st instance, which passed the decree and is, therefore, competent to order restitution under S. 144, C P C. 7 S L R 19 = 20 I C 540.

—The Court of first instance is the Court which did the act which turned out to be wrong. Under s. 144 it is the duty of the Court to place the parties in the same position as though the final decree in the declaratory suit had been the only decree that was passed in the suit. A I R 1931 Rang 21 = Ind Rul (1931) Rang 97 = 130 I C 353.

—“Court of first instance” confines the applicability to the cases where the variation or reversal has been made or is in consequence of an order made by a superior Court. If the case comes within the purview of the section no matter whether the question is simple or complicated, it will have to be determined on an application made under it and a separate suit would be barred. A I R 1931 Cal 42 = 52 C L J 505 = 34 C W N 746 = Ind Rul (1931) Cal 364 = 130 I C 236.

—Section 144 applies where a decree is “varied or reversed” A decree is only varied or reversed by a superior Court on appeal or on revision or on reference. But, if a decree is set aside either by a proceeding in the suit itself or by a decree in another suit altogether or if, without being set aside by such a decree, it is superseded these are matters which are not within the words of the section. A I R 1931 Cal 14 = 34 C W N 707 = Ind Rul (1931) Cal 179 = 129 I C 403.

—An application for restitution is not an application for execution. A I R 1930 Lah 961 = Ind Rul (1931) Lah 140 = 129 I C 204.

—S. 144 provides speedy and simple remedy for party who has suffered by reason of an erroneous decree and not to a case where the Court has to decide questions of conflicting rights under

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## C. P. C. (1908) SEC. 144 (Contd)

## (9) Construction. (Contd).

different decrees which may be very complicated. A I R 1929 Cal 814 = 33 C W N 908 = Ind Rul (1930) Cal 565 = 125 I C 645.

—M obtained possession of certain property in execution of his decree against L—Decree set aside in appeal—L applied for possession of property and K resisted his claim—Proceedings were treated as under O. XXI, r. 97 and not under s. 144. A I R 1930 All 415 = (1930) A L J 834 = Ind Rul (1930) All 310 = 122 I C 758.

—Decree in another suit in respect of same property and between same parties cannot be effected by any thing in s. 144. A I R 1929 All 527 = Ind Rul (1929) All 871 = 118 I C 519.

—S. 144 is not exhaustive, Court has inherent power to restore any party which has suffered any injury by virtue of an order. A I R 1929 Lah 657 = Ind Rul (1929) Lah 741 = 118 I C 389.

—Restitution must be granted as a matter of course and is not discretionary. A I R 1928 Rang 293 = Ind Rul (1929) Rang 169 = 117 I C 57.

—S. 144 is not a rule of substantive law but lays down merely the procedure. A I R 1928 All 293 = 50 A 767 = 26 A L J 587 = 112 I C 876.

—The section is mandatory and a refusal to order restitution on equitable considerations arising from events subsequent to decree is not justifiable. A I R 1926 Lah 685 = 96 I C 804.

—For the purpose of s. 144 the “Court of first instance” when it has lost territorial jurisdiction should be interpreted according to the general principle as laid down in s. 37 (b) as it would apply even to cases where the Court of first instance has been abolished and also to cases where the Court of first instance has ceased to have jurisdiction. A I R 1926 Mad 813 = 51 M L J 161 = (1926) M W N 395 = 95 I C 587.

—An application for restitution is an application in execution. A I R 1926 Mad 813 = 51 M L J 161 = (1926) M W N 395 = 95 I C 587.

—Application for restitution under s. 144 is an application for the execution of a decree. A I R 1926 Oudh 199 = 13 O L J 731 = 1 Luck 40 = 3 O W N 65 = 92 I C 23.

—Under s. 144 there is no distinction between a decree in suit and a decree in a proceeding. A I R 1925 Cal 102 = 28 C W N 988 = 84 I C 747.

—Where the property in dispute was never in possession of the applicant S. 144 has no application as the property

## C. P. C. ( 1908 ) SEC. 144 (Contd)

## (9) Construction (Concl'd)

cannot be said to be taken out of applicants possession and given to the non-applicant under any order or decree of Court A I R 1924 Cal 769=51 C 324=81

I C 571.

—In S. 144 the word "decree" covers an order and the word "Court" includes Courts of every grade. A I R 1924 Nag 258=20 N L R 93=7 N L J 130=80 I C 49.

—An application for restitution is not an application for execution and therefore cannot be governed by Art. 182 Limitation Act. A I R 1923 Nag 94=71 I C 42.

—Where prejudice suffered is not due to the variation in decree but to the terms of the sale order which was not objected to either at the time of proclamation or sale s. 144 does not apply. The terms of s. 144 are much more restricted than those of corresponding—S. 583 of the previous Code. A I R 1922 Mad 96=(1922) M W N 141=42 M L J 315=16 L W 355=68 I C=516.

—Proceedings under s. 144 of the Code are not execution proceedings although they are of course in the nature of proceedings in execution to enforce either directly or indirectly the final decree. A party to application under s. 144 need not have been a party to the decree. S. 144 includes matters which an execution Court or Appellate Court could not ordinarily deal with and the word "party" in the section is not used in the sense "party to the suit" but means "party to the application." A I R 1922 All 238=44 A 555=20 A L J 456=4 U P L R (A) 74=66 I C 545.

—Proceedings under s. 144 of the Code cannot properly be described as proceedings in execution of a decree in view of the different language used in the present s. 144 and the s. 586 of the old Code. The terms of s. 144 apply to such proceedings and the Court is competent to set aside the order of dismissal for default and to restore the application. A I R 1922 All 223=20 A L J 226= L R 3 A 209=44 A 407=66 I C 144

## (10) Court fee.

—Applications under s. 47 and s. 144 are kindred and similar. Application under s. 144 when a decree is fully executed is made in consequence of decree passed by Appellate Court S. 47 does not apply to the case because the decree is fully executed and it is unequitable for applicant to force him to pay ad valorem Court fee. A I R 1928 Lah 143=107 I C 491.

## C. P. C. ( 1908 ) SEC. 144 (Contd)

## (10) Court fee. (Concl'd)

—Appeal from order of restitution under s. 144—Such order not contained in the decree of the Appellate Court is an order which has the force of a decree. The Court-fee payable on the memorandum of appeal against such an order must be calculated in accordance with Art 1 Sch I Court-Fees Act. A I R 1930 Lah 24 =113 I C 270.

—Ad valorem Court-fee is payable on appeal from order under s 194 A I R 1930 Rang 241=8 R 271=Ind Rul (1930) Rang 291=126 I C 211.

—Not ad valorem fee but a fee of Rs. 4 is required for an appeal from order under s. 144. A I R 1927 Lah 635=103 I C 657.

—Section 144 relates to the execution, discharge or satisfaction of the decree either of the First Court or of the Appellate Court where First Court's decree has been discharged by the Appellate Court, the question arising under s. 144 will naturally be a question as to the discharge of decree coming under s. 47 ad valorem fee need not be paid on appeal but a stamp of Rs. 4 is enough. A I R 1925 Pat 577=4 Pat 294=7 P L T 415= 92 I C 474.

—An appeal from an order under s. 144 must be stamped ad valorem, A I R 1925 All 137=47 A 98=22 A L J 881=L R 5 A 773 Civ=32 I C 321

—Application for compensation s. 144 by judgment-debtor relates to execution, discharge or satisfaction of decree, and so the Court-fee payable on memorandum of first appeal against its dismissal is 8 annas. A I R 1922 Nag 62=18 N L R 15 =67 I C 225.

## (11) Decree awarding costs.

—Where one of the defendants deposits the costs and the decree is reversed on appeal preferred by him alone, he is entitled to a refund of the entire amount even though if such an order was made the decree-holders might be without their remedy in matter of the realization of this sum from the other judgment-debtors. He is entitled to interest on the amount deposited by way of restitution but only from the date on which the amount was withdrawn by the decree-holder. 35 C W N 1305.

—A party realising costs awarded to him under a decree must refund the amount on reversal of the decree quite apart from the fact that property in the suit was given to a charity or applied to any other purpose Under S. 144 C. P. C. the court is bound to restore the parties

## C. P. C. ( 1908 ) SEC. 144 (Contd)

## (11) Decree awarding costs (Contd)

to the position which they would have occupied but for the decree which was subsequently reversed. 54 I C 816.

## (12) Decree varied or reversed.

—S. 144 C. P. C. can apply only where and in so far as a decree is varied or reversed and the Court of first instance is asked to order restitution. The variation or reversal contemplated by the section is that made either by the Court itself in the exercise of its inherent jurisdiction of reviewing its own order or by a superior Court interfering in appeal or revision or perhaps by another Court passing a declaratory decree. It does not contemplate the variation or reversal of a decree under a private compromise entered into by the parties whether out of Court or in the course of an execution proceeding. A L R 1933 A 839 (840)=A I R 1933 A 743=1933 A L J 724=2 A W R 57.

—But where decree is superseded by another compromise decree—restitution is allowable. A L R 1933 M 614=1933 M W N 641.

—Where a sale takes place in execution of a decree and the decree is varied on appeal and the amount is reduced, if the judgment-debtor could and would, have paid what was due, and thus prevented sale he can get the sale set aside as against the decree-holder by way of restitution. But where it appears, however, that the sale would not have been prevented had the original decree been correct, no object, is to be served in setting aside the sale. 35 C W N 1298=54 C L J 293.

—Where property is sold under final decree and the preliminary decree is varied in appeal the appellant may apply for restitution even though no appeal was filed from final decree as the final decree ipso facto falls through. A I R 1931 All 655=Ind Rul (1931) All 734=(1931) A L J 668=133 I C 622 (1).

—Decree of Sub-Judge reversed on appeal by High Court by Privy Council—Effect—Execution of decree of Sub-Judge if maintainable—Possession taken by decree-holder—If restitution may be ordered. See 16 I C 945.

—A decree need not necessarily be put in execution for s. 144 (2) to apply. Where an application for restitution is erroneously rejected suit for possession and declaration is barred. A I R 1931 Cal 14=34 C W N 707=Ind Rul (1931) Cal 179=129 I C 403.

—Under s. 144 a Court by virtue of the equitable jurisdiction sets right injustice caused by lower Courts passing erro-

## C. P. C. ( 1908 ) SEC. 144 (Contd)

## (12) Decree varied or reversed (Contd)

neous decrees creditor of the decree-holder attaching the decree, is a representative of the decree-holder and restitution can be had against him. A I R 1930 Mad 787=32 L W 148=53 M 796=59 M L J 225=Ind Rul (1930) Mad 1027=127 I C 643.

—Section 144 applies where the decree is varied or reversed and not to a case where, as the result of a different suit the title of a person derived by purchase under quite a different proceeding in execution of a decree which stands unreversed is questioned. A I R 1929 Cal 814=33 C W N 908=57 C 226=Ind Rul (1930) Cal 565=125 I C 645.

—For restitution under s. 144, decree must be reversed. A I R 1930 Cal 89=56 C 550=Ind Rul (1930) Cal 87=120 I C 807.

—Where a decree-holder is auction purchaser the sale cannot stand if the decree is reversed or modified and judgment-debtor pays amount finally decreed. Restitution should be ordered only when applicant discharges his obligation under the reversed decree. A I R 1929 Rang 157=7 R 107=Ind Rul (1929) Rang 188=117 I C 252.

—Decree-holder getting possession of the property decreed otherwise than by executing decree but under colour thereof, decree set aside on appeal. The opposite party is entitled to be replaced in possession. A I R 1927 Lah 37=8 Lah 41=8 Lah L J 551=28 P L R 62=99 I C 952.

—It is only a bona fide purchaser who is not a party to the suit or proceeding that is entitled to keep the property purchased by him. In all other cases the purchase is liable to be defeated on the reversal of the decree in execution of which the sale is effected. Per Wallace, J.—This salutary principle of restitution should be enforced as the rule, and exceptions to that rule should be allowed only so far as authority by which we are bound, has allowed them. A I R 1926 Mad 78=48 M 767=49 M L J 452=22 L W 439=91 I C 16.

## (13) Dependent Judgment.

—It is a general rule that upon the reversal of a judgment, order or decree, all connected or dependent judgments or orders fall with it, specially judgments subsequently entered and dependent thereon; but this rule does not operate by implication to set aside a distinct and independent judgment or proceeding though forms a part of the same litigation. Whether a judgment or order is a dependent judgment or order, that is, merely ancillary and necessary to another judgment so as



## C. P. C. ( 1908 ) SEC. 144 (Contd)

## (13) Dependent Judgment (Concl'd)

[to share its fate and fall to the ground along with it is to be determined from the nature and scope of the proceedings.

24 C L J 467=21 C W N 564=38 I C 17.

See also 37 M L J 591=34 I C 647.

## (14) Execution.

—Restitution under S. 144 of the C P C may be made even when the possession of the property was taken otherwise than by execution. 21 I C 34.

—S. 141 of the C P Code, does not make S. 144 applicable to execution proceedings. A decree-holder purchased the property put up for sale in execution of his decree and remained in possession thereof for several years. The sale was set aside on the application of the judgment-debtor and the property restored to him. Subsequently, the judgment-debtor transferred the property together with the right to sue the decree-holder for past mesne profit to A. A applied to the Court under S. 144 for recovery of the mesne profits from the decree holder. Held that the application was not one authorised by the terms of S. 144 of the C P Code, as no restitution was sought in respect of any decree which had been varied or reversed. 19 C W N 1167=26 I C 870.

—Execution Sale set aside for fraud—Application for mesne profits by judgment debtor—Section not applicable. see 22 I C 839.

—Mortgage by decree-holder to secure refund of decretal amount paid out to him in execution of decree subsequently reversed on appeal—Restitution claimed against him on reversal of decree—Amount recoverable under mortgage in—Subsequent mortgage of same property from decree-holder who had purchased the property in execution of decree on his mortgage has locus standi to contest 138 I C 260=33 P L R 673=I R 1932 L 451=A I R 1932 L 527.

—Stay of execution of money decree—Order for, conditioned on payment into Court of portion of decree-amount to be withdrawn by decree-holder on furnishing security—Amount deposited by judgment-debtor into Court pursuant to—Failure of decree-holder to furnish security and to withdraw—Reversal of decree in appeal—Restitution on—Interest on amount deposited into Court—Right to—Judgment-debtor has. 55 M 1025=63 M L J 383=36 L W 504=139 I C 348=1932 M W N 1044=A I R 1933 M 33 (2)=I R 1932 M 661.

—An attaching creditor of sale proceeds, payable to a vendor decree-holder

## C. P. C. (1908) SEC. 144 (Contd)

## (14) Execution. (Contd)

not being a party to the decree in execution of which the sale took place nor to an application for substitution as a vendee of the decree holder, is not a representative of the said vendor decree-holder within the meaning of S. 144 of the C P Code. 2) C L J 360=51 I C 375.

—An order under O 21 R 90 C P Code refusing to set aside a sale held in execution of a decree was reversed on appeal but the auction-purchaser was not made a party to the proceedings for setting aside the sale or to the appeal therefrom. The judgment-debtor subsequently applied for restitution against the auction-purchaser. Held, that S 144 of the C P Code did not in terms apply, as no decree was varied or reversed but only an order under O 21 R 90 was reversed on appeal 41 Mad 467=47 I C 628.

—On the 4th November 1901, a decree was passed by trial Court awarding possession of certain lands to the plff. who obtained possession in execution of the decree. The decree was on appeal by the applicant who was then a minor, amended on the 17th August 1903 by excepting from the decree two of the Survey numbers. The Survey numbers, however remained in the plff's possession. The applicant attained majority on the 1st October 1912; and on 4th August 1914, he applied, for delivery to him of the two excepted Survey numbers. A question having arisen whether the application was within time :—Held (1) that the application was within time, for it was virtually an application for the execution of the appellate decree amending the decree of the first court (2) that an order under S 144 of the C P Code being an order in execution of a decree of the appellate Court fell within the purview of S 6 of the Lim Act, and was saved by its provisions. 41 Bom 625=19 Bom L R 638=41 I C 238. And see 3 M L J 258; and 5 C W N 287.

## (15) Evilsence.

—The object of S 144 C P C is to restore the status quo ante, which might be done after taking evidence if necessary. The statement made by a partition Commissioners appointed in a suit in his report as to prior possession is not conclusive. 55 I C 356.

## (16) Ejectment suit.

—Landlord and tenant—Ejectment decree reversed on appeal—Restitution and compensation on Tenants' remedy—Application under S 144 Oudh Rent Act, 1886, S 108 (9) (c) see 16 R D 503.



## C. P. G. (1903) SEC. 144 (Contd.)

## (16) Ejectment suit (Concl'd)

—In a suit for ejectment the landlords obtained a decree against their tenants. The tenants were ejected from their holdings. Subsequently the decree was reversed. Some of the tenants applied to the Asst. Collector for restitution of possession under S 144 (2) of the C P Code. In view of various facts he ordered them to be restored to a portion of the original area from which they had been ejected. The order was affirmed by the Commissioner. The plffs. then sued to recover the whole of their original rights. Held that the suit was not maintainable 17 A L J 174=49 I C 721 and see 19 M L T 336=34 I C 2.

## (17) Ex parte decree.

—Strangers to decree or order subsequently reversed or varied—Rights or benefits acquired by—Interference with, by an order for restitution—Not permissible. 58 C 1070=A I R 1932 C 29 (32-4)=1932 Cr C 66=35 C W N 483=134 I C 906.

—Ex parte decree—Sale in execution—Decree subsequently set aside—Retrial ending in plff's favour—Application to set aside see 20 Bom L R 925=43 Bom 235=48 I C 130.

—Ex parte decree—Possession obtained pursuant to—Restitution of, on setting aside of ex parte decree and eventual dismissal of suit on rehearing—Application for, under S 144 (2)—Maintainable if not, because decree not reversed by a superior Court. *Quære* 58 C 1070=A I R 1932 C 29 (31)=1932 Cr C 66=35 C W N 483=134 I C 906.

—The plaintiff obtained on 27-11-1915 an ex parte decree in the Poona Court which the defendant applied to have set aside on 25-3-1916. On the 17th April 1916 the plaintiff recovered possession of the property in execution of the decree. The ex parte decree was set aside on the 1st July 1916 and the suit transferred to the Haveli Court for trial. The defendant applied to the Poona Court for restoration of the property but the Court dismissed the application on the ground that the application should have been made to the Haveli Court as the Poona Court has no jurisdiction to entertain it. Held (1) that the defendant, who applied for restitution, was entitled to have the property restored to him when the decree under which the plaintiff got possession had been set aside, and (2) that the Poona Court which originally passed the decree, had jurisdiction to entertain the application. 44 Bom 702=22 Bom L R 403=57 I C 125.

## C. P. C. (1908) SEC. 144 (Contd.)

## (18) Inherent power

—A Court has an inherent right irrespective of this section to order restitution—14 Cal. 484; 21 Cal 989; 6 Cal W N 712 see also 21 C L J 624=39 I C 49 and 54 I C 664. and 2 Lah L J 207. and 15 C L J 187=14 I C 456.

## (19) Interest

—The award of interest is generally speaking a matter of court's discretion except where by the law it is made obligatory. It is a rule of law that where a party has wrongly taken from the Court money deposited in court by his opponent that court has inherent power to enforce a refund of the amount with interest. 14 C 484, 3 B. 42 foll. 13 Bom L R 259=35 B 255=10 I C 818.

—A party in whose favour an order directing payment of costs is made under a decree subsequently reversed is entitled to interest thereon. L R 3 P C 465; 3 C 151 distinguished [8 All 262, 20 W R 49 referred to 63 I C 513, followed] A I R 1931 Mad 561 (1)=61 M L J 34=Ind Rul (1931) Mad 592=33 L W 618=134 I C 832.

—Right to interest by way of restitution—Costs of suit—Deposit in Court of amount of, as a condition of stay and withdrawal thereof by decree-holder—Interest on amount by way of restitution on reversal of decree in appeal—Judgment-debtor is entitled to. 137 I C 294=1 R 1932 C 300=A I R 1932 C 313 (315).

—Where no interest is awarded by the decree the Court has no power to grant interest or damages in lieu of interest by way of restitution. A I R 1924 Rang 275=3 Bur L J 58=82 I C 427.

—Mortgage-decree varied on appeal—Interest at a sufficient rate may be substituted for profits, enjoyed by person in possession under original decree during the period between his execution of the first Court's decree and his giving notice of deposition of additional amount. In a suit for redemption of a Karyam the defendants are not entitled to recover possession which the plaintiff had taken in pursuance of the decree of trial Court simply because the amount of compensation for improvements was increased on appeal. A I R 1924 Mad 87=18 L W 30= (1923) M W N 508=33 M L T 45 (H C)=45 M L J 323=73 I C 1041.

—Restitution on reversal of a decree means restoring benefit under erroneous decree—Interest from date of deposit to date of refund is consequential relief when decree is reversed. Deposit of decretal amount in Court—Objection petition

## C. P. C. ( 1908 ) SEC. 144 (Contd)

## (19) Interest (Contd)

restraining decree-holder from withdrawal dismissed on later date.—Decree reversed in appeal—Interest should be granted from date of reversal. A I R 1929 Pat 593=Ind Rul (1930) Pat 623=126 IC 383.

—On varying decree in appeal and while ordering restitution trial Court can award interest though not provided by security bond. A I R 1930 Mad 577=(1930) M W N 153=58 M L J 318=53 M 708=31 L W 262=Ind Rul (1930) Mai 463=123 IC 47.

—On reversal of decree in Privy Council—Interest should be allowed on money to be paid back on reversal. A I R 1926 Lah 488=7 Lah 232=8 Lah L J 338=27 P L R 400=93 IC 954.

—Where money is lying in Court and none is on such money deriving benefit from it no interest is payable. A I R 1925 Rang 215=4 Bur L J 58=3 R 251=89 IC 603.

—In a suit for return of earnest money and damages for breach of contract plaintiff having got a decree against defendants Nos. 1 and 2 went in appeal on ground that he was entitled to specific performance of the contract against defendant No. 3. Pending the appeal defendant No. 1 paid into Court, the amount which had been awarded against defendants Nos. 1 and 2. The plaintiff succeeded in the appeal. On application by Defendants Nos. 1 and 2, for restitution and claiming interest on the money paid in Court Held, that plaintiff could not resist the claim though he acquired no benefit from the money. A I R 1925 Bom 313=27 Bom L R 485=87 IC 713.

—When granting restitution interest must be allowed on costs, allowed in the original decree but disallowed in appeal. A I R 1921 All 241=19 A L J 771=3 U P L R (A) 126=63 IC 513.

## ( 19-a ) Limitation

—An application for restitution under s. 144 C. P. C. is not an application for execution and is, therefore, governed by Art. 181 and not by Art. 182 of the Limitation Act. The time for making such an application runs from the date of the decree which for the first time gave a right of restitution to the applicant and not from the decree of last appeal [ 56 C 61, followed ] 35 C W N 1294.

—Suit for possession decreed and possession delivered defendants appeal to the first Appellate Court decreed. Second appeal to the High Court dismissed. Defendants' application for restitution

## C. P. C. ( 1908 ) SEC. 144 (Contd)

## (19-a) Limitation (Contd)

and possession re-delivered. Further application for ascertainment of mesne profits by way of restitution and for recovery thereof the article applicable is Art. 181. Limitation Act; the time was to be computed from the date of the final decree which was the decree of the High Court and not that of the first Appellate Court; the right to apply for ascertainment of mesne profits did not accrue until after delivery of possession. A I R 1928 Pat 598=7 Pat 794=10 P L T 49=Ind Rul (1929) Pat 156=114 IC 476.

—Application under s. 144 is one for execution of decree passed in appeal—It is governed by Limitation Act, Art. 182. A I R 1931 Oudh 51=7 O W N 1153=Ind Rul (1931) Oudh 126=130 IC 78.

—Decree of trial Court was reversed in first appeal but the decree was executed in the meantime and the first appellate decree was affirmed in second appeal—Limitation for application for restitution began from date of first appellate decree. A I R 1928 Cal 646=32 C W N 971=56 C 61=Ind Rul (1929) Cal 527=117 IC 543.

—Per Mukerji, J.—An application made to obtain restitution as per order of His Majesty in Council, is governed by Art. 183 and not by the general and omnibus. Art. 181; A I R 1928 All 293=50 A 767=26 A L J 587=112 IC 876.

—An application for restitution under s. 144 is not an application for execution but a miscellaneous application, and is governed by Art. 181 Limitation Act. A I R 1926 Lah 685=96 IC 804.

—The period of limitation is three years for an application for restitution. Time for restitution begins from the date of High Court's order in second appeal, which affirms the first Appellate Court's order reversing trial Court's decree. A I R 1926 Cal 981=92 IC 960.

—Section 6 Limitation Act applies to application made under S. 144. A I R 1926 Oudh 199=13 O L J 731=1 Luck 40=3 O W N 65=92 IC 23.

—Per Das and K. Sahay, JJ.—An application for restitution is governed by Art. 181 and not Art. 182. Per Ross, J.

—In principle there is no reason why an application for restitution should not be treated as an application for execution such an application is therefore governed by Art. 182. A I R 1925 Pat 1=3 Pat 371=5 P L T 145=(1924) Pat 33=78 IC 200.

—Application for mesne profits under s. 144 is not one for execution, and when the decree is reversed a right to apply for mesne profits accrues. A I R 1924 Lah 166=5 Lah L J 889=76 IC 501.

## C. P. C. ( 1908 ) SEC. 144 (Contd)

## (19-a) Limitation. (Conclud)

—Plaintiff successful in first Court—Defendants successful in decision on remand by Appellate Court—For an application for restitution starting point is the date of latter decision and not of the order of remand. A I R 1923 Nag 101=18 N L R 200=76 I C 255.

—A judgment-debtor applied for execution against the decree-holder, transferee and certain other persons and was successful. The purchaser then appealed and the order was set aside the judgment-debtor then made a second application for restitution against the decree-holder for loss suffered by him on account of the sale Held, that it was a continuation of the first application and so not time barred. 19 A L J 549=3 U P L R (A) 91=63 I C 184.

—An application for restitution is an application for execution under the present Civil P. C., as it was under the old Code, and is governed by Art. 182 of the Limitation Act A I R 1923 Pat 371=(1923) Pat 1=2 Pat 277=1 Pat L R 336=72 I C 912.

—An application for restitution cannot be treated as anything else than an application for execution of the decree of the Appellate Court and hence is governed by Art. 182, Limitation Act. A I R 1921 Bom 67=45 B 1137=23 Bom L R 480=62 I C 233.

—S. 144 is not to be narrowly construed so as to restrict its application; it was enacted with a view to shorten litigation and afford speedy relief and it applies even for restitution of property taken by force by decree-holder on the strength of the decree. S. 144 is not limited to restitution of what may be technically described as mesne profits; and if an appropriate order for restitution is made there-under no question of limitation arises. The Court will not, in the interests of justice, be astute to force the parties to a separate suit merely to allow the question of limitation to be raised in a case of this description. 16 C L J 135=17 I C 121.

## ( 20 ) Jurisdiction

—Duty of Court in respect of restitution—Does not arise under S. 144, but is inherent in the general jurisdiction of the Court, A I R 1932 C 29 (31)=1932 Cr C 66=35 C W N 483=58 C 1070=134 I C 906.

—Insolvency Court—Judication of—Receiver distributing assets under an order of the Insolvency Court—Order set

## C. P. C. ( 1908 ) SEC. 144 (Contd)

## (20) Jurisdiction (Contd)

aside on appeal—Power to order refund under this section. A L R 1933 A 42=A I R 1933 A 117=143 I C 330=1 R 5 A 230=1932 A L J 1095.

## ( 21 ) Mesne Profits.

—Decree-holder purchased property in suit at sale—Sale confirmed during pendency of appeal by judgment-debtor—Possession granted to decree-holder—Appeal compromised—Decree-holder agreed to give possession receipt of first instalment from judgment-debtor—Instalment paid but possession not transferred—Application by judgment-debtor for mesne profits from date of delivery of possession by way of restitution. A I R 1930 Cal 89=56 C 550=1nd Rul (1930) Cal 87=129 I C 807.

—On a suit for redemption of four items of mortgaged property a decree for redemption of the three items on deposit into Court of balance of mortgage-money by mortgagor was passed—Mortgagor after such deposit filed appeal for redemption of fourth item and appeal was decreed and application under s. 144 for mesne profits was filed—Mortgagor not being in possession of that item at date of trial Court's decree, s. 144 did not apply—Under s. 47, application under s. 144 was allowed to be converted into plaint. A I R 1931 Mad 81=(1930) M W N 1245=60 M L J 219=33 L W 259=1nd Rul (1931) Mad 371=130 I C 451.

—Suit for ejectment decreed and possession obtained in execution—Decree finally reversed—Property leased in meantime to third persons—Application made under s. 144—Possession can be recovered from the third persons and mesne profits from ejector only. A I R 1929 Cal 586=1nd Rul (1930) Cal 489=125 I C 105.

—Suit under O. XXI, r. 103, for declaration and possession decreed application for mesne profits does not lie under s. 144. A I R 1927 Mad 898=39 M L T 94=27 L W 188=104 I C 768.

—Order for mesne profits, after decree, is not one for restitution under s. 144. An executing Court has ample power to make an order to prevent what would be essentially a miscarriage of justice and a separate suit is not necessary. A I R 1927 Lah 346=28 P L R 178=103 I C 328.

—When money-decree is reversed judgment debtor is entitled to mesne profits for the period during which the decree-holder auction-purchaser remained in possession plus interest thereon, as also

## C. P. C. ( 1908 ) SEC. 144 (Contd)

## ( 21 ) Mesne Profits (Contd)

the commission paid to the auctioneer.  
A I R 1924 Lah 486=6 Lah L J 142=80 I  
C 316.

—An order awarding mesne profit is not consequential on an order of remand when the question as to whether the person in possession under the decree of the first Court was rightly in possession is yet to be decided. An application for mesne profits would be in that case premature and limitation will start only when it is decided that possession is wrongful A I R 1923 Nag 101=18 N L R 200=76 I C 255

—Where pending an appeal by judgment-debtors execution was stayed on furnishing security for mesne profits. Held, that the decree-holders could recover mesne profits in execution proceedings against the judgment-debtors and a separate suit is unnecessary. The Court could order restitution in a case of this sort on dismissal of the appeal 9 Lah L J 207.

—Decree for redemption against mortgagee with possession reversed on appeal—Mortgagee's application to first Court for recovery of mesne profits for period of dispossession in execution—Duty to award mesne profits. See 38 All 163=43 I A 43 (P C)=33 I C 505.

—If a decree is reversed in appeal, the successful party is entitled to have restitution of all that he had been deprived of under the decree reversed including the profits accruing from property the possession of which he had been deprived by the other party. 53 I C 119.

—When in execution of a rent decree, the landlord decree-holder purchased the property and settled it with another tenant, and the decree was subsequently set aside at the instance of the tenant judgment-debtor. Held, that the tenant judgment-debtor was entitled to possession as against the tenant settled by the decree-holder purchaser, under S. 144 of the C. P. Code as well as to mesne profits for the period he was out of possession against the landlord decree-holder 29 C L J 499 Fol: 24 C W N 50=29 C L J 486=51 I C 959.

—Stay order conditional on furnishing security for mesne profits—Appeal of the objectors in which stay order granted accepted though ultimately the objectors failed—Auction purchaser whether entitled to mesne profits under S 36, C P C or by way of restitution—Appeal from the order allowing mesne profits whether competent. A L R 1933 L 371=34 P L R 938=A I R 1933 L 485=146 I C 301. And see 11 O C 235.

—A judgment-debtor on reversal of an execution sale is not only entitled to

## C. P. C. ( 1908 ) SEC. 144 (Contd)

## (21) Mesne Profits. (Contd)

be restored to possession of the properties sold in execution but also to a refund of the profits which have been or might have been collected by the decree-holder auction purchaser during the period he was in possession. He is entitled to set off such mesne-profits against the decretal amount. 15 C L J 187=14 I C 456.

## (22) Money taken in execution.

—Restitution of money paid under decree subsequently reversed on appeal—Right to apply for—Money paid not by judgment-debtor but by third party claiming in his own right property attached in execution of decree to get it released from attachment. The question depends upon whether the money paid to the decree-holder was money of the judgment-debtor or of the third party. If the third party, in order to have a clear title to his property, paid money to the decree-holder, the judgment-debtor has no right to recover it. 1932 A L J 724=A I R 1932 A 609=A L R 1932 A 1027.

—Money not paid in time due to holidays—Lower Court cancelling pre-emption decree—Possession given to vendees—Decree restored by High Court—Application for restitution—Attachment of a portion of pre-emption money—Effect of—Nevertheless pre-emptor entitled to possession. A L R 1933 L 835 (836)=A I R 1933 L 791=144 I C 635=1 R 6 L 1.

—Pre-emption money deposited—Defendant's appeal—Stay of execution—Plaintiff to receive interest at 10 per cent—Defendant withdrawing pre-emption money—Decree reversed on appeal—Plaintiff entitled to 6 per cent interest. A L R 1933 A 269 (270).

—A judgment-debtor from whom the assignee of a money-decree has realised the decretal amount in execution is entitled to recover it back from the latter on a reversal of the decree in appeal, even though the assignee was not brought on record in the appeal—23 M 201, followed: 24 A 283, dissented from. 23 M L J 513 =38 Mad 36=(1912) M W N 1152=17 I C 420.

—And see

17 M 82

## (23) Parties

—Section applies to nominee of decree-holder to whom decree amount is paid pending appeal on his executing security bond for refund of amount on reversal of decree in appeal. 34 B L R 379 (380).

—“Party”, in s. 144 includes representative of a party. 33 P L R 673=A I R 1932 L 527=138 I C 260=1 R 1932 L 451.



## C. P. C. ( 1908 ) SEC. 144 (Contd)

## (23) Parties (Concl'd)

—Person against whom restitution claimed—Representative of—Property mortgaged by decree-holder to secure refund of decretal amount paid out to him—Subsequent mortgagor from him of purchasing the property in execution of decree obtained on foot of his mortgage—Representative of decree holder from whom restitution claimed is. 33 P L R 673=A I R 1932 L 527 (529)=138 I C 260=I R 1932 L 451.

—Substituted parties in P C appeal—Restitution as between, of costs of courts below paid by one of original parties to the other pursuant to decree of High Court on appeal—Amount not paid by substituted party claiming restitution, and not received by substituted party against whom restitution claimed 10 R 480 (484-5)=A I R 1932 R 148=A L R 1932 R 356.

—S. 144, C P C refers to the parties to the erroneous decree but not to third persons who were parties neither to the objection proceeding nor to the proceeding on appeal. The question of restitution as against such third person does therefore fall within the purview of S. 144. 16 O C 225=21 I C 570.

—A person who did not enter into possession of the property in virtue of a decree in his favour cannot be made liable to pay mesne profits by way of restitution. 41 I C 23.

—Even in a case which does not come under S. 144, C P Code, the Court can and will make restitution for the wrong done to a party by reason of its erroneous order. 61 P R 1917=98 P W R 1917=41 I C 910.

—Where an assignment has taken place even after the appellate decree, which is the basis of the claim for restitution, the assignee is entitled to the benefit of S. 144 of the C P Code. Parties in S. 144 do not mean only persons who were impleaded as parties at the time of the decree of the trial Court but include also their representatives whether by assignment or devolution. (1918) Pat 243=5 Pat L W 141=46 I C 465.

—Person entitled to restitution under—Party in possession deprived thereof under decree subsequently reversed on appeal—Death of—Son of that party entitled to restitution on, where there is no proof that the position of the deceased terminated with his death. 137 I C 39 (2)=1932 A L J 239=I R 1932 A 265=A I R 1932 A 239=A L R 1932 A 7.

## (24) Partition Decree.

—Where a preliminary decree for partition is set aside on appeal, the final decree which may have been passed pend-

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## C. P. C. ( 1908 ) SEC. 144 (Contd)

## (24) Partition Decree (Concl'd)

ing the appeal from the preliminary decree becomes ineffective. Consequently, a party from whom any money has been levied under the final decree so rendered inoperative, is entitled to restitution of the amount from the party who levied it on the basis of the final decree. 27 C L J 451=43 I C 775; and see 100 P R 1876.

## (25) Possession.

—Under S 144 C P Code where a decree-holder gets possession of the property decreed to him otherwise than by executing the decree but under colour thereof and that decree is set aside on appeal the opposite party is clearly entitled to be replaced in possession. 42 All 568=18 A L J 729=57 I C 148.

—In a suit to recover joint possession of the water of a well the plaintiff got a decree and in execution of it was put into joint possession with the defts. The defendants having appealed the lower appellate court reversed the decree and dismissed the suit. In execution of the appellate decree the plff was deprived of joint possession of the water of the well. On plff's appeal to the High Court, the appellate decree was reversed, and the decree of the trial court restored. He next applied for restitution by way of compensation for the loss of the joint enjoyment of the water during the period during which he was deprived of it in virtue of the appellate decree. The lower courts dismissed the application on the ground that it did not fall under S. 144 of the C P Code. Held by Heaton and Shah, JJ: (Beaman J. dissenting) that the plaintiff's application was clearly within the scope of S. 144 of the C P Code. 43 Bom 433=21 Bom L R 157=50 I C 715. See also 43 Bom 492.

## (26) Powers and duties of Court

—The powers of the Court to grant restitution is not confined to cases under S. 144 C P C nor S 144 is confined to cases where the decree is varied or reversed in appeal. Where a decree was passed by the High Court in a partition suit, giving liberty to reopen the decree in the light of orders that may be passed by the Board of Revenue in certain commutation proceedings and where the High Court varied the decree subsequently in the light of the orders of the Board of Revenue, Held, that the executing Court can award full restitution under S. 144 or 151 C P C even though the case did not come strictly within S. 144 A L R 1934 P 30=14 P L T 753.

—Restitution—Grant of S. 144 not exhaustive of all cases—Inherent powers of Court under S. 151—Moneys realised by execution sale shared by rival decree-holders—Sale subsequently set aside for



## C. P. C. (1908) SEC. 144 (Contd)

## (26) Powers and Duties of Court (Contd)

want of saleable interest to judgment-debtor—Court has inherent power to order restitution by way of compelling decree-holders to refund money. A I R 1933 A 62 (64-5)=55 A 221=A I R 1933 A 218=144

I C 492=I R 5 A 438=1933 A L J 60.  
see also 6 L W 568=42 I C 523.

—Under s. 144 the Court makes orders necessary for ends of justice or to prevent abuse of processes of the Court. A I R 1930 Pat 473=11 P L T 361=Ind Rul (1930) Pat 555=125 I C 779.

—S. 144 does not deal with restitution only. It covers a case of party entitled to a benefit by way of restitution and empowers a Court to do justice to the parties to the suit. A I R 1929 Lah 657=Ind Rul (1929) Lah 741=118 I C 389.

—Power of restitution is not limited to s. 144. On all cases where the parties have invoked the aid of the Court and the Court has recognized a certain transaction on the basis of an existing decree, then, if that existing decree is set aside on appeal, the Court may order the parties to be restored to the position they would have been in, if they had not taken action under the existing decree. A I R 1927 Lah 635=103 I C 657.

—Apart from s. 144, restitution can be granted under s. 151. A I R 1926 Lah 685=96 I C 804.

—The jurisdiction as to restitution is not limited to s. 144 it can also come under the inherent power of Court under Civil Procedure Code s. 151 A I R 1924 All 718=46 A 767=22 A L J 673=L R 5 A 559 Civ=84 I C 75 see also 75 I C 858=A I R 1924 Lah 583.

—The Courts have inherent power under s. 151 to apply the principle of s. 144 even in cases which do not come strictly within the terms of that section and to order restitution. A I R 1925 Mad 365=83 I C 138.

—Court can also order restitution under its inherent power to do what is right and proper under the circumstances. Where the Court executing the decree delivered possession of the property in dispute to certain persons and the High Court decided that the interpretation put on the decree by the executing Court was wrong. Held that, that being so, the Court had complete jurisdiction to restore the properties to the persons who had been in possession originally. A I R 1921 Pat 800=5 P L T 553=78 I C 310.

—The power of a Court to grant restitution is not confined to cases covered by the provisions of s. 144 but under that section, read with s. 151 may be extended to other cases. A I R 1924 Lah 583=75 I C 858.

## C. P. C. (1908) SEC. 144 (Contd)

## (26) Powers and Duties of Court (Contd)

—Per Das J—Execution presupposes a decree or order capable of being carried into effect; restitution presupposes an act of the Court, which has done an injury to the suitors. Execution will issue as of course; but in case not strictly within the letter of s. 144 restitution is not a matter of course but depends upon the discretion of the Court and will be ordered only when the justice of the case calls for it. The jurisdiction as to restitution bears only a superficial resemblance to the jurisdiction as to execution. The jurisdiction to order restitution is inherent in the Court and that it flows, not from any power which it may have to carry into effect the decree or order of the Court, but from the recognition of the duty which it owes to the suitors to take care that no injury is done to them by its acts. A I R 1925 Pat 1 (F B)=3 Pat 371=5 P L T 145=(1924) Pat 33 (F B)=78 I C 200 Over Ruling 1923 Patna 371=72 I C 912.

—A decree-holder purchased property in execution sale. Subsequently, it was agreed that the sale should not be confirmed, if by a certain fixed date the judgment-debtors paid Rs. 1,313 to the decree-holder. One of the judgment debtors paid two instalments of Rs. 317 and 230 respectively within the time allowed and the rest was not paid. The sale was therefore confirmed in full satisfaction of the judgment-debt, the Court overlooking the fact of retention by decree-holder of the two sums paid by the judgment-debtor. The judgment-debtors then made an application for restitution of the two sums. Held, that the judgment-debtors were entitled to a refund of that amount, that a regular civil suit for the purpose would not lie, that the case was not covered by of s. 144 but the execution Court could in the exercise of its inherent powers under s. 151, make an order for restitution with a view to do complete justice between the parties. A I R 1922 Cal 28=26 C W N 408=35 C L J 53=64 I C 864.

—The provision of s. 151 may be taken as a guide to determine as to when an order for restitution may be made to restore the parties to the status quo ante to do complete justice. A I R 1922 Cal 28=26 C W N 408=35 C L J 53=64 I C 864.

—The discretionary power given to a Court by S. 151, C. P. Code cannot enlarge the scope of section 144 C. P. Code, and cannot convert an application for a relief which has nothing to do with restitution, into an application for restitution. 4 L W 400=34 I C 774.

—Under S. 144, of the C. P. Code, 1908, the court may in its discretion award such interest as it chooses, and the fact,

## C. P. C. (1908) SEC. 144 (Contd)

## (26) Powers and Duties of Courts (Concl'd)

that the principle only is secured by the bond executed under the order of the court at the time of the withdrawal of the sum originally decreed does not affect the liability of the person order to make restitution to pay interest in accordance with the section. 2 Pat L J 149=39 I C 22.

—Power to decree interest on cost-judgment-debtor liable to refund. see 20 O C 327=43 I C 337.

## (27) Principle of restitution.

—It is the party who is entitled to restitution who can apply to the Court and claim the help of the Court in the matter, it is for his benefit that the provision is introduced. The restitution must be such as will put the parties in the position which they would have occupied but for the wrong decree. The party who is to be assisted by Court must be put into the position which he could have occupied but for the wrong decree. It is no answer to that provision to say that it cannot be given effect to because the other party happened to gain no benefit by the wrong decree or order which had been made, 35 M 1025 (1029-30)=63 M L J 383=36 L W 504=1932 M W N 1014=139 I C 348=A I R 1933 M 33 (2)=1 R 1932 M 661.

—Appeal by defendant—Stay of execution conditional on his paying a portion of the decree amount in Court—Direction to the plaintiff to withdraw the amount on furnishing security—Failure of the plaintiff to withdraw amount—Decree reversed in appeal—Defendant entitled to recover the amount deposited with interest from the plaintiff. A L R 1933 M 889= 139 I C 348=55 M 1025=36 L W 504=63 M L J 383=1932 M W N 1014=A I R 1933 M 33 (2).

—A claim under S. 144 is governed by the same principles that apply to a claim for money had and received. Where pursuant to a decree or order of the Court one party has been compelled to pay money or transfer property in invitum to another party it would be unconscionable upon the reversal of the decree or order that the party who had received the money or property through the wrongful act of the Court should be held entitled to retain such money or property as against the party who had wrongfully been ordered to pay it and who was claiming restitution. 10 R 480 (483)= A I R 1932 R 148=A L J 1932 R 356.

—Where a decree is passed with a reservation as to the question of restitu-

## C. P. C. (1908) SEC. 144 (Contd)

## (27) Principle of restitution (Contd)

tion the party taking benefit of the decree cannot object to the application for restitution. A I R 1933 Cal 42=52 C L J 595=Ind Rul (1931) Cal 364=130 I C 236.

—Sale in execution of a decree set aside under O XXI, r. 90 judgment-debtor applying for restitution and mesne profits decree intact and hence, s. 144 cannot apply such a case comes under s. 151 in the exercise of the inherent jurisdiction of the Court. A I R 1930 Pat 280=11 P L T 156=9 Pat 685=Ind Rul (1930) Pat 237=122 I C 589.

—A claimant for restitution under s. 144 need not be a party to the suit. The section covers the case of a person deprived of any property or any interest in property to be compensated by way of restitution or otherwise for anything done under a decree varied or reversed. A I R 1929 Lah 657=Ind (1929) Rul Lah 741=118 I C 389.

—Restitution means restoration of parties to their former position before passing of erroneous decree that is reversed. A I R 1929 Nag 138=Ind Rul (1929) Nag 240=117 I C 288.

—Where disputed property is in the hands of a Receiver such custody is for the benefit of the true owner and restitution can be ordered in favour of the true owner. A I R 1928 Pat 260=7 Pat 319= 108 I C 89.

—Restitution implies restoration of what has been lost in execution. A I R 1927 Lah 625=8 L 356=9 Lah L J 359=28 Pat L R 695=104 I C 817.

—Where a decree is reversed in an appeal filed by one of the defendants the other defendants are also entitled to apply for restitution. A I R 1927 All 182=98 I C 1042.

—In execution immoveable property of judgment-debtor sold, but on appeal decree set aside, only in part, and substantial part of the decree left standing. In such case the judgment debtor was not entitled to have the sale set aside, but was entitled to restitution and could claim the balance of the sale proceeds. A I R 1926 Rang 126=5 Bur L J 66=95 I C 877.

—Where in a suit by the appellant against decree-holder to set aside the sale the stranger purchaser declined to join as defendant though expressly invited and was therefore absent. Held, that he was a representative of decree-holder to that extent, that he had notice of the claim and therefore, restitution should be granted even as against him. A I R 1924 Sind 101=17 S L R 73=80 I C 1002; but see 34 I C 760.

—No restitution can be obtained against bona fide auction-purchaser, though

## C. P. C. (1908) SEC. 144 (Contd)

## (27) Principle of restitution (Contd)

Court competent to hold the sale. A I R 1925 Lah 176-79 I C 157.

—Where the appellants, purchasers in Court auction, were deprived of their properties owing to cancellation of the sale and thereupon applied for restitution of the sums paid by them which were rateably distributed the decree-holders held that as under s. 144 restitution can only be granted on application of a party to the "decree varied or reversed" the appellants were not entitled to it. They cannot be compensated for the loss of their money at the expense of equally innocent parties nor can the powers under s. 151 be invoked, in their favour where the equities are so evenly balanced. A I R 1922 Mad 228-42 M L J 308-15 L W 303-(1922) M W N 255-67 I C 369.

—Wrongful attachment of judgment-debtor's properties—Objection dismissed—Judgment-debtor privately selling the properties and depositing money in Court to set aside auction-sale pending his appeal against the order dismissing his objections—Sale set aside on appeal—Loss caused by private sale cannot be claimed in restitution by judgment-debtor as being very remote. A I R 1927 Mad 353-95 I C 630.

—Where a decree-holder is the auction-purchaser in execution of ex parte decree, the sale will fall through if decree is set aside, but not in the case of an innocent purchaser in good faith where his right is injuriously affected by conduct of the parties to suit. A I R 1925 Cal 1074-86 I C 376.

—Applications for restitution are in substance execution proceedings and as such cognizable by the executing Court. They also come under s. 47 C P Code, and under that section suits can be treated as execution proceedings and proceedings as a suit. A I R 1922 Nag 198-67 I C 319.

—Provided the decree is varied or reversed, the section applies however, the reversal or variance has been effected whether in appeal or not order of High Court, setting aside abatement necessarily affects the lower Court's order awarding costs to defendants. A I R 1922 Mad 70-(1922) M W N 186-16 L W 587-65 I C 797.

—Purchase by decree-holder is a nullity if the decree is reversed though the sale is not formally set aside. The property if restorable must be restored to the applicant with any loss suffered from being deprived of the profits or with interest or with mesne profits, and if it is not restorable, the original decree-holder is liable to pay the loss. L R 3 A 41.

—Where in appeal a sale is set aside after the auction-purchaser was put in possession of the property sold in exe-

## C P C (1908) SEC. 144 (Contd)

## (27) Principle of restitution (Conclud)

cution restitution should be granted to the judgment-debtor applying for restitution of possession under s. 115, C P C A I R 1922 Nag 92-18 N L R 24-64 I C 732.

—Where in an appeal the decree of a Temporary Subordinate Court was reversed and that Court ceased to exist and a new Temporary Subordinate Court was established. Held, that the latter Court was the Court of first instance within the meaning of s. 144 and could order restitution. A I R 1921 Mad 103-13 L W 67-51 I C 962.

—Restitution of properties under—Application for—Properties seized in execution of decree—Decree reversed on appeal—No declaration by the tribunal under the Gurudwara Act that the properties belonged to the Gurudwara—Order of restoration—Restitution of properties ceased can be given. A L R 1933 L 67 (71)=A I R 1933 L 798.

—Where a sale of property not covered by the proclamation is afterwards set aside, the judgment debtor can claim restitution only on payment to the purchaser of the purchase-money. The purchaser cannot be forced to seek his remedy against the decree-holder or required to vacate, till restitution is made of the sum paid by him for the property erroneously offered for sale. Courts acting under S. 144 C P Code will only re-place parties in the position which they actually occupied at the time of the order reversed and will not consider all the various subsequent positions voluntarily taken up by the parties as the remote consequences of that order. 37 I C 863-5 Pat L W 238-(1917) Pat 153.

—Decree amount reduced on amendment petition—Sale held for larger amount while amendment petition pending—Sale proceeds less than reduced amount—Restitution petition for, by judgment-debtor, not allowable. A L R 1933 M 1067.

## (28) Procedure.

—In the proceedings under s. 144 forms under O. XXI, should not be used by the Courts. A I R 1921 All 321-19 A L J 549-3 U P L R (A) 91-63 I C 184.

—In objection proceedings and proceedings therefrom (such as proceedings under s. 144) the objector under r. 58 is party to the suit, and the decree-holder and the judgment-debtor are the other parties. A I R 1929 Lah 657-Ind Rul (1929) Lah 741-118 I C 389.

—Only the Court executing the decree can restore the property to the judgment-debtor by way of restitution. A I R 1928 Pat 502-113 I C 717.

## C. P. C. (1908) SEC. 144 (Contd)

## (28) Procedure (Conclud)

—Where order is passed under s. 144 that a party is entitled to mesne profits—Another order determines amounts and second order is appealed against when appeal against first order is time-barred, first order being appealable cannot be attacked in appeal against second order.

A I R 1930 Lah 24=113 I C 270.

—Restitution proceeding not being one in execution, O. XLV, r. 15 does not apply to application for restitution, applicants for restitution unable to put before trial Court a copy of the decree of the Privy Council, before the order trial Court had been furnished with a copy of that order. There was no irregularity. A I R 1927 Pat 208=6 Pat 252=102 I C 614.

—An appeal lies from order under s. 151 in exercise, by analogy, of jurisdiction under s. 144. A I R 1927 Cal 285=31 C W N 290=100 I C 735.

—Decree reversed on appeal. Auction sale in execution cancelled. The order cancelling the sale allowed by the auction-purchaser to become final. The remedy of the auction-purchaser was not by proceedings under s. 144. A I R 1925 Rang 215=3 R 251=4 Bar L J 53=89 I C 603.

—A bona fide auction-purchaser for value is not a party to the suit hence an order refusing restitution against him is not a decree and is, therefore, not appealable. A I R 1925 Lah 176=79 I C 57.

—An order for rateable distribution between rival decree-holders is not an order under s. 47 and is not a decree within the meaning of s. 144. Powers under s. 151, Civil Procedure Code should be exercised when necessary for the ends of justice in the absence of other legal method of redress. A I R 1922 Mad 93=42 M L J 473=(1922) M W N 181=15 L W 421=30 M L T 178=67 I C 546.

## (29) Refund of money or costs.

—Person appealing as accused in criminal case and coming from another place is exempted from arrest—Person illegally arrested can get refund of money paid to secure his release. A I R 1929 Oudh 426=6 O W N 809=Ind Rul (1929) Oudh 527=119 I C 367.

—Where execution proceedings are pending prior to application for insolvency and no notice under s. 52 to Executing Court by Receiver and attached property is sold and decree-holder obtains payment and no refund is possible—

## C. P. C. (1908) SEC. 144 (Contd)

## (29) Refund of money or costs (Conclud)

Proper course is application under s. 52 and not under. A I R 1930 Lah 39=Ind Rul (1929) Lah 461=116 I C 192.

—Where the mortgaged property is sold in execution of prior mortgage-decree and it is again sold in execution of subsequent mortgage decree—subsequent sale is set aside the Court can order refund to auction-purchaser under s. 151. A I R 1926 All 274=92 C I 571.

—Where in appeal the pre-emption money is increased and the decree holder fails to deposit the enhanced amount he can withdraw the deposit originally made. A I R 1925 Lah 177=73 I C 971.

—Where a decree is set aside after confirmation of sale the auction-purchaser can by application under s. 47 recover his purchase-money. A I R 1921 All 391=45 All 363=21 A L J 238=4 L R A Civ 161=74 I C 873.

—Auction sale—Deposit of price by purchaser and subsequent discharge of incumbrance—Sale set aside—Judgment-debtor must refund deposit paid into Court before claiming restoration of possession—Purchaser is not entitled to money paid for incumbrance being an optional payment giving him the rights of the incumbrance and consequently causing no hardships. A I R 1922 P C 269=27 C W N 582=44 M L J 735=37 C L J 351=21 A L J 490=25 Bom L R 643=1923 M W N 368=4 A L R P C 117=18 M L W 802=49 I A 351=2 Pat 10=32 L T 10=4 P L T 61=69 I C 278.

—When an order of abatement is set aside restitution of the costs paid as per 1st Court's order of abatement can be obtained. A I R 1929 Mad 70=1922 M W N 167=16 M L W 445=66 I C 216.

## (30) Revenue officers.

—Jurisdiction of Revenue Officers—Powers of restitution. 46 I C 475.

## (31) Successive applications.

—Dismissal of application to set aside a sale does not prevent a subsequent application for restitution under s. 144. A I R 1931 All 655=Ind Rul (1931) All 734=(1931) A L J 663=133 I C 622 (1).

—Successive application for restitution—No res judicata. 5 L W 267=40 Mad 780=38 I C 806.



## C. P. C. (1908) SEC. 144 (Concl'd)

## (32) Miscellaneous Cases.

--Agriculturists' house--Exemption from sale--Not confined to contractual debts. 17 Bom L R 962=31 I C 305.

## C. P. C. (1908) SEC. 145.

## Synopsis.

- (1) Legislative Changes
- (2) Applicability and scope of the section
- (3) Appeal
- (4) Attaching creditor, if entitled to security money
- (5) Contract of surety
- (6) Decree-holder whether bound to exhaust his remedies against J. D.
- (7) Defences open to surety
- (8) Discharge of surety
- (9) Execution of decree against surety
- (10) Extent of surety's liability
- (11) Filing of or failure to file insolvency petition by J. D.
- (12) Forfeiture of security bond
- (13) Limitation
- (14) Modes of enforcing security bond
- (15) Notice
- (16) Power of Court
- (17) Separate suit
- (18) Suit by surety to cancel bond
- (19) Suit to contest validity of security
- (20) Surety to avoid attachment before judgment
- (21) Surety money whether can be credited against decree
- (22) Surety for guardian of minor
- (23) Miscellaneous Cases

## (1) Legislative Changes.

--Change introduced by the present section:--The cases under old Code are still of value but it will be seen that the scope of the section is very much enlarged to cover cases of restitution and indeed all other orders made in suits and proceedings in suits.

## (2) Applicability and Scope of the Section.

--Scope of the section is not confined to appeals by the surety but includes appeals against the surety to enforce bond. (1914) M W N 714=26 I C 76.

--But S. 145 of the C. P. Code applies only where the surety has rendered himself personally liable for the decretal amount. Where during execution proceedings, B handed over two Govt. Promissory Notes to the decree-holder's pleader upon the understanding that the latter should hold them as security for the fulfilment

## C. P. C. (1908) SEC. 145 (Cont'd)

## (2) Applicability and Scope

## of the Section (Cont'd)

of the decree against A. Held, that the case did not come under S. 145, C. P. Code. B only created an equitable charge upon the notes in favour of the decree-holder by depositing them as security, and this liability could only be enforced in a regular suit. 19 C W N 961=29 I C 149.

--So, S. 145 of the C P Code does not apply to proceedings for the enforcement of surety bonds taken by the decree-holder outside the Court. 24 M L T 416=8 L W 507=(1918) M W N 764=48 C 940.

--The object is to provide that a party for whose benefit a security has been given may enforce the security by executing the decree or order against the surety in the same manner as if the surety had been a party to the decree or order and was directed by the decree or order to perform the obligation undertaken by him. A I R 1924 All 105=45 A 649=21 A L J 604=L R 4 A 356 Civ=74 I C 927.

--Object of s. 145 is expeditious enforcement of liabilities against sureties. The surety can raise any defence that is open to him. A I R 1923 Mad 340=(1923) M W N 253=41 M L J 171=17 L W 473=72 I C 194.

--The procedure laid down in s. 145, Civil Procedure Code is not applicable to the case of a surety under the Guardians and Wards Act. A I R 1926 Sind 35=19 S L R 390=89 I C 342.

--S. 145 does not apply to refund of deposit by surety. A I R 1926 Lah 544=95 I C 139.

--S. 145 is applicable only where surety is for payment of decree--Liability of surety for production of goods can be enforced on execution in Court's inherent power. A I R 1926 Mad 1005=24 L W 300=51 M L J 239=(1926) M W N 681=97 I C 787.

--That it is not the function of the zaman to take out a warrant. Moreover, before proceeding against the person or property of the party the executing Court should satisfy itself that the decretal debt cannot be realised from the principal debtors. A I R 1927 Lah 846=102 I C 710.

--S. 145 applies to surety even in compromise of suit. A I R 1928 Lah 209=103 I C 449.

--S. 145 lays down procedure for enforcing sureties liability. A I R 1927 Rang 316=5 R 494.

--S. 145 applies only where surety is personally liable and not where charge created. A I R 1928 Bom 42=30 Bom L R 19=52 B 72=107 I C 701.



**C. P. C. (1908) SEC. 145 (Contd)****(2) Applicability and Scope****of the Section (Contd)**

—Per Das and Carr, JJ.—The word “decrees” in the operative part of s. 145 refers only to cls (a) and (b) and not to clause (c), to which the word “order” only applies. A I R 1928 Rang 249=6 R 474=112 I C 427.

—S. 145 does not bar suit—Is not exclusive remedy. A I R 1928 Rang 249=6 R 474=112 I C 427.

—S. 145 is not applicable to administration proceedings. A I R 1928 Rang 249=6 R 474=112 I C 427.

—S. 145 does not apply to sureties of an administration bond. A I R 1929 Rang 248=6 R 474=112 I C 427.

—S. 145 (1) applies even to person who is surety for himself. A I R 1931 Rang 65=Ind Rul (1931) Rang 132. 131 I C 500; See A I R 1931 Bom 444=33 Bom L R 820=Ind Rul (1931) Bom 526=134 I C 718.

—Inasmuch as s. 145 (1) refers to a condition imposed on any person and not to any other person it is applicable even to a person who is surety for himself just as much as to one who is a surety for someone else A I R 1931 Rang 65 (1)=Ind Rul (1931) Rang 132=131 I C 500.

—Where the surety bond was not for securing the abundance of the judgment debtor but for securing the amount of decree that may be passed against the judgment debtor, held, that the bond is enforceable against the surety under S. 145 C P C and the general principles of Contract Act. A L R 1934 Mad. 249.

—Where it was contended that as the judgment debtor had paid the money due from him under the decree into Court and there is no further dispute between the two parties to the suit. Held that so long as the money deposited by the judgment-debtor was not finally disbursed there can be a “proceeding consequent upon a suit.” A L R 1933 M 82 (1)=56 M 687=A I R 1933 M 678=146 I C 459=38 L W 315=65 M L J 132=1933 M W N 949=I R 6 M 264 (F B) Proceedings under-see 38 I C 130.

**(3) Appeal**

—Order against surety for arrest—Appeal see 20 C L J 129=27 I C 10.

—Order requiring surety of receiver to pay up money—Appeal under S 47 see 59 I C 844.

—Under s. 145 a surety can appeal as if he were a party to the decree if an order is made against him but he is not a party for any other purpose and is not entitled to make an application under s. 47. A I R 1931 Rang 206=9 R 434=Ind Rul (1931) Rang 301=134 I C 509.

**C P C (1908) SEC. 145 (Contd)****(3) Appeal (Contd)**

—S. 145, C P C while it prescribes a remedy against the surety also provides for the surety's remedies by way of appeal. An order passed for sale of surety's immovable property though not one under S 145 is an order which Courts are competent to pass under their general powers and is appealable. A L R 1933 M 1192.

**(4) Attaching creditor if entitled to security money.**

—A debtor who had been arrested and imprisoned in a Civil Jail was released upon his filing a petition in insolvency and upon a person depositing cash security for his production. After the petition in insolvency was dismissed the surety failed when called upon to produce the debtor. The Court thereupon ordered the security money deposited to be forfeited to the Government and dismissed the attaching creditor's application to have the money paid to him: Held that there was no power in the Court to decree a forfeiture in favour of the Government and that the security money should be paid to the decree-holder. 16 C W N 664=39 C 1048=16 I C 118.

**(5) Contract of Surety.**

—Contract of surety may be oral or in writing A I R 1926 Cal 877=53 C 515=43 C L J 493=30 C W N 609=95 I C 483.

—Construction of bond—Personal liability not excluded—Hypothecated property can be sold in execution. A I R 1927 Mad 416=51 M L J 182=38 M L T 143=(1927) M W N 202=100 I C 841.

—Surety bond not to named person not void and is enforceable. A I R 1928 Bom 42=52 B 72=50 Bom L R 19=107 I C 710.

—Surety bond is enforceable like any other contract. A I R 1928 Lah 51=108 I C 376.

—Suretyships must be construed strictly—Surety not liable for not producing judgment debtor on any other date then named even if Court closed. A I R 1928 Lah 696=10 Lah L J 404=109 I C 546.

—The mere omission of the title as a heading and the name of the presiding officer from a security bond does not make it an invalid document. A I R 1931 All 65=1930 A L J 913=52 A 964=Ind Rul (1931) All 328=130 I C 712.

—Contract of surety is revocable. A I R 1931 All 243=1931 A L J 74=132 I C 813.

—Declaratory suit with prayer for temporary injunction—Plaintiff executing security bond in the Court undertaking to make good any loss the other party might suffer—Dismissal of suit—Defen

## C P C (1908) SEC. 145 (Contd)

## (5) Contract of Surety (Concl'd)

—dant's claim for damages under the bond—  
Assessment of damages—The bond neither  
can be sued upon by Court nor assigned  
—Claim can be enforced under S 151  
though S 145 is not applicable. A L R  
1933 M 858=A I R 1933 M 691=145 I C  
1011=38 L W 385=65 M L J 342=1933 M  
W N 985=1 R 6 M 190.

—Attestation by Court—Bond attested  
by Judge, before whom execution pro-  
ceedings not pending—Placed on the record  
of the executing Court—Bond can be en-  
forced under S 145. A I R 1933 L 1039=  
A I R 1933 L 913.

(6) Decree-holder whether bound to  
exhaust his remedies against J. D.

—Surety—Execution. A decree-holder  
is not bound to exhaust his remedies  
against the judgment-debtor, before pro-  
ceeding in execution against the surety  
of such judgment-debtor 6 Bom H C R  
241 referred to. 7 S L R 19=20 I C 540.

—Execution against judgment debtor  
before proceeding against surety not  
necessary. A I R 1925 Rang 135=84 I C  
998. See also 6 R 474=A I R 1928 Rang  
249=112 I C 427.

—Surety undertaking to pay whatever  
payable under a decree on failure of  
judgment-debtor to do so—Decree-holder  
can proceed against surety without exhaust-  
ing resources of legal process against judg-  
ment-debtor in case of voluntary non-pay-  
ment by judgment-debtor. A L R 1933 N  
231 (232)=A I R 1933 N 287.

## (7) Defences open to Surety.

—Surety being party can plead fraud  
in execution. A I R 1925 Lah 618=7 Lah  
L J 457=26 P L R 561=92 I C 259.

Consent decree passed without know-  
ledge and consent of the surety for judg-  
ment-debtor, the surety is discharged. A  
I R 1926 Cal 818=30 C W N 540=95 I C 409.

—Decree-holder's absence does not  
excuse non-production of judgment-debtor  
on date fixed. A I R 1928 Lah 974=Ind  
Rul (1929) Lah 538=116 I C 554.

—Stay of execution—Security by  
secretary of State—Suit on—Defences open  
to secretary of State 38 C 754=13 C L J  
365=9 I C 862=15 C W N 475.

## (8) Discharge of Surety

—Where a surety asks for time to  
bring the judgment-debtor next time, and  
the Court allows the time and the judg-  
ment-debtor is brought on the adjourned  
date surety's obligation is discharged A I  
R 1924 Rang 247=3 Bar L J 99.

## C P C (1908) SEC. 145 (Contd)

## (8) Discharge of Surety (Contd)

—Death of principal debtor does  
not absolve surety. 71 I C 46.

—The liability of a surety for a debt  
ceases when his principal's debts exting-  
uished by merger of the estate of the  
debtor and the creditor. A I R 1923 Mad  
340=17 L W 473=44 M L J 171=(1923) M  
W N 253 =72 I C 194.

—Surety failing to produce judgment  
debtor—Execution case closed but not  
dismissed—Liability not terminated. A I  
R 1924 Mad 241=(1923) M W N 770=75  
I C 830.

—Surety both for judgment-debtor's  
applying for insolvency and for producing  
him in Court—Fulfilment of first does not  
discharge surety from other condition—  
But no execution without order to produce  
and failure to do. A I R 1925 Lah 170=  
78 I C 447.

—Order discharging surety from  
suretyship is decree. A I R 1925 All 344=  
23 A L J 59=L R 6 A 171 Civ=86 I C 105.

—Surety for stay of proceedings is  
discharged if decree-holder commits breach.  
A I R 1925 Lah 552=7 Lah L J 343=26 P  
L R 634=91 I C 772.

—Surety for performance of decree  
that may be passed cannot be discharged  
for misconduct of defendant. A I R 1927  
Mad 294=23 L W 705=92 I C 251.

—Surety's liability does not end by  
setting decree set aside in first Court  
unless otherwise provided in bond. A I R  
1927 Rang 321=5 R 496=105 I C 602.

—Surety for appearance can be  
discharged but surety for performance of  
decree cannot. A I R 1929 Lah 435 =11  
Lah L J 141=30 P L R 130=Ind Rul (1929)  
Lah 883=119 I C 419.

—Discharge of surety for decree-  
holder extending time to judgment-debtor  
is discretionary, Court should discharge.  
A I R 1930 Lah 896=Ind Rul (1931) Lah  
234=129 I C 762.

—Surety for stay of execution is  
discharged if execution taken out. A I  
R 1929 Lah 770=11 L 7=Ind Rul (1929) Lah  
901=119 I C 485.

—Where a person undertook to fulfil  
the terms of the decree that may be passed  
in a suit which was subsequently bona fide  
compromised, held, that the surety's liability  
was not discharged by the compromise.  
[(1894) P J25, followed, 43 M 272, referred  
to, 30 C W N 540; 55 C 91 distinguished]  
A I R 1931 Bom 105=Ind Rul (1931) Bom  
119=55 B 103=32 Bom L R 1385=128  
I C 903.

—For plaintiff respondent in execution  
proceedings—Consent order embodying  
compromise between appellant and respon-  
dent as to recovery of mesne profits—  
When creditor's rights against surety are

## C. P. C. (1908) SEC. 145 (Contd)

## (8) Discharge of Surety (Concl'd)

expressly reserved there is no discharge of surety by the discharge of judgment-debtor or by time being given to the debtor. A L R 1933 M 165 (166-7)=56 M 625=A I R 1933 M 309=141 I C 852=37 L W 170=64 M L J 886=1933 M W N 45=1 R 5 M 168.

—Where a surety gives security in the course of execution proceedings for the appearance of a judgment-debtor and for satisfaction of the decree against him in the event of his failure to produce him when required, the bond ceases to have any force after the dismissal of the execution application and it cannot revive with the restoration of the execution proceeding, unless it is specifically mentioned in the bond that it was to remain in force even in such circumstances. A L R 1933 L 1261 (1262).

## (9) Execution of decree against surety

—Surety—Ex parte decree set aside—Fresh decree—Confirmation on second appeal—Application for execution of decree against surety—Lim Act, Art. 182 (2). 21 Bom L R 861=44 Bom 34=53 I C 187.

—In an application for execution of a decree against the sureties of the judgment debtor, it appeared that the sureties had made themselves liable to pay the decretal amount only in case the debts did not settle the dispute and judgment was passed against them, and that the plff, had entered into a compromise with the debts according to which the latter had made themselves liable to pay the total amount of money claimed by the plff, by certain instalments set forth in the deed of compromise. Held, that as the decree was passed on the basis of the compromise without any mention being made of the sureties, it could not be executed against them under the terms of the surety bond. 99 P W R 1918=45 I C 992.

—Surety for receiver can be proceeded against in execution. 10 L B R 236=13 Bur L T 91=59 I C 844.

—Supratdar can be proceeded against in execution—His liability not affected by O XXI, r 48. A I R 1921 All 220=19 A L J 247=62 I C 719.

—Court has discretion to refuse execution against surety. A I R 1922 Bom 340=23 Bom L R 1263=46 B 702=64 I C 648.

—Where sureties have substantially complied and have though somewhat late, produced the judgment-debtor, the extreme step of executing the decree must not be taken. A I R 1925 Rang 135 =2 R 567=84 I C 998.

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## C. P. C. (1908) SEC. 145 (Contd)

## (9) Execution of decree against

## surety (Concl'd)

—Decree executed against surety is same decree in suit and not second decree. A I R 1926 Mad 674=49 M 325=50 M L J 584=24 L W 361=94 I C 522.

—Surety not party to suit—Becomes judgment-debtor in execution against him. A I R 1928 All 527=51 A 346=26 A L J 1160=112 I C 534.

## (10) Extent of surety's liability.

—Where a condition is imposed on a surety under an order of Court the surety can be compelled to fulfil that condition in execution proceedings under s. 145, Civil Procedure Code without any second formal order being passed against the principal. 64 I C 430.

—Where the judgment-debtor is in jail and hence cannot be produced the sureties cannot be directed to pay the agreed amount. A I R 1923 Rang 26=1 Bur L J 236=4 U B R 99=70 I C 870.

—See also A I R 1922 All 390=65 I C 374.

—Surety for appearance is liable personally for decree debt, if he fails to produce judgment-debtor on date fixed. A I R 1924 Lah 490=6 Lah L J 200=80 I C 700.

—A surety under an adjustment of an execution can be proceeded against in execution under s. 145. A I R 1925 Sind 25=17 S L R 257=83 I C 870.

—Sapurtdar failing to produce articles made over to him—Executing Court can attach his property. A I R 1925 Lah 412=26 P L R 26=86 I C 173. But See 28 P L 525.

—Surety becomes party only on application in execution against him. A I R 1925 Lah 552=7 Lah L J 343=26 P L R 634=91 I C 772.

—Surety for payment of interest up to certain amount on stay of execution pending appeal—Amount of security changed—Surety liable for interest up to date of changing the order. A I R 1926 Bom 565=28 Bom L R 517=94 I C 645.

—Surety is party only for purposes of appeal and not in suit before trial Court. A I R 1926 Sind 165=20 S L R 362=96 I C 234.

—Obtaining of protection order does not excuse non-production of judgment-debtor on date fixed. A I R 1926 Mad 558=(1926) M W N 612=24 L W 480=97 I C 413.

## C. P. C. (1908) SEC. 145 (Contd)

## (10) Extent of surety's liability (Contd)

—Surety for production of goods by order of trial Court is bound by order of Appellate Court also. A I R 1927 Bom 84=28 Bom L R 1516=51 B 31=99 I C 820.

—Surety for payment of decree that may be passed will not be liable for compromise decree granting time for payment.

A I R 1927 Cal 239=98 I C 983.

—Surety for deceased not liable on decree against wrong legal representatives. A I R 1927 Bom 63=50 B 802=28 Bom L R 1382=100 I C 185.

—Surety liable for Receiver's accounts unchallenged but subsequently discovered to be improper. A I R 1927 Rang 334=6 Bur L J 15=100 I C 996.

—Surety for party in suit is for successor in trust also though not on record. A I R 1928 Nag 294=109 I C 636.

—Supratdar is surety—Liability can be enforced in execution. A I R 1928 Lah 181=111 I C 592.

—Surety's liabilities is co-extensive with judgment-debtor—Decree-holder can proceed directly against surety on dismissal of appeal. Ind Rul (1929) Lah 609=117 I C 65.

—Surety liable for not only property but its profits also. A I R 1929 All 905=Ind Rul (1929) All 847=118 I C 191.

—Surety agreeing to pay instalment in case of default is personally liable even without express stipulation. A I R 1930 Lah 185=Ind Rul (1930) Lah 549=124 I C 677.

—Surety for performance of decree bona fide compromise of suit surety held liable. A I R 1931 Bom 55=32 Bom L R 1394=55 B 97=Ind Rul (1931) Bom 119=128 I C 903.

—Surety for presence of judgment-debtor in execution proceedings judgment-debtor absent—Surety liable to decree-holder. A I R 1930 Lah 80=Ind Rul (1931, Lah 209=129 I C 689

—Liability is co-extensive with that of the principal debtor—Contract Act, S 128 Decree-holder is entitled to proceed against surety as if he is judgment-debtor. A L R 1933 N 231 (232)=A I R 1933 N 287.

—Commissioner appointed by Court to attach moveables of judgment-debtor—Commissioner locking the goods in a shop and appointing watchmen—Commissioner is in the position of surety and is accountable to any missing article and not the watchman. A L R 1933 A 387 (388-9)=A I R 1933 A 385=144 I C 364=1933 A L J 579=I R 5 A 413.

## C. P. C. (1908) SEC. 145 (Contd)

## (10) Extent of Surety's liability (Contd)

—A security bond ceases to have effect, at any rate, for the purposes of s. 145, when the suit is once dismissed, and the liability of the sureties is not revived by the appellate Court's order remanding the suit for trial on the merits. 8 Ind Cas 980. Surety for producing judgment-debtor when required—Liability of. see 21 I C 612.

Surety, liability of—Bound to restore property attached before judgment-suit dismissed—Effect—Appeal against sureties. see 26 I C 76.

—Where certain crops attached as the property of the judgment-debtor, were allowed to be removed on execution of a surety bond that if the claim was not allowed the sureties would pay the decree-holder a certain sum, the mere fact that the execution case against the judgment-debtor was dismissed after the claim was disallowed does not affect the liability of the sureties under the bond. 22 C W N 919=43 I C 464.

—In execution of an ex-parte decree of a Court of Small Causes, the decree-holder attached a bullock belonging to the judgment-debtor. The latter applied to set aside the decree, and under S. 17 of Act IX of 1887 the petitioner stood surety on his behalf not only for the restitution of the cattle attached but also for the payment of the entire decretal amount. The bullock was released. On the dismissal of the debtor's application, the surety produced the bullock, and contended that the liability had come to an end. Held, that the surety was liable for the full amount of the decree under S. 145 of the C P Code. 38 I C 90.

—A surety of a Receiver is liable to the extent of the amount secured by his recognisance for balances retained improperly by the Receiver interest thereon and the cost of all proceedings necessitated by the default of the Receiver, such as, taking accounts, attachment for failure to account, application for his discharge and appointment of another and steps to enforce recognisance. 20 C L J 123=28 I C 31.

—Attachment before judgment—Surety for debt.—Death of debt before trial.—Substitution of legal representative—Liability of surety continues up to execution. 41 Bom 402=19 Bom L R 112=39 I C 88.

## (11) Filing of or failure to file insolvency petition by J. D.

—Judgment-debtor failing to apply for insolvency within time fixed makes



## C. P. C. (1908) SEC. 145 (Contd)

## (11) Filing of or failure to file insolvency

petition by J. D. (Concl'd)

surety liable. A I R 1928 Lah 974=Ind Rul (1929) Lah 538=146 I C 554

Where a surety undertook to pay the decretal amount to the decree-holder if the judgment-debtor did not file an insolvency petition in the proper court or if the insolvency petition was rejected and the surety failed to produce the judgment-debtor, on the failure of the judgment-debtor to file an insolvency petition the surety is liable to be proceeded against in the same manner as if a decree for the amount decreed against the judgment-debtor has been passed against himself. No question arises as to whether he had failed to produce the judgment-debtor upon being called upon to do so. Held, on a construction of the bond that the surety's liability was a general one and that the mere fact that the execution proceedings against the judgment-debtor had been dismissed did not bar the decree-holder's application to proceed against the surety. 5 Pat L J 417=1 Pat L T 604=57 I C 303.

## (12) Forfeiture of Security bond.

—Forfeiture of security bond, application for—Surety, a party to suit within the meaning of S. 47. see 34 I C 247. Execution—Surety-bond, forfeiture of—Personal attendance of party—No Service of summons. see 36 I C 73.

## (13) Limitation.

—An application for execution against the judgment-debtor and the surety is not barred, if made within three years of the application against the judgment-debtor alone. A I R 1922 All 481=20 A L J 726=44 A 743=77 I C 129.

—Step-in-aid—Sureties for production of attached articles—Execution against judgment-debtor and one of the sureties—Cannot save limitation with regard to the other surety—Surety bond not coming within the terms of S. 145, proper Art. applicable. A L R 1933 M 817=A I R 1933 M 722=145 I C 1004=38 L W 456=65 M L J 507=1933 M W N 1095=1 R 6 M 194.

## (14) Modes of enforcing Security bond

Dismissal of execution in which security furnished is no bar to enforcement of the bond by separate execution. A I R 1924 Pat L T 336=(1924) P 487=Pat 563=81 I C 702.

—Surety bond not in favour of Court can be enforced. A I R 1926 Cal 877=53 G 515=43 C L J 493=30 C W N 699=95 I C 483.

## C. P. C. (1908) SEC. 145 (Contd)

## (14) Modes of enforcing security bond. (Contd)

—Mortgage by surety can be enforced in execution irrespective of provisions of O XXXIV, r. 14. A I R 1926 Bom 279=50 B 339=28 Bom L R 603=95 I C 696.

—Equitable mortgage by surety can be enforced in execution—No separate suit is necessary. A I R 1926 Cal 883=54 C 1=30 C W N 683=95 I C 908.

—Liability of surety can be enforced against his legal representative. A I R 1926 Sind 294=19 S L R 165=98 I C 136.

—Contract of additional interest by surety can be enforced by decree-holder. A I R 1927 Mad 416=52 M L J 182=38 M L T 143=(1927) M W N 202=100 I C 841.

—Immoveable property validly mortgaged as security can be realized in execution. A I R 1929 Rang 126=7 R 352=Ind Rul (1929) Rang 280=118 I C 632.

— See also A I R 1929 Lah 393=113 I C 443.

—Surety bond not complying with order of Court or any provision of law—Enforceability. see 7 Bur L T 5=23 I C 349.

—Security bond executed to court—Enforceable by suit only. T P Act, Ss. 53 & 66 see 23 C W N 769=51 I C 736.

—Liability of surety under bond—Suit to enforce liability—Practice—Procedure. see 36 Bom 42=13 Bom L R 909=12 I C 549.

—A compromise was arrived at between the decree-holder, the judgment-debtors and a claimant to the property whereby a promissory note for a further sum was given and, it was covenanted that the rest of the decree-holder's claim would be satisfied by paying a certain sum in annual instalments and the claimant stood surety making himself liable if the judgment-debtor failed to pay two consecutive instalments and gave liberty for the decree-holder to proceed in execution against his person and property and hypothecated some of his own property. On default by both of them the decree-holder applied to execute the decree by selling the hypothecated property:—Held, upon a construction of the compromise that the application was under S 145 C P Code to enforce the personal liability incurred by the surety who has come in under S 47 and that O 34 R 14 was not applicable, no decree having been obtained against the claimant. 38 All 327=14 A L J 385=33 I C 982.

—A simple money decree was obtained against one S D Before decree J N stood surety for the payment of any money that might be decreed against S D and in the bond he hypothecated certain property. After decree, the decree holder



C. P. C. (1908) SEC. 145 (Contd)

## (14) Modes of enforcing security bond (Concl'd)

sought to execute his decree by means of the same of one of the properties hypothecated by J N. J N however, had sold his equity of redemption to the plffs. who objected to the sale. In spite of their objection, the property was sold and purchased by the deft. In a suit for declaration, held, that the deft. had acquired no title to the property, in as much as it could not be sold without a regular suit being brought on foot of the mortgage, the decree for money against S D being capable of execution against J N in the same manner as against S D himself and not otherwise. Provisions of S. 253 of Act XIV of 1882 and of S 145 of Act V of 1908 construed and discussed 39 All 225-15 A L J 76-38 I C 33.

—An order directing a surety to pay is not a decree under the Code except for the purposes of appeal. Where in a case in which a judgment-debtor obtained a stay of execution of the decree against him upon a surety giving security, the judgment-creditor, after exhausting his remedies against the judgment debtor sought to proceed against the surety for the remainder of his debt and the latter objected on the ground that his property could not be sold in execution relying upon O 34 R 14 C P C Held, that the rule was inapplicable because the order calling upon the surety to pay was not a decree. 2 Pat L J 197-3 Pat L W 414-39 I C 648.

—Where pending the disposal of an appeal execution of the decree was stayed on the judgment-debtor giving a security bond and the appeal was eventually dismissed, held that the furnishing of the security in no way detracted from the right of the decree-holder to enforce his decree as against his judgment-debtor in any way he thought fit in accordance with the law. 3 Pat L J 176-4 Pat L W 216-43 I C 454

—As to the mode of enforcement of bonds under O 21, r. 43 see 25 M L T 220 (1919) M W N 219-9 L W 476-52 I C 410.

—Surety bond for release of judgment-debtor—Bond given out of court but filed—Enforcement—Suit or execution, see 53 I C 673.

—Section 145 of the Code of Civil Procedure has no application to cases where the instrument of suretyship creates no personal liability but gives only charge on the property. 46 I A 228-22 O C 212-6 O L J 682-42 All 158-38 M L J 302-18 A L J 263-22 Bom L R 521-55 I C 559 (PC)

C. P. C. (1908) SEC. 144. (Contd)

## (15) Notice.

—A court is not entitled to pay the surety's money in court to the judgment creditor without notice to the surety and without a finding that the conditions of the bond had not been complied with. 30 I C 517.

—Order to pay against surety without notice is wrong. A I R 1923 Rang 26-4 U B R 99-1 Bur L J 236-70 I C 870.

—Notice before attachment of surety's property is essential. A I R 1929 Lah 205-30 P L R 131-11 Lah L J 40-Ind Rul (1929) Lah 658-117 I C 226.

—Notice must be given to a sapurdar before an order for attachment of his property is passed under s. 145. A I R 1931 Oudh 311-8 O W N 218-Ind Rul (1931) Oudh 209-132 I C 49.

—Under s. 145 Civil Procedure Code, execution cannot be ordered against a surety for a judgment-debtor without giving notice to the surety to show cause why execution of the decree should not issue against him. A I R 1931 Mad 828- (1931) M W N 963.

—An order for attachment of the personal property of a sapurdar without notice after he was directed by an order of Court to deliver the property, is illegal. A I R 1931 Oudh 311-8 O W N 218-Ind Rul (1931) Oudh 209-132 I C 49.

—It is immaterial whether the notice is given by the Court which passed the decree, or by the Court to which it is sent for execution. 29 Bom 29.

—Notice under the proviso along with warrant for the arrest of surety is not invalid. A I R 1927 Lah 131-99 I C 518.

## (16) Power of Court.

—The Court may, in exercise of its discretion, refuse to make an order in favour of the judgment-creditor in case of deposit. A I R 1922 Bom 340-46 B 702-23 Bom L R 1263-64 I C 648.

—A Court cannot call on sapurdar to produce property in a different suit. A I R 1924 All 61-73 I C 602.

—Punjab Courts have inherent jurisdiction to proceed against surety even if obligee not named. A I R 1928 Lah 802.

## (17) Separate Suit.

—Surety hypothecated house—It could not be attached due to misdescription and objection by occupier—Another house attached and sold—Objection taken on ground that effective steps against hypothecated house not taken first—Suit

## C. P. C. (1908) SEC. 145 (Contd)

## (17) Separate Suit (Concl'd)

filed for declaration—Suit though not barred under s. 47 was not maintainable as sale though irregular not nullity. A I R 1928 All 527=51 A 346=26 A L J 1160=112 I C 534.

—Suit for damages for misappropriation against supratdar is barred. A I R 1929 All 266=(1929) A L J 80=113 I C 751.

—In execution of a decree for costs obtained in the Privy Council against a surety who had charged as security certain properties, under O 45 R, 7 of the C. P. Code, an application was made for sale of the aforesaid mortgaged properties. Held, that the claim of decree holder was based entirely on the security bond which created a mortgage in her favour and that the claim against the surety was one arising under the mortgage within O. 34 R, 14 of the C. P. Code. The properties could not therefore be sold without a suit under S 67 of the T. P. Act. Held, also that the security bond created a personal liability and the decree-holder could realise the amount of costs covered by the security bond from the person and other properties under S. 145 of the C. P. Code. 27 I. C. 365=19 C W. N. 178.

—Application for stay of execution till decision of appeal—Property mortgaged as security—Appeal dismissed—Hypothecation can be enforced by a regular suit only. A L R 1933 A 190=55 A 347=A I R 1933 A 269=142 I C 510=I R 5 A 121=1933 A L J 42.

## (18) Suit by surety to cancel bond.

—A third party who has given security on behalf of a judgment debtor for due performance of a decree has no independent right of application under S. 47 C. P. C. and cannot therefore apply to the executing court to cancel the security bond on the ground that it was obtained by fraud. His remedy is only by way of suit. The effect of s. 145 is that the surety may be made a party to the execution proceedings against the principal debtor and an order against the surety is in effect a decree upon his separate contract against him for the payment of money. 43 Mad 325=38 M L J 65=27 M L T 207=11 L W 45=(1920) M W N 114=35 I C 363.

## (19) Suit to contest validity of security.

—Stay of execution—Future litigation concerning validity of security, whether barred by—see 15 C W N 475=13 C L J 365=9 I C 362

## C. P. C. (1908) SEC. 145 (Contd)

## (20) Surety to avoid attachment before judgment.

—Surety to remove attachment before judgment is discharged by dismissal of suit. A I R 1927 Rang 310=5 R 492=105 I C 540.

—When a surety pledges property by a bond in order to save the property of a debt attached before judgment under O. 38 of C. P. Code, the attachment of property or the liability of the surety or property pledged ceases as soon as the suit is dismissed, by the first Court and the surety's liability is not revived by the appellate court decreeing subsequently the plaintiff's claim. 12 B 71; 5 I C 985; 3 Bur. L. R. 135; 8 I C 980, foll. The plea of want of registration of the surety bond cannot be entertained on second appeal when the point has not been raised in the two courts below. 11 W R 381, foll 84 P R 1877, not foll. 147 P L R 1915=53 P W R 1915=29 I C 271.

## (21) Surety money whether can be credited against decree.

—Forfeiture of security will be applied in satisfaction of the decree. 25 C W N 36=59 I C 778.

—A judgment debtor arrested and imprisoned in execution of a money decree was released on furnishing security for a sum of Rs. 500 the surety undertaking to produce the judgment-debtor in Court in the event of his not applying to be adjudicated an insolvent within a month. The judgment debtor failed to apply for adjudication as an insolvent and the surety to produce him. Held—That the payment of Rs. 500 made by the surety was to be credited against the decree and was not to be made available to the decree holder over and above his decretal amount 25 C W. N 36=59 I C 778.

## (22) Surety for Guardian of minor.

—Where a surety executed a security bond charging his properties for any claim of the minors against their guardian ad litem in respect of the amount of money withdrawn from the court, held, that the minor's guardian cannot proceed against the surety personally under s. 145 he being not personally liable, that s. 145 did not apply the application being not between the parties to the suit, that the court cannot order sale of the properties of the surety under its inherent powers; but the proper course would be for petitioners to file a suit for an account or for declaration of the extent of the defendant's

C. P. C. (1908) SEC. 145 (Concl'd.)

(22) Surety for Guardian of minor. (Concl'd)

liability and on the strength of such declaration, to apply to the court to which the security bond was given for directing the sale of the property charged. A L R 1934 Mad 268.

—A surety for the guardian of a minor owed some moneys to the minor's estate. On an application by the guardian of the minor, the court ordered attachment of property of the surety. Held, that the order was one without jurisdiction and was not warranted either by S. 154 or by O. 32 R. 6 of the C. P. Code. 41 M 40=22 M L T 320=(1917) M W N 490=39 I C 928.

—Handing over property for safe custody to third person on executing bond with sureties—Sureties cannot be proceeded against in execution decree-holder must get the bond assigned. 12 L W 329=39 M L J 472=(1920) M W N 784=60 I C 134.

## ( 23 ) Miscellaneous Cases

—Judgment-debtor not bound to accept price in Supurdnama in absence of condition to that effect. A I R 1929 Lah 386=Ind Rul (1930) Lah 53=120 I C 421.

—Security for production of judgment-debtor arrested in execution—Liability of surety—Issue of notice to judgment-debtor—Waiver. See 34 I C 407.

C. P. C. (1908) SEC. 146

## ( 1 ) Scope of the section.

—The proceedings contemplated by S. 146 C P Code includes an appeal and the expression 'claiming under' is wide enough to cover the case of devolution of interest. 41 Mad 510=8 L W 21=48 I C 840.

—S. 146 is subject to procedure in O XXI, r. 16 A I R 1922 All 98=66 I C 878.

—And covers cases of transfers in part. A I R 1921 Mad 599=(1921) M W N 649=44 M 919=41 M L J 316=14 L W 287 (F B)=69 I C 337.

—S. 146 should be read as supplementing the rules A I R (1921) Mad 599=(1921) M W N 649=44 M 919=41 M L J 316=14 L W 287 (F B)=69 I C 337.

—Assignment or devolution of interest creates legal representative. A I R 1924 Mad 709=19 L W 660=76 I C 809.

—See also 8 L W 21=41 M 510=48 I C 840. Section 146 does not refer to pending proceedings A I R 1927 Mad 507=52 M L J 477=38 M L T (H C) 275=102 I C 243.

C. P. C. (1908) SEC. 146 (Cont'd)

(2) Appeal by or against representative.

—Assignment of interest between date of decision of first Court and filing of appeal—Assignee's right to join in the appeal. 38 I C 511.

—A person claiming under a party to a suit but not himself a party thereto may present an appeal from the decree therein. In such a case the Appellate Court will determine whether he is a representative of the original party and as such, entitled to present the appeal. (1917) M W N 306=40 I C 846.

—Judgment-debtor's assignee cannot continue appeal when already withdrawn A I R 1924 Mad 470=(1924) M W N 62=84 I C 665.

—Representative can continue appeal or application when not properly prosecuted or when the person dies it is not limited to fresh proceedings. A I R 1926 Mad 573=51 M L J 10=23 M L W 379=(1926) M W N 287=93 I C 831.

## ( 3 ) Execution by or against representative.

—M. sued for the recovery of some immoveable property. By a compromise, M. was awarded a portion of the property. Before a decree could be passed in terms of the compromise M. transferred his interest in the property to A. A did not apply to bring himself on the record. After the decree was passed A applied to execute the decree as representative of M. Held that he was not a representative within the meaning of S. 146 C. P. C. and as his name was not on the record, he could not execute the decree. 17 I C 512.

—A transferee decree-holder may put in petition to enter up satisfaction of a whole or a part of a decree without putting in an application for execution. There is no necessity, according to the Code, for the assignee getting any previous order recognising his assignment before doing so. It is open to a decree holder to certify satisfaction of a decree at any time. The date of assignment has nothing to do with the question of limitation applicable to execution of decree. A transferee decree-holder is not precluded from receiving payment from the Judgment debtor of the amount due under the decree by the mere fact that he had not paid some portion of the consideration to his transferor. 17 I C 617=12 M L T 592.

—A transferee from an auction-purchaser is competent to apply for possession of the property transferred under O. XXI R. 95 and S. 146 of the C. P. Code. 42 I C 936=40 All 216=16 A L J 150.

## C. P. C. (1908) SEC. 146 (Contd)

## (3) Execution by or against

## representative. (Conclud)

—Legal representative cannot execute decree without his name being substituted  
A I R 1922 Pat 563=3 P L T 625=(1922)  
Pat (Sup) 256=69 I C 959.

\* —Decree holder's legal representative cannot be substituted in the execution petition to continue it. A I R 1927 Mad 184=50 M 1=25 L W 354=(1926) M W N 981=51 M L J 745=99 I C 627.

—No fresh execution petition by legal representatives is necessary. A I R 1930 Sind 283=24 S L R 195=Ind Rul (1930) Sind 111=123 I C 303.

—A decree sought to be executed should be executed as a whole and not split up into parts. A part assignee of a decree e. g. for principal and interest but without costs cannot be regarded as a joint decree-holder and cannot execute the decree in whole or in part. A L R 1934 Bom 29.

—Execution application by one of the surviving co-parceners of the deceased decree-holder cannot be said to be invalid so as to prevent the deduction of the time mentioned in sub-para (3) of part II of the 3rd Sch of the Crde. A I R 1927 Bom 123=51 B 143=29 Bom L R 75=100 I C 619

## (4) Ex parte Decree.

—Legal representative not on record  
—Can apply for setting aside ex parte decree. A I R 1925 Oudh 370=27 O C 299 =85 I C 529 See also A I R 1923 All 30=83 I C 601.

—Puisne mortgagee not representative under s. 146.—Cannot apply for setting aside ex parte decree. A I R 1926 Cal 1015=92 I C 946.

## (5) Other Cases.

—Pending proceedings can be continued against purchaser pendente lite. A I R 1921 Mad 126=13 L W 37=(1921) M W N 181=61 I C 979.

—Assignee of heir cannot apply under O. XXII r. 10 when heir not on record. A I R 1925 Mad 1166=87 I C 402

—Where the heir of a pauper plaintiff who dies, is brought on record, and he is himself not a pauper, an application may be made to have him dispaupered. A I R 1931 Mad 324=33 L W 446=(1931) M W N 199=Ind Rul (1931) Mad 588=131 I C 828.

—Auction-purchaser of under proprietary tenure in mortgage decree is legal representative for the purpose of rent

## C. P. C. (1908) SEC. 146 (Contd)

## (5) Other Cases (Conclud)

decree against the original tenant. A I R 1929 Oudh 353=6 O W N 469=Ind Rul (1929) Oudh 356=117 I C 452.

—The assignee of preliminary partition decree is not a person claiming under the decree-holder within s. 146. A I R 1926 Mad 1129=24 L W 352=97 I C 754.

—Nominee of decree-holder to whom decree amount is paid pending appeal on his executing security bond for refund of amount in event of reversal of decree on appeal is not a person claiming under decree-holder and s. 146 is inapplicable to him. 34 B L R 379 (381).

—The principle underlying the joinder of new parties to an action is whether their presence before the Court is necessary or desirable to decide the question arising between the parties under O. 1 r. 10 C. P. C. A person applying to be made a plaintiff under O. 22 r. 10 must show that the original plaintiff's interest in the suit has devolved on or has been assigned to him absolutely. The principle of devolution which underlies O. 22 r. 10 is that which underlies S. 146 also and is extended thereby to proceedings and applications not otherwise specifically provided for. In a partition suit, before the passing of the preliminary decree, the simple mortgagee subsequent to suit of the share of any of the parties cannot claim to be added as a party as plaintiff or defendant on the plaintiff's withdrawing the suit and continue the suit thereafter either by invoking S. 146 or O. 22. r. 10 C. P. C. A L R 1934 Mad 59.

—Court fees Act see 21 M 269; and 103 A W N 1902. Lint Act see 26 C 925.

—Doctrine of restitution is applicable to representatives of parties to suits. 27 C L J 486=22 O W N 66=42 I C 590.

## C. P. C. (1908) SEC. 147

—See under Order 32. r. 7.

## C. P. C. (1908) SEC. 148

## Synopsis

- (1) Applicability and scope of the section
- (2) Agreement for payment
- (3) Alteration or amendment of decree
- (4) Appeal, review, revision
- (5) Appeal subject to payment of costs
- (6) Arbitration award
- (7) Conditional decree or award
- (8) Court-fee, payment of deficit
- (9) Executing Court, whether can extend time
- (10) Execution petition
- (11) Ex parte decree, setting aside of on condition
- (12) Extension of time subsequent to final decree



## C. P. C. (1908) SEC. 148 (Concl'd)

- (13) "Fixed or granted by Court"
- (14) Mortgage
- (15) Power of Court
- (16) Pre-emption
- (17) Printing charges
- (18) Time fixed by decree (compromise or otherwise), whether can be extended
- (19) Time fixed by order, whether can be extended

—(1) Applicability and Scope of the section:—The section gives legislative force to the view taken in 16 B 263 and sets at rest the conflict of opinion that had hitherto existed as to which see 32 M 305 and 14 C W N 882 and the cases discussed therein. S. 148 does not authorise the Court to grant extension of time for filing the security bond, which is an act required by the Prov. Sm. C. Court Act and not by the C P Code 1 Pat L T 323-(1920) Pat 203-56 C 810.

—S. 27 (2) of the Insolvency Act contemplates an extension of time for application for discharge for good reason and should be granted even if the application for extension is made after expiry of the fixed date. The principle established by s. 148 Civil Procedure Code and there is nothing repugnant to it in the provisions of the Insolvency Act. A I R 1925 Lah 416-26 P L R 126-86 I C 115

—As the provisions of s. 43 (1) Insolvency Act are mandatory and the powers given by s. 5 of the Act are limited to that extend time of application for discharge cannot be extended. A I R 1930 Rang 166-8 Rang 187-Ind Rul (1930) Rang 266-125 I C 346

—Time can be extended excusing delay under s. 148, where an application for issue of fresh notice is not made in time, the previous notice having been returned unserved. A I R 1927 Bom 68-28 Bom L R 1446-50 B 815-100 I C 147.

—Time cannot be extended when it is of the essence of the contract. A L R 1933 A 733-2 A W R 474.

—S. 148 of the C. P. Code has not the effect of making O. 7, R. 11 applicable to memorandum of appeals so as to make it incumbent on the Court to admit them though out of time when the conditions of that rule are complied with. 27 M L J 677-26 I C 33 dissenting from 38 B 41.

—As a general rule when once a Court has admitted and registered a plaint it cannot subsequently reject it; and a Court may be taken to have extended the time and to have treated the time when the Court fees were actually paid as the time fixed for payment when it accepts them on that date. (1915) M W N 228-78 I C 504. following 34 C 20.

## C. P. C. (1908) SEC. 148 (Cont'd)

—(2) Agreement for payment:—Court cannot extend time fixed by the parties themselves for performing the contract: 36 I C 809.

—(3) Alteration or amendment of decree:—A decree can be altered by review, on appeal or on revision, but neither s. 148 nor s. 151 empowers Court to alter a decree A I R 1921 Lah 6-3 Lah L J 310 (F. B.)= 66 I C 772.

See also 10 A L J 520; and 24 I C 825. and 14 C W N 584-6 Ind Cas 275= 37 C 548.

—(4) Appeal, Review, Revision:—High Court—Revision—Power to extend time fixed by lower Court for doing of an act by one of the parties. 52 I C 4.

—Order under s. 148 is not a decree and is not appealable as an order under s. 104. A I R 1923 Lah 162-71 I C 35.

—A revision lies against an order dismissing application for extension of time fixed for payment under the terms of a decree. A I R 1924 Oudh 330-11. O L J 119-78 I C 387.

—In the absence of a very strong case the Appellate Court must not interfere with the trial Court's discretion used under s. 148 or s. 149. A I R 1925 Pat 299-6 P L T 4-3 Pat L R 22 (Civ)-4 Pat 190 (1924) Pat 355= 85 I C 172.

—Withdrawal of suit with liberty—Order for—Costs directed to be paid by—Time allowed by order for—Extension of—Application under S. 148 for—Dismissal of—Review of order of—Application subsequent purporting to be for—Treatment of, as application for review of original order allowing withdrawal of suit—Held to be proper in circumstances of case. 35 L W 57 (60)=1932 M W N 72 (2)=138 I C 121= I R 1932 M 514=A I R 1932 M 223=A L R 1932 M 502.

—Redemption suit—Dismissal by first court—Decree by appellate court—Extension of time—Jurisdiction—Appeal against. See 39 Mad 876-29 M L J 708-31 I C 240.

—(5) Appeal subject to payment of costs:—Where an appeal is to be accepted only on payment of costs by appellant and he does not pay in time the Court cannot extend the time limited in the order for payment either under s. 148 or 115. A I R 1925 Pat 153-80 I C 575

—Order for security merely to the effect that if security is not furnished within the time allowed the appeal will be rejected—Court has power to extend time in case of before the pendency of the appeal is put an end to by a further order rejecting the appeal for failure to furnish security within the time allowed. 1932 M W N 655=A L R 1932 M 1109 (1115-6).



## C. P. C. (1908) SEC. 148 (Contd)

—(6) Arbitration award :—Where in a suit, the matter in dispute was referred to arbitration by agreement of the parties and an award was duly made directing one of the parties to pay certain sums to the other party within a specified time and a decree was made thereon, the court has no power to extend the time fixed by the award for the payment even on the ground that the case is a hard one.

41 I C 609.

—Extension of time given to arbitrators to make award. 18 C W N 1325=

27 I C 233.

see also

12 I C 13=38 C 522.

—(7) Conditional decree or order:—Where decree is passed conditional on plaintiff's paying additional Court-fee within certain time failing which, the suit was to stand dismissed. Held that as the term of deposit had been embodied in the decree the Court itself cannot extend time except on an application for review. A I R 1923 Lah 372=73 I C 922 see also 16 A L J 625=47 I C 4=40 A 579.

Ex-parte decree—Conditional order, setting aside—Condition not fulfilled in time

—Extension—Jurisdiction. see 36 All 77=12 A L J 38=23 I C 138.

—Decree for possession conditional on payment of money within one month—Powers to extend time. See 42 I C 613 and 18 A L J 826=57 I C 16=42 A 639; and 35 A 582.

—Stay of execution—Conditional order not complied with—Court has power to extend time. A L R 1933 M 399 (400)=A I R 1933 M 563=143 I C 903=38 L W 201=65 M L J 539=I R 5 M 355.

—(8) Court-fees, payment of deficit:—Court has no inherent power to amend its own decree, so as to extend time fixed to make up the deficit Court-fee. A I R 1923 Cal 612=27 C W N 720=37 C L J 395=74 I C 575. See also 6 Ind Cas 424=14 C W N 882=12 C L J 62.

—Decree by one Judge fixing time within which costs of the opposite side and ad valorem Court-fee should be paid else suit to stand dismissed—Order by successor-in-office enlarging time for payment of ad valorem Court-fee—Order construed as making the default clause applicable only in respect of payment of costs and not Court-fee and consequently Court has power to extend the time to pay Court-fee. A L R 1933 C 405=A I R 1933 C 20=36 C W N 869=140 I C 373. See also 137 I C 76=33 P L R 149=I R 1932 L 287=A I R 1932 L 235=A L R 1932 L 168 (Civ)=1932 P C L 168 (Civ.)

—After ordering return of plaint for presenting to proper Court with additional

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## C. P. C. (1908) SEC. 148 (Contd)

## (8) Court-fees payment of deficit (Contd)

Court-fee, Court cannot extend time fixed for payment of Court-fee A I R 1926 Mad 133=22 L W 582=(1925) M W N 804=92 I C 800.

—But where deficit Court-fee is accepted after time fixed for payment and plaint is registered, it may be inferred that the Court condones the delay, and grant extension as it is in its discretion to do under s. 148 or s. 149, for it might have rejected the plaint under O. VII r. 11. A I R 1925 Pat 299=6 P L T 4=(1924) Pat 355=4 Pat 190=3 Pat L R 22 (Civ.) 85 I C 172.

—So also the time for filing deficit Court-fee after setting aside in review an order rejecting the plaint insufficiently stamped can be extended and if the original plaint is within time suit does not become time-barred. A I R 1922 Cal 234=26 C W N 391=70 I C 43.

—A judge passing orders under S. 149 of the C P Code for payment of deficit Court-fees, must be taken on the record as it stands to have exercised his discretion as provided by the section and an Appellate Court cannot go into the question as to whether he exercised his discretion in making the various orders of payment. 24 C L J 88=29 I C 571.

—Order directing payment of additional court-fee within fixed time—Non-payment—Effect of—Appellate Court, if can extend time. see 28 I C 890 but see 10 I C 268.

—(9) Executing Court, if can extend time:—An executing Court cannot extend time fixed for payment of the decretal amount. Court cannot extend time only when a period is fixed for the doing of any act allowed by the Code itself. The section has no application where time is fixed by a decree. S. 151 also does not empower the executing Court to alter the decree or in any way effect its finality and hence extension of time fixed by decree cannot be granted. A I R 1923 Nag 210=19 N L R 8=71 I C 401 see also 72 I C 879=A I R 1923 O 16; and 80 I C 575=A I R 1925 pat 153; and 49 I C 840.

—Appellate Court—Fixing time for payment of decree amount. If lower court to which it is sent for execution can extend time. 21 M L J 1018=12 I C 139.

—(10) Execution petition:—Where an application for execution filed within time which had been returned for amendment of certain formal defects was refiled after the period of limitation had expired and after the time allowed by the Court for the purpose, with an application ex-

## C. P. C. (1908) SEC. 148 (Contd.)

## (10) Execution petition (Contd.)

plaining the delay and the petition was accepted. Held, that the Court had in fact in the exercise of its discretion enlarged the time under S. 148, C P C, though there was no express order to that effect.  
20 C W N 615= 34 I C 625.

—(11) *Ex parte* decree, setting aside of on condition:—Where an *ex parte* decree is set aside on the condition of the deft. paying his adversary's costs into Court within a specified time, he had jurisdiction to vary the order subsequent by enlarging the time at its discretion. Such power is vested in Courts by the combined effect of S. 148 to 151 of the C P Code. 23 M L T

7=(1917) M W N 870=42 I C 961.

See also A I R 1924 Lah 222=73 I C 648.

—(12) Extension of time subsequent to final decree:—After passing a final decree a Court cannot extend the period fixed by the decree for the doing of any act. 15 I C 941=99 P R 1912=121 P W R 1912.

—See also A I R 1926 Mad 1059=24 L W 443=(1926) M W N 713=97 I C 795 and 13 O C 38=5 Ind Cas 443.

—S. 148 applies only to proceedings prior to the passing of a decree. Any order extending time after final decree must be deemed to have been passed under s. 47 of the Court and hence is appealable.

A I R 1924 Oudh 179=74 I C 573.

—But S. 148 applies to proceedings prior to the passing of a decree. Where the Appellate Court passed an order, for restoration of a suit dismissed for default by Trial Court on payment of a sum of money within a fixed time and the Trial Court refused to accept the sum a day later. Held that the Court had jurisdiction to extend time for payment. A I R 1926 Nag 44=21 N L R 111=87 I C 12.

—(13) "Fixed or granted by Court":—Section 148 in terms applies to an enlargement of a time limit fixed by the Court, and it can have no application to a time-limit fixed by Statute. [53 M L J 477, referred to] 61 M L J 544=1932 M W N 164=A I R 1932 M 112=34 L W 799. Thus the Court cannot extend the period of one month allowed under s. 55 (4) as in that case the period is fixed by Code and not by Court and s. 148, does not apply. A I R 1926 Mad 689=50 M L J 477=(1926) M W N 890=94 I C 444. see also 59 C 117 (127)=35 C W N 877=138 I C 177=A I R 1932 C 126 =I R 1932 C 427=A L R 1932 C 450; but see contra 34 Bom L R 880=A I R 1932 B 615=A L R 1932 B 1003 =56 B 231

## C. P. C. (1908) SEC. 148 (Contd.)

## (13) "Fixed or granted by Court" (Contd.)

—Time fixed by Court, performance of act till a certain date includes that date see 39 Mad 583=30 I C 544.

—(14) Mortgage:—S. 148 does not apply to extension of time for doing acts under mortgage or other decrees. 39 M 876=2 L W 1074=29 M L J 708=18 M L T 486=31 I C 240. See also 34 A 388=14 I C 240; and 10 A L J 520=17 I C 912.

—S. 148 and O. 34, r. 4 do not apply to mortgage decrees based on compromise. Where the preliminary decree in a mortgage suit was based on a compromise whereby the decretal amount was payable by instalments and in default of any, the decree-holder could himself sell the property but the court granted extension of time on such default of the judgment-debtor, held, Court cannot grant extension in compromise decree and the provision for sale by the decree-holder was not penal. A L R 1934 Oudh 108.

—A suit for possession other mortgaged property brought, by a puisne mortgagee against the prior mortgagees was compromised, by the claim for possession being allowed on condition of the puisne mortgagee paying a certain amount by a fixed date. In default of payment on that date the prior mortgagees were to be allowed to take possession. On the date fixed for payment the puisne mortgagee applied for extension of time which was granted by the Lower Court. Held, that no extension of time could be granted either under S. 148, C P Code, or O. 34, R. 8, C P Code. 18 O C 58=28 I C 862.

—But where by a compromised decree deft was to pay plff a certain sum within a certain time failing which the mortgaged property was to be foreclosed, held whether the decree is a foreclosure decree or is treated as a contract the Court can extend time. 71 I C 421=A I R 1923 N 88.

—S. 148 applies to cases in which is extended the time fixed by C. P. C. for the doing of some act and not to the extending of the time fixed by a mortgage decree for the payment of a prior mortgage. Where in a redemption decree the decree erroneously described that the suit will stand dismissed on default of payment on a certain day instead of the words found in O. 34, r. 8, Held, that the Court could extend the time. When the plaintiff in a redemption suit who has obtained a decree makes a bona fide mistake in calculating the interest and deposits less than he ought to deposit there is a good cause for extension of time for payment of the mortgage money. 9 A L J 381=14 I C 240=34 All 388.

## C. P. C. (1908) SEC. 148 (Contd)

## (14) Mortgage (Concl'd)

—S. 148 of the C. P. Code gives a Court power to enlarge the period of redemption if it thinks fit. 8 Bur L T 92=27 I C 706.

—A mortgagor attempting to raise money in pursuance of an ex parte preliminary decree for foreclosure should be granted extension if the mortgagee applies for final decree immediately he is entitled to do so. A I R 1925 Nag 258=8 N L J 6=86 I C 397.

—Suit for redemption—Preliminary decree—deposit of mortgage money—Extension of time to the mortgagor—Whether proper see A L R 1933 A 514=A I R 1933 A 157=145 I C 591=I R 6 A 122.

—Application to extend time decree for redemption see 2 L W 1074=39 Mad 876=29 M L J 908=31 I C 240.

—(15) Power of Court:—Court has power to grant extension of time fixed by it for doing any act. A I R 1924 All 818=22 A L J 791=L R 5 A 515 Civ=46 A 864=82 I C 184.

—In the absence of negligence or laches time for payment of Court fee can be extended if there is sufficient cause for the delay. A I R 1924 Pat 663=3 Pat 337=6 P L T 151=80 I C 1030.

—Expiry of time fixed for appeal—Point allowed to be raised in an appeal admitted after time—Implied extension of time—Powers of appellate court. 43 Mad 550 (P C)=18 A L J 489=22 Bom L R 568=38 M L J 444=56 I C 163.

—The discretion conferred by S. 148 of the C. P. Code cannot be arbitrarily exercised in matters to which the rules of limitation apply, and in which, by those rules, the Court can only extend the time after a proper judicial consideration of the cause shown under S. 5 of the fraud established under S. 18 of the Lim. Act. 3 Pat L J 376 dist. A Court cannot keep alive a cause of action for an indefinite period by granting without cause shewn and without consideration, indulgence under S. 148, to litigants who are guilty of the grossest laches, and who fail to comply with the order of the Court 4 Pat L J 428=52 I C 439.

—(16) Pre-emption:—Time fixed by a pre-emption decree, for paying purchase money cannot be extended either under s. 148 or s. 151, C P Code. 61 I C 242; See also A I R 1923 Lah 162=71 I C 35; See also A I R 1924 Lah 359=73 I C 891; and 23 O C 254=57 I C 488; Contra 1 Pat L J 92=2 Pat L W 400=34 I C 88.

—Jurisdiction under s. 148 is limited to cases where time is fixed by Court,

## C. P. C. (1908) SEC. 148. (Contd)

## (16) Pre-emption. (Contd)

otherwise than by its decree in a suit. But once an appeal is preferred from the decree the Appellate Court has jurisdiction to extend time though not under s. 148 but under the provisions of r. 32 O. XLI by varying the decree of the Court of first instance in that behalf. Where a suit for pre-emption was decreed conditional on payment into Court of a certain sum in default of which the suit was to stand dismissed and the plaintiff appealed before the expiry of the period. Held that the Appellate Court could extend time for deposit under O. XXXI r. 33. A I R 1928 Oudh 33=2 Luck 425=4 O W N 252=101 I C 258.

—Where period was fixed for paying pre-emption money failing which suit was to be dismissed and plaintiff went in appeal which failed and the Appellate Court was not asked to extend time which had then expired the Court is not bound to extend the time as s. 148 applies only to proceedings before passing final decree. A I R 1928 Oudh 492=5 O W N 890=1nd Rul (1929) Oudh 148=114 I C 500.

—Pre-emption decree—Expiry of time fixed for payment of purchase money—No power to extend 16 A L J 892=48 I C 353.

—Pre-emption or redemption cases—Court's power to extend time fixed in decree. see 7 Ind Cas 36; see also 19 I C 347; and 18 I C 86; and 27 I C 419. S. 148 C. P. Code applies only to acts prescribed by the code and not to acts prescribed by decree which have become final. A court therefore cannot extend the time fixed by a pre-emption decree for the payment of purchase money even if the application is made before the expiry of the time fixed. 28 I C 458=2 O L J 162.

—Section 148 of the Civil Procedure Code does not authorise the Court to extend the time fixed by the decree for payment of purchase money in pre-emption cases. 11 A L J 959=35 All 582=21 I C 583.

—The plaintiff in a suit for pre-emption was given a decree conditional on his paying into court a certain sum together with costs mentioned therein within a fixed time. On the last day he tendered for deposit the amount made payable by decree but not the amount of costs. After the court had risen and the court officials had left the Court he tendered at the house of the Naib sheriff the amount of costs also but the money was not accepted. The court ordered that the suit stood dismissed for payment not being made within the time fixed in the decree. An appeal against the order of the Divisional Judge extended the time for payment.

## C. P. C. (1908) SEC. 148 (Contd)

## (16) Pre-emption. (Concl'd)

Held, that the order of Divisional Judge was ultra vires and that S. 148, was not applicable to the case for no time was prescribed or allowed by the Code which could be extended by court. 8 I C 812-140  
P W R 1910=22 P L R 1911.

—Payment of money into court within a fixed time in pursuance of a pre-emption decree is not an act prescribed or allowed by the Civil Procedure Code within the meaning of S. 148 A Court has no power to extend the time fixed by a pre-emption decree for payment of the price. 10 A L J 520-17 I C 912

(17)—Printing Charges:—Applicability of Oudh Rules of Practice, R 13—Extension of time for deposit of printing charges see 50 I C 789.

(18)—Time fixed by decree (compromise or otherwise) whether can be extended:—Court cannot extend the time fixed by a decree for the payment of money where the decree provides for payment of money within certain time and specifies the penalty for non-payment, the enforcement of the penalty cannot be delayed by any order in derogation of decree. A I R 1922 Oudh 131-25 O C 74-68 I C 205.

—See also A I R 1924 Oudh 330-11  
O L J 119-78 I C 387.

—Where plaintiff in whose favour decree is passed in suit for specific performance is asked to deposit sale consideration within fixed time that time cannot further be extended. A I R 1930 Pat 279=Ind Rul (1930) Pat 670-126 I C 910.

—So also time fixed by compromise decree cannot be extended by Court, 9 O L J 53-66 I C 273.

—But see contra. A I R 1923 Nag 88-71 I C 421, and A I R 1929 Nag 164-25  
N L R 110=Ind Rul (1929) Nag 171-116 I C 621.

—Where under a compromise decree payment of the decretal amount, is to be made within certain time the Court can extend the time if it thinks that time is not of the essence of the contract, and no revision lies from such an order extending time. A I R 1924 Pat 387-2  
Pat 906-(1924) Pat 122-5 P L T 401-82 I C 505.

—But where in proceedings by the judgment-debtor to set aside an execution sale, a compromise is made that on payment of the decretal amount within a fixed time the sale shall stand cancelled, while upon failure the sale shall stand confirmed the Court has no power to extend the time fixed for payment. A I

## C. P. C. (1908) SEC. 148 (Contd)

## (18) Time fixed by decree. (Contd)

R 1925 Pat 691-6 P L T 511-(1926) Pat 40-88 I C 1020.

—Where a consent decree was passed that on defendant depositing certain amount within certain time suit would stand dismissed and on failure stand decreed and the defendant deposited amount after the period but the Court accepted it and dismissed suit. Held that the order of the Court not being in satisfaction or discharge of a decree was not appealable. Held further that the Court could not extend the period for making the deposit because where the decree finally settles the rights of the parties, the Court cannot extend time so as to interfere with the rights of the parties. A I R 1929 All 666-(1929) A L J 968=Ind Rul (1929) All 895-118 I C 591.

—Compromise decree—Provision for payment by instalments—No jurisdiction of Court to extend time. A L R 1933 P

451=A I R 1933 P 563-145 I C 548.

—Where an order allowing plaintiff to withdraw the suit with liberty to bring a fresh suit fixed the time within which the plaintiff should pay the costs of the defendant, the payment of which was made a condition of the said order, held accordingly, that the Court had no power, under S. 148 to extend the time allowed by the order for payment of the costs. 35 L W 57 (59)-1932 M W N 72 (2)-138 I C 121-I R 1932 M 514=A I R 1932 M 223=A L R 1932 M 502.

—Where a decree passed by the High Court in Second Appeal directed that on payment by the plaintiffs to the 8th defendant of a sum of Rs. 50 within three months from its date a moiety of the suit property should be delivered to the plaintiffs, and where the plaintiffs without applying for review of the judgment prayed for an extension of time originally granted on the ground that they were minors and that their next friend in collusion with the 8th defendant misconducted himself wilfully by not making the payment within the time fixed: Held, that there was no provision of law under which the extension prayed for could be granted and that neither. S. 143 nor 151 of the C. P. Code (of 1908) was applicable to the case. 16 M L T 430-1  
L W 832-26 I C 63.

—Suit for partition—Alienation of joint family property impleaded as deft.—Decree declaring alienation good to a certain amount and directing possession to be delivered to plff. on paying his share of the amount within fixed time—Power of Court to enlarge time see 37 M L J 695-54 I C 451.



C. P. C. (1908) SEC. 148 (*Concld*)(18) Time fixed by decree (*Concld*)

—Time for payment fixed by decree of first Court—Decree confirmed on appeal—Time rule from date of appellate decree though it does not expressly mention the time for payment. 34 C L J 415=70 I C 6

(19)—Time fixed by order whether can be extended :—Where an application is allowed providing that if within the time allowed certain terms are not complied with the application shall automatically and without further interposition stand dismissed, no further order of Court is necessary to effect its dismissal. The test to determine whether power exists to extend time is whether the proceeding in which time was originally granted is still pending or not. A I R 1928 Mad 154=53 M L J 494 =26 L W 333=39 M L T 146=(1927) M W N 809=105 I C 124.

—Where an order provides that the suit would be dismissed if money is not paid within certain time further order by the Court is necessary before the suit is dead, and on an application for such an order, it is open to the Court, to extend the time for making the payment. But if the order states that default of payment the suit will stand dismissed time cannot be extended. A I R 1922 Cal 320=48 C 902=66 I C 481.

—Jurisdiction of Court to extend time—is not applicable to orders fixing time on agreement of parties. A L R 1933 A 733 (734)=2 A W R 474.

—Appellate Court ordering remand conditional on filing of certain papers within time—Otherwise appeal dismissed automatically—Papers not filed—Time can be extended as the order of remand does not amount to a decree. A L R 1933 A 229=55 A 326=A I R 1933 A 262=55 A 326=A I R 1933 A 262=142 I C 331=I R 5 A 106=1933 A L J 127 (F. B.)

—An order allowing an amendment of the plaint was made conditional on payment of the necessary court-fee and of the defendants' costs within a specified period. The order provided that, if the costs were not paid within the time allowed, the suit would stand dismissed with costs. Held, that the successor of the Judge who made the order had power to extend the time allowed for payment of court-fee but not the time allowed for payment of the costs. Though the order extending the time for payment of the costs was held to be erroneous in law, the High Court declined to interfere in revision as to do so would cause irreparable loss to the plaintiff and would as such amount to a denial of justice to him. 36 C W N 86)=140 I C 373=I R 1932 C 712.

## C. P. C. (1908) SEC. 149

*Synopsis.*

- (1) Scope of the section.
- (2) Appellate Court.
- (3) "At any stage".
- (4) Bona fide mistake.
- (5) Deliberate omission or neglect.
- (6) Discretion of Court.
- (7) Duty of Court.
- (8) Pauper applications and appeals.
- (9) Payment of Court-fee on memo of appeal after limitation period.
- (10) Payment of Court-fee on plaint after limitation period.
- (11) Payment of Court-fee within time allowed by Court.
- (12) Question of limitation see under (7), (9) and (10) supra.
- (13) Revision or review.

## (1) Scope of the Section.

—S. 149 is one of general provisions not liable to annulment or alteration by any proceedings under Part X, and in case of any conflict between a general provision and a rule under the first schedule, the former must prevail. A I R 1926 Mad 676=(1926) M W N 311=51 M L J 90=95 I C 439.

—Time allowed under Art. 158, Limitation Act, for supplying Court-fee stamp on application to set aside an award can be extended. A I R 1928 Sind 87=23 S L R 91=107 I C 223.

—Where indulgence under s. 149 in case of an appeal insufficiently stamped is refused the appellant is entitled to have his appeal heard with regard to his claim for which Court-fee has been paid and in so far as it is within time, whether or not such a request is made to the Court by the appellant. A I R 1931 Lah 237=Ind Rul (1931) Lah 425=32 P L R 129=131 I C 297.

—Court-fee payable according to the law "for the time being in force" means in the case of an appeal, court-fee payable according to the scale which was in force when the memorandum of appeal was filed. 9 O W N 855=110 I C 190=A I R 1932 O 313=I R 1932 O 396 (1).

## (2) Appellate Court.

—Question of exercise of discretion under s. 149, should be left to the discretion of the trial Court and the Appellate Court must not interfere with the discretion unless there is a strong case. A I R 1925 Pat 293=(1921) Pat 355=6 P L T 4=3 P L R (Civ) 22=1 Pat 103=85 I C 172.



## C. P. C. (1908) SEC. 149 (Contd)

## (2) Appellate Court. (Concl'd)

—Suit for partition and profits—  
Amount of Court-fee determined by first  
court and time fixed for its payment—  
Dismissal for default in payment—  
Appellate Court incompetent to extend  
time or reduce amount. see 28 I C 890.

—An Appellate Court cannot ques-  
tion the propriety of an order under S.  
149 of the C P C for the payment of  
deficit Court-fees if the order is not ob-  
jected to when it is made, or in the Court  
which made it. 56 I C 47-2 U P L R  
(Pat) 45.

## (3) "At any Stage".

—S. 149 of the C P C is inapplicable  
when there are no proceedings actually be-  
fore the Court. When the application for  
leave to appeal in forma pauperis is  
rejected the unstamped memorandum  
attached to that petition falls to the  
ground. 18 I C 518-5 Bur L T 294; see  
also 18 A 395.

—Time can be granted at any stage  
for payment of deficient Court-fee. Court  
may therefore grant time before or after  
registration of the plaint and even after  
expiry of the period of limitation. A I R  
1926 Nag 156-89 I C 419.

—Once a decree is passed a Court is  
deprived of its jurisdiction to extend the  
time for payment of Court-fee. A I R  
1931 All 378-Ind Rul (1931) All 220-129  
C 732

## (4) Bona fide mistake.

—A case of mistake in valuation is  
pre-eminent a case where discretion under  
s 149, Civil P C should be used. A I R  
1929 P C 147-Ind Rul (1929) P C 261-31  
Bom L R 841-83 C W N 781-56 I A 232-  
50 C L J 39-30 L W 104-57 M L J 281-  
10 Lah 737-(1929) M W N 818-31 P L R  
7 (P C)=117 I C 493. see also 59 C 388  
(392)=138 I C 613-A I R 1932 C 482-I R  
1932 C 483. and A I R 1926 Lah 509-92 I C  
319 and 44 I C 398.

—Where through bona fide mistake  
full Court-fee is not paid in the first  
instance but deficiency afterwards is made  
good the benefit of s 149 can be claimed  
and the Court accordingly can extend  
time. A I R 1923 Lah 629-80 I C 251.

—When an appellant filed her memo-  
randum of appeal within time, stamped  
with a Rs. 2 Court-fee stamp only owing  
to a bona fide error on the part of her  
pleader, who on discovering his mistake  
made up the deficiency after expiry of the

## C. P. C. (1908) SEC. 149 (Contd)

## (4) Bona fide mistake. (Concl'd)

period allowed for the appeal. Held that  
the case was one in which the Court might  
exercise the discretion vested by S. 149 of  
the C P Code. 10 P R 1919-49 I C 188.

—Where the question involved is  
debatable one and the deficiency in Court-  
fee is due to a bona fide mistake, exten-  
sion of time should be granted. A I R 1923  
Lah 135-71 I C 737.

—Discretion under s. 149 to allow  
party to make up deficiency even after  
the expiration of limitation for filing the  
document can be exercised in cases of a  
bona fide mistake or a misunderstanding  
of the law as to valuation but not where  
the party never carried to find out the  
proper Court fee which he had to pay. A  
I R 1929 Nag 294-Ind Rul (1929) Nag 332-  
119 I C 700.

—Where however there is no bona  
fide mistake but a deliberate attempt  
either to avoid payment of sufficient court-  
fee or to defer the day of payment as  
long as possible, extension of time will  
not be granted. 1 Lah 234-57 I C 215.

—In the absence of bona fide mistake,  
the Court may refuse time to a party to  
make up the deficiency in Court-fee in a  
memo of appeal. A I R 1931 Lah 343-  
32 P L R 251-Ind Rul (1931) Lah 895-  
134 I C 127.

## (5) Deliberate omission or neglect.

—S. 149 of the C P Code should not  
be construed in such a way as to nullify  
the express provisions of S. 4 of the  
Court-Fees Act. Where the amount of  
Court fee payable is open to doubt or  
cannot be ascertained by the High Court  
till the record is received or it appears  
that the appellant has made an honest  
attempt to comply with the law, the Court  
may properly receive the appeal and  
allow time for the deficiency, if any, to  
be made. Where however an appellant  
deliberately and to suit his own conveni-  
ence paid insufficient court-fee on his  
appeal, the Court is not bound to re-  
ceive the appeal and give the appellant  
time to make good the deficiency. 42 I C  
675-3 Pat L J 74-5 Pat L W 18.

—Where appellant's Pleader, delibe-  
rately refuses to pay up deficiency  
brought to his notice while filing appeal  
extension cannot be allowed A I R 1924  
Lah 325-69 I C 196.

—In absence of a bona fide mistake  
about the Court-fee and where the omis-  
sion to pay the full amount is deliberate,  
time to make up deficiency cannot be  
granted. A I R 1923 Lah 303-75 I C 667.

## C. P. C. (1908) SEC. 149 (Contd)

## (5) Deliberate omission or neglect. (Concl'd)

—See also 1 Lah 234=57 I C 215 And also A I R 1922 Lah 440=4 U P L R (Lah) 77=67 I C 106 and 62 P L R 1919=53 I C 256.

—Though the attention of the appellant was called to the deficiency nearly four years before the date of hearing of the appeal, he did not make good the deficiency and applied for extension at the hearing of the appeal on objection taken by the respondent. 138 I C 738=33 P L R 187=1 R 1932 L 537=1932 P C L 211 (Civ)=A L R 1932 L 211 (Civ).

## (6) Discretion of Court.

—The section gives wide discretion to Court. 38 Bom 41=15 Bom L R 902=21 I C 337.

—See also 27 M L J 677=26 I C 33

—But the discretion allowed to Courts by S. 149 cannot be exercised in favour of an appellant unless he shows reasonably diligence in the prosecution of his appeal. 130 P L R 1913=19 I C 788=55 P R 1913.

—Thus when there is no question of any mistake Court will not generally extend time. 24 I C 276.

—Period fixed for payment of deficient Court fee—Extension of time originally granted —Power of Court. see 51 I C 154.

—Ignorance of law or poverty is not an adequate legal ground for extension and no extension should be granted where an insufficiently stamped memorandum of appeal is re-filed. 3 Lah L J 237=67 I C 901.

—Plaintiff got a decree for specific performance on condition of deposit within a certain period, but made the payment 4 days later but before the expiry of the period allowed, he applied for amendment of decree by insertion of certain directions as to what was to happen in the event of his making the deposit. The Court on 20th March allowed the amendment, but stated in the same order that plaintiff decree-holder had failed to make the deposit and was not entitled to any extension of time. Two months before this order, the plaintiff decree-holder had applied for execution and was given possession of the property, the failure to make deposit not having been brought to Court's notice. The judgment-debtor in connection with proceedings which culminated in the order of 20th March, applied to be restored to possession and application was granted. Held, where a definite time is fixed by decree Court cannot extend it, but in any case no extension having been granted

## C. P. C. (1908) SEC. 149 (Contd)

## (6) Discretion of Court (Concl'd)

decree-holder was not entitled to any relief. A I R 1923 Oudh 16=72 I C 879.

—Time for payment of deficient Court-fees cannot be extended when there could have been no misapprehension as to the Court-fee payable. 73 I C 788.

—Where while dismissing a suit plaintiff is ordered to make up the deficiency in Court-fees, the Court must be presumed to have acted under s. 149, and the plaintiff becomes of the same force and effect as if the Court-fee had been paid in the first instance if deficiency is made up. A I R 1926 Lah 346=8 Lah L J 60=27 P L R 172=92 I C 986.

—Where the amount of Court-fee payable is doubtful and the party had a reasonable cause for not paying the requisite Court-fee the case is a fit one for extending time for making good the deficiency. A I R 1930 Lah 24=11 I C 270.

—When discretion as regards granting time is not exercised and the memorandum of appeal is rejected the order of rejection should be set aside. A I R 1923 All 349=21 A L J 333=L R 4 A 188 Civ=74 I C 757.

—Discretion under s. 149 can be exercised at any stage in the case and in respect of whole or part of any prescribed fee. A I R 1929 P C 147=Ind Rul (1929) P C 261=31 Bom L R 841=33 C W N 781=56 I A 232=50 C L J 39=30 L W 134=57 M L J 281=10 Lah 737=(1929) M W N 818=31 P L R 7 (P C)=117 I C 493.

—Discretion under s. 149 to accept the plaint on a Court-fee and treat the suit as having been instituted on date of application to sue as pauper should not be too widely used by Court in favour of a plaintiff who fails to establish his right to sue as pauper. A I R 1929 Pat 637=Ind Rul (1929) Pat 521=11 P L T 55=118 I C 329.

—Where question of amount of the Court-fee is beyond doubt or when there is no honest attempt on the appellant's part to comply with the law, discretion may not be exercised in his favour. A I R 1929 Pat 731=1 R (1930) Pat 25=8 Pat 906=10 P L T 622=120 I C 313.

—A court before which an insufficiently stamped appeal is filed in time has power under s. 149 C. P. C. to accept it on the deficiency being made good, even if it was made after expiry of limitation. A Bench before which the appeal is posted under O 41, r 11 C. P. C. will not ordinarily set aside the judge's accepting the memorandum of appeal, especially when the paper books had been prepared and printed (50 All 980 and 16 A L J 57 dist.)

A L R 1934 All 72.

## C. P. C. (1908) SEC. 149. (Contd)

## (7) Duty of Court.

—Plaint insufficiently stamped—Duty of Court, see 27 P L R 1917-391 C 766

—To avail of the terms of s. 149, the permission to deposit deficit-fee must be given after considering the circumstances and reasons for not filing the entire Court fee in the first instance 60 I C 493.

—Unless there is satisfactory explanation of the mistake, no extension will be granted for making up deficiency on memorandum of appeal. 3 Lah L J 156-67 I C 130.

—Court cannot refuse to fix a time within which the deficient Court-fee shall be paid. It has discretion to extend the time already fixed. Section 149 does not give the Court any discretion to refuse to grant the time which O. VII, r. 11, says it shall grant. Where a party pays beyond the fixed time and has not asked the Court to extend the time for payment but the Court receives the fee, the inference is that the Court has implicitly, extended that time. Court can accept payment after the fixed time. A I R 1926 Mad 676-(1926) M W N 341-51 M L J 90-95 I C 439.

—It is an abuse of the powers of the Court to refuse the deficit Court-fee where the delay is that of one day. A I R 1927 Oudh 507-1 Luck Cas 574-104 I C 527.

—Deficiency appearing on face of memo of appeal—Receiving of memorandum in case of, is without jurisdiction—Proper procedure in such a case is once return the memorandum to the party presenting it. 59 C 388 (392-3)-138 I C 648-A I R 1932 C 482-1 R 1932 C 483.

—The District Judge who had jurisdiction to hear the appeal exercised his discretion and allowed the court-fee to be made up. This could only be done under s. 149, Civil P. C. That section clearly lays down that upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance. That clearly means that once the Court has allowed and accepted payment no further question of limitation arises. It was not fair to permit the deficiency to be made up and then to hold that the appeal was barred by limitation. A I R 1932 L 21-133 I C 122.

—Rejection of appeal on ground of Court has no Unlimited power of rejection. 1932 M W N 104.

—Where the plaint claim is reduced in appeal, the Court must not dismiss the entire appeal, but should hear the same to the extent that Court-fee has been paid. A I R 1931 Lah 237-32 P L R 129-Ind Rul (1931) Lah 425-131 I C 297.

## C. P. C. (1908) SEC. 149. (Contd)

## (8) Pauper applications and appeals

—Where an application for permission to sue as pauper is withdrawn on ground that in another Court application to sue in forma pauperis with respect to a previous suit had been rejected, and the requisite Court-fees are paid after limitation it is not a fit case to exercise discretion under s. 149, and the suit is barred as both the applications are fraudulent. A I R 1923 Rang 256-1 R 196-74 I C 835.

—On dismissal of an application for leave to sue as a pauper the plaint still remains and may be validated by payment of Court-fees within time to be fixed by Court which lies in the discretion of the Court to do. A I R 1924 Mad 118-18 L W 451-33 M L T 18 (H C)-46 M L J 254-(1923) M W N 720-76 I C 767.

—S. 149 has no application to validate subsequent payment of Court-fees in case of an application for leave to sue as pauper. A I R 1929 Nag 268-Ind Rul (1929) Nag 287-12 N L J 696-118 I C 687.

—Application for leave to sue in form a pauperis—Rejection of—Subsequent payment of court-fee—Effect—Suit shall be deemed to have been instituted when Court-fee paid—S. 149 can be invoked only when the pauper petition is kept pending. A L R 1933 N 283-A I R 1933 N 237.

—Extension of time to pay Court-fee on pauper application—Power of Court and effect. see (1915) M W N 228-28 I C 504.

—Power of Court to extend time to pay stamp, if applies to pauper appeals. see 31 M L J 269-40 Mad 687-38 I C 617.

## (9) Payment of Court-fee on memo of appeal after limitation.

—An appeal must be taken to be filed on the date on which the memorandum of appeal is properly stamped. 2 Lah L J 481-56 I C 742.

—Where the deficiency in an insufficiently stamped plaint filed within limitation is made good under O. VII, r. 11 no question of limitation arises. law as regards memoranda of appeal is however different. A I R 1922 Pat 56 (1) -3 P L T 142-70 I C 378.

—It would be an exceedingly bad precedent to hold that an appellant who cannot pay the full court fee within the period of limitation prescribed for the filing of the appeal should be allowed to file the appeal on insufficient stamp and should be given time to pay the balance at his leisure, 8 P L R 1919-19 I C 871.

C. P. C. (1908) SEC. 149 (Contd)

## (9) Payment of Court-fee on Memo of appeal after limitation. (Contd)

—Where deficiency in stamp for a memorandum of appeal is brought to notice of appellant but is still not made up till long after the appeal is time-barred benefit of s. 149, Civil P C cannot be given, 21 P W R 1921=59 I C 689 see also A I R 1921 Lah :371=26 P L R 1921=59: I C 667.

—Where the deficiency in an insufficiently stamped appeal is made good after the expiry of the limitation but the omission to pay proper Court-fee is unintentional and a bona fide mistake, the appeal should not be dismissed merely for such an omission. A I R 1925 Lah 246=6 Lah L J 506=84 I C 946.

—Where on a memo of appeal insufficient Court-fee was paid and the additional fee required by law was paid later but the limitation had then expired and the explanation was that the insufficient Court-fee was paid under the old practice. Held that in view of the explanation necessary extension should be allowed and the appeal was within limitation. A I R 1930 Lah 108=Ind Rul (1330) Lah 415=123 I C 527.

—Appeal presented out of time—Memorandum not bearing any stamp—Time extended for paying Court-fee—Appeal when to be taken as presented—Powers under S. 5, Limitation Act—cannot be exercised. A L R 1933 C 419 (420)=37 C W N 179=A I R 1933 C 796=146 I C 559 (1).

—A Court before which an insufficiently stamped appeal is filed in time has power under S. 149, C P C to accept it on the deficiency being made good, even if it was made after expiry of limitation A Bench, before which the appeal is posted under O. 41, r. 11 C P C will not ordinarily set aside the Judge's order accepting the memorandum of appeal, especially when the paper books had been prepared and printed. A L R 1934 A 72=1933 A L J 1357.

—Memorandum of appeal presented out of time without any stamp whatsoever

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C. P. C. (1908) SEC. 149 (Contd)

## (9) Payment of Court fee of memo of appeal after limitation. (Contd)

—Proper memorandum of appeal is not  
—Extension of time for payment of Court-fee—Ex parte order for—payment of court-fee pursuant to—Presentation of appeal must in such a case be held to be on the date on which the court-fee is paid. 37 C W N 179.

## (10) Payment of court-fee on plaint after limitation.

—Under O VII r. 11, cl. (c) read with s. 149 empowers Court to allow plaintiff further time to make up the deficiency and if such deficiency is made good within the prescribed time the fact of limitation expiring in meantime would not affect the suit. The decision in 15 All 65 is no longer law. A I R 1923 All 538=21 A L J 387=45 A 518=L R 4 A 251 Civ =74 I C 358 see also O VII r. 11.

—A suit is not barred by limitation, if the plaint is filed within time and the deficit Court-fee called for by the Court is paid up even after the time allowed by the Court when the Court accepts the plaint and registers it. No express order extending the time for paying up the deficit Court-fee is necessary. 1 Pat L T 544=58 I C 216.

—Where a suit was instituted on the last day of limitation on an insufficiently stamped plaint and the balance of Court fee was subsequently paid after the period of limitation had expired, and the Court signified acceptance by issuing summons to deft. held, that the suit was not barred by limitation 29 A 749 Approved. 1 Pat L J 420=3 Pat L W 51=37 I C 507.

—Where the plaint is in time and the deficiency is made up within the time allowed by the Court, but after the expiry of the period of limitation, the suit is not barred. A I R 1926 Nag 156= 89 I C 419.

—Court-fee deficient—Paid within time allowed by court but after limitation  
—Whether suit barred. See 12 A L J 709= 23 I C 408.



## C. P. C. (1908) SEC. 149 (Contd)

## (10) Payment of court-fee on plaint after limitation. (Contd)

—Under S. 149 of the Code of Civil Procedure the Court has a discretion to allow the plaintiff to pay the deficit court-fee on an insufficiently stamped plaint, even after the expiry of period of limitation prescribed for filing the suit. But when the Court has exercised this discretion in favour of the plaintiff and has allowed the deficiency in stamp to be made good, the payment relates back to the date on which the plaint was originally presented. In the last clause of that section it is clearly laid down that upon the payment of the additional court-fee the document in respect of which fee is payable shall have the same force and effect as if such fee had been paid in the first instance 1932 P C L 773 (Civ)=I R 1932 L 635=A L R 1932 L 773 (Civ.)

## (11) Payment of court-fee within time allowed.

—Where Court-fee is paid within time allowed, the memorandum of appeal has the same force and effect as if the Court-fee had been paid in the first instance and its validity cannot be challenged on the ground of limitation. A I R 1922 Lah 225-3 Lah 35-26 P W R 1922-65 I C 741.

—Where deficit Court-fee is accepted after time fixed for payment and plaint is registered, it may be inferred that the Court condones the delay and grants extension, as it is in its discretion to do under s. 148 or s. 149 for it might have rejected the plaint under O. VII, r. 11. A I R 1925 Pat 299-4 P 190-3 P L T (Civ) 22-6 P L T 4=(1924) Pat 355-85 I C 172.

—Court-fee time fixed for payment of deficient court-fee on memorandum of appeal—Question of limitation left open—Requisite Court-fee paid within time—Limitation saved. A L R 1933 L 325-14 L 312-34 P L R 274=A I R 1933 L 598=I R 6 L 272.

—Where a party, mistakenly treating the order absolute made in a suit on a

## C. P. C. (1908) SEC 149 (Contd)

## (11) Payment of court-fee within time allowed. (Contd)

mortgage, as an order made in execution proceedings paid a Court fee of As 8 only on the memo. of appeal therefrom and paid the deficient Court fee within the time allowed by the Court, held the appeal must be treated as presented in time especially as the Court had granted time under S. 582 of C. P. Code of 1882 for payment of deficient Court fee, and that S. 149 of the new Code vests wider discretion in Court. 21 I C 856.

—A plaint was presented to a Civil Court on the 19th April. On the 29th. April an order was made on the plff. to pay the deficit Court fees within a week. This was followed by several other orders providing for payment on later dates. Ultimately there was an order on the 7th Aug. under which the balance was to be paid within five days but it was paid the next day, the 8th Aug. Held, that there was an order and also payment in conformity with that order within the meaning of S 149 C. P. Code. A discretion exercised properly under the section cannot be challenged in appeal 29 I C 571=24 C L J 88.

## (12) Question of Limitation.

—See cases under the headings (7), (9), and (10) supra.

## (13) Revision or Review.

—Propriety of the exercise of discretion in granting time under s. 149 cannot be challenged in revision. A I R 1926 Nag 156=89 I C 419.

—Where deficient Court fees are accepted after the time fixed for its payment though without specifically excusing the delay, review lies on proper and legal grounds. A I R 1926 Mad 676=(1926) M W N 341=51 M L J 90=95 I C 439.

—An order demanding additional Court-fees is open to revision. A I R 1927 Nag 256=10 N L J 106=103 I C 268



## C. P. C. (1908) S. 150

—S. 150 is intended to apply not merely to cases where there was a judicial transfer of specific business but the section is in terms wide enough to authorise the Court to which the area had been transferred (including *a fortiori* the business not directly depending on territorial jurisdiction) to entertain in the first instance any application which might have been made to the Court which passed the decree. 137 I C 183 = A I R 1932 M 260 = I R 1932 M 332 = 1931 M W N 842 = 34 L W 271 = 61 M L J 307.

—Sadasivaiyar. J in 31 M L J 22 said that the transfer of business referred to in S. 150 can be only by a notification effecting change of jurisdiction and not transfer of business by specific order. In this extreme view he was not supported by the latter decisions which hold that S. 150 applies to both kinds of transfer. 55 M 801 (814) = 62 M L J 687 = 35 L W 742 = 1932 M W N 255 = 137 I C 305 = I R 1932 M 373 = A I R 1932 M 418 (F B).

—The section applies to suits and proceedings under Mad. Estates Land Act 17 M L T 190 = 28 I C 269.

—Assignment of business under s. 13 (2) of the Bengal and Assam Civil Courts Acts from one Judge to another is not transfer within the meaning of s. 150 and the latter Judge cannot entertain application to execute decree of former. A I R 1922 Cal 41 = 26 C W N 216 = 70 I C 210.

—Word 'transfer' in s. 150 includes case where the District Judge fixes jurisdiction of the Court under the Civil Courts Act and transfers business within a certain area to it. A I R 1923 Mad. 92 = (1922) M W N 743 = 16 L W 748 = 43 M L J 713 = 46 M 83 = 86 I C 650.

—S. 150 enables decree-holder to file execution application to the Court which has to execute the decree, but it must be shown that the business in question was transferred from Court passing decree to another Court. A I R 1921 Pat. 152 = 2 P L T 374 = 6 P L J 304 = (1921) Pat 186 = 62 I C 487.

—Section 150 applies only to cases of transfer from a Court and not to cases of Court which has ceased to exist. A I R 1927 Mad. 627 = 50 M 882 = 52 M L J 605 = 38 M L T 351 = 25 L W 671 = (1927) M W N 282 = 103 I C 245.

—S. 150 applies only to cases where certain specified business has been actually transferred by order of a competent Court. 37 M 462 held over-ruled by 42 M 481 (F B); A I R 1928 Mad 746 = 28 L W 885 = Ind Rul (1929) Mad 289 = 114 I C 545.

—When Court passing decree is abolished, Court competent to execute the decree is

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## C. P. C. (1908) S. 150 (Contd)

that to which business is transferred. A I R 1929 All 677 = (1929) A L J 976 = Ind Rul (1929) All 910 = 118 I C 670.

—Where a suit is pending a transfer of territorial jurisdiction will not *per se* result in a transfer of the suit and a transfer order is technically necessary. A I R 1930 Mad 528 = 53 M 378 = 59 M L J 102 = 32 L W 329 = Ind Rul (1931) Mad 496 = 131 I C 160.

—Where after attachment of property and order for sale by Court passing a money decree, the property is transferred to the local limits of the jurisdiction of another Court the new Court can entertain an application for execution by sale of property. A I R 1929 Mad 952 = 30 L W 649 = Ind Rul (1930) Mad 746 = 125 I C 90.

—An application to set aside an *ex parte* decree passed by a Court can be entertained by Court to which whole business is transferred. A I R 1922 Mad 10 = 40 M 1 = 42 M L J 344 = 15 L W 458 = (1922) M W N 349 = 31 M L T 79 = 65 I C 727.

—Transfer of money suit from Court of institution to another Court beyond that jurisdiction and decree obtained in latter Court—Abolition of latter Court subsequently, and whole business of that Court sent by administrative order (and not by judicial order under C P C) to a third Court—Third Court has jurisdiction to entertain application for transmission of decree for execution to the Court of institution—Application for execution need not be presented in first instance to Court of institution. 137 I C 183 = A I R 1932 M 260 = I R 1932 M 332 = 1931 M W N 842 = 34 L W 271 = 61 M L J 307.

—Jurisdiction as to execution of mortgage decree. Notification effecting change of jurisdiction over mortgaged property from Court which passed decree to jurisdiction of another Court—Jurisdiction of former Court to execute decree—Jurisdiction of latter Court to do so—Transmission of decree from Court which passed decree if necessary in case of. See 55 M 801 (F B).

—Transfer of business—Notification effecting change of jurisdiction for the future—Interpretation of, as effecting transfer of past business—Not permissible. 55 M 801 (814) = 62 M L J 687 = 35 L W 742 = 1932 M W N 255 = 137 I C 305 = I R 1932 M 373 = A I R 1932 M 418 (F B).

—Where an injunction order under O XXXIX, r. 1 C P Code is passed by a Court and the local jurisdiction as well as the suit in case are transferred to another Court. An application for punishing the opposite party for contempt for disobeying the injunction can be entertained by the latter

## C. P. C. (1908) S. 150 (Concl'd)

Court. A I R 1923 Mad 92 = 43 M L J 713 =  
(1922) M W N 743 = 16 L W. 748 = 46 M 83  
= 86 I C 650.

—A Court which acquires jurisdiction over properties covered by a mortgage decree owing to territorial changes cannot by reason thereof entertain an application for its execution for an unrealised balance after sale by attachment of other properties within its jurisdiction unless the decree is transferred to it in manner provided in O 21 R 6 O P Code or the business of the Court, where execution was last taken is transferred to it under S. 150. 38 I C 152.

—Revenue, transfer of, from one Rev. Division to another—Jurisdiction—see 2 L W 255=17 M L T 190=28 I C 269.

—Transfer of territorial jurisdiction—Effect on execution proceedings. see 26 M L J 189=37 Mad 462=22 I C 899.

—Passing of the new Civil Courts Act in Punjab—Abolition of Div-Judge, Dt. Judge not successor of Court abolished. see 30 P R 1915=27 I C 625.

—Temporary Court having no definite jurisdiction—Whether can execute decree of attachment of immoveable property not within jurisdiction—S 150 not applicable. 31 M L J 22=35 I C 296.

—Transfer of the place from one jurisdiction to another—Decree before transfer—Appeal, from of, how determined See 37 Mad 477= 26 I C 519.

—Probate, grant of, by one Court—Subsequent transfer of jurisdiction to another Court—Power to order inventory—Jurisdiction. See 31 I C 499

## C. P. C. (1908) S. 151.

## Synopsis.

- (1) Abuse of process.
- (2) Amendment.
- (3) Appeal.
- (4) Applicability and scope of the section.
- (5) Award.
- (6) Compromise decree.
- (7) Consolidation.
- (8) Contempt of Court.
- (9) Court fee.
- (10-11) Costs.
- (12) Decision.
- (13) Dismissal of appeal or suit.
- (14) Dismissal for default.
- (15) Ends of Justice.
- (16) Enforcement of order.
- (17) Erroneous order.
- (18) Execution.
- (19) Ex parte decree or order.
- (20) Expunging from record.
- (21) Extension of time.

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- (22) Fraud.
- (23) General power of Court.
- (24) Guardian and ward.
- (25) Hearing of Appeal.
- (26) Inherent powers, miscellaneous.
- (27) Injunction.
- (28) Interlocutory judgment.
- (29) Invention of procedure.
- (30) Issues.
- (31) Judgment.
- (32) Jurisdiction.
- (33) Letters of administration.
- (34) Limits of inherent powers.
- (35) Mistake.
- (36) Nature of the provisions.
- (37) Parties addition of.
- (38) Partition suit.
- (39) Receiver.
- (40) Reconstruction of records.
- (41) Refund.
- (42) Reliefs.
- (43) Remand.
- (44) Restitution.
- (45) Restoration.
- (46) Retrial.
- (47) Review or revision.
- (48) Settlement Court.
- (49) Stay of execution or suit.
- (50) Striking out pleadings.
- (51) Suit for possession.
- (52) Time fixed for deposit.
- (53) Who can invoke.
- (54) Wrong order—see (17) Erroneous Order

## (1) Abuse of Process.

—S. 151 does not validate every act of Court which cannot otherwise be justified. The power is to be exercised in specified circumstances and cannot be exercised until those circumstances are established Court purporting to prevent abuse must find what the abuse is. Mere non-compliance with r. 24 of Madras High Court Rules of practice is hardly in every case an abuse of Process. A I R 1928 Mad. 522 = (1928) M W N 222 = 54 M L J 665 = 28 L W 152 = 109 I C 528.

—Where the application asking for an enquiry under O. XXXII, r. 15 was dismissed without holding any independent inquiry as required by law, this is an abuse of the process of the Court and can therefore be interfered with under s. 151 A I R 1928 All 108 = 50 A 335 = 25 A L J 1082 = 108 I C 141.

—S. 151 may be resisted for preventing gross abuse of the powers of the Court in proper cases. A I R 1927 Mad 592=52 M L J 670 = 38 M L T 364 = (1927) M W N 259=102 I C 396

—Idle multiplicity of proceedings included in abuse of process of Court. A I R 1926 All 212 = 48 A 356 = 24 A L J 375 = 93 I C 285.

—Sons of the judgment-debtor applied for injunction staying the sale and got it

## C. P. C. (1908) S 151 (Contd)

## (1) Abuse of Process—(Concl'd).

and the same afterwards refused to the judgment-debtor though on other grounds, is an abuse of the process of the Court and s. 151 can be invoked to set aside the order refusing injunction A I R 1924 Mad 100 = 45 M L J 312 = (1923) M W N 672 = 77 I C 12.

—Where plaintiff obtains a decision on an immaterial issue in a suit which he knows, is bound to fail, and brings another suit, requiring the Court to follow the dictum previously given, it was held that this would amount to abuse of the process of the Court. A I R 1923 All 495 = 45 A 466 = 21 A L J 393 = L R 4 A 532 Civ = 74 I C 656.

—Court has inherent power to investigate whether certain property should vest in Court under S. 47 (2) Provincial Insolvency Act (1907) so far as process of Court is not abused, and is not absolutely barred from deciding claims of third parties. A I R 1921 Nag. 159 = 61 I C 589.

## (2) Amendment.

—The Courts in India have inherent powers to amend or vary decrees so as to bring them into accord with the judgments even if the amendments do not fall within S. 152 of the Code of Civil Procedure 92 P R 1919 = 52 I C 574.

—Court has inherent power to amend even in cases of matter not covered by S. 152. 9 O W N 803 (807) = 140 I C 412 = I R 1932 O 402 = A I R 1932 O 293.

—The mere fact of an appeal being filed does not oust the jurisdiction of the first Court to amend the plaint and decree to correct a clerical error. (1931) A L J 536.

—Suit for recovery of rent—Brought against the proper person who was misdescribed owing to his own fault is not giving the correct name—Summons served on the person—*Ex parte* decree passed in the suit—Objection against arrest of the person—Amendment of decree bringing the said person by giving the correct name on record—Amendment proper. A L R 1933 B 201 (202) = 35 B L R 365 = 144 I C 901 = A I R 1933 B 200 = I R 6 B 14.

—The Court has inherent power to amend decrees and orders even in cases not covered by S. 152. Para 12 (c) of Sch II C P C expressly lays down that where the award contains a clerical mistake or an error arising from an accidental slip or omission the Court may by order modify or correct such an award. Para 21 of that Schedule while referring to paras 14 and 15 omits all mention of para. 12. This omission leads inevitably to the conclusion that the Court's power to modify or correct an award on the three grounds mentioned in para 12 of Sch II

## C. P. C. (1908) S. 151 (Contd)

## (2) Amendment—(Contd)

even after it has been embodied in a decree of the Court has been left untouched. 9 O W N 803 (809, 811-2) = 140 I C 412 = I R 1932 O 402 = A I R 1932 O 293.

—Assuming that the Court has jurisdiction to allow an appellant to continue an appeal in *forma pauperis* it can be exercised in favour of an appellant only if on a perusal of the judgement and decree appealed from and the appeal memorandum the court is of opinion that decree is contrary to law or to some usage having the force of law or otherwise erroneous or unjust. 38 M L J 146 = (1920) M W N 277 = 10 L W 659 = 54 I C 761.

—The inherent power of the Court mentioned in S. 151, does not include a power to set aside the deliberate decision of superior Court. Order 20 rule 3, is a distinct prohibition against any alteration of a signed judgment save as provided by S 152 or on review. 20 I C 3 = 254 P L R 1913 = 159 P W R 1913.

—Inherent power of court—Amendment of decree—Improper exercise, See 23 I C 906.

—Where in an appeal "the suit was decreed with costs" and the intention of the court was clear that only the contesting defendant ought to be made to pay the costs and not the other defendants: *Held*, that it is open to a court *suo motu* to rectify a decree making all defendants liable so as to make it conform to the intention of the court even though the decree might have been appealed from. The court can make the amendment either under S. 151 or S 152 or under O 20 R 6 of the C P Code. 18 C W N 772 = 20 C L J 18 = 23 I C 419 and 26 I 946.

—Inherent power—Amendment—No difference between decree and judgment—No power to amend though error apparent on the face of record. see 3 L W 499.

—A decree for the sale of mortgaged property described the property according to the description given in the mortgage deed. Before the institution of the suit, the description of the property was changed in the Revenue Registers and the court omitted to give the correct description. *Held* that the court had jurisdiction under S 151 to amend the decree so as to do justice between parties. 19 C W N 1021 = 28 I C 304.

—Amendment of decree—Inherent power to amend in appeal from execution proceeding. 34 I C 344.

—A commissioner was appointed to make an allotment by a preliminary decree in a partition suit. While the case was before the commissioner one K. whose name was not in the decree applied for amendment of the decree so as to include his name in it and also for the allotment of a separate share to

## C. P. C. (1908) S. 151 (Contd.).

## (2) Amendment—(Contd.)

him. The Court made the amendment and ordered the case to be tried *de novo*. *Held*, that the Court had no power under S. 151 of the C P Code to make such order under that section. It had power only to amend the decree so as to bring it into conformity with the pleadings and should have acted accordingly. 37 I C 352.

—Inherent power—Amendment of decree see. 92 P R 1919.

—Amendment of decree for pre-emption —Power under the section see. 54 I C 34.

—When by some oversight or other-wise a judge commits mistakes which injuriously affect parties the Court should exercise powers under S. 151 and 152 of the C P Code, 1908, to correct the mistake and amend the decree accordingly. The Chief Court in reversing the Appellate decree in second appeal and restoring the decree of the first Court in a pre-emption suit omitted to provide for the time of payment of the pre-emption money, etc. This defect was removed from this judgment, on an application made by the plff under Ss. 151 and 152 of the C P Code of 1908. 169 P W R 1916 = 37 I C 378.

—Amendment of decree necessitated by the decision in second appeal should be granted A I R 1929 Lah 317 = 11 Lah L J 37 = Ind Rul (1930) Lah 16 = 120 I C 176.

—No amendment should be allowed either under s. 152 or s. 151 where laches may in circumstances of the case disentitle party to relief under s. 152. A I R 1928 Nag 149 = 109 I C 727.

—Where there is mistake as to costs included in the decree, it is open to the aggrieved party to point out the mistake and claim its correction under s. 151. A I R 1928 Lah 800 = 10 Lah L J 401 = 107 I C 476.

—If prior application for amendment has been heard and finally decided on merits, subsequent application claiming substantially the same relief as before cannot be entertained except in special circumstances but dismissal of prior application for amendment of clerical or arithmetical error in judgment or decrees and decision thereon, does not operate as *res judicata* to subsequent applications. A I R 1928 Lah 244 = 107 I C 390.

—But it is competent for the Court under s. 151 to restore the case to the original file subsequent to discovery that the minor was not properly represented A I R 1930 All 644 = (1930) A L J 938 = Ind Rul (1931) All 54 = 52 A 24 = 128 I C 438. See also 36 I C 366; and 14 A L J 818.

—A decree which is in conformity with judgment cannot be amended under s. 151. A I R 1927 Lah 403 = 101 I C 142.

## C. P. C. (1908) S. 151 (Contd.)

## (2) Amendment—(Contd.)

—Decree in conformity with judgment cannot be amended under s. 151 and any mistake in the judgment can only be amended by appeal or review. A I R 1927 Cal 203 = 44 C L J 441 = 100 I C 309.

—In appeal from preliminary decree against minors X was appointed guardian in place of Y who was guardian in original suit and had since died, but in final decree by trial Court Y's name was by mistake shown as guardian. Application for amendment was made in execution when mistake was discovered. *Held* that as it was not necessary for either party to apply for appointment of X as guardian amendment should be allowed. A I R 1926 Pat 56 = (1926) Pat 303 = 8 P L T 143 = 97 I C 152.

—Only Appellate Court can amend original decree appealed against where appeal is dismissed under O XLI, r. 11. 95 I C 649 (All).

—Even where second appeal has been dismissed under O XLI, r. 11, High Court can amend the plaint and the decree so as to correct the mistake in the description of the property. A I R 1923 Pat 218 = (1923) Pat 46 = 81 I C 295.

—Where a co-plaintiff is made a defendant other plaintiff can be ordered to give costs up to the date on which he was made defendant. S. 151 should not be invoked to give costs in cases other than in O XXV r. and O. 41 r. 10 A I R 1924 Cal 251 = 50 C 853 = 79 I C 298.

—Under ss. 42 and 157 Court can amend its final decree and order the restoration of the land recovered by a party in excess of award by a decree, separate suit being unnecessary for the same. A I R 1925 Sind 126 = 19 S L R 302 = 78 I C 1039.

—Substitution of heir wrongly applied for under other rule can be amended into one under O XXII, r. 10. A I R 1924 Cal 90 = 27 C W N 710 = 75 I C 255.

—Amendment of decree under s. 151 can be allowed to correct accidental omission of item of mortgaged property both from plaint and decree. A I R 1924 Rang 104 = 74 I C 1020.

—High Court acting as Court of Appeal can correct clerical errors under s. 151. A I R 1923 All 358 = 45 A 53 = L R 3 A 597 = 74 I C 1004.

—Court cannot under its inherent power amend its own decree extending time to pay deficit Court fees. A I R 1923 Cal 612 = 37 C L J 395 = 27 C W N 720 = 74 I C 575.

—Alteration to make the decree consistent can be made before it being signed. A I R 1923 Mad 392 = 17 L W 254 = 74 I C 416.



C. P. C. (1908) S. 151 (Contd)

(2) Amendment—(Conclld)

—Court has inherent power to correct decree not correctly expressing what Court actually decided or intended to decide. A I R 1923 Lah 147 = 73 I C 679.

—Amendment as to overstatement of interest in execution application can be allowed under s. 151 A I R 1922 Pat 409 = 1 Pat 149 = 69 I C 200.

—Alteration in decree can only be made by way of review, appeal or revision, and s. 151 cannot be resorted to for the same A I R 1921 Lah 6=3 Lah L J 310 (F B)=67 I C 772.

—Decree acted upon for six years cannot be allowed to be amended under s. 151. A I R 1923 Nag 109 = 67 I C 310.

—Ss. 151 and 152, cannot be invoked for the amendment of decree in execution, if amendment is allowed the act of the Court would be *ultra vires*. A I R 1922 Mad 186= 15 L W 301=65 I C 710.

—Where in a preliminary decree which was in accordance with the judgment in a mortgage suit there was no provisions for interest, amendment in final decree allowing the same cannot be allowed of the amendment to the other party. A I R 1921 U B 5=4 U B R 1=63 I C 799.

### (3) Appeal

—Law relating to appeals cannot be ignored by invoking S. 151 90 W N 430 (433).

—No appeal lies to High Court from order under S. 151. See A L R 1933 O 501=10 O W N 1008=14 L R 739.

—See to the same effect. A I R 1931 L 344=134 I C 292=12 L 602; and 1932 P C L 438 (440) (Civ)=33 P L R 285=138 I C 202= I R 1932 L 42= A I R 1932 L 311= A L R 1932 L 438 (Civ.)

—Such order falls under the category of appealable orders under the code, (1917) M W N 495=6 L W 272=42 I C 421.

—But the memo of appeal can be treated as revision petition. A L R 1933 L 596 (597) =34 P L R 51= A I R 1933 L 73 = I R 5 L 91 (2)=140 I C 843. See also A L R 1932 L 384.

—No appeal lies from application under S. 151 for excusing of delay on ground of Counsel's mistake 1932 P C L 63 (67) (Civ)= A L R 1932 L 63 (Civ.)

—But an order made by a Court acting under s. 151 and exercising the same jurisdiction given as s. 144, is exercising same the jurisdiction given as s. 144, is appealable A I R 1931 Cal 779 (2) = 53 C L J 49 = 35 C W N 105. See also A I R 1927 Cal 285 = 31 C W N 290 = 100 I C 735.

—The appellate Court has inherent jurisdiction under S 151, C P C to make such

C. P. C. (1908) S. 151 (Contd)

(3) Appeal—(Contd)

order as may be necessary for the ends of justice. This power includes one for stay of proceedings in a subordinate Court from which an appeal is pending. The order confirming the sale has not yet become final so far as the appellate Court is concerned, and if the order of the Court below is set aside the proceedings relating to the delivery of possession will become infructuous. 1932 A L J 582 = A I R 1932 A 655 = A L R 1932 A 767.

—Court can under S. 151 pass order of appeal 1932 P C L 438 (440) (Civ.) = 33 P L R 285 = 138 I C 202 = I R 1932 L 426= A I R 1932 L 311 = A L R 1932 L 438 (Civ.)

—But such order should not be made, where there is some other provision of law, e. g. O. 41, r. 25, under which a remand can be suitably made and which applies to the circumstances of the case. A L R 1932 L 384 (Civ) = 1932 P C L 384 (Civ.)

—The High Court has jurisdiction, in the exercise of its inherent power under S. 151 of the C P Code, to condone in special cases the misapplication of the special provisions of the Code, if the provisions of the law as regards limitation and Court-fees are complied with. The High Court has authority to convert an application for revision into a memo of appeal. 48 I C 779.

—Where an Appellate Court adds a new party, it has inherent power to reverse the decree to the Court of first instance and remand the case for retrial. This power has not been taken away by O. 41, R. 23, C P C. 2 L W 1034 = 31 I C 263.

—Appellate Court should exercise its inherent power under S. 151, C P C to make such orders as might be necessary for the ends of justice. 31 C L J 130 = 56 I C 726.

—Inherent power—Appellate Court—Power of, to consolidate appeals in Land Acquisition case see. 34 M L J 279.

--Order under s. 151 is not appealable. But if it in substance purports to be under some other provision from which an appeal lies, then an appeal does lie from it. A I R 1930 Lah 468 = Ind Rul (1930) Lah 831 = 127 I C 159. See also 119 I C 883 = A I R 1929 Pat 232. See also A I R 1930 Nag 199 = 124 I C 246 = 26 N L R 187.

—Appeal does not lie from an order under s. 151 made by the successor in office setting aside the order under O. XXXII, r. 6 in the decree of the previous Judge. A I R 1929 Lah 884 = Ind Rul (1930) Lah 508 = 123 I C 876.

—In a suit dismissed under O. XXVII, r. 3 appeal was preferred but dismissed for want of subsisting decree. During the pendency of an appeal application for restoration



C. P. C. (1908) S. 151 (Contd)

(3) Appeal—(Contd)

was allowed, but in revision preferred by the defendant, against order restoring the suit was set aside. Appeal revised and it was held that there was sufficient ground to restore the appeal under s. 151. A I R 1930 All 100 = Ind Rul (1930) All 226 = 122 I C 402.

—Appeal from an order under s. 151 is not altered since an express provision exists for it, A I R 1930 Lah 789=31 P L R 477=12 Lah L J 71=Ind Rul (1930) Lah 294=122 I C 102 See also A I R 1927 Cal 167=104 I C 331.

—If the order of remand is passed under the inherent powers of the Court given by s. 151 it is not appealable. A I R 1929 Mad 205=Ind Rul (1929) Mad 1009 = 119 I C 705 See also A I R 1929 Lah 245 = 118 I C 530=230 P L R 604.

—Order restoring execution application dismissed for default being under s. 151 cannot be appealed against A I R 1930 Lah 20 = 11 Lah 93=31 P L R 375=Ind Rul (1929) Lah 910=119 I C 494.

—Order of remand under s. 151 is appealable. A I R 1928 Cal 211=Ind Rul (1929) Cal 566 =117 I C 678.

—Right to appeal is determined by what the Court does and not by what it ought to have done, hence order of remand under O. XLII r 23, which in reality should have been under s. 151 can be appealed from A I R 1928 Lah 341=107 I C 284.

—Decision not appealed against is not generally reversed but when justice so demands, Appellate Court can set aside a decision on point not appealed against. A I R 1927 Oudh 455=4 O W N 862=104 I C 824.

—Where case is remanded by Appellate Court for trial on the amended plaint, after being tried upon all the issues by the trial Court the order is under s. 151 and hence non-appealable. A I R 1927 Mad 859 = 103 I C 670.

—When the Court remands a suit, deciding upon all the issues raised, the remand order is one under s. 151 and not under O. XLI, r. 23 and hence non appealable. A I R 1927 Mad 1190=(1927) M W N 286=102 I C 28.

—Order of remand under s. 151 is appealable only when it amounts to a decree. Mere fact that order reverses decree of trial Court and deprives plaintiffs of valuable right acquired thereunder would not make an order of remand a "decree" unless it determines any of the points arising for determination relating to matters in dispute. A I R 1926 Pat 457=6 Pat 160=7 P L T 535 = (1926) Pat 333 = 97 I C 105.

—Remand ordered when original suit has not been decided on preliminary point on ground that case was not decided properly is remand under the inherent power of Court

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(3) Appeal—(Contd)

and the order is not appealable. A I R 1926 Pat 516=7 P L T 811=(1926) Pat 302 = 96 I C 440. See also A I R 1925 Pat 760=92 I C 684.

—Suit dismissed for default—One plaintiff happening to be present—Application for restoration allowed to be altered to one for review Defendants not objecting—Judge setting aside order of dismissal under s. 151 treating application as one under O. XLVII, r. 1—Appeal to District Judge is not competent as order passed under s. 151 is not appealable. A I R 1922 Cal 450=37 C L J 99 = 73 I C 306.

—Appellate Court has inherent power to grant special leave to appeal, and hear it where it has been refused under s. 106 (a) Presidency Towns Insolvency Act, if a question of principle is involved. A I R 1923 Bom 245 = 25 Bom L R 161=72 I C 261.

—Refusal to act under s. 151 cannot be appealed against. A I R 1922 Pat 479=1 Pat 277=(1922) Pat (Sup) 61=65 I C 341.

—Appeal dismissed for default can be readmitted under s. 151 A I R 1921 Bom 20 =45 B 649=23 Bom L R 110=60 I C 919

(4) Applicability and Scope of the section.

—Code is not exhaustive as to powers of Court—Courts have therefore always acted upon the assumption of their being possessed of an inherent power "to act *ex debito justitiae* and to do that real and substantial justice for the administration for which alone they exist." 9 O W N 803 (807) =140 I C 412 = 1 R 1932 O 402=A I R 1932 O 293 =A L R 1932 O 667.

—Court can make order for security for costs even in case not falling under O. 25. A I R 1932 S 33 (34) = 26 S L R 21 = I R 1932 S 183 = 140 I C 233 = A L R 1932 S 35.

—Court has inherent power to enforce its own order. A L R 1933 N 317=23 N L R 332 = A I R 1933 N 62 = 141 I C 170 = I R 5 N 40.

—The exercise of inherent power under S. 151 of the C P C is subject to the rule that it must not be invoked where the Code contains specific provisions which would meet the necessities of the case. The section does not become applicable in every case in which there is no other remedy. It is not usually applied at the instance of the party who has a specific remedy under the Code but has neglected to avail himself of it; nor can the law of limitation be ignored by taking recourse to the section. A L R 1933 P 449 = A I R 1933 P 132=144 I C 147.

—When the High Court finds that a petitioner had no remedy of revision under S. 115 of the C P C and that the provisions of S 107 of the Government of India Act

## C. P. C. (1908) S. 151 (Contd)

## (4) Applicability and Scope of the section—(Contd)

could not be invoked, the High Court could exercise its inherent powers contained in S. 151 of the C P C and make such order as may be necessary for the ends of justice as the petitioner had no remedy open to him under the provisions of the Code A L R 1933 L 747 (746) = A I R 1933 L 266.

—Inherent powers cannot be exercised when other remedies are open. A L R 1933 L 1087 = A I R 1933 L 671.

—Party neglecting to take advantage of the remedy provided by the Code cannot invoke inherent jurisdiction under S. 151 A L R 1933 A 546 (547) = A I R 1933 A 382 = 144 I C 731 = I R 6 A 3.

—The action taken by the Court under S. 151 is not one prescribed by the Code and if that action is permissible under S. 151, then it cannot be said that the Court is doing an act which is not allowed under the C P C. A L R 1933 M 399 = A L R 1933 M 563 = 143 I C 903 = 38 L W 281 = 65 M C L J 538 = I R 5 M 355.

—Appeal from a preliminary decree—Application for stay of further proceedings—Cannot as a matter of course be granted—Conditions of O. 41 r. 5 as to likelihood of irreparable injury and furnishing security must be complied with. A L R 1933 L 595 = A I R 1933 L 724.

—There is no rule of law which can authorize a Court to revise its own order e. g. order superseding reference to arbitration except S. 151. 138 I C 524 = A I R 1932 A 565 = I R 1932 A 417.

—Where rights are conferred by the Code and there is no provision for a particular set of facts, the Courts should apply provisions which are nearest in point with necessary modifications s. 151 is intended to give such power to the Courts and to prevent a failure of justice. A I R 1931 Mad 303 = 33 L W 359 = (1931) M W N 48 = 60 M L J 628 = Ind Rul (1931) Mad 562 = 131 I C 610.

—S. 151 C P C is very wide in its terms and may be used in suitable circumstances for the prevention of clear cases of miscarriage of justice. But great care should be exercised before the provisions of this section are utilized, and the section should never be utilized so as in effect to nullify any general principles applicable to the law of limitation. Where, therefore, the counsel, for the appellant, before leaving for England, left his client's case with his clerk who misappropriated the copying fees necessary for Bench copies sent by the client in his counsel's absence and absconded, as a result of which the appeal was dismissed for default and the counsel, more than three

## C P. C. (1908) S. 151 (Contd)

## (4) Applicability and Scope of the section—(Contd)

months after his return did not take any action, when he filed an application for restoration of the appeal *Held*, that as he did not exercise due care and attention, and considering the application as an application under S. 5 Limitation Act, sufficient cause for the delay was not shown, the delay could not be excused and application for restoration of appeal was liable to be dismissed. A L R 1933 R 335 = A I R 1933 R 96 = 142 I C 185.

—Application under S. 151 cannot be treated as a review application. *So held* in a case in which the application under S. 151 prayed for an extension of time for filing an appeal on the ground of an honest mistake on the part of Counsel 1932 P C L 63 (68) (Civ) = A L R 1932 L 63 (Civ).

—Relief cannot be given under S. 151 to a party who has neglected to avail himself of the remedy provided for in the Code. 9 O W N 430 (433) = 138 I C 149 = I R 1932 O 293 = A I R 1932 O 220 = A L R 1932 O 445. See also 1932 P C L 95 (97) (Civ) = 53 P L R 146 = 136 I C 735 (2) = I R 1932 L 271 (2) = A I R 1932 L 238 = A L R 1932 L 95 (Civ).

—S. 151 no doubt does not directly confer any particular power on the Court. It is a general section saving the existing inherent jurisdiction of every Court but not conferring any new power. 13 P L T 576 = A I R 1932 P 321 (322) = 139 I C 903 = I R 1932 P 284 = A L R 1932 P 734.

—Set-off cannot be allowed under S. 151 as the provisions as to set-off contained in O. 21 r. 18 are exhaustive. 138 I C 285 = 34 P L R 671 = I R 1932 L 467 = A I R 1932 L 537.

—Relief to which applicant is really entitled ought not be denied to him by reason merely of wrong section having been quoted by him. 36 L W 57 (60) = 1332 M W N 72 (2) = 138 I C 121 = I R 1932 M 514 = A I R 1932 M 223 = A L R 1932 M 502.

—Power to amend proceedings in suit for ends of justice is not confined to power under S. 152 but can be exercised under Ss. 151 and 153. 1932 A L J 784.

—S. 151 is not applicable to payment of deficient amount in pre-emption decree 141 P L L 1913.

—An application for execution dismissed for default cannot be restored either under O. 9 or under S. 151 of the C P Code (1918) Pat 265 = 5 Pat L W 208 = 4 P L J 330 = 47 I C 154.

—Where a lower Court dismissed for default an application to set aside a sale under O. 21 r 89 and on a subsequent application by the judgment-debtor, re heard the application for setting aside the sale and eventually cancelled the sale *Held*, that the

## C. P. C. (1908) S. 151 (Contd)

## (4) Applicability and Scope of the section—(Contd)

Court was competent to treat the latter application as one for review and re-hear the original application preferred under O 21 r 89 Civil Procedure Code, *Quære*:—Whether the Court has jurisdiction to restore the application under S. 151 or O 9 rr. 9 and 4 Civil Procedure Code. 22 M L J 148 = 10 M L T 569 = (1912) M W N 547 = 12 I C 351.

—S. 151 of the Civil Procedure Code does not apply to a Commissioner under the Workman's Compensation Act and cannot exercise power under the same. A I R 1933 Lah 657 = Ind Rul (1930) Lah 653 = 125 I C 637.

—Where in execution of decree possession of wrong property was given to the auction-purchaser application objecting to delivery of such wrong property is under s. 151 and not under O. XXI r. 100. A I R 1929 Pat 391 = Ind Rul (1930) Pat 320 = 123 I C 400.

—Where other remedies exist by which justice can be done, s. 151 has no application. But it does apply when there are provisions of law leading to injustice. It can also be resorted to override certain provisions of law under exceptional circumstances A I R 1928 Nag 106 = 106 I C 575.

—Court cannot set aside its own orders whenever it likes. Section 151 does not apply to every case where there is no other provision. A I R 1926 Pat 27 = 4 Pat 704 = 7 P L T 291 = 91 I C 483.

—S. 151 applies when and where there is doubt and difficulty in applying other provisions of Code and particular case but cannot vest Court with power to order to do a thing which is prohibited by Statute. A I R 1925 Pat 435 = 4 Pat 180 = 1925 Pat 147 = 91 I C 213.

—To invoke inherent power to receive document not produced in time. Court should have *prima facie* reason to believe that reception will enable person tendering it to win case which he will otherwise lose and the loss should appear as excessive penalty for non-production in time. A I R 1923 Oudh 59 = 25 O C 286 = 70 I C 278.

—Where there is express provision of law applicable to case s. 151 cannot apply. A I R 1924 Lah 70 = 40 P L R 1922 = 69 I C 718.

—S. 151 cannot be so used as to override the provisions of the law of limitation. A I R 1922 Pat 479 = 1 Pat 277 = 1922 Pat (Sup) 61 = 65 I C 341.

—S. 151 applies where case is not covered by s. 144. A I R 1922 Cal. 28 = 26 C W N 40 = 35 C L J 53 = 64 I C 864.

—Order certifying adjustment of decree can be set aside if there is no application for review unless order is prejudicial to one party. 1 P L T 663 = (1920) Pat 358 = 5 P L J 379 = 62 I C 234.

## C. P. C. (1908) S. 151 (Contd)

## (4) Applicability and Scope of the section—(Contd)

—Where aggrieved parties have other remedies provided in the Code S. 151 will not ordinarily apply. A I R 1921 Pat 491 = 2 P L T 251 = 60 I C 368.

—Inherent power—To award compensation—Execution sale set aside—Mesne profits. 22 I C 839.

—Inherent power of court to construct case when record lost. 1 L W 932.

—Inherent power—Reconstruction of lost records—Power of Court. 26 I C 244.

—Inherent power—No summary jurisdiction to fine a person for contempt. 23 C W N 389.

—Inherent power to correct its own proceedings. 19 C W N 419.

## (5) Award.

—Award—Validity—Clerical errors—Jurisdiction of court to rectify. 23 I C 950.

—Claim against military officer—Reference to arbitration—Award and decree thereon. see 38 Bom 638.

—Clerical errors. power of court to rectify—Award—Decree thereon—No illegality—Award based on no evidence—Revision—see 114 P L R 1914.

## (6) Compromise Decree.

—Where a compromise decree is passed with the consent of a Pleader who was not duly authorised to enter into a compromise, the Court can set aside the decree under s. 151. 8 O W N 1267.

—Court cannot set aside a consent decree by virtue of its powers under S. 151. 26 S L R 395.

—To set aside consent decree—Suit for dissolution of partnership and account—Consent preliminary decree passed—plea of illegality of decree—Inherent powers of court—Companies Act, S. 4 See A L R 1933 S 28 (30) = A I R 1933 S 29 = 141 I C 290 = 26 S L R 365 = 1 R 5 S 41.

—No formal decree drawn up in terms of the compromise—Application under Ss. 151 and 152 can be filed to draw up decree in terms of the compromise. A I R 1933 P 135.

—Order recording compromise of suit—Appeal barred—Proper remedy for the party aggrieved is a review or an application under S. 151 to set aside compromise or a separate suit. A L R 1933 B 209 (211) = 57 B 206 = 35 B L R 127 = A I R 1933 B 205 = 144 I C 448 = 1 R 5 B 306

C. P. C. (1908) S. 151 (Contd)

## (6) Compromise Decree—(Concld)

—Compromise decree as a result of fraud upon the Court can be reversed under s. 151. A I R 1927 Pat 354 = 6 Pat 108 = 105 I C 271.

—Remedy to set aside decree passed in pursuance of compromise by lady whose signature was obtained by mistake or fraud of agent, is by way of review petition and not under s. 151 A I R 1922 M 446 = 43 M L J 290 = (1929) M W N 495 = 31 M L T 132 = 16 L W 440 = 70 I C 425.

—If a decree embodies a compromise inaccurately or does not embody the true terms of the compromise the only remedy is by an independent suit to set aside the decree on the ground of mistake or fraud or some other ground *ejusdem generis* therewith. 4 Pat L J 205 = 50 I C 497.

—A Court has no power to vary or set aside under S. 151 C P Code a consent decree made by it when there is no variance between the decree and *solenamali*, 36 I C 239.

## (7) Consolidation.

—Effect of order declaring appeals analogous is not that of consolidation but merely that they shall be heard together and order in one does not unless so stated govern the other: A I R 1925 Pat 765 = 7 P L T 431 = 4 Pat 448 = 1925 Pat. 345 = 93 I C 129.

—When individual suits are not maintainable Court can under s 151 allow consolidation of all the suits A I R 1924 Nag 196 = 75 I C 917.

—Under s. 151 two cross appeals from the same decree can be consolidated. A I R 1923 All 490 (F B) = 21 A L J 465 = L R 4 A 265 = 45 A 506 = 74 I C 411.

—Appeals once consolidated for whatever reason, from in fact one appeal and parties in suit must be regarded as parties in one suit A I R 1923 Pat 215 = (1923) Pat 17 = 70 I C 782.

—Courts are empowered under s. 151 to consolidate suits even without the consent of the parties. A I R 1932 Pat 566 = 3 P L T 584 = 1 Pat 669 = 67 I C 1000.

—A Court consolidated a mortgage suit, a money suit and a partnership suit on the ground that the substantial parties where the same and some of points raised were common to them and so it would be convenient to try them together in that the evidence on the common points would be the same in all the suits. It appeared however that the substantial questions in controversy were not identical and it was likely that the

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C. P. C. (1908) S. 151 (Contd)

## (7) Consolidation—(Concld)

questions in controversy between the parties in the money suit and in the mortgage suit could be covered by the decision in the partnership suit. *Held*, that the order for consolidation ought not to have been made, that the Court acted with material irregularity in the exercise of its jurisdiction and that irremediable mischief might be done if the High Court to refused interfere. 15 I C 897 = 16 C L J 591 = 17 C W N 526.

—There is no provision in the C P Code for the consolidation of suits but a Court has inherent jurisdiction under S. 151 to consolidate two or more suits pending before it. The High Court, however, has no jurisdiction to entertain an original application for the consolidation of suits pending before a district Court and the case is still stronger when the suits are pending in different Courts. 17 Bom. L R 655 = 39 B 604 = 30 I C 567 F B).

—It was not intended by O. 45 R 4 to limit the powers of the High Court to consolidate case to the purposes mentioned in that rule alone. The power of consideration is an inherent power of the High Court, which can be exercised in consolidating appeals to the Privy Council for the purpose of security for costs, and to save expenses. 3 Pat L J 446 = (1918) Pat 259 = 45 I C 551.

—Consolidation order for when made. see 40 I C 182.

## (8) Contempt of Court.

—District Judge filing date for sale of property alleged to belong to judgment-debtor, claimant of property filing suit in subordinate Judge's Court and obtaining *ad interim* injunction restraining decree-holder from selling—District Judge refusing to stay sale—Though not bound by order of injunction District Judge should have under inherent power directed stay of sale decree-holder having been restrained from proceeding with sale—Once injunction is granted High Court is bound to see that order of Court is carried out. A I R 1922 Pat 382 = (1922) Pat (Sup.) 225 = 3 P L T 645 = 1 Pat 662 = 70 I C 394.

## (9) Costs.

—Courts can under inherent power enforce in such manner as is thought proper payment of costs, in favour of Commissioner in connection with execution of Commission recoverable from parties and proceeding taken if not proceeding between parties within s. 47 and the order is not appealable. A I R 1924 All 192 = 74 I C 186.



## C. P. C. (1908) S. 151 (Contd)

## (9) Costs—(Conclud)

—Where pre-emption money only is paid and not the costs as directed to be paid within certain time mistake is inexcusable. A I R 1924 Lah 359 = 73 I C 891.

—Order to pauper to pay costs of amendment in cash and order dismissing a suit in failure of the same is bad. A I R 1922 Bom 385 = 24 Bom L R 924 = 47 B 104 = 69 I C 207.

—The High Court has ample inherent power to make an order with regard to the costs of proceedings taken before it where it is satisfied upon the facts of the case that the proceedings have been an abuse of the process of the Court. 21 C W N 826 = 26 C L J 44 = 40 I C 999.

—Security for costs—Direction to furnish—Inherent power. 22 C W N 1018.

## (10-11) Court-fee.

—Appeal disposed of—Deficiency in Court fee—Recovery of. A L R 1933 M 174 = A I R 1933 M 321.

—Remand of suit—Refund of court-fee on memorandum of appeal—Competency of Court to order refund when remanding a case under this section. A L R 1933 L 593 = 34 P L R 270 = A I R 1933 L 135 = 141 I C 400 = 1 R 5 L 118.

—In the exercise of its inherent powers the High Court has power to make an order directing the Taxing Officer to issue the necessary certificates to enable an appellant to apply to the Revenue authorities to obtain a refund of an excess Court fee paid on a memorandum of appeal. 3 Pat L J 452 = (1918) Pat 273 = 46 I C 271.

—Creditor's petition in insolvency—No adjudication—District Court if has power to stay execution in a Civil Court. 32 I C 897.

—S. 151 does not authorize a court to override the express provisions of any law. 9 I C 246.

## (12) Decision.

—Decision disregarding Civil Circulars of Bom. H. Court, see 38 Bom 638.

## (13) Dismissal of appeal or Suit.

—Court has inherent jurisdiction to entertain application to set aside order of dismissal of suit under O. 11 r. 21. 138 I C 248 = I R 1932 B 356 = A I R 1932 B 271 = A L R 1932 B 596.

—Where a Court dismissed an appeal of the hearing of which the appellant has no notice whatever, the court, though in ignorance of the true facts, must be held to have acted with material irregularity and in such a way as to induce a miscarriage of justice.

## C. P. C. (1908) S. 151 (Contd)

## (13) Dismissal of appeal or Suit—(Conclud)

The High Court can interfere under Ss. 115 and 151 and set aside the order of dismissal and direct the lower Court to restore the appeal and rehear it. 9 L W 513 = 52 I C 540.

## (14) Dismissal for default.

—Preliminary decree for sale of mortgaged property passed—Application for final decree—Dismissal for default—Application for setting aside dismissal and for final decree under S. 151—Court should grant the application to pass final decree—Court has no jurisdiction to dismiss an application for final decree when once a preliminary decree is passed. A L R 1933 O 353 (354) = A I R 1933 O 229 = 10 O W N 293.

—The Court cannot under s. 151 set aside the order of dismissal for default or an order passed *ex-parte* in applications under O. XXI, rr. 97 and 100, on sufficient cause being shown, since there is no justification in taking resort to s. 151 when other remedies already exist. A I R 1929 Mad 757-52 M 899 = 57 M L J 387 = 30 L W 424 = Ind Rul (1930) Mad 23 = 120 I C 567.

—Application was dismissed for default under O XXI, r 90 but the applicant immediately after, appeared in the Court and applied for restoration *Held*, order of dismissal for default was a mistaken order and can be set aside under s. 151. A I R 1928 All 301 = 26 A L J 382 = 108 I C 576.

—Where plaintiff is absent as having been adjudged insolvent and the Official Assignee is not served, dismissal of suit for default is bad and can be set aside in appeal. A I R 1927 Cal 76 = 31 C W N 22 = 53 C 844 = 98 I C 781.

—Inherent power cannot be exercised in favour of party remaining absent when he ought to be present and unable to give satisfactory reason therefore; so as to interfere with rights of third parties coming in due to his fault. A I R 1926 Bom 377 = 28 B L R 626 = 59 B 457 = 96 I C 411.

—Appeal dismissed for default can in proper case be re-admitted by Court under its inherent power and minor's absence at hearing cannot be treated as default if next friend is of unsound mind and his appeal will be re-admitted 45 B 648 = 23 Bom L R 110 = 60 I C 919.

—If an application under O IX, r. 9 is made when the period for it has expired, s. 151 cannot be invoked to set aside a dismissal for default. A I R 1931 Cal 319 = 52 C L J 23 = Ind Rul (1931) Cal 250 = 129 I C 778 See also 23 N L R 183 = 107 I C 193 = A I R 1928 Nag 91.

—Order under s. 151 restoring execution application dismissed for default in that due notice to the judgment-debtor is not maintainable. A I R 1926 Oudh 59 = 87 I C 438.



## C. P. C. (1908) S. 151 (Contd)

## (14) Dismissal for default—(Concl'd)

—Dismissal for default—Application for restoration also dismissed for default—Power of restoration. See 58 I C 748.

—Where under a decree two persons are entitled to recover two unequal sums from each other execution can only be taken out, under O 21 R 9 of the C P Code by the person entitled to the larger sum, and for so much only as remains after deducting the smaller sum of execution is taken out without making this deduction, the Court has power, under S. 15 of the Code, to compel a refund of the sum taken in excess, 56 I C 753.

—A person applied to set aside an *ex parte* decree and employed a pleader to appear for him on the date fixed for hearing. The pleader was not present in time on the 12th of June and the application was dismissed for default of appearance. On the 24th of July, A proved to the satisfaction of the Court that his pleader's absence was due to an accident over which the pleader had no control. But the application for restoration of the application was refused. On revision against this order, *held*, that the court exercised its discretion wrongly and with material irregularity and the High Court was competent to set aside the *ex parte* decree. 15 A L J. 24=38 I C 673.

## (15) Ends of Justice

—Order based on wrong view that wrong procedure has been followed cannot be changed on the ground of importing justice. A I R 1929 Nag 251=12 N L J 148= Ind Rul (1930) Nag 89=27 N L R 102=121 I C 57.

—Court may act *ex debito* justice whenever necessary and do what is required for ends of justice the C P C not being exhaustive. A I R 1930 Lah 20=11 Lah. 93=31 P L R 375= Ind Rul (1929) Lah 910=119 I C 494.

—The extraordinary discretionary powers should not be exercised in refusing to record a compromise when person alleged to have been subjected to undue influence did not repudiate in his life-time and question would involve elaborate and lengthy enquiry. A I R 1928 All 494=50 A 748=26 A L J 691=110 I C 573.

—When process of Court has been abused by party Court has inherent power to direct it to make good loss caused by such abuse or to restore to other party benefit obtained by misleading Court A I R 1928 Mad 610=110 I C 555.

—Outrageous valuation of a suit by the plaintiff for the purpose of getting it tried by a particular Court can be interfered with and corrected under s. 151. A I R 1928 Oudh 260=107 I C 330.

## C. P. C. (1908) S. 151 (Contd)

## (15) Ends of Justice—(Contd).

—S. 151 can be invoked to intervene and supersede the arbitration on grounds other than those mentioned in Sch II, rr. 5, 8 and 15, if this is urgently necessary for ends of justice or to prevent abuse of process of Court. Failing such exercise, Court acts with material irregularity in the exercise of its jurisdiction and High Court can interfere in revision. A I R 1929 All 743=(1929) A L J 918=51 A 1010= Ind Rul (1930) All 285=122 I C 685.

—When there are distinct provisions in Code, inherent power cannot be invoked. Appellate Court can order fresh local inquiry itself or send case to trial Court to have it made and decide appeal after considering result,, such inquiry is necessary at appellate stage. A I R 1926 Cal 897=94 I C 393.

—Courts are given inherent power under s. 151 to go beyond the law of procedure in the interest of justice. A I R 1926 All 212=24 A L J 375=48 A 356=93 I C 285.

—Court can under s. 151 remedy the injury caused to a party by dishonesty of Officer of Court deputed to execute its order, by passing necessary orders. A I R 1925 Mad 1212=22 L W 387=(1925) M W N 742=91 I C 300.

—The very object of s. 151 is to prevent miscarriage of justice and any order made under s 151 for preventing miscarriage of justice appearing on face of proceedings is most proper. A I R 1924 All 818=22 A L J 791=L R 5 A 545 Civ=46 A 864=82 I C 184.

—S. 151 should at once be resorted to for the proper administration of justice, the moment fraud on Court is known. A I R 1924 Oudh 40=11 O L J 227=80 I C 833.

—In a suit to enforce contract, order under s. 151 allowing a portion of amount claimed before right to the claim is established is bad. A I R 1924 Pat 69=(1923) Pat 290=2 P L R 159=5 Pat L T 560=77 I C 718.

—In spite of absence of sufficient cause for plaintiff's absence Court should use inherent power to restore suit if claim is substantial and would be barred by limitation. A I R 1924 Pat 274=(1924) Pat 280=4 P L T 647=72 I C 668.

—The Court can under s. 157, pass such order as it deems fit in the circumstances for the proper administration of justice. A I R (1922) Pat 409=1 Pat. 149=69 I C 200.

—Courts are under s. 151 given wide powers and they should always resort to it in order to avoid multiplicity of suits unless a separate provision in the Code is made for the same A I R 1933 Mad 193=42 M L J 563=15 L W 586=(1922) M W N 268=31 M L T (H C) 35=68 I C 910.

C. P. C. (1908) S. 151 (Contd)

## (15) Ends of Justice—(Concl'd)

—S. 151. should be invoked to prevent abuse of the process of the Court and to meet the ends of justice. A I R 1922 S 6=16  
S L R 79 = 66 I C 796.

—Even an order not appealed against in the revisional petition can be set aside under s. 151 by the High Court in order to give proper relief to the parties. 2 P L T 739 = 64 I C 496.

—Inherent power to do justice—Applicability of, to probate and administration proceedings. see 37 All 380.

## (16) Enforcement of Order.

—A change in consent order can be made by Court in matter of detail for the enforcement of the same. A I R 1923 All 460 = 82 I C 513.

## (17) Erroneous Order.

—An order confirming a court sale in favour of a transferee from the bidder, who him self alleged not to be the actual purchaser, is erroneous, as the transferee is not the auction purchaser. A court making such an order has inherent power to revoke it at any time. 30 I C 230 = 2 O L J 216.

—Whether the court granted time to the plaintiff to decide what course to take in the matter of appointing a guardian for a certain minor and on the date fixed for this purpose neither the plaintiff nor his pleader appeared in court, where upon the court dismissed the suit for want of prosecution and the plaintiff's application, the filed on same day asking that the case might be re-admitted was rejected as not showing sufficient cause therefor.—Held, that the court had acted improperly in dismissing the whole suit as the only matter before it was the appointment of a guardian. 33 A 560 = 10 I C 313 = 8 A L J 61 2 (F B).

## (18) Execution.

—Execution court dismissing application for execution *ex parte* as adjusted out of court—Certificate of satisfaction sent to court passing decree—Decree-holder applying to have *ex parte* order set aside—Executing court has power to review its previous order—O 9 is no bar as S. 141 does not apply to execution proceedings. A L R 1933 A 651 = A I R 1933 A 783 = 1933 A L J 1049 = 2 A W R 594 = 145 I C 995 = I R 6 A 228 (F B).

—Confirmation of sale—Setting aside sale by consent of parties—Judgment-debtor's objection that the setting aside of the sale was without jurisdiction—Not tenable—Rule that consent does not give jurisdiction, not

C. P. C. (1908) S. 151 (Contd)

## (18) Execution—(Contd)

applicable to the case—Judgment-debtor estopped. A L R 1933 M 851 = 38 L W 337 = A I R 1933 M 753.

—The Court has inherent power to carry out its orders. Hence where a sale is held in contravention of its orders it has inherent power to set aside the sale. A I R 1931 Lah 344 (1) = Ind Rul (1931) Lah 916 = 12 Lah 602 = 134 I C 292.

—Where the Collector had ordered the sale of an entire property when the decree was for a small amount and the order of the executing Court was only for sale of a portion of it, held that the Court had no jurisdiction to set aside the sale as it did not appear from the record that it was possible to sell a portion of the property, or there was collusion. A I R 1931 Bom 385 = Ind Rul (1931) Bom 503 = 33 Bom L R 611 = 134 I C 695.

—The order dismissing execution application is appealable, and where no appeal has been preferred from that order, the application cannot be restored under S. 151. The provisions of the law relating to appeal cannot be ignored by appealing to S. 151. 9 O W N 430 (433) = I R 1932 O 293 = 138 I C 149 = A I R 1932 O 220 = A L R 1932 O 445.

—Where the same property has been sold twice in execution of decrees of different decree-holders and an application for rateable distribution is put in long before the confirmation of the first sale, but the Court in ignorance of these facts confirms the second sale it has inherent power to avoid abuse of process of Court and to set aside its order of confirmation of the second sale on being apprised of the true facts. 11 P 250 = A L R 1932 P 192 (196-7) = 12 P L T 639 = 134 I C 616.

—Court has no inherent jurisdiction as to setting aside of executionsale 1932 A L J 392 = A I R 1932 A 403 = A L R 1932 A 703.

—Court can pass, under s. 151 but not under O. 21 r. 47, prohibitory orders against judgment debtor from receiving, and against tenant from paying rent under lease of property sold by judgment-debtor after sale and prior to confirmation of such sale. 1932 P C L 442 (Civ) = 33 P L R 435 = 136 I C 4 = I R 1932 L 180 = A I R 1932 L 295 = A L R 1932 L 442 (Civ).

—Court cannot set aside execution sale in case of non-compliance with O 21 r. 89. 136 I C 755 (2) = 33 P L R 146 = I R 1932 L 271 (2) = A I R 1932 L 238 = 1932 P C L 957 (Civ) = A L R 1932 L 95 (Civ.)

—Confirmation of sale can be stayed under s 151. A I R 1930 Lah 793 = Ind Rul (1930) Lah 731 = 126 I C 443.

C. P. C. (1908) S 151 (Contd)

(18) Execution—(Contd)

—S. 151 cannot be invoked for setting aside sale of moveable property in contravention to specific provision for the same though injustice may have been caused as a result of absence of notice to the judgment-debtor. A I R 1930 All 513 = Ind Rul (1930) All 480 = 124 I C 48.

—Where only land under the *haveli* was attached and *haveli* itself was sold in execution though not mentioned in the attachment order, the defect in the attachment was mere an irregularity and not illegality and Court cannot set aside sale *suo motu* under s. 151. A I R (1930) Lah 789 = 31 P L R 477 = 12 Lah L J 71 = Ind Rul (1930) Lah 294 = 122 I C 102.

—Inherent powers should be invoked for execution of order of Court procedure where for is not clearly provided in the Act under which it is passed. A I R 1929 All 211 = L R 10 A 179 Rev = Ind Rul (1929) All 314 = 114 I C 890.

—Attachment and sale of library and office furniture of judgment-debtor who is a Pleader cannot be refused by Court the decree-holder being entitled to execute decree in manner he likes and as that right cannot be interfered with by Court except in exceptional cases, A I R 1927 Lah 153 = 28 P L R 82 = 99 I C 291.

—S. 151 can be invoked to refuse to confirm auction-sale only when it is shown that the Court is misled by misstatement or non-disclosure of relevant facts. A I R 1926 Nag 17 = 88 I C 693.

—The Court should not except in very substantial circumstances set aside a sale *suo motu* without proof of any substantial injury under s. 151 A I R 1925 Sind 253 = 18 S L R 130 = 86 I C 1045.

—In considering validity of execution sale, Appellate Court need not confine itself only to O XXI r. 90 but it may act even under s. 151 A I R 1924 Mad 778 = 47 M L J 549 = (1924) M W N 842 = 84 I C 975.

—Notwithstanding the procedure in O XXI r. 89 Court can under s. 151 set aside the sale before it is confirmed, where parties concerned have come to the necessary arrangement A I R 1925 Oudh 128 = 80 I C 444.

—Where the sale was held and confirmed inspite of the injunction granted staying the same, the sale is an abuse of process of the Court and under s. 151 can be set aside. A I R 1924 Mad 100 = (1923) M W N 672 = 45 M L J 312 = 77 I C 12.

—Sale of ship in conformity with r. 36 of the Admiralty Rules, should not be set aside under s. 151 on the ground that the procedure was against the practice in such cases and worked great hardship. A I R 1923 Bom 51 = 24 Bom L R 1167 = 76 I C 433.

C. P. C. (1908) S 151 (Contd)

(18) Execution (Contd)

—To restore execution application under s. 151 strong grounds are necessary as would be required for application for review. A I R 1922 Oudh 201 = 73 I C 73.

—Where Court was misled in giving leave to bid by suppression of material facts by a decree-holder it can under its inherent powers refuse confirmation of sale, O XXI r. 92, C P C is no bar to the Court interfering to cancel the sale even though no party has applied therefor. A I R 1923 Mad 635 = 44 M L J 680 = 17 L W 759 = 32 M L T 285 = (1923) M W N 323 = 46 M 583 = 72 I C 545.

—Where permission to bid at execution sale is granted upon inaccurate statement that certain conditions are fulfilled, the permission is conditional and Court has power under r. 86 or under s. 151 to refuse to confirm sale apart from r. 72 and from provisions contained in r. 92 of O XXI, until conditions are in fact fulfilled, A I R 1922 Pat 511 = 1 Pat 235 = 1 P L R 179 = 69 I C 822.

—Attachment like an order can also be revived by the Court under s. 151 if it is necessary in the interest of justice. A I R 1922 Nag 267 = 4 N L J 118 = 18 N L R 152 = 64 I C 420.

—Mesne profits for period for which decree-holder was out of possession due to pendency of execution owing to filing of appeal which is subsequently dismissed can be awarded by Court under its inherent power. 63 I C 43.

—There is inherent power in Court to release property from illegal attachment apart from O XXI r. 59, the Code not being exhaustive in that respect. A I R 1921 Pat 409 = 2 P L T 240 = (1921) Pat 205 = 61 I C 922. See also O XXI, r. 59.

—Court has inherent power to transmit certified copies of necessary documents to Court in Native state to enable it to execute decree though the decree itself cannot be transferred. 13 Bur L T 145 = 61 I C 704.

—Execution Sale—Setting aside of—*Ex-parte* decree, in execution of which property sold set aside on appeal—Inherent power 20 Bom L R 925.

—Application for amendment of previous execution application treated as a fresh application to execute. see 53 I C 111.

—Execution sale—Fraud and collusion between decree-holder and auction purchaser

—Setting aside sale—Right of judgment-debtor to compensation for the period during which auction-purchaser was in possession—Court's inherent power to order compensation. 21 I C 839.

—Inherent Power—Execution Sale—Purchaser—Right to possession—No power to restrain auction purchaser from taking possession of properties purchased. 9 L W 81.

## (19) Ex parte order or decree.

—Application for final decree in a mortgage suit—A person in whose absence a final decree is passed can only ask the Court to exercise its inherent power. A L R 1933 L 331.

—Counsel absent on account of another engagement—Not sufficient cause to set aside ex parte decree Court's inherent power to set aside a decree—Counsel to return brief, if unable to attend. A L R 1933 B 33 = A I R 1932 B 634 = 141 I C 402 = 1 R 5 B 81 = 34 B L R 1425.

—Directing property (inclusive of minor's interests) to be delivered to Official Receiver—Petition on behalf of minors to revise—Review not permissible under O. 47, r. 21 but might be reconsidered under this section. A L R 1933 M 228 = A I R 1933 M 345 = 143 I C 613 = 37 L W 720 = 1933 M W N 75 = 1 R 5 M 314.

—Setting aside of an ex parte decree in the case where deft. was present in Court but his Counsel unable to be present owing to his being engaged in another Court in the same building must be under inherent power of Court and not under O. 9, r. 13 34 B L R 1425 = A I R 1932 B 634 = A L R 1933 B 33.

—Under peculiar circumstances Court can under s. 151 set aside *ex parte* decree at the instance of person not party to original suit and make him a defendant and allow him to defend the suit though it may have no inherent power to set aside *ex parte* decree against party to suit unable to comply with O IX r. 13 and Law of Limitation. A I R 1928 Rang 273 = 6 R 494 = 113 I C 811.

—Suit dismissed for default can be restored by Court under its inherent jurisdiction. A I R 1926 Nag 409 = 9 N L R 145 = 95 I C 260.

—But the applicant is bound to show sufficient cause for his non-appearance at the proper time otherwise it is only in exceptional circumstances that s. 151 can be resorted to. A I R 1927 Sind 223 = 103 I C 129.

—Cancellation of *ex parte* decree for non-service of summons is provided for by O IX r. 13 and hence cannot be allowed under s. 151 A I R 1927 Lah 372 = 101 I C 617.

—There is no remedy under s. 151 if an applicant whose application to set aside *ex parte* decree of Small Cause Court has been dismissed does not avail of right to go in revision under s. 25, Provincial Small Cause Courts Act. A I R 1927 Nag 95 = 98 I C 658.

—There is no inherent power in Court to set aside *ex parte* decree passed by itself it can do so only under O. IX, r. 13 A I R 1923 Lah 147 = 73 I C 660 See also O 9 r. 13.

—S 151 cannot be invoked for setting aside an *ex parte* decree. A I R 1922 Pat 479 = 1 Pat 277 = (1922) Pat 61 = 65 I C 341.

## (19) Ex parte order or decree—(Concl'd)

—Where a corporation or a company was not properly represented, a decree or order passed against it can be set aside under s. 151 and a separate suit is not necessary for the same. A stranger, however, cannot claim protection under s. 151 A I R 1922 Mad 193 = 42 M L J 563 = 15 L W 586 = (1922) M W N 268 = 31 M L T 35 (H C) = 68 I C 910.

—*Ex parte* decree cannot be set aside under s. 151 but under O IX r. 13 A I R 1922 All 441 = 19 A L J 907 = 64 I C 527.

—There is no inherent power to set aside *ex parte* decree as it is provided for in the Code. A I R 1921 Sind 38 = 15 S L R 61 = 63 I C 131.

—*Ex parte* order under O. XXI, r. 90 can be set aside under inherent power of Court. A I R 1921 Pat 293 = 2 P L T 270 = 62 I C 113.

—It cannot be laid down as a hard and fast rule of law that in no circumstances can power of Court under s. 151 of the Code be exercised in respect of *ex parte* decree except under provisions of O IX, r. 13. It cannot be contended that such power should never be exercised because it was not exercised in previous cases of same kind. *Ex parte* decree under O XXXIV, r. 6 passed by oversight against person who was not mortgagor can be set aside by Court under inherent power. A I R 1921 Pat 491 = 2 P L T 251 = 60 I C 368.

—Prize Court has jurisdiction to set aside an *ex parte* judgment of condemnation and re-hearing is discretionary. A I R 1916 P C 85.

—The court has an inherent power to set aside an *ex parte* order on an application therefor. S. 151 of the C P Code is intended to enlarge the discretion of courts and to discourage the technicalities. 27 I C 812.

—An appellate Court has inherent power not only to reverse a decree passed on evidence given by the plaintiff only, the defendant being *ex parte* but also to direct a re-trial of the Case. 56 I C 255.

—*Ex parte* order setting aside *ex parte* decree not to be set aside under S. 151. 29 I C 673.

—*Ex parte* decree—Setting aside—No inherent power—Power confined to O. 9, R. 13. 37 M L J 599 = 43 Mad 94.

—Inherent powers when to be exercised—inherent powers and their exercise. Lim. Act. Art 166 see. 27 M L J 605.

—Inherent power—Expunging from record—Judgment of inferior court—Power of High Court. Govt of India Act S. 107. see 35 M L J 368.

—Inherent jurisdiction, extent of—Not confined to matters dealt with in C P Code. 19 C W N 84.



C. P. C. (1908) S. 151 (Contd)

## (20) Expunging from record.

—Adverse remarks on the character and credibility of witness cannot be expunged from the judgment of a lower Court unless the same is subject to appeal or revision. A I R 1922 All 107 = 44 A 401 = 20 A L J 261 = L R 3 A 66 Cr. = 4 U P L R (A) 165 = 23 Cr. L J 349 = 66 I C 1005.

## (21) Extension of time.

—See under (52) Time fixed for deposit infra.

## (22) Fraud.

—Section 151 can be resorted to, to prevent any miscarriage of justice by reason of any fraud by the parties. A I R 1929 Mad 813 = 39 M L T 34 = 26 L W 481 = 103 I C 825.

—But the section cannot be invoked for amendment of consent decree on ground of fraud the procuree being to file separate suit. A I R 1929 Cal 470 = 33 C W N = 883 Ind Rul (1929) Cal 321 = 115 I C 177.

—Court has no inherent power to set aside decree passed in terms of award nor can the decree be challenged in appeal on ground of fraud. Remedy is by way of separate suit A I R 1929 Nag 111 = Ind Rul (1929) Nag 253 = 118 I C 61.

—Execution of *ex parte* decree can be stayed under s. 151 on the ground that it was obtained by fraud but it can so be done under. O. XXI, r. 29. A I R 1923 Lah 514 = 75 I C 419.

—Review is no remedy for setting aside compromise decree on the ground of fraud and undue influence nor can S. 151 be resorted to in such cases. A I R 1924 All 398 = 46 A 245 = 22 A L J 118 = L R 5 A 46 Civ = 82 I C 1022.

## (23) General Power of Court.

—Court has inherent power to set right wrong committed by Court. 54 A 154 (161. 167) = A I R 1931 A 727 (F B).

—Court has inherent power as to enforcement of the order which the Court has power to issue. 28 N L R 332 (337).

—Court is bound to see that plaintiff is recouped in case of payment by him under Court's order and that no wrong is done to him by a party to the cause. 139 I C 247 = 55 C L J 1 = I R 1932 C 589 = A I R 1932 C 414.

—Court has inherent jurisdiction to take cognizance of question cutting as the root of the subject matter of controversy. 138 I C 808 = 9 O W N 523 = I R 1932 O 332 = A I R 1932 O 244 (246).

—General Power of Court—Application to amend decree, pending appeal—Appeal

C. P. C. (1908) S. 151 (Contd)

## (23) General Power of Court—(Concl'd)

disposed of, Power of Court to deal with application after delivery of judgment. 38 I C 377.

## (24) Guardian and Ward.

—Decree set aside for want of guardian can be again revived by the appointment of proper guardian A I R 1924 All 225 = 45 A 606 = 76 I C 765.

## (25) Hearing of appeal.

—S. 151 C P C has no application to a case where an appellate court is asked to set aside the proceedings in an appeal on the ground that on the date of hearing of the appeal the respondent was not living. The correct procedure is to apply within the period of limitation for a review of the judgment passed in appeal. 14 I C 284.

## (26) Inherent powers, miscellaneous.

—Where an order is passed under S. 151 C P C determining the manner in which the suit should proceed, the consideration of the question of want of previous notice becomes immaterial. A L R 1934 All 142.

—Appellate Court has inherent powers to take cognizance of pleas not raised in courts below. A L R 1933 O 247 = 8 Luck 87.

—Widow—Application for interim maintenance—Pending suit for maintenance—Maintainability. A L R 1933 S 351.

—Insolvency Court—Power to make supplementary orders for the protection of Creditors—has the same inherent powers as any court exercising civil jurisdiction. A L R 1933 P 180 = 12 P 163 = A I R 1933 P 84 = 141 I C 836 = 13 P L T 775 = I R 5 P 98.

—High Court in the exercise of its inherent jurisdiction direct that the order of suspension passed upon an advocate be kept in abeyance in a case where that advocate prayed for such abeyance till he had an opportunity to place his case before the Privy Council in order to obtain special leave to appeal. A L R 1933 A 367 (368) = 1933 A L J 221 = 145 I C 367 = I R 5 A 290 (F B.)

—Where in a prior case, the Judge had expressly stated his opinion as to the nature of certain account books and the same had to be considered in a later case, held, that the interests of justice required that the transfer of the later case be allowed. Ind Rul (1931) Lah 844 = 32 P L R 388 = 133 I C 876.

—Where husband and wife were co-defits non-compliance with the order for appearance of the wife would not entitle the Court to pass an order for arrest of husband under its inherent power 1932 A L J 221 = 136 I C



C. P. C. (1908) S. 151 (Contd.)

(26) Inherent powers, miscellaneous—(Contd.)

367 = A I R 1932 A 524 = I R 1932 A 191 =  
A L R 1932 A 507.

—Court can under S. 151 admit a document, which had been rejected under O. 13, r. 3, on its being presented after registration. 1932 P C L 862 (Civ) = A L R 1932 L 862 (Civ).

—Apart from S. 185 of the Companies Act, the Court possesses ample powers *ex debito justitiæ* to pass interim orders for protection and preservation of the subject-matter in dispute, pending the result of the litigation. A L R 1932 L 758 (Civ)

—High Court has inherent jurisdiction to stay operation of the order suspending a legal practitioner pending appeal to Privy Council. 1932 A L J 861.

—Court has, under S. 151, though not under O. 41, r. 5, power to stay proceedings for passing of final decree in mortgage suit, pending appeal from preliminary decree. 54 A 344 = 1932 A L J 43-136 I C 75 = I R 1932 A 123 = A I R 1932 A 238 = A L R 1932 A 29

—Court can condone, under S. 151, formal defect in vaklatnama. A I R 1932 P 3.

—Discretion of an executing Court is not limited to rules 11, 21, 26, and 37, O XXI. s. 151 can be invoked whenever just necessary. Process of the Court can be delayed but not so as to ignore just rights of the decree-holder. A I R 1927 Cal 581 = 31 C W N 653 = 102 I C 513.

—High Court can under s. 151 pass such orders and give such directions as it finds necessary in the circumstances of a particular case, pending appeal to the Privy Council. A I R 1931 Cal 79 = 34 C W N 631 = Ind. Rul. (1931) Cal 273 = 129 I C 833.

—Re-opening of a decision of fact arrived at upon evidence or in absence of it, cannot be allowed except under provisions for review of judgment. A I R 1929 Mad 404 = Ind Rul (1930) Mad 375 = 122 I C 519.

—Under certain circumstances suit may be decreed even if cause of action arises subsequent to its institution. A I R 1929 Lah 409 = 30 P L R 306 = 11 Lah L J 251 = Rul Ind. (1929) Lah 493 = 116 I C 317.

—Court would not necessarily be acting illegally or irregularly or in contravention of the Code in passing interlocutory judgment not provided for in the Code. Such an order can be passed as a step towards framing of final decree, and, if it is an adjudication and not merely an opinion is binding upon the Judge's successor. A I R 1929 Mad 121 = 113 I C 646.

—Discretion conferred upon by s 151 should not be exercised unless a strong case is made out for the same. A I R 1927 Cal 420 = 100 I C 518.

C. P. C. (1908) S. 151 (Contd.)

(26) Inherent powers, miscellaneous—(Contd.)

—Revocation of arbitrator's appointment before making award can be made under s. 151 in proper cases but this should be done with greatest caution. A I R 1927 Lah 187 = 100 I C 46.

—Questions cutting at root of subject-matter under dispute can be taken cognizance of by every Court under its inherent power. A I R 1927 Mad 143 = 98 I C 280.

—Court is not empowered either by s 148 or s. 151 to meddle with its final decrees. A I R 1926 Mad 1059 = 24 L W 443 = 1926 M W N 713 = 97 I C 795.

—Court has no inherent power to treat as nullity its previous order not cancelled by review or appeal. A I R 1927 Cal 57 = 97 I C 697.

—Court can under s. 151 order the cancellation of order made by it under Para 3 of Sch II. A I R 1925 Pat 20 = 6 P L T 488 = 86 I C 540.

—Court can under s. 151 allow judgment-debtor to set off as against the attaching decree holder executing the decree for mesne profits against him a decree which he holds for a larger sum against original decree-holder for mesne profits. A I R 1925 Cal 102 = 28 C W N 988-84 I C 747. see O 21 R 18.

—It is the duty of the Court to invoke s. 151 whenever justice so demands, even in absence of any precedent. A I R 1924 Bom 90 = 25 Bom L R 713 = 82 I C 852.

—Abortive proceedings can be set aside and necessary orders can be passed under s. 151 by the High Court. A I R 1924 All 818 = 22 A L J 791 = L R A 545 Civ = 46 A 864 = 82 I C 184.

—Though Court has inherent power to re-call order not perfected there is no power to re-call one which has been perfected. A successor cannot therefore re-call the perfected order of his predecessor. A I R 1922 Pat 204 = 69 I C 742.

—Where a plaint was returned for presentation to a proper Court and was so presented without a fresh *vakalatnama*, Court can under s. 151 allow the plaintiff time to produce *vakalatnama*, if it is necessary. Such a power be sparingly and with great caution used and in the last resort. A I R 1922 Nag 125 = 5 N L J 265 = 67 I C 296.

—Memorandum of appeal can be changed into revision petition by the High Court. A I R 1921 Mad 612 = 41 M L J 54 = 14 L W 85 = (1921) N W N 487 = 63 I C 730.

—Where a court dismissed a case for default in ignorance of the death of the party himself before the hearing is eminently a case which falls within S 151 C P C to be rectified. Even otherwise courts have inherent jurisdiction to restore the case to file,

C. P. C. ( 1908 ) S. 151 (Contd)

(26) Inherent powers, miscellaneous—(Contd)

17 C W N 829 = 18 C L J 9 = 15 Bom L R 640 = 25 M L J 148 = 11 A L J 625 = 35 All 331 = 16 O C 194 = 19 I C 526 = 14 M L T 33 = ( 1913 ) M W N 566 = 40 I A 150 P C.

—The C P Code is not exhaustive and the Court possesses inherent powers to act *ex debito justitiae* in order to do that real and substantial justice for the administration of which alone it exists. A person asking the Court to exercise its discretionary jurisdiction must make out a strong case and must show that there is no other remedy open to him by which he can protect himself from the consequences of the injury complained of. 2 Lah L J 283 = 55 I C 403.

—Inherent jurisdiction of High Court to interfere with lower court's order See 26 M L J 467.

—Court overlooking an important plea—Custom—Alienation by sonless male proprietor—Acquiescence—Attestation of deed of sale by principal plaintiff. 26 P L R 1911 = 9 Ind Cas 545.

—Court not to override express provisions of any law. 9 Ind Cas 246.

—Inherent power, doctrine of—claim application, if can be proceeded with after execution sale. 15 I C 53.

—Inherent power—Doctrine of, not to be invoked so as to nullify statutory prohibition. 21 C L J 614.

—It is the duty of a judge to try the causes set down for trial before him and the failure of the Court to decide a case after submission cannot be permitted to defeat the substantial right of a litigant. The Court has inherent power to vacate its own order so as to enable it to discharge the duty of determining the controversy between the parties when the prior order proceeds on a mistaken basis. 31 C L J 48 = 56 I C 4.

—Inherent power to entertain—Suit partly heard—Dismissal for default—Appeal against order. 17 A L J 849.

—The High Court has an inherent jurisdiction to make orders to prevent a miscarriage of justice and this right is expressly recognised by S 151 C P C. 39 All 147 = 14 A L J. 1230 = 17 Cr. L J 537 = 36 I C 585.

—Power of Br. Indian Courts to aid execution in Travancore Court of decree of Br. Court, See 33 M L J 130.

—Inherent power—Prevention of abuse of process—Judicial Proceeding—Notice to persons affected necessary though no provision in C P Code. 29 I C 580.

—Inherent power to prevent abuse of process—Suit to harass deft. See 27 M L J 645.

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C. P. C. ( 1908 ) S. 151 (Contd)

(26) Inherent powers, miscellaneous—(Contd)

—Inherent power—Court's power to recall money improperly paid. See 21 I C 111.

—Inherent power—Recalling wrong order See 20 C L J 213.

## ( 27 ) Injunction.

—When the inherent jurisdiction of the Court is invoked under S 151 of C P C., and it is called upon to act *ex debito justitiae* and to grant an injunction, it is necessary for the plaintiff to establish a strong *prima facie* case that there is no other remedy open to him to protect himself and that if the injunction asked for is not granted, irreparable injury or inconvenience would result. A L R 1933 L 596 ( 597 ) = 34 P L R 51 = 140 I C 843 = A I R 1933 L 73 = I R 5 L 91 ( 2 ).

—Where the plaintiff applied for a temporary injunction during the pendency of his suit, to restrain defendant an auction-purchaser, from taking possession of the property, the plaintiff having only a charge thereon after the life of a widow, and the injunction was granted by the Subordinate Judge, reversing the order of the trial Court. *Held*, ( 1 ) that the order was not one which fell under O. 39 C P C and the trial Court must be deemed to have passed it under its inherent powers under S. 151. ( 2 ) that no appeal lay against the order, ( 3 ) that the appellate Court had no jurisdiction to resort to inherent powers to grant the injunction, ( 4 ) that, whether a second appeal lay to the High Court or not, the High Court had power to treat the appeal to it as a petition in revision and set aside the order. A L R 1934 L 55.

—The High Court has inherent power to order an injunction against a person living within the jurisdiction of another Indian High Court. A I R 1931 Cal 279 = 57 C 1280 = Ind Rul ( 1931 ) Cal 380 = 130 I C 252.

—Injunction order which cannot be passed under O 39, r. 1 Or 2 can be passed under S. 151 35 L W 168 = 136 I C 346 ( 2 ) = I R 1932 M 298 ( 2 ) = A I R 1932 M 180 = A L R 1932 M 311.

—Inherent Power—Injunction—Not to be granted against person, not a party to the proceedings. 3 Pat L J 456.

—Inherent power to grant temporary injunction in Probate and Administration proceedings. 19 C W N 205.

—Temporary injunction against execution of a decree passed by a competent Court

C. P. C. (1908) S. 151 (Contd)  
(27) Injunction—(Conclud)

cannot be given either under O XXXIX or s. 151 and if such injunction granted, remedy lies not by way of appeal but by way of revision A I R 1927 Mad 687 = 38 M L T 358 = 26 L W 899 = 102 I C 700.

—S. 151 cannot be resorted to for giving injunction restraining execution of decree as other provisions for the same remedy is open A I R 1927 Mad 592 = 52 M L J 670 = 38 M L T 364 = (1927) M W N 259 = 102 I C 396.

—A strong *prima facie* case must be made out for the innovation of s. 151, it must be shown that if the injunction asked for is not granted, great injustice would result A I R 1927 Lah 833 = 9 Lah L J 536 = 100 I C 544.

—If necessary for some reason Court has inherent power to issue temporary mandatory injunction but it should not act under O XXXIX r. 2 A I R 1927 Mad 210 = 24 L W 854 = 99 I C 566.

—Injunction against govt officers not subordinate cannot be granted by Court as they have no such inherent power. A I R 1926 Lah 284 = 27 P L R 11 = 96 I C 540.

—Only a Chartered High Court in which suit was filed has inherent powers to issue injunction in certain cases restraining executing Court from executing decree A I R 1925 Lah 618 = 7 Lah L J 457 = 26 P L R 561 = 92 I C 259.

—If a person not within the jurisdiction of a Court submits to its jurisdiction, an injunction can be issued even against such person to meet the error of justice. A I R 1926 Pat 171 = 6 P L T 540 = 85 I C 852.

—Stay order respecting suit pending in another Court should not be issued in a suit merely of a declaratory nature. A I R 1925 Lah 242 = 78 I C 802.

—Notwithstanding O XXXIX, Court can grant injunction under s. 151. A I R 1925 Lah 242 = 78 I C 802.

## (28) Interlocutory judgment.

—A Judge has power to re-consider an interlocutory judgment delivered by his pre-decessor on any issue before the final disposal of the case, if interlocutory judgment is based on an erroneous assumption or hypothesis. 5 S L R 184 = 13 I C 264.

## (29) Invention of Procedure.

—Rules nearest in point with necessary modification should be applied where rights are conferred by sections but no provision is made for particular set of facts. A I R 1931

## C. P. C. (1908) S. 151 (Contd)

## (29) Invention of Procedure—(Conclud)

Mad 503 = (1931) M W N 48 = 33 L W 359 = 60 M L J 628 = Ind Rul (1931) Mad 562 = 131 I C 610.

—New form of procedure cannot be introduced by resorting to s. 151. A I R 1922 Cal 1 = 80 I C 192.

—New form of procedure not provided for by Indian law cannot be introduced by Court under its inherent powers A I R 1922 Cal 1 = 80 I C 192.

## (30) Issues.

—Court can frame, such issue and give a decision thereon even after the case has been closed as cut at the root of the subject-matter of the suit, A I R 1922 Pat 514 = 2 Pat 52 = 4 P L T 239 = 68 I C 383.

## (31) Judgment.

—S. 152 of the C. P. Code of 1908 is wide enough to enable a judge to avoid *reductio ad absurdum*: So where the time allowed in the judgment and decree to the vendee for removing his materials of the building erected by him on the pre-empted site had expired long before the date of the decision and had consequently become impracticable for him to do so. The Chief Court on an application made by the vendee under Ss 151 and 152 of the C. P. Code, 1908, amended both the judgment and the decree so as to give fresh period within which the vendee could remove his materials. *Held also*, that where a vendee by his act or omission deprives the pre-emptor both of the use, of the pre-emption-money and the pre-emptor is entitled to get reasonable interest for the time he is so deprived. In this case 6 per cent per annum was allowed 170 P W R 1916 = 37 I C 382.

## (32) Jurisdiction.

—S. 151 cannot be invoked to or what has been expressly prohibited by the Code. Hence the Court cannot reverse its own decree except by review or under s. 152. A I R 1925 Pat 36 = 3 Pat 778 = 6 P L T 309 = 84 I C 320.

—Where certain questions have been taken away from the jurisdiction of the Court, s. 151 can not be invoked to bring them again within the jurisdiction. A I R 1926 Nag 17 = 88 I C 693.

—Court can under s. 152 Civil Procedure Code, if under the peculiar circumstances of case it feels inclined to do so refuse application for amendment of decree. Where on the judgment debtor, satisfying mortgage-decree in full, the case is struck off and three years afterwards, the defendant applies for amendment of the decree, the Court can,

C. P. C. (1908) S. 151 (Contd.)  
(32) Jurisdiction—(Concl'd)

if so inclined, dismiss the application, and failure by Court to exercise this jurisdiction to the ground of its non-existence, amounts on material irregularity in exercise of its jurisdiction rendering revision of its order competent. A I R 1925 All 556 = 23 A L J 518 = L R G A 423 Civ = 88 I C 396

—Sub—Judge returned a plaint for presentation to the Munsif who refused to entertain it as being out of his jurisdiction High Court can under s. 151 direct a suit to be tried where application was barred and references under O. XLVI, r. 1 could not lie, to meet the ends of justice. A I R 1925 Oudh 461 = 12 O L J 189 = 2 O W N 81 = 28 O C 323 = 85 I C 702.

—The Court can dismiss the suit if it thinks that the suit though instituted by a next friend is not in the interest of the minor. A I R 1924 Oudh 413 = 11 O L J 260 = 83 I C 778.

—Order as to costs cannot be altered by the successor-in-office except in review or under s. 152. A I R 1925 Pat 47 = 3 Pat 654 = 82 I C 813.

—Right of plaintiff to institute suit in Court in which law permits him to sue should not be interfered with by High Court in exercise of its extra-ordinary jurisdiction unless suit is brought in bad faith for purpose of working injustice to which defendant would not be subjected if suit were brought in another competent Court. Mere fact that it would be more convenient to applicant to have case tried elsewhere is no sufficient reason to force plaintiffs summarily out of Court in which they are entitled legally to sue by application of inherent powers not utilised except for preventing for remedying grave abuse. A I R 1924 Lah 306 = 69 I C 772.

(33) Letters of Administration.

—Issues found for plaintiff.—Suit dismissed for want of Letters of Administration with liberty to apply to set aside dismissal on obtaining letters.—Plaintiff obtaining letter and applying to set aside dismissal.—Merits being in plaintiff's favour he should not be prejudiced by error of procedure by Court.—Dismissal order really means to suspend suit and discharging it from file at the same time. A I R 1922 Bom 210 = 24 Bom L R 738 = 70 I C 910.

(34) Limits of inherent powers.

—Where a specific remedy has been provided by the C P Code the litigant should not for that purpose invoke the inherent power conferred upon the Court by S. 151. The object of that section is to supplement,

C. P. C. (1908) S. 151 (Contd.)  
(34) Limits of inherent powers—(Contd.)

and not to replace, the remedies provided for in the rest of the Code. 73 P L R 1916 = 105 P W R 1916 = 35 I C 633.

—Where there is a prescribed remedy a Court should not go beyond this remedy by applying its inherent powers under S. 151 C P C. A L R 1934 Mad 202..

—The Court has inherent jurisdiction and power to act *ex debito justitiae* even in cases not covered by the provisions in the Code. The contention that in view of the provisions of S. 94, C P C temporary injunction could be issued to prevent the ends of justice being defeated, only, "if it so prescribed" i. e., only when the case comes within O. 39, rr 1 and 2 is overruled. A L R 1933 L 596 (597) = 34 P L R 51 = A I R 1933 L 73 = 1 R 5 L 91 (2) = 140 I C 843.

—A statute providing express provisions—Exercise of inherent powers not proper. A L R 1933 530 (531) = 34 P L R 414 = A I R 1933 L 229 = 142 I C 654 = 1 R 5 L 233 = 34 Cr L J 375.

—Laws relating to limitation cannot be ignored by appealing to S. 151. 9 O W N 430 (433) = 138 I C 149 = 1 R 1932 O 293 = A I R 1932 O 220 = A L R 1932 O 445.

—Where jurisdiction of the Court is limited by certain other express provisions in the Code, s. 151 cannot be invoked to override these provisions. A I R 1930 Lah 26 = Ind Rul (1930) Lah 531 = 11 Lah 342 = 31 P L R 668 = 124 I C 339.

—In presence of specific provisions governing a particular case s. 151 cannot be invoked. A I R 1930 Lah 789 = 31 P L R 477 = 12 Lah L J 71 = Ind Rul (1930) Lah 294 = 122 I C 102. See also 45 C L J 557 = 194 I C 188 = A I R 1927 Cal 657. See also 55 C 219 = 47 C L J 69 = 103 I C 864 = A I R 1929 Cal 850. See also 28 P L R 554 = 103 I C 425 = A I R 1927 Lah 622. See also 102 I C 543 = A I R 1927 Nag 262.

—In a declaratory suit by auction-purchaser consequential relief for mesne profits could have been claimed or a separate suit would be competent for the same. Hence whereafter remedies are open resort to s. 151 cannot be justified. A I R 1930 Lah 72 = Ind Rul (1930) Lah 137 = 120 I C 681.

—Relief under s. 151, can and should be given in absence of any provision in the Code giving the same and if any provision to the contrary disallowing it, for the proper administration of justice. A I R 1928 Cal 179 = 47 C L J 87 = 107 I C 729.

—In absence of specific provision providing for a remedy and also when there is no provision which prohibits a remedy being allowed. S. 151 may and should be invoked in proper cases for administering justice. A I R 1927 Cal 534 = 54 C 405 = 31 C W N 576 = 103 I C 69.



## C. P. C. (1908) S. 151 (Contd)

## (34) Limits of inherent powers—(Contd)

—The main object of s. 151 is to prevent in justice being due from ordinary rules of procedure but it should be resorted to only when other remedies are open. A I R 1927 Nag 212 = 23 N L R 79 = 103 I C 220.

—S. 151 cannot be resorted to where other remedy was open but was not taken advantage of within the period of limitation. A I R 1927 Nag 197 = 101 I C 320.

—The rule that Court cannot invoke inherent power where there is provision in Code application of which would meet justice of case, and the particular circumstances of the case must be guided to determine whether justice requires Court to invoke its inherent jurisdiction. A I R 1927 Cal 158 = 98 I C 70.

—Code must be deemed to be exhaustive in that respect where it provides for certain procedure and inherent power cannot be invoked in opposition to those provisions. A I R 1926 Mad 258 = 23 L W 85 = (1925) M W N 886 = 92 I C 615.

—Court cannot invoke inherent power in favour of party not availing himself of right of appeal granted to him. A I R 1926 Bom 139 = 27 Bom L R 1511 = 92 I C 354.

—Court must state reasons whenever it exercises discretion vested in it by s. 151. A I R 1926 Oudh 59 = 87 I C 438.

—Where a remedy existed by law but was lost owing to expiry of the period of limitation, s. 151 cannot be resorted to in such cases. A I R 1925 Lah 321 = 26 P L R 841 = 7 Lah L J 13 = 86 I C 256.

—Dismissal for default cannot under s. 51 be set aside when remedy under other provisions lay but the party failed to resort to the same within time. A I R 1924 Rang 274 = 3 Bur L J 47 = 82 I C 418.

—Court cannot ignore the provisions of the law of limitation by resort to s. 151. S. 151 applies when relief claimed is not barred under any law or where no other remedy is provided for it. A I R 1924 All 668 = 46 A 631 = 22 A L J 583 = L R 5 A 347 Civ = 79 I C 997.

—An order duly made cannot be re-called under s. 151. A I R 1924 Pat 696 = 5 P L T 631 = 79 I C 90.

—Inherent power is not limited to ss. 151 and 152 if vested in the Court by its own constitution. A I R 1925 Cal 420 = 79 I C 586.

—S. 151 cannot so be invoked as to perpetrate injustice on third parties. A I R 1924 Nag 98 = 20 N L R 11 = 78 I C 601.

—S. 151 cannot be invoked where there are provisions in the Code meeting the requirements of the case. A I R 1924 Nag 325 = 78 I C 72.

## C. P. C. (1908) S. 151 (Contd)

## (34) Limits of inherent powers—(Concl'd)

—The interpretation of a provision applicable to a particular case should be based on the language used by the Legislature. A I R 1924 Mad 114 = 45 M L J 813 = 18 L W 870 = 33 M L T 207 = 47 M 171 = 76 I C 836.

—Private citizen cannot be summoned to give evidence before another private citizen under s. 151. A I R 1922 Bom 444 = 24 Bom L R 853 = 47 B 250 = 75 I C 221.

—In a suit for ejectment defendant cannot be ordered to give security from mesne profits since there is no provision made in the Code for the same. If however an order is made the order is bad and therefore subject to revision. A I R 1924 Oudh 11 = 10 O L J 209 = 74 I C 335.

—Where there is no right of appeal given by Code, Court has no inherent power to allow appeal against order of remand. Inherent power cannot be invoked to confer jurisdiction not otherwise possessed. A I R 1923 Oudh 177 = 26 O C 10 = 10 O L J 36 = 73 I C 591.

—Where remedy by way of review is open to plaintiff Court should not exercise inherent power to set aside its own decree as where suit is dismissed for want of proof but it is subsequently found that there was some documentary evidence on record. A I R 1923 All 603 = 21 A L J 447 = L R 4 A 365 Civ = 73 I C 494.

—Only persons who were parties to original suit and not made parties to appeal can be impleaded by Appellate Court under s. 151 but not strangers to suit. The power is circumscribed by O XLI r. 20 and can be invoked only in exceptional circumstances. A I R 1923 Lah 490 = 73 I C 136.

—There is no inherent power to disregard limitation placed expressly by Code on power of Court. A I R 1923 Mad 331 = 17 L W 159 = 71 I C 204.

—S. 151 cannot be invoked to contravene a distinct provision of law. A I R 1921 Oudh 46 = 24 O C 215 = 64 I C 217.

## (35) Mistake.

—An insolvency petition which stood adjourned for hearing to 22nd Jan. 1926 was advanced to 22nd Dec. 1925 and disposed of by the court without notice to the insolvent and the insolvent applied for discharge within six months from 22nd Jan. 1926; but the Court dismissed the first application for discharge as out of time and annulled the adjudication. The Court subsequently passed an order rectifying the mistake. Held that the mistake being apparent on the face of record the Court acted legally under s. 151. A L R 1934 Mad 5.



C. P. C. (1908) S. 151 (Contd)

## (35) Mistake—(Contd)

—Decree based upon agreement between the parties—Court has inherent power to correct mistake in such decree. A L R 1933 A 347 (1) = 1933 A L J 509 = A I R 1933 A 608.

—Where it was contended for the appellants that in the absence of an application by the judgment debtor under O. 21 C P C to set aside the sale for irregularity, the Court has no power to do so under s. 151. *Held*, that where the orders of Court have not been carried out and it has been misled the Court can correct its own error and set aside the sale. A L R 1933 M 606 (607) = A I R 1933 M 399 = 143 I C 454 = 37 L W 484 = 64 M L J 586 = 1933 M W N 634 = 1 R 5 M 302.

—An insolvency petition, which stood adjourned for hearing to 22nd January 1926 was advanced to 22nd December 1925 and disposed of by the Court without notice to the insolvent and the insolvent applied for discharge within six months from 22nd January 1926; but the Court dismissed the first application for discharge as out of time and annulled the adjudication. The Court subsequently passed an order rectifying the mistake. *Held* that the Court was not wrong in exercising its inherent power to set right a mistake made by it in passing the annulment order as it was an error apparent on the face of the record. A L R 1934 M 5 = 1933 M W N 1309.

—Error as to full costs of appeal whether can be rectified see 54 C L J 555 = 137 I C 474 = A I R 1932 C 349 = 1 R 1932 C 322.

—Where the name of the Vakil is inadvertently omitted in the *vakalatnamah* Court has inherent power to condone the defect. 12 P L T 558 = Ind Rul (1931) Pat 331 = 133 I C 171.

—Where there is a clerical or arithmetical mistake or an error arising from an accidental slip or omission in judgments, decrees or orders, the Court may correct the mistake or the error independently of the fact that the same mistake or error could have been corrected by the Court of appeal. It will be reading S 152 out of the Code and not interpreting it where we to hold that it would not apply to a case where the mistake or error could be corrected on appeal but was not so corrected and where no appeal was preferred. 9 O W N 633 (636-7) = I R 1932 O 362 = 139 I C 367 = A I R 1932 O 294 = A L R 1932 O 658. See also 9 O W N 803 = A I R 1932 O 293.

—S. 152 applies both to judgments and decrees and a slip in judgment in including property not belonging to judgment debtor

C. P. C. (1908) S. 151 (Contd)

## (35) Mistake (Contd)

can be corrected and for that reason the map also can be revised to avoid abuse of the process of Court under s. 151 A I R 1929 All 147 = 50 A 859 = Ind Rul (1929) All 291 = 114 I C 867.

—S. 151 can be invoked for correction of arithmetical or clerical error in the judgment. A I R 1927 All 585 = 102 I C 124.

—Court can correct error committed by it not owing to negligence of party but owing to its not being aware of certain facts, and passes an order inadvertently. A I R 1926 Mad 980 = 50 M 67 = 51 M L J 219 = (1926) M W N 890 = 26 L W 878 = 97 I C 1008.

—Accidental mistake in name of party can be allowed to be corrected under s. 151. 8 Lah L J 398 = 27 Pat L R 648 = 96 I C 11.

—Though there may be no express provision for such mistakes Court has inherent power to correct its own proceedings where misled. A I R 1926 Mad 119 = 22 L W 629 = 91 I C 727.

—Where appellant applied for passes of the decree and notices were issued to the defendants for the same and the case was adjourned from time to time. Defendants never appeared but applicant happened to be absent in one of these dates. The suit on that date was dismissed for default. Appellate Court held that the order was wrong and the Court was right in setting it aside. The Court has power to correct the mistake committed inadvertently even apart from s. 151. A I R 1925 All 622 = 47 A 546 = 23 A L J 405 = 87 I C 225.

—Where a wrong decree was filed in the memo of appeal s. 151 can be invoked for the correction of mistake. A I R 1925 Rang 188 = 3 Bur L J 325 = 85 I C 196.

—S. 151 cannot be invoked to correct mistake in execution sale after three years so as to affect a *bona fide* purchaser for value. A I R 1925 All 236 = 47 A 304 = 22 A L J 1119 = L R 6 A 153 Civ = 84 I C 746.

—Court can correct an obvious mistake in its judgment at a subsequent stage. A I R 1925 Cal 178 = 40 C L J 24 = 82 I C 382.

—Accidental error in erroneous judgment should not be corrected if third parties have acquired right in the interval. A I R 1924 Oudh 408 = 11 O L J 227 = 78 I C 96 = 80 I C 833.

## C P C (1908) S. 151 (Contd)

## (35) Mistake—(Concl'd)

—S. 151 can always be resorted to to correct mistakes obvious in the face of the record. A I R 1923 Mad 392 = 17 L W 254 = 74 I C 416.

—Court has inherent power to set right a wrong done by mistake in ordering execution in belief that plaintiff had fulfilled terms of decree. A I R 1923 Oudh 16 = 72 I C 879.

—Court is bound to correct clerical error in the judgment where by mistake the words 'fails and is dismissed' were used while it appeared that the intention was to decree and the words 'is decreed' should be substituted at any time the mistake is brought to notice. The provisions of Ss. 151 and 152 are much wider than the corresponding sections of the old Code. A I R 1921 Oudh 144 = 71 I C 563.

—Court has inherent power to correct its own mistake Apart from s 151, any Court might rightly consider itself to possess inherent power to rectify mistake made through inadvertence. A I R 1922 Mad 485 = 31 M L T 215 = 70 I C 867.

—It is illegal to appoint guardian *ad litem* without notice to natural guardian, and Court has inherent power to correct errors or mistakes committed by itself. A I R 1922 Mad 485 = 31 M L J 215 = 70 I C 867.

—Rectification of mistakes in judicial orders arising from the ignorance of the Court can be made under s 151 A I R 1924 Nag 58 = 69 I C 112.

## (36) Nature of the provisions.

—Nature of the provisions—Analogous to Vexatious Actions Act, (52 and 60, Vict. C. 51) see 27 M L J 405.

—S. 151 of the C P Code is not intended to empower courts to deal with their own decrees and orders and was not intended to give authority to 2 superior courts by way of conferring supplemental jurisdiction to that conferred by S, 115. 42 Bom 363 = 20 Bom L R 348 = 45 I C 552.

—Inherent power—To recall prior order appointing guardian—Court's powers to make orders to satisfy ends of justice. 26 I C 275.

—On any point specifically dealt with by the C P Code, it would be patent misapplication of S. 151. if a Court were in the exercise of its inherent power to assume jurisdiction where the Legislature has forbidden expressly. Where the effect of the order of the court would be that one of the

## C. P. C. (1908) S. 151 (Contd)

## (36) Nature of the provisions—(Concl'd)

parties would be needlessly driven to a suit for possession to which no defence is possible on behalf of the other party in whose favour the order has been passed, the Court would not exercise its inherent power. 20 C L J 433 = 25 I C 267 = 19 C W N 835.

—S. 151 of the C P C does not authorise the court to exercise its inherent powers so as to break the clear provisions of the Lim. Act-2 Lah L J 249 = 1 Lah 363 = 58 I C 789.

—Institution of second suit against same party for the same relief and same cause of action if an abuse of process of court—Principles of Vexatious Actions Act—See 27 M L J 405.

—If on the face of it, an order made under s. 90 of the T P Act is not in accordance with the previous judgment, then the Court will be justified under the inherent powers given to it by S 151 of the C P Code in making the decree in accordance with the judgment 2 Pat L W 205 = 41 I C 206.

## (37) Parties, addition of

—In proper cases Court has inherent power to add parties to appeals whatever its powers under O XLI, r. 20. A I R 1928 Pat 343 = 7 Pat 510 = 9 P L T 207 = 109 I C 609.

—If justice demands parties can be added or transposed from one category to another by High Court. A I R 1927 Cal 37 = 44 C L J 243 = 98 I C 822.

—Substitution of parties by way of addition of the legal representatives of one of the deceased plaintiff as respondent can under s. 151 be allowed even if the application is time-barred. A I R 1921 Cal 722 = 34 C L J 405 = 67 I C 10.

—On an appeal preferred by some of the defendants without impleading their co-defts as respondents the appellate court set aside the decree of the lower Court as against the appellants and made a new decree against a co-deft who was not a respondent to the appeal. Thereupon the latter applied for the restoration and hearing of the appeal in his presence. *Held*, that although no provision of the C P Code dealt with such a case yet the appellate court should restore the appeal and re-hear it in the presence of the co-deft after adding him as a party. 47 I C 917.

—Inherent power—Rejection of plaint—Omission to rectify defect in plaint as presented—See 55 I C 445.

C. P. C. (1908) S 151 (Contd)

## (38) Partition Suit.

—S. 151 applies where a partition decree directs partition in an impossible manne.  
A I R 1932 N 31 = 27 N L R 341 = 135 I C 413 = A L R 1932 N 53.

—In a partition suit the Court has inherent power to fix a time within which objections to the Commissioner report are to be filed, and if this order is not complied with the Court is justified in refusing to hear the objections.  
17 A L J 498 = 50 I C 152.

## (39) Receiver.

—Where in a suit for value of clothes sold, the court passed an interim ex parte order for the appointment of receiver and the production of all the defendant's account books into court even before the receiver was appointed which was intended to prevent the defendant from realizing his dues pending the plaintiff's suit and the latter order was passed under S. 151 C P C threatening prosecution for its disobedience, held that the order was illegal. A L R 1934 Mad 202.

—Receiver can be appointed in the interval between the submission of an award and the final acceptance or rejection of it and where an arbitrator is proceeding with a reference he should be appointed only in exceptional circumstances. A I R 1925 Sind 102 = 18 S L R 303 = 78 I C 84.

—There is no provision made in the Civil Procedure Code for the discharge or removal of a Receiver, nor is there any provision for appeals against orders of discharge or removal of Receivers. The power to discharge and remove or to give directions to a Receiver must be taken to be inherent in the Court which appointed the Receiver and the Appellate Court has got all the powers of the original Court. 17 I C 583 = (1912) M W N 1208.

## (40) Reconstruction of records

—A decree can be drawn in accordance with the deposition of a credible witness as to the decision contained in the judgment

C. P. C. (1908) S. 151 (Contd)

## (40) Reconstruction of records—(Contd)

or part of it. A I R 1923 Rang 113 = 4 U B R = 77 I C 258.

—Records destroyed can be re-constructed by Court under its inherent power. Appellate Court has inherent power to re-construct records of Court from which appeal lies to it. A I R 1923 Mad 647 (F B) = 46 M 679 = 44 M L J 673 = 18 L W 21 = 32 M L T 382 = (1923) M W N 471 = 73 I C 1050.

## (41) Refund

—The court has the power under S. 151 to grant a certificate for refund of Court fees in cases not covered by Ss. 13 to 15 of the Court—fees Act the discretion of the court is not barred by the fact that the excess fee was paid by the mistake of the party and not in consequence of any direction by the Court 55 Mad 641 followed.  
A L R 1934 Mad 26.

—The Court has the power under S. 151 of the C P C to grant a certificate for refund of Court—fees in cases not covered by Ss. 13 to 15 of the Court—fees Act. The discretion of the Court is not barred by the fact that the excess fee was paid by the mistake of the party and not in consequence of any direction by the Court. A L R 1934 M 26 = 38 L W 983.

—High Court has inherent power to refund excess Court-fee when obviously injustice would be done if it were not repaid. 55 M 641 = 62 M L J 541 = 35 L W 618 = 1932 M W N 420 = 139 I C 131 (2) = A I R 1932 M 438 = I R 1932 M 625 = A L R 1932 M 811.

—An auction sale was set aside and the auction-purchaser was allowed to take out the purchase money which he had desposited in Court. Held, that the auction-purchaser was bound to refund the purchase money which he had taken out from the Court. It is not in accordance with justice, equity and good conscience that in a summary miscellaneous proceeding for refund of money taken out by an auction-purchaser, the Court

C. P. C. (1908) S. 151 (Contd)  
(41) Refund—(Contd)

should enter into an adjudication between the auction-purchaser and a person who is strictly no party at all to the proceedings but is alleged to be the real auction-purchaser. 5 Pat L W 132 = 46 I C 275 = (1918) Pat 281.

—Inherent power to order refund of money wrongly paid out. 43 Cal 269.

—Inherent powers—Refund of money—Deposit in court as security for satisfaction of decree See 22 M L J 190 = 12 I C 692.

—Inherent power—Refund of purchase money—power of executing court to order. See 19 I C 439.

—Court-fees paid in excess by inadvertence can be directed to be refunded under s. 151. A I R 1930 All 471 = (1930) A L J 805 = Ind Rul (1930) All 220 = 122 I C 188.

—Where order under O. XXXII. r. 6 directing next friend to refund money drawn from the Bank without the permission of the Court was passed on the authority of s. 151, no, appeal lies from the order it having been passed under s. 151. A I R 1930 Lah 496 = 31 P L R 171 = Ind Rul (1931) Lah 410 = 131 I C 282.

—Decree of District Judge by mistake made those defendants also liable against whom no relief was claimed. On appeal to High Court, decretal amount was increased but there was no reference to question, as to who were bound by the decree. Defendants whose names were wrongly included in the decree then applied to High Court for amendment of decree, *Held*, that High Court could either under s. 151 or s. 152 interfere and that Court-fee paid on review application should be refunded to prevent abuse of process of Court and for ends of justice although s. 15 Court Fees Act was inapplicable. *Held*, further that only High Court could in the case grant relief as decree of District Judge must be held to have merged in its decree as it could in plaintiff's appeal have altered decree and omitted applicant's names. A I R 1929 Rang 158 = 7 R 88 = Ind Rul (1929) Rang 217 = 117 I C 585.

—Where property is sold in execution of prior mortgage decree and is resold in execution of subsequent mortgage decree in proceeding to which judgment-debtor, decree holder and previous and subsequent purchaser are all parties. Court can direct decree-holder to refund price paid by auction-purchaser. A I R 1926 All 274 = 92 I C 571.

C. P. C. (1908) S. 151 (Contd)  
(41) Refund—(Concl'd)

—Certificate for renewal or refund of value of stamps used on memo of appeal returned as not properly stamped can be granted by High Court under its inherent power. A I R 1923 Pat 600 = 4 P L T 504 = 72 I C 405.

—Executing Court is competent to order refund of deposit withdrawn by a person having no right or title. A I R 1922 Pat 166 = 1 P 336 = (1922) Pat 53 = 3 P L T 754 = 65 I C 307.

## (42) Reliefs

—Where in regular suit by unsuccessful applicant to set aside sale under O. XXI. r. 90 it is prayed *inter alia* that if sale is found valid plaintiff alone should be declared entitled to surplus sale-proceeds the prayer must be considered even if suit is held to be not competent. A I R 1929 Lah 618 = Ind Rul (1929) Lah 895 = 119 I C 431.

—Remedy of a judgment-debtor against order under s. 47 dismissing for default objection by him if order is not covered by O IX, is by way of application under s. 151 or O. XLVII. A I R 1929 All 123 = 26 A L J 1395 = 112 I C 380.

—Where change of date and hasty procedure has caused prejudice to the applicant and application was refused by the District Judge on the ground that civil matter could not be taken up during vacation, *held*, that s. 151 can be resorted to by the High Court in such a case. A I R 1927 Oudh 276 = 1 Luck Cas 187 = 105 I C 146.

—Where plaintiff is not clearly entitled to relief, advancement of income should not be ordered for A I R 1925 Mad 443 = 48 M L J 395 = 21 L W 308 = (1925) M W N 109 = 86 I C 909.

## (43) Remand

—Where the judgment appears to be erroneous and defective in material particulars and is also unintelligible, the Court has inherent jurisdiction under S. 151, to remand the case to the lower Court. A L R 1933 S 171 (172) = A I R 1933 S 327 = 27 S L R 194.

—Although the withdrawal of an appeal is mentioned in O 41 r. 22 (4), the Code nowhere lays down the procedure of the Court upon such withdrawal, and any consequent dismissal must be under S 151 C P C. A L R 1933 M 432 = 56 M 530 = A I R 1933 M 442 = 143 I C 412 = 27 L W 557 = 64 M L J 695 = 1933 M W N 623 = 1 R 5 M 294 See also A I R 1933 L 135 = A L R 1933 L 593 = 34 P L R 270 = 141 I C 400.



C. P. C. ( 1908 ) S. 151 (Contd)

( 43 ) Remand—(Contd)

—There may be remand orders passed under the inherent powers of the Court and not under O. 41, r. 23 or 25. A L R 1933 P 706. See 60 M L J 475 = ( 1931 ) M W N 710 = Ind Rul ( 1931 ) Mad 717 = 133 I C 205.

—In a case in which both parties had closed their respective cases before the executing Court, and did not in that Court or in the grounds of appeal preferred from its order make a request for the appointment of Local Commissioner, the appellate Court nevertheless remanded the case under S. 151 for the appointment of a local commissioner on the ground that it always found it difficult to arrive at a correct conclusion on the mere oral statement of witnesses. *Held*, that the remand was not justified and the only proper course for the Judge was to decide the case on the evidence on the record. A L R 1932 L 530 ( Civ ) 1932 P C L 530 ( Civ ).

—An order of remand was made by the Appellate Court and the provision of law was not stated in the order. It appeared that O. XLI r. 23 was not applicable. *Held*, that the order of remand can only be taken to be in the exercise of inherent powers of Court under s. 151 A I R 1931 Lah 302 ( 1 ) = 32 P L R 169 = Ind Rul ( 1931 ) Lah 751 = 133 I C 127.

—Where the defendant did not give evidence because of the lower Court's wrong placing of the onus although it was rightly placed in appeal and relief was prayed for on that ground *Held*, that, the proper procedure was to remand the case under s. 151. A I R 1931 Lah 299 ( 1 ) = Ind Rul ( 1931 ) Lah 943 = 134 I C 495.

—The inherent power of remand possessed by the Appellate Court is subject to the limitation that the power cannot be invoked in a case for which the Code contains an express provision *e. g.* O. XLI, rr. 23, 27. ( 1928 ) M W N 164, approved 37 M L J 536; 44 C 929 F B followed. 16 L W 515 dissented from. 60 M L J 475 = ( 1931 ) M W N 710 = Ind Rul ( 1931 ) Mad 717 = 133 I C 205.

—Where there is another provision of the law under which remand can be made, *e. g.* O. 41 r. 25 of C P C a remand cannot be made under S. 151. 139 I C 126 = 33 P L R 487 = I R 1932 L 565 = A I R 1932 L 443.

—Refund of court-fee paid on memo of appeal—Court ordering remand competent to order 136 I C 559 = 33 P L R 54 = I R 1932 L 239 = A I R 1932 L 219.

—Under its inherent power an appellate Court may remand a case if it thinks that it is necessary for the ends of Justice to do so even where the case does not come within O. 41 Rr 23 and 25 C P C. 5 Pat L J 146 = 58 I C 664.

C. P. C. ( 1908 ) S. 151 (Contd)

( 43 ) Remand—(Contd)

—Remand under s. 151 can be allowed in cases not covered by O. XXIII and XXV of O. XLI. But it shall not so be allowed where it is specifically disallowed by other provisions in the Code. Hence order of remand is not irregular or invalid where it does nothing which is prohibited by the Court. A I R 1930 Lah 224 = 31 P L R 50 = 11 Lah L J 507 = Ind Rul ( 1930 ) Lah 329 = 122 I C 473 See also 32 C W N 101 = 106 I C 512 = A I R 1928 Cal 814.

—To meet ends of justice High Court can refuse to be bound by the finding in a remand order of a lower Court though not appealed against. A I R 1929 All 421 = ( 1929 ) A L J 418 = 51 A 780 = Ind Rul ( 1930 ) All 99 = 121 I C 211.

—An order under S. 151, C P C must show on the face of it that it is necessary for the ends of justice or to prevent abuse of the process of the Court. An appellate Court has inherent power to remand a case, but it is a power which can only be exercised for the ends of justice. The mere fact that there has not been a proper trial of the case, apart from other circumstances in the case, is not sufficient to vest the Appellate Court with jurisdiction to remand the case in the exercise of its inherent power. The rule is that if the trial has not been proper owing to some neglect on the part of the Court the Appellate Court has power to remand the case, but where the neglect or default is on the part of a party to the litigation, the Appellate Court has no such power. 56 I C 834 = 2 U P L R ( Pat ) 163.

—Inherent power to re-open transaction on the ground of fraud—Question relating to execution—Payment out of court, uncertified—Plea of fraud not raised by judgment-debtor cannot be allowed to be raised by his assignee. See. 48 I C 133.

—Where in appeal from mortgage-decree, decree of the first Court is reversed and the Court is directed to take proper pleadings with regard to sum due to the mortgagees The remand order is under s. 151, it being neither an order under O. XLI, r. 23 nor a decree, and no appeal lay. A I R 1929 Nag 63 = 26 N L R 44 = Ind Rul. ( 1929 ) Nag. 2 2 = 117 I C 280.

—Court can remand case under its inherent power even where O. XLI, r. 23 does not apply. A I R 1930 Mad. 72 = Ind Rul. ( 1929 ) Mad 962 = 119 I C 466.

—Where parties have no evidence to offer on questions at issue and ask Court to deal with the case on admissions made by them, it is highly irregular for Appellate Court to allow appellant to raise new questions and to remand case for fresh evidence.



C. P. C. (1908) S. 151 (Contd.).

(43) Remand—(Contd.)

on those points and order of remand is open to revision. A I R 1929 Mad 205 = Ind. Rul. (1929) Mad. 1009 = 119 I C 705.

—Plaintiff in redemption suit based his claim on purchase of equity of redemption from X Objection by defendant in argument that purchase would not be binding on heirs of X was upheld Appellate Court allowed plaintiff to be amended adding heirs of X as parties and remanded case under its inherent powers *Held*, that exercise of inherent powers of remand is not without jurisdiction. A I R 1930 Mad. 72 = Ind Rul (1929) M 962 = 119 I C 466.

—Where a suit against Railway Company for compensation for non-delivery of consignment is dismissed on preliminary point, on the finding that there was no "wilful neglect" on the part of the Company and leaves undecided the issue as to question of damages and on appeal the lower Appellate Court holds that "wilful neglect" was proved and remands case. The remand is under O. XLI r. 23 and not under s 151 A I R 1928 Lah. 774 = 10 Lah 30 = 80 P L R 541 = 112 I C 736.

—Apart from provisions of O XLI, rr 27 and 28 Court has inherent power to remand case for taking evidence rejected by trial Court and for final disposal and the order is not open to revision A I R 1928 Mad 991 = (1928) M W N 164 = 112 I C I

—Where a case has been remanded by the Appellate Court but no mention is made of the law under which order of remand was passed, it does not necessarily follow that it is one under s. 151. A I R 1928 Lah 116 = 9 Lah L J 543 = 29 P L R 300 = 106 I C 842.

—Where the case is remanded by the lower Appellate Court for trial upon issues framed by it, the remand order is one under s 151 and not under O XXI, r. 23 A I R 1927 Pat 296 = 6 Pat 380 = 103 I C 722.

—Remand given under s 151 is not without jurisdiction and hence no appeal lies from such an order. A I R 1927 Mad. 335 = 52 M L J 90 = 25 L W 193 = 38 M L T (H C.) 15 = 100 I C 135.

—Only course for Appellate Court thinking addition of other parties as defendants and inclusion of other properties in suit necessary is to remand suit under its inherent power for fresh trial from beginning. A I R 1926 Cal. 1076 = 43 C L J 601 = 97 I C 188.

—Power under s 151 is to be used in exceptional cases, and where a remand can be granted under another provision of law by which case is covered, is not competent to grant it under s. 151. A I R 1926 Lah 537 = 95 I C 169.

C. P. C. (1908) S. 151 (Contd.)

(43) Remand—(Contd.)

—If remand is not possible under O. XLI r 23 it can be given by the Court under s. 151 if it is necessary for the proper administration of justice. A I R 1925 Cal 1157 = 87 I C 575.

—S. 151, C P C recognises the inherent power of Courts to make such orders as are necessary for the interests of Justice and the inherent power extends to orders for remand outside the scope of O. XLI C P C, Where in a suit by a Mahomedan widow against her husband's heirs for a portion of her dower debt, the lower Appellate Court remanded the suit with a direction that a plff. should bring into hotshot all the properties of her husband of which she was inpossession and that an account should be taken as in an administration suit, it was held that the order was proper, 19 C W N 502 followed. 1920 Pat 222 = 58 I C 144 = 2 U P L R (Pat) 48.

—If justice so demands remand can be ordered under s 151. A I R 1922 Cal. 279 = 80 I C 172.

—The correctness of a remand order can be investigated even though no appeal has been preferred against it A I R 1925 Pat 336 = 78 I C 466.

—Order of remand under s. 151 should be made and not one under O XL r. 25 in a second appeal involving general difficult points. A I R 1923 Cal 521 = 37 C L J 122 = 74 I C 392.

—Remand of case after amending plaint is not under O. XLI, r 23 and s 151 would apply. A I R 1924 Lah 245 = 73 I C 915.

—Remand under s. 151 can only be ordered when O. XLI, r 23 has no application A I R 1924 Lah 245 = 73 I C 915.

—Where trial Court has fully tried and decided all issues it is not proper for Appellate Court, coming to different decision on one issue, to remand the case. A I R 1923 Mad 113 = 30 M L T 314 = 16 L W 593 = 70 I C 665.

—Where case is is not disposed of on preliminary point, Appellate Court has no jurisdiction to remand it under O. XLI, r 23, but if necessary for ends of justice it can remand under its inherent power. A I R 1922 Cal 456 = 35 C L J 345 = 70 I C 547.

—Where adjournment is wrongly refused, Appellate Court has power to set aside decree and order re-trial. 23 Bom L R 769 = 63 I C 478.

(44) Restitution.

—Where an execution sale is set aside under O. XXI, r. 92, and restitution or mesne profit are to be allowed, s. 144 has no application, but such restitution can

C. P. C. (1908) S. 151 (Contd)

(44) Restitution—(Concl'd)

be granted in the exercise of the Court's inherent powers under s. 151 A I R 1931 Cal 779 (2) = 35 C W N 105 = 53 C L J 49.

—The duty or jurisdiction of a Court in respect of restitution does not arise merely under s. 144 but is inherent in the general jurisdiction of the Court 35 C W N 483=58 C 1070 = Ind Rul. (1931) Cal 906 = 134 I C 906 relying on 27 C W N. 582 = P C

—Restitution in respect of things obtained by one party to the prejudice of the other under an order made by the Court and which the Court ultimately vacates—Order for—Court has inherent jurisdiction to pass 34 B L R 743 (745) = A I R 1932 B 428 = A L R 1932 B 812.

—Execution against legal representatives—Issue of writ of attachment without notice—Illegal—Payment out of court to save seizure—Proceedings declared illegal—Inherent jurisdiction of court to order restitution of money paid—Rejection of restitution application—Appeal—Revision by High Court. A L R 1934 L 45.

—Decree against dead man—Nullity—Execution levied—Restitution. right to order—Court has inherent power to award restitution. A L R 1933 M 988 = 38 L W 874 = A I R 1933 M 888 (1) Restitution power of Court to award in cases outside S. 144—Inherent powers to award restitution. A L R 1934 P 30.

—An application to set aside the sale was dismissed and the purchase money was paid over to the decree-holder and the judgment-debtor. Subsequently on appeal the sale was set aside. *Held*, that the appellate court has inherent jurisdiction and ought to have at the time of setting aside the sale made an order against the decree-holder and judgment-debtor to make restitution to the auction purchaser. 24 I C 384.

—Restitution of money paid under wrong order of Court. See 29 I C 580. See also. 21 C L J 624. and 30 I C 49.

—Inherent power to order restitution—Power of Court—Section if enlarges scope of S. 144. see. 34 I C 774

—If restitution is not possible under s. 144, s. 151 can be resorted to in the interest of justice. A I R 1925 Mad 365 = 83 I C 138.

—If restitution is not possible under s. 144, it may so be given under s. 151 to meet the ends of justice. A I R 1924 Lah 583 = 75 I C 858.

—Execution application dismissed for default can be restored under s. 151 if necessary on the interest of justice without notice to other side. A I R 1924 Lah 350 = 69 I C 506.

C. P. C. (1908) S. 151 (Contd)

(44) Restitution—(Contd)

—Restitution wherever necessary in the interest of justice can be allowed under s. 151 if it is not possible under s. 144. A I R 1922 Mad 99 = 42 M L J 473 = 30 M L T 178 (1922) M W N 184 = 15 L W 421 = 67 I C 546

—Stranger purchaser cannot claim refund of money in cases where the proceeds of the execution sale have been rateably distributed among several decree holders and the execution sale is set aside. A I R 1922 Mad 228 = 42 M L J 308 = 15 L W 303 = (1922) M W N 255 = 67 I C 369.

—Where judgment-debtors were entitled to the refund of the amount claimed and s. 144 does not permit restoration, s. 151 can always be restored to, in the interest of the justice. A I R 1922 Cal 28 = 26 C W N 408 = 35 C L J 53 = 64 I C 864.

—Restitution under s. 151 can be granted to the judgment-debtor on the auction-sale being set aside. A I R 1922 Nag 82 = 18 N L R 24 = 64 I C 732.

—Principle of s. 144 can be applied to cases which it would not ordinarily apply and Court can under its inherent power order restitution as may be necessary. 63 I C 43 (Lah.)

—If restitution is not possible under s. 144, it may so be given under s. 151 for the purpose of doing justice A I R 1931 Cal 42 = 52 C L J 505 = Ind Rul (1931) Cal 364 = 34 C W N 746 = 130 I C 236.

—Restitution granted in pursuance of sale in execution of decree having been set aside under O. XXI, r. 90, decree remaining intact, is one under s. 151 and not under s. 144. A I R 1930 Pat 280 = 11 P L T 156 = Ind Rul (1930) Pat 237 = 9 Pat 685 = 122 I C 589.

—High Court can under s. 151 in proper cases order the respondents to furnish security for restitution although the respondents may have obtained possession thereof without giving any security. A I R 1928 Pat 187 = 9 P L T 87 = 109 I C 323.

—Equitable relief of restitution can be claimed only when complete restoration to the *status quo ante* is possible. But the party from whom restitution is claimed must be a party to the contract or transaction under which the subject matter of situation has passed to him. A I R Mad 945 = 108 I C 639.

—S. 151 gives power to order restitution apart from s. 144. Order under s. 151 ordering restitution "so far as may be," such as would necessarily have to be passed where the case governed by s. 144 can be passed if complete restitution of position of parties cannot be effected. A I R 1926 Lah 685 = 96 I C 804.

## C. P. C. (1908) S. 151 (Contd)

## (44) Restitution—(Contd)

—Not only is restitution possible under s. 144 but also under s. 151. A I R 1924 All 718 = 46 A 767 = 22 A L J 673 = L R 5 A 659 Civ = 84 I C 75.

—Inherent power to restore execution application struck off. for non-appearance of parties see. 8 S L R 327.

—Inherent power—Restitution—Sale set aside—Application for return of purchase money—Refusal to act under S. 151 see. 25 P W R 1914.

—The Court has, independently of statute an inherent power to order restitution. Where a property attached and sold in, execution of a decree is subsequently held, in a suit for declaration as not liable to attachment, the Court has inherent power to order restitution to successful claimant. 5 Bur L T 233 = 18 I C 144.

## (45) Restoration.

—Restoration of an application to restore suit—Application time-barred S. 151 cannot be invoked to deprive the defendant of the plea of limitation. A L R 1933 M 225 (2) = A I R 1933 M 258 = 143 I C 240 = 1933 M W N 216 = 37 L W 48 = 65 M L J 193 = I R 5 M 289 (1).

—Order consigning execution application to the record room—Restoration on decree-holders insistence—Judgment-debtor can object to restoration. A L R 1933 L 455 = A I R 1933 L 441 = 144 I C 509 = I R 5 L 488.

—Exercise of Court's power under s. 151 Directing personal attendance of parties to admit or deny documents without first asking pleaders—Dismissal of suit for default of appearance—Order irregular—Power of Court to revoke order and restore suit. A L R 1934 A 48.

—A Court is not competent to bring its inherent powers into play in order to restore an order made under O. 9, r. 8 in a case where no sufficient cause for non-appearance has been established. A L R 1933 L 530 (531) = 34 P L R 414 = A I R 1933 L 229 = 142 I C 654 = I R 5 L 233 = 34 Cr. L J 375.

—Plaintiff's agent negligent—Inherent powers not to be exercised. A L R 1933 L 530 = 34 P L R 414 = A I R 1933 L 229 = 142 I C 654 = I R 5 L 233 = 34 Cr. L J 375.

—Silent on points of procedure—Inherent powers must be exercised—Execution application dismissed for non-appearance of decree-holder for reasons beyond his control—Can be restored. A L R 1933 N 138 (139) = A I R 1933 N 176 = 143 I C 584 = 29 N L R 176 = I R 5 N 180.

—Court can entertain application for restoration of appeal which has been dismissed for non-payment of initial deposit.

## C. P. C. (1908) S. 151 (Contd)

## (44) Restoration—(Concld)

59 C 1334 = 36 C W N 564 = 55 C L J 314 = 138 I C 393 = 1 R 1932 C 441 = A I R 1932 C 770

—An appeal dismissed in default of paying the paper book charges can be restored under the inherent powers of the Court to meet the ends of justice. A. I. R. 1931 Sind 153 relying on A I R 1921 B 20 not following A I R 1926 Pat 27.

—An application under O. XXI, r 90 which has been dismissed for default can be restored under the inherent power of the Court if good cause in made out. A I R 1931 All 594 = (1931) A L J 622 See also A I R 1931 Sind 153.

—Application under S 151 C P C for restoration of objection to execution proceedings by judgment debtor, which was dismissed for default. Fresh application by judgment-debtor purporting to be under S 47 and O 21 r 66 raising same and other objections—Maintainability of—Treatment of, as a second application under S 151 and reconsideration of previous order of rejection Power of Court 36 C W N 367.

—Application for restoration of a suit dismissed for default is maintainable under S 151. 28 N L R 83.

—S 151 can be invoked if restoration is not possible under O IX r 13. Where an *ex parte* decree is set aside both under O IX r 13 and s 151 the order is irregular, and the Court acts over and above its jurisdiction. Hence the order is subject to revision A I R 1930 Cal 488 = Ind Rul (1931) Cal 14 = 52 C L J 524 = 34 C W N 419 = 128 I C 94 See also A I R 1930 Rang 65 = 126 I C 542. See also 121 I C 659 = 26 N L R 30 = A I R 1930 Nag 40. See also 103 I C 620 = 9 P L T 136 = A I R 1927 Pat. 369.

—Application for setting aside *ex parte* decree if dismissed for default can be restored under s. 151 upon sufficient cause being shown. A I R 1929 All 906 = Ind Rul (1930) All 79 = 120 I C 559.

—Application by judgment debtor for restoration of application for setting aside sale can be entertained by Court and if order of restoration is passed on being satisfied that there was good ground for default in appearance, High Court will not interfere in revision on the merits. A I R 1929 All 721 = (1929) A L J 1079 = 51 A 901 = Ind Rul (1929) All 1091 = 119 I C 85.

—If necessary for ends of justice Court has inherent power to restore suit wrongly dismissed for default, party being represented by junior Pleader. A I R 1929 All 811 = (1929) A L J 1183 = Ind Rul (1929) All 975 = 119 I C 15.

—Application for restoration of suit can be restored under s. 151 A I R 1929 All 624 = (1929) A L J 1082 = Ind Rul (1929) All 909 = 118 I C 669.

C. P. C. (1908) S. 151 (Contd)

(45) Restoration—(Contd)

—If necessary for ends of justice Court can under s. 151 restore execution application dismissed for default and such order is non-appealable. Ind Rul (1929) Lah 644 = 117 I C 372 (Lah).

—Plaintiff applied under O IX r 9, for restoration of suit *in forma pauperis* dismissed for default, but did not appear when application was taken up for hearing which was hence dismissed. He then applied under s. 151 for restoration of the application. Court holding s. 151 inapplicable dismissed the application. Held, that the Court is wrong in its view. Held further, that the order was not an error apparent on the face of the record. A I R 1929 Cal 17 = 32 C W N 811 = Ind Rul (1929) Cal 357 = 115 I C 357.

—Court has no inherent jurisdiction to restore dismissed suit under s. 151. A I R 1929 Cal 158 = 48 C L J 596 = Ind Rul (1929) Cal 272 = 114 I C 672.

—Inherent power cannot be invoked where there is other remedy under Code and party wilfully neglects to avail himself of it. Where an application for execution is dismissed for default Application of s. 151 in restoring application on the ground that agent of decree-holder had been prevented unavoidably by sickness from presence on the day before Court as a fresh application was not in time is right. A I R 1928 Oudh 478 = 5 O W N 895 = Ind Rul (1929) Oudh 128 = 114 I C 128.

—Restoring a suit under O IX, r. 13 when no sufficient cause existed, is acting without jurisdiction, and s. 151 cannot be invoked when specific provision applicable to the case in hand exist. A I R 1930 Cal 387 = 34 C W N 222 = Ind Rul (1930) Cal 795 = 126 I C 779.

—Application for execution dismissed for default can be restored under s. 151 A I R 1930 Nag 134 = Ind Rul (1930) Nag 37 = 120 I C 405.

—Where there is power to dismiss even without express provision therefor there must also be power to restore and both must be presumed to exist by virtue of s. 151 if not expressly conferred. Execution application dismissed for default can thus be restored. A I R 1930 Lah 20 = 11 Lah 93 = 31 P L R 375 = Ind Rul (1929) Lah 910 = 119 I C 494.

—Order by the successor in-office admitting a suit rejected under O. VII r. 13, is neither one which could be viewed as a review nor can such an order be passed under s. 151 and hence should be reversed. (1929) M W N 140.

—Suit dismissed for default under O. IX r. 2 can be restored under s. 151 if fresh suit would be time-barred an evidence shows

C. P. C. (1908) S. 151 (Contd)

(45) Restoration—(Contd)

that the defaulter could not attend the Court on account of justifying circumstances. A I R 1930 Lah 440 = Ind Rul (1931) Lah 227 = 129 I C 755.

—O. IX not being applicable a claim case under OXXI r. 100, can be restored under s. 151. A I R 1928 Cal 179 = 57 C L J 87 = 107 I C 729.

—*Ex parte* decree was passed against tenant but set aside on the ground of his minority and non-representation in the suit. Landlord's application for restoration of suit on the tenant's attaining majority can be allowed under s. 151. A I R 1928 Nag 106 = 106 I C 575.

—Suit or appeal dismissed for default can be restored only if sufficient cause is shown —In the absence of such cause inherent powers cannot be invoked. A I R 1927 Lah 622 = 28 P L R 554 = 103 I C 425.

—S. 141, C P C does not make O IX applicable to proceedings under O IX When an application under O IX r 9 for restoration of the suit is dismissed for default under r. 4 of that Order, no application lies under O. IX r 9, for setting aside that order of dismissal but the second application may be treated as an application to restore the suit itself and not to restore the first application and if it is not out of time there is no bar to its being dealt with as application under O IX r. 9, Civil P C If it is time-barred s. 151 may be invoked in proper cases for restoring the suit. A I R 1927 Cal 534 = 54 C 405 = 31 C W N 576 = 103 I C 69.

—Suits dismissed for default can be restored under s. 151 Ind Rul (1930) Pat 233 = 122 I C 585.

—Case dismissed in default through the mistake of the Court can be restored under s. 151. A I R 1928 Lah 534 = 108 I C 603.

—Court has inherent power to restore execution application dismissed for default and should do so if satisfied that it should exercise it *ex debito justice*. A I R 1926 Lah 534 = 95 I C 924.

—Court can apart from its duty provided by O IX rr. 9 and 13 afford relief to party at fault where the cause shown is not sufficient but just and proper and may for the purpose taken into consideration the nature of claim and loss likely to result to the absenting party if the *ex parte* order of dismissal of suit or the *ex parte* decree is not set aside. Merits or demerits of claim in suit or extent of risk involved cannot by themselves be taken into consideration or afford good ground for setting aside *ex parte* order of dismissal of a suit or an *ex parte* decree under s. 151. A I R 1929 Sind 249 = 20 S L R 266 = 95 I C 533.



C. P. C. (1908) S. 151 (Contd)

(45) Restoration—(Contd)

—Execution application dismissed for default cannot be restored on the ground that fresh application would be time-barred. Mere fact that law of limitation steps in and prevents Court from claiming relief under procedure laid down by law is not sufficient justification for granting relief under s. 151. A I R 1926 Mad 980 = 50 M 67 = 51 M L J 219 = (1926) M W N 890 = 26 L W 878 = 97 I C 1008.

—Restoration of execution petition dismissed for default cannot be granted under s. 151. A I R 1927 Mad 355 = 52 M L J 123 = 25 L W 192 99 I C 954.

—If satisfied that the case is fit one for its exercise Court has inherent power to restore case dismissed for default. A I R 1927 Rang 58 = 5 Bur L J 139 = 69 I C 151.

—Court can restore under s. 151 application of decree-holder for ascertaining mesne profits dismissed for failure to pay Court fee. A I R 1926 Pat 218 = (1926) Pat 49 = 7 P L T 13 = 5 Pat 361 (F B) = 93 I C 939.

—S. 151 can be resorted to in cases of restoration application dismissed for default. A I R 1925 All 773 = 22 A L J 817 = L R 6 A 412 Civ = 47 A 878 = 89 I C 350.

—S. 151 can be invoked in case of restoration application which itself was dismissed for default. A I R 1923 Bom 386 = 80 I C 182.

—To exercise inherent power, laches of advocate or careless mistake of clerk is not good ground, to restore appeal dismissed for default. A I R 1926 Rang 50 = 3 R 488 = 92 I C 208.

—The responsibility of party ceases after having paid money to a duly constituted agent and an officer of Court under Legal Practitioners Act and rules of the High Courts whose duty it is to deposit it in Court, until he is informed of the default made by the Pleader or his clerk and suit rejected for non-payment, of deficit Court-fee through dishonesty of Pleader's clerk who misappropriated the money should be restored to file. A I R 1925 Pat 435 = 4 Pat 180 = (1925) Pat 147 = 91 I C 213.

—Where an application was for restoration of execution case wrongly dismissed for default and headed under O. XLVII, r. 1 and also under s. 151 the application was really one under s. 151. A I R 1925 Cal 184 = 78 I C 816.

—Suit rejected under O. VII, r. 11 (c) cannot be restored under s. 151. There is no inherent power in Court to alter or add to order which has once been perfected, except under s. 152 or on review. A I R 1923 Pat 354 = 4 P L T 261 = 2 Pat 504 = 72 I C 629.

C. P. C. (1908) S. 151 (Concl'd)

(45) Restoration—(Concl'd)

—Restoration of execution application dismissed for default can be allowed under s. 151 upon which the attachment revives. A I R 1923 Nag 18 = 68 I C 643.

—If restoration of an application dismissed for default is applied for immediately after the dismissal Court must restore the same under s. 151. A I R 1922 Nag 267 = 18 N L R 152 = 4 N L J 118 = 64 I C 420.

—Court has jurisdiction to restore suit dismissed for default under its inherent power although it could not be restored under O. IX r. 9. 63 I C 440 (Cal).

—Mere fact that alternative remedy may be open to decree-holder cannot prevent Court from exercising its inherent jurisdiction in setting aside dismissal of execution application for default if necessary under circumstances. A I R 1921 Lah 67 = 2 L 66 = 64 P L R 1921 = 60 I C 720.

(46) Re-trial.

—Where adequate procedure is not provided for, re-trial can be ordered by Appellate Court in exceptional circumstances under s. 151. 64 I C 599 (Cal.)

—Appellate Court apart from provision of O. XLI rr. 33 and 23 consider re-trial under s. 151 whenever it so finds necessary in the interest of justice. A I R 1922 Bom 267 = 46 B 184 = 23 Bom L R 769 = 63 I C 478.

—The Commissioner has no power to "review" under s. 151 or O. XLVII, r. 1. He may on proper grounds re-open the inquiry into any of the objections taken by the party. Nothing is final till he submits his report. If he re-opens the inquiry on grounds which are not proper the party aggrieved can object only by means of exceptions to his report. A I R 1924 Bom 231 = 47 Bom 593 = 25 Bom L R 280 = 82 I C 593.

—Decision passed in appeal in ignorance of party's death is not a nullity and the appeal could be ordered to be re heard paying due consideration to the party's death. A I R 1923 Cal 676 = 37 C L J 494 = 74 I C 545.

—Where lower Court entirely misunderstood the defence, and hence no proper trial, Court must under s. 151 order re-trial. A I R 1921 All 335 = 19 A L J 553 = 63 I C 501.

—Application for re-constitution of suit and summons to legal representative to set aside *ex parte* decree passed against the defendant who was found to be lunatic at the date of the suit and who subsequently died, and the execution of which was objected to on the ground that the decree



C. P. C. (1908) S. 151 (Contd)

(46) Re-trial—(Contd)

is nullity, is maintainable A I R 1931 Cal 168 = 34 C W N 989 = Ind Rul (1931) Cal 398 = 130 I C 878.

—Re-hearing under s. 151 cannot be asked of case where r. 3, Ch. 7 Allahabad High Court Rules has not been complied with being a mere irregularity not affecting case on merits A I R 1929 All 403 = Ind. Rul (1929) All. 503 = (1929) A L J 713 = 116 I C 23.

—Where trial was badly conducted, all concerned being responsible for the same, trial *de novo* should be ordered. A I R 1927 Lah 480 = 9 Lah L J 268 = 28 P L R 679 = 103 I C 854.

(47) Review or Revision.

—No recourse to inherent powers to grant review under S. 151, C P C. would be permissible as O. 47. r. 1, specifically provided for the case in which review is allowed by law. A I R 1933 L 598 = 34 P L R 88 = A I R 1933 L 169 = 141 I C 188 = I R 5 L 68.

—Courts have no inherent power to review apart from Statute. A I R 1931 Pat 409 = Ind Rul (1931) Pat 486 = 12 P L T 652 = 134 I C 639.

—Revision does not lie against discretion exercised under S. 151. A L R 1932 P 84.

—Where there is an inherent incompetency in a court, no consent can confer upon the Court that jurisdiction which it does not possess. It is a patent misapplication by a court of S. 151 of the Code of Civil Procedure, if the Court in the exercise of its inherent power, assumes jurisdiction by way of review where it was expressly forbidden by the legislature to entertain such an application. 45 Cal 519 = 26 C L J 325 = 42 I C 711 = 22 C W N 446.

—Court's jurisdiction to review its own order see. 37 M L J 162.

—Power of Court, to review see. 32 I C 527.

—On an *ex parte* application made to the District Judge asking him under the provision of S 5 of the Lim. Act to extend the time for filing an appeal and to give the appellant time for the purpose of paying the Court fees, the Judge made an order that time would be extended. But subsequently and before the memo of appeal had in fact been admitted, he reconsidered his order and revoked it. *Held*, that the Judge had ample authority under the law to revoke or alter his previous order at any time before the appeal was admitted. 45 I C 725.

C. P. C. (1908) S. 151 (Contd).

(47) Review or Revision—(Contd)

—If justice so requires, interlocutory orders can be reviewed under s. 151 though the application for the purpose does not come in the language of O. XLVII A I R 1930 Bom 294 = 32 Bom L R 665 = Ind Rul (1930) Bom 354 = 125 I C 690.

—Review under s. 151 cannot be resorted to, when it has been specifically prohibited by other statutory provisions A I R 1927 Cal 920 = 36 C W N 822 = 104 I C 136.

—Court has no power under s. 151 to review its order dismissing plaintiff's suit under O. XI, r. 21 the order being appealable. A I R 1927 Cal 158 = 93 I C 70.

—Review can be made even under s. 151 apart from O. XLVII, r. 1. A I R 1921 Pat 673 = 5 P L T 425 = (1924) P H C C 254 = 3 Pat 930 = 80 I C 667.

—Order rejecting petition under O. VII, r. 11 can be reviewed. A I R 1923 Pat 354 = 2 Pat 504 = 4 P L T 261 = 72 I C 629.

—Where powers under other provision of the Code do exist, s. 151 should not resisted to to exercise the same, A I R 1924 Cal 1054 = 28 C W N 928 = 84 I C 278.

—Court has no jurisdiction to set aside in review its order passed without considering certain provision of law as it would amount to setting aside order passed on a misconception of law, which is not competent. A I R 1929 Cal 162 = 48 C L J 594 = Ind Rul (1929) Cal 348 = 115 I C 268.

—Decree perfectly good when passed cannot be reviewed by Court under its inherent power under s. 151. A I R 1926 All 50 = 48 A 162 = L R 6 A 569 = Civ 23 A L J 1029 = 89 I C 946.

—Court can under s. 151 admit review applied for instead of setting aside an *ex parte* decree. A I R 1925 Rang 192 = 2 R 659 = 85 I C 284.

—It was pleaded, *inter alia* that the plaintiff's suit for a declaration that a sale made by the sonless male proprietor would not affect their reversionary rights ought to be dismissed on the ground that the sale was made with the consent of the plaintiffs, who as *lambardar*, took an active part in negotiating the sale and assisted in the registration of the sale deed. The fact was admitted by the particular plaintiff. In the Chief Court the plea was urged by the defendant but the court overlooked it and a decree was passed against the defendant. On an application for review of the decree—*Held*, that there was good ground for review to be granted and that the plea should have been accepted and the suit dismissed. 26 P L R 1911 = 9 I C 545 = 42 P W R 1911.

—Court has inherent power under S. 151 of the C P Code to revive the suit though the original order was improper and the proper course would have been to stay the suit. 5 O L J 259 = 47 I C 137.

## (47-a) Scope of the Section.

—The provisions of S. 151 of the C P Code can only be utilised to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. 5 O L J 153 = 46 I C 68.

—S. 151, C P C is not intended to override the distinct provisions of S. 3 of the Lim Act. 57 I C 15.

—The inherent power must not be exercised where the Code contains specific provisions that would meet requirements of case and such provisions should be followed. A I R 1929 Lah 694 = Ind Rul (1929) Lah 904 = 119 I C 488.

—Where there is another remedy, the inherent power cannot be invoked. A I R 928 Lah 772 = 112 I C 295.

—Court has no inherent power to pass order in respect of suit not pending before it. Court trying subsequent suit cannot pass order in respect of previous suit. A I R 1929 Mad 631 = 91 I C 519.

—Where final decree omitted to give relief of mesne profits as amended by the preliminary decree and appeal was not filed therefrom, review application for the same being rejected, S. 151 cannot be resisted to, for the purpose of granting the suit relief. A I R 1925 Mad 886 = 48 M L J 512 = 88 I C 94.

—S. 151 empowers the Court to pass such order as it deems necessary for the proper administration of justice to prevent abuse of the process of the Court. A I R 1925 Oudh 418 = 12 O L J 216 = 2 O W N 218 = 87 I C 987.

—Where a sale is set aside on the ground of a violation of certain order and not on the ground of material irregularity order is not one under O XLI, r 9 but under s. 151. A I R 1924 Mad 778 = 47 M L J 549 = (1924) M W N 842 = 84 I C 975.

—The inherent power of the Court under S. 161 C P Code, cannot be invoked in the face of a direct statutory bar. 6 O L J 55 = 50 I C 180.

—S. 151 can be invoked for proper administration of justice only if remedy asked for is not expressly prohibited by other statutory provision. A I R 1925 Mad 42 = 48 M 494 = 20 L W 175 = 84 I C 134.

—If the Court is satisfied that a party never in fact consented to the decree but that the Court was induced to pass it on the fraudulent misrepresentation made to it

that the party had consented; such a consent decree can be set aside under s. 151. A I R 1923 Pat 483 = (1923) Pat 197 = 2 Pat 731 = 77 I C 14.

—Consent decree can be set aside by a Court to s. 151 on the ground that the consent was caused by fraud. A I R 1923 Pat 423 = (1923) Pat 192 = 2 Pat 731 = 77 I C 14.

—Inherent power—Setting aside decree for fraud—Court's powers to correct its own proceedings. See. 27 I C 628.

—Setting aside execution sale—Application for compensation by judgment debtors and auction purchaser for period during which they were out of possession—Power of court. See 39 I C 653.

—Limits to the exercise of inherent power. See 37 M L J 599.

—No right to grant review if expressly prohibited by O. 47. 19 C W N 758.

—Express statutory directions not to be overridden. 35 I C 616.

—Pending suit essential for exercise of inherent powers. 52 I C 982.

—No variance between decree and judgment—Jurisdiction to amend. 34 I C 787.

—S. 151 C P C gives no new powers to those courts relating as it does merely to dowers that are inherent in all courts. 55 I C 55 = 27 P W R 1920 = 116 P L R 1920.

—Applicability to court of first instance and appellate Courts—Wide and salutary powers. 38 All 398.

—S. 151 merely recognises the inherent power of the Court to make such orders as may be necessary for the ends of justice.

This inherent power is in no sense restricted to civil cases it is equally applicable to criminal cases. The power is not capriciously or arbitrarily exercised; it is exercised *ex-debito* justice to do that real and substantial justice for which alone Court exists. But the Court in the exercise of such inherent power must be careful to see that its decision is based on sound general principles and is not in conflict with them or with the intentions of the Legislature as indicated in the statutory provisions. 44 Cal 816 = 21 C W N 269 = 25 C L J 193 = 18 Cr. L J 497 = 39 I C 465 = 9 Cr L R 280.

—Plaint can be rejected even under s. 151 in case not mentioned by O VII r. 11. A I R 1924 Oudh 413 = 11 O L J 260 = 83 I C 778.

—Damages or interest under s. 151 cannot be awarded when not decreed. A I R 1924 Rang 275 = 3 Bur L J 58 = 82 I C 427.

—Where undue advantage to one party is likely to be the result of decree-holder's action, Court can under S. 151 prevent abuse if its process even apart from considera-

C. P. C. (1908) S. 151 (Contd.)

(47 a) Scope of the Section—(Contd.)

tions of law and equity. A I R 1924 Oudh 230 = 10 O L J 443 = 79 I C 685.

—Exercise of powers conferred upon by s. 151 is merely discretionary. A I R 1923 Lah 506 = 75 I C 487

—Court has no inherent jurisdiction to set aside order of predecessor-in-office or touch his judgment except that he can correct clerical or arithmetical mistakes or error by slip or omission or if there are grounds he can review it A I R 1924 Pat 136 = 12 Pat L R Civ. 155 = 74 I C 110.

—Power under s. 151 is to be used only when there is no other remedy. Courts are not enabled to evade or ignore provisions of law as to procedure. A I R 1923 All 603 (1) = 21 A L J 447 = L R 4 A 365 = 73 I C 494.

—Order to prepare inventory and keep accounts is one under O XXXIX. r. 1 and not under s. 151 A I R 1923 Lah 48 = 72 I C 569.

—It is the first duty and the chief if not the only object of existence of Court to prevent injustice and abuse of its own powers, to do which they have inherent power. A I R 1923 Nag 182 = 19 N L R 36 = 6 N L J 100 = 71 I C 436.

—To relieve party from result of his own mistakes or to enable him to evade law of limitation, inherent power cannot be invoked. A I R 1922 Mad 417 = 43 M L J 184 = 16 L W 178-(1922) M W N 514 = 1 M L T (H C) 135 = 70 I C 743

—Application under s. 151 can be regarded as one for review. A I R 1922 Mad 446 = 31 M L T 132 (H C) = 6 L W 448 = 43 M L J 290 = (1922) M W N 495 = 70 I C 425.

—In presence of express provisions governing the case, s. 151 cannot be resorted to. 40 P L R 1922 = 69 I C 718.

—Interpretation of the words should not be too literal and artificial. End is the administration of justice and that should always be kept in view. And that is exactly what s. 151 does. A I R 1924 Nag 58 = 69 I C 112.

—S 151 cannot be so used as to override the provisions of the law of limitation. A I R 1922 Lah 266 = 66 I C 270

—Where an *ex parte* decree is set aside without having jurisdiction to do so, all subsequent proceedings based on the above dismissal are illegal and must fall to the ground. Hence though no appeal is preferred from the dismissal of suit made after setting aside of *ex parte* decree revision applied for against the previous order was allowed. A I R 1921 Oudh 141 = 24 O C 282 = 64 I C 303.

संखी ३१ सी ५१. (१) ११८ (६)

C. P. C. (1908) S. 151 (Contd.)

(47-a) Scope of the Section—(Concl'd)

—As no Code can be exhaustive of procedure for exercising every power which a Court of justice is competent to exercise s. 151 has been enacted and should be availed of only where power which has been exercised has not been provided for in the Code. A I R 1921 Sind 38 = 15 S L R 61 = 63 I C 131.

—An order of restitution under S. 151 in exercise of the inherent powers of the Court is not a decree nor does it amount to adjudicating the rights of the parties to a suit. The auction purchaser cannot be said to be a representative of any of the parties so as to bring the order within S. 47 C P C. Such an order is not appealable nor does a second appeal lie from it. The court acting under S. 151 can order an auction purchase money withdrawn by him after the sale in his favour was set aside if the sale is confirmed on appeal and thus restore the purchase money to the person entitled. It is clearly within the powers of a court to correct a result which amounts to something akin to abuse of the process of the court and put the parties in the position in which they would have been if the Court had not erroneously passed an order which had to be corrected in appeal. The Code of Civil Procedure is not exhaustive and when a court passes an order which it has jurisdiction to make there is inherent power to the court to have that order carried into effect. So an order to refund can be executed as a money decree. 2 Pat. L J 361 = 1 Pat. L W 551 = 39 I C 763.

—Inherent power—When invoked See. 36 All 354.

—When it is brought to the notice of the High Court that its decree is being executed in a manner manifestly at variance with the purport and intention of that decree then the High Court, under its inherent powers of supervision which are expressly saved by S 151 of the C. P. Code may take such action for the ends of justice as may be necessary to enforce the proper execution of the decree. Where the decree which was being executed was a decree of the Calcutta High Court in a suit which arose within the present jurisdiction of the Patna High Court. *held*, that it was the latter Court which had power to supervise the execution of the decree. 3 Pat. L J 435 = 48 I C 107.

(48) Settlement Court.

—Settlement Court—Mistake—Obvious errors on record—Powers of correction. See. 17 I C 379.

C. P. C. (1908) S. 151 (Contd)

## (49) Stay of execution or Suit.

—See A I R 1931 Bom = 384. Ind Rul (1931) Bom 448 = 33 Bom L R 702 = 133 I C 864.

—The High Court can by virtue of its inherent jurisdiction stay execution under an award, when an application to set aside the award has been refused and an appeal is pending from it A I R 1931 Bom 384 = Ind Rul (1931) Bom 448 = 33 Bom L R 702 = 133 I C 864.

—Where two suits have different subject matters and do not attract the provisions of s. 10, the Court cannot by exercising its powers under s. 151 stay one of them till the disposal of the other in another Court, A I R 1931 Oudh 313 = 8 O W N 644 Ind Rul (1931) Oudh 257 = 132 I C 257.

—Stay order conditional on furnishing security for mesne profits—Appeal of the objectors in which stay order granted, accepted though ultimately the objectors failed—Auction-purchaser whether entitled to mesne profits under S. 36, C. P. C. or by way of restitution—Appeal from the order allowing mesne profits competent. A L R 1933 L 371 = 34 P L R 938 = A I R 1933 L 485 = 146 I C 301.

—Money decree—Stay of execution—High Court, practice—Hardship—Stay allowed. A L R 1933 L 61

—Pending insolvency proceedings stay of execution proceedings should be ordered where the property attached is not subject to delay or it is not of such a nature that the delay would seriously depreciate its value, A I R 1924 Sind 69 = 76 I C 380

—Execution of decree can be stayed under s. 151 prior to granting of certificate. A I R 1925 Sind 216 = 82 I C 739.

—Where evidence is procurable outside the jurisdiction of the Court and where plaintiff instituted a suit merely to harass and vex the defendant, and avoided the natural person stay of suit can be ordered for its institution in proper Court and if no injustice is done to the plaintiff under s. 151 A I R 1934 Bom. 50 = 25 Bom L R 713 = 82 I C 852.

—Pending appeal to the Privy Council High Court can both under s. 151 and O XLV; r. 13. order stay of proceeding where it having set aside an *ex parte* decree, orders re hearing of the suit. A I R 1931 Cal 79 = 34 C W N 631 = Ind Rul (1931) Cal 273 = 129 I C 833

—Order refusing stay of suit or its execution is an interlocutory order and cannot therefore, be revised under s. 151 Srehan order can however, be interfered with in appeal both under s 157 Civil Procedure Code and s 107 Government of India

C. P. C. (1908) S. 151 (Contd)

## (49) Stay of execution or Suit—(Contd)

Act, if the circumstances justify. A I R 1930 Lah 525 = 31 P L R 174 = Ind Rul (1931) Lah 1 = 128 I C 49.

—If justice so required order under s. 151 staying the trial of the suit can be passed. 7 O W N 386 = 14 R D 171 = Ind Rul (1930) Oudh 146 = 123 I C 50.

—Entertainment of application by obstructor of possession under execution of decree for stay of proceedings on ground that he was prosecuting a suit or appeal with respect to property in dispute, amounts to refusal of jurisdiction conferred on Court under O. XXI, rr 97 and 98 cannot be justified under s. 151 A I R 1929 Lah 694 = Ind Rul (1929) Lah 904 = 119 I C 488.

—If necessary to do justice between parties a suit which under s 10 cannot be stayed, can be so stayed under inherent powers of Court which are limited or otherwise affected by express provisions of the Code. A I R 1929 Oudh 341 = 4 Luck 573 = 7 O W N 157 = Ind Rul (1929) Oudh 183 = 114 I C 775.

—Besides under s. 10 suit can also be stayed under the inherent powers of High Court and under the powers of general supervision and superintendence vested in it suit in particular Court can be stayed pending decision of another suit in different Courts A I R 1929 Lah 12 = 10 L J 470 = 113 I C 783.

—Proceedings under Guardians and Wards Act can be stayed and transfer of custody of minor to guardian appointed by lower Court can be disallowed pending decision of appeal to it by the High Court under its inherent power. A I R 1928 Lah 912 = 110 I C 912.

—Execution of an *ex parte* decree passed by Calcutta was sought at Surat Court The judgment-debtor's suit in the Surat Court for declaring the *ex parte* decree to be null and void on ground of fraud is competent and the decree-holder cannot apply under s. 151 for the stay of such suit in Surat Court. He could apply only under s. 23 (3). If order under s. 151 staying the suit is passed it is without jurisdiction and can be set aside in revision. A I R 1927 Bom 79 = 51 B 26 = 28 Bom L R 1442 = 100 I C 154.

—Criminal case of which subject matter is same as in Civil suit should be stayed pending trial of the latter A I R 1927 Lah 17 = 27 Cr L J 1114 = 97 I C 426.

—High Court can order stay of suit to avoid multiplicity where proceedings are started against one defendant in other Court under Lunacy Act and plaintiff's prayer for stay until proceedings are over is refused by Court. A I R 1926 All 212 = 24 A L J 375 = 48 A 356 = 93 I C 285.



C. P. C. (1908) S. 151 (Contd)

## (49) Stay of execution or suit—(Contd)

—Where order staying execution would merely impede execution of final decree without good and sufficient cause High Court should not exercise its inherent power to pass such order 89 IC 588 (Lah).

—Superior Court can under s. 151 stay proceedings under s. 476 Criminal Procedure Code, pending in lower Court. A I R 1925 Lah 323 = 7 Lah L J 73 = 26 Cr L J 1166 = 88 IC 526

—Power under s. 151 is not to be capriciously or arbitrarily exercised. It is to be exercised to facilitate proper administration of justice. Court can under s. 151 order stay of cross suit or postpone the hearing pending the decision of a selected action A I R 1924 Cal 757 = 28 C W N 295 = 86 IC 1023. Stay of execution should be ordered where to do so, is not detrimental to the interest of the decree-holder A I R 1925 Mad 42 = 48 M 494 = 20 L W 175 = 84 IC 134.

—Inherent power of High Court to stay execution of decree appealed from See (1919) Pat 145.

—Stay of proceedings in suit pending reference to arbitration. See 35 IC 536.

—Stay of Sale in execution of decree of lower Court, see 34 M L J 470.

—Per *Curtam* S. 151 of the Code of Civil Procedure does not lay down any new principle, but merely declares that the Court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. This inherent power is not capriciously exercised; it is exercised *ex debito justice* to do that real and substantial justice for the administration of which alone the Court exists 16 C L J 508 = 40 Cal 955 = 18 IC 207.

## (50) Striking out pleadings.

—Security to be furnished by defendant as a condition of his cutting and carrying away standing crops on suit land—Order for, subject to condition that in default defendant's defence will be struck off—Non-compliance by defendant with, but crops cut and carried away by him not withstanding—Striking off defence in case of—Jurisdiction as to—Court has, under S. 151. 136 IC 42 = I R 1932 M 250 = A I R 1932 M 263.

—Order of Court in striking out evidence on persistent failure of defendant to attend Court when ordered to do so and even on attempts by Court to persuade him to appeal, is not objectionable as Court has inherent power to do so A I R 1928 Oudh 282 = 5 O W N 291 = 111 IC 473

C. P. C. (1908) S. 151 (Contd)

## (50) Striking out pleadings—(Contd)

—Court can strike off the defence and proceed *ex parte* when the costs which are made of condition precedent to the granting of an adjournment are paid as directed A I R 1925 All 280 = 47 A 538 = 23 A L J 212 = L R 6 A 212 Civ = 86 IC 862.

—Where a suit was declared to be not within the jurisdiction of Civil Courts but within the jurisdiction of Revenue Court s. 151 cannot be resorted to, to bring the same within the jurisdiction of Civil Court A I R 1925 Oudh 604 = 85 IC 703.

## (51) Suit for possession.

—Suit for possession—Decree conditional on payment of sum—Extent of time—Order without jurisdiction See. 42 All 639.

## (52) Time fixed for deposit.

—Where an appeal is filed against a decree or order directing deposit of money by a certain date, an application for extension of such time should be made the expiry of the time but a Court may extend such time on an application made even after such date under S. 151, C. P. Code, if it is necessary to do so for the ends of justice. 9 Bur. L T 83 = 32 IC 509.

—Time fixed for depositing money—Extension of time—No power to extend time for deposit under O. 21, R. 19, See 19 M L T 192 = 33 IC 996.

—Time fixed by decree for performance within specified time—Provision for dismissal on default Default—No power to extend time. See. 16 A L J 625.

—Time fixed by decree for payment Power of executing Court, to extend time. 15 N L R 39.

—The court has inherent power to vacate order recording satisfaction obtained by the gross fraud of the judgment-debtor on the court. 27 M. L. J. 172 = 25 IC 213.

—In a suit for specific performance of a contract of sale, the Court of first Instance gave the plff one month's time for the payment of the price and this decree was confirmed on appeal More than one month after the date of the appellate decree, the plff offered to pay the money and moved the Appellate Court to extend the time originally fixed by the Court of first Instance for payment of the price. The application was granted *Held* on revision that the Appellate Court had no jurisdiction to extend the time and that the order so extending time must be set aside 31 M 28; I L W 882; 16 Bom. L R 778 foll 19 M L T 137 = 3 L W 29 = 32 IC 401; 31 IC 457.



C. P. C. (1908) S. 151 (Contd.)

(52) Time fixed for deposit—(Concl'd)

—Application under O IX, r. 9, not made within 30 days—Court cannot extend the period. A I R 1928 Nag 913 = 23 N L R 183 = 107 I C 193.

—Where in a decree for specific performance no date for performance was fixed, Court can in its discretion fix or extend the time. A I R 1927 Rang 311 = 5 R 615 = 6 Bur L R 216 = 105 I C 467.

—Order extending time upon application for review cannot be disturbed as Court has jurisdiction to grant extension and the order is upon application for extension and not for review. A I R 1925 Pat 452 = (1925) Pat 151 = 90 I C 79.

—Inherent power cannot be invoked to extend definite period of limitation prescribed within which action could be taken. A I R 1926 L ah 135 = 89 I C 427.

—Where payment of costs was made a condition precedent for the acceptance of appeal and such payment was not made within time allowed for the same time cannot be extended either under s. 151 or s. 148. A I R 1925 Pat 153 = 80 I C 575.

—Ordinary period of limitation cannot be extended under s. 151 nor does an appeal lie from an order refusing to set aside an *ex parte* decree A I R 1922 Pat 479 1 Pat 2, 7 = (1922) Pat 61 65 I C 341.

—Ordinary limitation for review cannot be extended unless sufficient cause is shown L R I A 73 Rev.

—The High court in second appeal passed a final decree that an item of property be delivered to plaintiff on his depositing Rs 450. Within a certain time and that in default the suit do stand dismissed. The plff having defaulted payment, the plaintiff granted extension of time. The plaintiff did not pay even within the further time allowed, but appealed against both the order requiring the deposit and the order dismissing the suit. The appellate court, while holding that the omission to make the deposit was deliberate allowed further extension to plff held the court improperly acted under s. 151. A L R 1924 Mad 124.

—As to power of Court regarding review of decree itself and extension of time for payment of costs see 35 L W 57.

(53) Who can invoke.

—S. 151 should not be resorted to where remedies were provided for by other provisions but not availed of in time. A I R 1924 All 446 = 46 A 144 = 78 I C 416.

—The Court has ample powers in the exercise of its inherent jurisdiction under s. 151 even to make an order for refund.

C. P. C. (1908) S. 151 (Concl'd)

(53) Who can invoke—(Concl'd)

Also the fact that the auction-purchaser applying for withdrawal of the attachment was not a party to the suit in which the order for attachment of the surplus sale proceeds was made does not disentitle him to apply. The application being one under s. 151 Civil Procedure Code invoking the inherent powers of the Court to make an order necessary for the ends of justice the question as to the *locus standi* of the application can hardly arise. A I R 1925 Cal 1145 = 86 I C 882.

—Where decree is passed on basis of compromise verified and admitted by party having no such authority on behalf of another such party may invoke the inherent power of Court to get judgment and decree amended under ss. 151 152, and 153 so as to remove his name from the decree after limitation for appeal or review has expired and judgment and decree have become final. A I R 1929 Oudh 385 = 4 Luck 562 = 6 O W N 604 = Ind Rul (1929) Oudh 449 = 118 I C 753.

(54) Wrong Order.

—See under (17) Erroneous order supra.

C. P. C. (1908) SEC 152.

*Synopsis.*

- (1) Scope of the section.
- (2) When amendment will be allowed.
  - (1) Decree not in conformity with judgment.
  - (2) Clerical or arithmetical mistakes.
  - (3) Accidental slip or omission.
- (3) Inherent powers of Court to amend.
- (4) When amendment will be refused.
- (5) Appeal, revision, or review.
- (6) Amendment and limitation.
- (7) "At any time".
- (8) Compromise Decree.
- (9) Court by which amendment can be made.
- (10) Effect of amendment.
- (11) "May".
- (12) Notice.
- (13) Power of executing Court to go behind decree.
- (14) Practice and Procedure.
- (15) Miscellaneous Cases.

(1) Scope of the section.

—Power given by S. 152 is wider than that conferred by O. 47, r. 2, on the successor of a Court passing an order. 13 P L T 576. A I R 1932 P 321 (322) = 139 I C 903 = I R 1932 P 284 = A L R 1932 P 734.

—For example, the language of the section is wide enough to cover correction of mistakes. 139 I C 491 = 1932 A L J 734 = I R 1932 A 567 = A I R 1932 A 587 (588) = A L R 1932 A 979.

C. P. C. (1908) S. 152 (Contd)

## (1) Scope of the section—(Concl'd)

—And a Court cannot set aside its own decree except under s. 152 or on review A I R 1925 Pat 36 = 3 Pat 778 = 6 P L T 309 = 84 I C 320

—But it cannot amend certificate of sale:— 18 I C 725.

—S. 152 of the C P Code is confined to the correction clerical errors made by the Court itself, and has no concern with the mistakes of parties. An Insolvency Court has the same jurisdiction that the ordinary courts of law possess under the Civil Procedure Code to correct any mistake either of a clerk or of the parties themselves upon a question of fact, when a mistake is established. 51 I C 55 = 1 U P L R (H C) 69.

—It is wrong for Court to pass order describing person as appellant who was never an appellant before it. A I R 1923 All 119 = 20 A L J 980 = L R 4 A 53 Civ = 71 I C 424.

—Reversal of finding, if allowed. see 24 I C 831

## (2) When amendment will be allowed

## (1) Decree not in Conformity with judgment.

—The test for determination of the application for amendment under s. 152 of the Code of C P should be whether the decree is or is not in accordance with the intention of the Judge who decided the case. A I R 1931 Oudh 422 = 8 O W N 1121 = Ind Rul (1931) Oudh 417 = 134 I C 1909.

—Per Suhrawardy, J.—Though the word "may" used in S. 152, C P C apparently looks as if it is within the discretion of the Court to allow such amendment, there is another provision of the Code which is mandatory and which must be obeyed, that is, O 20, r. 6, which says that the decree shall agree with the judgment. Per Graham, J.—It is no doubt the general rule that a decree should be in conformity with the judgment. O. 20, r. 6 C P C, provides that "the decree shall agree with the judgment." At the same time S. 152 of the Code, which deals with the amendment of decrees and orders, is in its language discretionary, and it cannot be laid down as a hard and fast rule that amendment must be allowed as a matter of course in every case regardless of its particular facts. 36 C W N 97 = A I R 1932 C 563 (564 to 568) = 139 I C 528 = I R 1932 C 637.

—It is the duty of a Court to prepare its decree in accordance with its judgment, and if there is any variance between the two it must correct the decree so as to make it in conformity with the judgment. The duty primarily rests with the Court, and not with any interested party to apply

C. P. C. (1908) S. 152 (Contd)

## (2) When amendment will be allowed—(Contd)

## (1) Decree not in Conformity with Judgment—(Concl'd)

to that Court for amendment of the decree. 54 A 490 (495) = 1932 A L J 272 = 136 I C 817 = I R 1932 A 237 = A I R 1932 A 337 = A L R 1932 A 716.

—The remedy where a decree does not accord with the judgment is amendment of decree and not a suit to set it aside. 43 C 217 = 19 C W N 1228 = 31 I C 13.

—Where a decree wrongly drafted gives the decree holder only a charge on the property while the judgment gives a mortgage decree, the proper way is to apply to Court passing it to amend the decree as to accord with judgment. Appellate Court also can amend decree on appeal. (1915) M W N 914 = 31 I C 478.

—Amount payable by the plaintiff entered in a pre-emption decree was higher than that really payable by him. The plaintiff paid the amount really due from him within time fixed being *bonafide* ignorant of the error. On objection being raised by the defendant the decree had not been complied with the plaintiff applied under s 152 for amendment of the decree. The lower Court (after expiration of the period fixed for payment and without giving notice to the defendant) amended the decree. Held lower Court's order was correct. A I R 1925 Oudh 418 = 12 O L J 246 = 2 O W N 218 = 87 I C 987.

—Ordinarily where there is a discrepancy between the decree and the judgment and the decree-holder accepts payment of the amount due under the decree, he is not by that circumstance alone, debarred from taking proper steps to have the decree brought in accordance with the judgment. A I R 1929 Mad 839 (1929) M W N 729 = Ind Rul (1930) Mad 490 = 123 I C 355.

—Judgment intending decree to be in representative capacity—Personal decree drawn up—Amendment must be allowed. A I R 1924 Lah 621 = 76 I C 198.

## (2) Clerical or arithmetical mistakes.

—Lower Court fixing pleader's fee deliberately—High Court fixing a higher scale in second appeal—No clerical error. A L R 1933 L 60.

—Amendment of—Omission to specify particulars of properties at the foot of plaint—preliminary decree and final decree in terms of—Amendment to include specification—Can be allowed. A L R 1933 A 384 = A I R 1933 A 102 = 140 I C 113.

—Where wrong description of the mortgaged property is given through error or inadvertence in the mortgage-deed, and

## C. P. C. (1908) S 152 (Contd)

(2) When amendment will be allowed—(Contd)

(2) Clerical or arithmetical mistake—(Contd)

it is copied in the plaint and decree is based on the mortgage-deed it is open to the plaintiff to apply under s. 152 to have the description corrected. 10 C 538; A I R 1926 Mad 516; 12 M L J 96, distinguished 16 M 424; 22 I C 774; 62 I C 652; A I R 1924 Rang 104 referred to A I R 1931 Mad 260 = Ind Rul (1931) Mad 470 = 131 I C 6.

—Mortgage—Preliminary decree in—Misdescription of property in mortgage deed copied in plaint in suit and in—Rectification of preliminary decree—Suit for—Maintainability—Proper remedy of mortgagee in case of. See 62 M L J 350.

—A court has ample powers under S. 152 of the C. P. Code to add an order as to costs in the judgment after it has been pronounced. 57 I C 739.

—An application to correct a decree in the matter of costs be made under S. 152 C. P. C. 54 I C 821.

—Objection to decree passed by lower Appellate Court not taken in grounds of second appeal—Period for review having expired—No clerical or arithmetical mistake—Point cannot be raised by way of petition under s. 152 A I R 1922 Mad 192=15 L W 393

—Where clerical errors have crept into a decree the Court has got power to amend such clerical errors. It is not a preliminary requisite to the amendment of such decree that the pleadings in which the same errors had formerly appeared should be first amended. 16 M 101, 15 M L T 102 = (1914) M W N 107 = 22 I C 774.

—S. 152 applies to mistakes which have an origin not anterior to the filing of a suit; while S. 153 applies *prima facie* to amendments to be made while the suit is pending. Where it is necessary to go into evidence and try the matter out, a fresh suit would be the appropriate remedy. 8 N L R 13 = 14 I C 407.

—An error arising out of a discrepancy between a decree and judgment is practically a clerical error and, therefore, falls within the scope of S 152 of the C P Code, A Court can amend the decree of its own motion and it is the duty of Court to make such amendment whenever it becomes aware of variance in the decree or other clerical error. Applications under S. 152 are not governed by limitation. Act. Where a decree containing a clerical error is incorporated in the decree of an Appellate Court, it is the latter decree which must be corrected. 7 S L R 53 = 21 I C 540.

—Omission in decree not due to clerical or arithmetical mistake—Section 152 does not apply. A I R 1923 Nag 109 = 67 I C 310.

## C. P. C. (1908) S 152 (Contd)

(2) When amendment will be allowed—(Contd)

(2) Clerical or arithmetical mistakes—(Contd)

—Court has power to amend clerical errors which had crept into a decree by following similar errors in plaint without causing the pleadings to be amended. It is also competent to amend error arising from some accidental slip or omission. A I R 1923 Lah 147 = 73 I C 679.

—Section 152 is the widest possible law justifying the amendment of misdescription of lands in the plaint. A I R 1923 All 349 = 21 A L J 328 = L R 4 A 184 Civ = 72 I C 483.

—Clerical error occurring in plaint in the description of certain property—Error repeated in subsequent record by mistake—High Court can rectify that error. 14 L W 445 = 62 I C 652.

—Office overlooking Court's order directing calculation of redemption amount—Mistake was covered by s. 152. A I R 1924 All 127=74 I C 842.

—Court can correct mistake in final form in order due to original mistake in party's application A I R 1924 All 520 = 22 A L J 215 = L R 5 A 102 Civ=78 I C 166

—If the error has been committed deliberately s. 152 cannot be invoked for the purpose of correcting it. A I R 1924 Oudh 408 = 78 I C 96 = 11 O L J 227 = 80 I C 833.

—A clerical error can be corrected even after dismissal of the appeal in the interest of justice A I R 1923 Pat 218 = (1923) Pat 46=81 I C 295 But see 11 Pat 409 = 1532 Pat 238 = 138 I C 903.

—Dower decree making all defendants liable jointly and severally for whole dower debt can be amended. A I R 1924 All 690 = L R 5 A 467 Civ = 82 I C 627.

—Where application by judgment-debtor under s. 152 on the ground that certain sum incurred as expense in summoning witnesses, was wrongly included in the decree was refused to be considered on its merits for the reason that the decree as prepared had been signed by the judgment-debtor's pleader, Court was held to have failed to exercise jurisdiction vested in it by law. A I R 1925 Oudh 373 = 12 O L J 141 = 87 I C 333.

—Award made on the basis of certain figures contained in documents relied on by both parties—Decree passed without objection—Mistake in figures subsequently discovered—Application for correction of mistake by party affected was held incompetent A I R 1927 Mad 720 = 53 M L J 38 = (1927) M W N 242 = 103 I C 829.

—Nothing prevents the Court from doing justice in an appropriate case where mistakes arise by reason of copying an erroneous document into the plaint. Where wrong

C. P. C. (1908) S. 152 (Contd)

(2) When amendment will be allowed—(Contd)

(2) Clerical or arithmetical mistakes—(Contd)

description of the mortgaged property is given through mistake or inadvertence in the mortgage deed, and it is copied to plaint and decree based on the mortgage, it is open to the plaintiff to apply under s. 152 to have the description corrected, A I R 1931 Mad 260 = Ind Rul (1931) Mad 470 = 131 I C 6

—Section 152 deals with amendments of clerical errors in orders or decrees of the Court itself which are drawn up and which do not properly represent what the Court decides. A I R 1927 All 585 = 102 I C 124

—A plaintiff who obtains a decree for specific share is not entitled the more merely because there is an arithmetical error in the decree. If there is such an error and the plaintiff's interest is prejudiced thereby the proper course is to get the mistake rectified by an application under S. 155. Where however, the operative part of a decree awards a particular share to the plaintiff but the detail attached to the decree contains a mistake in calculation, the error in the detail may be disregarded as surplusage, 9 I C 433.

—A Court should correct its own mistake and not drive the parties to a subsequent suit. Where in execution of a decree the Court officer delivers possession with the knowledge of the judgment debtor of lands not covered by the decree the court is bound to correct the mistake on an application made by the judgment-debtor within the period of limitation. 49 I C 948.

—A judge owing to a clerical error recorded an order dismissing the suit instead of decreeing it. The decree was passed in accordance therewith. *Held*, that the judge had jurisdiction to correct the error under S. 152 C P C. 29 I C 144.

—When certain clerical and arithmetical errors committed by the court below have been repeated by the the High Court in drafting the order *Held*, that the mistakes ought to be corrected. 1 L W 298 = 24 I C 283.

—Where in a mortgage-deed, wrong survey number for the field mortgaged was given, and the error was also made in the suit on that mortgage and repeated in the plaint in the pleadings, in the first decree and in the decree absolute, and where the mistake was discovered only when the decree was being executed by the Collector. *Held*, that a suit would lie for the rectification of the decree by substituting the correct survey number in the place of the wrong number. But the relief prayed for being an equitable remedy coming under s. 31 Specific Relief Act, 1877, the amendment should, if at all, be made so far as it can be done without prejudice to rights which third parties may have acquired

C. P. C. (1908) S. 152 (Contd)

(2) When amendment will be allowed—(Contd)

(2) Clerical or arithmetical mistakes—(Contd)

in good faith or for value. Scope of ss. 152 153 Civ Pro. Code 1908 pointed out. 8 N L R 13.

—Where the mistake in the plaint was due to a clerical mistake *held* that the preliminary and final decrees ought to be amended. No amendment of the plaint is necessary as it clearly prays for a sale of the property entered in the mortgage deed which was in suit and which was made part of the plaint. 140 I C 113 (1) = I R 1932 A 608.

—Defendant against whom no relief claimed in plaint—Decree also not granting any relief against him—Amendment of, by grant of relief against him—Jurisdiction as to see 11 P 882 = 63 M L J 694 (702) (P C.)

—When a judgment awards costs to a party, it implies costs deemed to be such according to rules. If a decree includes costs not legally taxable it cannot be said to be in accordance with the judgment. 54 A 490 (495) = 1932 A L J 272 = 136 I C 817 = I R 1932 A 247 = A I R 1932 A 337 = A L R 1932 A 716.

(3) "Accidental Slip or Omission"

—Mortgage decree omitting one item of property by oversight—No dispute as to what was included in mortgage deed—Error could be corrected under s. 152. A I R 1924 Rang. 104 = 74 I C 1020.

—Final decree omitting clause regarding interest in the preliminary decree for sale—Omission can be rectified at any time by Court. A I R 1926 Oudh 223 = 91 I C 29.

—Court can add a necessary direction in its judgment accidentally omitted after the judgment is signed. A I R 1927 Pat 25 = (1925) Pat 323 = 8 P L T 81 = 97 I C 386.

—Accidental omission in decree—Appeal is not necessary for amendment—Omission to appeal does not bar application for amendment where first application is refused second application is competent. A I R 1927 Rang 57 = 4 Rang 347 = 98 I C 799.

—Where in decree passed in favour of mortgagee omitted to mention that the amount was recoverable by sale of mortgaged property words "by sale of house mortgaged" can be added on application made for amendment. A I R 1928 Lah 636 = 108 I C 622.

—Where omission was not a deliberate one but was merely inadvertent, the judgment and the decree based on it could be amended even though the right of appeal open to petitioner was not availed of. A I R 1930 Lah 210 = Ind Rul (1930) Lah 607 = 125 I C 335.



C. P. C. (1908) S. 152 (Contd.)

(2) When amendment will be allowed—(Contd.)

(3) "Accidental Slip or Omission"—(Concl'd)

--S. 152 applies both to judgments and decrees and a slip in the judgment which lies in including wrong property in judgment, can be corrected and for that reason the map also can be revised in order to avoid the abuse of the process of the Court under s. 151. A I R 1929 All 147=50 A 859=Ind Rul (1929) All 291=114 I C 867.

--Provisions of s. 152 empower Court not only to correct clerical or arithmetical mistakes but also errors arising therein from any accidental slip or omission, which may be done at any time and even without application by any of the parties. A I R 1929 All 337=51 A 672=(1929) A L J 505 = Ind Rul (1929) All 991=119 I C 287.

--Where in a suit for possession the property was described as a 2-anna share; court-fee was paid thereon and all the evidence and argument were directed on the 2-anna share, but owing to an accidental slip in the relief portion in the plaint the property was described as 2-pie share and a decree also was made for the 2-pie share. *Held*, that the clerical error was merely a slip and the court has under S. 152 of C P Code power to amend the error through out the record and the High Court directed in revision the amendment refused by the lower court. 12 A L J 185=23 I C 344

(3) Inherent powers of Court to amend decrees and orders.

--The Courts in India have inherent powers to amend or vary decrees so as to bring them into accord with the judgment even if the amendments do not fall within S. 152--37 Cal 649 referred to. 92 P R 1919=52 I C 574; see also 23 I C 96; and 24 C 759; and 37 C 649=7 Ind Cas 876.

--Under s. 152, read with s. 107 the Appellate Court is entitled, while appeal is pending to correct any clerical or arithmetical mistake in the decree of the trial Court. A I R 1928 All 458=26 A L J 1923=111 I C 245.

--And the Court has inherent power to correct error in judgment that certain party being *pro forma* defendant was not liable for costs. A I R 1926 Lah 664=97 I C 66.

--Where property is sold at a Court sale and made over to the auction-purchaser, the Court which has ordered the sale, cannot set it aside under its inherent powers on the ground that the sale was ordered by a mistake for a sum larger than what was due under the decree. A I R 1925 Bom 389=27 Bom L R 657=89 I C 569.

C. P. C. (1908) S. 152 (Contd.)

(3) Inherent powers of Court to amend decrees and orders—(Concl'd)

--Award--Decree on foot of--Accidental mistake in both--Amendment of award and decree in case of--Power of--Court has inherent power. See 90 W N 801.

--Mortgaged property--Misdescription of, in mortgage deed--Error repeated in plaint in suit on mortgage, preliminary and final decrees therein, in sale certificate issued to purchaser at sale held in execution of decree, and in dakhnama, and discovered only when auction-purchaser applied to Revenue Court for mutation in respect of purchased property--Correction of error in all the said documents can be allowed. 1932 A L J 784=A I R 1932 A 587=I R 1932 A 567=139 I C 491=A L R 1932 A 979.

--Order for return of appeal for presentation to proper Court--Full costs of appeal awarded by--Remedy of appellant in case of--Review of judgment is proper--Application under S. 152 not proper remedy--*Quare* whether error could not be rectified under S. 151. 54 C L J 555=137 I C 474=I R 1932 C 322=A I R 1932 C 349.

--Judgments, decrees or orders--Clerical or arithmetical mistake or error arising from accidental slip or omission in Court has inherent power to correct where error is capable of being corrected on appeal no bar to exercise of such power. 90 W N 633 (637).

(4) When amendment will be refused.

--An amendment of decree should not be allowed to prejudice the rights of third parties. (1928) A W N 547, referred to. A I R 1931 Mad 399=32 L W 919=(1930) M W N 1152=Ind Rul (1931) Mad 338=54 M 184=60 M L J 721=129 I C 818.

--Court setting aside *ex parte* decree--becomes *functus officio* after passing the order--Court cannot subsequently interfere with the order at the instance of the assignee. A L R 1933 O 543=A I R 1933 O 365=19 O W N 794=145 I C 302.

--When a preliminary decree for sale was made in the form prescribed by Appendix B, Form No. 4 of the Code of Civil Procedure which was in force at the time the decree was passed, retaining Cl. (3) of Form No. 4 and the Judge signed the decree which was prepared in that form, the presumption is that when he signed the decree he satisfied himself that it had been prepared in accordance with the judgment. A L R 1933 O 410=A I R 1933 O 466=146 I C 310=100 W N 884.



C. P. C. (1908) S. 152 (Contd)

(4) When amendment will be refused—(Contd)

—Where third parties have acquired rights, even accidental error should not be amended. A I R 1924 Oudh 408=78 I C 96=11 O L J 227=80 I C 833.

—Court cannot amend decree when it is in conformity with the judgment, even if there is an error apparent on the face of the judgment. A I R 1924 Mad 225=18 L W 876=33 M L T 221=76 I C 786.

—Exercise of the power to amend under s. 152 is discretionary and necessarily so when no period of limitation is provided for application for its exercise. An application for amendment should therefore, be rejected as too late, if the rights of third parties acting in good faith have intervened. A I R 1923 Mad 57=16 L W 623=43 M L J 559=(1922) M W N 731=32 M L T 98=69 I C 977.

—Amendment of decree prejudicing rights of third parties should not be allowed. A I R 1931 Mad 399=54 M 184=32 L W 919=Ind Rul (1931) Mad 338=(1930) M W N 1152=129 I C 818.

—Where in a mortgaged suit a judgment contains two contradictory directions as regards the decree in a mortgage suit and the decree is technically in accordance with the earlier and operative part of the judgment, no application for amendment of decree lies. A I R 1930 Lah 589=Ind Rul (1930) Lah 614=125 I C 374.

—Where the minor defendant was represented in suit by mother, but in the decree the name of the father instead of mother was inserted as guardian through oversight and the same mistake was repeated in the application for execution: *Held*, that the mother's name cannot be substituted for that of father by amending decree in execution. A I R 1928 Mad 1057=113 I C 663.

—Where judgment contains no clerical or arithmetical mistake and there is no error arising from any accidental slip or omission the judgment and decree cannot be amended. 108 I C 737 (Lah).

—Decree in conformity with judgment cannot be amended. A I R 1927 Pat 405=9 P L T 15=103 I C 298.

—Decree in conformity with judgment can be amended. A I R 1927 Mad 435=25 L W 102=(1927) M W N 38=38 M L T (H C) 24=99 I C 655.

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C. P. C. (1908) S. 152 (Contd)

(4) When amendment will be refused—(Contd)

—Decree drawn up in pursuance of judgment being on the face of it in conformity with it—Successor of Judge cannot amend decree so as to bring it in conformity with supposed intention. A I R 1926 Cal 1100=96 I C 195.

—The exercise of the power to amend a decree ought not to be exercised where an application to amend is made after the rights of third parties acting in good faith have intervened without those parties being made parties to such application. A I R 1923 Mad 57=43 M L J 559=(1922) M W N 731=16 L W 623=32 M L J 98=69 I C 977.

—Where the decree is in conformity with judgment, it cannot be amended, but the remedy of the party aggrieved is by way of appeal or review. 3 L W 499=34 I C 787.

—Where in a suit by principal against agent for accounts, a decree directing appointment of Commissioner to take accounts on application by the plaintiff, is passed, the decree cannot be amended by granting leave to agent to apply for appointment of Commissioner in case of plaintiff failing to apply. A I R 1932 L 619=140 I C 15.

—Court has power to award interest on costs in decree even though judgment was silent on the point, and the decree cannot be allowed to be amended in second appeal on that account. 35 I C 218.

—A High Court cannot amend a decree which is the subject-matter of an appeal to the Privy Council. 32 I C 194 [But see 11 C L J 155 Ed]=5 I C 723.

—Erroneous description of property in the Schedule to the plaint, copied into the decree—No variance between judgment and decree—Amendment, if allowable 28 I C 920.

—Where a decree for foreclosure was wrongly passed instead of for sale, it cannot be amended at the instance of the assignee of the decree, if neither the decree-holder nor the judgment-debtor had applied for amendment before the assignment. 22 I C 935=7 L B R 81.

—A decree in which costs is assessed on wrong principle cannot be amended on that ground alone, and the proper remedy is way of appeal or revision. 25 P W R 1913=47 P R 1913=17 I C 418.

## C. P. C. (1908) S. 152 (Contd)

## (4) When amendment will be refused—(Concl'd)

—Where mistake in the decree is due to omission of the Court to amend the plaint by substituting the legal representatives of the deceased on record, the decree and all subsequent orders were discharged, and the plaint was ordered to be amended and the suit tried de novo. 16 C L J 571=16 I C 58.

—A decree in conformity with judgment cannot be amended by adding the words "with interest" without at the same time amending the judgment to that effect. 11 I C 896.

—Where a decree of lower Court is affirmed in appeal the decree can be amended only if there is variance between the judgment of the appellate Court and its decree. 16 A L J 451=46 I C 376

## (5) Appeal, revision and review.

## (1) Appeal.

—Where a decree is amended appeal lies from amended decree alone even if it attacks on original decree. A I R 1931 Cal 576 = 35 C W N 251 = Ind Rul (1931) Cal 699 = 133 I C 571.

—No appeal lies against order amending decree nor can order directing amendment be challenged in appeal against amended decree. Ind Rul (1929) Lah 14 = 120 I C 174 (Lah) See also—A I R 1927 Lah 68 = 98 I C 863; A I R 1926 Lah. 664 = 97 I C 66; A I R 1923 Lah 147 = 31 I C 679. 1 U P L R (H C) 70 = 54 I C 387.

—Application challenging whole system of calculation adopted by Court. No allegation that there was any arithmetical or clerical mistake—Court purporting to act under s. 152—Order is really under O XLVII and not under s. 152 and so is appealable. 3 Lah L J 341 = 4 U P L R (Lah) 54 = 66 I C 992. See also A I R 1921 Lah 250.

## (2) Revision.

—Order amending a decree is not appealable but subject to revision. A W N 1885 256. See also 1 M L J 45; 24 P R (1911) = 10 I C 850 = 56 P W R 1911 = 186 P L R 1911, but see A W N 1891 35, 16 M 424 7 A 411 = A W N 1885, 88 (Mahmood, J Contra).

—Where lower Court rejects an application for amendment of decree, the Chief Court can interfere in revision A I R 1931 Qudh 422 = 8 O W N 1121 = Ind Rul (1931) Qudh 417 = 134 I C 1009.

## C. P. C. (1908) S. 152 (Contd)

## (5) Appeal, revision and review—(Contd)

## (2) Revision—(Concl'd)

—Mortgage suit—Wrong description of mortgaged property in plaint—Preliminary and final decrees—Amendment refused by Trial Court—Discretion improperly exercised—High Court can interfere. A L R 1933 O 228.

—S. 152 applies both to judgments and decrees. An order refusing to make correction is revisable. A I R 1929 Lah 400.

—Where Court wrongly declines to amend decree, it is failure to exercise jurisdiction vested in the Court, and the High Court can interfere in revision under s. 44 Punjab Courts Act. A I R 1929 Lah 664 = 30 P L R 363 = Ind Rul (1929) Lah 414=115 I C 542. See also 37 All 323 = 13 A L J 449 = 29 I C 50

—The Chief Court will not interfere in revision with an order of the lower court refusing to amend a decree on the ground of the application being made long after the passing of decree. 7 P L R 1915 = 32 P W R 1915 = 27 I C 639.

—Where District Munsif when shorthand transcription reached him entirely changed the effect of what he dictated in open Court the revision was held incompetent. A I R 1923 Mad 663 = 18 L W 105 = (1923) M W N 354 = 72 I C 688.

## (3) Review.

—Order amending decree without giving opportunity to party against whom amendment was to operate to show cause against it is open to review. A I R 1926 All 384 = 48 A 281 = 24 A L J 266 = 94 I C 877.

—Where in a petition for amendment of the decree, the judgment is also attacked the petition is in effect a petition for review as well as a petition for the amendment of the decree. 5 Pat L J 253=1 Pat L T 219=58 I C 510.

## (6) Amendment and limitation.

—The order allowing an amendment of a decree under S 152 C P C is an "order" and not a "decree". Therefore an application to set aside the same is not governed by Art. 164 but by Art. 181, Sch. I, Limitation Act. A L R 1933 R 328=A I R 1933 R 264=145 I C 823.

## (7) "At any time"

—There is no limitation for an application to amend the decree. 10 M 51. See also 12 P R 1897 = 21 I C 259.

C. P. C. (1908) S. 152 (Contd)

(7) "At any time"—(Contd)

—Mistake in lower Court's decree discovered only after decision in appeal—Application for amendment filed in Appellate Court should not be dismissed merely because mistake was not brought to notice when appeal was heard. A I R 1929 Mad 830 = (1929) M W N 729 = Ind Rul (1930) Mad 499 = 123 I C 355.

—Although there is no limitation for a case under s. 152 no amendment should be allowed where laches may disentitle a party to relief. A I R 1928 Nag 149 = 109 I C 727.

—Correction involving payment of larger amount should not be allowed long after satisfaction was recorded. A I R 1926 Mad 516 = (1926) M W N 180 = 50 M L J 655 = 94 I C 453.

—Court is not bound to grant application for amendment in every case Court can dismiss application filed 3 years after full satisfaction of mortgage decree. Per *Daniels J*—Court cannot entertain application under s. 152 where money decree is finally satisfied and discharged. A I R 1925 All 556 = 23 A L J 518 = L R 6 A 423 Civ = 88 I C 396.

—Error may be amended though 20 years old. A I R 1924 Oudh 408 = 78 I C 96 = 11 O L J 227 = 80 I C 833.

—Decree against the legal representative of the deceased defendant making him personally liable is not competent to a Court to direct when the attention of the Court is drawn to the error, although at a rather late stage, the mistake can be remedied. A I R 1923 Bom 414 = 80 I C 180.

—No lapse of time would disentitle the Court to make correction under s. 152. A I R 192 Cal 895 = 28 C W N 873 = 80 I C 55.

—Errors in judgments and decrees can be corrected at any moment. A I R 1921 Oudh 190 = 8 O L J 416 = 66 I C 693.

—An order under S. 152 can be made in the suit itself. 16 C L J 517 = 15 I C 719.

—Obvious slip or mistake—Application for amendment, when lies 13 I C 113.

—Decree—Error in—Amendment of, in execution—No prejudice. 16 A L J 262 = 44 I C 998.

—Court can amend a record even after an appeal is brought. A I R 1924 Pat 528 = 2 Pat. L R Civ. 6 = 5 P L T 588 = 78 I C 794.

C. P. C. (1908) S. 152 (Concl'd)

(8) Compromise decree—Amendment in case of.

—Order of Court recording Compromise, but failing to give effect to compromise, owing to negligence, can be corrected by Court under s. 152 13 P L T 576 = A I R 1932 P 321 (322-3) = I R 1932 P 284 = 139 I C 903 = A L R 1932 P 734, see also 21 I C 115.

—Where a provision for a personal decree was improperly added in a compromise decree; *Held*, that the Court had power under s. 152, C P C to amend the decree by scoring out the clause providing for a personal decree. A I R 1931 Oudh 422 = 8 O W N 1121 = Ind Rul (1931) Oudh 417 = 134 I C 1009.

—Consent decree cannot be amended without consent. A I R 1931 Cal 51 = Ind Rul (1931) Cal 427 = 57 C 1143 = 130 I C 907.

—Compromise decree—Judgment-debtor applying for amendment under s 152—Decree holder cannot plead that compromise was obtained by fraud. A I R 1929 Lah 400.

—Application to amend consent decree on the ground of fraud is outside s 152. A I R 1929 Cal 470 = 33 C W N 883 = Ind Rul (1930) Cal 461 = 124 I C 525.

—Where suit is compromised in appeal but the judgment omitted certain terms of compromise, Court would pass an order correcting the omission under s. 152. A I R 1928 Lah 352 = 9 Lah. 176 = 30 P L R 135 = Ind Rul (1929) Lah 849 = 119 I C 257.

—According to the compromise arrived at by the parties to a suit, the plaintiff was to be granted a decree realizable from the assets of a deceased person in the hands of A. But the Court in passing the decree made A personally liable if the decree could not be realized from the assets. *Held, obiter* that the error was due to accidental slip and the Court itself could have corrected it under s. 152, A I R 1929 Lah 254 = Ind Rul (1929) Lah 562 = 116 I C 706.

—Under compromise terminating suit for partnership accounts, S was held entitled to a three annas share in the partnership and it was further agreed that another sharer should transact business of the firm, balance accounts and render them when asked. In the decree that followed it was ordered and declared in terms of compromise that S was entitled to three annas share in the property belonging to the firm S sought to execute the decree praying that he should be put in joint possession of his share and if the decree be considered as not embodying

## (8) Compromise decree—Amendment in case of—(Conclud)

terms of contract it should be amended under s 152 No appeal against the decree was filed, nor any application for review made within time. *Held*, that the decree was in accordance with the terms of the compromise But even supposing that the decree was faulty as not being according to the terms of the compromise, it could not now be amended, as time for such amendment as to make it capable of execution had passed by. A I R 1929 Nag. 34 = Ind Rul (1929) Nag. 97 = 115 I C 161.

—Consent decree—No power to vary when there is no difference between compromise petition and decree. 36 I C 239.

## (9) Court by which amendment can be made.

—Lower Court can cure mistake in spite of appeal by parties. A I R 1924 All 127 = 74 I C 842.

—But after confirmation of lower Court's decree in appeal, jurisdiction of that Court to amend decree ceases. A I R 1929 Mad 830 = (1929) M W N 729 = Ind Rul (1930) Mad 499 = 123 I C 355; see also 4 U B R 1 = 63 I C 799; and A I R 1921 All 130 = 19 A L J 375 = 62 I C 910; and 22 M 293; and 6 C L J 542; and 10 A 51; and 32 P R 1896; and 59 P R 1900; and 182 P L R 1905 = 74 P R 1905; and 55 I C 305; and 31 M L J 438 = 35 I C 891; and 28 I C 586; and 45 I C 246; and 42 I C 970; and 10 M L J 216; and 11 A 267, F B; and 11 C L J 159 = 5 Ind Cas 261; and 6 C P L R 142; and 5 I C 723. So also where Lower Court's decree is superseded by that of Appellate Court. A I R 1921 U B 5 = 4 U B R 1 = 66 I C 799.

—Where an appeal is dismissed for default, the dismissal does not amount to a confirmation of the decree appealed from and that decree continues to be the final decree in the case, so that an application for amendment of the decree in such a case must be made to the Court which passed the decree appealed from and not to the Court which dismissed the appeal. 43 I C 360.

## (9) Court by which amendment can be made—(Contd)

—The dismissal of an appeal on the ground that no appeal lay cannot be regarded as confirming the decree of the lower court or as a decree which supersedes the decree of that Court, and the lower Court has the power to amend its decree. 16 I C 933.

—Privy Council substantially altering decree of lower Appellate Court and restoring that of lower Court—Clerical error can only be corrected by His Majesty in Council. A I R 1930 Nag 138 = Ind Rul (1930) Mad 63 = 120 I C 735.

—Court in s 152 does not mean presiding Judge but the Court whoever may be the presiding officer. 2 Pat L T 296 = 63 I C 840.

—The Code itself makes a distinction between cases where an appeal is *dismissed* summarily under O. 41, r. 11 (1), and cases where the appellate Court, after hearing the parties, affirms, varies or reverses the decree appealed from (contrast the language of O. 41, r. 11, with that of O. 41, r. 32). Where an appeal is dismissed under O. 41, r. 11, it leaves the decree of the lower Court untouched and the decree remains the decree of the lower Court. 11 P 409 = 13 P L T 484 = 138 I C 903 = A I R 1932 P 238 = I R 1932 P 193 = A L R 1932 P 667.

—High Court decree affirmed on appeal to P C—Amendment of—High Court—Power of—Court—fee on memo of appeal to High Court paid by opposite party included twice in High Court decree and mistake discovered in proceedings in High Court for execution of decree—Amendment of decree by correction of error—Power of—High Court has. 36 C W N 665.

—Where it was objected in a revision petition filed against an order of the Court below amending its decree that the decree of the Court below having been affirmed on appeal by the High Court the amendment sought must be of the decree of the High Court and not of that of the Court below the revision petition was treated as an application made to the High Court for the amendment of its own decree to obviate the objection urged. 54 A 490 (494) = 1932 A L J 272 = 136 I C 817 = I R 1932 A 237 = A I R 1932 A 337 = A L R 1932 A 716.



C. P. C. (1908) S. 152 (*Contd*)(9) Court by which amendment can be made—(*Concl'd*)

—A suit was decreed in part. An appeal by plaintiff against that portion of the decree which dismissed the suit in part was dismissed. *Held* that an application by the plaintiff to amend the decree to bring it in conformity with the judgment should be made to the trial Court inasmuch as it relates to a matter which was outside the scope of the appeal.

57 I C 710.

—It is open to the successor in office of a judge to rectify an accidental error the judgment of his predecessor. If the Judge declines to do the High Court might interfere in revision. 18 A L J 501 = 55 I C 963 = 2 U P L R (All) 195

—A Court has jurisdiction to correct any clerical error or accidental slip occurring in its own order notwithstanding the pendency of an appeal therefrom in a superior court. The proper Court to correct clerical errors in a decree or order is the Court in which the errors were made and not the Court wherein at the time of the prayer for amendment an appeal from the decree or order is pending. 7 L W 8 = 44 I C 248.

—An error in its final decree copied from High Court's preliminary decree cannot be amended by District Court. 31 I C 320.

—Erroneous order—Single Judge of High Court—No power to set aside order of predecessor except on application for review. see. 44 Cal 28 = 38 I C 584.

—Decree, Amendment of—Small Cause decree—Application to be made to Small Cause Court and not High Court whether latter refuses to interfere in revision. see 1 Lah 342 = 58 I C 630.

## (11) "May"

—Correction of error is discretionary—party has no right to claim it. A I R 1925 All 187 = 47 A 44 = L R 5 A 753 Civ = 82 I C 1030.

—A Court is not bound, on an application under S 152 C P C to correct its decree. It has a discretion to make amendment or not A L R 1933 O 597 (598) = A I R 1933 O 425 = 10 O W N 988.

—There is no right in any party to have a clerical or arithmetical mistake corrected; the matter is left to the discretion of the Court and the discretion has to be exercised in view of the peculiar facts of each case A L R 1933 O 410 = A I R 1933 O 466 = 146 I C 310 = 10 O W N 884.

C. P. C. (1908) S. 152 (*Concl'd*)

## (14) Practice and procedure.

—Decree—Amendment of—Appeal pending—Copy of amended decree to be attached to memo of appeal. see 43 I C 772.

—It is open to an appellant, in an appeal against the final decree in a partition-suit, to question the correctness of the preliminary order or decree for partition, when no appeal was preferred against such order within the time allowed by law. 10 Bom L R 514.

## (15) Miscellaneous cases.

—Scope of Court's power to add to or alter judgment—Extension of time fixed in the decree. 19 I C 347.

—Plaintiff dying during pendency of appeal from interlocutory order—Legal representative brought on record—Appeal disposed of—Legal representative carrying on suit—Decree drawn up against original plaintiff. No joinder of the legal representative was necessary in the suit before decree was passed, as the Court could have brought it in conformity with the appellate decree which contained the names of the legal representatives of the plaintiff. A I R 1930 Sind 96 = Ind Rul (1930) Sind 20 = 120 I C 516.

—A decree ordered and declared that S was entitled to three annas share in the property belonging to the firm. S sought to execute the decree praying that he should be put in joint possession of his share and if the decree were considered as not embodying terms of contract it should be amended under S. 152. No appeal against the decree was filed, nor any application for review made within time. *Held*, that the decree was only declaratory and could not therefore, be executed. A I R 1929 Nag 34 = 115 I C 161.

—The Board has jurisdiction to recommend the alteration of a former Order in



mouncil on the ground that by inadvertence it does not give effect to the intention of the Board as expressed in their judgment. Such a jurisdiction was exercised in order not to defeat the manifest rights of the defendant which were intended to be effectuated by the former decision of the Board. A I R 1931 P C 104 = 35 C. W. N 583 = (1931) M W N 620 = Ind Rul (1931) P C 117 (P C) = 131 I C 309.

## C. P. C. (1908) S. 153

—See Under C P C O 6 r. 17.

—S. 153 has no application where an order is passed dismissing an application under O. IX r 13 for default as the dismissal order is not an error of defect in the proceedings, though it may be an erroneous order as made on the merits. A I R 1922 Pat 121 = (1922) Pat 5.

—A clerical error in the plaint about description of property can be corrected by the High Court even after decree is passed in whatever subsequent record it is repeated by mistake. 14 L W 445 = 62 I C 652.

—Party should not be punished for inapt procedure when its right is clear, and there can be no misunderstanding, surprise or prejudice to the other side. Where parties, and the Court, have understood real meaning of application it ought to be amended in suitable form. A I R 1921 All 321 = 19 A L J 549 = 63 I C 148.

—Rules of Courts are only provisions intended to secure the proper administration of justice and they should therefore be subordinate to that purpose so that full powers of amendment must be enjoyed and should be always exercised liberally but none-the-less one distinct cause of action cannot be substituted for another, nor can the subject-matter of the suit be changed by amendment. A I R 1922 P C 249 = 24 Bom L R 682 = 30 M L T 28 = 48 I A 214 = 48 C 832 = 4 U B R 30 = (1921) M W N 396 (P C) = 63 I C 914.

—Notice by Court should be given to judgment debtor of the auction-purchaser's application to amend a sale certificate, which is a solemn document and could not easily be impugned, and it is acting with material irregularity if such notice is not given. A I R 1922 Mad 63 = (1922) M W N 130 = 16 L W 760 = 65 I C 732.

—Where a mistake as to description of village in which mortgage property is situate is found in appeal the Appellate Court should allow amendment of plaint to rectify the mistake. A I R 1922 All 81 = 20 A L J 159 = L R 3 A 115 = 66 I C 208.

—An amendment asked for, before any prejudice could have arisen and which would raise no new question of limitation should be allowed. A I R 1922 Mad 417 = 43 M L J 184 = 16 L W 178 = (1922) M W N 514 = 31 M L T (H C) 135 = 70 I C 743. But see 21 I C 609 = 1913 M W N 1003 = 14 M L T 513.

—Where the respondent was dead before presentation of appeal and the appellant applied to substitute the names of his legal representatives. *Held*, that the application could not be sustained. The proper course was for appellant to file another appeal against the legal representatives and to have the delay excused. A I R 1924 Mad 56 = 18 L W 54 = (1923) M W N 408 = 45 M L J 231 = 75 I C 739.

—Where the respondent was found to have died before the presentation of appeal and an application was made to substitute the names of his legal representatives. *Held*, that an appeal against a person who has ceased to exist cannot be presented and that another appeal should be filed and that appellant should have the delay excused. A I R 1924 Mad 56 = 45 M L J 231 = 18 L W 54 = (1923) M W N 408 = 75 I C 739.

—Original Court can allow amendment of pleading during pendency of the suit, but not after a decree is passed and has become final. A I R 1924 Bom 166 = 25 Bom L R 888 = 77 I C 171.

## C. P. C. (1908) S. 153 (Contd)

—Any defect or error in any proceeding in suit can be amended. An application not signed by the parties, though it ought to have been should be allowed to be signed by way of amendment. A I R 1924 All 804 = L R 5 A 565 Civ = 82 I C 65.

—It is an abuse of the process of Court to overvalue a suit to get round a previous decision and the plaint should be returned for presentation to proper Court. A I R 1925 All 142 = L R 5 A 709 Civ = 83 I C 1.

—Pending the decision of appeal from it the decree of the trial Court remains in force and can be amended by the Court passing it. The jurisdiction of the Trial Court to interfere with the decree ceases only when decree is passed in appeal. A I R 1926 All 304 = 48 A 224=24 A L J 149=92 I C 264

—The filing of an appeal is included in the term "any proceeding" A I R 1930 All 131 = Ind Rul (1930) All 440 = 123 I C 824.

—A owed money to B and B to C. A paid certain sum to C on behalf of B with his authority and C gave credit for the amount to B and gave A a letter of indemnity against losses. The letter was discharged by B; arbitration was held to settle account between B and C after giving B credit for sum paid by A. B subsequently sued A for his debt and on arbitration A had to pay the amount paid to C the arbitrator having failed to give A credit for it. A then sued C. Held that the suit is entirely misconceived and subsequent amendment of plaint should not be allowed. A I R 1920 P C 121.

—Where an appeal is presented against a person who was dead at the date of presentation the cause title may be amended or the appeal memo may be returned for amendments and re-presentation. Although appeal may be incompetent the Court dealing with it is acting in a proceeding in a suit and has full power to direct amendment of the memo of appeal. A I R 1925 Mad 1210 = 49 M L J 590 = 49 M 18 = 23 L W 418. Overruling 1924

Mad 56

## C. P. C. (1908) S. 153 (Concl'd)

—Amendment—Judgment and decree—No difference between—No power amend though error apparent on the face of judgment—Remedy by review or appeal. See 3 L W 499=34 I C 787.

—Amendment of pleadings—Power of court—Practice see. 27 M L J 25=24 I C 195.

—The courts are allowed by the C P C ample power to amend, and the High Court is slow to interfere with their exercise of discretion, but no Court has power to allow a new cause of action to be introduced into a plaint after the cause of action has become barred by limitation. Where the amendment amounts to a mere correction of the description of the property, the amendment is within the power of the court to make and when so made limitation must be reckoned as from the date of presentation of the plaint. 33 A 616 = 8 A L J 636 = 10 I C 476.

—After the decree of the Original Court has merged in the decree of the Appellate Court the only Court which is competent to entertain an application for amendment of the decree is the Court of appeal. 15 C L J 432 = 17 C W N 133=12 I C 669.

—If one of the plaintiffs is wrongfully described in the plaint as a minor and has not himself signed and verified the plaint, he is not on the account to be considered not a party. Want of signature and verification does not entail the rejection of the plaint as such verification and signature can be supplied at any stage of the proceedings. The plaintiff who has not signed or verified cannot be considered to be a new party when he signs or verifies the plaint, so as to attract the application of S. 22 of the Limitation Act. 17 I C 580=25 M L J 174=(1912) M W N 1207.

—Amendment of execution petition—Attachment ceasing on dismissal of execution application. Subsequent application only for sale defective—Defect, if can be cured. see 23 I C 883.

## C. P. C. (1908) S. 153 (Contd.)

—Amendment of proceedings in suit for ends of justice—Power of, not confined to power under S. 152 but exercisable under. Ss. 151 and 153, See 1932 A L J 784.

—Amendment of execution application on appeal See 38 Mad 677 = 15 M L T 232 = 23 I C 515.

—*Held*, on the merits, that the learned Munsiff did not exercise his authority which he was bound to exercise in view of S. 153 C P C Ss. 152 and 153 are very salutary provisions of law and are meant to invest the Courts with authority to see that the object for which the Court exists is carried out and that the merest technicality may not be allowed to stand in the way of substantial justice A L R 1933 A 121 (122) = 55 A 216 = A I R 1933 A 295 = 145 I C 437 = I R 6 A 106 = 1933 A L J 110

## C. P. C. (1908) S. 154

—S. 154 means that nothing should prejudicially affect any present right of appeal. It can have no bearing on the powers of an appellate court in dealing with appeals before it. 9 I C 815.

—The new C P C does not deprive a litigant of the right of appeal which he had under the old Code, even if the right could not be exercised immediately on the introduction of the new Code. The right of appeal to a superior tribunal which belongs to a suitor as of right is a very different thing from matters relating to procedure. 9 M L T 259 = 21 M L J 631 = 9 I C 937 = (1911) 1 M W N 143.

—“Present right of appeal” can mean only a right existing on 1st January 1909 to appeal against a particular order passed under the former Code and subsisting on that date. In an application to set aside an execution sale for fraud under the old Code

## C. P. C. (1908) S. 154 (Contd.)

both the Original and Appellate orders where made under the new Code: *Held* that the right of second Appeal did not exist in the case 14 I C 53.

—The words “any present right of appeal” in S. 154 of Act V of 1908, mean a right of appeal in *esse* and not in *passé* i e, a right of appeal which had actually come into existence and was capable of being exercised by the aggrieved party at the commencement of the new statute. Where in a suit instituted before the coming into force of the new C P Code an order of remand is passed after the new Code has come into force, the right of appeal against the order is regulated by the new and not by the old Code. 15 I C 725 = 1 P R 1913 = 84 P W R 1912 = 156 P W R 1912.

—Express saving or pending rights of appeal do not imply repeal of other vested rights. It is unsafe to apply the maxim “*expressio unius est exclusio alterius*” in such cases A I R 1921 Mad 126 = 13 L W 37 = (1921) M W N 181 = 61 I C 979.

## C. P. C. (1908) S. 155, 156 &amp; 157

—S. 157 is an enabling and not a repealing section. The rules made by the local Government under S. 269 of the old Code are in force until superseded by rules made by the High Court by S. 128 (2) (b) of the new Code even though the former are inconsistent with the orders in the Schedule. The words in “so far as they are inconsistent with this Code” do not include inconsistency with the orders in Sch. 1 of the Code. 24 M L J 637 = 20 I C 775 = 37 Mad 17 (F B).

—The term “rules made” mean rules made by the proper authority having jurisdiction. Rules under old Code which were then *ultra vires* are not valid because they could be made under the new Code. 29 M L J 663 = 31 I C 924.

## CIVIL PROCEDURE CODE

## THE FIRST SCHEDULE

## ORDER I

## Parties to Suit

## Synopsis.

- (1) General principles and scope of the rule.
- (2) Appeal.
- (3) Benamidar.
- (4) Ejectment.
- (5) Foreign states.
- (6) Forfeiture.
- (7) Hindu Widows, suits against.
- (8) Idol.
- (9) Joint Interest.
- (10) Joint family.
- (11) Karnavan.
- (12) Lessee.
- (13) Mortgagee.
- (14) Official Assignee.
- (15) Partition.
- (16) Partnership.
- (17) Receiver.
- (18) Rent.
- (19) Third person.
- (20) Reversioners.
- (21) Trustees.
- (22) Minor.
- (23) Other cases.

—(1) General Principles and Scope of the rule:—This rule has been re-drafted and brought directly into line with O. 16. r. 1 of the English Rules, as altered in 1896. It applies to High Court and Prov. Sm. Cause Court. Under the General Clauses Act 1897 s. 3 (39) "person" includes any company or association or body of individuals whether incorporated or not. The rule should not be read as though all members of a community must be joined as plffs: 24 C 385.

—The plaintiff's causes of action may now be separate and distinct so long as they arise out of the same act or transaction or the same series of transaction alleged and there is a common question of law or fact to be decided. see 73 I C 71 = A I R 1923 Pat 411.

—All the persons interested in a suit are necessary parties thereto, but if the parties are omitted to be impleaded they will have no defence whatever, it is not absolutely necessary to join them by amending the plaint and thus delay the disposal of the suit. 42 I C 92.

—Where addition of another plaintiff is necessary for the maintenance of a suit, both could remain as plaintiff but on understanding that second plaintiff had no case if first plaintiff succeeded. A I R 1921 Nag. 9 = 4 N I. J 58 = 63 I C 419.

## C. P. C. O. I r. 1 (Contd.)

## (1) General Principles and Scope of the Rule—(Contd.)

—Where second plaintiff was joined merely as a safeguard, the suit is a good one. 4 N I. J 58 = 63 I C 419.

—As to distinction between proper and necessary parties see 17 I C 921. Person remotely or indirectly interested is not a necessary party; 17 I C 921 see also 59 I C 292.

—Persons with derivative interest are not entitled to be associated in a decree in favour of person having the real title, merely because added as co-plffs. 30 C W N 56 = 22 L W 304 = 26 P L R 524 = 23 A I J 643 = 52 I A 211 = 1925 M W N 534 = 50 M L J 118 = 88 I C 198 = A I R 1925 P C 168 = 6 I 388.

—Suit for specific performance—Person in possession claiming under anterior agreement for sale is a necessary and proper party, 44 I C 361.

—Heirs in possession are the only necessary parties in a suit for rent for the period that they were in possession and not the other heirs of the tenant: 63 I C 949 = 48 C 518.

—A suit is not bad for misjoinder wherein right to relief claimed arises out of the same transaction though alleged to exist in first or second set of plffs in the alternative: 1912 M W N 316 = 16 L W 186 = 43 M L J 277 = 70 I C 684 = A I R 1922 M 174.

—A sued B and made C a party defendant. The trial Court found that the right to sue vested only in C who was therefore, made a plaintiff. The objection was that the suit not being instituted by A through bona fide mistake, C could not be made plaintiff under sub-r. (1), of r. 10. Held, that C could be joined as co-plaintiff under r. 1, O I, as a person in whom the right to the relief would lie in the alternative, and judgment may be given either for A or C whoever is found entitled to relief under O I r. 4, A I R 1927 Oudh 484 = 1 Luck Cas 546 = 105 I C 473.

—But a person who has no interest in the subject-matter of a suit and, therefore, no cause of action to institute the suit, cannot bring a suit and afterwards, in order to give himself a cause of action add the name of some person in whom a right of action exists. 11 Ind. Cas 223.

—Where one of two co-promisees sues making the other co-defendant, the suit should not be dismissed, merely because the plaintiff did not prove that the co-defendant refused to join as co-plaintiff. A I R 1931 Lah 445 = 32 P L R 385 = Ind Rul (1931) Lah 839 = 133 I C 871 following 26 C 409.

—Where it is not possible to make a person co-plff, the only alternative is to make him a co-deft: 80 I C 285 = A I R 1925 O 71.



## C. P. C. O. 1 r. 1 (Contd.).

## (1) General Principles and Scope of the rule—(Conclud)

—It may also be noted that though under the common law a person cannot be both a plaintiff and a defendant in the same suit equity Courts allow such a contingency only if full justice is done to all the parties. A I R 1926 Sind 4 = 93 I C 214

—Finally, may be noted some of the rules of Practice, namely that those persons only whose names appear on the record as parties are parties to the suit. 33 C W N 997 = 1 R 1930 C 637 = 125 I C 861 = A I R 1930 C 263.

—If some of the defendants in a suit support wholly or partly the plaintiff's case, they must address the Court and call their evidence before the defendants, really opposed to the plaintiff's case, commence their case.

—The word "plaintiff" means every person asking relief against another person. 10 Bom. L R 327 = 32 B 599.

—As to the limits of the rule against dismissal for non-joinder : 10 N L R 72 = 24 I C 831.

—Lastly, general provisions of the Code will prevail over the rules under Schedule I. 51 M L J 90 = 1926 M W N 341 = 95 I C 439 = A I R 1926 M 673.

—(2) Appeal :—see under O 1, r 3.

—Joint appeal by plff. and deflt. no. 2 from a suit dismissed against deflt. no. 1 is allowed and O 1 r 1 applies to appeals also : 75 I C 950 = A I R 1923 L 638.

—Appeal in partition suits is not maintainable unless all the interested persons are made parties thereto even if some of them do not choose to contest the appeal : 91 I C 567 = A I R 1926 C 741.

—In a suit on behalf of estate by some of the executors, all the remaining executors must be joined. But if in spite of the objections taken to that effect by the defts, plffs failed to join remaining executors both in suit and in appeal such addition cannot be permitted in second appeal to the High Court : 1923 M W N 89 = 17 L W 241 = 44 M L J 249 = 72 I C 63 = A I R 1923 M 337.

—Misjoinder—Order rejecting plaint—Legality—Appeal. See 5 Bur L T 234 = 18 I C 181.

## (3) Benamidar

—The fact that *benamidar* is a party to suit does not make the real owner party to the suit A I R 1930 Cal 263 = 33 C W N 997 = 125 I C 861.

## (4) Ejectment

—A suit for ejectment of trespasser may be brought by one or more co-owners. 1926 M W N 398 = 95 I C 856 = 24 L W 181 = A I R

## C P C. O. 1 r. 1 (Contd.)

## (4) Ejectment—(Conclud)

1926 M 809; for there is no misjoinder where two different sets of persons join together to eject a trespasser : A I R 1929 A 790.

—So, where a single proprietor maintains a suit in ejectment against a trespasser, such a decree, though in favour of one, is for the good of all the proprietors : 95 I C 121 = A I R 1926 L 545.

—That is to say, provided there is no denial of other co-owner's right, he need not be made a party to a suit by one co-owner for ejectment of trespasser : 75 I C 112 = A I R 1925 M 63.

—Ejectment suit by some co-sharers impleading others as defts.—Co sharers defts. to be arrayed as plffs. and decree to be passed. see 43 Cal 660 (P C).

—Suit to eject defts. from *shamilat* land in which one of the defts. is on field service and claim against whom was subsequently withdrawn is not bad for non-joinder : 60 I C 6.

## (7) Hindu Widows, suits against.

—In 15 Mad 422, it was held that according to the Hindu Law in Madras, a reversioner is entitled to sue to establish the invalidity of a sale by the widow of the last male holder, notwithstanding that he left a daughter who was alive at the date of the suit, but was not joined as a party. Suit for arrears of maintenance by two widows—basis of claim of each founded on the same decree—each relief arising out of the same transaction—common question of fact or law involved—separate suits not necessary. A I R 1933 P 128.

—The Code does not give sanction to the joinder as plffs of rival claimants, each of whom denies the right to the relief of the other : 57 I C 784.

—Opposing claimants in a suit cannot join as co-plffs. 38 Bom. 272 = 16 Bom. L R 164 = 23 I C 221.

—A single suit brought by a party his son and wife for their maintenance is not bad for misjoinder of parties and causes of action. 17 C W N 341 = 18 I C 764.

## (9) Joint Interest

—All creditors must be joined in a suit under s. 53, T P Act 2 P L T 217 = 6 Pat L J 48 = 1921 P H C C 47 = 63 I C 788 = A I R 1921 Pat 53.

—All living joint promisees must join in suit to enforce a debt due to them under s. 45, Contract Act and a suit brought by any number less than the full number of joint promisees is misconceived, and wrongly con-



C. P. C. (1908) Or. 1, r. 1 (Contd.)

(9) Joint interest—(Contd.)

stituted, from the beginning. A I R 1928 Bom 191 = 30 Bom L R 117 = 109 I C 99.

—Persons having joint right must join in an action to assert that right and one or two of them cannot bring a suit for the assertion of that right on behalf of all without joining them as defendants A I R 1927 Mad 984 = 39

M L J 442 = 106 I C 140.

—Where two brokers agreed on transaction in respect of sale of some property to receive one anna per cent. brokerage on consideration amount and one broker should get 13 annas share and the other three annas share out of the brokerage so gained and the former sued the owner for his 13 annas share without joining the co-broker as a party *Held*, that the suit was not properly constituted having regard, in particular, to s. 49, Contract Act. The broker should sue for the whole amount with the co-broker as co-plaintiff or as co-defendant. A I R 1928 Sind 16 = 105 I C 544.

—Joint promisees cannot split up claim and sue singly for respective share. The suit must be for entire debt and all must join in it. A I R 1927 Mad 84 = 51 M L J 648 = 98 I C 549.

—Suit against the *shortindar* for establishing occupancy right by several plaintiffs each having separate cause of action in which others are not entrusted cannot be maintained. A I R 1926 Mad 1140 = (1926) M W N 723 = 98 I C 463.

—Suit for profits of jeroity land—All co-sharers are necessary parties—Effect of non-joinder. see 35 I C 868 (F B).

—Suit against *lambardar* for accounts—One item of property—One co-sharer alone if can maintain suit—see 56 I C 761.

—Co sharers can join in suit under s. 164 of the Agra Tenancy Act against the *lambardar* as their several rights arise out of the same act, *viz.* the *lambardar's* failure to divide profits among co sharers on the date on which they are divisible. A I R 1929 All 668 = (1929) A L J 1098 = L R 10 A 361 Rev = 51 A 994 = Ind. Rul (1930) All 250 = 13 R D 678 = 122 I C 602.

—Landlord is a necessary party in a suit between lessees for possession. A I R 1926 Oudh 422 = 94 I C 3.

—But it is not necessary that all should join as plaintiffs. Any one is entitled to maintain a suit so far as he is damaged 15 C L J 225 = 14 I C 478.

—Person interested in worship can alone institute a suit for declaration that the properties are *dehutter* properties. A I R 1926 Cal 417 = 42 C L J 30 = 87 I C 159.

C. P. C. (1908) Or. 1, r. 1 (Contd.)

(9) Joint interest—(Contd.)

—In a declaratory easement suit by dominant owner, servient owners other than those who have obstructed the exercise of right or challenged it, need not be made parties, since no cause of action exists against them. A I R 1926 Cal 92 = 85 I C 739.

(10) Joint family

—The *karta* of a joint Hindu family can effectively represent all other members of the family though not so described in the records of the case. A I R 1929 Pat 741 = 8 Pat 788 = 11 P L T 237 = Ind Rul (1930) Pat 106 = 121 I C 330.

—Other co-parceners are not necessary parties in a suit by manager of undivided family on a promissory note : 23 Bom L R 1135 = 64 I C 966 = A I R 1922 B 281 = 46 B 358.

All the adult members of joint Hindu family having been made as defendants in a suit the presumption is that they are managers of themselves as well as that of minor members, though not so stated in the plaint A I R 1924 All 908 = 46 A 709 = 22 A L J 702 = L R 5 A 480 Civ. = 79 I C 1001.

—In a creditor's suit for manager's debt after his death, all the members of the joint Hindu family must be made parties thereto.

—If only some members are joined, other members cannot be proceeded against in execution. A I R 1925 Nag 288 = 8 N L J 73 = 89 I C 838.

—Member of joint Hindu family in whose favour a bond stands can sue alone on the bond. The other members if found necessary parties can be made defendants in the case. A I R 1927 Lah 129 = 99 I C 565.

—Suit by concubine and her son against the members of the family, for maintenance—Not bad for misjoinder. 26 M L J 343.

(12) Lessee : Lessor out of Possession.

—Where a tenancy is not represented in its entirety in a suit for arrears of rent decree against such of the tenants as are before the Court cannot be passed. 25 C W N 525 = 62 I C 464.

—Tenancy-in-Common—One joint tenant suing lessee of the lands for his share of land and rent by partition—whether other owners necessary parties. see 19 Bom L R 932.

—Whether a suit for possession by landlord alone against his tenants depends upon the status of tenants A I R 1924 Cal 977 = 79 I C 1038.

—Where the plffs. landlords in respect of a portion of the house are tenants in respect of the rest, they could sue in their double

C. P. C. ( 1908 ) Or. 1, r. 1 (Contd.)

(12) Lessee : Lessor out of Possession—(Conclud)

capacity for damages for a nuisance caused by a third person to the house. 40 Bom 401 = 17 Bom L R 1040 = 33 I C 192.

—Suit for declaration of status as tenants  
—Under raiyats holding under plff if proper or necessary parties. see 39 I C 409.

## ( 15 ) Partition

—In a partition suit persons not having present interest are not the necessary parties though all the shareholders must be represented before the Court. A I R 1923 Cal 221 = 49 Cal 1043 = 36 C L J 217 = 70 I C 687 See also 23 O C 62 = 7 O L J 158 = 56 I C 304.

—Partition suit—All interested persons entitled to come in as plffs. When should be joined as deflt see 56 I C 304. Partition suit  
—Interested parties to be joined either as plffs or defts. 56 I C 304.

—In a suit for partition by a transferee, co-sharer vendors are proper though not necessary parties. A I R 1923 Pat 162 = (1924) P H C C 272 = 68 I C 804.

—Partition suit—Mortgagee of plff's. share—Proper party. see 44 Cal 28.

## (16) Partnership.

—Receiver appointed in a suit for dissolution of partnership need not be joined in a suit against partnership. 14 S L R 171 = 60 I C 273.

—In a suit for damages by the real owner against the creditor of an insolvent at whose instance the Receiver took possession of the property as belonging to the insolvent, and an objection was restored to the real owner, Receiver is not a necessary party. 43 A 452 = 3 U P L R (All) 42 = 19 A L J 277 = 60 I C 821.

—All members of firm are proper parties to suit on the pro-note—Effect of retirement of one, sec. 15 I C 380.

—In a suit for dissolution of partnership all the representatives of the deceased partner must be made parties : 33 I C 564.

—Dormant partner is not a necessary party in a suit by the firm on a contract : 1915 M W N 864 = 31 I C 913.

—In respect of cause of action which has accrued to all jointly, all partners of a firm or promisees must be made parties to the suit. A I R 1925 Sind 181 = 17 S L R 324 = 79 I C 914. See also A I R 1923 Mad 85 = 16 L W 527 = 68 I C 927, and A I R 1922 Sind 13 = 15 S L R 152 = 65 I C 26.

—An administration suit in respect of the property of the deceased can be joined to a claim for accounts of the partnership of the deceased with the executor, and strangers,

C. P. C. ( 1908 ) Or. 1, r. 1 (Contd.)

( 16 ) Partnership—(Conclud)

in as much as the executor is sued in his representative capacity and if any question of his personal liability, apart from his representative liability, arises, then it is one arising with reference to the estate in respect of which he is sued as executor. The other partners are not liable to be joined as parties in absence of collusion with executor or misconduct in not showing account of profits received by executor. A I R 1927 Bom 470 = 29 Bom L R 937 = 51 B 800 = 104 I C 764.

—Suit for dissolution of partnership—Person not in partnership as member of firm but in superior partnership with whole firm as other partner need not be joined. A I R 1927 P C 70 = 53 M L J 245 = 4 O W N 491 = 31 C W N 857 = 25 A L J 697 = (1927) M W N 500 = 26 L W 265 = 39 M L T 232 (P C) = 101 I C 17.

—To suit for dissolution and accounts all heirs of deceased partner must be made parties. A I R 1927 Mad 491 = 52 M L J 318 = 25 L W 388 = 38 M L T 214 = (1927) M W N 574 = 100 I C 616.

## ( 18 ) Rent

—The other co-sharers are not necessary parties in suit for assessment of rent. A I R 1929 Cal 90 = 32 C W N 1238 = Ind Rul ( 1929 ) Cal 374 = 115 I C 518.

—Person alleging to be transferee from co-sharer-landlord but not so recognized by plaintiffs-proprietors cannot be joined against plaintiff's wish. A I R 1926 Pat 519 = 7 P L T 602 = 97 I C 612.

In a suit on rent note to *Jagirdar* plaintiff, junior members are not the necessary parties. A I R 1922 Bom 354 = 24 Bom L R 826 = 46 B 1022 = 84 I C 508.

—A rent decree against some of the holders of a holding can be obtained without impleading every holder and so an *ex parte* rent decree can be set aside as against some defendants and remain a perfectly good decree against the others. A I R 1928 Cal 397 = 32 C W N 507 = Ind Rul ( 1929 ) Cal 446 = 116 I C 158.

—All co-sharer landlords must be made parties to suit seeking recovery of enhanced rents. It makes no difference even if the claim be for rent for excess land taken. A I R 1925 Bom 542 = 27 Bom L R 1107 = 90 I C 558.

—Rent suit instituted by all the landlords but subsequently compromised by one of them is maintainable as its nature is not thereby changed. A I R 1926 Cal 188 = 89 I C 177.

—A purchased certain property from B who however wrongfully remained in possession and received rents and mesne profits. A then sold the property to C who sued B for

## C. P. C. ( 1908 ) Or. I, r. 1 (Contd)

## ( 18 ) Rent—(Conclud)

possession and mesne profits joining *A* as *pro forma* plaintiff. No relief was claimed in favour of *A* in the plaint and it was prayed that the decree should be passed in favour of *C* alone. An amendment of plaint for relief in favour of *A* was applied for after his claim had become barred by time. *Held*, that the amendment could be allowed as it was not against the provisions of either O I, r 1, or O II, r. 3 although the application was made the claim was time-barred. A I R 1929 Bom 51 = 30 Bom L R 1588 = Ind Rul (1929) Bom 214 = 114 I C 262.

—Co-sharer landlords—If can jointly sue for rent—Rents relating to various periods see 10 I C 891.

—Suit for rent—All co-sharers to be impleaded plffs.—Objecting co-sharer impleaded as deft.—Suit not bad for non-joinder. 21 C W N 371.

—A suit is maintainable by one of several joint landlords for recovery of the balance of rent due from a tenant and in the alternative for recovery of sum which may have been collected by his co-sharers in excess of their legitimate share. 37 I C 671.

—(20) Reversioners :—In a suit by adopted son against the widow of adoptive father, for possession of property, remote reversioner need not be a party. A I R 1926 Nag 354 = 94 I C 918.

—Right of remote reversioner to be joined as plff.—Suit by presumptive reversioner for declaration see 38 Mad 405 (P C).

—Suit to set aside alienation or adoption by Hindu widow—Remote reversioners, right of, to join presumptive reversioner as plffs. see. 28 M L J 535.

—Suit for declaration that plffs were reversioners—Joinder, of parties—on bar of opposite party and obscuring issues, see 48 I C 540 (P C).

—Plaintiff sued in personal capacity as reversioners of a certain person to recover possession of the properties *A, B, C* on the death of the widow, from defendants who held possession under a transfer from the widow and in the same suit sought to recover the property *D* in the capacity of *shebait* which belong to a deity and was in the possession of defendant No. 2, claiming it as transferee from the widow. *Held*, that the plaintiff should be treated as comprising two suits, one at the instance of the plaintiff as *shebait* of the deity in respect of property *D* and the other in his personal capacity in respect of the properties *A, B, C* and the two suits should be tried separately. A I R 1928 Cal 199 = 55 C 164 = 32 C W N 885 = 109 I C 755.

—( 21 ) Trustees :—All trustees should be co-plaintiffs in—only those who are un-wil-

## C. P. C. ( 1908 ) Or. I, r. 1 (Contd)

## ( 21 ) Trustees—(Conclud)

ling to be joined as plaintiffs or have precluded themselves from being plaintiffs should be made defendants. A I R 1932 C 27 (29) see also 27 C L J 605.

—In a suit to declare charitable trust void and seeking injunction restraining the trustee from dealing with the trust property, Advocate General is a proper though not a necessary party. A I R 1925 Sind 195 = 19 S L R 220 = 78 I C 249.

—In an action by one co-trustee for recovery of rent due to the trust other co-trustees are necessary parties 2 Bur L J 266 = 83 I C 329 = A I R 1924 R 201.

—Suit by some trustees impleading others as defts.—When not bad for non-joinder. see 28 M L J 571.

—( 22 ) Minor :—An easement suit must be dismissed in which one of the defendants being a minor, is not represented for no effective decree can be passed thereon. 64 I C 90.

—( 23 ) Other cases :—Damages for hurt—Each of several persons receiving hurts from a body of persons—Suit joint by them for damages against the persons causing hurts—Strictly in accordance with O. 1, r. 1. 138 I C 77 = 1932 A L J 497 = I R 1932 A 358 = A I R 1932 A 401.

—Manager of a holding and recorded as such in *patwari* papers is a sufficient party and all the co-sharers need not be made parties. 3 U P L R (B R) 92.

—To a suit by an unsuccessful objector to establish his right under r. 63, O XX I, the decree-holder is not necessary party where the auction-purchaser has obtained possession of property sold. A I R 1928 Nag 65 = 105 I C 799.

—Where a Muhammadan suing to set aside an alienation by his mother compromised with some of the alienees whereby such alienees retain the alienated properties the suit can continue against the remaining alienees and the alienees with whom compromise is made are not necessary parties. A I R 1927 Mad 82 = (1926) M W N 1919 = 98 I C 790.

—In an administration suit the debtors to the estate of the deceased are not necessary parties. A I R 1926 Mad 110 = 24 L W 425 = 98 I C 838.

—Transferee to whom plaintiff had conveyed portion of his properties at the time when he had neither the title nor cause of action to sue is not a necessary party in a suit for setting aside alienation of property nor is his *pendente lite*. A I R 1922 Pat 243 = 1 Pat 475 = 67 I C 401.

—Where in a suit by two sets of plffs, claiming that either of them is entitled to the property and that by agreement they have arranged to divide the property in the event

**C. P. C. (1908) Or. 1, r. 1 (Concl'd)****(23) Other cases—(Concl'd)**

of success of either party, *held*, that the provisions of O 1, R 1 contemplate claims by different plffs, in the alternative, provided there is common question of law or of fact which would arise if such plffs brought separate suits, and that the suit should not have been dismissed on the ground that the plaintiff contained contradictory allegations and inconsistent claims. 10 P R 1916=32 I C 526 = 69 P L R 1917=204 P W R 1915.

—In a suit for removal of obstruction to the exercise of easement right, non-obstructing servient owners need not be made parties. A I R 1926 Cal 462=88 I C 970.

**C. P. C. 1908 Or. 1, r. 2**

—This rule has been newly added so as to enable the Court to deal with cases in which the joinder of plaintiffs may embarrass the trial of the suit: see also O. 2, r. 6. C P C and also O. 16 r. 1 of the English Rules of the Supreme Court. The Court may allow the plffs to elect which plff will proceed with the suit, striking out so much of the plaint as relates to the plffs struck out see also 11 C W N 680 = 34 C 662 and A I R 1928 C 199 = 55 C 164.

—The rule does not refer to election of joinder of causes. Such order of election must be reversed 16 L W 175 = 1922 M W N 453 = 43 M L J 218 = 69 I C 966 = A I R 1922 M 453.

—In a suit for possession on the ground that the deft. wrongfully encroached upon the disputed land, one of the plffs. was a purchaser from the co-sharer of the other plffs *Held*, that the suit was not open to the objection of misjoinder of parties or of causes of action. 16 I C 623.

—Opposing claimants cannot join as co-plffs. in a suit. 38 Bom. 272 = 16 Bom L R 164 = 23 I C 221.

—The plaintiffs alleged that they jointly took a loan from the defendants, and mortgaged properties. They sued for redemption. The lower Court returned the plaint and directed the plaintiffs to file separate suits within a month as in its opinion there was a mis-joinder of causes of action. *Held*, that the decision of the Court was premature before it had heard the plaintiff's case on the point; that the proper course was to return the plaint for amendment but that as the order amounted to rejection of the plaint, it was appealable. Order 1, rule 2, and Order 11, rule 6 of the Code of Civil Procedure refer merely to procedure and have no application where there is a misjoinder of either plaintiffs or causes of action. 18 I C 181 = 5 Bur. L T 234.

—Where a suit is dismissed for misjoinder of parties and causes of action, there is no second appeal. A suit ought not to be dismissed

**C. P. C. (1908) Or. 1, r. 2 (Cont'd)**

for mis-joinder of parties or causes of action but the court may direct the plff. to make an election under O. I. R. 2 or direct separate trial of the several causes of action under O. 2, R. 6. 19 C L J 316 = 25 I C 438. Suit under S. 92—Alienee if necessary party. see 27 M L J 266.

**C. P. C. 1908 Or. 1, r. 3***Synopsis.*

- (1) Appeal.
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- (33) Other Cases.

**(1) Appeal.**

—Appeal against order by Official Receiver against creditor—Official Receiver may or may not be made respondent. A I R 1924 Mad 830 = 46 M L J 212 = 19 L W 193 = 34 M L T 337 = (1924) M W N 212 = 78 I C 857.

—Non-joinder of respondent's legal representative, when the appeal is as to apportionment as between the plaintiffs of the costs, vitiates appeal A I R 1925 Lah 2 = 17 P W R 1923 = 79 I C 670.

—A person who is a necessary party to a suit must also be a necessary party to the appeal. A I R 1922 Pat. 4=3 P L T 456 = 66 I C 780.

—*Pro forma* defendant need not be made respondent. A I R 1924 Cal. 998=39 C L J 612.



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## (1) Appeal—(Conclud.)

—Omission to implead defendant as respondent who is not interested in result of appeal does not vitiate. A I R 1926 Cal. 512 = 91 I C 620.

—In appeal by objector, receiver of insolvent's property is necessary party. A I R 1926 Lah. 696 = 94 I C 660.

—In administration suit person alleging to be adopted son must be joined even in stage of appeal. A I R 1927 Rang. 192 = 5 R 159 = 103 I C 22.

—Plff. purchased certain property at an auction sale. Defts. purchased the same property in lots at the same auction. Plffs. sued the several sets of debts for the recovery of possession of the portions purchased by each set. He did not allege any joint action or community of interest as between the different sets of debts.—*Held*, that the suit was bad for multifariousness. The error made by the plff. in filing a single suit when he ought to have brought more than one suit was a defect of a formal nature having nothing to do with the merits and the plff. was allowed to withdraw from the suit with liberty to institute such fresh suit or suits subject to the payment of all costs and expenses incurred by defts. 15 A L J 809=40 All 7=42 I C 856.

## (2) General Principles &amp; Scope.

—But owing to the express insertion of the words "in respect of or arising out of the same act or transactions or series of acts or transactions." in the present rule numerous decision of this point under the old Code are no longer of practical interest.

—The rule applies to joinder of causes as well as to joinder of parties. 136 I C 497=I R 1932 B 193=A I R 1932 B 1 (2).

—And the language of the rule is much more favourable to plaintiffs in this country than the corresponding English rule. 136 I C 497=I R 1932 B 193=A I R 1932 B 1 (3).

—Permission nature of—Distinction between the nature of O. I. R. 3 and O. 2. R. 2. see 40 Bom 351.

—A plaintiff may not only join different causes of action against the same defendants when such defendants are jointly interested, but he may also join different causes of action against different defendants if covered by the purview of O. I. r. 3. A I R 1926 Sind 66 = 19 S L R 395=90 I C 970.

—Under order 1. rule 3, Civil Procedure Code the test is not whether the decree awarded to the plaintiff against the defendant is joint but whether it is alleged in the plaint that there is against the said defendants any right to relief in respect of the same act or transaction. 13 S L R 133=53 I C 32.

## C. P. C. (1908) Or. 1, r. 3 (Contd.)

## (2) General Principles &amp; Scope—(Conclud.)

—Persons should be joined as defendants if same cause of action exists against them and if same question of law and fact would arise separate suit is filed. A I R 1930 All. 180= (1930) A L J 90=Ind. Rul. (1930) All. 372=123 I C 324.

—Persons having no cause of action against each other should not be ordered to be joined in the suits and suits having different causes of action should not be consolidated. A I R 1930 Lah 84=31 P L R 976 = Ind. Rul. (1931) Lah 849=127 I C 353.

—Involving of common question of law and fact is not sufficient—All persons must be interested in same cause of action. A I R 1926 Sind 66 = 19 S L R 395 = 90 I C 970.

—Impleading person claiming paramount title in mortgage suit is an irregularity but does not vitiate trial as jurisdiction not affected. A I R 1925 Cal 973=29 C W N 784 = 88 I C 866.

## (4) Alienees.

—A reversioner after the death of the widow brought a suit for possession impleading the person in possession of the property and other reversioners in possession and also the transferees from the widow. *Held*, the suit is not bad for multifariousness and the plaintiff is entitled to join all to recover his share of the estate. 36 All 406 = 12 A L J 509 = 24 I C 95. Suit to remove trustee under S. 92—Alienee from trustee joinder of, good. 42 Cal. 1135.

—A suit for possession on the ground of inheritance can proceed against a number of different alienees. The question is purely one of convenience. 11 P L R 1911 = 33 B 223=29 C 189 foll. 64 P W R 1918 = 59 P R 1918 = 44 I C 549.

—In suit for possession by mortgagor transferees from mortgagee also may be made parties. A I R 1922 Bom 350 = 24 Bom L R 762 = 46 B 993 = 68 I C 487.

—In suit against trustee his alienees should be joined. A I R 1925 All 683 = 23 A L J 601 = L R 6 A 352 Civ=47 A 770 = 89 I C 40.

—Debtor's transferee of liability can be impleaded in suit against debtor A I R 1926 Mad 135 = 90 I C 721.

—In suit to set aside mother's alienations various alienees can be joined. A I R 1928 Mad 820 = 110 I C 672.

—Reversioner can implead all widows alienees. A I R 1926 Nag 316 = 9 N L J 17 = 98 I C 819.

—Misjoinder—Suit for possession—Different alienations to different persons—All alienees made defts.—No Misjoinder. See. 167 P L R 1911 = 10 I C 48.



**C. P. C. (1908) Or. I r. 3 (Contd.)****(4) Alienees—(Conclud)**

—In a suit for possession all persons claiming by derivative titles from a trespasser as a common source may be joined as defendants. A I R 1931 Bom 330 = 33 Bom L R 624 = Ind Rul (1931) Bom 497 = 134 I C 689.

—The rule not only refers to parties to actions but also to causes of action. The mere fact that there are several defendants in suit is not decisive. A person can sue for partition and join as defendants several alienees or mortgagees from different members of the family. A I R 1931 Bom 330 = 33 Bom L R 624 = Ind Rul (1931) Bom 497 = 134 I C 689.

**(9) Costs.**

—Plaintiffs who have wrongly impleaded them cannot pray in aid the provisions of O. I, r. 3, or O. I. r. 10. 10 B 342 = 140 I C 317 = I R 1932 R 231 = A I R 1932 R 132 see also I C W N 65.

**(10) Court of Wards.**

—In execution against ward manager of Court of Wards is necessary party. A I R 1925 Pat 160 = 3 P L R 242 Civ = 6 P L T 164 = 80 I C 716.

—Succession to Mahantship—Court of Wards in possession to be added. Sp. Rel. Act, S 42. 37 All 185.

**(11) Decree-holder.**

—Decree-holder not necessary party to a claimant's suit under O XXI r 63. A I R 1923 Mad 58 = 16 L W 330 = (1922) M W N 674 = 32 M L T 124 = 70 I C 168.

—Suit for possession of house sold in execution by third person against purchaser decree-holder is not necessary party. A I R 1930 Lah. 45 = Ind. Rul. (1929) Lah. 458 = 116 I C 186.

**(12) Easement.**

—Owners of servient tenements not residing plaintiff's right of easement are not necessary parties. A I R 1926 Cal 1201 = 96 I C 665.

—Unobstructing servient owners are not necessary parties in easement suit. A I R 1923 Pat 65 = 4 P L T 81 = (1922) Pat 305 = 2 Pat 110 = 69 I C 947.

—All persons entitled to easement are not necessary parties unless their right is interfered with—Question of parties is to be determined from pleadings. A I R 1924 Cal 1050 = 40 C L J 74 = 84 I C 467.

**(13) Ejectment.**

—Persons in possession and not persons in receipt of rent and profits should be made

**C. P. C. (1908) Or. I r. 3 (Contd.)****(13) Ejectment—(Conclud)**

parties to ejectment suit. A I R 1924 Pat 172 = 72 I C 1038.

—The proprietor of a village sued to eject three brothers from *shamilat* land. One brother being on field service, the plaintiff reduced his claim to two-thirds of the land. The suit is not bad for non-joinder. 60 I C 6 (Lah).

**(14) Forfeiture.**

—An action for possession based upon forfeiture of a term should, for partial reasons, be brought against all persons in possession (including constructive possession) at the date of the suit; not that the suit is necessarily defective otherwise but because the decree will be difficult to enforce under the Code. 47 Cal 907.

**(17) Joint Family.**

—There is no mis-joinder of causes of action if a Hindu widow sues in one suit the co-parceners of her deceased husband to recover her *stridhan* property improperly or illegally detained by them and also to enforce her right of maintenance out of the estate of the joint family of which during his life time her husband was a member. 14 B 490 dissented from 38 Bom. 120 = 15 Bom. 1 R 684 = 20 I C 533.

—Suit against father for specific performance of contract by father—Father died—Son claiming independent title was necessary and proper party. A I R 1929 Cal. 667 = 33 C W N 687 = Ind. Rul (1930) Cal 353 = 123 I C 457.

—Joint Hindu family—Agreement to sell share by a member—Suit for Specific performance and partition against all members. 40 Mad. 365 (F. R.)

**(18) Joint interest or liability.**

—Liability joint or several for one cause of action and involving same question of law or fact are conditions of joining parties. A I R 1925 Oudh 75 = 4 U P L R (O) 47 = 77 I C 1028.

—In claim for easement all owners of servient tenements must be made parties but co-sharers, may not be impleaded. A I R 1924 Cal 369 = 69 I C 183.

—All joint decree-holders must be made respondents. A I R 1922 Pat. 606 = 1 Pat 699 = 4 P L T 170 = 1 Pat L R 103 = (1923) Pat 207 = 69 I C 624.

—Co-heir of mortgagee claiming independent title may be joined as defendant. A I R 1931 Nag 20 = 26 N L R 359 = Ind Rul (1931) Nag 41 = 130 I C 105.

—Suit for damages for wrongful attachment against one of three judgment-creditors—Joinder of the others after expiry of limi-

C. P. C. (1908) Or. 1 r. 3 (Contd)

## (18) Joint interest or liability—(Concld)

tation period—Causes of action if separate.  
see 12 I C 866.

—Defamation suit against several persons  
making defamatory statements—Maintainability of see 41 I C 12.

## (20) Karnavan.

—In maintenance suit on 'teer' deed  
karnavan of tavazhi is necessary party. A I  
R 1925 Mad 761=21 L W 432=87 I C 198.

## (21) Lessee.

—In a suit for possession the tenants are  
not necessary parties. A I R 1924 Cal 977=79  
I C 1038.

—And in a suit for fishery against tenants  
claiming adverse possession by lessees of  
zemindari zemindar is necessary party. A I R  
1922 Pat 9=3 P L T 53=(1922) Pat (Sup) 195=  
64 I C 346.

—Where a tenant pleads payment of rent  
to third person such person is invariably  
impleaded as co defendant. A I R 1929 Oudh  
459=113 I C 794.

—Receiver can implead all lessees in one  
suit to set aside leases by trustee as improper.  
A I R 1926 Mad 911=49 M 836=51 M L J  
194=94 L W 186=(1926) M W N 642 (F B)=  
97 I C 212.

—Declaratory suit—Wrong entry in Re-  
cord-of-Rights—One suit against all tenants in  
the village, if maintainable. see 22 C L J 57.

## (22) Minor.

—Minor executants also must be made  
parties to enforce registration. A I R 1923  
Mad 81=16 L W 287=68 I C 911.

## (23) Misjoinder.

—Where paddy land and crops growing on  
the land in a certain period were transferred,  
and a judgment creditor attached the paddy,  
a suit by the mortgagee joining the attaching  
creditor as defendant is bad for misjoinder. A  
I R 1931 Rang 108=Ind. Rul (1931) Rang 258=  
133 I C 482.

—Joinder of parties and causes of action  
—distinct causes of action against 1st and 3rd  
defendants respectively—question at issue  
common to both parties—no misjoinder. A L  
R 1933 M 303.

—Joinder of persons claiming adversely  
to mortgagor, in a mortgage suit is bad. 20  
C W N 1279 (P C).

—Where the transferee of a mortgage has  
brought a suit for sale against the mortgagor  
and has joined therewith a claim against his  
transferor (the original mortgagee) for  
damages in case it should appear that any

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C. P. C. (1908) Or. 1 r. 3 (Contd)

## (23) Misjoinder—(Concld)

portion of the mortgage-debt had been dis-  
charged by the mortgagor before the date of  
the transfer and so not be recoverable in the  
present suit from the mortgagor, held, the  
suit is not bad for misjoinder of defendants.  
18 M L J 238=31 M 252. approved in 19 M L J  
399.

—Suit for declaration that alienation in  
favour of several alienees is not binding on  
the reversioners—Not bad for misjoinder. 54  
I C 512.

—But under the new Code the insertion  
of the words "on account of any misjoinder  
of parties or causes of action" in S. 99 makes  
it quite clear that if a decree is passed in a  
suit as above the appellate Court should not  
interfere with such decree if the objection to  
the decree is that of multifariousness, unless  
the misjoinder has affected the merits of the  
case. A claim to direct a trustee to render-  
accounts of trust property for a certain  
period was joined with a claim against the  
trustee and others, who dealt with the trust  
property, to render accounts for another  
period. Held, that the suit was not bad for  
misjoinder of parties and causes of action as  
the claims referred to the same matter. 9 I  
C 565=9 M L T 233=(1911) 2 M W N 303.

## (24-25) Mortgage Suits

—And a single suit for redemption against  
different mortgagees holding distinct mort-  
gages is bad for multifariousness. 37 I C 976.

—Non joinder of aprior mortgagee, whose  
rights are admitted by all the parties to the  
suit, whether the suit is liable to be dismissed  
on the ground of see. 29 M 84=16 M L J 50.

—Persons disclaiming mortgagee's right to  
mortgage money can be impleaded in suit  
against mortgagor for declaration by plaintiff  
for being entitled to mortgage money. A I  
R 1921 Cal 653=33 C L J 369=63 I C 744.

—The cause of action against a co-mor-  
tgagee for sums paid is identical with that  
against the mortgagor for any balance unpaid.  
The co-mortgagee is an essential party so far  
as the unpaid balance is concerned. If sepa-  
rate suits are brought, the main question in  
each would be what payments were made. As  
the transaction is single, the joinder of the  
co-mortgagee and mortgagor is covered by  
the section. 7 N L R 130=12 I C 357.

—Suit for profits by one sharer against  
co-sharer who has mortgaged his share—  
Whether co-sharer and his mortgagee may  
be joined as defendants. 9 O C 142.

—Suit for redemption—Part-owners of  
mortgaged property who did not execute  
mortgage-deed and who did not receive mort-  
gage-money not made parties to suit—Suit  
not bad. 32 C 746.

C. P. C. (1908) Or. 1, r. 3 (Contd.)  
(24-25) Mortgage Suits—(Concl'd)

—In a suit for resumption of a muafi, the mortgagees from the grantee are not necessary parties and are bound by the decision arrived at in such suits if the proceedings are fairly conducted between the grantor and the grantee. But where they are not so conducted and where the mortgagor impleads the mortgagees, the latter have a right to have their pleas heard and determined. 2 O L J 161 = 28 I C 440.

—Vendee, when vendor repudiates mortgage as bogus should for equity and justice be allowed to implead mortgagee in suit for specific performance against his vendor to avoid multiplicity of suits. A I R 1926 Mad 597=(1926) M W N 459 = 92 I C 715

—By a compromise effected between A and B, A was to remain in possession of  $\frac{1}{4}$  of certain property. A gifted the property to C and he mortgaged it to D. After the death of A, B sued C for possession. Pending the suit, C sold the property to D who applied to be made a party to the suit. *Held*, as no relief was sought against him and the case against him was not the same as against the others, he could not be made a party to the suit. 10 A L J 387=17 I C 641.

(26) Partition.

—Where debts are disputed creditors may be made parties to suit for partition against father A I R 1922 Mad 332; 45 M 194 = 42 M L J 97=30 M L T (H C) 172 = 14 L W 642; (1921) M W N 799 = 69 I C 961.

—In partition suit by sons, grandsons are not necessary parties. A I R 1922 Pat 96 = 1 Pat 361 = 3 P L T 238 = 67 I C 156

—Partition can be affected only of that partition of the property of which all co-sharers are made parties into suit for partition. A I R 1925 Cal 754 = 85 I C 662.

—A mortgagee is not a necessary party to a partition suit provided the question of the mortgagor's interest is not in controversy. It has been laid down that if mortgagee comes in and applies to be added as a party the Court should give him leave to attend the proceedings as a *quasi* party. A I R 1931 Cal 594=35 C W N 296 = Ind Rul (1931) Cal 803 = 134 I C 307.

(27) Partners.

—Partnership—Suit for dissolution of—Sub-partners not necessary parties. 20 M L T 134. Partnership—Suit for dissolution—Sub-partners whether necessary parties. 34 I C 543.

—Person alleged by defendant to be partner can be impleaded in account suit. A I R 1924 Pat 65 = (1923) Pat 276 = 2 P L R Civ 132 = 76 I C 950.

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(27) Partners—(Contd.)

—In a suit for accounts every partner must be made a party. A I R 1930 Mad 714 = 58 M L J 613=31 L W 757 = Ind Rul (1931) Mad. 373 = 130 I C 456.

—Vendor and purchaser—Specific performance—Vendor's suit for—Firm—Managing partner—Contract for sale of land by, on behalf of firm—Specific performance of—Suit for, by another partner who, on dissolution, took over the assets of the firm—Claim in, for specific performance against purchaser if the price was Rs 9,000 as entered in the partnership accounts, and, if the price was only Rs 5000 as alleged by the purchaser, for specific performance against purchaser on that basis and as against the managing partner who had entered into the contract for the recovery of the balance of Rs. 4000 under the contract of indemnity against mistakes in accounts contained in the deed of dissolution. *Held*, that the case plainly fell within the words of O 1 r 3, and that the suit was not bad for multifariousness. There is a series of transactions contained in the agreement of sale and deed of dissolution and there is a common question of fact, *viz*, what were the terms of the agreement of sale. 136 I C 497 = I R 1932 B 193 = A I R 1932 B 1.

—Where in a suit for rent the tenants pleaded payment to a person who was a co-sharer with the landlord, such payee is not a necessary party when decree is to be given only for the plff's share of the rent. 28 M L J 197 = 28 I C 141

—The owner of an eight annas share of an estate brought a suit against the tenants making his co-sharers *pro forma* debts, with a prayer to recover his share of the rent from the tenant debts, or in the alternative from the *pro forma* debts, in case the latter had realised the share of the rent due to the plff. *Held*, that the prayer for the relief against the *pro forma* debts, could be joined with the prayer for the recovery of the rent against the principal debts inasmuch as O. 1, R. 3 of the C. P. Code provides for the joinder of such claims, and it is a well established practice to join such claims. 48 I C 726.

—Suit for assessment of fair and equitable rent—Third person if a necessary party. 50 I C 908.

—Heirs of deceased tenant not in possession are not necessary parties to suit for rent against heirs in possession accrued during their possession. A I R 1921 Cal 81 = 48 C 518=63 I C 946.

—The landlord can sue all the heirs of the deceased tenant for the entire rent without making the other tenant a party thereto. A I R 1923 Cal. 615=27 C W N 521 = 77 I C 364

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## (28-30) Secretary of State or Government.

—Suit for title to revenue registry—Collector a necessary party—Declaratory decree, Suit for—Miscellaneous. 19 M L J 331.

—Secretary of State is not necessary party in suit to set aside sale under s. 60 Punjab Excise Act on ground that it is not binding on plaintiff's shares. 96 I C 927 (Lah).

—In a suit by a tenant against his landlord, who is a *ghatwal*, for declaration of occupancy-rights in a *ghatwali* land and for recovery of its possession, the Secy. of State is not a necessary party, though he may be a proper party and, therefore, the suit cannot be dismissed for the non-joinder of the Secy. of State. *Semble*: A *ghatwal* is not a mere servant of Govt. but has an interest in the *ghatwali* land held by him. 35 I C 788.

Grant of fishery rights to *Gramattars*—Exclusive claim by *mirasidars*—Parties—Govt. whether should be joined. 38 I C 100.

## (31) Trespasser.

—Addition of parties—Scheme suit—Trespasser or alliance from trustee—Joinder of improp. S. 92. 28 C L J 4.

## (32) Other Cases.

—When only by one contract a master and a number of servants agree that they will work together and that the whole profits would be divided among them in certain proportions, a suit for account by one servant will be had if all others also are not impleaded. A I R 1930 Mad 714=58 M L J 613=31 L W 757=Ind. Rul (1931) Mad 373 = 130 I C 453.

—Question whether legal representatives are necessary parties or not in suit for administration against executor *de son tort* depends upon whether the suit was for whole of assets and to what extent executor is in possession. A I R 1922 Mad 457 = 46 M L J 190 = 16 L W 369 = (1922) M W N 532 = 43 M L J 486 = 31 M L T 221=70 I C 689.

—Suit between mortgagor and mortgagee, who got himself recorded as occupancy holders for the holding—Landlord not necessary party. A I R 1923 All 11 = 70 I C 958.

—Several persons resisting possession of several parts of same plot of different grounds can be joined in one suit. A I R 1924 Nag 55=19 N L R 178 = 77 I C 761.

—Joinder by permission of Court should not be allowed to prejudice the party. A I R 1924 Oudh 337 = 27 O C 35 = 83 I C 850.

—Joining of several defendants in possession of plots declared by Survey Officer not included in plaintiff's village is not bad as common question is involved. A I R 1925

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## (32) Other Cases—(Concl'd)

Mad 1237 = 49 M L J 420=(1925) M W N 629=90 I C 748.

—New defendant can be joined on defendants allegations and amendment cannot be objected. A I R 1928 Bom 91 = 30 Bom L R 162 = 109 I C 191.

—In suit for declaration of title person denying title is not *pro forma* defendant. A I R 1928 Cal 425 = 55 C 590 = 113 I C 247.

—Suit for correction of entry and for possession all persons recorded as in possession are necessary parties. A I R 1925 Pat 218 = 82 I C 204.

—Names appearing in village record is sufficient to implead though no interest claimed in suit property. A I R 1927 All 315 = 100 I C 679.

—Will only apply when Court has jurisdiction over party tried to be impleaded. A I R 1922 Cal 500 = 49 C 895 = 27 C W N 82 = 70 I C 229.

—Secured creditor can sue on his security any other creditor in absence of Receiver. A I R 1930 Lah 855 = 12 Lah L J 113 = Ind Rul (1931) Lah 28 = 128 I C 300.

—In mortgage suit managing members are necessary and sufficient parties 96 I C 664 (All).

—Where the defendant in a case has raised no objection as to the non-joinder of a plaintiff the Court should not dismiss the plaintiff's claim on that ground without framing an express issue and allowing the plaintiff to meet it. 21 I C 181.

—Mortgages distinct executed by different persons—Suit for joint decree in respect of joint amount of—Not quite correct 1932 A L J 795 = A I R 1932 A 676 = A L R 1932 A 1069.

## C. P. C. (1908) Or. I r. 4

—This rule embodies in a more convenient form the provisions of sections 26 and 28 of the old Code relating to judgment: its effect is merely to invest the Courts in India with the power to distribute relief and liability among the parties a power which was originally vested in the English Courts of Chancery exclusively. Though new in form, this effects no alteration in procedure already established in India under the old Code.

—O. 1, R. 1 quite as much as O. 1, R. 3 applies to questions of joinder of parties as also of causes of action. To determine whether a suit has been constituted in conformity with O. 1, R. 3, two factors have to be considered (1) could the right to relief against the debts be said to be in respect of or arising out of the same act or transaction and (2) would any common question of law



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or fact arise if separate suits were brought. It is not necessary that all the questions of law or fact which arise should be common to all the parties. For this purpose there is no difference in principle between a claim founded on breach of contract and one founded on tort. Where the plff. asserted that he was the owner of certain goods, that one of the defts had obtained possession of the same and of the documents of title relating thereto by means of fraud and had transferred the same on different occasions to the other defendants and prayed in the alternative for the recovery of the goods and of the documents of title or of the value thereof. *Held* that the suit was not bad for misjoinder of parties and of causes of action and that if convenience required it the several issues might be tried separately. 21 C W N 724 = 41 I C 944 = 45 Cal. 111 = 27 C L J 158.

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--As to whether a corporate body can be made co-plff. without its consent see 10 I C 515

**C. P. C. (1908) Or. 1 r. 6**

--In a suit on Hundi drawer is a necessary party. 25 I C 881.

--In case of parallel contracts with different carriers for same goods for same journey, all carriers are necessary parties in a suit for compensation for shortage of delivery : 108 I C 591 = A I R 1928 C 490.

--But see dictum of Davar J that in a suit by a creditor to establish his mortgage against the share of his mortgagor in a joint Hindu family, the other members of the family are not necessary parties. 15 Bom L R 944 = 21 I C 689.

**C. P. C. (1908) Or. 1 r. 7**

--All persons in possession being proper parties to a suit for possession, a sub-tenant not joined cannot resist possession : 23 Bom L R 1251 = 64 I C 692 = A I R 1922 B 273 = 46 B 526.

--The practice of presenting a pleading subsequent to the written statement and trying preliminary issues and not giving leave to amend is reprehensible. 17 M L T 48 = 26 I C 927.

**C. P. C. (1908) Or. 1 r. 8***Synopsis.*

- (1) Legislative Changes.
- (2-3) General Principles and scope.
- (4) Conditions to be complied with under the rule.
  - (a) numerous persons.

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- (b) "having the same interest—instances.
- (c) clubs and other associations.
- (d) suit by a member of a community in his own right.
- (e) representative persons.
- (f) permission when to be obtained.
- (g) permission whether should be express.
- (h) notice and public advertisement.
- (i) fresh permission for appeal.
- (5) Malabar Law,
- (6) Sub-rule (2)
- (7) Court adding parties after decree.
- (8) Abatement.

**(1) Legislative Changes.**

--The rule applies to High Court and Prov. Sm. C. Court and corresponds to O. 16 r 9 of R. S. O.

--Sub-rule (1) corresponds to S. 30 of the C P Code, 1882. The only change is the substitution of the word "persons" for the word "parties" contained in the old section. The alteration seems to have been made on account of a contention raised in 9 C 604 (606). Subrule (2) corresponds to para. 4 of S. 32 of the old Code, with the addition of the words "or for whose benefit."

--"We have, on the suggestion of the Advocate-General of Madras, added the words "or for the benefit of" after the words "on behalf of."—See the Report of the Select Committee.

**(2-3) General Principles and scope of the rule**

--The rule is based on the general principle that all persons interested in the suit, however numerous they may be, ought to be made parties so as to enable the Court to do complete justice by deciding upon and settling the rights of all persons interested, but in cases where there is a large class of individuals having the same interest the Court, for the sake of convenience allow them to be represented by one of the class for himself and others. 28 B 209 = 5 Bom. L R 937.

--The provision has been enacted for the benefit of the defendants to the extent that it prevents multiplicity of suits 107 I C 789 = A I R 1929 Mad 44.

--The Court cannot proceed to act *suo moto* under Or. 1 r. 8 without being moved to that effect by the plaintiff. 33 P L R 221.

--Thus where notice issued under O. 1, r. 8 does not mention whether permission to file representative suit is granted nor is it served on all the persons concerned, the proceedings are vitiated. A L R 1933 L 1214; but permission under O. 1 r. 8 to sue in a representative character need not be expressly



C. P. C. (1908) Or. 1 r. 8 (Contd.).

(2-3) General Principles and Scope of the Rule—(Contd.)

recorded and so omission to pass formal order granting permission does not vitiate the decree.

A L R 1933 L 1213.

—The rule should not be applied where its application will defeat some other provision of the law. Where in the case of a temple there are no proper trustees, and any prayer to get the properties restored would be futile for that reason, without a prayer to have a proper trustee appointed, a suit under Or. I, r. 8 would, under the circumstances, be evading S. 92 of the Code and so not maintainable.

110 I C 894 = A I R 1928 Mad. 614.

(4) Conditions to be complied with under this rule.

—These are: (1) that there must be numerous persons having the same interest in one suit; (2) that necessary permission is obtained; and (3) that notice of institution is given to all persons interested.

—Once the Court is satisfied that the imperative provisions have not been complied with, it cannot go into the merits. A I R 1929 All 806.

—If the requisite conditions are not complied with, the decree binds the defendants personally and not the community generally. 7 P 197 = 9 P L T 113 = 108 I C 330 = A I R 1928 Pat. 205.

—But if some out of the numerous persons whose interest is common in the suit subsequently side with the opposite party, the representative character of the suit is not lost.—48 C L J 276 = A I R 1928 Cal 741 (Suit to recover rent on behalf of a village deity).

—(a) "Numerous persons."—O. I, R. 8 does not lay down any hard and fast rule as to how many persons should represent public or the rest of the class of persons of the same interest. A L R 1933 Pat. 253.

—The point has been raised in several cases as to what constitutes "numerous."—In 9 M 463 (466) it was held that the rule does not allow one or more persons to sue on behalf of the general public. In 20 C 397, the Madras case was referred to, and it was further held that a suit could not be brought on behalf of the Hindu community generally, as it was not capable of ascertainment, and that inasmuch as the section required notice to be served "upon all such parties," the words "numerous parties" meant parties capable of being ascertained. This decision was disapproved, and the point fully considered in 33 C 905 = 10 C W N 867, and in 24 C W N 206 = 54 I C 742, where it was held that the section should not in its application be limited to cases where the parties, though

C. P. C. (1908) Or. 1 r. 8 (Contd.).

(4) Conditions to be complied with under this rule—(Contd.)

numerous, can be definitely ascertained. A suit may be instituted under this section on behalf of a defined class of the general public, though that class may be composed of a more or less indefinite number of persons. This was a suit by the plaintiffs who were members of the *Satchasi* community on behalf of themselves and other members of the community for a declaration of their right to take part in the management of the worship of a goddess and for joint possession with the defendants of the land on which the worship was carried on. See to same effect A L R 1933 L 1213. Suits have been allowed by one or more persons on behalf of a sect—23 M 28, 30; 21 C 180; 31 C 839; 14 M 57; 22 A 269; or a caste 21 M 10; or worshippers at a mosque 8 C 32; or fellow villagers—21 C 181 notes; 29 C 100; 8 M 496 or a class of villagers—19 B 319; 12 B 221.

—The Mahomedan community (7 A 182) or the Hindu community (33 C 905) is not the general public, but only a particular portion, though it is a large one, of the general population of this country which consists of numerous races and creeds. The question whether the community has got confidence in the plaintiff as regards the proper conduct of a suit is not a matter with which the defendants are concerned. 107 I C 789 = A I R 1929 Mad 44.

—Certain members of the Dhobi community of Narainda, with the leave of the Court under Or. 1, r. 8, C P Code, sued on behalf of the community for a declaration of its title to an *akhra* alleged to have been established by the ancestors of the community and for recovery of possession thereof. It was found as a fact that the Dhobi community of Narainda had been owning the *akhra* and its properties from time immemorial through panchayats. Held, that the Dhobi community of Narainda had the right to hold and manage the property and maintain suits with respect thereto through panchayats and that the present suit which was properly constituted under Or. 1, r. 8, C P Code, should succeed. 24 C W N 206 = 54 I C 742.

—It has also been held that a person may render himself liable to a community, like the Vysia community of Mogarala, by agreeing to pay a certain sum of money to it, and a suit to recover it may be brought by the community under this rule. 44 M L J 240 = 72 I C 95 = A I R 1923 Mad 434.

—Where numerous members of a caste seek to enforce rights as against strangers or as against certain other members of the caste, Or. 1, r. 8, C P Code, applies to the case. It is not necessary for the persons asking for leave under Or. 1, r. 8 to obtain formally

C. P. C. (1908) Or. 1, r. 8 (Contd.).

(4) Conditions to be complied with under this rule—(Contd.)

beforehand the authority of those whom they seek to represent. Nor need they summon a caste meeting before bringing the suit. 30 M L T 47=64 I C 618=A I R 1921 Mad 682.

—If however a meeting is called the position presumably would be different, for it has been held, that where the plaintiffs instituted a suit as representing a section of the caste, for taking of accounts and recovery of monies belonging to that section, after being authorized at a meeting not properly convened, and the suit was supported by a large number of members and opposed by numerous other members, that a representative suit was in the circumstances not maintainable. 40 B 158 = 19 Bom L R 1 = 33 I C 264.

—But where the plaintiffs have been validly appointed in a meeting to represent the community, the fact that some members of the community subsequently side with the defendant will not affect the representative character of the suit under this rule. 48 C L J 276=A I R 1928 Cal 741.

—Premises belonging to a community were let out to the defendant. The president of the community who was authorized by a resolution of the community to file suits, sued to eject the defendants on the ground that the demised premises were required for letting to members of the community. Held, that the resolution passed by the community did not entitle the plaintiff to sue in his own name since there having been numerous members of the community with the same interest in the suit, notice of the institution of the suit, to all such persons as well as permission of the Court for filing the suit was necessary under Or. I r 8, 46 B 132 = 64 I C 555 = 23 Bom L R 972 = A I R 1922 Bom 109.

—(b) "Having the same interest"—Instances—Where a number of persons in the same interest have occasion to assert and defend their rights, they should resort to the provisions of this rule. 7 M 87. See 32 M 131.

—This section applies only to cases in which many persons are jointly interested in obtaining relief, and not to a case in which an individual right has been violated 7 A 178. See also 8 B 432; 32 M 131; and 20 C 810. See also 23 M 28 (approved in 11 M L T 275 = (1912) 1 M W N 105=15 I C 399).

—A villager may bring a suit on behalf of himself and his fellow villagers for a declaration of a right of way and for an injunction against the defendant for obstructing the way 26 C W N 587=69 I C 910.

—But the rule is not intended to enable individuals to sue on behalf of the general public in respect of an encroachment on a

C. P. C. (1908) Or. 1, r. 8 (Contd.).

(4) Conditions to be complied with under this rule—(Contd.)

public high way. 10 P 568=133 I C 463=A I R 1931 Pat 418

—The disciples of a *muth* have sufficient interest within the meaning of this rule to maintain a representative suit to declare alienations made by the Mahant invalid; 41 M 124 = 42 I C 366.

—It is open to the worshippers of a temple under this rule, to bring a representative suit for a declaration that a permanent lease of temple property granted to the defendants in possession is invalid; 43 M 410 = 38 M L J 226 = (1920) M W N 393; (40 M 212 (F B) and 41 M 124 followed); or for recovering temple property from a trespasser; 44 M L J 116 = 71 I C 463 = A I R 1923 Mad 276.

—Under this rule the Court has the power to allow a plaintiff to sue some persons as representing themselves and others having the same interest in the subject-matter of the suit, and the consent of the defendants on the record is not necessary (1912) M W N 152.

—(c) Clubs and other associations.—A suit in respect of a matter in which a club or other association is interested cannot be instituted by the secretary alone even if he is authorized by a resolution of the members of the club or association to do so. In such a case the suit must be brought either by the Secretary on his own behalf and on behalf of the other members, or by all the members of the association under this rule; 6 A 284; 14 M 362; 49 C L J 357 = A I R 1929 Cal 445.

—Unless the Secretary of a club has expressly accepted personal liability on a contract, entered into by him on behalf of the club, he cannot be sued personally on the contract, nor can the members be sued collectively through the Secretary; 20 A 497. Similarly, a suit to eject tenants from property belonging to the caste cannot be maintained by the President of the Managing Committee of the caste, even if he is authorized to do so by a resolution passed by the members of the Committee. In such a case, the suit must be brought by him on behalf of all the members of the caste; 46 B 132 = 64 I C 555 = 23 Bom L R 972; 24 C W N 206 = 54 I C 742.

—One member of an unincorporated association cannot sue in damages on behalf of the other members where all such members are alleged to have suffered damage by reason of the publication of the same libel, nor can he maintain such a suit on behalf of the incorporated association after subsequently getting it registered. 8 R 250 = A I R 1930 Rang 177.

—With the permission of the Court an officer of an unregistered or unincorporated body or society can bring a suit on behalf of the members. 38 I C 572.

C. P. C. ( 1908 ) Or. I, r. 8 ( *Contd* )( 4 ) Conditions to be complied with under this rule—( *Contd* )(d) *Suit by a member of a community in his own right,*

—This is an enabling rule and it does not debar any member of a committee from bringing a suit on his own right, though the act complained of is injurious to the whole community. Where Mahomedans belonging to a particular sect are restrained from using a mosque for prayer, any member of the sect who is entitled to use the mosque may bring a suit to enforce the right. In such a case, it is not necessary that the suit should be brought by him on behalf of himself and all the members of the sect; 2 P 391 = 74 I C 403 = A I R 1923 Pat 475.

—In the same way, any member of a community may bring a suit to set aside unauthorized alienation of endowed property or formal administration of property belonging to the community; 7 A 178; 32 A 284; 33 A 666; 35 A 197; 5 A 497; 20 C 810; 28 Bom L R 309 = A I R 1926 Bom 179 = 94 I C 47.

—A beneficiary of a trust in respect of a Mahomedan *wakf*, interested in the maintenance of a mosque or other charitable institution, may, without having recourse to the provisions of Or. I, 8 C P Code, and without suing in a representative capacity on behalf of the other beneficiaries, sue for recovery of possession of property wrongfully alienated by the trustee and for the incidental declaration that the subject of the trust cannot be alienated; 2 P 391 = 74 I C 403 = A I R 1923 Pat 475; 66 I C 90 = A I R 1922 Oudh 1 = 9 O L J 111; 28 Bom L R 309 = 94 I C 47 = A I R 1926 Bom 179; 55 I A 96 = 55 C 519 = 108 I C 361 = A I R 1928 P C 16.

—If the individual rights of the plaintiffs are infringed they can maintain an action without joining others whose rights are equally infringed by the wrongful act; 29 I C 248 = 29 M L J 91 = 17 M L T 453. *See* also 35 A 197 = 11 A L J 233 = 18 I C 797.

—Where the plaintiff brought a suit on a promissory note executed by five persons who, he alleged, were managers appointed by the community and invested with powers of borrowing and dealing with the common property, it is open to the Court to allow the defendants to be sued as representatives of the community. The question if the managers were competent to contract the debt so as to bind the common property being an issue in the case, no substantive rights of those who have not been impleaded are affected by this order.—136 I C 315 = A I R 1932 Mad. 163.

—Where injury is threatened to a well constructed for the use of the people

C. P. C. ( 1908 ) Or. I, r. 8 ( *Contd* )( 4 ) Conditions to be complied with under this rule—( *Contd* )

*mothalla*, any resident of the *mohalla* can bring a suit in his own right to restrain the threatened injury. In such a case the leave of the Court under Or. I, r. 8, C P Code, is not necessary to prove special damage; 62 I C 888.

—The Secretary of State sued to recover possession of certain lands from eight persons described as "all residents and mohants of 'Guna akhara' which was an unregistered association of a large number of Sadhus, alleging that the property, had not been granted to the institution by *samad* but that the Government had proprietary right therein. At the date of the suit the defendants were the managers of the institution and were through their agents in possession. *Held* on the above fact that it was not necessary for the plaintiff to obtain leave under this rule.—34 C W N 849 (P C) = 52 C L J 54 = 32 Bom. L R 1516 = 127 I C 542 = A I R 1030 P C 232 = 59 M L J 134.

—(e) *Representative suit*—In a suit where one person is allowed to represent others as defendants in a representative capacity the general rule is that any decree passed in that suit can bind those others only with respect to the property of those others which he can in law represent and no personal decree can be passed against them, although the party on record *co nomine* may be made personally liable. This is the principle to be applied to suits brought under this rule; 36 M 414 = 12 I C 1006 = 22 M L J 109 = 10 M L T 515.

—Persons conducting a suit on behalf of themselves and others with the leave of the Court under this rule have authority to enter into a compromise so as to bind those whom they represent. 24 M L J 192 = 18 I C 369.

—The provisions of Explanation VI to S. 11 of the Code apply to a suit under this rule, but they are not controlled by it. So if a Court allows a suit to proceed in a representative capacity for the benefit of numerous parties all of them would be bound by the decree even though the procedure prescribed by this rule was not duly followed. A suit filed with leave by two or more members of a community who claim a right in common with others is *res judicata* by reason of a previous decision in a prior suit by other members of the community instituted under S. 30 of the Code of 1877 for the same relief, although no leave under that section was taken, provided the decision was given on *bona fide* contest.—51 M 128 (F B) = 107 I C 625 = 54 M L J 8 = A I R 1928 Mad 77.

—(f) *Permission when to be obtained*—There is no doubt that the proper course is to obtain permission under Or. I, r. 8 before the suit is instituted. But there is nothing in

C. P. C. (1908) Or. 1, r. 8 (Contd.)

(4) Conditions to be complied with under this rule—(Contd.)

the rule to show that if it is not so done it cannot be granted afterwards. It used to be held previously by the Calcutta High Court that permission must be obtained *before* the institution of the suit, otherwise it would be dismissed and that such leave cannot be granted at the hearing.—9 C 604 = 13 C L R 142 and 11 C 213.

—But subsequently it has been held by the same Court that the mere fact that the leave of the Court was not obtained *before* the institution of the suit should not result in the dismissal of the suit, and that permission under Or. I, r. 8 can be granted subsequent to the filing of the suit; the objection is not one affecting the jurisdiction of the Court.—44 C 258 = 21 C W N 1144=39 I C 773 (21 B 784, 25 M 399, 23 M 28, 22 A 269 *folld.* : 8 C 32, 11 C 33 *refld.* to 9 C 604 *dissented from*; 21 C 180 *distinguished*). The Bombay and other High Courts have held that such permission may be granted at the hearing and may relate back to the institution of the suit; 26 B 577; 21 B 784 (F B) (followed in 22 A 269); 47 B 809 = 25 Bom. L R 689; 10 M 185; A I R 1928 Nag. 39.

—Objection as to the absence of permission must be taken before the trial commences, and if no objection is taken then and trial is allowed to proceed, no objection can be raised in the appeal, the defect being cured by S 99. A I R 1931 Oudh 375 = 8 O W N 722.

—Where the Secretary of a Brahma Samaj sued to recover possession of certain lands it was held that the permission of the Court would be ordinarily necessary as Or. XXIX, r. 1 has no application except in the case of a Society which is a corporation registered under the Companies Act or legally competent to sue in the name of an officer. But where the Secretary had in fact been authorized by the members to sue, *held* that the omission to take the permission should be regarded as a mere irregularity cured by S. 99.—49 C L J 357 = A I R 1929 Cal 545.

—(g) *Permission whether should be express*.—Or. I, r. 8 does not require an "express" permission to be recorded by the Court; but if such permission can be well gathered from the proceedings of the court in which the suit was instituted an appellate Court may infer from such proceedings that permission was really granted, 21 C 180; 29 C 100; 35 C 1021; 39 C L J 612=84 I C 79=A I R 1924 Cal. 998; 101 I C 738 = A I R 1927 Cal. 608. See also 51 M 128 (F B). But see 5 A 602.

—(h) *Notice and public advertisement*.—In a representative suit service of proper notice to persons concerned is essential. A L R 1933 L 1213.

C. P. C. (1908) Or. 1, r. 8 (Contd.)

(4) Conditions to be complied with under this rule—(Contd.)

—Under O 1, R. 8 the Court ought to give notice at the plaintiff's expense of the institution of the suit to all such persons purported to be represented by plaintiff either by personal service or by public advertisement as the Court may in each case direct. A L R 1933 Pat. 253.

—So that the persons interested may have an opportunity of knowing who have been allowed to represent them; 17 C 906; 101 I A 738 = A I R 1927 Cal. 608; 46 B 132.

—The Court in granting permission to sue to two plaintiffs on behalf of all the residents of a locality directed the plaintiffs to advertise and give notice to all the residents of the locality as regards the suit. But the notice and advertisement were not issued. *Held*, (1) that the omission to issue notice was not fatal to the suit and would not result in its dismissal (2) that the publication of notice was peremptory and must be complied with under Or. I r 8 and that the case should be remanded to the trial Court for issuing notice and for retrial of suit; 44 A 231 (F B) = 20 A L J 73 = 65 I C 259 = A I R 1922 All 16; A I R 1927 Pat 221 = 8 P L T 267.

—It is the duty of the Court to cause service of notices or advertisements to be published as required by this section. If a plaintiff omits to move the Court for that purpose, his suit should not be dismissed on account of the failure of the Court to perform the duties imposed upon it by the section. 35 C 1021; 13 C W N 104 Note 44 A 231 (F B) = A I R 1922 All 16 = 20 A L J 73=65 I C 259.

—Where a trading committee instituted a suit by its Manager, whom the committee had authorized to sue on its behalf, against two members of the committee who had withheld certain monies, and on objection being taken that the committee could not sue in its own name the suit was amended and the manager was allowed to sue in a representative character on behalf of himself and also on behalf of the committee, *held* that the amendment was valid and that the nature of the suit was not changed by the amendment, provided that notice under Rule 8 was issued. 118 I C 285 = A I R 1929 Mad 683.

—Where notice was not given it was held that a decree could only be passed against those defendants who were on the record 7 P 197 = 108 I C 330 = A I R 1928 Pat 205.

—(i) *Fresh Permission for appeal*.—If permission has been validly granted for representation of the suit in the Court of first instance, no fresh permission is necessary for the purposes of an appeal if an appeal is preferred from the trial Court's decree. So far as this question is concerned, the process



C. P. C. (1908) Or. I, r. 8 (Contd.).

(4) Conditions to be complied with under this rule—(Contd.)

dings in appeal may very well be regarded as proceedings in continuation of the suit and the result of the appeal would be taken as the result of the suit itself. 101 I C 738 = A I R 1927 Cal 608. See also 51 I C 437 = 46 P R 1919.

(5) Malbar Law.

—Where the senior *anandravan* of a Marumakkatayam *tarwad*, sued to set aside a lease by a *karnavan* and obtained a decree, and the defendant filed an appeal during the pendency of which the plaintiff died, and so the *karnavan* and another *anandravan* applied to be impleaded as legal representatives, it was held that Or. XXII, r. 3 did not apply, but that the applicants as also any junior *anandravan* could be made parties under Or. I, r. 8.—(1928) M W N 867.

(6) Sub-rule. (2)

—Where at first permission was granted to the plaintiffs to maintain the suit in a representative capacity but subsequently some other members of the community objected to the plaintiffs' carrying on the suit the proper procedure for the Court is to allow those persons to be brought on the record as parties under Cl. (2) of Rule 8 and not to dismiss the suit. 135 I C 806 = 33 Bom L R 1575 = A I R 1932 Bom 65.

(7) Court adding parties after decree.

—In a suit by three persons under S. 14 of the Religious Endowments Act, a decree for damages was passed in favour of the plaintiffs. The plaintiffs neglected to execute the decree whereupon the Court added the trustees of the temple as plaintiffs to enable them to execute the decree. Held, that as the suit was brought by the plaintiffs in a representative capacity, it was competent to the Court under Or. I, r. 8 C P Code to add parties even after the passing of the decree; 12 I C 284 = A I R 1923 Mad 472 = 17 L W 422 = 44 M L J 282=(1923) M W N 239 (24 M L J 192 and 33 M 483 = 20 M L J 546; 28 M 319 followed). The principle of this rule can be given effect to in a proper case in an appeal. 132 I C 657 = A I R 1931 Lah 610.

(8) Abatement.

—Where a suit is instituted by the plaintiff on behalf of himself and other members of his community with the necessary permission under this rule, the suit does not abate on the plaintiff's death; any party on whose behalf the suit was instituted can then apply to be added as party and the Court cannot dismiss the suit for default. 54 M 770 = 132

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C. P. C. (1908) Or. I, r. 8 (Contd.)

(8) Abatement—(Contd.)

I C 289 = A I R 1931 Mad. 590 = 60 M L J 659. See also 54 M 527 = 34 L W 214 = 130 I C 761 = A I R 1931 Mad. 452 = 61 M L J 135.

—Where certain plaintiffs sued under this rule and obtained a decree and the defendants preferred an appeal from that decree and made the said plaintiffs as well as other persons on whose behalf the suit was instituted respondents in the appeal, and some of the latter died and their heirs were not substituted; held that no substitution was necessary. I L 582.

—Where a suit is laid with an order under Or. I, r. 8 by which some defendants were to represent others, any death amongst the latter who were so represented cannot affect the constitution of the suit. 55 C L J 8 = A I R 1932 Cal. 275.

—A representative suit does not abate on the death of one of the others who were represented by the plaintiffs on the record. 91 I C 558 = A I R 1926 Lah. 216.

C. P. C. (1908) Or. I r. 9

**Object and scope.**—This rule corresponds to S. 31 of the C P Code, 1882. The words "*or non-joinder of parties*" have been added, and the second para. of S 31 of the old Code has been omitted. It follows English Or. XVI r. 11 and the principle laid down in 21 M 373 where it was held that the word "*misjoinder*" in this section comprehends cases of "*non-joinder*" as well as "*misjoinder*". This rule must be held to amount to a direction to the Court not to dismiss a suit on the ground of misjoinder or non-joinder of parties. Addition of the word "*non-joinder*" makes it clear that non-joinder is not fatal.—See 19 C L J 316; 19 C L J 455; 41 C 581 at p. 585.

—The latter part of this rule provides that "*the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it*" this part of the rule clearly applies to cases where the rights and interests of the parties actually before the court can be determined. But it has no application in cases where, under the substantive law, it is not possible to determine the rights of the parties before the Court. The rule as to nonjoinder presupposes that there are certain parties properly before the Court and certain other necessary parties not before the Court.—9 L 588=110 I C 384=A I R 1928 Lah 375.

—It refers to cases where the *lis* may be determined with reference to the parties before it; the principle of non-joinder contained in it is different from the principle underlying Or. XXII, r. 4. 128 I C 8=28 A L J 857; A I R 1930 All 762.

**Misjoinder.**—Misjoinder may be of parties or of causes of action. Joinder of plaintiffs



## C. P. C. (1908) Or. I, r. 9 (Contd)

## Object and scope—(Contd)

is dealt with by Or. I r. 1 joinder of defendants by Or. I r. 3 and joinder of causes of action by Or. II rr. 3 to 6. This rule deals with misjoinder of parties. Misjoinder of parties can do the defendants no real harm, and the defect can easily be remedied by the Court by making a proper order for striking out, adding or transposing a party; and the remedying of the defect at any time cannot prejudicially affect in any particular the course of the defence or attack (see 34 B 13 at p. 20) See also S. 99 which says that no decrees shall be reversed or substantially varied nor any case shall be remanded on account of misjoinder of parties of action, etc.

**Non-joinder**—Non-joinder is the omission to implead a party or to join a cause of action in a suit. The provisions relating to joinder of causes of action are to be found in Or. II. So far as omission to implead a party is concerned it may be of two kinds omission to implead a *proper* party, or omission to implead a *necessary* party. Non-joinder of parties is a more serious thing than misjoinder of parties (see 34 B 13.)

**Distinction between necessary and proper parties**—There is a distinction between necessary and proper parties to a suit. Two conditions must be fulfilled in order that a defendant may be considered a necessary party, namely, first, there must be a right to some relief against him in respect of the matter involved in the suit, and secondly, his presence is necessary in order to effectually and completely adjudicate upon and settle all the questions involved in the suit; (1922) P 326.

—There is a distinction between the non-joinder of proper, but not necessary, parties and non-joinder of parties whose presence is essential. In a suit for partition in a joint Hindu family, the grandsons are not necessary parties and are represented by their own father. At the same time they may be proper parties and on an appeal the appellate Court can direct the lower Court to bring them on record and give them separate allotments if they so desire: 1 P 361; 3 P L T 238.

—Necessary parties are parties "who ought to have been joined," in the sense that they are parties in whose absence no decree at all can be passed; 33 A 272 = 43 B 575; 51 I C 223; 21 Bom. L R 369.

—Proper parties are those whose presence is necessary to enable the Court to adjudicate upon the matter in dispute more effectually and completely; noted *ante*. 28 B 11 at p. 17; 51 M L J 148; A I R 1926 Mad. 927.

—How a question of non-joinder is to be treated—In determining the question of non-joinder the Court must confine itself to the claim before it—

24 Bom. L R 1318.

## C. P. C. (1908) Or. I, r. 9 (Contd)

## Distinction between necessary &amp; proper parties—(Contd)

—Where the defendant in a case has raised no objection as to the non-joinder of a co-plaintiff the Court should not dismiss the suit on that ground without framing an express issue and allowing the plaintiff to meet it.—

21 I C 182.

—Where it appeared that no issue on the point was framed and the plaintiff had no opportunity to adduce evidence on the plea of non-joinder, *held*, that the suit was not liable to be dismissed on the ground of non-joinder of parties; 217 P L R 1910.

—Opportunity must be given of amending the plaint by joining the party omitted if it is found that he is a necessary party.—129 I C 508 = A I R 1930 Rang. 295.

—Where a suit was brought by the plaintiff alone on the allegation that he had made a contract with the defendant and the latter produced an agreement showing that another person was a contracting party along with the plaintiff, and the appellate Court accepting the correctness of the agreement dismissed the suit on the ground of non-joinder, *held* that the proper course was not to dismiss the suit but to issue notice to the party who ought to have been impleaded and either implead him as a party plaintiff or join him as a *pro forma* defendant and then dispose of the suit on the merits.—122 I C 597 = 28 A L J 247.

—Where after notice to all the parties and without any protest from them certain persons are brought on the record as legal representatives in the place of deceased person, the co-defendants cannot afterwards reopen the question of representation or insist on abatement on the ground that one other legal representative has been left out.—36 C W N 1138

"So far as regards the rights and interest of the parties actually before the Court."—Order I, r. 9 does not apply where the rights and interests of the parties actually before the Court cannot be determined. The change made in the new Code does not affect the rule regarding the indivisibility of a mortgage nor the rule under the Mitakshara that no co-partener has a definite share till partition is made; 10 N L R 72 = 24 I C 831; 13 I C 197 = 9 A L J 86.

—Order I, r. 9 deals only with cases where the Court can deal with the matter in controversy in the suit with regard to the rights and interests of the parties actually before it; 52 I C 18.

—The rule does not apply when a cause of action arises against a number of persons jointly, because in that case, when one of such persons is eliminated, no cause of action subsists against the rest of them. If it does not subsist against all, it cannot subsist against any one; 35 A 441 = 11 A L J 630.

C. P. C. (1908) Or. I, r. 9 (Contd.)

So far as regards the rights and interest of the parties actually before the Court—(Contd.)

—The court cannot, by its decree, affect the rights of those who are not parties to suit, if therefore no decree can be passed without affecting the rights of absent parties, the suit cannot proceed in their absence and should be dismissed. If however, the rights of the parties actually before it can be determined in the suit leaving the rights and interests of others unaffected, there is no reason why, even though other parties might properly have been added, the Court should not determine the matters in controversy between the parties actually present; (1922) P 326; 25 C W N 249.

—In an action for sale upon a mortgage of joint Hindu family property, when some only of the members of the joint family are made defendants, their rights and interests in the joint family property are neither defined nor separable from the rights and interests of those who are not before the Court. The Court therefore, cannot proceed to deal, under this rule, with the matter in controversy so far as regards the rights and interests of the parties actually before it; 9 A L J 86.

—Order I, r. 9 is subordinate to Or. XXXIV, r. 1. A mortgage is indivisible and if all persons entitled to a share in the mortgage-money are not on the record, the whole suit must be dismissed; 36 I C 542 = 1 P L J 468. See also 31 I C 814.

—The Calcutta High Court has held that Or. I, r. 9 applies to a mortgage suit just as well as to any other suits.—54 C L J 113 = 134 I C 1968. The Allahabad High Court has also held that the provisions of Or. XXXIV are subject to the provisions of Or. I, r. 9.—10 A L J 134.

—In a suit for profits of *zerai* land held by the defendants in excess of their shares, all the co sharers were not made parties. Held that the suit must be dismissed for non-joinder of necessary parties in whose absence the excess could not be determined; 1 P L J 573 (F B).

—Necessary Party in appeal.—Under Or. I, r. 9, C P Code, a person who is a necessary party to the suit is a necessary party to the appeal; 3 P L T 456 = 66 I C 780.

—Joinder of necessary parties.—Persons who are jointly entitled to the same relief in respect of a transaction must join as plaintiff in one suit, and ordinarily all of them should be co-plaintiffs and only such of them should be made defendants as are unwilling to be joined as plaintiffs or have done some acts precluding them from being plaintiffs.—35 C W N 478; 5 C L J 527; 106 I C 140.

—The following notes are intended to give

C. P. C. (1908) Or. I, r. 9 (Contd.)

Necessary Party in appeal—(Contd.)

an idea as to who are or are not necessary parties in different classes of suits :—

#### (a) Suits relating to joint property.

—The grandsons of a deceased member of a joint Hindu family are proper, though not necessary, parties and a suit by a stranger is not defeated by mere non-joinder of the grandsons where the sons have been already made defendants. 124 I C 377 = A I R 1930 Sind 147 (1 P 361 = A I R 1922 Pat. 96 relied on).

—It is not the form in which the manager sues which determines his capacity to sue on behalf of a joint Hindu family, but the fact that nobody except him has the right to interfere in the business of the joint Hindu family or to give a discharge or a receipt for a debt due to or from that family which confers the capacity on the manager. It is therefore a question of fact and not a question of form. 12 L 428 = 133 I C 116 = 32 P L R 199 = A I R 1931 Lah. 559.

#### (b) Suits for damages for Tort

—Where all the plaintiffs received hurts from a body of persons and each of them could have brought a suit for damages against all those persons, they can in law bring a suit for damages against all those persons jointly. 138 I C 77 = 30 A L J 497 = A I R 1932 All. 401.

—(c) Suits on contract.—By reason of S. 45 of the Contract Act, all living joint promisees must join in the suit to enforce a debt due to them. 109 I C 99 = 30 Bom L R 117 = A I R 1928 Bom. 191.

—Where two parties contract with a third party, a suit by one of them making the other a co-defendant ought not to be dismissed merely because the plaintiff has not proved that the co-defendant had refused to join as a co-plaintiff; the objection cannot be sustained when the others have taken pleas contrary to those of the plaintiff. 133 I C 871 = 32 P L R 385 = A I R 1931 Lah. 445.

—Where there are two parallel contracts for the carriage of the same goods and for the same journey, a suit for the recovery of compensation for shortage of delivery cannot be proceeded with unless all the carriers are made parties 47 C 6 = 108 I C 591 = A I R 1928 Cal 490.

—Defendant No. 1, who had contracted to sell his *jama* to the plaintiff, failed to do so and joined his son, 2nd defendant, in selling a part of the land to another. Pending the suit for specific performance the 1st defendant died and the 2nd defendant contended that he claimed under a different title and that he had been improperly joined in

C. P. C. (1908) Or. 1, r. 9 (Contd.)

Joinder of necessary parties—(Contd.)

(c) Suits on contract—(Contd.)

the suit. *Held* that the 2nd defendant was a necessary and proper party to the suit. 33 C W N 687 = A I R 1929 Cal. 667.

—(d) Suits by executors, trustees, etc.—Where several executors have been appointed under a will and have entered on their duties as such, it is not open to some of them to sue on behalf of the estate without impleading the others. If a defendant is sued by one only of two persons who have a cause of action against him, he has a right to the action dismissed unless the other is joined (6 C 815 referred to) 72 I C 63 = 17 L W 241 = 44 M L J 249 = A I R 1923 Mad. 337.

—In a suit to recover trust property, all the trustees must join as plaintiffs. 42 M L J 133 = 70 I C 645 = A I R 1922 Mad. 317 = (1922) M W N 106.

(e) Suits in respect of property dedicated to an idol or religious endowment

—Where the very existence of the property of an idol is disputed, some-body should be appointed or allowed to represent the interest of the idol as against the interest of those persons who were in possession adversely to the temple, and it would not be in consonance with ordinary notions of justice or equity that a person who comes forward not on his own behalf but on behalf of a charitable or religious foundation, should be non-suited on the ground that he had no power or legal position to represent the idol. Where the plaintiffs, as persons interested in the affairs of a temple, brought a suit to have certain properties which were in the possession of the defendants restored for the benefit of the idol, and the defendants contended that the plaintiffs had no right to sue, *held* that the plaintiffs should not be non-suited but the aforesaid course should be pursued. 34 Bom L R 415.

—In a suit for setting aside an alienation of properties belonging to a religious endowment, a person to whom the plaintiff had conveyed a portion of the properties at a time when he had neither title nor cause of action to sue, need not be joined as co-plaintiff in the action. Nor is a transferee *pendent lite*, a necessary party to the suit; 1 P 475 = 3 P L T 352.

—In a suit to recover property belonging to an endowment all the trustees of the endowment should be made parties either as plaintiff, or as defendants. 11 C 338; 8 C 42; 14 M 489; and 5 C L J 527. But strangers to the trust are not proper or necessary parties to a suit under S. 92 of the Code. A I R 1932 Rang. 132.

C. P. C. (1908) Or. 1, r. 9 (Contd.)

Joinder of Necessary parties—(Contd.)

(f) Suits by one of several co-owners.

—One of several heirs (sisters) of a deceased Mahomedan, can sue his widow for her own share of her brother's property, without impleading the other sharers; 11 A L J 919 = 20 I C 658.

(g) Suits for rents, damages, apportionment of rent, and enhancement of rent under the Bengal Tenancy Act

—It has now been held that a suit for rent is maintainable against some of the heirs or successors in interest of a deceased tenant without bringing all these heirs or successors in interest on the record. 53 C 107 (F B).

—For a suit for recovery of rent by the sole landlord or by the entire body of landlords, see S. 148; and for a suit by a co-sharer landlord see S. 148-A of the B. T. Act.

—Where after the death of the original tenant a suit was brought against some of his men, who were in possession of the holding and against whom a previous decree was obtained for arrears of rent accruing due during the period of the latter's occupation *held*, that the suit was not defective by reason of the non-joinder of the other heirs 48 C 518 = 63 I C 949.

—All the relevant cases under this head will be found collected in Mitter and Mukerji's Bengal Tenancy Act, pp 654-659 in the notes under S. 188.

(h) Suits for ejectment.

—*Prima facie*, persons claiming adversely to the plaintiff's rights are not necessary parties in a suit for ejectment brought by him against his tenant. Where an order was made for joining the Secretary of State as defendant in such circumstances, *held* in revisions that the order was bad. A I R 1932 Mad 688.

—In a suit for recovery of khas possession on declaration of plaintiff's title, all trespassers should be made parties. 46 C L J 433.

—Where in such a suit two of the defendants were minors and their natural guardian did not appear and no steps were taken to have them properly represented, *held* that the suit was not maintainable. 30 C W N 742 = A I R 1929 Cal 669.

—An action for possession based upon forfeiture of a term should, for practical reasons, be brought against all persons in possession (including constructive possession) at the date of the suit, not because the suit is necessarily defective otherwise but because the decree will be difficult to enforce under the Code; 47 C 907.



C. P. C. (1908) Or. I r. 9 (Contd.)

Joinder of necessary parties—(Contd.)

(h) Suits for ejectment—(Contd.)

—But it has been held that it would be unreasonable to force a landlord to make in a suit for ejectment against his lessee all the under-lessees or even persons who may be in actual possession under such under lessees parties to the suit, the nature of which may change from a simple suit for ejectment on forfeiture or determination of the lease.—35 C W N 1132.

—(i) Suits for partition.—A suit which is in the nature of a partition suit cannot be properly dealt with unless all who are admittedly shareholders in the joint property are before the Court. 12 W R 256 (followed in 17 C 906). See also 2 C 149; 31 B 271 (291).

—Where the suit is not for partition between all the alleged co-parcener *inter se*, but for decision between the two branches of the family, held that it is not obligatory for the plaintiffs to implead all the members of the two branches but only the heads of the two branches. 13 L 483.

(j) Suits concerning Partnership business:

—To a suit for winding up a partnership, all partners having distinct interests must be parties; and where such a suit brought against all the partners, is not maintainable against some, the suit must be dismissed. 33 M 423.

—The non joinder of a dormant partner as co-plaintiff in an action on a contract entered into with the firm or one of its members is not fatal to the suit: (1915) M W N 864.

—(k) Suits by creditors to avoid conveyance under S. 53 of the Transfer of Property Act.—A suit to set aside a conveyance alleged to be fraudulent within the meaning of S. 53 of the T P Act, must be brought by or on behalf of all the creditors.—34 C 999 = 11 C W N 889 = 6 C L J 610 (affirmed on appeal in 43 I A 104 = 43 C 521).

—(l) Suits by contingent reversioner during the life-time of presumptive reversioner.—The right to sue to set aside an adoption or alienation by a Hindu widow is, as a general rule, limited to the nearest reversioner, and if he without sufficient cause refuses to institute proceedings, or if he has precluded himself by his own act, and conduct from so doing or has colluded with the widow, or concurred in the alleged wrongful act, the more remote reversioner will be entitled to sue by making the nearer reversioner a party to the suit.—8 I A 22 = 6 C 764 (P C) (followed in 19 B 614, and in 18 M 53). See also 9 A 441; 15 M 422; 15 A 132; 29 M 390 (F B); 16 M L J 307; 3 C L J 224; 38 M 406 (P C) = 19 C W N 641.

—Where the nearest reversioner precludes himself or herself from maintaining a de-

C. P. C. (1908) Or. I, r. 9 (Contd.)

Joinder of necessary parties—(Contd.)

(l) Suits by contingent reversioner during the life-time of presumptive reversioner—(Contd.)

claratory action by omitting to sue within the statutory period and thus practically concurs in an alleged improper alienation, the remote reversioner is entitled to maintain the suit. 32 C 62 = 9 C W N 25 See also 28 M 57; 27 A 406; 37 A 45 (P C) = 19 C W N 197 = 21 C L J 26 = 28 M L J 453 = 27 I C 892.

—(m-n) Possessory suits by persons in constructive possession.—A person in constructive possession of land through his tenant, who is dispossessed, is entitled to bring a suit under S. 9 of Act I of 1877, where the tenant in collusion with the dispossessor, refuses to bring the suit.—28 M 238; 13 C W N 303; 13 C W N 305; 13 C W N 835 = 10 C L J 30; 15 C W N 715 = 15 C W N 294 = 12 C L J 483. But see 6 C W N 616.

—(o) Suits against a firm or corporation.—See notes under Or. XXIX, r. 1. A firm is not a person under the Indian law and all that is prescribed in the C P Code is a form of suit which remains really one against the partners of the firm. Where a suit was instituted against a person who was not a partner of a firm, no decree could be passed against the firm, 111 I C 706 = A I R 1929 Lah. 149.

—See notes under Or. XXIX, r. 1, post.

—(p) Mortgage suits.—See notes under Or. XXXIV, r. 1, post.

—(q) Suits for accounts.—Where the agent has to account to more principals than one, they must all sue together, and he is not liable to render separate accounts in separate suits to each of the principals to whom jointly he is accountable. 62 I C 766.

—The plaintiffs brought a suit against the defendant No. 1 who was their cashier and defendant No. 3 who was the Sadar Naib. It was alleged that money was due by defendant No. 1 on account being taken against him and that the Sadar Naib was responsible for any loss which the plaintiffs might have sustained through the action or omission of their cashier which loss had been occasioned by his negligence, his duty being amongst others to supervise the work and to sign the accounts of the treasurer. Held that the suit was bad for misjoinder of parties and causes of action; 71 I C 324.

(r) Suits in which Government is a necessary party.

—Where it has been held that in a suit to set aside a sale held under the provisions of the Public Demands Recovery Act, the Secretary of State is a necessary party. This case has been distinguished in, 11 C L J 385 = 14 C W N 606.

## C. P. C. (1908) Or. I, r. 9 (Contd)

## Joinder of necessary parties—(Contd)

## (r) Suits in which Government is a necessary party—(Contd)

—In a suit by a tenant against his landlord, who is a *ghatwal*, for declaration of occupancy rights in a *ghatwalli* land and for recovery of its possession, the Secretary of State is not a necessary party, though he may be a proper party, and, therefore, the suit cannot be dismissed for the non-joinder of the Secretary of State ; 35 I C 788.

## "No suit shall be defeated"

—Though misjoinder, or non-joinder does not merit the dismissal of the suit, still, if a plaintiff after the Court decides that a certain person is a necessary party, refuses to make him a party, the suit should be dismissed ; 3 P R 1915 = 215 P L R 1914 = 110 P W R 1914 = 25 I C 480.

—Where two parties contract with a third party, a suit by one of them making the other a co-defendant ought not to be dismissed merely because the plaintiff has not proved that the co-defendant has refused to join as a plaintiff. In such a case, if the plaintiff succeeds, the decree should be in favour of himself, and the defendant who should have been joined as co-plaintiff ; 76 I C 577 (26 C 409 = 35 C 331 = 10 Bom. L R 66 *relied on*).

—Where in a suit for a declaration of a right of way as a village road and for removal of obstruction thereon, an objection was taken that one of the persons in the servient tenement had not been made a party the suit, which was overruled by the Courts below on the ground that it was taken at a late stage and the Courts below decreed the suit, *held* that the nonjoinder of person in question as a party to the suit was a fatal defect and on that ground the suit was dismissed ; 25 C W N 249. In 14 C W N 15 also it had been previously held that no suit for declaration of an easement and for other consequential relief can proceed unless all persons interested in the land over which such easement is claimed are parties to the suit. But the general proposition laid down in 25 C W N 249 is not applicable to all cases. See in this connection, 19 C W N 1211 on Letters Patent appeal 19 C W N 1216 ; 40 C L J 74 ; 64 I C 90 ; 69 I C 183 ; 85 I C 739 ; 88 I C 664.

## C. P. C. (1908) Or. I, r. 10

—See now the Indian Limitation Act, 1908 (IX of 1908), S. 22

## Synopsis.

- (1) Appeal.
- (2) General principles, scope and object.
- (3) Addition of parties.

## C. P. C. (1908) Or. I, r. 10 (Contd)

- (a) After limitation period.
- (b) At any stage of suit.
- (c) By consent.
- (d) Effect of.
- (e) Formal Procedure of application.
- (f) Joint family.
- (g) Mortgage.
- (h) Necessary parties.
- (i) Partition.
- (j) Partnership.
- (k) Power of Court.
- (l) Pre-emption suits.
- (m) Proper Parties.
- (n) Rent suit.
- (o) Secretary of State.
- (p) Suit by a benamidar.
- (q) Trust.
- (r) Other cases.
- (4) Amendment of plaint.
- (5) Bonafide mistake.
- (6) Defendant made plaintiff.
- (7) Plaintiff made defendant.
- (8) Questions involved in the suit.
- (9) Revision.
- (10) Striking out parties.
- (11) Substitution as plaintiff or defendant.
- (12) Other cases.

## (1) Appeal.

—An order under r. 10 adding a party is not appealable. A I R 1930 Mad. 987=1930 M W N 971=32 L W 766=60 M L J 237 = 129 I C 44; for an order under O. I, r. 10 is not a decree A I R 1922 Mad. 332 = 14 L W 642= (1921) M W N 799 = 42 M L J 97 = 30 M L T 172=45 M 194=69 I C 961; see also 36 M L J 619; as also such order is merely in discretion of the Court and cannot be appealable 36 I C 919.

—An order under O. I, r. 10 (2) discharging a defendant from a suit is also not appealable. A I R 1926 Nag. 75 = 89 I C 331; nor is an order striking out defendants joined for the sake of convenience. A I R 1923 Mad 690=45 M L J 703=18 L W 198=(1923) M W N 403=76 I C 207.

—But where in a partition suit the name of one of the defendants is struck out at the instance of the plaintiff thereby prejudicing the defendant's claim to share in the partition the order is appealable. A I R 1925 Pat. 121= 3 Pat 859=6 P L T 581=85 I C 90.

—And an order under this rule striking out name of a deft. on the ground that the plaint does not disclose any cause of action against such deft. is a decree and appealable as such : 49 I C 835=42 M 219.

—Where, inspite of plff's protest, certain persons were added as parties, and on appeal from that order, the order was upheld, and where such parties put in statements, let in evidence and ultimately a decree was passed



## C. P. C. (1908) Or. 1, r. 10 (Contd.)

## (1) Appeal—(Contd.)

against the plff. Held on appeal from the decree that the parties could not be struck off and their pleadings and evidence could not be ignored in deciding the appeal 1 O L J 591 = 26 I C 547.

—The appellant was the first defendant in a suit brought by the plff. and the suit had been decreed against him. The lower appellate court, finding that the appellant was not a necessary party to the suit and was wrongly joined as a defendant, struck off the appellant's name from the record and dismissed his appeal without costs. Held on second appeal that the proper order which should have been made by the lower appellate court was to set aside the order of the primary court and to dismiss the suit against the appellant with costs. 48 I C 963.

## (2) General principles, scope, and object.

—Rule obtaining under r. 10 (2) for addition of parties cannot be invoked if such addition would alter the nature of the suit. A I R 1925 Cal 26 = 28 C W N 805 = 82 I C 369.

—And the joinder of plffs under O. I. r. 10 is subject to provisions under O. I. r. 1, A I R 1927 Mad 831 = 53 M L J 269 = (1927) M W N 903 = 105 I C 114.

—An order under R. 10, O. 1, C P C ought not to be made when the plaint discloses no cause of action against the parties sought to be added newly. 40 C 323 at 330 = 17 C L J 183 = 16 I C 908. O. 1, R. 10 of the Code does not empower a Court to add any person as plff. who could not have originally joined as such. O. 1, R. 8 of the Code does not conflict with this view. 57 I C 784.

—As to applicability and scope of the rule see the Privy Council decision in 20 C W N 833 P. C.

S. 27 of the Civ. Pro. Code, does not apply to an appeal filed in the name of a wrong person. 4 C W N 58. The rule does not apply to a suit against dead person. 47 I C 894.

—Nor does it apply to a suit by receiver. 135 I C 863 = A I R 1932 R 11 (12) = I R 1932 R 79.

—As to a suit by Official Liquidator see. 2 L L J 402 = 59 I C 588. The rule applies to Revenue Courts; 2 A 264; see also 3 U P L R (B R). 106 (2).

—Where a Karnavan applied for withdrawal of appeal and subsequently the junior members applied to be made appellants the granting of latter application was held proper where Karnavan's withdrawal of appeal is with a view to cause loss to the tarwad—Appeal must be treated as pending till junior members' application is disposed of. 135 I C 8 = A I R 1932 M 31 = I R 1932 M 40.

## C. P. C. (1908) Or. 1, r. 10 (Contd.)

## (3) Addition of parties.

## (a) After limitation period.

—Change of limitation due to amendment of the limitation Act is a good ground for addition after the period of limitation. A I R 1925 Mad 347 = 78 I C 168.

—A suit for the ejectment of a sub-tenant's sub-tenant is not maintainable without the sub-tenant being made a party to the suit and in such a case if the sub-tenant is joined after the expiry of the period prescribed for suits for ejectment, the entire suit still fails. 30 I C 795.

—Execution sale—Setting aside—Auction-purchaser impleaded after expiry of period of limitation—Bar of limitation. O 21 R 90. 50 I C 5.

—Suit by some trustees of a temple against tenants—Addition—of other trustees after limitation—Objection—Suit if barred. 50 I C 353.

## (b) At any stage of suit.

—The power to add a party under O. 1 r. 10 can be exercised at any stage even at such a late stage as the time of the decree. A I R 1929 Bom 337 = 31 Bom L R 476 = Ind Rul (1930) Bom 98 = 122 I C 66.

—The power under s. 27 C P C 1882 ought to be exercised before the first hearing 6 C 370.

—Addition of parties in appeal—parties—Non-joinder of see 10 I C 776. Person cannot claim to be made a party in appeal if not so made in the lower Courts. 163 P W R 191 = 31 I C 27.

—A person neither a plaintiff nor a defendant in a lower courts cannot be allowed to come in as party at the final stages of the case in second appeal. 31 I C 27 = 163 P W R 1915.

—Though unusual plaintiffs may be added to a suit after decree especially in representative suits so that persons interested might enforce in execution the direction in the scheme A I R 1923 Mad 472 = 44 M L J 282 = 17 L W 422 = 32 M L T 212 = (1923) M W N 239 = 72 I C 284.

—A Court can order joinder of a new party even after a preliminary decree is passed. A I R 1926 Sind 26 = 89 I C 609.

—Under O. 1, r. 10 any party may be joined to the suit at any stage means he should be so joined before the passing of decree which also includes preliminary decree and an existing decree. 13 N L R 69 = 89 I C 849.

—Fresh parties cannot be added after compromise of the suit by original parties and during proceedings under O. XXIII, r. 3. A I R 1926 Mad 341 = 50 M L J 59 = 92 I C 311.

—In a representative suit court is competent to add decree-holders as parties even

C. P. C. (1908) Or. 1, rule 10 (Contd)

(3) Addition of parties—(Contd)

(b) At any stage of suit—(Contd)

after the passing of the decree. A L R 1933 M 1039.

—Court has jurisdiction, after the passing of the preliminary decree in a mortgage suit and before the final decree has been passed, to implead as defendants to the suit persons who were not originally impleaded as defendants and were not parties to the preliminary decree. A I R 1927 All 465=49 A 664=25 A L J 369=101 I C 868.

—A Court can add parties after the suit has been remanded to it by the Court of Appeal but the Court of Appeal cannot do so after passing the order. A I R 1926 Rang. 9=3 R 474=92 I C 125.

—As to whether court can add parties after suit has reached the stage of decree see. 42 C 72 P C.

(c) By Consent.

—A person cannot be added or substituted as plaintiff without the consent of the existing plaintiff, and before he can be so added or substituted it must be shown that the action was commenced in the name of original plaintiff by mistake and that the substitution or addition is necessary for the determination of real matter in dispute. A I R 1927 Cal. 340=45 C L J 146=101 I C 527.

—And ordinarily, the plaintiff has the choice of his opponent, and a party cannot be added as defendant at his will A I R 1925 Nag. 373=87 I C 988.

—But a new party can be impleaded as defendant even against the consent of the plaintiff, even though such addition may enable him to counter claim against the plaintiff. A I R 1929 Mad 413=(1929) M W N 67=29 L W 753=Ind. Rul. (1929) Mad. 844=118 I C 780.

—If a person who applies to be added as a party is only a permissible party, he cannot be so added against the wishes of the person to fight whom he is sought to be brought on record. A I R 1926 Mad 836=50 M 34=(1926) M W N 575=51 M L J 148=24 L W 738=95 I C 214.

(d) Effect of.

—When a party is added on his own motion addition takes effect for purposes of limitation from the date of application. A I R 1927 Mad 468=50 M 372=52 M L J 199=25 L W 477=38 M L T (H C) 126=100 I C 680.

—Otherwise from the date of the institution of suit A I R 1927 P C 252=26 A L J 371=30 Bom L R 220=32 C W N 281=47 C L J 136=54 M L J 88=4 O W N 1231=6

C. P. C. (1908) Or. 1, r. 10 (Contd).

(3) Addition of parties—(Contd)

(d) Effect of—(Contd)

R 29=27 L W 1=(1928) M W N 20=107 I C 237.

—Where a defendant is discharged and again reinstated as defendant, the suit must be deemed to be instituted on the date of re-instatement. A I R 1926 P C 88=(1926) M W N 592=31 C W N 174=96 I C 887.

—Even where the Court of its own motion adds a necessary party, the suit will be deemed to be instituted when the party is added. A I R 1925 Sind 181=17 S L R 324=79 I C 914. As to effect on limitation of addition of pro forma party see. 26 M L J 449.

—A plaintiff on the record cannot be given a good cause of action by the addition subsequently of a person as plaintiff who has a good cause of action. A I R 1927 Bom 424=29 Bom L R 418=103 I C 225.

(e) Formal Procedure of application.

—In adding a party the Court will not as a rule, act except on the application of parties: 25 All W N 35; see to the same effect 20 I C 262; and 36 I C 77; and 19 I C 163=18 C W N 464.

—But such application is not always necessary. Addition of parties to a final decree without any formal application under O 1, r. 10 (2) for joining them does not amount to an order under O. 1, r. 10 and no decree can be granted against such parties. A I R 1927 All 465=49 A 664=25 A L J 365=101 I C 868.

—A court has no jurisdiction to pass a decree against a person against whom the plaintiff does not seek any relief and who is joined as a defendant on his own application. The position of a person who is made a defendant on his own application and that of a person who is so made without any such application are very different in that the former has to make out a *prima facie* case before the plaintiff can be asked to meet it. 56 I C 845.

—The second deft, in a suit applied for leave to add a third party as deft. The plff. objected. *Held* that the power to add a third party is discretionary, but is widely exercised even though the addition may add new issues; if however serious embarrassment or inconvenience be caused to the plff. the addition is not effected. *Held*, also that although in this case new issues arose between the added deft. and the original defts, serious inconvenience would not be caused to the plff. if his position was safeguarded by the following provisions:—(1) that the issues between the plff. and the original defts. should be tried first (2) that no delay should take place in the determination of those issues (3) that if the plff.

**C. P. C. (1908) Or. 1, r. 10 (Contd)****(3) Addition of parties—(Contd)****(e) Formal Procedure of application—(Conclud)**

succeeded in obtaining a decree against the original defts. such a decree was not to be stayed pending the determination of the issues between the defts. 46 Cal 48=50 I C 51.

—Though when that is possible, any application under r. 10 of O 1 should be made to the Judge who heard the suit, in his absence another Judge can entertain it. A I R 1931 Cal 580; 58 C 801; 35 C W N 122=134 I C 1279.

—Where a scheme contains a clause reserving liberty to apply for modification, the proper persons who can apply under the liberty are the parties to the suit. If the previous parties are dead or colluding with the defendants, the Court can bring the applicants on record under O 1 r. 10. Sanction of the Advocate-General is not necessary for such application. 37 A 296; not followed. 5 Rang 263; 48 I A 12; 40 M 110, followed A I R 1931 Bom 388=33 Bom L R 546= Ind Rul (1931) Bom 407=133 I C 823.

—In a suit which is merely for compelling the registration of a certain document, no third parties can be added as parties to the suit on their own motion. A I R 1929 Bom 353=31 Bom L R 472=53 B 598= Ind Rul (1929) Bom 526=119 I C 654.

**(f) Joint family.**

—Mortgage of joint family property—Non-joinder of all persons interested—Suit not maintainable. 12 A L J 794 = 24 I C 252.

—Promissory note—Suit upon by manager of joint Hindu Family—other members not parties. See— 14 O C 127 = 10 I C 200.

—Suit brought by some members as managers - Maintainability. See 15 I C 876. Suit by manager on contract—Rules for joinder of—See 4 S L R 2 = 7 Ind Cas 584.

—Suit on a mortgage by members of a Hindu family—joinder. See 12 A L J 794 = 24 I C 252.

**(g) Mortgage.**

—In a redemption suit by some of the heirs of the mortgagor, Court can make other heirs as defendants. 45 Bom. 1009 = 23 Bom L R 405 = 61 I C 590.

—In a suit by mortgagee upon a mortgage by an administratrix without sanction of the Court, it is the duty of the Court to join the beneficiaries if they apply to be so joined and even though the mortgagee be unwilling to have them joined. A I R 1927 Bom 49 = 51 B 16 = 28 Bom L R 1360 = 98 I C 915.

—And in a suit for foreclosure by a puisne mortgagee, the prior mortgagee should be made a party under s. 85 of the Transfer of Property Act. 22 Bom., 701.

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**C. P. C. (1908) Or. 1 r. 10 (Contd)****(3) Addition of parties—(Contd)****(g) Mortgage—(Conclud)**

—But an attaching creditor of the mortgagors interest in the mortgage property applying to be made a party to mortgagee's suit, should not be added as party if his sole aim in being so added is to challenge the validity of the mortgage. A I R 1926 Nag. 67 = 89 I C 446.

—So also, the lessee of the mortgaged property need not be added after the preliminary decree. A I R 1927 Nag. 299 = 103 I C 306; for it is not competent to a Court, in a mortgage suit, to make a person who was not party to the preliminary decree, a party to the final decree where such person should have been made a deft. before the previous preliminary decree. O. 1, R 10 C P Code refers to a stage of the proceedings not concluded by a decree. 13 N L R 69 = 39 I C 849.

—In a suit on mortgage by wife of the deceased mortgagee the alleged adoptee of the mortgagee intervening and asking to be joined as party is not a necessary party : 113 I C 310 = A I R 1928 M 978.

—As to limitation against added defts in a suit for sale of mortgaged property against mortgagor's son in which widow and daughter were added as party see. 17 Bom L R 685.

**(h) Necessary parties.**

—A party necessary to appeal should be so made before deciding it otherwise the decree thereon cannot stand. 31 I C 814.

—A previous finding that a party was not necessary to a suit is no bar to a subsequent finding that he is a necessary party in a case where the character of the suit is altered from one on a rent note into a suit for redemption. A I R 1931 Bom 408 = 33 Bom L R 608 = Ind Rul (1931) Bom 477 = 134 I C 365.

—Persons whose case conflicts with the case of plaintiffs on record cannot be added as co-plaintiffs at the instance of the plaintiffs, A I R 1922 Cal 459 = 36 C L J 92 = 76 I C 915.

—In an ejectment suit by landlord against tenant the person claiming adverse title against landlord is not a necessary party. 36 L W 378 = 139 I C 679 = I R 1932 M 775 = A I R 1932 M 688.

—Suit for damages for wrongful attachment—Three separate decrees and applications for attachment—Separate causes of action—Other decree-holders not necessary parties. 4 Bur L T 145 = 12 I C 866.

—In a suit against a company liquidator or trustees in bankruptcy added as parties to the suit otherwise than under O. XXII, r. 130, must be considered to have been so added



C. P. C. (1908) Or. I. r. 10 (Contd)

(3) Addition of parties—(Contd)

(h) Necessary parties—(Concl'd)

under O I. r. 10 A I R 1930 Cal 113 = 50 C L J 208 = 57 C 170 = Ind Rul (1930) Cal 282 = 123 I C 250.

—On the death of the obligee of a money-bond, one heir cannot sue for his share. 7 All 313; 9 All, 68; but a surviving partner can sue for a trade debt without making the representatives of a deceased partner parties. 9 All, 486; followed in 14 A 524; 20 A 365; 32 A 638; and 10 P R 1906; and 17 B 6; but the Calcutta High Court has taken a contrary view: 18 C 86: See also 7 R 558; and 4 L 142.

—In a suit for dissolution of partnership, sub-partners are neither necessary nor proper parties: 20 M L T 134 = 34 I C 543. See also cases under—(j) Partnership suits infra.

#### (i) Partition.

—In a suit for partition all the sharers must be brought before the Court: 17 C 906; and 6 M 284. See to the same effect 6 I C 244 = 11 C L J 580; and 10 O C 33; and 1925 C 754 = 85 I C 662 and 51 I C 223 = 43 B 575 = 21 B L R 369; and 56 I C 304 = 23 O C 62 = 7 O L J 158; 1926 C 741 = 91 I C 567; 1927 Lah 189 = 100 I C 17; and there is nothing in the Code limiting or affecting the inherent power of the Court to make such orders as might be necessary for the ends of justice, at any stage of the proceedings, to add the name of any person, whose presence might be necessary. 13 Bom L R 517. See also 7 I C 382.

—Thus worshippers of a temple claiming a sum of joint family money in trust for temple were added after preliminary decree, though they were not necessary parties: 60 M L J 229 = 33 L W 734 = 131 I C 643 = A I R 1931 M 357; similarly persons in possession in collusion with some of the co-sharers were properly added: 10 O C 33; as also a co-sharer whose interest is transferred: 1923 Pat 162 = 68 I C 804 = 1924 Pat H C C 272.

—but persons not claiming any interest in the suit property cannot be added 1923 Cal 221 = 49 C 1043 = 36 C L J 217 = 70 I C 687.

—So also the alinees of joint family property may be made, but are necessary parties, in a suit for partition of Hindu joint family properties: 1930 M W N 679 = 32 L W 438 = 59 M L J 524 = 129 I C 235 = A I R 1930 M 913.

—As also the grandfathers in suit for partition by sons against their fathers. 1922 Pat 96 = 1 Pat 361 = 3 Pat L T 238 = 67 I C 156.

—In a suit for partition between branches of family and not between co-parceners inter se, heads of branches only are necessary par-

C. P. C. (1908) Or. I. r. 10 (Contd)

(3) Addition of parties—(Contd)

(i) Partition—(Concl'd)

ties and not other members of the branches: 13 L 483 = 33 P L R 842 = A I R 1932 L 641.

—In a suit for partition, the mortgagees of the plaintiff need not be made a party 5 Calc 882; but see to the same effect: A I R 1921 L 83 = 3 L L J 377 = 67 I C 425 and 44 C 28; but see the ruling of the Bombay High Court in. 16 B 608.

—Where a sale had been held in execution of a mortgage decree and confirmed pending a partition suit the purchaser or the mortgagee should be allowed to come in as a party especially when the Court thinks it necessary to give the mortgagee all possible facilities for representing the case before the commissioner so that his rights may not be injured. A I R 1931 Cal 594 = 35 C W N 296 = Ind Rul (1931) Cal 803 = 134 I C 803.

#### (j) Partnership.

—In a suit on pro-note all partners should be joined as parties: 11 M L T 246 = 15 I C 380. as also in a suit for dissolution of partnership and accounts: 19 I C 963 = 18 C W N 464. See to the same effect 33 I C 564; and A I R 1922 Sind 13 = 65 I C 26 = 15 Sind L R 152; and A I R 1924 Pat 65 = 1923 Pat H C C 276 = 76 I C 950 = 2 Pat L R 132; and A I R 1930 Mad 714 = 58 Mad L T 613 = 31 Mad L W 757 = 130 I C 453; and 7 C L J 266; and if a partner is dead his legal representative should be joined: A I R 1927 Mad 491 = 52 M L J 318 = 25 M L W 388 = 38 M L J 214 = 100 I C 616 = 1927 M W N 574. or the receiver 7 I C 75 = 12 C L J 368 but sub-partners are neither necessary nor proper parties: 20 M L T 134 = 34 I C 543. see also A I R 1927 P C 70 = 4 O W N 491 = 101 I C 17 = 31 C W N 857 = 25 A L J 687 = 1927 M W N 500 = 53 M L J 245 = 26 M L W 265 = 39 M L T 232; as also the business agent: 25 I C 140 = 7 Bur L J 702.

—There was conflict of opinion as to whether all partners are necessary parties including the legal representatives of deceased partners in a suit to recover debt due to the partnership see 18 C 86 and 1872-22 L B R 651 and 17 B 6 and 20 A 365 and 9 A 486 see also 7 M L J 432 = 6 I C 438 and 17 B 413.

—But the conflict has now been set at rest by Or 30 of the Code which provides that the suit for such debt may be brought against a single partner provided it is instituted in the name of the firm: 40 I C 108 = 1 P L W 650 = 1917 Pat H C C 239. see also A I R 1921 Cal 722 = 34 C L J 405 = 67 I C 10. A "sleeping" partner is not a necessary party: 31 I C 913 = 1915 M W N 864.

C. P. C. (1908) Or. 1, r. 10 (Contd)

(3) Addition of parties—(Contd)

(k) Power of Court to add parties.

—No party can be added without leave or cognizance of the Court: 139 A W N 1892; mere fact that the name of the person in question appears in the decree does not amount to an order of joinder: 101 I C 868 = 25 A L J 369 = A I R 1927 A 465 = 49 A 664.

—Addition of parties is a matter of procedure and cannot be claimed as of right: 11 Bom L R 273 = 3 I C 837 = 34 B 13, and the Court has wide discretion with regard to joinder of parties: 156 P R 156 F B but see 5 L W 207 = 39 I C 160.

—It can thus allow a party to be added on the condition that he can only intervene at a particular stage in the suit and cannot question an order or orders passed before he applied to the Court: A I R 1931 Cal 580 = 58 C 801 = 35 C W N 122 = 134 I C 1279.

—And where necessary Court may add a person interested in the equity of redemption as a party even after the preliminary decree, and re-open the proceedings so far as the added party is concerned. A I R 1924 Mad 648 = 46 M L J 368 = 34 M L T 114 = (1924) M W N 364 = 84 I C 122.

—But the power under O I r. 10, can ordinarily be exercised only in proceedings not concluded by a decree unless the person to be added is a subsequent transferee. A I R 1924 Oudh 33 = 26 O C 317 = 10 O L J 232 = 72 I C 1031.

—But the Court should exercise the discretion judiciously, the criterion for which is to enable itself effectually and completely to adjudicate upon and settle all the questions involved in the suit. A I R 1923 Mad. 521 = 44 M L J 322 = 17 L W 329 = 72 I C 156.

—Hence, before a person is added as party on his own motion the Court ought to see whether there is anything which cannot be determined owing to his absence or whether he will be prejudiced by his not being joined as a party. A I R 1929 Mad 291 = Ind Rul (1929) Mad 521 = 116 I C 137. see also 10 N L R 72.

—Where the addition involved de novo trial the prayer was refused: 1931 P C 229 = 35 C W N 977 = 61 M L J 294 = 1931 All L J 797 = 54 Cal L J 274 = 34 M L W 444 = 134 I C 654 P C.

—Only persons immediately affected by the demands of the plff. in a suit may be added as parties 118 P R 1890; that is to say, the Court cannot add as party person who is neither necessary nor proper party: 119 I C 21 = A I R 1929 C 477 = 56 C 447; 11 C L J 416; 50 W R 386; or persons only indirectly interested in the suit: 6 I C 36; or persons who have no interest in the suit: 5 L W 207

C. P. C. (1908) Or. 1, r. 10 (Contd)

(3) Addition of parties—(Contd)

(k) Power of Court to add parties—(Contd)

= 30 I C 160; nor can a Court add a plaintiff to the suit after passing of the decree. A I R 1923 Mad 472 = 44 M L J 282 = 17 L W 422 = 32 M L T 212 = (1923) M W N 239 = 72 I C 284.

—Moreover, Court's power to add a party is subject to the provisions of s. 22 of the Limitation Act. A I R 1930 Lah 747 = 11 Lah 688 = Ind. Rul. (1930) Lah 686 = 126 I C 78.

—So also, adding a new co-plaintiff without paying additional Court-fees cannot be allowed if the original plaintiff is proved to be incompetent. 8 Bur L T 283 = 8 L B R 302 = 31 I C 332.

—As to the power of the Court to add transferees of deft's interest pending suit as party see. 27 I C 704. And as to plff's right of election in case of adding and striking off of parties see. 21 I C 604.

—Suit against dead person alone is incompetent. But a suit against a number of defendants of whom one was dead at institution, Court should entertain application for joinder of his representatives under O. 1 r. 10 although it is wrongly framed as one for substitution: A L R 1934 All. 252.

—In a suit for declaration, that the plaintiff should have been entered as a raiyat instead of a tenure-holder in the Record of Rights, the Court *suo motu* before the filing of the written statement and without any objection from the defendant added, in the interests of justice and to prevent a multiplicity of suits persons who were recorded in the Record of Rights as raiyats of the land under the plaintiff as tenure-holder, though the plaintiff alleged that they were tenants at will paying rent in kind. *Held*, that as the status of the tenants depended on the plaintiff's status the tenants who were added were vitally interested in the Record of Rights. *Held* also, that the order, though irregular, should not be set aside as it did not prejudice the plaintiff. 16 L J 381 = 17 I C 917.

—The Court should not dismiss a suit for non-joinder of necessary or proper party, but should add such party even though the Court is not applied for it. A I R 1921 Oudh 148 = 8 Oudh L J 310 = 63 I C 548; see to the same effect 27 All. 75 = 1 All L J 476; and 6 I C 977 = 13 Oudh Cas 109; and A I R 1930 Rang 295 = 129 I C 508.

—Where a suit was instituted by a person having no interest in the property, and the right person was subsequently added as plff. it was held that the power was not unreasonably or illegally exercised by the Court under O. 1, r. 10. 13 I C 350.

—Insolvency proceeding—Appeal by person not aggrieved—Court can add person



C. P. C. (1908) Or. I, r. 10 (Contd).

(3) Addition of parties—(Contd)

(k) Power of Court to add parties—(Contd)

really aggrieved. 17 Bom. L R 989 = 40 Bom 461.

—As to addition of parties in a scheme suit under s. 92 of the Code see 31 M L J 279 = 40 M 110; and 38 M L J 201; and (1916) 1 M W N 402.

—In a suit under S. 92, C P Code, for removal of a hereditary trustee, the son of the deft. is entitled to be added as a party deft. and it is open to a Court under O. 1, R. 10 to add a party as deft. in the suit as in any other suit. 36 Bom. 168, diss. 36 M 364; 21 M L J 952 foll. (1917) M W N 550 = 6 L W 9 = 38 I C 133.

—Where in a reference under s. 18, Land Acquisition Act the question referred to the Judge is the question of the market-value of the property acquired, addition of parties to the proceeding will in no manner violate the principle and enlarge the scope of his enquiry. A I R 1927 Cal 352 = 31 C W N 384 = 101 I C 539.

—Joint promisors—Suit by promisee against one—Power of Court to join the other promisor. 107 P R 1914 = 27 I C 94.

—Suit to obtain puttah—Rival transferees from original ryot—Duty of Rev. Court to try question of plff's title—Addition of rival transferee as party. 39 M L J 474.

—The appellate Court also possesses the same powers regarding addition of parties described above: 8 M 300; see to the same effect: 12 I C 69; and A I R 1921 Mad 172 = 44 M 605 = 41 M L J 129 = 13 M L W 562 = 1921 M W N 316 = 63 I C 374 F B; and A I R 1922 M 343 = 56 M L J 315 = 29 M L W 546 = 1922 M W N 374 = 117 I C 796; and 21 I C 928 = 18 C W N 259 = 26 M L J 86 P C; and 12 Cal W N 946 = 31 M 236 = 35 I A 176 = 8 C L J 230 = 10 B L R 781 = 18 M L J 387 = 4 M L T 101 P C; though it should use this power with judicious discretion: 6 I C 912 = 12 Cal L J 91.

—In case of necessary parties, therefore, the appellate Court should itself add such parties and remand the case: 31 I C 814; see also 46 I C 398 = 3 Pat L J 409 = 1918 Pat H C C 276 = 5 Pat L W 216; and 31 I C 263 = 2 Mad L W 1034; or direct the lower Court to add such parties: 14 B 299; see also 18 A 332; and 2 L B R 277; and 33 Bom L R 608 = A I R 1931 B 408; though it should not specify the particular order to be passed by the lower Court: A I R 1932 P C 146; parties cannot be added by High Court after the remand 92 I C 125 = A I R 1926 R 9 = 3 R 474.

—Where the suit is carried to the appellate Court trial Court loses the power to it add parties: 12 I C 69; see also 11 B L R App 37 = 20 W R 123; but the appellate Court will not

C. P. C. (1908) Or. I, r. 10 (Contd)

(3) Addition of parties—(Contd)

(k) Power of Court to add parties—(Contd)

use its power in favour of a party who had resisted objection as to non-joinder in the Lower Court: A I R 1931 P C 229 = 35 C W N 977 = 61 M L J 294 = 1931 A L J 797 = 54 C L J 274 = 34 M L W 444 = 134 I C 654 P C.; see also A I R 1923 M 337 = 17 M L W 241 = 44 M L J 249 = 1923 M W N 89 = 72 I C 63.

—In view of the wide powers given by s. 107 and O. 1, r. 10 High Court can add parties in second appeal see also 5 M L J 279 = 19 M 151; and 47 I C 917 (cal); and 20 C W N 547; and 41 I C 65; and 5 Pat L T 509 = 82 I C 600 = A I R 1924 Pat 773 = 1924 P H C C 249.

—Decisions of the Allahbad High Court in 16 A 5 and 12 A L J 1277 = 26 I C 25 = 37 A 57 holding the contrary view do not, therefore, represent the law. The Court can under s. 107 and O. 1, r. 10, add really aggrieved persons as a party to the appeal in an appeal by person not aggrieved by order in insolvency. 17 Bom L R 989 = 40 B 461 = 31 I C 507.

—As to the question whether a person who is not a party to the original suit can be added as party in second appeal the Calcutta High Court has held that he can be so added: 8 C W N 404; and A I R 1932 C 448 = 59 C 329; but the Bombay, Allahbad and Lahore High Courts hold the contrary: 31 Bom L R 672 = A I R 1929 B 353 = 53 B 598; and 73 I C 136 = A I R 1923 L 490; and 163 P W R 1915 = 31 I C 27; and A I R 1925 All 768 = 23 A L J 757 = 6 L R A civ. 386 = 88 I C 493 = 47 A 853; and the Lahore High Court has held that a Court of appeal has no power to add as appellant in an appeal preferred by a party, another party to the original suit, who had not appealed. 118 P R 1890, following 10 B 227.

—But the High Court has inherent power under s. 151 to add parties, or to transpose a party from one category to another. A I R 1927 Cal. 37 = 44 C L J 243 = 98 I C 822.

—And in revision the High Court can add a party refused to be so joined by the trial Court, if such addition be necessary to avoid likelihood of conflicting findings A I R 1929 Mad 403 = Ind Rul (1929) Mad. 476 = 115 I C 812.

#### (l) Pre-emption suit.

—The only necessary party in a pre-emption suit is the owner for the time being of the property, i. e., the vendee. A person who is holding the property as a mortgagee from the vendee is bound by any decree for pre-emption passed against the vendee. 91 P L R 1912 = 13 I C 647 = 55 P W R 1912.

—The vendor is not a necessary party: 32 A 14; and 26 A 549, and 6 A 57; and 239 A W N 1903; and 10 O C 49; and 80 P R 1898; and 134 P R 1889; nor the mortgagee from the vendee:

C. P. C. (1908) Or. 1, r. 10 ( *Contd.* )

( 3 ) Addition of parties—( *Contd.* )

( 1 ) Pre-emption suit—( *Conclud.* )

19 O C 153=3 O L J 683=37 I C 163; and 91 P L R 1912=13 I C 647.

—Where a stranger is joined as co-plff. mere striking off of such co-plff. will not cure the defect, the whole suit will fail : 87 I C 55 =23 A L J 198=A I R 1925 A 355 = 47 A 450; and 79 I C 220=A I R 1923 A 187.

( m ) Proper parties.

—Where in a suit for ejectment the plaintiff impleaded as defendant a stranger stating that he had no objection to a decree passed in his favour, *held*, that the stranger should be added as co-plaintiff, and that the statement that the stranger had no objection to a decree being passed in the plaintiff's favour should come not in the plaint, but in his pleadings. A I R 1931 Cal 76 = 52 C L J 357 = Ind Rul (1931) Cal 300=58 C 561=129 I C 860.

—In a suit for partition, certain worshippers of a temple alleged that a sum of money in the hands of the family belonged to the family and applied to be impleaded as parties: *Held*, that they should be impleaded as being proper parties within the meaning of O. I. r. 10 (2). The fact of there being no issue between the parties to the suit as originally framed on the question raised by the applicants was immaterial. A I R 1931 Mad 357= 60 M L J 229=Ind Rul (1931) Mad 547 = 33 L W 734=131 I C 643.

—Receiver being a representative of all the parties to the suit, must be made a party in all the proceedings effecting property, but is not a party within the meaning of O I r. 10 A I R 1923 Mad 144 = (1922) M W N 745 = 43 M L J 211 = 16 L W 322 = 31 M L T 290 = 47 M 47 = 71 I C 293.

—In a suit against the widow in which the adoption by her is in question, the reversioners are the proper parties though not necessary. A I R 1923 Mad 521 = 17 L W 329 = 44 M L J 322 = 72 I C 156.

—Persons claiming adverse to plff should not be added in the absence of special circumstances : 36 L W 371 = 139 I C 679=A I R 1932 M 688 = I R 1932 M 775.

—It is not possible in a suit to make an opposing and contesting claimant a plaintiff nor is a decree possible in favour of contesting defendant against his co-defendant. A I R 1921 All 184 = 19 A L J 833 = 63 I C 773.

—In a suit under s. 77 of the Registration Act, a person claiming to have purchased the property at a prior sale from the executant is not a proper party, the title question not being strictly within the scope of s. 77. A I R 1925 Cal 1257 = 89 I C 57.

C. P. C. (1908) Or. 1, r. 10 ( *Contd.* ).

( 3 ) Addition of parties—( *Contd.* )

( m ) Proper parties—( *Conclud.* )

—The expression "proper party" means the party interested in the result of and having a right to seek the assistance of the Court in coming to a decision on the point in issue. A I R 1925 Cal 1257 = 89 I C 57.

—In a suit by an administrator for an account of mesne profits against the heir of the deceased intestate, who had acted as an executor *de son tort*, the other heirs of the deceased though not necessary parties are proper parties and can be impleaded by consent of parties even after case has come by remand from Appellate Court. A I R 1929 Lah 753 = 30 P L R 503=Ind. Rul (1930) Lah 323 = 122 I C 467.

( n ) Rent suit.

—Creditor of a landlord recovering money twice from the tenant under an authority from him and also from landlord himself is not a party to the rent suit between landlord and tenant. A I R 1922 Bom 454 = 24 Bom L R 1318 = 81 I C 296.

—A party should not be added to a rent suit if such addition has the effect of the rent suit in title suit regarding property in respect of which rent is claimed. A I R 1927 Cal 340 = 45 C L J 146 = 101 I C 527.

—In a suit for arrears of house rent, the purchaser of the house who has already obtained a declaration of his title as against the plaintiff is a necessary party and should be impleaded if he so applies. A I R 1929 Oudh 148 = 6 O W N 118 = Ind. Rul. (1929) Oudh 298 = 116 I C 58.

—In a suit for rent by a landlord against a tenant—A person alleging to be transferee with the consent of the landlord claiming to be real tenant of the holding can claim to be added as a party. A I R 1930 Pat 323 = 11 P L T 43 = Ind. Rul (1930) Pat 471 = 125 I C 119. In rent suits—See 6 Ind. Cas. 570 = 12 C L J 267.

—In a suit for recovery of arrears of rent instituted against one of the heirs of the original tenant whose name was recorded in the landlord's *sherista*, the remaining heirs of the tenant were on their application added as parties to the suit. *Held*, that although the added defts. were not strictly necessary parties to the adjudication of the questions arising between the plff. and the original deft, yet they were not improperly added as parties to the suit. 12 C L J 267 foll. 44 I C 465.

—In a rent-suit, the tenant set up the title of a third person. The suit was decreed by the first Court, but on appeal the lower Appellate Court held that person should be brought in as defendant, and remanded the case for

## C. P. C. (1908) Or. 1, r. 10 (Contd.)

## (3) Addition of parties—(Contd.)

## (n) Rent suit—(Contd.)

retrial on the question of title between him and the plaintiffs: *Held*, that although that person may not be an absolutely necessary party to the suit he was a proper party and the lower Appellate Court was entitled to hold that his presence was necessary to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit within the meaning of O 1 r. 10 of the Civil Procedure Code. It was competent to the Appellate Court to remand the case in the exercise of its inherent powers under S. 151 of the Code. 7 Ind Cas 75: 12 C L J 378, followed. 15 C L J 6 = 11 I C 183.

—An intervenor claiming to be transferee of the interest of tenant can be added as party to a rent suit if he is found to be tenant in possession: 10 P L T 442.

—The defendant took a shop on rent from the owner, and with the latter's consent, agreed to pay rent to the plaintiff, the lessee thereof. The plaintiff sued for rent due. Defendant alleged that he had paid rent to one P at the request of the owner. The Court declined to make P a party. *Held*, that the Court should have made P a party and have decided once for all whether he or plaintiff were entitled to the rent. 168 P L R 1913 = 106 P W R 1913 = 19 I C 473.

—Rent paid to third party—Third party should be brought on the record. 106 P W R 1913 = 168 P L R 1933 = 19 I C 473.

## (o) Secretary of state or Govt.

—Where the Court granted a Succession Certificate regarding G P Notes and the Secretary of State subsequently intervened and applied to set aside the order, *held*, that he could be impleaded as a party but that he should be permitted only to object to the jurisdiction of the Court to grant certificate. A I R 1931 Cal 580 = 35 C W N 122 = 58 C 801.

## (p) Suit by a Benamidar.

—In a suit by a *benamidar* in his own name, the Court can make the real owner a party, if it thinks that his presence is necessary for the proper determination of the suit. A I R 1929 Mad 268 = 55 M L J 856 = 29 L W 56 = Ind Rul (1929) Mad 420 = 115 I C 340.

—If in a suit between a *benamidar* and real purchasers regarding title to property purchased a third person claims that he is the real purchaser adversely to the pleas of both plaintiff and defendant, he must file his own suit and he cannot claim to be joined as party to the suit. A I R 1927 Mad 834 = 53 M L J 269 = (1927) M W N 903 = 105 I C 114.

## C. P. C. (1908) Or. 1, r. 10 (Contd.)

## (3) Addition of parties—(Contd.)

## (q) Trust.

—Worshippers of a temple applying to be made parties to the suit for partition of joint family property alleging that a large fund in the hands of the family was really a fund held in trust for the benefit of the deity should be added as parties. A I R 1931 Mad 357 = 60 M L J 229 = 33 L W 734 = Ind Rul (1931) Mad 547 = 131 I C 643.

—So also beneficiary joined as co-plaintiff on appeal when plaintiff trustee surrenders decree—*Sec.* 12 C W N 946, P C = 4 M L T 101 = 8 C L J 230 = 31 M 236 = 10 Bom L R 781 = 18 M L J 387 = 35 I A 176.

—In a suit under s. 97 by co-trustees other co-trustees can be joined as co-defendants. A I R 1927 Rang 180 = 5 R 263 = 103 I C 261.

## (r) Other Cases.

—Capacity in which, as also party at whose instance party is to be added are material considerations in addition of parties. A I R 1925 Mad 836 = 50 M 34 = (1926) M W N 575 = 51 M L J 148 = 24 L W 738 = 95 I C 214. Injunction against trespass by one co-owner without the others. *See* 3 L W 542 = 35 I C 147.

## (4) Amendment of plaint

—For general rule as to amendment of plaint in case of misdescription of parties. *see* A L R 1933 B 295 = 35 B I R 569.

—A sole proprietor of a firm filed a suit in the name of the firm. The suit was objected to as not maintainable and then the plaintiff applied for amendment. *Held*, that the amendment should be allowed, but that the plaintiff should pay costs up to date of amendment. 30 Bom L R 117. Relied on. A I R 1931 Cal 770 = 35 C W N 432.

—Where the amendment if allowed, would necessitate the trial of the suit *de novo* and further evidence would be necessary the trial Court is justified in refusing amendment. Such prayer when rightly refused by the trial Court cannot be entertained by the High Court on appeal. A I R 1931 Lah 260.

—A suit which is instituted in the name of a sole plaintiff dead at the time of the institution of the suit cannot be amended in any way. A I R 1927 Cal 880 = 104 I C 623.

—But if the name of a dead person appears on the petition of appeal instead of his legal representative through a *bona fide* error, petition of appeal can be amended under O. I. r. 10, read with ss. 107 and 153. A I R 1930 All 131 = Ind Rul (1930) All 443 = 123 I C 824.

—Appeal against dead man—Application to add his legal representative can be allowed under O. I. r. 10 and s. 153. A I R 1924 Mad

C. P. C. (1908) Or. I, r. 10 (Could)

(4) Amendment of plaint—(Could)

56=18 L W 54=45 M L J 231 = (1923) M W N 408=75 I C 739.

—An application to bring true legal representatives on record, when case has been remanded for judgment according to law on Appellate Court itself bringing on record certain other wrong persons as legal representatives on an application made *bona fide* by the party should be granted. A I R 1928 Pat 197 = Ind Rul (1929) Pat 191 = 115 I C 223.

#### (5) Bonafide Mistake.

—A plaintiff can only be added under this rule where there has been a *bona fide* mistake. Where certain persons having only an expectation, and not an interest, brought an action for administration, the persons directly interested not being parties and apparently objecting, it was held this section did not apply. 4 C D 413. Mistake may either be of fact or of law. A I R 1921 Sind 59=16 S L R 71=66 I C 873.

—Before an application to be added as party under O. I, r. 10 to a suit under O. I, r. 8 can be allowed the applicant must prove that suit originally instituted was in the name of wrong person through a *bona fide* mistake. A I R 1924 Mad 883=47 M L J 540= (1924) M W N 522=82 I C 492.

—A suit can be continued by substitution of right plaintiff if *bona fide* mistake was committed in the institution of it. A I R 1923 Mad 180=1922 M W N 817 = 16 L W 826 = 69 I C 413.

—It is a *bona fide* one where different Courts take different views on a point of law in which the plaintiff's case depends. A I R 1923 Mad 180=(1922) M W N 817=16 L W 826= 69 I C 413.

—Mistake made without exercise of due care and caution may be a *bona fide* mistake. A I R 1932 N 20=27 N L R 335=135 I C 409=I R 1932 N 9=A L R 1932 N 40. As to what is a *bona fide* mistake and limitation when a bar see. 29 I C 680.

—Where plaintiff sued for possession of certain property which was found to have been exchanged by him with defendants 2 and 3, but which plaintiff alleged was made contingent on defendant 1 giving up possession of plot 1. Held, on the finding that there was a valid unconditional exchange, there was no *bona fide* mistake on his part and the suit was dismissed. 17 C W N 462=15 I C 39.

—Where through a *bona fide* belief the plaintiff is described as a minor and is represented by his next friend provided the suit is instituted by the right person, though through another purporting to act as his next friend, the suit is maintainable. A I R 1927 Cal 477=100 I C 469; see also 40 M 743.

C. P. C. (1908) Or. I r. 10 (Could)

#### (6) Defendant made plaintiff.

—Transposition of parties from one category to another and *vice versa* is permitted by O. I r 10 and in a suit for partitions such procedure can be resorted to even after a decree for partition. A I R 1927 Nag 32 = 97 I C 1023.

—Transposition of parties in a partition suit can be made even after the withdrawal of a part of a claim and the suit thus can be continued. 12 L W 563 = 60 I C 144.

—Even though O. I r. 10 is not exhaustive, transposition of respondent as petitioner may be allowed on general principles even in revision. A L R 1934 AH 241.

—Proforma debts should be transposed as plaintiffs where it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings. 59 C 80 (91) = 58 I A 228 = 1931 M W N 865 = 1931 A L J 566 = 33 B L R 1273 = 35 C W N 870 = 54 C L J 137 = 34 L W 1 = 61 M L J 632 = 132 I C 6 = A I R 1931 P C 162 (P C).

—A transposition which would have the effect of defeating a valuable right acquired by a party under the Statute since institution of suit should not be allowed. A I R 1928 Pat 24 = 9 P L T 238 = 104 I C 526.

—An Appellate Court has powers of transposition of parties similar to those exercised by original Court under O. I, r. 10. A I R 1930 AH 785=(1930) A L J 926.

—If in a suit for ejectment a third party is added as defendant on the allegation that he supported the plaintiff's case and had no objection to decree being passed in plaintiff's favour the Court should order transposition of such party as co-plaintiff with necessary amendment of pleading. A I R 1931 Cal 76 = 58 C 561 = Ind Rul (1931) Cal 300 = 129 I C 860.

—Transposing of a subsequent mortgagee sued as one of the defendants to a foreclosure suit, as a plaintiff is permissible on such mortgagee paying of the prior mortgagee under s. 74, Transfer of Property Act and indeed is the logical consequence of the provision contained in s. 74, Transfer of Property Act A I R 1928 Nag 145=24 N L R 119 = 11 N L J 89=109 I C 251.

—If after preliminary decree for taking accounts, the plaintiff, withdraws his claim, for rendition of accounts, but defendant wishes to proceed with the case, the Court should transpose parties and allow the defendant to prosecute the suit further. A I R 1926 All 582 = 24 A L J 694 = 96 I C 67.

—Transferring a defendant as a plaintiff without his consent and *vice versa* is improper. A L R 1933 C 860.

—Transposing a defendant to the category of plaintiff is entirely within the discretion



## C. P. C. (1908) Or. 1, r. 10 (Contd)

## (6) Defendant made plaintiff—(Contd)

of the trial Court, and if not objected to during the trial, it cannot be interfered with in appeal. A I R 1926 Nag 333 = 95 I C 171.

—Merely because transposition of some co-defendants as plaintiffs would raise the valuation of the suit beyond the pecuniary jurisdiction of the Court is no reason for refusing the transfer. Plaintiff can be returned for presentation after such transfer. A I R 1926 Pat 28 = 90 I C 82.

—If refusal of an application for transposition of a party to the suit would lead to a separate suit by such party, the application should be allowed. A I R 1925 Cal 421 = 40 C L J 535 = 85 I C 168.

—Court can make a defendant in a partition suit a plaintiff and thus continue it. 23 Bom L R 391; 45 B 983 = 61 I C 398.

—Order 1 rule 10 of the Code of Civil Procedure authorises the Court to make an order for transfer of a party from the category of the defendant to that of plaintiff at any stage of the proceedings. The power of the Court depends on the question whether the case is *subjudice*. The Courts have always been reluctant to place a narrow construction upon this provision of the law and to restrict the exercise of this discretionary power. 24 C W N 110 = 30 C L J 417 = 54 I C 636.

—The Court has jurisdiction in an administration suit (if it be found that the original plff. has no right of suit) to make one of the deft entitled to share, as party plff. It is not necessary to find *bona fide* mistake for the Court to act under O 1 R 10 of the C P Code. 9 L W 79 = (1918) M W N 929 = 25 M L T 140 = 49 I C 139.

—Under the terms of O 1 R 10 (1) the circumstances under which a person can be added as a plaintiff in a suit are strictly limited. A defendant cannot ask to be made a plaintiff merely on the ground that he would have brought a suit if he had thought of doing so. 15 N L R 21 = 49 I C 34 see also 28 M L J 147.

—Where in a partition suit the plaintiff withdraws his claim for moveables, after a preliminary decree by consent had been passed as regards the immoveable properties, and the Court subsequently allowed the transposition of some of the defendants, as plaintiffs and allowed the suit to proceed regarding the moveables. *Held*, that the procedure adopted was correct and fell within the provisions of O 1 R 10 of the Code. 12 L W 563.

—Transposition of a party does not in any way affect limitation. A I R 1927 Mad 204 = 24 L W 826 = 52 M L J 33 = 99 I C 687.

—A change of parties as plaintiffs under this section does not give rise to such a ques-

## C. P. C. (1908) Or. 1, r. 10 (Contd).

## (6) Defendant made plaintiff—(Contd)

tion of limitation as arises under s. 32, 14 Cal., 499 see also. 17 Bom 413.

—Addition of party—*Pro forma* deft. made Plff.—No Limitation Lim Act S. 22 21 C L J 611.

—Ejectment suit—by some co-sharers, impleading others as defts—Decree in favour of all sharers—Appellate Court duty of, to array co-sharers defts as plffs. and maintain decree of the first Court Lim. Act S. 14 43 Cal 660 (P C).

## (7) Plaintiff made defendant.

—Court has power under r. 10 to transfer a plaintiff to the category of defendants, A I R 1925 Cal 328 = 82 I C 649.

—A partner in business refusing to join as plaintiff, should be made defendant in the suit, and suit should not be dismissed on that ground. A I R 1925 Lah 504 = 7 Lah L J 280 = 26 P L R 699 = 92 I C 569.

—In a suit under s. 55 Madras Estates Land Act, it should not be dismissed merely for non-joinder of rival claimant but should instead be added as a party defendant. 44 M 43; 39 M L J 474 = 60 I C 316.

—A general question of interest to the whole community cannot be effectually and completely adjudicated and settled in a suit by adopting the expedient of joining a member of community as a co-plaintiff. A I R 1930 Sind 73 = Ind Rul (1930) Sind 21 = 120 I C 517.

## (8) Question involved in the suit.

—Expression "all the questions involved in the suit" refers only to questions between the parties to the litigation. A I R 1926 Mad 836 = 50 M 34 = (1926) M W N 575 = 51 M L J 148 = 24 L W 738 = 95 I C 214.

—It does not mean all claims which may possibly be put forward by any body to the property. O 1 Rr. 9 and 10 should be construed together. 5 L W 207 = 39 I C 160.

—O. 1 r. 10 (2) is only intended to apply where either one or other of the parties makes an application to the Court or the Court itself is of opinion that some other persons ought to be brought into the proceedings in order to enable the Court effectively and completely to adjudicate upon and settle all questions *involved in the suit* that is to say, the questions which were involved in the suit, as originally framed between the parties to the suit. 59 C 329 (332-3) = 138 I C 104 = A I R 1932 C 448 = I R 1932 C 415.

## (9) Revision.

—Whether persons should or should not be impleaded as co-defendants in a pending



C. P. C. ( 1908 ) Or. I, r. 10 (Contd)

( 9 ) Revision—(Concld)

suit, is a question of pure discretion. An improper exercise of discretion would not amount to illegality or material irregularity. so as to be subject to revision under s. 115.

111 I C 141.

—Erroneous exercise of discretion under r. 10 is no ground for interference under s. 115 (c) unless such exercise of discretion results in mis-joinder of parties and mis-joinder of causes of action. A. I R. 1926 Mad 135 = 90 I C 721.

—Revision does not lie against an order refusing to add a party as plaintiff, A I R 1926 Pat 207; 4 Pat 723=7 P L T 499 = 93 I C 932.

—But the Oudh J C Court has held that revision lies against an order refusing to make a person as defendant A I R 1929 Oudh 148=6 O W N 118=Ind Rul (1929) Oudh 298 = 116 I C 58 see also 13 O. C. 109 and 11 C L J 420 = 61 C 546.

—High Court will interfere in revision and set aside the order in order to relieve a party from embarrassment : 5 L W 207=39 I C 160.

—Addition of—Parties—Improper refusal—No appeal from order—Revision. 47 I C 725. see also 44 I C 465.

—The order of Court, acting under O I R 10 (2) striking out the name of a defendant is not open to revision as it does not decide anything between the parties. 14 I C 263.

—The remedy of a party aggrieved by his name having been struck off is to file an appeal and not an application for revision, because the order amounts to a decree, the effect of the order being the refusal to grant the relief to the plaintiff which he had prayed for. 42 M 219; 3 Pat 859; 43 M 812; 50 M L J 387; 45 M 194; 45 M L J 703 distinguished. A I R 1931 All 333 (2)=(1931) A L J 181 = Ind Rul (1931) All 388 = 131 I C 548.

—In an administration suit, an order adding party to watch the proceedings is wrong and has no meaning. A I R 1929 Cal 477 = 56 C 447 = Ind. Rul. ( 1929 ) Cal 709 = 119 I C 21.

—An order allowing an alleged purchaser of the holding to be added as defendant to landlord's rent suit against recorded tenant is an order without jurisdiction, A I R 1928 Pat 281=9 P L T 437=107 I C 539.

—Nature of proceedings under—If open to revision—Addition of party—Grounds for, to be specific. 16 I C 592.

—Power of Court—Partnership suit—Withdrawal by plff.—Appln. by some of the defts. to be made plffs. and to continue the suit—Refusal—Order improper and liable to be set aside in revision. 20 C W N 752.

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C. P. C. ( 1908 ) Or. I, r. 10 (Contd)

( 10 ) Striking out parties.

—Party against whom no relief is claimed should be struck off, it is improper to retain him. A I R 1931 Mad 284 = 33 L W 681 = Ind. Rul. ( 1931 ) Mad 747 = 61 M L J 563 = 54 M 793 = 133 I C 507.

—Per Wallace J. The retention of a party against whom no relief is claimed is improper and he may be struck off from the suit. A I R 1931 Mad 284 = 33 L W 681 = Ind. Rul. (1931) Mad 747 = 61 M L J 563 = 54 M 793 = 133 I C 507.

—A stranger who has no personal interest in any of the reliefs claimed by the plaintiffs in a suit cannot be joined as co-plaintiff under O. I, r. 10 A I R 1930 Sind 73=Ind Rul (1930) Sind 21=120 I C 17.

—Per Wallace J.—Party against whom no cause of action is mentioned no relief claimed may be struck off from the suit. A I R 1931 Mad 284; 33 L W 681.

—Parties improperly impleaded—Proper order is not to dismiss the suit as against them but to strike out their names. A I R 1930 Mad 817=59 M L J 932=32 L W 836 = 54 M 81=Ind Rul (1930) Mad 1045 = 127 I C 805.

—Where an Appellate Court has joined a party as defendant, the lower Court cannot strike off the same under O. I, r. 10 (2), on case being remanded A I R 1930 All 303=Ind Rul (1930) All 785=126 I C 225.

—A defendant adjudged bankrupt in England is not proper party to a suit relating to property in which he had interest, before bankruptcy and he can rightly be removed from record. A I R 1930 Cal 388=34 C W N 53=Ind Rul (1930) Cal 627=125 I C 851.

—Where one of the several defendants against whom a suit is brought happens to be dead at the time of the suit, the suit should not be dismissed as against other defendants but Court should strike off the name of the deceased defendant under O. I, r. 10 and proceed against the rest. A I R 1928 Lah 359=9 Lah 526=29 P L R 626=110 I C 281.

—A defendant given up but not struck off by amending plaint must be deemed to be party to the suit. A I R 1927 Mad 253=98 I C 726.

—An order discharging a defendant who is not a proper party and against whom no relief is claimed without more, amounts to striking out his name from the record. A I R 1926 Lah 202=27 P L R 194=93 I C 921.

—If a suit is against several defendants, one of whom is found to have died before institution of the suit, Court should strike out the name of the deceased defendant and proceed against the other defendants. A I R 1926 Lah 153=89 I C 661.

C. P. C. (1908) Or. 1, r. 10 (Contd.)  
(10) Striking out parties—(Contd.)

—If a plaintiff who is a major is wrongly described as a minor, the Court can strike off the name of such plaintiff. A I R 1924 Oudh 428=11 O L J 154=83 I C 833.

—As to principle and scope of the rule same person cannot be both plff. and deft.—11 M L T 409=14 I C 544.

—Probate proceedings—Discharge of caveat—Provisions of O. 1, R. 10 (2) applicable. 41 I C 705.

(11) Substitution as plaintiff or defendant.

—A suit can be continued by substitution or right provided the suit was instituted by a wrong person as plaintiff. Words of cl. 1 O. 1, r. 10 are comprehensive enough to include cases where the original plaintiff had no cause of action. 1921 A I R Sind 59 = 16 S L R 71 = 66 I C 823 See also—64 I C 413=1922 M W N 812 = 16 L W 826 = A I R 1923 Mad. 180.

—A substitute must enforce a single right pleaded in suit and not to bolster up a suit by pleading his own individual right. A I R 1930 Sind 73 = Ind Rul (1930) Sind 21 = 120 I C 517.

—If after a matter has been referred to arbitration under s. 19, Arbitration Act, it is found that the name of the plaintiff is wrong, and application is made to the Court to correct the mistake, the correction of the name does not make it a new suit so as to deprive the arbitrators of their jurisdiction upon original reference. A I R 1926 Cal 722=43 C L J 297 = 94 I C 182.

—Where a suit brought in the name of a firm carrying on business outside British India, is found not maintainable on preliminary issue and plaintiff thereupon applies for amendment of the plaint by striking out his name and inserting those of the parties, the application must be deemed to be an application for substitution of plaintiffs. A I R 1928 Bom 191; 30 Bom L R 117 = 109 I C 99.

—Insolvency of the judgment-debtor during the pendency of the appeal preferred by him against and order refusing to set aside a sale does not entitle the mortgagee of the property who took no steps to vindicate what rights he had in claim proceeding to be substituted in his place if the Official Assignee elects not to proceed with the appeal. A I R 1928 Cal 215 = 32 C W N 304 = 109 I C 282.

—Where a suit is instituted on behalf of a minor by his next friend, and the minor is found to have died before institution the Court cannot allow the amendment of the plaint by substitution of legal representatives, especially when it is not shown that the mistake was *bona fide*. A I R 1923 Lah 652 = 79 I C 284.

C. P. C. (1908) Or. 1, r. 10 (Contd.)

(11) Substitution as plaintiff or defendant—(Contd.)

—Major wrongly described as minor—Suit by next friend—O. 1, R. 10 wide enough to cover the case. 40 Mad 743.

—Where the respondent, whose name is entered in the appeal as presented, is found to have died before the presentation legal representative of the deceased cannot be substituted, proper procedure is to file another appeal. A I R 1924 Mad 56 = 45 M L J 231 = 18 L W 54 = (1923) W N 108 = 75 I C 739.

—O. 1, R. 10 of the C. P. Code gives very wide powers to a Court in the matter of substituting or adding a plff. The power is however, only to be exercised if the Court is satisfied that the suit was instituted through a *bona fide* mistake. Where the benamidar brings a suit on a mortgage, the Court is competent to substitute the real mortgagees as plaintiffs impleading the benamidar as deft. 50 I C 128.

—Addition of parties Suit against dead person—Substitution of name of living person, improper. 42 I C 539.

—An application made to implead as parties to a suit the legal representatives of a deceased deft. wrongly sought to be impleaded as such, in their individual capacity and not as such legal representatives is within O. 1, R. 10 of the C. P. Code. The fact that such application was once made under O. 22, R. 4 and rejected, does not bar an application made under O. 1, R. 10. 32 I C 320.

—Adding of parties—death of defendant—heir-at-law not added—subsequent petition to add stranger on the ground of his possessing the assets of the deceased—maintainability—treating petition for substitution as part of plaint—impropriety of. A I R 1933 C 153=56 C L J 228=A I R 1933 C 314.

—Sole surviving member of committee—Suit for removal of—Death during the pendency of—Cause of action if personal Substitution of heir or members of new committee see. 17 C I J 183.

—A mere money suit against a deft. who is subsequently adjudicated insolvent, does not affect the devolution of any interest on the Official Receiver within the meaning of O. 22, R. 10. The Official Receiver cannot, therefore be substituted in place of the insolvent nor is he a necessary or proper party to the suit under O. 1, R. 10, not being bound by a decree passed in such a suit. S. 16 of the Pro. Insolv. Act does not bar the continuance of a suit instituted before the passing of the order of adjudication. 8 S L R 325=29 I C 30.

C. P. C. (1908) Or. 1 r. 10 ( *Concl'd* ).

( 12 ) Other Causes.

—A suit for rent against only some of the heirs of the deceased tenant is maintainable. A I R 1925 Cal 1056 (F B)=29 C W N 100=42 C L J 232=53 C 197=90 I C 211.

—If the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred. A I R 1921 Cal 277=34 C L J 465=66 I C 923.

—In the absence of Thakurji Maharaj whose interests arose in the wakf the appeal cannot be dealt with and so the decrees below must be set aside and the case remitted to chief Court for directions as to new trial with reference to the effect of the wakf with the appropriate parties added. A L R 1933 P C 233.

—Costs of persons unnecessarily impleaded at the instance of defendant, should be directed to be paid by such defendant. A I R 1930 Mad 913=(1930) M W N 679=32 L W 438=59 M L J 524=Ind Rul=(1931) Mad 235 = 129 I C 235.

C. P. C. (1908) Or. 1 r. 11

—The rule applies to High Court and to Provincial Small Cause Court. The word "person" in O. 1 r 11 means a person who is party to the suit and not a stranger to it. A I R 1926 Cal 143 = 46 C L J 530=106 I C 854.

—Suit cannot be conducted by a third party on behalf of absent party without special authorization under O 1 R 11. A I R 1928 Cal 113 (b) = 46 C L J 530 = 106 I C 854.

—Suit by trustee impleading co-trustee as a party defendant can be continued by co-trustee after plaintiff's death. A I R 1921 Mad 124 = 13 L W 148 = 40 M L J 208=(1921) M W N 108 = 62 I C 360. As to suit for pre-emption see. J P R 1881.

C. P. C. (1908) Or. 1 r. 12

—The rule applies to High Court and Provincial Small Cause Court.

C. P. C. (1908) Or. 1 r. 13

*Synopsis.*

- ( 1 ) Objection as to non-joinder
- ( 2 ) Objection as to mis-joinder
- ( 3 ) Waiver

( 1 ) Objection as non-Joinder

—Objections as to non-joinder are to be taken as the earliest possible opportunity under O. 1, r. 13 and fall under two heads. ( 1 ) If plaintiff refuses to join party absolutely necessary to the suit, the Court should dismiss the suit but if instead it is proceeded with wrongly the objection can be raised in

C. P. C. ( 1908 ) Or. 1, r. 13 ( *Cont'd* )

( 1 ) Objection as non-Joinder—( *Concl'd* )

appeal. (2) But if is not absolutely necessary to join a party but merely proper, the absent may be added or the suit may be proceeded without him A I R 1922 Mad 317 = 15 L W 283=(1922) M W N 106=42 M L J 133=31 M L T 266=70 I C 645.

—A plea of non-joinder by a deft at a later stage of litigation is barred under O. 1, r. 13 if not raised in the written statement. 2 O W N 144=12 O L J 66 = 87 I C 17 = A I R 1925 Oudh 369.

—Objection as to nonjoinder cannot be taken for the first time in appeal if such objection could have been taken in the first Court. 13 I C 123. See as to revision 46 I C 648 See also 41 I C 527.

—Similarly, objections not taken in first appeal as to non-joinder of parties, cannot be raised in second appeal A I R 1921 Mad 243= 44 M 344=40 L W 282=14 L W 69=(1921) M W N 229=62 I C 386.

—In a suit relating to easement objection as to non-joinder, not taken in the Court below cannot be raised in appeal. 76 I C 781.

—So also where the want of parties has not caused a wrong decision to be given, the objection of non-joinder of parties cannot be made a ground of special appeal. 22 W R 288.

—Nor can it be raised after settlement of issues. 25 I C 122.

—In a suit against father of joint Hindu family executing agreement to sell. Son cannot for the first time raise in second appeal, an objection that he was not a necessary party thereto. A I R 1930 Mad 683=58 M L J 688 = 31 L W 917 = 125 I C 549.

( 2 ) Objection as to mis-joinder.

—Objections as to the misjoinder of parties and causes of action not taken in the written statement should not be allowed to be taken for the first time in appeal. 15 I C 744.

—Nor in second appeal if not pressed in the Court below. That is, it will not be allowed to be raised in second appeal even though it was raised in the pleadings but the objection was not pressed in either of the Court below. 21 M L T 382 =(1917) M W N 333 = 5 L W 360=38 I C 745.

—Objection as to mis-joinder of causes of action and parties and as to want of jurisdiction (owing to under valuation) when not raised before the Court of First instance are no ground for reversing a decree on appeal when they do not affect the decision of the case on merits. 25 I C 75.

C. P. C. ( 1908 ) Or. 1, r. 13 (Concl'd)

## ( 3 ) Waiver

—One of the defts. in a suit who along with the plffs. signed a petition for reference to arbitrators who passed their award on which judgment was also passed, is not entitled to object to the award on the ground that other defts. were not parties to the reference, when no such objection was taken at the time of the filing of the award. It must be deemed to have been waived. Though a Court may remit an award, on the ground that it has left undecided some of the matters referred, yet when the Court refuses to remit the award, no appeal lies from the refusal and the judgment passed in accordance with the award. 23 I C 862.

## ORDER II.

## Frame of suit.

## Order II. rule I

## ( 1 ) Scope of the rule.

—O. 2, r. 1, should not be confined in its incidence to the manner in which the pleadings ought to be drafted. It should be the effort no less of the Court to attain a final decision upon the subjects in dispute and prevent further litigation concerning them. 34 B L R 125=139 I C 678=I R 1932 B 530 = A I R 1932 B 175 ( 176 ) = A L R 1932 B 283

—Suppressed fact essential for the final decision of the case, cannot be made a ground for second suit. It is barred, under O. II, r. 1. Similarly if a plaintiff being entitled to make a claim does not make it, he is barred from making the same claim again under O. II, r. 2. Again what could have been a ground of attack in the former suit, cannot be so made again in the subsequent suit. The suit is barred under s. 11 where both the plaintiff and defendant have been parties to the former suit, a fresh suit relating to execution is barred under s. 47. A I R 1931 Bom 114 = 32 Bom L R 1473=Ind. Rul. (1931) Bom 209=129 I C 787. See also 10 L W 170; 52 I C 735 = (1919) M W N 677.

## ( 2 ) Subjects in dispute

—General :—The expression "subjects in dispute" includes the right of one party against the other : 49 M L J 701=23 L W 13=1926 M W N 126=91 I C 660=A I R 1926 M 234; that is to say, the jural relation between the parties for the determination of which the suit is brought. 26 Mad., 760.

—Under the rule, therefore a suit for declaration of a right to residence and maintenance should be so framed as to enable the defendant the ascertainment of actual

C. P. C. ( 1908 ) Or. 2, r. 1 (Cont'd)

## ( 2 ) Subjects in dispute—(Cont'd)

extent of right. A I R 1926 Sind 18 = 96 I C 997.

—But it should be noted that though a suit should include whole of the claim, it is not necessary to join all the causes of action. 59 I C 51.

—Mesne Profits :—Ejectment and mesne profits being separate reliefs, a suit for mesne profits without prayer for possession is maintainable. A I R 1931 Pat 233 = 12 P L T 540=10 Pat 329=Ind Rul (1931) Pat 414 = 133 I C 766; nor does a suit for possession bar a subsequent suit for mesne profits accrued due at the date of the suit for possession. 38 Mad 829=28 M L J 127=17 M L T 125=(1915) M W N 130=27 I C 679 (F B.)

—Mortgage :—Mortgagor cannot in a mortgage suit claim account if the agency from the mortgagee where mortgagee is acting as managing agent of mortgagor's business. But a credit for the lump sum received can be claimed by mortgagor. A I R 1930 Cal 85=Ind Rul (1930) Cal 456=124 I C 520.

—A suit for an account upon a mortgage can not be maintained by a mortgagor unless he asks, also for redemption. 20 B 469. If a puisne mortgagee fails to ask for and obtain a decree for sale of any portion of the property liable to sale under the mortgage, he cannot bring a fresh suit for sale to recover the balance left over after sale of the property mentioned in the decree. 8 A L J 599=10 I C 336.

—The plff. brought a suit to redeem a mortgage claiming title as karnavan of a tarward and on failure of that suit brought his present suit to redeem as successor to the tarward. Held, (1) that the plff. ought to have alleged his present title in the previous suit and made it a ground of attack so as to afford room for final decision upon the subject in dispute and (2) that the second suit was barred. 31 Mad 385 and (1916) M W N 286 foll. 10 L W 170=52 I C 735 = (1919) M W N 677.

—Possession :—In the suit for declaration of title possession of the properties need not be asked for where the properties are in possession of Receiver under s 145, Cr. P. C. Lands lying fallow at the time of attachment makes no difference. A I R 1925 Mad 427 = 20 L W 754 = 80 I C 929.

—A suit for declaration of title to some lands was dismissed on the ground that plff was entitled to possession and ought to have sued for it also. Held that it was no bar to a subsequent suit for possession of the lands on the same title, as the causes of action are different in the two cases. It is only when the cause of action is the same, that O. 2, Rr. 1, 2 and 3 bar the suit. To determine whether the cause of action is the same one must look to the facts relied on in the plaint in the first



C. P. C. (1908) Or. 2, r. 1 (Concl'd).

(2) Subjects in dispute—(Concl'd)

suit as constituting the cause of action and if on those facts it was open to Plffs. to ask for the reliefs prayed for in the second suit, then only would the suit be barred. 12 Cal. 291, 16 C 98; 29 M 153; 26 M 760; 14 All. 512, foll. 6 M L J 51; 22 M 263; not foll. 38 Mad 247=25 M L J 125=(1913) M W N 554=20 I C 418.

—In a suit where the plaintiffs are unable to say which of debtor's property is in defendant's possession, it was held that a claim can be decreed on the ground that the debtor may in execution proceedings be able to point out debtor's property in their possession if any.

A I R 1923 Lah 471 = 83 I C 810.

—Other Cases:—A suit for arrears of maintenance payable as per the provisions of a Will from the income of a property, can be framed as such, without framing it on the charge of the property left by the Will. A I R 1931 Cal 670 = 35 C W N 307 = Ind. Rul. (1931) Cal 601 = 132 I C 684.

—Suit by transferee for declaration that he has become entitled to the property—Transfer to him in consideration of his causing other property to be transferred to transferor—Non-performance of his part of contract by transferee—Court should under O 2, r. 1, insist upon his praying for possession and averring his willingness to perform his part of the contract. 34 B L R 125 (127-8) = 131 I C 678 = I R 1932 B 530=A I R 1932 B 175 = A I R 1932 B 283.

—Where a number of persons made defamatory allegations against the plff. a suit against all of them to recover damages for defamation will not lie, unless it is proved that the defts. made those allegations acting together, as each publication of the libel or slander is a distinct tort and a separate suit would lie against every person uttering and publishing the slander. 41 I C 12.

—Separate suits for partition of lands in different villages—Multiplicity see. 23 I C 442.

C. P. C. (1908) Or 2 r. 2

*Synopsis.*

- (1) General principles, scope and object.
- (2) Amendment of plaint.
- (3) Burden of proof.
- (4) Cause of action.
- (5) Execution proceedings.
- (6) Explanation—see under cause of action
- (7) Leave of Court.
- (8) Minors.
- (9) Omission to sue for one of several reliefs
- (10) Omission to sue in respect of any portion of the claim.
- (11) Second suit whether barred.

C. P. C. (1908) Or. 2 r. 2 (Cont'd)

- (1) General Cases.
- (2) Contract — suits on.
- (3) Declaratory suits.
- (4) Discretion or Competency of Court as to bar of suits.
- (5) Dismissal of first suit—its effect on the subsequent suit.
- (6) First suit for interest only, second one for principal.
- (7) First suit for possession, second one for mesne-profits.
- (8) First suit for profits, second one for possession.
- (9) Instalment bonds, suits on.
- (10) Mortgage suits.
- (11) Partition suits.
- (12) Possession suits.
- (13) Pre-emption suits.
- (14) Rent-suits.
- (15) Suits for accounts.
- (16) Suits for damages.
- (17) Suits for dower.
- (18) Suits to impeach alienation.
- (19) Suits for maintenance.
- (20) Suits for share.
- (21) Suit for specific performance — second suit for other relief.
- (12) Splitting of claim.
- (13) Miscellaneous Cases.

(1) General principles, scope and object.

—Ss. 42 and 43, C P Code of 1882 are aimed against a multiplicity of suits in respect of the same cause of action. An objection founded on those sections must be treated as a preliminary point and when no notice of the point is given by the defendant either in the defence or at the trial or in the grounds of appeal first delivered she should not be allowed to raise it subsequently except on terms which would indemnify the plaintiff for defendant's omission to raise it at the proper time. A suit by a Burmese husband for divorce of his wife is no bar to a subsequent suit for partition based on the divorce. The causes of action for the partition and the divorce being different Ss. 42 and 43 C P C did not bar the suit. 38 Cal 629 = 15 C W N 766 = 6 L B R 18 = 8 A L J 739 = 13 Bom L R 464 = 14 C L J 15 = (1911) 2 M W N 397 = 4 Bur L T 153 = 10 M L T 479 = 11 I C 497 (P C).

—In applying O. II r 2 the test is unity of cause of action and not more than one cause of action. A I R 1927 Rang. 237 = 6 Bur L J 85 = 104 I C 370; for the rule is directed against two evils, the splitting of claim and the splitting of remedies. A I R 1926 Lah 539 = 8 Lah L J 381 = 22 P L R 630 = 97 I C 396.

—But the rule does not require that every suit shall include every claim or every cause of action arising out of the same transaction.



C. P. C. (1908) Or. 2, r. 2 (Contd.)

(1) General principles, scope and object—(Contd.)

A I R 1929 Pat 241 = Ind. Rul (1930) Pat 47 = 120 I C 479.

—Provisions of O II r 2 Civil P C only require that a suit shall include whole of the claim with respect to one and the same cause of action and not that every suit shall include every cause of action which the plaintiff may have against the defendant at the time A I R 1928 Lah 238 = 9 Lah 451 = 29 P L R 548 = 108 I C 613.

—O II r 2 is directed to securing exhaustion of reliefs in respect of a cause of action and not to the inclusion in one and the same action of different causes of action arising out of same transaction A I R 1926 Cal 1022 = 30 C W N 873 = 97 I C 73.

—For a suit to be barred under O II r 2 a previous suit against the same defendant arising out of the same cause of action is necessary and for determining whether the cause of action was the same in the previous suit also the Court must arrive at the actual cause of action and will not accept the cause of action which a plff may choose to specify in his plaint : 81 I C 562 = A I R 1925 O 53.

—O 2 r. 2 of the C P Code refers to a case where there has been a suit in which there has been an omission to sue in respect of a portion of the claim and a decree has been made in that suit. In that case a second suit in respect of the portion so omitted is barred. 45 Cal 305 = 22 C W N 611 = 47 I C 129.

—Under O II r 2 every suit must include the whole of the claim arising from one and the same cause of action and it is not necessary that every suit shall include every claim or every cause of action which the plaintiff might have against the defendant. A I R 1923 Cal 371 = 37 C L J 545 = 27 C W N 673 = 70 I C 187.

—O II r. 2 covers only cases where plaintiff can claim several reliefs as to one cause of action and does not cover cases where several causes of action can be joined in one suit. A I R 1928 Mad 840 = 1928 M W N 336 = 28 L W 82 = 56 M L J 52 = 110 I C 554.

—O II r 2 only applies where the creditor brings a second suit; and cannot apply to a debtor's for a declaration that the previous suit by the creditor has extinguished his claim. A I R 1925 Mad 1120 = 49 M L J 474 = 22 L W 17 = 48 M 703 = 91 I C 403.

—O 2 r 2 while operating as a bar deprives the claimant of his remedy by suit founded on the same cause of action but it does not vest any right in the defendant. A L R 1933 All 488.

—Sections 16 and 17 do not over-ride the principles of the provisions of s. 11 and O. II

C. P. C. (1908) Or. 2, r. 2 (Contd.)

(1) General principles scope and object—(Contd.)

r. 2. A I R 1923 Mad 584 = (1923) M W N 294 = 44 M L J 652 = 17 L W 740 = 72 I C 430.

—O II r. 2 of the C P Code, does not bar a plaintiff from including in his claim certain additional profits omitted in a previous suit under a misapprehension. A I R 1923 All 230 = 4 U P L R (A) 16 = 65 I C 585.

—The rule would not apply to the case of two separate properties held under separate titles as the keeping of the plff. out of possession of these would give rise to distinct causes of action within the meaning of the rule. 16 All 167 : 19 All 376. 7 A L J 627 ref to. 41 All 583 = 17 A L J 658 = 50 I C 905 = 1 U P L R 78 (H C).

—It is the duty of a defendant who seeks to avail himself of the bar created by O 2 r. 2 not only to put it forward, but to establish it to the satisfaction of the Court. 132 P W R 1918 = 46 I C 119.

—Order II r. 2 requires plaintiff in a suit to include the whole of his claim he is entitled to make in respect of particular cause of action constituting the basis, but does not compel him to include all claims arising out of different causes of action. 87 P R 1915 = 181 P W R 1915 = 31 I C 463.

—O II r. 2 prohibits only the splitting of claims arising out of the same cause of action. 2 L W 830 = 29 M L J 474 = 18 M L T 377 = (1915) M W N 765 = 31 I C 59.

—The objection of O 2 r. 2 C P Code is not to compel a plff. to club together all his causes of action in one suit but merely to make him include in one suit the whole of the claim arising out of a single cause of action. 30 I C 607.

—There is no provision preventing the ejectment of a tenant from one of more plots in a large holding when he is liable to be ejected from the plot or plots but not from the rest of the holding. Order II. r. 2 will apply and protect a defendant from a further suit regarding other portions of the holding. 14 R D 632.

—The rule applies in case of alternative reliefs claimable on same cause of action. 1932 P C L 847 (Civ.) = 138 I C 270 = I R 1932 L 445 = A I R 1932 L 523 = A L R 1932 L 847 (Civ). Where cause of action definitely identical the rule applies. A L R 1933 L 374.

—O. II, r 2 does not apply where parties to suit are different. A I R 1929 Mad 96 = (1928) M W N 654 = Ind Rul (1929) Mad 500 = 116 I C 116; see to the same effect 47 I C 896; and 17 I C 434; or if the causes of action are different : Ind Rul (1929) All 235 = 114 I C 871.

—O II, r. 2 does not apply to pleas in defence. A I R 1926 Lah 494 = 7 Lah 297 = 27

## C. P. C. (1908) Or. 2, r. 2 (Contd)

## (1) General principles scope and object—(Contd)

P L R 463 = 96 I C 630 See to the same effect 57 I C 348 and 50 I C 909.

—A person is not deleteriously affected by the provisions of O 2 R 2 of the C P Code if at the time he brought his former suit he was not in a position to know all his rights. 21 O C 307 = 49 I C 54 = 1 U P L R 19.

—O. II, r. 2, refers to suits as distinguished from proceedings to file award and bars the second suit in respect of a claim omitted or intentionally relinquished in the first suit. Where there is no first suit, the rule does not apply. A I R 1925 Sind 242 = 86 I C 393.

—The rule does not apply to Revenue Court: 14 A L J 373 = 38 A 302.

—Proceeding for partition in Revenue Court is not a suit for purposes of O. 2, r. 2. 4 O W N 947 = A I R 1927 O 498.

—Where the plaintiffs applied to the Revenue authorities for partition of a Khata, a partition was duly made and was formally accepted by plaintiffs, to whom one-sixth was allotted. The plaintiffs, brought the present suit claiming one-twelfth share in addition, on the ground that previous mutation proceedings were wrong. Held that s. 43, Civ. Pro. Code, 1882 cannot be used to bar a suit in Civil Court, because of something that has happened in a Revenue Court in the partition case. 8 P R 1910 = 6 P W R 1910 = 5 Ind. Cas. 253 = 165 P L R 1910.

—But the rule is applicable to proceedings in Revenue Courts for recovery of arrears of rent and not only to cases of deliberate relinquishments but also of accidental or involuntary omission. A I R 1922 Cal 101 = 35 C L J 304 = 67 I C 375.

## (2) Amendment of plaint.

—O. 2, R. 2 does not apply to amendment of plaints, but merely bars a second suit for relief which should have been included in the earlier suit. 6 P L R 1919 = 84 P R 1919 = 52 I C 464.

—Where a suit claims two reliefs but the plaintiff is permitted to amend the plaint and by that amendment to claim only one relief a permission to omit the other claim is implied and subsequent suit on the other claim is not barred. A I R 1927 Rang 237 = 6 Bur L J 85 = 104 I C 370.

## (3) Burden of proof.

—The onus lies on deft to show that the suit is barred under O. 2, r. 2. A I R 1927 Lah 840 = 102 I C 31.

## C. P. C. (1908) Or. 2 r. 2 (Contd)

## (4) Cause of Action.

—See also under S. 20, 21, and O. 2, r. 3.

—If the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred. A I R 1921 Cal 277 = 34 C L J 465 = 66 I C 923.

—The cause of action referred to in the rule is the cause of action which gives occasion to, and forms the foundation of the suit, and if that cause enables a man to seek for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings. A I R 1922 P C 23 = 42 Mad L J 248 = 20 A L J 17 = 26 C W N 207 = 15 L W 377 = 44 A 121 = (1922) M W N 89 = 24 Bom L R 341 = 3 Pat. L J 279 = 30 M L T (P C) 224 = 1 P W R 1922 = 49 I A 9 = 35 C L J 126 = 65 I C 79.

—A plaintiff's 'cause of action' consists of facts which it is necessary for him to prove 'if traversed' in order to support his right to the judgment of the Court. A I R 1926 Oudh 365 = 13 O L J 448 = 93 I C 269.

—The cause of action for a suit means the fact or facts which the plaintiff alleges to entitle him to a decree and where two suits are based on distinct and separate elements the prior one does not bar the later. A I R 1931 Oudh 57 = 7 O W N 1156 = Ind. Rul. (1931) Oudh 127 = 130 I C 79.

—A cause of action means every fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to sustain his action. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour. A I R 1924 Bom 141 = 25 Bom L R 1172 = 81 I C 776.

—"Cause of action" means every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court, and refers entirely to the grounds set forth in the plaint as the cause of action, or in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour. A I R 1921 Pat 143 = (1921) Pat. Civ. 125 = 60 I C 496.

—A person's cause of action can be defined as consisting of every fact which would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court and the one test which is valuable in considering whether the causes of action are identical is whether the evidence which would suffice to enable the plaintiff to obtain a decree in both suits is the same. A I R 1923 All 311 = 45 A 376 = 21 A L J 267 = L R 4 A 169 = 71 I C 965.

C. P. C. (1908) Or. 2, r. 2 ( *Contd.* ).

( 4 ) Cause of Action—( *Contd.* )

—For a suit to be barred under order II Rule 2, a previous suit against the same defendant arising out of the same cause of action is necessary and for determining whether the cause of action was the same in the previous suit also, the Court must arrive at the actual cause of action and will not accept the cause of action which a plff. may choose to specify in his plaint. A I R 1925 O 53 = 81 I C 562.

—The mere fact that the title to the property in dispute in both suits is the same and that the property is the same does not necessarily show that the cause of action is the same. 59 I C 517.

—Where it is unnecessary to prove the same facts in both the suits and the evidence which would suffice the plaintiff to obtain a decree is not the same in both suits, the causes of action in both suits cannot be said to be the same. A I R 1930 All 116 = Ind Rul. ( 1930 ) All 203 = 121 I C 827.

—A plaintiff cannot be compelled to join several causes of action though in certain cases he can do so. A I R 1929 Oudh 162 = 6 O W N 142 = Ind. Rul. ( 1929 ) Oudh 348 = 117 I C 412.

—Cause of action arising subsequent to the dismissal of the claim under r. 58 need not be joined in suit under O XXI r. 63. A I R 1928 Mad 840 = (1928) M W N 336 = 28 L W 82 = 56 M L J 52 = 110 I C 554.

—Two different rights " *khas baich* " and " *raiyan* " in same fishery in two different persons must be mutually exclusive and misuse of one will necessarily interfere with the exercise of the other and give rise to a cause of action in respect of it. A I R 1926 Cal 1022 = 30 C W N 873 = 97 I C 73.

—A person is not bound to sue on an alternative cause of action. A I R 1927 Nag 322 = 103 I C 888.

—"Cause of action" should be interpreted not on the basis of English decisions nor on the basis of its meaning in Limitation Statutes, but on the basis of rules or on sections of previous Code. A I R 1924 Rang 145 = 1 Rang 694 = 2 Bur L J 169 = 79 I C 755.

—Suit against a firm and one against the managing proprietor personally for goods sold cannot be joined. A I R 1924 Rang 161 = 1 Rang 682 = 2 Bur L J 218 = 76 I C 791.

—Where defendant took possession of two different plots of land on two different occasions and claimed them under two different titles causes of action must be deemed to be distinct for each plot of land. A I R 1924 Nag 214 = 76 I C 218.

—A plaintiff is not bound under O II r 2 to join in one suit all the causes of action he

C. P. C. (1908) Or. 2, r. 2 ( *Contd.* )

( 4 ) Cause of Action—( *Contd.* )

has got against the defendant. A I R 1923 Mad 257 = (1922) M W N 845 = 17 M L W 188 = 32 M L T 82 = 46 Mad 135 = 72 I C 207.

—The suit on the promissory note and the suit for the original loan are not based on the same cause of action though the two actions arise out of the same transaction they are in respect of different causes of action. A I R 1925 Rang 304 = 4 Bur L J 130 = 94 I C 628.

—A person sued in different capacities is not the same deft. but a separate person in respect of each of the capacities in which he is sued. Claims against different estates cannot be joined in one suit merely because all such estates are represented by the same person because each of such claims is based on a separate cause of action as against the particular estate. Claims against several defts. cannot be joined in one suit unless all the defts. are jointly interested in the relief claimed. Claims against separate estates may however be joined in one suit if they are based on the same instrument executed for one undivided consideration and affecting plff's rights against both estates. 11 Bur L T 222 = 50 I C 528.

—Where the causes of action for a prior and subsequent suit in respect of the same property are different. O 2 R 2 C P C does not stand in the way of the entertainment of the subsequent suit. 41 I C 80 = 4 O L J 354.

—Where the title of the Plff. is the same and the trespasser deft is the same deft in both the suits the question whether the second suit is barred by the first depends on the answer to the following question *viz.* Did the two trespasses take place on or about the same time and as part of the same transaction so that the trespasses might be considered ( taking a common sense view of the facts ) as a single transaction forming one and the same cause of action. 25 I C 579.

—When at the time of instituting a prior suit plff had no cause of action for the relief now sought for a subsequent suit for the same is not barred. 20 I C 22 = 255 P L R 1913 = 163 P W R 1913.

—O 2 R 2 C P Code does not bar the institution of a suit when the cause of action is different from the cause of action in the prior suit. 10 I C 26.

Different causes of action—second suit not barred. A I R 1933 L 64.

—If the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred. A I R 1923 Pat 575 = (1923) Pat 234 = 77 I C 500.

—A cause of action must be antecedent to the institution of the suit. If the cause of

C. P. C. (1908) Or. 2, r. 2 (Concl'd)

(4) Cause of Action—(Concl'd)

action in the subsequent suit is different from that in the first suit the subsequent suit is not barred. A I R 1925 Nag 54=80 I C 286.

—Suit on a cause of action arising subsequent to prior suit is not barred. A I R 1927. Oudh 498 = 4 O W N 497.

—Plaintiff cannot get a decree upon a cause of action arising subsequent to decree and totally different from that pleaded A I R 1927 Cal 56 = 44 C L J 263 = 98 I C 845.

—A second suit founded on a cause of action distinct from that in the former suit is not barred by O. II, r. 2. Ind Rul (1929) All 295. 114 I C 871 (All).

—A subsequent suit for kattubadi is not barred under O. 2, r. 2 because suits are for different causes of action as kattubadi has to be determined each year after harvest. A I R 1934 M 6.

—Cause of action for suit based on conveyance for discrepancy in area that was actually conveyed and that conveyed under conveyance is different from cause of action for a suit for failure to convey land agreed to be conveyed and that actually conveyed being different the former does not bar the subsequent suit. A I R 1929 Rang 285 = Ind Rul (1930) Rang 174=122 I C 910.

—Identity of the causes of action in the two suits determined with reference to the allegations made by the plaintiff in either suit irrespective of defences raised and reliefs sought is the test for bar under O. II, r. 2. A I R 1922 All 510 (2) = L R 3 A 587 = 70 I C 817.

—A scheme of management in a previous suit does not bar a subsequent suit for a scheme, based on a different set of facts which came into existence at least partly after the previous suit had been filed and on a different sanction newly obtained from the Collector. A I R 1922 Mad 413=(1922) M W N 477=70 I C 579.

—O. 2, R. 2 does not bar a suit brought for the balance of a claim arising out of a cause of action after a suit has been brought for one portion of the claim in the Village Munsiff's Court. 29 M L J 474=18 M L T 377 = 2 L W 890 = (1915) M W N 765 = 31 I C 59.

—Where the cause of action of a later suit is not identical with that of a former the later is not barred under O. 2, r. 2 of the Code. 10 Ind Cas 26.

(5) Execution or other proceedings.

—This rule does not apply to proceedings in execution of decree. 18 Cal 515; see to the same effect. 19 All 98, and 18 C 462; and 18 C 635; and (3 A W N 57 = 19 A 90; and 43 C L J 596 = 96 I C 562 = A I R 1926 C 1019

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C. P. C. (1908) Or. 2, r. 2 (Concl'd)

(5) Execution or other proceedings—(Concl'd)

= 53 C 582; and 15 S L R 11 = 62 I C 507 = A I R 1921 S 13; and 1913 M W N 685 = 14 M L T 196 = 25 M L J 367 = 21 I C 22 = 38 M 199.

—So, successive applications for execution of different portions of the decree are not barred. 38 Mad 199.

—And it is quite competent to a person who holds a decree for possession of immovable property and mesne profits to execute it first for possession only and then for mesne profits. (1913) M W N 685 foll. 12 C L J 6 not foll (1915) M W N 793 = 2 L W 688 = 30 I C 246.

—But it should be noted that usually there cannot be a separate or piecemeal execution of a decree, except where there are distinct reliefs, such as possession and costs, which may be executed separately. Where there is only one homogeneous relief, such as money or costs execution should be taken out for the whole sum due. If, however, an application for execution of part of the sum due is made, the judgment-debtor should raise an objection to such an application at once, and, if he fails to do so, the execution of part of the decretal amount will not be invalid nor can the judgment-debtor be heard in a subsequent application for execution to say that the application is incompetent as being only for a part of the decree in other words O 2 r. 2 of the O P C does not apply to applications for execution, and if an application for partial execution has been allowed and has been successful, a subsequent application for executing the balance of the decretal amount will not be barred 28 N L R 77 (79) = 140 I C 120 (2) = I R 1932 N 132 = A I R 1932 N 89 = A L R 1932 N 177.

—The provisions of O 2 R 2 C P C are not applicable to proceedings for restitution which are really proceedings in execution. 40 Mad 780 = 5 L W 267 = 38 I C 806.

—A proceeding in which relief by way of restitution is claimed is neither a suit nor an execution proceeding, but a miscellaneous proceeding to which the rules applicable to execution proceedings in substance apply. The provisions of O. 2 R 2 do not apply to such a proceeding. 3 Pat L J 367 = 47 I C 47 see also 53 I C 552.

(6-7) Leave of Court.

—Where permission is granted to withdraw a claim or a portion of it with liberty to bring a fresh suit, O. 2 R 2 does not bar a fresh suit in respect of the claim or portion so withdrawn. 37 P L R 1911 = 176 P W R 1911 = 9 I C 936 see also 41 I C 897.

—Dismissal of an earlier suit on the ground of formal defect in the plaint with permission to file fresh suit does not bar



C. P. C. (1908) Or. 2, r. 2 (Contd.).  
(6-7) Leave of Court—(Contd.)

subsequent suit on the same cause of action.

A I R 1930 Lah 634 = 130 I C 572.

—An order for the withdrawal with leave under O XXIII r. 1 (2) does not preclude plaintiff from including portions of his claim in the new suit omitted in the first suit. A I R 1925 Rang 118 = 3 Bur L J 189 = 84 I C 483.

—Suit for declaration of title to, and recovery of possession of that half share of the property in suit in respect of which the Settlement Officer had recorded defendants as his co-sharer was withdrawn with liberty to bring fresh suit during pendency of partition suit which was decided in plaintiff's favour in the meantime. Subsequent suit for possession brought by the plaintiff against the legal representatives of the deceased defendant was held to be barred. A I R 1921 Pat 193 = 2 P L T 528 = 6 P L J 373 = (1921) Pat 209 = 62 I C 962.

—Apprehension on the part of the plaintiff that second suit would be barred under O II, r. 2 is good ground for allowing withdrawal. A I R 1924 Rang 249 = 2 R 66 = 81 I C 465.

—Personal decree obtained by mortgagee of moveable property bars a subsequent suit to enforce security in absence of leave obtained under sub r. (3) of r. 2 of O. 2.—O. 34, r. 14 is inapplicable to moveable property and does not affect provisions of r. 2 of O. 2. 34 Bom L R 1615.

(8-9) Omission to sue for one of several reliefs.

—Where a plff. knew what relief he was entitled to in a former suit and deliberately omitted to claim the right relief, his subsequent suit in respect of the same cause of action for the right relief is barred by the provisions of O. 2, R. 2 of the C P Code. 37 A 646 = 13 A L J 929 = 30 I C 951 see also 11 I C 87; and 34 P L R 115 = A L R 1933 L 181.

—As to the effect of the omission to sue for one of several reliefs without obtaining leave of Court see. A L R 1933 B 86 = 34 B L R 1615 = A I R 1933 B 51.

—Under the present rule where two reliefs on the same cause of action are open to plaintiff and he chooses only to ask for one he cannot bring a fresh suit for the other relief. A I R 1924 All. 849 = 22 A L J 745 = L R 5 A 580 Civ. = 83 I C 969.

—For the relief available in the previous suit or in execution of the decree in the previous suit is barred in subsequent suit A I R 1925 Cal. 305 = 80 I C 917.

—Thus if a mortgagee to whom a cause of action to realise the whole mortgage security has accrued, exercises the option obtain-

C. P. C. (1908) Or. 2 r. 2 (Contd.)

(8-9) Omission to sue for one of several reliefs—(Contd.)

ing under the deed and sues for interest alone, he must be deemed to have relinquished his claim for further relief, under O. II, r. 2 and a second suit for principal and interest is not maintainable. A I R 1922 P C 23 = 14 A 121 = 20 A L J 17 = 26 C W N 297 = (1922) M W N 89 = 35 C L J 126 = 42 M L J 248 = 34 Bom L R 341 = 15 L W 377 = L R 3 P C 73 = 30 M L T 224 = 3 P L T 279 = 1 P W R 1922 = 49 I A 9 (P C) = 65 I C 79.

—And in a suit by usufructuary mortgagee for possession relief under Transfer of Property Act, s. 68 (b) for money decree in the alternative should be prayed for. A I R 1926 Pat. 87 = 7 P L T 150 = (1925) Pat. 338 = 90 I C 622.

—There is nothing in O. II, r. 2 which limits its operation where of two reliefs open to a plaintiff on the same cause of action are both cognizable by the same Court. A wife sued for maintenance in Court A without claiming that the amount decreed to her might be made a charge and obtained a decree and subsequently instituted another suit in Court B within whose jurisdiction her husband's property was situated for having the amount of the decree awarded to her in the previous suit made a charge upon her husband's property. Held, that the second suit was barred. A I R 1931 Mad. 705 = 34 L W 277 = (1931) M W N 893 = Ind. Rul. (1931) Mad. 851 = 134 I C 803.

—In a suit for possession the plff must ask for declaration of title : 50 C 173. In a suit for cancellation of a deed, possession was not prayed for and no leave was taken to file a subsequent suit for possession. Held that a subsequent suit for possession was barred by O. 2 R. 2. sub. r. 3. The competence of a Court to give leave to a plff. to omit to sue for a relief to which he may be entitled is not affected by the pecuniary value of the relief in respect of which such leave is sought. 8 I C 689; 7 A L J 201; 33 A 244 foll. 9 Bur L T 93 = 33 I C 135. But see 1928 Oudh 359 = 50 W N 265 = 3 Luck 487 = 112 I C 169.

—Whether in a suit for specific performance delivery of possession should be prayed for see. 5 Pat. L J 314.

(10) Omission to sue in respect of any portion of the claim.

—General:—The words "omit to sue in respect of, or intentionally relinquish" in s.7, Act VIII of 1859, were "relinquish or omit to sue for" and it was held, that these words included "accidental or voluntary omission as well as acts of deliberate relinquishment." 8 W R P C 3 = 11 Moo I A 551, at p. 605, of portions of one whole claim arising from one



C. P. C. (1908) Or. 2, r. 2 (Contd.)

(10) Omission to sue in respect of any portion of the claim—(Contd.)

cause of action, *i. e.*, the cause of action for which the suit is brought. L R 12 I A 116 = 8 Mad 520; see also 17 W R 122; and 3 A H H C 27. See also to the same effect : 8 W R P C 3; and 8 I C 943; and 1 W R 199; and 20 W R 482; and 20 I C 173; and A L R 1933 A 470; and 1921 P H C C 125=60 I C 496; and the same rule applies to heirs of the plaintiff : 3 W R 25.

—This portion of the rule assumes that the plaintiff was, at some time prior to the suit, aware or informed of the claim, or aware of the facts which would give him a cause of action. 6 Mad 344; for a right which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a 'portion of his claim' within the meaning of s. 7 of Act VIII of 1859. L R 15 I A 106=15 Cal 800; 14 Mad 23; 15 Mad 296; and 19 Mad 145. See also to the same effect : 1926 M W N 94=23 L W 415=93 I C 1; and 7 A L J 738=7 I C 289=32 A 625; and 17 P R 1897; and there should be actual knowledge not mere constructive knowledge : 47 I C 881.

—And it should be noted that the relinquishment by a plaintiff of a portion of the claim under O 2 R 2 (1) C P C applies primarily to relinquishment before institution of the suit. The rule has no application to any part of a dismissed claim abandoned in appeal. No such abandonment can affect the jurisdiction of the appellate court. 54 I C 655. But see 51 I C 376 = 9 L B R 275 = 12 Bur L T 155.

—But an appellant can relinquish a part of his claim and claim the rest, paying Court-fee stamp on the memorandum of appeal on the claim as reduced on appeal A I R 1927 Lah 543=9 Lah L J 293=29 P L R 64 = 102 I C 705.

—(Per *Sadasiva Aiyar, J. Coutts-Trotter J. Dissenting*)—Under O. II r 2 a plaintiff can in his plaint relinquish any portion of his claim based upon the same cause of action in order to bring it within the jurisdiction of a particular Court. But if a suit had been filed in a Court having jurisdiction to grant the reliefs prayed for, the provision in O VII r 10 at once becomes applicable and all proceedings which take place in the suit before return of plaint for presentation to proper Court are of no effect. A I R 1921 Mad 696 = 16 L W 155 = (1922) M W N 83 = 66 I C 837.

—Failure to join all the persons in possession of the property which a plaintiff claims bars subsequent suit against those left out. A I R 1923 Lah 556=85 I C 203.

—Alienations, setting aside of:—If in a suit to set aside alienation by an adoptive mother, impleading the alienee, an item alienated and in possession of such defendant is omitted, a second suit claiming that item from that defendant is not maintainable. A I R 1931

C. P. C. (1908) Or. 2, r. 2 (Contd.)

(10) Omission to sue in respect of any portion of the claim—(Contd.)

Bom 114 = 32 Bom L R 1473 = Ind Rul (1931)

Bom 209 = 129 I C 737 see also 12 W R 336.

—Claim for money :—Where the appellants were directed by an award to pay the respondent certain moneys and to deliver to him certain title-deeds, the respondent sued them for such moneys. He subsequently sued them for the delivery of the title-deeds. *Held*, that the second suit was barred. A W N 1881, 72; similarly, where by virtue of an oral agreement, the plaintiff was entitled in the event of a certain litigation proving successful, to recover a certain sum of money and a quarter share of a certain house. 15 I C 296. See also 16 I C 383.

—So, also, a suit for some only of instalments due bars subsequent suit for the others. A I R 1922 All 379=44 A 663=20 A L J 590=68 I C 970.

—Claim for possession:—A plaintiff suing to recover damages in respect of his share for dismantling the house but omitting to sue for possession cannot subsequently sue for possession. 58 I C 636=46 C 640.

—If a plaintiff claims in the first suit only a conveyance and omits to ask for possession, a second suit for possession based upon the agreement may fail, unless the claim for possession in the second suit is based upon the conveyance obtained in pursuance of a decree in the first suit. A I R 1924 Mad 360 = 47 M 150=45 M L J 431=18 L W 333=(1923) M W N 726=77 I C 542.

—Where the plaintiffs in a previous suit pray only for declaration without possession which he is entitled to and ought to have asked, failure to do so clearly precludes him from asking for it. A I R 1922 Nag 129=21 N L R 124=4 N L J 192=65 I C 194; see also A I R 1923 A 554=77 I C 756. But see 7 C P L R 73.

—The relief for possession is not a part of the claim which a plaintiff suing for the specific performance of an agreement to lease is entitled to make in respect of the breach of the defendant's agreement to demise the land. Therefore, where a plaintiff obtained a decree for the specific performance of an agreement to lease and after the execution of the lease by the defendant brought a suit for possession of the land demised : *Held*, that the suit for possession was not barred by the provisions of Order II, rule 2 of the Civil Procedure Code. 14 N L R 17=48 I C 188.

—The plaintiff sued for the possession of a holding consisting of a homestead and arable lands attached thereto. He had previously sued for *Khas* possession of that portion of the holding only which included the homestead on the allegation that the deft. had dispossessed him of the homestead. The suit was dismissed. *Held*, that as it appeared from

C. P. C. (1908) Or. 2, r. 2 (Contd.)

(10) Omission to sue in respect of any portion of the claim—(Contd.)

the evidence in this case that plff. had been dispossessed of the arable land at the same time as the homestead, the whole suit was barred. 20 C W N 163=33 I C 139.

—Where a plaintiff claims a remedy, to which he is not entitled, in respect of a certain cause of action, and does not claim a remedy to which he is entitled, he cannot claim the latter in a subsequent suit founded on the same cause of action. 10 O C 44 (5 O C 173, 8 O C 389, 24 M 491, F)

—Claim to property.—In a suit by heirs for the property of the deceased, omission to sue for an item bars a subsequent suit in respect of the same. A I R 1922 Nag 246 = 18 N L R 136 = 65 I C 338.

—Suit for declaration as reversioner of certain properties.—Subsequent suit as to other properties not included in previous suit but in their possession is barred. 27 M L J 520.

—Contract.—Where a contract contains a number of covenants which are to be performed at different times, the breach of every single covenant constitutes an independent cause of action on which a separate suit can be brought. When however a suit is brought after there has been a breach of several covenants the breach of them all is considered a single cause of action and the plff. suing for a breach of one is held to have waived his right of suit on the other. 12 Bur L T 251 = 10 L B R 25 = 56 I C 653.

—Mortgage.—A claim for excess profit from the date of deposit of mortgage money must be included in redemption suit. A I R 1927 Nag 302=10 N L J 142=103 I C 290.

—Where several properties are mortgaged by one deed, a suit for declaration respecting one as being in alienable bars a similar suit regarding other. A I R 1927 Oudh 77 = 1 Luck 1 = 3 O W N 40 = 13 O L J 37 = 91 I C 976.

—The mortgagee died after obtaining a preliminary decree on his mortgage and one K alleging himself to be his adopted son obtained the final decree. Subsequently the plff. sued claiming to be the sole heir of the mortgagee and entitled to the properties left by him. Held, that by reason of the fact that the mortgage decree was not given in the schedule to the plaint as a portion of the properties claimed by the plff. as heir of the mortgagee it could not be held that under O. 2, R. 2 of the C P Code the plff. had abandoned his claim in respect of the mortgage decree. 50 I C 331. As to marshalling see. 13 B 45.

—Partition.—Where in a suit for partition of joint estate, the plaintiff intentionally

C. P. C. (1908) Or. 2, r. 2 (Contd.)

(10) Omission to sue in respect of any portion of the claim—(Contd.)

omitted certain property from partition, although the cause of action for getting that property partitioned had arisen along with the cause of action with respect to the other property: Held, that s. 43, Civ. Pro. Code, operated to bar subsequent suit for partition in regard to the property so omitted. 9 Ind. Cas 424. (following 7 B 182.)

—Rent and Royalties.—Where the plff. sued for Royalties due on a mining lease during a specified period, excluding from his claim certain previous arrears which were also due on the ground that amounts paid by the defts. during the period in suit had been appropriated in discharge of their previous arrears, but the Court held that the payments should have been appropriated in discharge of a portion of the arrears sued for, held, that a subsequent suit for the recovery of the arrears excluded from the claim in the previous suit was barred by O. 2, R. 2. Even an involuntary or accidental omission by a plff. of a portion of his claim is covered by the rule. 11 M I A 551 foll. 12 W R 79 ref. 43 Cal 95=20 C W N 475=36 I C 179.

(11) Second suit whether barred.

(1) General Cases.

—Plea of bar of suit under O. 2, r. 2 is maintainable for the first time in appeal: 51 A 65 (68) = A I R 1932 A 510.

—Respective dates of admission do not determine the order of the suit "after the plaintiff may elect as to which of two suits instituted by him together on the same day shall be held to be barred by the operation of O. II, r. 2. A I R 1926 Mad 934 = 49 M 869 = 1926 M W N 583 = 51 M L J 351 = 97 I C 443.

—Where former suit is brought in Munsiff's Court, O. 2, r. 2 operates as a bar to subsequent action laid in the sub-Court, A I R 1933 P 535.

—Knowledge of all facts—Wrong description in plaint—Decree—Further suit on same cause of action, if maintainable, see 27 I C 808. Relief claimed in plaint—Party referred to separate suit—No bar 72 P W R 1915.

(2) Contract-suits on.

—In a contract for the supply of goods by two monthly shipments a clause ran as follows "This indent is to be deemed and construed as a separate contract in respect of each item and instalment of goods and your rights and liabilities and ours respectively shall be the same as though a separate indent has been made out and signed in

C. P. C. (1908) Or. 2 r. 2 (Contd.).

(11) Second suit whether barred—(Contd.)

(2) Contract-suits on—(Contd.)

respect of each instalment". Held that in view of the intention expressed in clause 13, the Plff. is entitled to bring a separate suit for damages in respect of each shipment. 19 Mad. 304. Foll. 41 Cal 825 = 26 I C 209.

—Similarly, when two separate contracts are contained in one instrument and the performance of each is secured in a different manner, then each gives rise to a separate cause of action. Although they may be joined in the same suit, O. 2, R 2 of the C P Code would not prevent separate suits being instituted on them 21 Bom 267 foll. 16 N L R 136 = 58 I C 18.

—*Prima facie* each separate order and delivery of goods in the case of sale of goods is a separate contract and a separate cause of action, but in some cases it may be a question of successive claims under a single obligation within the terms of the "explanation" to the rule, that is, for example, when the successive claims arise under the same contract. It is open to the parties even in the latter case of a single contract to agree that successive claims for separate deliveries thereunder should be treated as separate contracts and, therefore, as separate causes of action; so that a prior suit for one part of the contract may not bar a subsequent suit for another part. A I R 1924 Rang 249 = 2 R 66 = 81 I C 465

—The question is really dependent on the contract between the parties. If all the goods were delivered under a single contract it would be within the explanation unless there was an express stipulation that each delivery or each month's deliveries should be deemed to be a separate contract. A I R 1924 Rang 145 = 1 R 694 = 2 Bur L J 169 = 79 I C 755.

—A suit for refund of purchase money from the vendor on the ground that he has no title to the property conveyed is not barred by a provisional suit against him for possession of the property conveyed. A I R 1926 Nag 109 = 22 N L R 49 = 88 I C 699 see to the same effect 28 C W N 1033 = 39 C L J 90 = 80 I C 357 = A I R 1924 C 558.

—Suit for damages for breach of contract to repair a car dismissed for default—Defendant giving a fresh undertaking to repair and deliver the car in certain time—Default and wrongful conversion of the car by the defendant—Suit for the price of the car was not barred as previous suit was based on failure to perform contract while latter arose out of test. A I R 1930 Lah 688 = Ind Rul (1930) Lah 381 = 122 I C 733.

—Where a promissory note is given in discharge of a debt, a suit based on the note

C. P. C. (1908) Or. 2 r. 2 (Contd.)

(11) Second suit whether barred—(Contd.)

(2) Contract suits on—(Contd.)

is not on the same cause of action as the one brought on the original contract: 29 A 256 doubted. 12 A L J 959 = 26 I C 302 = 36 All 560. see also 18 C W N 617; and 26 I C 228 = 41 I A 142 P C.

—Suit on pro-note to vakil for out-fecs dismissed does not bar a suit on original cause of action. 27 M L J 728.

—Some Hindu brothers entered into a partition. One of them made a claim for an allotment for the approximate marriage expenses of his unmarried daughters. The other brothers in settlement thereof agreed to pay in the partition *karar* a certain sum and two of the brothers executed pronotes subsequently for distinct sums amounting in the aggregate to the agreed amount. Held, that a suit on one of the pronotes was not barred by a previous suit for partition under S. 43 C P Code 1882. 22 M L J 212 = 13 I C 458 = 36 Mad 151 = 11 M L T 84 = (1912) M W N 59.

—Where a suit for balance due on specific *khata* is dismissed on the ground that there was a running account which contained the items of three *khata*s which included the *khata* in suit, a subsequent suit on the account of three running *khata*s is not barred under O II r 2, A I R 1930 Bom 60 = 31 Bom L R 1232 = 54 B 11 = Ind Rul (1930) Bom 145 = 122 I C 417.

—Where in a suit for recovery of possession of property the purchaser having failed to recover possession asked for repayment of purchase money and the question whether the purchase was a speculative purchase or a purchase under such circumstances as would warrant a good title had not been investigated but the purchaser was directed to raise the question in a separate suit, the separate suit is not barred. A I R 1926 P C 118 = 30 C W N 1009 = 24 L W 328 = 100 I C 345.

—Where a sub-lessee is to pay rent to superior landlord and obtain a receipt for it to be handed over subsequently to lessee, a suit in respect of defaults in payments does not bar subsequent suit for rent which though it had accrued could not have come to the knowledge of the lessee. A I R 1927 Mad 791 = 39 M L T 217 = 103 I C 74.

—Where a plff. vendee of a house joins a claim for possession against defts 2 and 3 who she alleged forcibly dispossessed her with a claim for the recovery of the purchase money from deft No. 1 the vendor, under a covenant in the sale contract there is no misjoinder of causes of action. Cause of action explained. 10 P R 1919 = 49 I C 188.

—A executed a sale deed in favour of B. in 1897. Shortly after the sale, mutation of

C. P. C. (1908) Or. 2, r. 2 (Contd)

(11) Second suit whether barred—(Contd)

(2) Contract-Suits on—(Concl'd)

names was effected in favour of B. C a brother of A, was not a party to the mutation proceeding. In 1910, B's son brought a suit for profits to which C. was impleaded as a party and obtained a decree. Shortly after the suit, C brought a suit for declaration that the sale in favour of B was invalid; *Held*, that the suit was within time. Whatever be the effect of mutation proceeding in the name of B the suit for profits against C. was a fresh invasion of his right and gave a fresh cause of action. 181 C 226.

—The consideration for a certain deed was agreed to be paid partly by delivery of certain things on the date of the bond, and partly in instalments. Default was made in respect of both. Suit was brought for the instalments and a decree was passed. A second suit was brought for the value of the articles agreed to be delivered on date of bond, but was not delivered. *Held*, that the cause of action was one and the same and the second suit was barred by O 2 R 2 of the C P Code. *Held*, also that the plaintiff was not bound to sue for the specific things. 183 P L R 1914 = 129 P W R 1914 = 231 C 845.

### (3) Declaratory suits.

—Dismissal of prior suit for mere declaration does not bar subsequent suit for possession of same subject-matter. A I R 1926 Rang 123=5 Bur L J 64=951 C 892.

—Suit for mere declaration that property in suit was not attachable does not bar subsequent suit to recover damages for wrongful attachment of same A I R 1927 Oudh 48=951 C 299.

—The dismissal of a suit for a mere declaration of a title, and for an injunction to restrain the defendants from interfering with plaintiffs possession, on the ground of want of possession, is no bar to a subsequent suit for a declaration of title and for possession. A I R 1930 Sind 87 = Ind Rul (1930) Sind 13=1201 C 509.

—Decree for declaration of title regarding certain property does not bar subsequent suit to recover from the defendant, whose name appeared all along in the revenue papers, his share of the compensation amount if subsequently the property is acquired by Government under Land Acquisition Act. A I R 1931 Oudh 57=7 O W N 1156=Ind Rul (1931) Oudh 127=1301 C 79.

—A former partition suit does not bar a subsequent suit for declaration of title to property fraudulently concealed: 15 C L J 258=121 C 684.

C. P. C. (1908) Or. 2 r. 2 (Contd)

(11) Second suit whether barred—(Contd)

(3) Declaratory suits—(Contd)

—Where a fractional co-sharer brings a suit in a Civil Court that a certain gift of plots to a party will not prevent his getting his full fractional share of the total *mahal* at partition and the suit is decreed in a latter suit he can claim that the deed of gift shall not affect the choice by the partition Court for the specific area to be assigned to him. A I R 1924 Oudh 129=26 O C 98 = 741 C 459.

—Where a residuary share of an estate is sold at a revenue sale and the purchaser of the rights of auction-purchaser brings a suit for declaration and joint possession against co-sharers in exclusive possession of different portions of land, and he is then obstructed from taking possession of each individual plot a subsequent suit for possession against each obstructing co sharer is not barred. A I R 1927 Cal 237=44 C L J 2 3=991 C 177.

—A suit by daughter to establish her title to her father's estate as heir in reversion her mother's death does not bar a subsequent suit to recover possession of a specific property not included in the previous suit, upon the footing that it formed a part of the estate and that the defendant was in wrongful possession of it. A I R 1929 P C 166 = 51 A 439 = (1929) A L J 716 = 33 C W N 809 = 30 L W 60 = 56 I A 267 = 31 Bom L R 891 = 57 M L J 160 = 50 C L J 52 = 6 O W N 589 = 10 P L T 527 = (1929) M W N 762 = Ind Rul (1929) P C 266 (P C) = 1171 C 498.

—A suit for compulsory registration does not bar second suit for possession based on an order under s. 146 Criminal Procedure Code. A I R 1923 Pat 575 = (1923) Pat 234 = 771 C 500.

—Suit by order of Magistrate to establish a right to certain stolen ornaments does not bar a subsequent suit for conversion A I R 1929 Bom 460 = 31 Bom L R 1123 = Ind Rul (1930) Bom 156 = 1221 C 428.

—A prior suit for dissolution of partnership and for accounts of share of partnership property is no bar to a suit to recover property held as co-owners, and not included in the partnership. 83 P L R 1914 = 43 P W R 1914=221 C 664.

—But a second suit for declaration of rights as partner and accounts will be barred if the cause of action was the same as in the prior suit for dissolution of partnership. 581 C 969.

—Although in a title suit there may be a claim in the alternative for a right of way, it may also be left to a second suit. Therefore the fact that the right of way was not claimed in a previous title suit would not bar a suit for a declaration of a right of way either by the rule of *res judicata* or by the



C. P. C. (1908) Or. 2 r. 2 (Contd)

(11) Second suit whether barred—(Contd)

(3) Declaratory suits—(Concld)

provisions of O. 2 R. 2 of the C P Code. 57  
1 C 852.

—Cause of action for declaratory suits—  
Suits based on different titles. see 38 Mad  
1162.

(4) Discretion or competency of Court as to  
bar of suits.

—Court is not bound to take up *pro prio*  
*motu* the question of a suit being barred. 27  
1 C 579 = 23 P L R 1915. As to competency  
of Court see 27 M 63 = 13 M L J 23.

(5) Dismissal of first suit—its effect on the  
subsequent suit.

—Question left open in previous suit—  
Subsequent suit on it is not barred. 108 1 C 406  
(Mad), nor does the dismissal of a suit on the  
ground of misdescription of property in  
suit bar a subsequent suit on the same cause  
of action. A I R 1925 Lah. 193 = 78 1 C 579.

—So also where a claim is made but re-  
jected by Court as not being claimable sub-  
sequent suit for same is not barred. It is only  
when there is an omission or intentional  
relinquishment that a second suit is barred.  
A I R 1925 Rang. 313 = 4 Bur L J 113 = 94  
1 C 611.

—Dismissal of suit on ground that plain-  
tiff was not entitled to relief sued for does  
not bar subsequent suit for relief which  
Court can grant him. A I R 1925 Lah 459 =  
7 Lah L J 236 = 6 Lah 384 = 26 P L R 280  
& 558 = 87 1 C 994.

—Dismissal of suit against several defts.  
Cause of action against some not established  
—Dismissal of suit—No bar to fresh suit on  
the true cause of action. 26 1 C 51.

—Dismissal of a suit for specific perfor-  
mance does not bar a subsequent suit for  
earnest money. A I R 1923 All 321 = 21 A  
L J 378 = 45 A 378 = L R 4 A 176 Civ. = 72 1 C  
86.

—A suit for recovery of money due under  
a promissory note was filed in the Munsif's  
court but dismissed for default of appear-  
ance. Another suit was then filed to recover  
the same money but it was based on entries  
in the account books. Held that the cause of  
action was the same and the suit was not  
maintainable. 42 All. 193 = 18 A L J 81 = 54  
1 C 424.

—Dismissal of a prior suit by a mortgagee  
for possession of the mortgaged land bars  
subsequent suit for recovery of mortgage  
debt. A I R 1921 Lah. 309 = 4 Lah. L J 502.

—Where a mortgagee obtains a decree for  
interest alone on a separate covenant and

C. P. C. (1908) Or. 2 r. 2 (Contd)

(11) Second suit whether barred—(Contd)

(5) Dismissal of first suit its effect on the  
subsequent suit—(Concld)

subsequent mortgage property free from  
mortgage in execution of his decree, dismissal  
of a suit for payment of mortgage money out  
of sale proceeds in deposit in Court bars sub-  
sequent suit on mortgage. A I R 1922 U B  
1 = 4 U B R 62 = 64 1 C 953.

—Where a prior suit was not maintainable  
as laid, a subsequent suit on proper cause of  
action is not barred: 24 M L T 311 = 1918  
M W N 427 = 7 L W 557 = 45 1 C 969.

—The dismissal of a suit for ejectment  
does not in any way bar the plaintiff in a  
subsequent suit to enforce his right to redeem  
as mortgagor. 63 1 C 684 (Lah).

—But a dismissal of prior suit for eject-  
ment of licensee, bars second suit by licensor  
for damages for use and occupation 13 O L J  
170 = 91 1 C 1031.

—A suit for possession of property will  
not be barred under O. 2 R. 2, C P C by  
reason of the dismissal of a previous suit for  
declaration and injunction restraining defen-  
dants from disturbing plff's possession, on  
account of the failure, of the plff. to prove  
possession. 52 1 C 434; see to the same effect  
6 N L R 81 = 6 1 C 926; and 8 C 819 and 12 C  
291 and 14 A 512.

—A plff. whose suit for a declaration of  
title to land has been dismissed on the ground  
that he was not in possession at the time of  
filing the suit is not debarred by O. 2, R. 2 (3)  
C P Code from bringing a subsequent suit  
on the same title for recovery of possession  
of the same land 37 1 C 15 = 10 Bur. L T 189 =  
9 L B R 37.

(6) First suit for interest only, second suit  
for principal.

—The question in such cases does not  
depend on whether the agreement for interest  
and principal is expressed in one or more  
documents or whether the documents, if  
more than one, all arose out of one transac-  
tion. The document or documents must be  
examined to see whether the obligation on  
which the former suit for interest was based  
was independent of that on which the subse-  
quent suit is brought. 1932 M W N 494 = 35  
L W 279 = 62 M L J 154 = 137 1 C 274 = 1 R  
1932 M 355 = A I R 1932 M 583 = A L R 1932  
M 696.

—Covenant to pay interest in order to be  
a basis of suit, must be distinct from and  
independent of claim for principal. A I R  
1929 Rang 96 = Ind Rul (1929) Rang 173 =  
117 1 C 61.

—If the mortgage provided, for an in-  
dependent obligation to pay the principal



C. P. C. (1908) Or. 2 r. 2 (Contd.).

(11) Second suit whether barred—(Contd.)

(6) First suit for interest only, second suit for principal—(Contd.)

and the interest then a suit brought to obtain a personal judgment in respect of the interest alone, would not prevent a subsequent claim for payment of the principal. But if the non-payment of the interest causes the principal money to become due O II, r. 2 applies. A I R 1922 P C 412 = 4 Lah 32 = 50 I A 115 = 27 C W N 802 = 38 C L J 126 = 18 L W 341 = 6 P W R 1923 = L R 4 P C 46 = 25 Bom L R 220 = 44 M L J 123 = 32 M L T 41 (P C) = 72 I C 187.

—A suit for the recovery of interest alone does not bar a subsequent suit for the recovery of principal and interest due under O. 2 r. 2 where under the deed the mortgagee clearly had two distinct causes of action of which one was in his favour and he is not bound to enforce it on the principle that a person cannot be compelled to take advantage of a forfeiture clause but can waive his right to do so. A L R 1933 L 860.

—The executors under a Will agreed to pay interest on legacy but declined to pay legacy until Succession Certificate is produced. The legal representative sued for interest and subsequently for the legacy: Held, that there was no bar of suit under O. II, r. 2, inasmuch as the interest was claimed in the first suit under an independent covenant with executors. 51 A 439 (P C), relied on 8 Cal 422; 21 Bom 267; 48 M 703; 18 M 466; A I R 1922 P C 23; 8 C 422 (P C); 40 M 291; A I R 1922 P C 412, referred to A I R 1931 Mad 313 = 132 I C 196.

—A suit on bond for interest only bars a subsequent suit for principal: 70 P R 1889; see to the same effect 28 P R 1907; and 19 P R 1910.

—O. 2 R 2 of the C P Code bars a suit for principal and interest due on a mortgage where the plff. mortgagee has previously sued and obtained a decree for interest only, when he could have sued for the principal as well 88 P R 1918: 167 P W R 1918: 47 I C 937 = 102 P L R 1918. see to the same effect: 3 L L J 390 = 41 P L R 1921 = 63 I C 928 = A I R 1921 L 225.

—A mortgage bond provided among others that interest would be paid to the creditor monthly; if for any reason the interest was not paid for six months the creditor would be competent to realise by suit without waiting for the expiry of the term either the unpaid interest or the principal and interest with costs. It was also stipulated that if the bond was not paid within the period fixed then the whole amount and interest etc. would be realised by the creditor by the suit. The interest being in arrears a suit was filed for the interest only "according to the terms

C. P. C. (1908) Or. 2, r. 2 (Contd.)

(11) Second suit whether barred—(Contd.)

(6) First suit for interest only, second suit for principal—(Contd.)

of the bond," even though the cause of action to sue for principal had also arisen. It was decreed without contest. The mortgagees then instituted a suit for the amount due under the bond and interest which accrued due afterwards, held that the suit was barred 39 All. 506 = 15 A L J 557 = 41 I C 233.

—Where a mortgage-deed and a contemporaneous lease form in reality one transaction (the latter merely providing a mode for realising interest) a suit for rent instituted after the principal mortgage debt had become due, bars a subsequent suit for recovery of the principal and interest due on the mortgage 69 P R 1918 = 117 P L R 1918 = 112 P W R 1918 = 47 I C 364 see to same effect 3 L L J 390 = 63 I C 928.

—But a second suit by a mortgagee for recovering principal mortgage money and arrears of rent is not barred under O. 2, R. 2. C. P. C. by reason of his bringing first a suit for realizing rent from the mortgagors as his tenants although at that time the right to recover the principal mortgage money had also accrued, as the cause of action in the previous and subsequent suits is not the same. The conditions in the mortgage were that (a) the mortgagor shall retain possession as tenant (b) shall pay the rent monthly, half-yearly or annually, and in default the mortgagee can either recover principal with arrears of rent or eject the mortgagor and also recover the rent 28 P R 1907, dist 36 I C 209, foll. 71 P W R 1917 = 41 I C 576.

—Where under deed a mortgagor authorizes the mortgagee to sue him for interest or for possession in the event of the former's failure to pay interest at the stipulated time, suit only for interest on default to pay interest does not bar a subsequent suit for possession for a subsequent default. 2 Lah 13 = 56 P W R 1920 (F B) = 59 I C 71.

—So also, where a mortgagor obtains a lease of property mortgaged with possession, a suit for rent does not bar subsequent suit for mortgage money. A I R 1922 Lah 111 = 8 P W R 1922 = 3 Lah 1 = 65 I C 102.

—And where the time stipulated for payment of the principal is one year after the date of the mortgage but interest is made payable monthly, a suit for interest alone does not bar a subsequent suit for principal. A I R 1922 U B 1 = 4 U B R (1921) 62 = 64 I C 953.

—Mortgage and lease on the same day—Separate transactions—Suit for rent alone does not bar suit for principal money. A I R 1924 Lah 190 = 69 I C 54.

C. P. C. ( 1908 ) Or. 2, r. 2 (Contd)

( 11 ) Second suit whether barred—(Contd)

( 6 ) First suit for interest only second suit for principal—(Contd)

—But where, on failure to pay interest, a mortgagee is entitled to recover the entire mortgages amount, a suit only for interest bars subsequent suit for mortgage. A I R 1930 Oudh 41=6 O W N 960 = 5 Luck 431 = Ind Rul (1930) Oudh 470 = 127 I C 246.

—Where defendant mortgaged certain properties to plaintiff with possession directing him to set off the rent against the interest due on the mortgage a decree for arrears of rent, does not bar a subsequent suit on the mortgage for recovery of the mortgage money and interest for the remaining period. A I R 1922 Lah 111 = 3 Lah 1-8 P W R 1922 = 65 I C 102.

—Similarly, where a mortgage deed provides for independent personal covenant for interest, a suit for interest brought on the covenant does not bar subsequent suit for mortgage money. A I R 1925 Mad 120 = 49 M L J 474 = 22 L W 17 = 48 M 703 = 91 I C 403.

—Where a mortgagee cannot sue for recovery of principal within two years and it is agreed that the mortgagee should set off profits from property towards a portion of interest a suit for interest alone within two years does not bar a subsequent suit for mortgage money and balance of interest two years after. 26 A L J 57 = 107 I C 591.

—If in a usufructuary mortgage mortgagor executes a lease simultaneously agreeing to hold property as tenant at fixed date for certain period a suit for rent does not bar subsequent suit for principal and interest on the mortgage. A I R 1926 Lah 559 = 8 Lah L J 381 = 27 P L R 620 = 97 I C 396.

—In a simple mortgage providing for recovery of principal and interest from mortgaged property as well as from the other property and personally from mortgagor a prior suit for interest against the mortgagor personally does not bar subsequent suit for recovering balance due on the mortgage from the mortgaged property A I R 1928 Lah 269 = 109 I C 613.

—A mortgagee is not debarred by O. 2, R. 2, C P C from suing for the possession of the mortgaged property on the strength of a stipulation conferring upon him the option to sue for interest or for possession in the event of the mortgagor's failure to pay interest at the stipulated time, because on the occurrence of previous default the mortgagee sued only for interest and not for possession. 2 Lah L J 466 = 59 I C 71 = 1 Lah 457, see also 69 I C 54 = A I R 1924 L 190.

—Where a person executed a mortgage and a lease simultaneously to another person and the lease provided that the rent would be appropriated for the interest due under

C. P. C. ( 1908 ) Or. 2, r. 2 (Contd)

( 11 ) Second suit whether barred—(Contd)

( 6 ) First suit for interest only second suit for principal—(Contd)

the mortgage and on the rent falling into arrears, the mortgagee brings a suit and recovers the arrears, a subsequent suit by the mortgagee to recover principal and interest under the mortgage is barred by O. II, r. 2, 36 P W R 1921 = 63 I C 928.

( 7 ) First suit for possession, second one for mesne-profits.

—Prior suit for possession, therefore, does not bar a subsequent suit for past or future mesne profits : 26 Bom L R 288 = 80 I C 259 = A I R 1924 B 368; see to the same effect 71 I C 972 = A I R 1924 C 442; and 6 P L T 78 = 80 I C 710 = A I R 1925 Pat 145; and 17 N L R 62 = A I R 1921 N 112; and 8 M L J 273; and 11 M L J 332; and 4 M L T 192 = 31 M 405; and 4 C P L R 88 and 31 P L R 745 = 12 L L J 152.

—So also a suit under s. 9 Sp. Rel. Act for possession of lands with crops does not bar a subsequent suit for mesne profits : 2 L W 157 = 30 M L J 326.

—But the Allahbad High Court has taken a contrary view that a former suit for possession bars a subsequent suit for mesne profits which had accrued at the time of the former suit : 35 I C 475 = 36 A 61; 3 A 660; 16 A 401; 198 A W N 1883; 3 A W N 1882; 17 A 533; and 58 A W N 1881; and A I R 1927 All 716 = 49 A 597 = 25 A L J 409 = 104 I C 406; so also the Oudh J C Court—90 C 224.

—As regards future mesne profits, however, both the Courts have held that subsequent suit is not barred : 135 I C 254 = I R 1932 A 78 = 1931 A L J 606 = A I R 1932 A 45; and A I R 1932 A 510 = 54 A 65; and A I R 1927 A 772 = 101 I C 816; and 40 I A 292; and 60 I C 65; and 1931 A L J 673 = A I R 1931 A 429; and A I R 1931 Oudh 131; as so a summary suit for possession under the Specific Relief Act will not bar a subsequent a suit for mesne profits—24 All 501.

—Where mesne profits were claimed but not adjudicated upon in the first suit a second suit for mesne profits is not barred under O II r 2. (1931) A L J 606.

—Consent decree providing for mesne profits up to date of decree—No provision in it for future profits—Subsequent suit for such profits is maintainable. 56 B 292.

—A suit for partition does not bar subsequent suit for mesne profits on fresh cause of action A I R 1928 Nag 65 = 105 I C 777. see to the same effect 5 Bur L J 47 = 95 I C 380 = A I R 1926 R 137 = 4 R 103.

—A prior suit for possession does not bar a subsequent suit for compensation for holding over A I R 1928 Lah 504 = 11 Lah L J 64 = 110 I C 491.

C. P. C. (1908) Or. 2, r. 2 (Contd.)

(11) Second suit whether barred—(Contd.)

(7) First suit for possession second one for mesne-profits—(Contd.)

—Suit for mesne profits up to delivery of symbolical possession does not bar a second suit for mesne profits after delivery of symbolical possession causes of action being different. A I R 1923 Cal 371 = 27 C W N 673 = 37 Cal L J 545 = 70 I C 187. But see (1886) 12 Cal 482 = 4 Sar 674 P C.

—The cause of action in a suit brought by the plff. to recover from the deft lambardar his share of profits in respect of the share of the mahal as to which his title is not denied is different from the cause of action in another suit which the plff. brings against the deft to recover mesne profits in respect of a share of the property on the allegation that the defendant along with some others has been in wrongful possession of it and O 2 R 2 of the C P Code does not bar the latter suit. 41 All 286 = 17 A L J 313 = 50 I C 953.

—Where a usufructuary mortgagee first brought a suit in ejectment against the mortgagor and subsequently sued him for mesne profits, Held, that the previous suit being a suit for ejectment and not a suit for redemption, the present suit for mesne profits was not barred. 15 N L R 101 = 46 I C 743.

—A suit for recovery of possession of fields and mesne profits against a *munim* does not bar subsequent suit for property purchased by *munim* from the income of the fields. 109 I C 65 Nag.

—Application for restitution in respect of property does not bar a suit for mesne profits. 54 I C 664.

—Changes in the new Code—Court which hears the suit must ascertain mesne profits—No alteration as to nature of claim regarding future mesne profits. 45 All 292.

(8) First suit for profits, second one for possession.

—Prior suit for produce under a mortgage which entitled the mortgagee to take possession on default of interest bars a subsequent suit for possession : 4 P R 1914 = 243 P L R 1913 = 19 I C 981 = 145 P W R 1913.

—But the suit is not barred by O. 2 R. 2 of the C P Code 1908, where at the time of the previous suit the mortgagee is precluded from suing for possession under the terms of the mortgage-deed. 42 P W R 1916 = 32 I C 719

—So also, a mortgagee is not debarred under O. II, r. 2 from suing for possession of the mortgaged property on the strength of a stipulation conferring upon him the option to sue for interest or for possession in the event of the mortgagor's failure to pay

C. P. C. (1908) Or. 2, r. 2 (Contd.)

(11) Second suit whether barred—(Contd.)

(8) First suit for profits, second one for possession—(Contd.)

interest at the stipulated time, by the fact that on the occurrence of a previous default he sued only for interest and not for possession. A I R 1924 Lah 21 = 4 Lah 76 = 5 Lah 1 J 238 = 72 I C 765.

—A suit for mesne profits from the end of period for which plaintiff had claimed mesne profits in a previous suit, and up to the date of a second suit for recovery of possession of property and future mesne profits, is not barred by reason of second suit. A I R 1926 Mad 1015 = 51 M L J 252 = 24 L W 290 = (1926) M W N 814 = 97 I C 389. but see under sub heading 7 supra.

(9) Instalment Bonds, suits on.

—Where a mortgage provides for payment of loan by instalments and stipulates that the whole amount was to be exigible on default of one instalment a suit for recovery of some one instalment with interest bars subsequent suit for the rest of the instalments. A I R 1923 Bom 201 = 25 Bom L R 203 = 72 I C 290.

—A bond after providing for instalments stipulated that if defendant made default in respect of any one instalment he would repay the whole quantity then remaining due on the bond at once. There was also a stipulation in the bond that if the creditor had, by default in payment of instalments, acquired the right to recover the whole debt, he might still at his option recover by instalments. Held, suit for four instalments which had fallen due on date of suit would not bar subsequent suit for the rest. Held, that 2nd suit for recovery of the last three instalments were not barred by O II r. 2 as the cause of action for the suit arose in May 1919. A I R 1924 Nag 61 = 19 N L R 170 = 76 I C 122.

—Where a bond stipulated that the plaintiff was entitled to recover whole amount on default of two instalments, regardless of whether the future instalment had fallen due a suit on default of four instalments for recovery of those instalments only bars subsequent suit for recovery of subsequent instalments. A I R 1928 Mad 705 = (1929) M W N 204 = 112 I C 270. But see (1892) 2 Mad L J 235.

—In all cases of default clauses, penal or not the mortgagor has an option to take advantage of the default clause or to waive it or not to make election at all. And it cannot be said that under O. II r 2 he becomes entitled to sue for the whole debt unless he has by some word or action elected to take advantage of the default clause. A I R 1929 Mad 371 = 29 L W 400 = 56 M L J 580 = (1929) M W N 208 = Ind Rul (1930) Mad 53 = 120 I C 853.

C. P. C. (1908) Or. 2, r. 2 (Contd)

(11) Second suit whether barred—(Contd)

(9) Instalment Bonds, suits on—(Contd)

—An instalment bond provided for recovery of entire amount on default to pay two successive instalments. A decree was obtained for two successive instalments falling in arrear. Held, that a subsequent suit for recovery of entire balance is not barred under O 2 r 2 because in such a case, the mortgagee has two alternative courses open to him, either to enforce the penalty, which would be advantageous to himself or to stand on the original deed, which would be rather to the advantage of the mortgagor. If he elects to adopt the latter course, it cannot lie in the mouth of the mortgagor to meet his suit on the mortgage with the objection that it is barred because he did not adopt the former. 35 L W 424 (426) = 138 I C 340 = I R 1932 M 570 = A I R 1932 M 245 = 1931 M W N 1246.

(10) Mortgage suits.

—In a suit for redemption all claims between mortgagor and mortgagee must be decided. 24 J C 688.

—But there is nothing in the Civil P C or in the Transfer of Property Act to prevent the holder of two independent mortgages over the same property from obtaining a decree for sale on each of them in a separate suit. A I R 1925 Oudh 379 = 12 O L J 127 = 86 I C 748. see to the same effect 4 C P L R 164 and 7 Bom. L R 811 = 30 B 156; and 13 B 45; and 10 L B R 360 = 69 I C 897; and 39 B 138; and 3 I C 176; and 38 M 927 F B; and 20 A 322 F B; See also 24 A 429 P C = 6 C W N 889 = 4 Bom L R 827 = 29 I A 118. and O 34 r 1.

—Government revenue of certain *patti* assigned to two different assignees in different shares—Suit by mortgagee of both for recovery of revenue due in respect of shares of one does not bar a subsequent suit for recovery of revenue due in respect of shares of the other assignee. A I R 1929 All 29 = L R 9 A 306 Rev = 113 I C 758.

—House hypothecated to plaintiff to secure future advance for reconstruction of defendant's house to the extent of Rs. 2,000 payable in 10 years—Expenditure exceeding Rs. 2,000 defendant executes *sarkhat* for excess—Suit on basis of *sarkhat* before ten years is not barred as causes of action for original agreement and *sarkhat* are different. A I R 1930 All 824 = (1930) A L J 1066 = Ind Rul (1931) All 167 = 129 I C 439.

—Where two successive mortgages are created on the same property by the same debtor in favour of the same creditor each can be sued upon separately. 33 C L J 232 = 25 C W N 129 = 60 I C 809.

—If a suit on subsequent mortgage substituted for prior one, fails for want of legal

C P C. (1908) Or. 2, r. 2 (Contd)

(11) Second suit whether barred—(Contd)

(10) Mortgage suits—(Contd)

attestation, failure to fall back on prior mortgage in same suit does not bar subsequent suit on prior mortgage. A I R 1927 Nag 83 = 98 I C 695.

—But where three mortgages really form part of the same transaction whereby the plaintiff gets security for balance due on old account together with fresh cash advance, suit on one alone bars subsequent suit on others. A I R 1921 Bom. 282 = 45 B 55 = 59 I C 347.

—Suit for possession does not bar subsequent suit for redemption. A I R 1927 Lah 752 = 104 I C 820.

—Plaintiff mortgagor brought a suit against the defendant mortgagee, claiming that the latter had realised more than was due to him under the mortgage and asking for a decree for Rs. 100. The Court held that the mortgage had not been paid off and dismissed the suit. Subsequently the plaintiff brought a suit to redeem the mortgage. Held, that the suit for redemption was barred by Order 2 rule 2 of the Civil Procedure Code. 119 P R 1918 = 48 I C 798. But see 19 I C. 393 = 6 Sind L R 140.

—The dismissal of a suit for redemption brought on foot of a specific mortgage is no bar to a subsequent suit on a promise to allow redemption by the mortgagee. 8 Bur L T 10 = 27 I C 731.

—In a prior mortgage suit a simple money decree had been asked for and obtained. Held, that O 2 R 2 was no bar to a subsequent suit for sale in view of the provision of O. 34. R 14. Where in the plaint in the previous suit the plaintiffs stated that they relinquished their right to enforce the mortgage. Held that it cannot be regarded as an extinguishment of the mortgage. 36 All 264 = 12 A L J 374 = 23 I C 429.

—Where the cause of action for the two suits was the same namely, the failure to get possession under the mortgage deed and that the second suit was barred. 1932 P C L 847 (Civ) = 138 I C 270 = I R 1932 L 445 = A I R 1932 L 523 = A I R 1932 L 847 (Civ).

—When the mortgage deed and the lease are executed on the same day and rent is equal to the amount of interest, yet if the mortgage-deed contains no reference to the lease, and that the mortgagee is not restricted in his choice of tenants, the mortgage and the lease could constitute two distinct transactions and suit for rent would not bar subsequent suit on mortgage. A I R 1923 Lah 203 = 4 Lah 52 = 5 Lah L J 259 = 74 I C 122.

—A mortgage-deed provided that if in any year the interest remained unpaid, the mortgagee was to take possession of the property

C. P. C. (1908) Or. 2 r. 2 *Contd.*

(11) Second suit whether barred—(*Contd.*)

(10) Mortgage suits—(*Contd.*)

mortgaged, the income of which was to be taken in lieu of interest and that the mortgagor could redeem it in any year whether the mortgagee had obtained possession or not. There was a default in payment of interest in the year 1908 when the mortgagee claimed possession and the mortgagor refused it. The mortgagee brought a suit for possession in August 1917 and the mortgage-deed was declared void *ab initio* and suit dismissed whereupon mortgagee brought his suit to recover mortgage money in 1920. *Held*, that the suit was barred under O. II, r. 2 as when mortgagor was refused possession he could bring the suit for possession under s.68 (c) of the Transfer of Property Act he could also bring a suit for his money (49 I A 9. Followed) A I R 1924 Oudh 917 = 10 O L J 376=77 I C 340.

—Mortgagee entitled to possession—Suit for possession—Subsequent suit for mortgage money is barred. A I R 1925 Oudh 524 = 28 O C 82 = 85 I C 391. See to the same effect.

A I R 1921 Lah 309 = 4 Lah L J 502.

—Where mortgagors have obtained a decree for possession and have failed to execute it, another suit to redeem will lie for the same reason that the cause of action is not the same. A I R 1924 Lah 143 = 5 Lah L J 296 = 4 Lah 187 = 75 I C 528.

—Mortgagee's suit for a part of mortgage money when whole is due bars subsequent suit for balance. A I R 1923 Bom 201 = 25 Bom L R 203 = 72 I C 290.

—Suit for redemption of 2 out of 3 properties mortgaged bars a subsequent suit for possession of the 3rd property. A I R 1923 Bom 63 = 24 Bom L R 1157=73 I C 862.

—A suit for mesne profits from the date of the decree up to the date of getting possession does not lie after a suit for redemption. A I R 1924 All 909=L R 5 A 223 Civ. = 78 I C 326.

—But see contra under the sub-heading 7 supra. Previous suit for the possession of the mortgaged property on the ground that the property was joint family property and that the mortgagor had no authority to transfer it does not bar a subsequent suit for immediate redemption of the mortgage on the ground that the plaintiff was the mortgagor's heir and that the terms of the mortgage amounted to a clog on the equity of redemption was different. A I R 1925 Oudh 386=12 O L J 105 = 86 I C 686.

—A mortgagee holding a separate money-bond against a mortgagor is under no obligation to enforce the money-bond along with the mortgage, or even to refer to its existence in his plaint seeking to enforce the mortgage.

A I R 1925 Mad 991=86 I C 481.

C. P. C. (1908) Or. 2, r. 2 (*Contd.*).

(11) Second suit whether barred—(*Contd.*)

(10) Mortgage suits—(*Contd.*)

—The dismissal of a suit instituted by a purchaser in execution of a mortgage decree for possession of the properties does not bar a subsequent suit for redemption or any other relief. (1913) M W N 646=21 I C 42.

—A prior suit was on the ground that the mortgaged property had been sold in execution of a simple money decree free of the mortgage does not bar a subsequent suit on the same mortgage on the allegation that the land was sold subject to the mortgage in execution of the money-decree. A I R 1922 U B 1 = 4 U B R (1921) 62= 64 I C 953.

—If in a mortgage-deed there is a clause to the effect that the mortgagor shall be liable to pay the mortgage money, if the whole or part of the mortgaged property went out of the possession of the mortgagee, and the mortgagee, on being dispossessed by a third person, obtains against the mortgagor a decree, which becomes inexecutable, the mortgagee is entitled to sue for recovery of his debt by sale of the mortgaged property.

63 I C 303 (Pat).

—A mortgagee's decree for possession on the basis of the mortgage bars further suit for possession unless it could be shown that possession had been taken under the decree and the judgment creditor has been subsequently dispossessed. 2 Lah L J 678 = 67 I C 281.

—Where a mortgage bond contains default clause, causes of action on mortgage and that for money are same and indistinguishable. A I R 1929 Mad 371=29 L W 400 = 56 M L J 580=(1929) M W N 208=Ind Rul (1930) Mad 53=120 I C 853.

—Per *Kumaraswami Sastri, J.*—In cases where there is power given to claim the payment due on the mortgage-deed and where demand is necessary, the money will not become payable until the demand has been made. Where the default clause is for the benefit of the mortgagee, he is not bound to enforce the clause but can waive it. A I R 1927 Mad 580=52 M L J 636 = 38 M L T 211= 25 L W 615=102 I C 187.

—Cause of action for the redemption suit and the subsequent suit for contribution against owner of a part of the equity of redemption are different. A I R 1929 All 696 =(1929) A L J 1162=Ind Rul (1930) All 834= 126 I C 354.

—Per *Ramesam, J.*—Option to sue for whole debt on default cannot be assumed in the absence of words to that effect in the bond such for example as "when required" or "when you required" or "if you choose" or "the mortgagee will be at liberty to sue." A I R 1928 Mad 705=(1929) M W N 204 = 112 I C 270. But see (1892) 2 Mad L J 235.



## C. P. C. (1908) Or. 2, r. 2 (Contd)

(11) Second suit whether barred—(Contd)

(10) Mortgage suits—(Contd)

—Where a mortgagee undertakes to pay rent to *zemindar* but commits breach and mortgagor pays the same, he can recover the same by redemption suit or by separate suit under s 69, Contract Act. A I R 1927 All 713 = 25 A L J 791 = 103 I C 289.

—Where a tenant mortgages his holding with possession, *malguzar's* suit against the mortgagee for declaring mortgage a void omitting to sue him for possession also does not bar a subsequent suit by the *malguzar* against the tenant and the mortgagee for possession. A I R 1930 Nag 119 = 12 N L J 156 = Ind Rul (1930) Nag 185 = 122 I C 697.

—Where mortgage land is taken possession of by landlord by escheat on death of mortgagor, mortgagee continuing in possession, a suit by heir of mortgagor against landlord for possession does not bar subsequent suit for redemption. A I R 1926 Lah 549 = 8 Lah L J 277 = 7 P L R 402 = 95 I C 9.

—Where mortgagee can claim principal in suit for interest, subsequent suit for interest is barred. A I R 1926 Lah 661 = 97 I C 285.

—But if a mortgage-deed provides for the payment of principal and interest as independent obligations a prior personal decree for interest due does not bar subsequent suit for principal. 110 I C 206 (Lah.).

—Where a mortgagor takes a lease of the mortgaged property paying rent towards interest, a suit for rent does not bar a later suit for principal and balance of interest. A I R 1928 Lah 732 = 112 I C 15.

—Where mortgagor makes himself liable personally for unpaid interest, suit on personal covenant for interest does not bar the subsequent suit for enforcement of the mortgage. A I R 1930 All 286 = (1929) A L J 1945 = 51 A 974 = Ind Rul (1929) All 938 = 119 I C 90.

—Where a person brought a suit on his mortgage against some of the co-owners of the mortgaged property and obtained a decree, a subsequent suit on the mortgage against the other co-owners is barred under O. 2, R 2 of the C P Code. 8 L W 152 = 47 I C 595.

—When the plaintiff sues for his share of a certain amount deposited in Court an account of a mortgage-decree in favour of two other persons, on the ground that he has purchased the whole rights of one of them, he is not debarred from suing on the same ground for his share in sums that are subsequently deposited to the account of his vendor. A I R 1925 Oudh 303 = 28 O C 2 = 84 I C 263.

—Out of the three mortgages which the defendant had executed in favour of the plff

## C. P. C. (1908) Or. 2, r. 2 (Contd)

(11) Second suit whether barred—(Contd)

(10) Mortgage suits—(Contd)

as part of the same transaction, the plff. sued only on one of them under the Dekkhan Agriculturists' Relief Act and obtained a decree. In execution of the decree the mortgaged property was sold, free of all incumbrances, and not subject to the other mortgage charges. The sale realized an amount which was in excess of that due under that decree. The plff filed another suit on the two remaining mortgages and sought a decree against the balance of the sale proceeds of the mortgaged property. *Held*, that the suit was barred under O. 2, Rule 2, of the C P Code coupled with the provisions of Ss 12 and 13 of the Dekkhan Agriculturists' Relief Act; 22 Bom L R 1093 = 59 I C 347.

## (11) Partition suits.

—The cause of action for partition of joint property is a constantly recurring one in the sense that if a suit for partition has been brought but for some reason the properties have not been actually divided by the decree made therein, it is open to any of the joint owners to maintain a subsequent suit for partition. 17 C W N 521 = 16 I C 383. see also 2 L L J 528 = 56 I C 701. and 87 P R 1915 = 181 P W R 1915 = 31 I C 463.

—Where a member of a family enjoying family property as tenant-in-common with others separated and obtained possession over a moiety of it, a suit by another claiming share in that portion of the property and asserting that the separated member was not entitled to the property over which he got possession, does not bar subsequent suit by this other person claiming his share in the rest of the property. A I R 1929 Oudh 1 = 5 O W N 1001 = 113 I C 785.

—But a former suit for partition relating to certain property bars a subsequent suit for partition of the same property. The only remedy is in execution of the former decree. (1917) M W N 327.

—And in a suit for partition, the plff. has to include the whole of his claim that is to say, the whole of the properties alleged to be the joint family properties, and such a suit cannot be treated as one for the recovery of possession of both immoveable and moveable property requiring for their joinder Court's leave under O. 2, R. 4 of the C. P. Code. An order passed in such a suit requiring the plff. to elect to proceed either with the claim for the recovery of immoveable properties or with that for the recovery of the moveables and funds is erroneous. 22 C W N 669 = 46 I C 156.

—That is to say, it is not open to a member of the joint family to ask for a partition

C. P. C. (1908) Or. 2 r. 2 (Contd)

(11) Second suit whether barred—(Contd)

(11) Partition suits—(Contd)

of a certain item and leave the rest to a subsequent suit except in cases where some of the items could not be divided by reason of their being in possession of usufructuary mortgagees or being under a long lease or set apart for maintenance of a widow or some member of the family or that the parties were ignorant as to the existence of some family property and divide the property that is known to them for some other reasons. A I R 1937 Mad 213 = 38 M L T 82 = 98 I C 538.

—Where brothers inherit property from their father and also from their maternal grandfather and the properties become mixed up, the properties do not get consolidated into one whole so as to give one cause of action for partition. A I R 1930 All 371 = Ind Rul (1930) All 227 = 122 I C 403.

—A suit brought by one member of the joint Hindu family against another member for partition of the unalienated portion of the joint Hindu family property does not bar a suit against the same member and his transferee for partition of the alienated property in which by reason of the alienation by that member strangers had already at the date of the former suit, become interested. A I R 1924 Nag 89 = 20 N L R 28 = 78 I C 376.

—The cause of action in a partition suit of joint family property must be regarded as exhaustive of the whole property available for division, so far as its existence is known at the date of the plaint. The position of suit properties in two jurisdictions makes no difference in the application of the principle involved in O. II, r. 2. A I R 1923 Mad 584 = 44 M L J 652 = 17 L W 740 = (1923) M W N 294 = 72 I C 430.

—Suit for partition of items not included in previous suit for partition is not barred if plaintiff was not aware of existence of these items and the information about them was withheld from him either through mistake or fraud of defendant. A I R 1931 Sind 27 = Ind Rul (1931) Sind 40 = 130 I C 552.

—As to whether property inadvertently omitted from prior suit for partition bars a subsequent suit for partition see. 138 I C 186.

—In a suit for partition by some of the members of a Hindu joint family decrees, preliminary and final were obtained. A subsequent suit by them for rent due in respect of their share was held barred as to the period prior to the date of partition suit but not as to period subsequent to that date. 1932 P C L 698 (Civ.) = 137 I C 775 = 33 P L R 570 = I R 1932 L 358 = A I R 1932 L 448 = A L R 1932 L 698 (Civ.).

—A partition suit by a purchaser of a coparcener's interest in a joint Hindu family

C. P. C. (1908) Or. 2 r. 2 (Contd)

(11) Second suit whether barred—(Contd)

(11) Partition suits—(Contd)

property is not barred by a prior decision against him in a suit brought by him for declaration of his right to possession under O. XXI r. 103. A I R 1926 Mad 683 = 49 M 596 = 23 L W 551 = 50 M L J 681 = 95 I C 209.

—A prior suit for dissolution of partnership and accounts between the same parties was referred to arbitration and an award was passed subsequently. One of them sued for partition of the immoveables according to the share fixed by the award. *Held*, that though in the first case the plaintiff was bound to sue for partition of the immoveable property, he was not bound to sue for its partition by metes and bounds. The award and the decree passed in accordance therewith did in fact deal with the right of the parties in the immoveable property by declaring it as their property in common-tenancy in equal shares. The present suit was not one between partners for dissolution of partnership and for rendition of partnership accounts, but was one between tenants-in-common for *mesne profits* and partition of the common property. The first suit was no bar to the present suit because there was no identity of causes of action in the two suits. 2 Lah L J 528 = 56 I C 701.

—A prior suit for profits between plaintiffs and defendants as tenants-in-common, without suing for partition would not bar a later suit for partition. *Per Crump, J.*—The words "cause of action" must be interpreted with reference to those facts which the plaintiff sets out as grounds for the relief he claims. A I R 1923 Bom 440 = 25 Bom L R 491 = 73 I C 424.

—In a suit for partition a plaintiff cannot file first a partition suit and then after the decree file another for accounts for a period prior to the partition. A I R 1922 Bom 9 = 46 B 823 = 24 Bom L R 302 = 69 I C 399.

—Suit for divorce under Buddhist Law does not bar a subsequent suit for partition. 21 M L J 749 = 13 Bom L R 464 = 15 C W N 766 = 8 A L J 739 = 14 C L J 15 = (1911) 2 M W N 397 = 4 Bur L T 153 = 6 L B R 18 = 38 C 629 = 10 M L T 479 = 11 I C 497 = 38 I A 140 (P C). Decision in holding contra is no longer law. 5 L B R 114.

—Where co-sharers in a holding sue for possession of a specific portion of the holding on the allegation of a prior amicable partition between the parties but allegation is found against and plaintiff is given a decree for a half share in the plaint portion of the holding, subsequent suit for a partition of the whole holding is not barred: *Held*, that the objection to the suit fell under O. II, r. 2 (3), rather than under s. II, Explanation IV, but that as the causes of action for the two suits

C. P. C. (1908) Or. 2, r. 2 (Contd)

(11) Second suit whether barred—(Contd)

(11) Partition suits—(Contd)

were different, O. II, r. 2 also did not bar the second suit. A I R 1921 L B 13=11 L B R 1=64 I C 174.

—A second suit for partition of certain survey numbers which were not included in a previous partition suit alleging that plaintiff was not aware of those survey numbers and they were omitted through fraud or mistake of defendant, is not barred either under O. II, r. 2 or by the rule of *res judicata*. A I R 1931 Sind 27=Ind Rul (1931) Sind 40=130 I C 552.

—Partition suit—First suit in respect of property covered by award—Second in respect of property still joint—Maintainable. 42 I C 413.

—Plff. brought a suit for partition of a house situated in Allahabad and for a declaration that a deed of gift in respect of it was invalid. He had brought a previous suit at Sultanpur for partition of property situated there alleging that he had been dispossessed. *Held*, that O. 2, R. 2 of the C P Code did not bar the suit. 38 All 217=14 A L J 257=33 I C 124.

#### (12) Possession suits.

—Where former suit is brought for recovery of one village only on the basis of a document containing grant of two villages, O. 2, r. 2 operates as a bar to second suit for recovery of the other village on the same document. A I R 1933 P 535.

—With regard to reversioner's suits for possession cause of action constituted of alleged unchastity of a widow resulting in a forfeiture of her rights is separated and distinct from that constituted by death of widow. A I R 1928 Oudh 411=5 O W N 653=112 I C 266.

—A reversioner is entitled to bring a single suit against any number of persons who may be holding different portions of the last male holder's property though they may be holding under different title-deeds executed at different dates. A I R 1924 All 902=46 A 822=22 A L J 753=L R 5 A 556 Civ=80 I C 31.

—Where the former suit is one for pure declaration and the second suit is for possession it must be taken that the two causes of action are different. A I R 1929 All 306=(1929) A L J 492=Ind Rul (1929) All 1058=119 I C 562.

—The assignee of a usufructuary mortgage brought a suit for money or sale. The dismissal of the suit is not a bar to a subsequent suit for possession of the property. 10 I C 26.

C. P. C. (1908) Or. 2, r. 2 (Contd)

(11) Second suit whether barred—(Contd)

(12) Possession suits—(Contd)

—A suit by reversionary heirs for a declaration of their right and for possession after setting aside a deed of gift; and a subsequent suit for possession as reversionary heirs of the estate on the ground that they were in possession and were dispossessed by the defendants, are based on distinct causes of action. The mere fact that the cause of action in the latter case arose before the institution of the previous suit, did not make it obligatory on the plaintiff to include the claim in the previous suit. 59 I C 517 (Cal.)

—Plaintiff should join all the persons in possession of the property which he claims, for a suit against some bars subsequent suit against rest. A I R 1923 Lah 556=85 I C 202. But see (1870-72) 14 M I A 187=10 Beng. L R 1=2 Suth. P. C. 474.

—If a Hindu widow sells two properties by different sales, the cause of action for reversioner's suit for possession is not simply the death of the widow but includes in each case the sales and the sales being different the causes of action in which the sales are included are also different. A I R 1930 Nag. 3=26 N L R 121=Ind Rul (1930) Nag. 73=121 I C 41.

—Cause of action in suit based on disposssession is entirely different from cause of action in reversioner's suit for possession and the former does not preclude latter. A I R 1929 Cal 83=18 C L J 368=Ind Rul. (1929) Cal 203=114 I C 139.

—A vendee of two fifth's share of a joint family property by means of two sale deeds from each sharer first sued for possession of one fifth share and then brought a second suit for possession of the other fifth. *Held* that the second suit was barred by O 2 R 2 C P C. 14 M L T 341=21 I C 402=1913 M W N 881=25 M L J 481.

—There is no distinction in principle between the dismissal of a suit for declaration of title on the ground that the plaintiff was not in possession and dismissal of a suit for injunction on the same ground. Where a suit for an injunction is dismissed on the ground that the plaintiff is not or has not proved that he is in possession of the property a subsequent suit for possession is not barred by the provisions of S 43 C P C 1882. 9 A L J 111=34 A 172=13 I C 154; but see (1910) 8 I C 9 (All.) nor does a suit for declaration of title bar a subsequent suit for possession 7 C P L R 63 (8 C 819, 4 A 261, 14 A 512 F).

—By one deed of sale A sold two plots of land to B. In respect of one of the plots, B sued A to recover the purchase money on the ground that A had no title to convey this plot, that in respect of the other plot B sued

C. P. C. (1908) Or. 2, r. 2 (Contd).

(11) Second suit whether barred—(Contd)

(12) Possession suits—(Concl'd)

A for possession of the land as purchaser—*Held* that the suit for possession was not barred under O 2 R 2 of the C P C. 16 I C 24 = 156 P W R 1912 = 182 P L R 1912 = 104 P R 1912.

--The plaintiff first sued for declaration that sale by his brother's widow of the half share of her husband would not affect her reversionary rights after the death of the widow. Subsequently he sued for possession of the other half claiming it as owner. *Held* that the suit was not barred by O 2 R 2 C P C as the causes of action were not the same in the two suits. 82 P L R 1915 = 28 I C 301.

--A suit for declaration of title as to some lands was dismissed on the ground that plaintiff was entitled to possession and ought to have asked for that also. *Held* that it was no bar to a subsequent suit for possession of the lands on the same title, as the causes of action are different in the two cases. (1913) M W N 554 = 20 I C 418 = 25 M L J 125 = 38 Mad 247.

--Where two sets of facts required to be proved in the two suits were different the second suit was not barred : 40 Bom 351 = 18 Bom L R 45 = 33 IC 950.

--Possession suit by auction purchaser for property purchased—First suit to recover one portion of property—Another to recover some other portion from different debts—Whether lies see. 22 Bom L R 296 = 44 Bom 352.

--First suit for recovery of possession as landlord does not bar a second suit as reversioner. (1919) M W N 287.

(13) Pre-emption suits.

--Claim to recover part of the property as owner and rest by pre-emption rests on two distinct causes of action. A I R 1926 All 710 = 25 A L J 48 = 97 I C 176.

--A puisne mortgagee's suit for redemption does not bar subsequent suit for pre-emption. A I R 1928 Lah 63 = 103 I C 348.

--Suit by mortgagee for possession—Failure to set up claim of pre-emption—Subsequent suit for pre-emption. see 99 P R 1910.

(14) Rent suits.

--The question whether there is only one cause of action in respect of the obligation to pay the rent and the premium may arise in one of three ways:—

—(1) The premium may be payable under a contract made subsequent to the contract to pay the rent. In such a case the cause of action for premium and the cause of action for rent is in each case different. In

C. P. C. (1908) Or. 2, r. 2 (Contd)

(11) Second suit whether barred—(Contd)

(14) Rent suits—(Contd)

each case there is a different contract which the landlord has to sue upon. In such a case O. 2, r. 2 will not apply.

—(2) The contract for payment of premium, though entered into later, may in effect be that the old rent is to be increased. In such a case there would, after the subsequent contract be only one cause of action for the whole of the rent, that contract being the later contract which increased and fixed the amount of rent. In that case O. 2, r. 2, would apply and a suit for the arrears of premium alone would be a bar to a subsequent suit for rent arrears which had then accrued due : and

—(3) The subsequent contract may provide that rent should be paid at the old rate and in addition a premium should be payable, so that in that case there would be one contract providing for payment both of rent and of premium. In that case also O. 2, r. 2 will apply, and if the landlord sues only for the premium he cannot afterwards sue for the rent.

--Where it appeared from the evidence that the landlord having given the tenant a notice to quit subsequent to the date of the contract of letting the tenant entered into an agreement for the payment of a premium as a consideration for the landlord agreeing to withdraw that notice, and that there was at the date of the subsequent contract no agreement affecting the payment of the rent which had been previously settled, *Held* that the case fell under the first of the three ways above mentioned and that a prior suit for premium was no bar to a subsequent suit for rent. 33 Bom L R 1563 = I R 1932 B 113 = 135 I C 801 = A I R 1932 B 86 (87-8) = A L R 1932 B 86.

--Suit for rent does not bar a second suit for cesses where cesses are agreed to be paid in the collectorate. A I R 1923 Cal 615 = 27 C W N 521 = 77 I C 364.

--Suit for ejectment of a tenant does not bar subsequent suit for arrears of rent. A I R 1922 Lah 118 = 4 Lah L J 17 = 63 I C 978. Prior suit claiming possession—Second suit for rent see. 35 All 512.

--A decree obtained under old rent, pending proceedings for enhancement under s. 105 does not bar suit for difference after the termination of proceedings under s. 105. A I R 1928 Cal 684 = 32 C W N 870 = 110 I C 395.

--But if in a suit for rent, the plaintiffs stated that they reserved the right for settlement of rent for the excess quantity of land, and no order however, allowing such reservation is made by the Court the plaintiffs are not entitled to claim for excess area for the

C. P. C. (1908) Or. 2, r. 2 (Contd)

(11) Second suit whether barred—(Contd)

(14) Rent suits—(Concl'd)

period of the prior suit. A I R 1925 Cal 463 =  
40 C L J 538 = 85 I C 162.

—Second suit for rent for period covered by first suit is barred under O II r. 2. A I R 1922 Bom 152 = 46 B 229 = 23 Bom L R 1086 = 64 I C 919.

—But where plff. sued for recovery of rent of a certain year, and the defence raised was that the rent claimed had become due at the time of the institution of a prior suit for rent for other years and the plaintiff did not sue for it in that suit. As a matter of fact, the rent claimed had been suspended at the time of institution of prior suit. *Held*, that the suit was not barred by Order 2 R. 2 of the Civil Procedure Code 1908. 18 I C 288.

—But the cause of action for a suit for reconveyance is entirely the same as that for rent and profits realised by the defendant and a second suit for rent and profits after obtaining a decree for reconveyance is barred under O. II. r. 2, C P C; A I R 1931 P C 229 = 35 C W N 977 = (1931) A L J 797 = 61 M L J 294 = 34 L W 444 = 54 C L J 274 = Ind Rul (1931) P C 302 = 134 I C 654 (P C).

—If in a suit in respect of a "khata" all the tenants are made defendants and the whole of the rent is claimed, the apportionment between them by the plaintiff of the respective share does not infringe r. 2, A I R 1931 Pat 135 = 11 P L T 617 = Ind Rul (1931) Pat 49 = 128 I C 785.

—Where on a forfeiture of tenancy, the landlord sued for possession only of the land and got a decree and he subsequently brought a suit for arrears of rent due, *held* that the suit was barred by O. 2, Rr. 2 and 4 of C P Code, as the claim for rent arose out of the same contract of tenancy as the claim on forfeiture. 38 Bom 444 = 16 Bom L R 454 = 25 I C 73.

—But where a plff. who had obtained a sale of certain property and afterwards by a separate assignment purchased the right of the vendor to the arrears of rent first sued for the arrears and subsequently for the rent due to him under his title between the date of his purchase of the property and the first suit. *Held*, that the cause of action for the two suits were different and that the second suit was not barred by the provisions of O. 2, R. 2, of the C P Code. 26 M L T 114 = 10 L W 31 = 52 I C 325.

(15) Suits for accounts.

—For account for one year—Plaint returned as not represented—No bar to subse-

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C. P. C. (1908) Or. 2, r. 2 (Contd)

(11) Second suit whether barred—(Contd)

(15) Suits for accounts—(Concl'd)

quent suit for accounts. 30 M L J 341 = 40 Mad 291.

(16) Suits for damages.

—Where the tenant has failed to pay the sum which he had undertaken to pay to the land-lord of the lessor, if upon the terms of the contract such sum may be rightly treated as rent it is open to the landlord either to recover it as rent or to institute a suit for damages for breach of contract. The mere fact that the landlords adopted one of those courses in the previous litigation did not debar them from following a different and alternative course in a subsequent litigation. 14 C L J 589 = 10 I C 406. (32 C 169; and 35 C 683 doubted).

—So also a suit for partition does not bar a subsequent suit for profits pendente lite: 57 I C 900; nor does a prior suit for declaration of title bar a subsequent suit for wrongful attachment. 55 I C 657 = 70 I J 310.

—An obstruction to a water course is a continuing wrong, and therefore the right to sue for damages for such obstruction continues even after the institution of a previous suit for a decree directing the removal of the obstruction 3 Pat. L W 283 = 43 I C 374.

—When the plaintiff brings a suit for possession on basis of a saledeed in his favour, he is not bound to ask in the alternative for damages or for the return of his purchase money in case possession could not be given, and a second suit for damages for breach of covenant is not barred by O. II r. 2. A I R 1927 Mad 273 = 25 L W 11 = 100 I C 40.

—But where the plff. first sued for possession and obtained a decree a second suit for damages for conversion before date of the suit is barred if the plff. was aware of the conversion before he filed the first suit. 13 Bom L R 874 = 12 I C 375.

—A previous suit for adjustment of accounts under a zuripeshgi lease bars a subsequent suit for damages for breach of contract included in the lease: 34 I C 51.

(17) Suits for dower.

—Suit for portion of dower debt bars a claim for remainder. A I R 1923 All 331 = 21 A L J 269 = 45 A 384 = L R 4 A 181 Civ. = 73 I C 977.

—But a suit for share of inheritance against husband of deceased does not bar a separate suit for dower due by him to the deceased. A I R 1922 All 510 = 70 I C 817; nor



C. P. C. (1908) Or. 2, r. 2 (Contd.)

(11) Second suit whether barred—(Contd.)

(17) Suits for dower—(Concl'd)

does a first suit for dower during the lifetime of the husband bar a second suit for balance.  
8 A L J 27=9 I C 200=33 A 291.

—Suit by sister, against the husband of the deceased for her share of inheritance under the Mohamadan Law in a *zamindari* alleging improper possession by the sister's husband purporting to be on behalf of his minor daughter does not bar subsequent suit for share of dower debt owing to the deceased, joining minor daughter also as party to the suit and claiming the daughter's share of the debt also on the ground of her being in collusion with the father. A I R 1924 All 713=46 All 452=22 A L J 432=L R 5 A 321 Civ.=79 I C 338.

—Per *Lindsay, J.* (*Kanhaiya Lal. J. contra*). Suit by an heir of a deceased Mohamadan lady for share of inheritance of certain *zamindari* estate bars a subsequent suit against the lady's husband for a share of the dower due to the deceased. A I R 1922 All 510=L R 3 A 587=70 I C 817.

(18) Suits to impeach alienation.

—Each alienation by the widow gives rise to a separate and distinct cause of action and a suit to impeach one is no bar under O. II, r. 2 C P C. to a subsequent suit to impeach another alienation. A I R 1922 Oudh 171=8 O L J 535=3 U P L R (J C) 83=66 I C 455.

(19) Suits for maintenance.

—Suit against putative father's heirs for maintenance for an illegitimate son and his mother during their life-time decreed only till attainment of majority of the son and during lifetime of mother. Subsequent suit by son for maintenance after attaining majority was held not to be barred. A I R 1929 Mad 545=56 M L J 673=29 L W 696=Ind Rul (1930) Mad 142=121 I C 126.

(20) Suits for share.

—Although as a general rule a partition suit should embrace all the joint family properties there is an exception in favour of property held jointly with strangers to the family who have no interest in the family partition, and therefore cannot be made parties to the general suit for partition. 15 I C 214=15 O C 81.

—Where two suits are brought against a *Lambardar* by a co-sharer, one for her own share of the profits and the other as assignee of another co-sharer, the second suit is not

C. P. C. (1908) Or. 2, r. 2 (Contd.)

(11) Second suit whether barred—(Contd.)

(20) Suits for share—(Concl'd)

barred by Order 2 R. 2. 10 A L J 469=17 I C 833; nor does a previous suit by plaintiff against vendee from whose vendor plaintiff claimed to succeed, and in which he also alleged that the sale was fictitious, bar a suit against defendant for a share of inheritance. A I R 1923 All 311=21 A L J 267=45 All 376=L R 4 A 169 Civ.=71 I C 965.

—Suit for partition of inheritance does not bar a suit for share of property gifted by ancestor. 40 I C 255.

—A suit for declaration regarding a property was decreed. Subsequently the same property was acquired by Government under the Land Acquisition Act and the plaintiffs sued to recover their share of the compensation amount. *Held*, that the latter suit was not barred by O. II, r. 2. A I R 1931 Oudh 57=7 O W N 1156=Ind Rul (1931) Oudh 127=130 I C 79.

—One joint owner suing for his own share does not affect the right of the other. 15 I C 833.

—Previous suit for wrongful conversion of goods does not bar subsequent suit to obtain payment of legacies, without any claim in respect of any of the goods to which the previous suit related. A I R 1925 P C 105=52 I A 214=(1925) M W N 441=3 Pat L R 208=29 C W N 989=23 A L J 261=48 M L J 627=L R 6 P C 82=48 M 312=27 Bom L R 823 (P C)=87 I C 324.

(21) Suit for specific performance—second suit for other relief.

—A suit for specific performance of a contract for sale bars a subsequent suit for recovery of money paid as part price: 8 M L J 61; but not a subsequent suit for possession: 1914 M W N 200=1 L W 147=15 M L T 103=22 I C 912 see to the same effect 6 A W N 1883; and 4 N L R 14; but see 22 M. 24 and 6 N L R 81.

—A suit to compel defendant to execute a registered conveyance according to an agreement to sell does not bar a second suit for possession. A I R 1926 Rang 197=5 Bur L J 113=98 I C 160.

—A suit for an injunction and value of fodder taken away does not bar subsequent suit for a refund of money advanced and damages for breach of contract. 2 Lah L J 304.

C. P. C. (1908) Or. 2, rule 2-(Contd.)

(12) Splitting of claim.

—It is not open to parties by agreement *inter se* or by admission to override the rule laid down by the Legislature as regards splitting of cause of action. 19 P R 1919, foll. 4 P R 1914 = 243 P L R 1913 = 145 P W R 1913 = 19 I C 981.

—Plaintiff therefore need not combine in one suit all the causes of action which he may have in respect of the subject matter of the suit. A I R 1930 Mad 264 = Ind Rul (1930) Mad 955 = 127 I C 139.

—And where permission to withdraw a claim or a portion of it with liberty to bring a fresh suit is granted, s 43 of the Civ. Pro. Code, 1882 does not bar the fresh claim. 37 P L R 1911, following 17 A 53.

—Where the deft. dies pending a suit and the plff. brings on record a wrong representative and obtains a decree, a suit against the right representative is not barred as there is no splitting of claims. 18 C W N 129 = 19 C L J 19 = 21 I C 397.

—In 1905, the plaintiff brought a suit against J to recover Rs.187.38 and odd on account of arrears of revenue and cesses due for J's moiety share in certain *Babooana* properties. In accordance with the terms of a compromise previously entered into J's brother E, who was the owner of the other half share of the property, was made a defendant in the suit. During the pendency of the suit, J. died, and a dispute arose between his widow and his brother (the two defendants in the present suit) as to the possession of the share left by J.—The plaintiff got E the brother, substituted stating that he did not want a decree against the widow and obtained a decree against E. alone. The widow was successful in a suit brought by her against E for possession of the half share of property left by her husband. Thereupon, the plaintiff brought the present suit for a declaration that J made default to the extent of Rs. 18,738 odd that the Court should hold that the widow, having been in possession of the estate was liable to pay the arrears covered by the decree in the suit of 1905, and for a declaration that the arrears were a charge on J's share of the *Babooana* property.—*Held*:—(1) that S. 43 of C P C of 1882 was not applicable to the suit 18 C W N 129 = 19 C L J 19 = 21 I C 397.

—A mortgagee of a house in order to secure the payment of interest due under the mortgage, leased back the house to the mortgagor by an instrument of even date with the mortgage. The lease deed provided for the payment of interest in certain speci-

C. P. C. (1908) Or. 2, r. 2 (Contd.).

(12) Splitting of claim—(Contd.)

fied months and that, if there was a default in the payment of interest for 3 years consecutively, the mortgagee was entitled to evict the mortgagor. The mortgage provided for the payment of the principal in 5 years. The rent of the house not having been paid for 6 years, the mortgagee sued for the recovery of the 6 years' arrears and obtained a decree. Subsequently he brought a suit for possession of the house under the lease. *Held* that the subsequent suit was barred under O 2 r 2 C P C. When the mortgagee instituted the prior suit, the cause of action for possession of the house by eviction of the mortgagor had undoubtedly accrued in his favour and he could not be allowed to split the claim or the reliefs piecemeal. 140 I C 181 = I R 1932 A 607.

—If a suit for profits for particular year is instituted on a day on which cause of action for profits of subsequent year arises, it must be included in the suit instituted on that date A I R 1925 All 795 = L R 6 A 371 Civ = 88 I C 530.

—A claim for mesne profits in respect of certain lands is maintainable in the absence of any claim for recovery of its possession. A I R 1931 Pat 233 = 10 Pat 329 = 12 P L T 540 = Ind Rul (1931) Pat 414 = 133 I C 766.

—Under s. 77, Registration Act, relief cannot be coupled with any other claim such as a claim for possession and mesne profits. A I R 1924 Cal 600 = 39 C L J 40 = 79 I C 520.

—Certificate under s. 4, Public Demand Recovery Act should not be split up so as to issue more than one certificate with regard to single demand. A I R 1922 Cal 101 = 49 C 1026 = 35 C L J 304 = 67 I C 375.

—A claim for money due based on the original loan or dealings can be combined with a claim for the same money as due under a pro-note. A I R 1924 Mad 520 = 44 M L J 361 = 17 M L W 374 = 32 M L T 118 = 72 I C 325.

—A mortgage bond recited that the mortgagor should pay the mortgagee  $\frac{1}{4}$  of the produce for interest and in default, the mortgagee was to obtain possession of the property : *Held*, that this did not take away the mortgagee's right to sue for arrears. Where the mortgagee on default in 1897 sued for the arrears alone and again in 1909 sued for possession, and arrears : *Held*, that the suit for possession was barred by O. 2 R. 2. *Held*, further, that the plaintiff in the face of his own denial of payments in the plaint, cannot rely on the admissions of the defendant as doing away with the bar or as creating

**C. P. C. (1908) Or. 2 r. 2 (Contd.)****(12) Splitting of claim—(Conclud)**

a new cause of action to sue : 4 P R 1914=243  
P L R 1913=145 P W R 1913=19 I C 981.

—Where a minor's property was mortgaged by his mother first suit against mother alone for mortgage money does not bar a subsequent suit against mother and son to enforce mortgage lien. 41 P R 1883; see to the same effect. 2 L W 212.

—The mortgagee sued the mortgagor for recovery of rent of mortgaged property which the mortgagee had leased to the mortgagor. Subsequently he sued for recovery of mortgage money which he had advanced to the mortgagor. *Held*, that the subsequent suit was not barred by R. 2 O. 2 of the C. P. Code for the cause of action in the two suits was not the same. 102 P L R 1916 = 36 I C 209 = 177 P W R 1916.

**(13) Miscellaneous Cases.**

—There is no limitation for certifying payment under O. II r. 2 (3). 22 Bom L R 1120=45 B 91=59 I C 399.

—Suits filed on the same day must be presumed to have been presented and admitted in the order in which their number appears in the register. A I R 1924 Rang. 161=1 R 682=2 Bur L J 218=76 I C 791.

**C. P. C. (1908) Or. 2 r. 3**

—The first two paragraphs are derived from the Rules of the Supreme Court, 1883, O. 18, r. 1. This rule applies to H. C. and Pro. S. C. C.

**Synopsis.**

- (1) Applicability and scope.
- (2-3) Multifariousness duty of appellate Court.
- (4-5) Suits not held to be multifarious.
- (6-7) Suits held to be multifarious.
- (8) Cause of action.
- (9) Save as otherwise provided
- (10) Revision.

**(1) Applicability and Scope.**

—Under O 2 rules 3 to 6 read together different causes of action against different defendants also can be joined. A I R 1926 Sind 66=19 S L R 395=90 I C 970

—The rule presupposes several causes of action 10 P. R. 1919 = 49 I. C. 188.

—Whether out of two suits filed simultaneously, the subsequent one is barred under the rule, is to see if they could be filed as one without misjoinder. A I R 1924 Rang 161=2 Bur L J 218=1 R 682=76 I C 791.

**C. P. C. (1908) Or. 2 r. 3 (Contd.)****(1) Applicability and Scope—(Contd)**

—Per Page, J.—It is not competent for the Court to pass a joint decree against two defendants on separate cause of action against each. A I R 1927 Cal 93=27 Cr. L J 1195 = 97 I C 955.

—But Court should allow persons seeking individual reliefs to join in same suit for identical investigation as the policy of the rules is to avoid needless expense where it can be done without injustice to anyone A I R 1928 Cal 92 = 103 I C 811.

—Cause of action arising subsequent to suit—Relief on the strength of, if can be granted in exceptional cases see. (1918) M W N 199=44 I C 863.

—*Ramesam, J*—Any party can object to the trial that it involves consideration of more than one cause of action between the same parties. A I R 1928 Mad 764=113 I C 865.

—Appellate decree from a judgment consolidating suits against several defendants does not affect cases or non-appealing defendants unless a specific direction to that effect is contained therein. A I R 1925 Oudh 732 = 2 O W N 894 = 91 I C 121.

—O. 2, R. 3 must be read along with O. 1, rr. 1 and 3 : 12 I C 357 = 7 Nag L R 130.

—The rule combines in itself two principles laid down in Ors. 1 and 2 viz. needless multiplicity of suits and undesirable embarrassment of trial : 41 I C 944 = 45 Cal 111 = 21 Cal W N 794 = 27 Cal L J 158.

—The Court may hold several trials even though the case falls under O. 2, r. 3. 41 I C 944=45 Cal 111 = 21 Cal W N 794 = 27 Cal L J 158.

**(2-3) Multifariousness : duty of appellate Court.**

—Appellate Court will entertain a plea of misjoinder as a successful ground for reversal of decree or remand only if it affects the merits of the case or jurisdiction of the Court. 17 C W N 128 = 18 I C 117; see also 36 I A 103 = 3 I C 282=6 A L J 567 = 13 C W N 920=19 M L J 548 = 36 C 780 P C; and 6 I C 15 = 34 M 55.

**(4-5) Suits not held to be multifarious**

—Similarly in a suit for possession on the ground that the defendant wrongfully encroached upon the disputed land, one of the plaintiffs was a purchaser from the co-sharer of the other plaintiff. *Held*, that the suit was not open to the objection of mis-

C. P. C. ( 1908 ) Or. 2, r. 3 (Contd)

(4-5) Suits not held to be multifarious—(Conclld)

joinder of parties or causes of action. 16 I C 623.

—The cause of action of a plaintiff suing in ejectment cannot be affected by the title under which debts, purport to hold. If his right has been infringed by one act or transaction it gives him a cause of action against all persons interested in the infringement. 29 Cal 87, foll. 6 C W N 585 dist 20 I C 347

—So also, where a person sues for damages for breach of a contract of marriage and impleads as parties to the suit the person breaking the contract and another whom he alleges has procured a breach of the contract: *Held per Beaman J.* That it is open to the deft. to put the plff. to his election either to proceed against the deft. for breach of contract or against the other on the case. 41 Bom. 137 = 19 Bom L R 12 at 16 = 38 I C 588.

—Parties being the same, reliefs for setting aside order of execution Court under one decree and for declaration of attachability of property under another can be joined in one suit. A I R 1923 All 306 = 75 I C 597.

—In a suit by purchaser of property for its mesne profits against a third person, joining vendor as *pro forma* plaintiff, amendment praying relief for mesne profits prior to purchase in vendor's favour is not opposed to O I R 1 or O I R 3 and can be granted. A I R 1929 Bom 51 = 30 Bom L R 1588 = Ind Rul (1929) Bom 214 = 114 I C 262.

—In a mortgage suit declaration can be obtained against rival claimants to the mortgage-money as the transaction is one. A I R 1921 Cal 653 = 33 C L J 369 = 63 I C 244.

—Plaintiffs who derive their titles from different sources *e. g.* some by inheritance, some by purchase, but who between them are entitled to a sixteen anna share of the property, can sue in ejectment together. 16 C L J 1 = 16 I C 84.

—Ejectment suit—Deft. claiming different plots under different title—Plff's cause of action not affected—Joinder if proper. see 18 I C 852.

—There is no misjoinder in a suit to set aside alienation of property to various alienees: 40 B 351.

—A suit for the recovery of a sum money on the basis of two *brokkas* with an allegation that all the defendants were benefited by the loan, although one of the *brokkas* was executed by two and the other by one only of the several defendants is not bad for multifariousness. 51 I C 609.

—The plff. sued in one suit on 3 pronotes, the claim in respect of each of which was less

C. P. C. ( 1908 ) Or. 2, r. 3 (Contd)

(4-5) Suits not held to be multifarious—(Contld)

than Rs. 500. *Held*, that under O. 2, R 3 of the C. P. Code a plff. can combine in one suit against a deft. several causes of action and as according to the aggregate value of the causes of action comprised in this suit it was not cognisable by a Court of Small Causes the suit was rightly tried by a Subordinate Judge. 100 P R 1915 = 32 I C 40 = 189 P W R 1915.

—Where a negotiable instrument is issued in satisfaction or discharge of a debt due, it operates *prima facie* only as a conditional payment not extinguishing the debt but only suspending the payment. If the debtor can prove that it has been accepted as a complete novation of the original liability, it will afford, while it stands, a completed defence to an action by the creditor on the original debt. But whether the acceptance of the title or other instrument be conditional pending payment, or in absolute novation of the old contract, the creditor has the right to revive the latter if, for any reason for which the debtor is responsible, the substituted contract fails. The existence of an unstamped negotiable instrument does not prevent the creditor from having recourse to his original cause of action for which the unstamped negotiable instrument was intended to be substituted. A claim on the original contract made in the alternative can be properly joined with a claim on the substituted contract. 8 N L R 7 = 14 I C 399.

—A plaintiff could join a claim for a share of profits as co-sharer with a claim for arrears of revenue etc., as *lambardar* in one suit. S. 108 of the Oudh Rent Act does not contain anything which would make this improper or unlawful and under O. 2, R. 3 of the Code of Civil Procedure read with S. 136 of the Oudh Rent Act the plaintiff could unite in the same suit the two causes of action. 22 O C 183 = 53 I C 456 = 1 U P L R (J Cr.) 85. and also the rent of agricultural holding together with fishery rents: 33 C 601.

—As to the maintainability of a suit for rent against some of the heirs of a deceased tenant see. 36 I C 243.

—The superior landlord of the plff and debts, who were co-sharers in certain tenures, brought two suits for rent and obtained two decrees jointly against them. The decrees were executed and the tenures were put up to sale. The plff. paid the entire decretal amount and sued the debts for contribution claiming against each of them a specific sum according to his share. *Held*, that, though the plffs. satisfied two different claims separately and on two different occasions the causes of action which were different, could be joined in one suit for contribution. 51 I C 826.



C. P. C. (1908) Or. 2, r. 3 (Contd.).

(4-5) Suits not held to be multifarious—(Contd.)

—In a suit for possession by inheritance the plaintiff can in one suit attack several alienations made at different times in respect of various portions by a deceased owner in favour of different persons. There is no misjoinder of parties or causes of action by including all the alienees in one suit. 10 I C 48=167 P L R 1911=120 P W R 1911.

—The heir of a deceased agriculturist alienor of ancestral property can attack all alienees in one suit for possession as his right to sue for possession accrues when succession opens on the death of the alienor. 9 I C 588=76 P L R 1911=73 P W R 1911.

—Where a person sues for a decree declaratory of his right to a half share in a cultivatory holding he is also entitled to ask for mesne profits, and it is open to the Court in granting a declaratory decree to also decree mesne profits. 17 A L J 993 = 52 I C 649 = 42 All 64=1 U P L R (H. C.) 129.

—Claim for two reliefs—Right to one proved and to the other not proved—Right of plff of a decree for the relief to which he was entitled. 2 Pat L J 15=38 I C 543.

—Joinder of Causes of action—Relief only ancillary to principal relief—No misjoinder 28 M L J 669=24 I C 519.

—Cl. 14 should be construed, as far as possible, consistently with the provisions of rr. 3 and 4 of O. II under which several causes of action arising within the High Court's jurisdiction can be joined together without leave of Court A I R 1929 Bom 100=31 Bom L R 7=53 Bom 251=Ind Rul (1929) Bom 392 = 117 I C 424.

—Although several causes in respect of separate holdings can be joined in one suit against the same defendant, Court can pass distributive decrees and orders in respect of the separate holdings. A I R 1929 P C 171=33 C W N 822=56 I A 238=57 M L J 132=30 L W 310=10 P L T 829 = Ind Rul (1929) P C 322 (P C)=119 I C 618.

—Two sets of defendants against whom relief is claimed in the alternative may be joined in the same action and such a suit is not bad for multifariousness. A L R 1933 All 458.

—Alternative claim for specific performance can be tried in a suit for rescission of contract and return of earnest money. A I R 1924 Pat 280 = (1923) Pat 357=5 P L T 49 = 2 Pat L R 82 = 75 I C 433.

—A claim for possession can be included with a claim for Sp. performance of a contract for sale of immoveable property against the vendor but a claim for possession against the usufructuary mortgagee of the vendor cannot be joined. When so joined the suit ought

C. P. C. (1908) Or. 2, r. 3 (Contd.)

(4-5) Suits not held to be multifarious—(Contd.)

not to be dismissed for misjoinder but so much of the suit as asked for Sp. performance must be allowed to be proceeded with. (1916) 1 M W N 77 = 32 I C 237.

—In a suit for partnership accounts, relief regarding a certain item can be claimed against only one of the defendants. A I R 1924 Pat 65 = 1923 Pat. 276 = 2 Pat L R 132 Civ=76 I C 950.

—Joinder of causes of action—Suit for a declaration that sale of partnership is void, and for recovery of assets from stranger purchasers—Account from other partners if can be claimed in the same suit. see 27 I C 344.

—Suit by partner for moneys due to him under the partnership deed—claim by same partner as creditor of the firm included in suit—parties same—causes of action different see A L R 1933 L 297.

—A pre-emptor can bring a single suit against the vendee in respect of all the sales taken by the latter, impleading various vendors as *pro forma* defendants. A I R 1924 Lah 156 = 6 Lah L J 349 = 82 I C 605.

—Three agreements to refer to arbitration—Same transaction—Different causes of action, joinder of. see. 9 I C 655.

(6-7) Suits held to be multifarious.

—*Reilly, J.*—O II r 3 does not help a mortgagor or mortgagee defendant to set up a paramount title even in a capacity different from that of mortgagor or mortgagee. A I R 1928 Mad 764 = 113 I C 865.

—The "series of acts or transactions" referred in the rule, must be the same A I R 1926 Sind 66 = 19 S L R 395 = 90 I C 970.

—Where plaintiff No. 1 claim was based upon an agreement with the defendants and that of plaintiff No. 2 upon his purchase from some of the defendants as the two plaintiffs were not jointly interested and there was no common question of law or fact nor was there the same act of transaction or series of acts or transactions, joinder of the two plaintiffs and causes of action was not authorized by any law or principle. Plaintiff No. 2 agreeing to forego his interest if plaintiff No. 1 succeeded in proving his agreement did not warrant jointing two dissimilar claims. A I R 1923 Pat 411=73 I C 71.

—Several persons, who had each separately contracted to supply cotton jointly suing to recover the price from the same defendant, cannot be said to be jointly interested within the meaning of the rule. A I R 1925 Bom 342=27 Bom L R 472=87 I C 435.



C. P. C. ( 1908 ) Or. 2, r. 3 (Contd.)

( 6-7 ) Suits held to be multifarious—(Concl'd)

—A suit against plaintiffs' cashier for money due from him on accounts and against their Sadar Naib as responsible for their loss that may be found occasioned by cashier is bad for multifariousness. A I R 1924 Cal 511 = 71 I C 324.

—Plaintiff's suit involving his one capacity of *shebait* for one property and another personal capacity for other properties should be treated as two suits which should be tried separately. A I R 1928 Cal 199 = 55 Cal 164 = 32 C W N 885 = 109 I C 755

—Suit under C P C S 92 Strangers to trust—Claim for relief against, added to claim for relief which Court is competent to decree in such a suit entails clear misjoinder both of parties and of causes of action, and unless the plaint is amended, the suit cannot be sustained. 10 R 342 = 140 I C 317 = I R 1932 R 231 = A I R 1932 R 137 (135).

—It is not permissible for a plaintiff to unite in the same litigation several suits, against separate defendants. A single suit to eject different tenants holding different parcels of land is bad for misjoinder. Where however, the plaintiff adopts the procedure he cannot be heard to object to the use of evidence to which the irregularity of his procedure has given relevance to. 43 Mad 567 = 38 M L J 476 = 18 A L J 707 = 27 M L T 102 = 11 L W 399 = 22 Bom L R 578 = (1920) M W N 61 = 47 I A 76 = 56 I C 117. ( P C )

—[ On appeal from 24 M L J 571 ].

—In a suit by an heir for a share in an estate all the persons in possession of different portions of the estate cannot be joined as defts. unless they are in possession by virtue of the same transaction or the same series of transactions within the meaning of O 1 R 3 of the C P Code. Under O 2 R 3 a plff cannot join in the same suit several causes of action against several defts. unless the defts are all jointly interested in each separate cause of action. 12 Bur L T 106 = 52 I C 927

### ( 8 ) Cause of action.

—Cases relating to meaning etc of the term cause of action have been already dealt with under s. 15, s. 20 and O. 2, r. 2. The following may also be noted. A " cause of action " may consist of a single fact or of an assemblage of facts which it is essential for the plaintiff to prove in order to support his claim against the defendant about the subject-matter in dispute. 1932 A L J 303 = 138 I C 269 = A I R 1932 A 487 = I R 1932 A 383 = A L R 1932 A 525.

—The term " cause of action " in other words is a comprehensive term including all those averments which are necessary in order to entitle a plaintiff to maintain an action.

C. P. C. (1908) Or. 2, r. 3 (Contd.)

( 8 ) Cause of action | (Contd.)

Primarily the cause of action must be found in the plaint. But that is not enough where the plaint alleges the facts necessary to make out a cause of action, but does not necessarily set out where those facts took place. The test is " what are the material facts without which the plaintiff must fail ? " 34 Bom L R 1410 (1414-5).

—The determination of cause of action has no relation whatever to the defence but refers to the grounds set up in the plaint. 33 Bom L R 1364.

—Thus a second suit on the same cause of action but moulded into a different shape by the ingenuity of pleaders is barred. (1916) 1 M W N 171.

—Objection as to non-existence of cause of action when to be taken—Cause of action when superseded see. 2 P L R 1911 = 9 Ind Cas 385 = 28 P W R 1911.

—A cause of action must be complete at the date of the institution of a suit and cannot be completed either by the plaint or by the written statement or any other pleading in the suit. 9 A L J 794.

—A cause of action must be antecedent to the institution of a suit and cannot arise from the pleadings themselves. 4 Pat L J 387 = 52 I C 231.

—The cause of action must arise before the suit. Thus a decree for ejectment of a tenant on the ground of forfeiture, by denial of landlord's title cannot be passed if there was no such denial before the institution of the suit even though there was a denial of title in the suit itself. 42 M 589, followed. Ind Rul (1931) Lah 1038 = 134 I C 1038.

—Suit by reversioner to declare widow's alienation, bad—Withdrawal on death of widow—Second suit for possession—No bar—Different cause of action. See 39 Mad, 987.

—Absence of cause of action death of defendant—addition of intermeddler of the estate as a legal representative—how far allowable see A L R 1933 C 153 = 56 C L J 228 = A I R 1933 C 314.

—Where the promissory note is not duly stamped and therefore inadmissible in evidence held there is no separate cause of action for the money but apart from the note as the time and the execution of the note were simultaneous and formed part of the same transaction. 38 M 660 = 26 M L J 19 = 14 M L T 520 = (1914) M W N 58 = 21 I C 864.

—Or when suit on pro-note is dismissed see 27 M L J 728.

—Promise to pay absolute—Failure—place of damnification. see 24 I C 873.

## C. P. C. (1908) Or. 2 r. 3 (Contd.)

## (8) Cause of action—(Contd.)

—Contract to pay the debt of the promisee due to a third person—Proof of damage, if necessary see 38 Mad 791.

—One cause of action cannot come into existence by instalments on different dates—86 P W R 1910=7 Ind. Cas. 505=213 P L R 1910.

—So also where a cause of action merges in judgment the remedy is by way of execution not a fresh suit: 34 M L J 167=44 I C 110.

—And a cause of action is not prolonged by transfer of title, 24 I C 216 see also 21 C L J 157; and 20 C L J 107.

—A mere attachment is a sufficient invasion of a person's right to give him a cause of action. 9 I C 663.

—Separate invasions of plaintiff's rights constitute distinct causes of action, 12 P W R 1910=5 Ind Cas. 835=59 P L R 1910.

—Allegation that defendant instigated karnavan to bring false suit and get decree, and that payment of decree, was unjustly made is not a legal cause of action and amendment cannot be allowed to change course of action. 21 I C 935.

—As to the effect of misjoinder of causes of action see. 19 C L J 316.

—A Hindu widow cannot join claim for maintenance with claim for stridhan jewels 38 Bom 120. Plff. cannot add to or enlarge his reliefs in view of later events. 16 M L T 244.

—In a suit for contribution the cause of action arises from the time when the joint debt was discharged by the plff. 22 I C 263.

—A *vatandar Joshi* is entitled to sue for the recovery of fees paid by his *yajman* to a usurper of the functions of the *Joshi*. Both the *yajman* and the intruder are jointly and severally liable to the *Joshi* for the amount of his fees. An action lies not only against a person who breaks a contract but also against any one who wilfully and with notice procures a breach of the contract to the detriment of the plaintiff. 17 I C 138; 8 N L R 133.

—When goods are bailed or pledged it is an implied contract that they will be returned on demand. When such a demand is made and refused there is a breach of contract as well as the unlawful withholding of goods and the owner may sue in contract or torts, the cause of action for which arises on refusal to deliver the goods. 17 A L J 888=55 I C 45.

—Highway—Right to go in possession—Threat of obstruction—No proof of damage

—Suit for injunction, maintainability of—Order under S. 144 Cr. P. Code—Cause of action to aggrieved party. see. 36 M L J 79 (F B).

## C. P. C. (1908) Or. 2 r. 3 (Contd.)

## (8) Cause of action—(Contd.)

—Obstruction to highway—Suit. by private person—Special damage necessary See 25 I C 603.

—Suit for injunction, High way, opening of door into—Special damage—Owners of soil. See 179 P L R 1914.

—Suit against Govt. for Property forfeited under Ss. 523 and 524 of the Cr. P. Code See 17 Bom L R 979. Suit for damages for abuse of process See 39 Mad 952.

—The suit land was entered in the Revenue records as joint and when partition proceedings were started by a recorded sharer plaintiff was referred to a Civil Court and he filed a suit for a declaration of his sole ownership. *Held*, that the cause of action arose when partition proceedings were started notwithstanding the entry in the revenue records, *Held*, that where a joint suit was withdrawn with liberty to bring a new suit, separate suits by the several plaintiffs were not barred. 163 P L R 1914=99 P W R 1914=23 I C 458.

—Decision of Revenue Court that defendant was not a tenant of a particular class—Later decision that they were not under-proprietors—Suit for declaration against under-proprietors—Accrual of cause of action See 23 I C 231.

—Where there was an entry in the name of a wrong person in settlement proceedings and the settlement officer refused to correct it on the application of the rightful owner *held* that the cause of action was the refusal of the settlement officer to correct the entry in the absence of anything to show that the title of plff. was denied earlier. 22 I C 608.

—Order for maintenance of illegitimate son—Declaratory suit denying paternity. See 17 O C 331.

—Suit for declaration of right of easement—Suit against servient owners. See 19 C W N 1211.

—Declaratory suit for title Knowledge of denial of title—Subsequent acts—Fresh cause of action See (1914). M W N 197.

—Where a Hindu sues to recover the loss alleged to have been sustained by his acting on certain misrepresentations made by the defendant the cause of action would survive, on the death of the plaintiff, to his heir. 11 M L T 240=14 I C 491.

—Mahomedan heirs—Right to shares not joint for purposes of Limitation. See 36 M L J 184.

C. P. C. (1908) Or. 2, r. 3 (Contd.)

(9) Save as otherwise provided

—Such provision will be found in O. 2, rr. 4 and 5 and also under Agra Tenancy Act see A I R 1925 Pat 674; and 29 A 18; and A I R 1924 A 720.

(10) Revision.

—Revision lies under this rule see A I R 1922 M 332=45 M 194; and 69 I C 966; and 46 M 186.

## C. P. C. (1908) ORDER II, RULE IV

## Synopsis.

(1) Scope of the rule.

(a-b) Claims based on the same cause of action.

(c) Claim to share in mortgage-decree.

(d) Misjoinder of causes of action

(e) Partnership.

(f) Question of title.

(2) Leave given.

(3) Specific performance.

(1) Scope of the rule.

—(a-b) Claims based on the same cause of action:—Notwithstanding s. 44; rule (a), C P C 1882 there is nothing irregular in seeking to recover in one suit immoveable and moveable property if the cause of action is the same in respect of both. L R 31 I A 10.

—Suit for recovery of immoveable property, rents, royalties is governed by O. 2, r. 4 (c) as the cause of action for both claims is the same 59 I A 331 = 59 C 1399 = 36 C W N 1046=63 M L J 196=34 B L R 1567 = I R 1932 P C 263=9 O W N 691=138 I C 861=56 C L J 92=36 L W 266=1932 M W N 923=1932 A L J 919=13 P L T 659 = A I R 1932 P C 216 = A L R 1932 P C 384 (P C).

—O. II R 4 does not bar joinder in an administration suit claim in respect of the partnership with that for recovery of immoveable property based on the same cause of action. A I R 1927 Bom 470 = 51 B 800 = 29 Bom L R 937 = 104 I C 764.

—O II, r. 4 (c) does not bar a suit to recover moveable and immoveable property if the cause of action is the same in both. 145 P W R 1913 = 19 I C 981 = 243 P L R 1913= 207 P W R 1913 = 4 P R 1914.

—(c) Claim to share in mortgage-decree:—Claim to immoveable property or to obtain a declaration of title to it does not include a claim to share in mortgage decree. 15 C L J 258 = 12 I C 684.

—(d) Misjoinder of causes of action:—Claims based on different causes of action cannot be joined in one suit. 13 Bom L R 268 = 35 B 297 = 10 I C 890.

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C. P. C. (1908) Or. 2, r. 4 (Contd.)

(1) Scope of the rule—(Contd.)

—(e) Partnership:—Suit for accounts of partnership between deceased and executor and others can be joined ordinarily with other suit for administration. Other partners are not necessary parties. A I R 1927 Bom 410 = 51 B 800 = 29 Bom L R 937 = 104 I C 764.

—(f) Question of title:—It is generally convenient in mortgage suit to decide question of paramount title of persons in possession and likely to resist possession of a successful plaintiff in a mortgage suit. A I R 1924 Pat 613 = 3 Pat 244 = 5 P L T 573 = 78 I C 885.

(2) Leave given.

—Leave of the Court may not be expressed but may be inferred from its acquiescence. A I R 1924 Pat 613 = 3 Pat 244 = 5 P L T 573 = 78 I C 885.

—Per *Mullic J.*—Joinder of causes of action when allowed—Causes of action joined under O II r. 4 of the C P Code if alternative and based on inconsistent titles should not arise out of inconsistent facts. A I R 1925 Pat 674 = 7 P L T 82 = 1925 Pat 294 = 89 I C 814.

(3) Specific performance.

—Suit for specific performance of contract of sale and recovery of possession of property is maintainable if the contract contains a covenant to deliver possession. 34 B L R 1322 = 140 I C 730 = A I R 1932 B 595 = A L R 1932 B 1241.

(4) Suit to establish title.

—In a suit by plaintiffs representing a community, for declaration of title to a temple, personal claim for damages cannot be joined. 17 M L J 135.

## ORDER II, RULE V.

## Synopsis.

(1) Scope of the rule:—

(a-b) Election of relief claimed.

(c) Joinder of claims.

(d) Partnership.

(2) Attachment of money due to judgment-debtor as executor.

(1) Scope of the rule.

—(a-b) Election of relief claimed:—Where in a suit for construction of will and administration of estate, personal claim against executor is joined it is unnecessary to put the plaintiff to his election in respect of the personal claim, 35 I C 792.

C. P. C. (1908) Or. 2 r. 5 (Concl'd)

(1) Scope of the rule—(Concl'd)

—(c) Joinder of claims:—Claim against executor as such can be joined with claim against him personally if they arise in reference to estate in respect of which the defendant is executor. 21 C W N 939 = 41 I C 615.

—(d) Partnership:—Suit asked for dissolution of partnership and its account and for another account between plaintiff's father and defendants to which former was entitled as administrator, does not contravene O. II, r. 5. A I R 1922 Mad 436 = 16 L W 175 = (1922) M W N 453 = 43 M L J 218 = 69 I C 966.

(2) Attachment of money due to judgment-debtor as executor.

—O. 2, R. 5 disallows attachment of money in the hands of an executor as such in execution of a decree against him personally. 9 Bur L T 226 = 38 I C 563.

#### ORDER II, RULE VI—VII.

##### Synopsis.

- (1) Scope of the rules, 6 and 7.
- (2) Appeal.
- (3) Effect of erroneous frame of Suit.
- (4) Misjoinder of Causes of action.
- (5) Waiver of objection.

(1) Scope of the rules 6 and 7.

—O. 2, contemplates a case where the causes of action joined in the same suit are essentially of different character and is not applicable to cases where the facts alleged in the plaint arise out of facts that are common to both the causes of action. 36 I C 29.

—O. II, r. 6, does not apply to rent suits under the Agra Tenancy Act. A I R 1924 All 720 = 22 A L J 945 = 79 I C 560.

—Joinder of separate purchasers of *debutter* property from *shebait* as defendants to a suit against *shebait* for removal from office is not bad. A I R 1928 Cal 514 = 112 I C 649.

—Objection to joinder of causes of action taken for the first time in second appeal was disallowed. 40 I C 462.

—Objection to misjoinder of causes of action must be taken at the earliest possible opportunity. 34 B L R 1322 = 140 I C 730 = A I R 1932 B 595 = A L R 1932 B 1241.

(2) Appeal

—Appellate Court should not interfere with trial Courts discretion under the rule. A I R 1924 Lah 156 = 73 I C 892.

C. P. C. (1908) Or. 2, r. 6-7 (Concl'd).

(3) Effect of erroneous frame of Suit.

—A suit for accounts as if on a mortgage against the purchaser of the equity of redemption from their mother, was filed but they failed to show that the sale deed was outside the powers of the mother. *Held*, that the suit for accounts was not maintainable as such, because, if the plaintiffs had attempted to show that the mother had no power to effect the sale, the defendants could have raised the plea of extreme necessity. 13 Bom L R 56 P C; 18 Bom L R 763, relied on Ind Rul (1931) Bom 478 = 33 Bom L R 603 = 134 I C 366.

(4) Misjoinder of causes of action.

—Issues on causes of action misjoined but noticed at a late stage, should not be struck out but tried separately, if embarrassing. A I R 1928 Mad 764 = 113 I C 865.

(5) Waiver of action.

—Objection if not taken when the party was taken out of the list of debt, will be deemed to be waived. 9 S L R 11 = 30 I C 24.

—Misjoinder if not objected in first Court will be deemed to have been waived. A I R 1921 Cal 368 = 33 C L J 317 = 63 I C 161.

—Objection on the ground of misjoinder of parties and of causes of action, if not pressed further so that case is closed without issue thereon. A I R 1928 Lah 289 = 10 Lah L J 49 = 108 I C 52. See also 51 B 800 = 29 Bom L R 937 = 104 I C 764 = A I R 1927 Bom 470.

—Objection, if not taken in the trial Court, would not be allowed when the suit fails on merits. A I R 1931 Pat 64 = 11 P L T 898 = Ind Rul (1931) Pat 161 = 10 Pat 234 = 130 I C 257. Misjoinder of parties—Dismissal of Suit. Second appeal. See 10 C L J 316.

#### ORDER III

##### Recognized Agents and Pleadings.

—The words "appearing, applying, or acting" have been substituted for the words "duly appointed to act" by the Amendment Act of 1926.

##### Synopsis

(1) Scope of the rule.

(a-b) General.

(c) Personal appearance when to be directed.

(d) Suit by next friend on behalf of major by bona fide mistake whether dismissible.

(2) Appeal or revision.



## C. P. C. (1908) Or. 3 r. 1 (Contd.)

- (3-4) Appearance.
- (5) Attorney.
- (6) Authority of agent duly appointed.
- (7-8) Consequence of non-appearance in person of a party as witness of his opponent.
- (9) Signing and Verification.
- (10) Vakalatnamah.

## (1) Scope of the Rule.

—(a-b) *General* :—Power granted by agent is for the principal and not himself. A I R 1922 P C 225=26 C W N 376 = 24 Bom L R 606=30 M L T (P C) 109 = 48 I A 534=44 M 736 = 41 M L J 645 = 14 L W 244=(1921) M W N 552=70 I C 281.

—(c) *Personal appearance when to be directed* :—It is improper to direct personal appearance of a party to be examined as a witness of his opponent under this rule. 27 M L T 171=(1920) M W N 241 = 11 L W 289=55 I C 945.

—But where proper, the party refusing to appear though directed under this rule, the Court may declare such party *ex parte* even though he has engaged a pleader who is prepared to appear for him : 41 I C 719=41 M 256. See also under heading (3) *infra*.

—In this connection it is necessary to distinguish O. 19, r 4 from the present rule, for which see... A I R 1926 Notes 175.

—(d) *Suit by next friend on behalf of major by bona fide mistake whether dismissible* :—Suit by next friend on behalf of major by bona fide mistake cannot be dismissed A I R 1931 All 507=1931 A L J 777=Ind Rul (1931) All 794=134 I C 26 (F B).

## (2) Appeal or revision

—Memorandum of appeal unaccompanied by *vakalatnama* is not bad and it can be taken on file. A I R 1926 Bom 336=28 B L R 538=95 I C 266; but see 55 I C 271.

—And an appeal presented by a pleader who was not authorized, is validly presented if the power of attorney is subsequently signed by the party or his agent. 55 I C 290=2 U P L R 18.

—But a memorandum of appeal presented by an unauthorized person is no appeal at all and the Court may reject it for that obvious defect. A I R 1930 All 112=(1930) A L J 394 = Ind Rul (1930) All 162=121 I C 546.

## (3-4) Appearance.

—(a) *Personal Appearance* :—The rough test as to whether a deft. has appeared is to see whether he has complied with the requirements of O. 5, r 1 and of the summons in form 1 of Sch. B. 18 C W N 775 = 19 C L J 535 = 23 I C 769 = 41 C 956.

## C. P. C. (1908) Or. 3 r. 1 (Contd.)

## (3-4) Appearance—(Contd.)

—When a party is present there is no default of appearance : 8 A L J 839 = 10 I C 903=33 A 690;

—Even though he may be present merely for asking for adjournment, 76 I C 288 = A I R 1924 N 26 see also 1917 M W N 241=40 I C 223.

—But mere presence of a party in the premises of the Court building is not "appearance" if he does not attend to the call : 13 Bom L R 1222 = 12 I C 903.

—As to the effect of the absence of a pleader engaged by the party who is present see under sub-heading (b) below. A plaintiff representing other plffs. is deemed to "appear" for all : 16 A L J 462 = 46 I C 390 = 40 A 590.

—(b) *Appearance by pleader* :—A party appearing through a pleader is sufficient "appearance" within the meaning of this rule : 9 Pat L J 63 = 103 I C 711 = 6 Pat 383; see also 3 I C 45 (Bom); notwithstanding physical disability of such pleader to argue : 9 I C 857.

—But mere presence of such pleader is not enough : 1 O W N 736 = 85 I C 811 = 28 O C 166 = A I R 1925 Oudh 549; he should have been intended to appear for the party and duly instructed by such party : 82 I C 107 = A I R 1924 M 842; 25 Bom L R 1222 = 82 I C 124 = A I R 1924 B 439; 110 I C 377 = A I R 1928 M 831; 74 I C 941 = 1923 P H C C 175 = A I R 1923 Pat 520; though mere instruction to apply for adjournment is not sufficient : 10 L B R 329 = 62 I C 57; see also 3 S L R 208=6 I C 851; and 34 C 403 F B (overruling 27 C 529); and 17 M L J 225 = 30 M 274; and 111 I C 150 = A I R 1928 A 760; and 1 C L J 76 N; and 74 I C 693 = 1 Pat L R 281 = A I R 1923 Pat 530; 124 I C 402 (All)=A I R 1930 Notes 23 and A I R 1928 R 191 = 6 R 323; and 1 S L R 224; and 36 C W N 158 = A I R 1932 C 148 (but see 14 C L J 603 = 13 I C 374); but where a party went to fetch the senior pleader and the junior pleader applied for time, held, there was no default of appearance : 119 I C 15 = 1929 A L J 1183 = A I R 1929 A 811.

—And there is also sufficient "appearance" within the meaning of this rule where a pleader without reporting "no instruction" asks for adjournment merely because he is not prepared with the case : 115 I C 173 = 11 N L R 238 = A I R 1929 N 89; 33 M L J 553 = 39 I C 948; 73 I C 982 = A I R 1924 M 43; 2 I C 621; and A I R 1925 N 236. (decision in 16B 23 no longer represents the law).

—Where a pleader who is engaged by the party to appear on his behalf absents himself, or is not instructed to deal with the case there is no "appearance" : 13 M L T 140 = 24 M L J 235 = 18 I C 360; see also 80 I C 950 = L R 5 A 615; and for this purpose refusing to appear and failing to appear fall in the same category : 82 I C 107 = A I R 1924 M 842;



C. P. C. (1908) Or. 3, r. 1 (Contd.)

(3-4) Appearance—(Contd.)

as also taking no further part tantamounting to withdrawal. 43 M L J 317 = 69 I C 513 = A I R 1923 M 13 = 42 M 882; so also where the pleader is unable to proceed for want of evidence : 9 I C 842 (Cal.)

—So the dismissal of suit in presence of pleader is not dismissal for default, and as such is not subject to O. 9 R. 9. 46 I C 492.

—But such pleader, though able to do so, does not think proper to conduct the case on behalf his principal, his mere presence in Court is not an appearance in the suit—23 Bom 414. So also the presence of a pleader without instructions is no presence and does not save *ex parte* decree being passed. A I R 1926 Mad 971 = 51 M L J 290 = (1926) M W N 616 = 97 I C 517.

—So a pleader reporting "no instructions" is no "appearance" : 82 I C 107 = A I R 1924 M 842; see to the same effect 5 C L J 260 = 34 C 235; and 20 A L J 123 = 65 I C 775 = A I R 1922 A 68; and 68 I C 942 = A I R 1923 Pat 156; and 107 I C 815 = 1927 M W N 897 = A I R 1928 M 234; and 19 M L J 760 = 5 I C 23 = 33 M 241 and 18 M L J 51; and A I R 1929 Notes 26; and 90 I C 768 = A I R 1926 C 246; and 5 I C 499.

—Irrespective of the fact whether such reporting was before or after the refusal of adjournment : 82 I C 102 = 47 M L J 398 = 20 L W 427 = 35 M L J 48 = 1924 M W N 589 = A I R 1925 M 21 = 47 M 819 F B; and despite the fact that the pleader was actually present : 1918 P H C C 236 = 3 Pat L J 481 = 46 I C 488.

—Appearance for applying for mere adjournment is appearance without instruction. A I R 1927 Rang 46 = 4 R 408 = 99 I C 717. Presence of clerk is no appearance by pleader. A I R 1928 Lah 841 = 110 I C 177.

—A pleader who is duly engaged by the party absents himself at the hearing but the party himself is present : Is there sufficient "appearance" within the meaning of O. 3, r. 1? It has been held that there is sufficient "appearance" if the party is ready to proceed further with the case : 10 Bom L R 1172 = 3 I C 992 = 33 B 475; but not if the pleader reports "no instruction" and the party takes no further steps : 17 M L J 225 = 30 M 274; see also 36 C W N 158 = 138 I C 87 = A I R 1932 C 418 = 59 C 756; and 51 M L J 684 = 99 I C 32 = A I R 1927 M 109; and 36 C W N 160 = A I R 1932 C 425 = 59 C 906; and 69 I C 837 = A I R 1922 Pat 485 = 1 Pat 188; and 47 I C 27 (Pat); and 52 I C 290 Pat; and 1 Pat L J 156 = 5 Pat L J 17 = 54 I C 715; and 69 I C 837 = A I R 1922 Pat 485 = 1 Pat 188; and 80 I C 950 = A I R 1925 A 58.

—As to the appearance by person not entitled to practice as pleader, and recognised by Court see. 33 I C 669.

C. P. C. (1908) Or. 3, r. 1 (Contd.)

(5) Attorney.

—Attorney can do the act which is to be done by himself in s. 806 Bengal Regulation of 1908. A I R 1927 Lah 141 = 9 Lah L J 14 = 28 P L R 753 = 100 I C 329.

(6) Authority of agent duly appointed.

—Pleader cannot consent to be bound by oath of opposite party—But Court can draw inference from circumstances of case that there was authority. A I R 1930 Cal 463 = 34 C W N 310 = Ind. Rul. (1931) Cal 184 = 179 I C 408.

—In case of *pardanashin* lady, however the power must be explicit.—General power for management does not authorise sale. A I R 1930 Pat 181 = 11 P L T 121 = Ind Rul. (1930) Pat 697 = 127 I C 457.

—Pleader duly appointed has authority to make any application including one for reference to arbitration. 9 S L R 183 = 34 I C 845.

—A person holding power of attorney can make execution application his description being immaterial. A I R 1929 Lah 759 = Ind Rul. (1930) Lah 799 = 126 I C 799.

—But a pleader cannot, without client's consultation, consent to consent-decree, and such decree is unenforceable. A I R 1930 Cal 477 = 34 C W N 210 = Ind. Rul. (1930) Cal 781 = 126 I C 765.

—A person empowered to file compromise petition has no authority to enter into a compromise. A I R 1930 Oudh 112 = 7 C W N 153 = Ind Rul. (1930) Oudh 299 = 125 I C 171.

—So also a general authority of Pleader does not authorise him to enter into compromise in collateral matter by becoming Receiver in a case relations of attorney and client come to an end. A I R 1927 Cal 714 = 31 C W N 953 = 55 C 113 = 103 I C 387.

—It should be noted, however, that although a compromise effected by a pleader without specific authority, is invalid, subsequent ratification by the client validates it. 9 S L R 218 = 34 I C 928.

—Recognized agent has no right of audience. 19 C W N 64 = 28 I C 838.

—Notice to Vakil after transfer of appeal is good notice even though Vakil stipulates to appear at one particular place his power for accepting notice continues. A I R 1927 Lah 428 = 101 I C 205.

—A Counsel has authority to make admissions on matters of fact relevant to the issues. Admission on questions of law would not bind the client. A Counsel has authority to confess judgment, withdraw or compromise, or refer to arbitration the suit in which he is instructed for his client's advantage or benefit, even though he has no express authority from

C. P. C. (1908) Or. 3, r. 1 (Concl'd)

(6) Authority of agent duly appointed—(Concl'd)

his client unless he is asked not to do so. A Counsel cannot without express authority agree to compromise or refer to arbitration matters unconnected with the subject-matter of the suit in which he is instructed. A I R 1927 Mad 852 = 26 L W 465 = 39 M L T 240 = 50 M 786 = 53 M L J 606 = 105 I C 5.

—Admission of fact by pleader for purpose of dispensing with further proof, estopes the party from disputing the correctness thereof. 9 S L R 220 = 34 I C 494.

(7-8) Consequence of non-appearance in person of a party as witness of his opponent.

—Failure of defendant to appear in person as plaintiff's witness does not justify the striking off of defence. A L R 1933 M 1116.

—And the failure of plaintiff to appear in person as defendant's witness does not justify the dismissal of the suit itself. 4 Pat. L J 152 = 50 I C 323.

(9) Signing and Verification.

—Permission to sign subsequently granted will not invalidate the plaint: 48 M L J 721 = A I R 1925 M 660.

—As to whether general power to enter appearance in suits includes power to sign plaint see. 25 I C 136.

—Vakalats, affidavits and pleadings must be signed in the same way. A I R 1928 Mad 175 = 51 M 242 = 27 L W 237 = (1927) M W N 885 = 54 M L J 65 = 107 I C 804. Plaint signed by an authorized agent is valid in law. 31 I C 859.

—Plaint filed by duly authorised agent with knowledge of plaintiff is valid, defects in filing and signing plaint are immaterial. A I R 1927 All 514 = 101 I C 698.

—Ratification after filing appeal is sufficient to show authority to file. A I R 1926 Lah 223 = 27 P L R 18 = 92 I C 966.

(10) Vakalatnamah

—Vakalatnamah signed by a party from gumasta, can be accepted and acted on by pleader. A. I. R. 1929 Cal. 11 = 48 C. L. J. 351 = I. R. (1929) Cal. 220 = 114 I C 156.

—Omission of Vakil's name by inadvertence does not render a vakalatnamah invalid if it is otherwise properly executed by the party and accepted by the Vakil. 12 P L T 558 = Ind Rul (1931) Pat 331 = 133 I C 171 see also 1930 A L J 394 = 121 I C 546 = A I R 1930 A 112.

—For a vakalatnamah is not rendered invalid by absence of names and other particulars describing the parties. A I R 1927 Lah 522 = 102 I C 476.

C. P. C. (1908) Or. 3, r. 1 (Concl'd)

(10) Vakalatnamah—(Concl'd)

—But a vakalatnamah, even if signed by pleader is rendered invalid by absence of name of pleader in body thereof. A I R 1927 All 816 = 102 I C 255, but the Nagpur J C Court has taken a contrary view: A I R 1923 Nag 281 = 6 N L J 179 = 73 I C 251.

### ORDER III, RULE II

—Detailed provisions as to Mukhtars under the corresponding section (37) of the old Code have been rendered unnecessary owing to the omission of the word "general" before "power of attorney" and the omission of the words "from parties not resident within the local limits of the jurisdiction of the Court with which appearance, application, or act is made or done", the result of which is to render the rule more comprehensive to the extent that simple power of attorney is now sufficient to authorise a person to act, apply, or appear. As to the amendment by Bombay High Court, however, see under heading (4) infra. Decisions in 14 M L J 223; and 28 A 135 and 6 B 100; and 26 A 19; 23 A 499 and 12 B 68 relating to the meaning of the term non-resident have been rendered obsolete by the omission above referred to.

### Synopsis

- (1) Scope of the rule.
- (2) Cl (a) as amended by Bombay High Court Rules.
- (3) Objection to agent acting.
- (4) Persons carrying on trade or business in the name of parties.
- (5) Recognized agent.
- (6) Vakalatnamah

(1) Scope of the rule.

—R. 2 does not deal with liability of principal to be bound by notice on agent, whether the principal is or is not resident within jurisdiction. It applies only to appearances, applications and acts; A I R 1931 Pat 282 = 10 Pat 441 = Ind Rul (1931) Pat 391 = 133 I C 679.

—But difference between general power and special power of attorney is immaterial under the new C P Code, O. 3, R. 2. The nature of a document must be determined by contents and not by stamp duty. 38 Mad 134 = 24 M L J 180 = (1913) M W N 72 = 13 M L T 114 = 18 I C 135.

—Power to defend suit—Includes authority to appoint pleader: A I R 1931 A 320 = 1931 A L J 904.

—Power of Attorney registered is admissible to prove power to act. 18 O C 377.

—Where there is a valid authority, mere formal defects will not invalidate the acts of

## C. P. C. ( 1908 ) Or. 3, r. 2 (Contd)

## ( 1 ) Scope of the rule—(Contd)

the agent : 133 I C 171 = 12 Pat L T 558 = A I R 1932 Pat 3; see also 55 I C 990; e. g. mere defect in signature : A I R 1927 A 514 = 101 I C 698 or description of the agent : A I R 1929 Lah 759; see also A I R 1923 N 281 = 6 N L R 179 = 73 I C 251; and 5 I C 532 = 37 Cal 399 = 11 Cal L J 285. But see 23 I C 464 = 36 A 46 = 11 A L J (1015).

—Authority may be given even subsequently : 48 M L J 721 = A I R 1925 M 660; see also 51 P W R 1913 = 18 I C 526 = 86 P L R 1913 = 1912 P R 118; and 27 P L R 18 = 92 I C 966 = A I R 1923 A 223.

—But where a vakaltnamah was signed subsequent to the presentation of the appeal it was held invalid : 1331 A L J 777 = 134 I C 26 = A I R 1931 A 507.

—A recognised agent may file an affidavit document or sign an amended plaint : 7 Bur L T 199 = 254 C 136; but has no right of audience and cannot plead or examine witnesses : 19 C W N 64 = 28 I C 838.

—Special power of attorney with a view to evade the law relating to Advocates and pleaders, see. 25 I C 163.

## ( 2 ) Cl. (a) as amended by Bombay High Court Rules.

—The Bombay High Court has amended the present rule and requires general power of attorney, but it has been held that the irregularity can be cured under 33-99 C P C : 24 Bom L R 1302 = 76 I C 34 = 47 B 227; and see 72 I C 1003.

—As to construct of general and special powers under Bombay High Court Rules R. 3 see O. 3 R. 2-General and special power 18 Bom L R 821 = 41 Bom 40.

—Plaint signed by person authorized to sign and verify plaint on plaintiff's behalf otherwise than by a general power of attorney is not properly signed. 34 Bom L R 628 (630) = 138 I C 797 = I R 1932 B 428 = A I R 1932 B 367 = A L R 1932 B 457.

## ( 3 ) Objection to acting.

—The trial Court should decide the question as to authority. 39 I C 462 = 39 A 343 = 15 A L J 309.

—And it should not dismiss the suit for defect in authority but afford opportunity to the defaulting party to remedy it : 15 A L J 309 = 39 I C 462 = 39 A 343; see 68 I C 217 = 23 Bom L R 911 = A I R 1922 B 113 = 46 B 150; and 34 Bom L R 628 = A I R 1932 B 367.

—An objection to the validity of power of attorney must be taken very early at the trial court and if not taken must be deemed to have been waived. 69 I C 365 = A I R 1924 L 296.

## C. P. C. (1908) Or. 3 r. 2 (Contd)

## ( 3 ) Objection to acting—(Contd)

—But a defect in the authority is only an irregularity under s. 99 not affording a right to appeal : 24 Bom L R 1302 = 76 I C 34 = A I R 1923 B 44 = 47 B 227; and see 4 L B R 284.

—One can show that a plaint signed by authorised agent is not valid by reason of the suit not having been instituted with the approval of the plaintiff. 31 I C 859.

—Where the manager of a firm files Vakalat as its agent, it should be clearly described as such. A I R 1926 S 57 = 89 I C 401.

## ( 4 ) Persons carrying on trade or business in the name of a party.

Residence within and without jurisdiction is immaterial for purposes of service of summons as recognised agent : 13 P L T 89 = A I R 1931 Pat 282 = 10 Pat 441.

—Person looking after zamindari property of judgment debtor is not a recognised agent for deposit under O 21 R 89 : A I R 1931 A 449.

—Service on the munim of party resident within jurisdiction is not sufficient : 1918 P W R 105 = 45 I C 932.

## ( 5 ) Recognised agent.

A person looking after the zamindari property of the judgment-debtor from time to time is not a recognised agent. 9 A L J 12, relied on. A I R 1931 All 449 (2) = (1931) A L J 404 = Ind Rul ( 1931 ) All 552 = 132 I C 808.

## ( 6 ) Vakalatnamah.

—Vakalatnama duly executed and accepted by the pleader is not invalid because the name of plader is not mentioned in margin or front.

A I R 1932 P 3 = A L R 1932 P 694.

## ORDER III. RULE III

—This rule does not bar service of notice on the parties themselves. W R 1864, Mis. 21. nor does it require the principal of the recognised agent to be residing outside jurisdiction so as to come under the operation of the rule : 13 P L T 89 = A I R 1931 Pat 282 = 133 I C 679 = 10 Pat. 441.

## ORDER III. RULE IV

## Synopsis.

- ( 1 ) Legislative changes.
- ( 1a ) Scope of the rule.
  - ( a ) General.
  - ( b ) Acceptance.
  - ( c ) Appointment.

## C. P. C. (1908) Or. 3, r. 4 (Contd.).

- (2) Appeal.
- (3) Appearance.
- (4) Delegation of authority by pleader.
- (5) High Court Rules.
- (7) Objection to validity of power.
- (8) Pleader appointed to act in Court.
- (9) Pleader engaged to plead by a pleader duly appointed to act in Court.
- (10) Until all proceedings in the suit are ended.
- (11) Until determined with the leave of Court by client or pleader.
- (12) Until the client or pleader dies.
- (13) Vakalatnamah.

## (1) Legislative Changes.

—O. 3, r. 4 as enacted by the C P Code 1908 after certain alterations in the corresponding s. 39 of the Code of 1908 ran as follows:—

—“(1) The appointment of a pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognised agent or by some other person duly authorised by power-of-attorney to act in this behalf.

—“(2) Every such appointment, when accepted by a pleader, shall be filed in Court, and shall be considered to be in force until determined with the leave of the Court, by a writing signed by the client or the pleader, as the case may be and filed in Court, or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client.

—“(3) No advocate of any High Court established under the Indian High Courts Act, 1861 or of any Chief Court and no advocate of any other High Court who is a barrister shall be required to present any document empowering him to act.”

—O. 3, r. 4 of C P C 1908, as stated above has been amended by the Amendment Act 22 of 1926 by which the present O. 3, r. 4 has been substituted for the old O. 3, r. 3 sub-rules (1) and (2) of the new rule correspond with sub-rules (1) and (2) of the old rule and sub-rules (3), (4), (5) and the proviso have been newly added. Under the present rule three different categories of pleaders have been distinguished (1) a pleader appointed to act in Court—see sub-rule (1) which requires the appointment to be in writing—see also sub-rules (2) and (3) for other requirements in this connection; (2) a pleader engaged for the purposes of pleadings only, and sub-rule (5) lays down that such pleader will not have to file a document of the type mentioned in sub-rule (1), but that only a memorandum with necessary particulars will suffice; and (3) It may also be noted that the present rule 4 as amended gives a statutory recognition to the old practice of one pleader appearing for

## C. P. C. (1908) Or. 3, r. 4 (Contd.)

## (1) Legislative Changes—(Contd.)

another pleader at the former's request, without any fresh writing. It has been held in 118 I C 58=A I R 1929 N 109 that the present rule has not extended the power of a second grade pleader who cannot act and plead in the High Court and therefore his appointment under sub rule (5) will not enable him to engage another pleader to file an appeal in the High Court.

## (1-a) Scope of the rule.

—(a) General—Order III, r. 4 (2) does not authorise second grade pleader to give power to another to file appeal in High Court where he himself cannot appear. A I R 1929 Nag 109 = Ind Rul (1929) Nag 250 = 12 N L J 54 = 118 I C 58. nor does it authorise Pleader to plead where under rules he is not allowed to do. A I R 1925 Mad 1201 = 48 M 676 = 49 M L J 366 = 22 L W 606 = 92 I C 300.

—O. III, r. 4 as amended applies to power granted before but filed after it was amended. A I R 1930 Lah 68=Ind Rul (1929) L 456 = 116 I C 184.

—Defect of *mukhtear* not holding general power as required by Bombay High Court rules is irregularity and can be cured. A I R 1923 Bom 44 = 24 Bom L R 1302 = 47 B 227 = 76 I C 34.

—Authorising to file application includes authority to engage Pleader and sign power —Rules are strict to prevent fraud but where no fraud committed for want of formalities. A I R 1924 Pat 114=2 P L R Civ 174 = 74 I C 1033.

—There is no conflict between O. III, r. 4 and r. 23 of Madras High Court Rules. A I R 1928 Mad 472 = 109 I C 206.

—(b) Acceptance:—In the old rule sub-rule (2) there were words “Every such appointment when accepted by a pleader and it was held that such acceptance of power must be endorsed. A I R 1923 Lah 402 = 84 I C 518.

—(c) Appointment—The appointment must be in writing and that writing must be executed by the party or by a person acting on his behalf as his recognized agent. 16 All 240.

—But the power of an advocate practising in High Court may be verbal and need not be in writing. A I R 1926 Pat 73 = 4 P 766 = 7 P L T 362 = 92 I C 179.

—Power of Advocate of Patna High Court need not be in writing. A I R 1925 Pat 614 = 6 P L T 380 = 1925 Pat 233 = 88 I C 91.

—And that the power must be signed by all unless one is proved to be authorised to sign on their behalf. A I R 1927 Lah 382=100 I C 838.

C P. C. (1908) Or. 3, r. 4 (Contd)

(1-a) Scope of the rule—(Concld)

—Power of manager must state clearly that he is agent of the firm. A I R 1926 Sind 51 = 89 I C 401.

—But an omission to sign power by guardian is mere irregularity and can be cured. A I R 1926 Nag 40 = 88 I C 235.

—And a power given by one judgment debtor in appeal is valid provided other one is made respondent. A I R 1930 Lah 101 = Ind Rul (1930) Lah 526 = 124 I C 318.

—Power given but not filed with appeal does not invalidate presentation. A I R 1925 Lah 331 = 7 Lah I J 29 = 86 I C 207.

—A letter is sufficient authority, if sufficiently stamped I Calc W N ceviii; but not a telegram authorising filing of an appeal A I R 1927 Lah 398 = 101 I C 613.

#### (2) Appeal.

—'Appeal' includes second appeal also A I R 1928 Lah 733 = 108 I C 513.

#### (3) Appearance.

—Suit cannot be dismissed against all plaintiffs for default of appearance of one order to attend I R 2 A Rev. 233; see also cases under the same heading in O. 3, r. 1.

#### (4) Delegation of authority by pleader.

—It was held under the old rule that a pleader cannot delegate his authority to another unless exempted under cl. (3) of old O. III, r. 4. or unless he holds power of attorney, from his client expressly authorizing him to do. 12 N L R 189 = 37 I C 103.

—And that a pleader cannot withdraw from a case or delegate his power to another Pleader without notice to client and consent of Court. A I R 1922 Cal 515 = 24 Cr. L J 33 = 35 C L J 356 = 26 C W N 589 = 49 C 732 = 71 I C 81.

—And where a pleader who merely appeared on behalf of another pleader who was duly empowered, joined in referring a pending suit to arbitration, it was held that in making the reference he has not merely pleaded, but also "acted" and that in the absence of specific authorization he had no authority to join in the reference. 33 P L R 388 = 138 I C 712.

#### (5-6) High Court Rules.

—Rule 4, O. 3 is not absolute but is subject to High Court rules regulating procedure 59 C 370 (375) = 35 C W N 1100 = 135 I C 789 = A I R 1932 C 1; and as such according to Bombay High Court rules person holding general power can act for non-resident parties. A I R 1923 Bom 41 = 72 I C 100.

C P. C. (1908) Or. 3, r. 4 (Contd).

(5-6) High Court Rules—(Concld)

—The Madras High Court proviso to the present rule does not conflict with anything contained in the Code : 109 I C 206 = A I R 1928 M 472.

But rule 29 of the Calcutta High Court Appellate side Rules conflicts with cl. (5) of O. 3, r. 4 C P C and it has been held that the former should prevail : 35 C W N 1100; see also 135 I C 789 = A I R 1932 C 1.

—An Advocate of the High Court under r. 29, Cal. High App. side Rules cannot plead in the High Court by merely putting in a memorandum of appearance unless there has been an appearance by the party in person or by a Pleader appointed to act for him. In the latter case, if the Pleader appointed to act for a party has engaged the Pleader merely to plead for the said party, then this memorandum of appearance need not be filed. 35 C W N 1100.

#### (7) Objection to Validity of power.

—Objection of validity of power can be raised for the first time in appeal. A I R 1924 Lah 296 = 69 I C 365; but see cases under O. 3, r. 1.

#### (8) Pleader appointed to act in Court.

—Authority to act in particular case is special power of attorney. A I R 1930 Bom 511 = Ind Rul (1931) Bom 65 = 32 Bom I R 1178 = 128 I C 609.

—Reference of pending suit to arbitration by a pleader is acting and not pleading. 136 I C 712 = 33 P L R 388 = I R 1932 L 248 = A I R 1932 L 373 = A L R 1932 L 302 (Civ) = 1932 P C L 302 (Civ).

—Pleader can refer on strength of *rakalat-namah* alone—Though such authority was necessary under the old Code. A I R 1930 Sind 190 = Ind Rul (1930) Sind 118 = 123 I C 694.

#### (9) Pleader engaged to plead by a pleader duly appointed to act.

—Pleader appointed by a party's pleader can only plead and cannot act for the party and cannot therefore refer a pending suit to arbitration without authority from party. A I R 1932 L 302; see to the same effect 96 I C 277 = A I R 1926 L 563.

#### (10) Until all proceedings in the Suit are ended.

—Appointment of Pleader continues till the end of the case if sufficient grounds for Court's sanction to terminating power are not shown. A I R 1930 Pat 408 = Ind Rul (1931) Pat 46 = 9 Pat 865 = 11 P L T 371 = 128 I C 350; and such power remains in force in all stages



C. P. C. (1908) Or. 3 r. 4 *Contd.*

(10) Until all proceedings in the suit are ended—(Concl'd)

of the suit. A I R 1930 Cal 721=Ind Rul (1931) Cal 209=34 C W N 914=52 C L J 87=(1930) Cr Cas 1129=32 Cr L J 377=58 C 374=129 I C 561.

—Mere dismissal of suit or passing of an *ex parte* decree does not terminate Counsel's power—He can apply for restoration of suit without fresh power. A I R 1929 Lah 96=Ind Rul (1929) Lah 236=10 L 570=30 P L R 628=114 I C 76.

—Return of plaint does not terminate pleader's authority to represent client. A I R 1922 Nag 125=5 N L J 265=67 I C 296.

—So also a fresh authority is not required for a Pleader to appear, act and plead in the execution proceedings if he was so authorized by a *rakalatnama* in the suit itself. A I R 1925 Pat 692=(1925) P 234=7 P L T 220=91 I C 211, and also for representation of plaint fresh power is not necessary, in any case time for producing one can be granted A I R 1922 Nag. 125 = 5 N L J 265 = 67 I C 296.

—But filing memo of appeal or cross-objection is acting and power of attorney is necessary. A I R 1926 Rang. 215 = 4 R 249=5 Bur L J 221 = 98 I C 15; but if he is appointed to prosecute all litigation of suit, no fresh power is required for appeal. A I R 1926 Lah 32 = 6 Lah 461 = 26 P L R 721 = 91 I C 30.

—Appointment of pleader continues for appellate purposes also. A I R 1933 L 526; so an advocate appointed in a case can present appeal also. A I R 1930 Lah 68 = Ind. Rul. (1929) Lah 456 = 116 I C 184.

—And a deft's attorney can appeal against order refusing to set aside *ex parte* decree. A I R 1927 Lah 134=99 I C 690.

—But a pleader engaged by agents for a suit has no power to conduct appeal. A I R 1928 Lah 733 = 108 I C 513.

—So also where a power of attorney contains clause requiring fresh power to act in appellate Court presentation by pleader without fresh power is not in accordance with law. A I R 1933 N.87.

—Prosecution of the conduct of the suit includes all proceedings till its final decision in the Court concerned—Authority of Counsel depends upon terms of powers-of-attorney—In absence of such authority general practice is good indication of implied authority. A I R 1929 Lah 96 = Ind Rul (1929) Lah 236=10 L 570=30 P L R 628=114 I C 76.

(11) Until determined with the leave of Court by client or pleader.

—Pleader's authority can be terminated only with the leave of Court and by a writing signed by client or pleader and filed in Court.

अप्री ३१, ३१, ३१, (१) १२६

C. P. C. (1908) Or. 3 r. 4 *(Contd.)*

(11) Until determined with the leave of Court by client or pleader—(Concl'd)

2 Pat L J 259=1 Pat L W 483=(1917) Pat 217=41 I C 329=18 Cr L J 808.

—Termination of power without leave of Court cannot be recognized. A I R 1930 Lah 134.

—But Court's consent for withdrawal need not be formal, it can be presumed from circumstances. A I R 1925 Mad 21 (F B)=(1924) M W N 689=35 M L T 48 = 20 M L W 427=47 M L J 398=47 M 819=82 I C 102.

—There is no specified form for written withdrawal by pleader. A I R 1925 Mad 21 (F B)=(1924) M W N 689=35 M L T 48=20 L W 427=47 M L J 398=47 M 819=82 I C 102.

—Reporting absence of instruction after appearing at several hearings does not amount to withdrawal from the case. A I R 1925 Mad 316=82 I C 1028.

—Guardian for the suit—Appointment of Vakil—Minor attaining majority—Vakil's authority when ceases. see 42 I C 421.

(12) Until the client or pleader dies

—A power of attorney in favour of Counsel ceases on the death of the party. The Counsel cannot act for widow of deceased without fresh power. Ind Rul (1931) Lah 845=32 P L R 389=133 I C 877.

(13) Vakalatnamah.

—*Vakalatnama* must bear parties or authorised agent's signature. A I R 1921 Nag 27=4 N L J 22=62 I C 259.

—If name of second pleader appears in the body, *Vakalatnama* can be signed by him even after it is filed. A I R 1922 Pat 504=3 P L T 447=68 I C 659.

—Acceptance of *vakalatnama* need not be in writing, his conducting the case shows acceptance. A I R 1926 Lah 32=6 Lah 461=26 P L R 721=91 I C 30; and see 43 C 884; and 20 C W N 283.

—Intention and not form of execution of *vakalatnama* is essential. A I R 1924 Nag 159=78 I C 79.

—No fresh *vakalatnamah* is necessary to appear in any proceedings subsequent to decree, even in such as an appeal to the Privy Council—8 W R 92 or in an application for a new trial—12 W R 465 or for execution of decree, or to answer a claim put forward under s. 246 of Act VIII of 1859—5 Bom H C 83; 20 Bom. 198, or to appear in a remanded case, 4 Mad. H C xliii., or in case of the death of a Collector, who had given a *vakalatnamah* to a pleader to appear in a suit on behalf of the Court of Wards—5 Mad 135; or for repre-

C. P. C. (1908) Or. 3, r. 4 (Concl'd)

(13) Vakalatnamah—(Concl'd)

sentation of plaint. A I R 1923 Nag 182=6 N L J 100=19 N L R 36=71 I C 436.

—But vakalatnamah embodied in general terms does not include power to refer a suit to arbitration. A I R 1924 Nag 338=79 I C 48.

—Vakalatnamah authorizing second grade Pleader to appoint other Pleader does not empower him to appoint other Pleader for filing appeal after suit ends. A I R 1929 Nag 109=Ind Rul (1929) Nag 250=12 N L J 54=118 I C 58.

—Vakalatnamah without pleader's name in the body is not invalid if duly accepted. A I R 1923 Nag 182=19 N L R 36=6 N L J 100=71 I C 436. See also A I R 1921 All 210=43 A 392=19 A L J 183=61 I C 410; and 55 I C 415; and 41 I C 685; and 11 C L J 285=37 C 399. But see contra 12 N L R 189=37 I C 103 and 36 A 46. See also A I R 1927 A 816

—And the cases reviewed there. Recently the Allahbad High Court has held that absence of pleader's name in the body of vakalatnamah invalidates the appointment despite endorsement on the back and neither oral evidence nor pleader's acceptance would cure the defect. 29 A L J 983=132 I C 566=A I R 1931 A 767.

—The Patna High Court, on the other hand, has held that absence of pleader's name from the body of the vakalatnamah would at the most be clerical mistake curable under S. 151 C P C : 12 P L T 558=133 I C 171.

#### ORDER III, RULE V.

##### Local Amendments.

—(1) Madras :—The Madras High Court has added an Explanation to the present rule as follows :—"Service on a pleader who does not act for his client, shall not raise the presumption under this rule."

—(2) Nagpur :—The words "on the pleader of any party" have been omitted and the words "on a pleader who has been appointed to act for any party" inserted instead.

—(3) Oudh :—The same as Nagpur.

—(4) Patna :—As follows "Notwithstanding anything contained in O. 3, sub-rules (2) and (3) of rule 4 of sch. I C P C 1908 no pleader shall act for any person in the High Court unless he has been appointed for the purpose in the manner prescribed by sub-rule (1) and the appointment has been filed in the High Court.

##### (2) Service of Process.

—O. 3, R. 5 applies only when the Court orders a particular process to be served on the

C. P. C. (1908) Or. 3, r. 5 (Concl'd)

(2) Service of Process—(Concl'd)

pleader 63 I C 47 Pat. Under O. 3, r. 5 notice to duly appointed Pleader is good notice against his client. A I R 1928 Lah 426=108 I C 62.

—For the pleader is bound to protect client's interest in all proceedings unless power is duly cancelled. A I R 1922 Oudh 75=25 O C 40=9 O L J 170=67 I C 554.

—Or unless the proceeding is at an end and the pleader is no more "acting" for the party : 63 I C 47 Pat; but mere endorsement by pleader that he is not appearing for the party will not oust the provision of the rule; the engagement should have been legally determined : 101 I C 205=A I R 1927 L 428; see also 1920 P L R 97=52 P W R 1920=58 I C 143.

—Communication of order of filing award to pleader is sufficient compliance with para. 10 and Sch. II. A I R 1927 Cal. 619=45 C L J 458=103 I C 625.

—Want of formality of service cannot be pleaded when knowledge of matter is given—Signing of ordersheet by Pleader is sufficient to imply notice. A I R 1927 Pat 135=(1926) Pat 161=7 P L T 739=95 I C 321

#### ORDER III, RULE VI

##### Local Amendment.

—Sind :—Add the following as sub-rule (3) to Or. 3, r. 6 :—" (3) The Court may at any stage of a suit and whether upon application made to it, or of its own motion, direct any party to the suit, not having a recognised agent within the jurisdiction of the Court, to appoint within a time to be specified, an agent within the jurisdiction of the Court to accept service of process on his behalf. To every appointment made under this sub rule the provisions of sub-Rule (2) shall be applicable."

#### ORDER IV.

##### Institution of Suits.

##### (1) Local Amendments.

—(1) Allahabad :—For Rule 1 (1) substitute the following—" (1) Every suit shall be instituted by presenting to the Court or such officer as it appoints on this behalf, a plaint, together with a true copy for service with the summons upon each defendant, unless the Court for good cause shown allows time for filing such copies.

C. P. C. (1908) Or. 4, r. 1 ( *Concl'd* ).

( 1 ) Local Amendments—( *Concl'd* )

—( 2 ) The Court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed and in the case of all other proceedings when the process is applied for."

—Re-number the present sub-Rule ( 2 ) as sub-Rule. ( 3 )

—( 2 ) *Oudh*:—To sub-Rule ( 2 ), add the following words:—"and except with the permission of the presiding officer, for reasons to be recorded, no plaint shall be admitted until the necessary process-fee has been paid into Court."

—( 3 ) *Nagpur*:—Substitute the following for sub-Rule (1)—"1 ( 1 ) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf a plaint together with as many true copies on plain paper of the plaint as there are defendants for service with the summons upon each defendant, unless the Court, for good cause shown, allows time for filing such copies."

—Add the following sub-Rule ( 2 ) and re-number the present sub-Rule ( 2 ) as sub-Rule ( 3 ) :—"( 2 ) The Court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed and in the case of all other proceedings when the process is applied for."

## ( 2 ) Sub-Rule. ( 1 )

—*General*:—The sub-Rule does not define "plaint;" but a plaint which is substantially in accordance with O. VI and O. VII, is valid even with certain defendants A I R 1921 Sind 166 = 17 S L R 223 = 85 I C 893.

—Where plaint is signed by plff's servant who was not his recognised agent the plff. should be given opportunity to sign personally. 23 Bom L R 911 = 68 I C 217.

—Where plaintiff had attained majority but plaint was signed and verified by next friend, plaint was not validly presented. A I R 1924 All 54 = 45 A 701 = 21 A L J 628 = L R 4 A 342 Civ. = 77 I C 30.

—But this has been overruled in 1931 A L J 777 = 134 I C 26 = A I R 1931 A 507 S B in which it is held that where a plaintiff had attained majority but the plaint was presented by his next friend, the presentation is good if there was a bona fide mistake. Presentation of plaint is the starting point of a case. A I R 1929 Mad 480 = 113 I C 550.

—For the filing of a plaint though imperfect is the day of institution of suit. A I R 1921 Sind 166 = 17 S L R 223 = 85 I C 893.

—In Bombay, a plaint not signed by party or person holding general power not properly presented. A I R 1932 B 367 = 34 Bom L R 628.

C P C (1908) Or. 4, r. 1 ( *Concl'd* )

( 2 ) Sub-Rule ( 1 )—( *Concl'd* )

—But in Allahbad oral authority is sufficient. A I R 1931 A 507 = 1931 A L J 777 = 134 I C 26 S B.

—As to the effect of mere registration of a plaint subject to objections. see 5 I C 330 (All).

—*Time of Presentation*:—Plaint accepted out of office hours is presentation on that date. A I R 1924 Mad 448 = 47 M 312 = 46 M L J 78 = 19 L W 468 = 33 M L T 278 = (1924) M W N 162 = 79 I C 1017. see also 23 I C 360; and A I R 1922 N 167.

—But note that the word accepted implies discretion and the discretion of the Judge of a civil court in declining to accept a plaint presented out of office hours at his club cannot be interfered with in revision by the High Court : A I R 1925 Mad 201 = 20 L W 655 = 35 M L T 116 = 82 I C 928.

—When two suits are filed on the same day, it must be presumed, until the contrary is proved, that they were presented and admitted in the order in which their numbers appear in the Register of Civil Suits. 16 All 165. but see 51 M L J 351 = 97 I C 443 = A I R 1926 M 934 = 49 M 869.

—*Place of Presentation*:—Where a plaint is presented to a Court having no jurisdiction, and is returned for presentation to the proper Court the date of institution is the date of presentation to such proper Court : 63 I C 924 = A I R 1921 M 651 = 44 M 817.

—As a rule the plaint must be presented to the Court of lowest grade competent to try the case : 113 I C 550 = A I R 1929 M 480.

—Or to the officer appointed by such Court e. g. a head ministerial officer : 40 M L J 229 P C ( on appeal from 6 L W 16 ).

—But not to persons not so authorised to receive plaints e. g. head-clerk : 29 I C 449 = 38 M 295 F B; or a clerk : 141 C 221 ( *Oudh* ); or a Munsarim : 5 I C 330 (All).

## ORDER IV. RULE II

### Local Amendment.

—*Madras*:—Sub-Rule ( 2 ) added under Dis no. 908 of 1912 has been deleted by G. O. No. 2606, Law ( General ) dated 6th August 1928.

## ORDER V.

### Issue and Service of Summons

#### Issue of Summons.

#### ( 1 ) Local Amendments

—*Oudh*:—Add a new sub-Rule (1-A) after sub-Rule ( 1 ) as follows:—" ( 1-A ) A party

**C. P. C. (1908) Or. 5, r. 1 (Concl'd).****(1) Local Amendment—(Cont'd)**

shall file with his application for the issue of a summons to the deft. or opposite party a printed summons in duplicate, on part being in the Urdu and the other in the Nagri character, duly filled up, except in respect of the date of appearance and of the summons, in a bold, clear and easily legible handwriting provided that (a) if the party to be served is a European British subject the party applying for the summons shall file a special form which shall be filled up in English; and (b) the presiding officer may in his discretion direct that such forms in general or that any particular such form be filled up entirely in the office of the Court."

**(2) Appearance.**

—This refers to appearance under O 9 r 6.  
7 All 538.

—Appearance by pleader, who was instructed only to apply for an adjournment and not duly instructed and able to answer all material questions is not an appearance under O 5 R 1. 24 M L J 235 = (1913) M W N 165 = 13 M L T 140 = 18 I C 360.

—Presence of a Pleader, who is instructed only to apply for an adjournment, is not "appearance" A I R 1927 Rang 46 = 4 R 408 = 99 I C 717.

—Though sub-cl. (2) in terms refers only to defendant it equally applies to plaintiff. Appearance by Pleader having no instructions is no appearance. A I R 1924 Mad 842 = 17 M L J 514 = 20 L W 795 = (1924) M W N 835 = 82 I C 107.

—Where no date is fixed for the appearance of the defendant within the meaning of O V r 1 the Court has no power to dismiss the suit in default under O IX r 3. A I R 1921 Lah 320 = 27 P L R 1921 = 60 I C 475.

—An appearance by the defendant in an interlocutory application before the registration of a suit itself is no appearance within the meaning of the proviso. 35 A 163.

**(4) Summons.**

—Burden of Proof:—It is for the plff to prove that summons had been served on the deft: A I R 1925 Cal 801 = 52 C 453 = 88 I C 929.

—Fraud in suppressing service alleged against party—It is necessary to prove that non-service was due to some active part taken by that party in not having summons served and keeping opposite party from knowledge of suit. A I R 1922 Pat 291 = J P L T 451 = 66 I C 137.

**C. P. C. (1908) Or. 5, r. 1 (Concl'd)****(4) Summons—(Concl'd)**

—Service of Summons:—Where summons was not served personally on a defendant and the peon who was charged with the service of it on his return, gave it as his opinion based merely on inference, that the defendant was evading service or was away at some other place and the affidavit filed by him did not show what action he took in the way of serving the summons, held that the service was not sufficient. 11 A L J 540 = 20 I C 318.

—Summons should be taken out at the place where the deft. ordinarily or voluntarily resides or carries on business or works for gain: 1914 M W N 314 = 23 I C 324; see also 29 I C 26 (Mad).

—It has been held that summons is necessary even in case of interlocutory application before the registration of the suit: 35 A 163 = 11 A L J 135 = 18 I C 711.

**C. P. C. (1908) Or. 5, r. 2****Local Amendments.**

—Allahbad:—Omit the words "or if so permitted by a concise statement."

—Oudh:—Omit the words "or, if so permitted by a concise statement."

**C. P. C. (1908) Or. 5, r. 3**

—Order by Court:—As a rule the defendant can select any of the modes of appearance prescribed in O 5 r 1, but under the present rule the Court may require the defendant, where necessary, to appear in person, and the same applies to pro forma defendant: 30 I C 351 = 18 M L T 163 = 1915 M W N 640.

—It should be noted, however, that Court has no power to order personal appearance of a party apart from cases provided for in O 5 r 3 and O 10 r 4. 28 N L R 146 = 146 I C 716 = A I R 1932 N 135 = A I R 1932 N 152.

—As to whether an order for personal appearance remains in force on adjourned date. See 39 A 476.

—Appeal:—Where no sufficient attempt is made to serve summons personally and the person served is not shown to be authorized to receive summons appeal to set aside *ex parte* decree must succeed on the ground of non-service. A I R 1922 Cal 128 = 70 I C 292.

—Non-compliance with the order:—See under O. 9, r. 12.

**C. P. C. (1908) Or. 5, r. 4****Local Amendment.**

—Allahbad.—Add the following Rule 4-A.—"Except as otherwise provided in every interlocutory proceeding and in every proceeding after decree in the trial Court, the Court

C. P. C. (1908) Or. 5, r. 4 (Concl'd)

Local Amendment—(Concl'd)

may, either on the application of any party or of its own motion, dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement."

C. P. C. (1908) Or. 5, r. 5

Local Amendment

—Calcutta :—Insert the words "for the ascertainment whether the suit will be contested" after the words "issues only."

—Madras :—Delete the first paragraph and substitute the following in lieu thereof :—  
"(5) The Court shall determine, at the time of issuing the summons, whether it shall be :—  
(1) For the settlement of issues only, or (2) for the defendant to appear and state whether he contests or does not contest the claim and directing him if he contest to receive directions as to the date on which he has to file his written statement, the date of trial and other matters, and if he does not contest for final disposal of the suit at once; or (3) for the final disposal of the suit; and the summons shall contain a direction accordingly."

Scope of the Rule.

—The rule is controlled by provisions applicable to special suits. A I R 1932 S 199; e. g. Rule of the High Court and Supreme Court Bombay. see 10 Bom. L.R. 301 = 32 B. 534.

—Where in a mortgage suit, plaintiff having died his son's name was substituted and the court issued for the first time a summons to defendant as for final disposal and after settlement of issues on the date of hearing, as the plaintiff was not ready with his witness dismissed the suit as not proved. *held*, that there was a miscarriage of justice as the scheme of the Code requires that in cases of such a nature the parties should have an opportunity to let in evidence relevant to the issues. 38 Bom 377 = 16 Bom. L. R. 39 = 24 I C. 665.

C. P. C. (1908) Or. 5, r. 6

Scope of the Rule.

—An application to set aside the *ex parte* decree must be made within 30 days from the date of decree. 8 S. L. R. 153 = 27 I. C. 351.

—As to the meaning of the expression "duly served" under art 164 of Lmt Act see 42 I.C. 611 = 11 Sind L. R. 71.

C. P. C. (1908) Or. 5, r. 9

Service of Summons.

—This rule applies to H. C. and Pro. S. C. It has been substituted by Act VII of 1888 s. 10 and corresponds with S. 72 of the Code of 1882.

—Service of Post :—The words "unless the Court otherwise directs" have been newly added to give "increased facilities for the service of process" e. g. by registered post. see 99 P R 1918 = 184 P W R 1918 = 48 I C 28 and in case of purdanashin lady. 21 C L J 653 = 19 C W N 1231 = 30 I C 64.

—And service by post being a substituted service very little evidence would be required to displace it : 23 Bom L R 908 = A I R 1922 B 377 = 64 I C 386 = 46 B 130.

—Service by registered post if brought into question, very slight evidence is necessary to displace it A I R 1928 Pat 588 = 113 I C 698 see also 7 C L J 251.

—Presumption that notice sent by post was duly served is not a conclusive presumption of law : 19 C W N 489 = 20 C L J 455 = 26 I C 962.

—A summons sent by registered post and returned endorsed "refused" can be treated by the Court as sufficient service : 13 Bom L R 323 = 11 I C 35 = 35 B 213; see also 16 Bom L R 204 = 24 I C 437; and 121 I C 382 = 31 P L R 26 = A I R 1931 L 439; and 17 C W N 1073 = 20 I C 363.

—Residence :—For the purpose of service of summons, residence is not identical with ownership, that is, a permanent absentee cannot be described as resident in a place merely by virtue of ownership. Residence denotes the place where an individual eats, drinks and sleeps. Substituted service can be justified under O. 5, r. 17 of Code. only when it is shown that proper efforts were made to find the defendant. In this respect the new Code has altered the law. The mere presentation of an appeal does not put it beyond the power of the original Court to deal in any manner with the judgment under appeal. But the position is different after the adjudication of the appeal, when the original judgment has been superseded by the judgment of the Court of Appeal. 9 Ind Cas 189 = 15 C W N 399.

—Irregularity :—Mere irregularity in the manner of service does not justify setting aside of the decree : 46 I C 277.

—Service of summons effected outside jurisdiction of the Court and without any order of the Court having jurisdiction is irregular A I R 1925 Rang 325 = 3 R 239 = 89 I C 870.



## C. P. C. (1908) Or. 5, r. 10

## Local Amendments.

—Lahore:—The following proviso should be added:—"Provided that in any case if the plaintiff so wishes, the Court may serve the summons in the first instance by registered post (acknowledgement due) instead of in the mode of service laid down in this rule."

—Patna:—Add the following to the rule 10:—(1) Provided that in any case the Court may, of its motion, or on the application of the plaintiff, send the summons to the defendant by post in addition to the mode of service laid down in this rule. An acknowledgement purporting to be signed by the defendant or an endorsement by postal servant that the defendant refused to take the delivery may be deemed by the Court issuing the summons to be prima-facie proof of service."

## (2) Mode of Service.

—General:—It is the duty of the Court to see that summons are properly served. 20 C W N 511.

—Whenever practicable the service of summons ought to be made by delivering or tendering a copy of it to the defendant in person and it is only when reasonable grounds exist for believing that the defendant is keeping out of the way to avoid service or that for other reasons it cannot be served in the ordinary way that substituted service should be ordered. Temporary absence by itself will not justify resort to such service. 29 M 324. (21 M 419 F 21 M 325 D.) see also 40 C L J 154 = 82 I C 703 = A I R 1924 C 1004; and 88 I C 508 = A I R 1925 C 627 = 52 C 179; and 43 I C 623; see also A I R 1932 Pat 150 = 12 Pat L T 911 = 135 I C 110.

—Service of Summons when complete—Tender to witness. see 28 M L J 405 = 29 I C 109.

—Where a summons delivered to debt is not received by him and acknowledgement not signed by him and summons not affixed to his house, the service is not proper: 99 P R 1918 = 184 P W R 1918 = 48 I C 28.

—O 5 R 10 of the C P Code lays down the main rule that service shall be made by delivering or tendering copy of the summons signed and sealed as prescribed. Whenever such delivery or tender has been made to the debt, personally, the service is complete, and no subsequent irregularity by the process server or other ministerial officer of Court such as the omission of the process server to obtain the signature of the debt can undo it. Such a case is particularly of a kind to which the maxim *quod fi ri non debet factum valet* seems applicable. But where the service is not personal there is necessity for a strict compliance with the rules of procedure laid down in the

## C. P. C. (1908) Or. 5, r. 10 (Concl'd)

## (2) Mode of service—(Concl'd)

C P Code 26 Cal. 131, 13 I C 669, appr: 16 Bom 117 diss. 46 I C 277.

—Service not made by Officer of Court is irregular. A I R 1925 Rang. 325 = 3 R 239 = 89 I C 870.

—Summons sent to one of defendants describing him as guardian of the others, his minor brothers—Refusal of, on ground of his not being the guardian of his brothers and on ground of there being no summons in his own name—Process-server returning all copies of summons stating that he could not serve the summons and that they were returned unserved—No service within meaning of r. 10 read with r. 2 of O. 5 in case of. 135 I C 110 = 12 P L T 911 = I R 1932 P 30 = A I R 1932 P 150.

—Identifier need not be supplied by party. He may be a resident of the village knowing defendant. A I R 1923 Pat 114 = 3 P L T 498 = 65 I C 49.

—Service by Post:—In spite of service by registered post defendant not appearing—Court should not proceed *ex parte* but is bound to send summons in ordinary manner. A I R 1927 Lah 376 = 28 P L R 300 = 101 I C 615.

—So also where debt admits service by registered post—*Ex parte* proceedings should not be taken. A I R 1926 Lah 579 = 95 I C 874.

—Refusal of service by registered post prior to July, 1924, was not due service under the law then in force in Punjab. A I R 1929 Lah 235 = Ind. Rul. (1929) Lah 556 = 116 I C 620; see also cases under. O. 5, r. 9.

—Lahore Rule:—Under the Proviso added by Lahore High Court dismissal of suit under O IX, r. 2 on failure to pay postal charges when process-fee is paid is unjustified. A I R 1927 Lah 157 = 9 Lah L J 96 = 99 I C 909.

## C. P. C. (1908) Or. 5, r. 12

—Substituted service when allowed:—If A has posed as B and had dealings with plaintiff in that name, there can be no doubt that he knows that the summons is intended for him, and in those circumstances the service of a summons in the name of B, even though that is not his real name, is sufficient notice of the suit. A I R 1926 Rang. 73 = 3 R 515 = 93 I C 91.

—In an ejectment-suit against the under-riyats, a notice to quit addressed to several tenants must be served by proclamation and beat of drum as provided by Rule 3, ch. 1 of the rules made by the Bengal Government under Beng. Ten. Act and the provisions of the C P Code regarding personal service of summons do not apply: 6 C W N 67 = 28 C 590.

C. P. C. (1908) Or. 5, r. 12 (Contd)

Substituted service when allowed—(Contd)

—As to the principle underlying the present rule see 29 Mad 324 and 70 I C 292 = A I R 1922 C 128.

—As to when a declaration of service on deft is allowable see. (1914) M W N 79.

—Service on the brother of a party at a different place from the one in which the defendant lives is not valid. (1911) 1 M W N 186 = 9 M L T 258 = 9 I C 763.

—Nor is the service effected on deft's house or on the female members sufficient: 16 I C 83.

—Service on chela, if sufficient in law. See 57 I C 563.

—Where it is a question of substituted service the requirements of the Code should be strictly observed in every respect even though the deft knew of the issue of the writ. Where the serving officer went to a deft's place of business and made enquires about him and not finding him on any one of the three separate occasions when he went there pasted a copy of the writ on the outer-door of the said house which he erroneously believed to be the deft's ordinary place of residence. Held, this was not sufficient service of the summons. 43 Cal. 447 = 20 C W N 173 = 23 C L J 183 = 34 I C 799.

—But as it is not always practicable to effect personal service on a purdanashin lady, the affixing of a summons at the lady's residence may be taken to be sufficient service. 57 I C 594; see also 30 I C 64 and A I R 1922 Oudh 268.

—Though in one case, service of summons on the husband of a purdanashin lady was held not to be a proper service. A I R 1923 Pat 433 = 4 P L T 89 = 72 I C 910.

—Where guardian *ad litem* is appointed by Court notice to guardian is sufficient, Notice to minor need not be given. A I R 1926 Cal 1106 = 30 C W N 919 = 97 I C 617; but see 11 I C 317 = 35 Pun. Re. 1912 = 211 Pun. L R 1911 = 115 Pun. W R 1911.

—Where by the custom in India, a Hindu woman of rank could not be personally served with an order of revivor, the Judicial Committee allowed service to be substituted on her dewan. 2 Moo I A 263; see also 57 I C 594.

—Service on a gumasta for a party *prima facie* is not good service unless the party proves that the service so effected is a valid service under O. 5, R. 12 or 13. (1913) M W N 1028 = 14 M L T 535 = 21 I C 922.

—A service on agent is good only if he is authorised to accept it. 42 I C 235 = 33 M L J 472 = 1917 M W N 878.

—As to managers see 42 I C 235 = 33 M L J 472 = 1917 M W N 878.

C. P. C. (1908) Or. 5, r. 12 (Concl'd)

Substituted service when allowed—(Concl'd)

—Place:—If a deft. is going from place to place it is not the duty of the plaintiff to go about seeking him in all the places through which he is travelling. If however he had any other place of business or residence the plaintiff is bound to take out summons to that place. (1914) M W N 314 = 23 I C 324.

—A refusal of a Collector to serve the summons is not a sufficient reason for dismissing a suit. Where a deft. was at first residing in Br. India but at the time of the suit was residing in the Aminidivi Island. Held, that the service should be effected by affixing the summons to his last known place of residence in Br. India and by registered post. 32 I C 820.

C. P. C. (1908) Or. 5, r. 13

—O. V. r. 13 does not apply where suits are brought against persons in their individual capacity. A I R 1922 Pat 376 = (1922) Pat 76 = 3 P L T 29 = 1 Pat 48 = 62 I C 927.

—Service on cousin is not sufficient where no substantial efforts are made the service personally: A I R 1922 Cal 128 = 70 I C 292.

—Service of a notice otherwise than by personal delivery cannot be said to have been effected duly unless the Court declares under O. 5, R. 13 that the notice has been duly served though personal service has not been effected. Where a Munsiff passed orders for attachment after the return of the process server that the summons was affixed to the door, though there was no express note that the Court accepts the service as sufficient, declaration to that effect could be presumed. (1914) M W N 63 = 22 I C 302.

—As to service on an agent of a foreign company see 97 I C 286 = 43 C L J 576 = A I R 1926 C 1030; and under Income-tax Act see 10 Pat 441 = 13 P L T 89 = A I R 1931 Pat 282.

C. P. C. (1908) Or. 5, r. 15

Local Amendments.

—Allahabad:—For the words "where in any suit the defendant cannot be found read "when the defendant is absent or cannot be personally served."

—Bengal:—Cancel Rule 15 and substitute therefore the following:—

—"15. Where in any suit the defendant is absent from his residence at the time when the service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time, then unless he has an agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of

**C. P. C. (1908) Or. 5, r. 15 (Contd.)**  
**Local Amendments—(Concl'd)**

the family of the defendant who is residing with him. Provided that where such adult male member has interest in the suit and such interest is adverse to that of the defendant, a summons so served shall be deemed for the purposes of the third Column of Article 164 of schedule 1 of the Limitation Act, 1908, not to have duly served. Explanation—A servant is not a member of the family within the meaning of this rule."

—**Lahore** :—In rule 15, after the words "where in any suit the defendant cannot be found the following words were inserted:—"or is absent from his residence."

—**Madras** :—In rule 15 of Order 5, delete the words "the defendant is absent or cannot be personally served" for the words "where in any suit the defendant cannot be found."

—**Oudh** :—Order 5 Rule 15.—In Oudh for the words "where in ... .. found", substitute "where a summons has been issued to a defendant on the institution of a suit and he is absent from the address stated in the summons."

—**Rangoon** :—For the words "where in any suit of the defendant cannot be found" in the first line Rule 15, substitute the words "where the defendant is absent." Omit the word "male" between the word "adult" and the word "member" in the third line of Rule 15.

**Service to other Members.**

—The service of the summons in suits is a very important part of the procedure and the service made upon the maternal uncle of a defendant, who is himself a deft and who lived with him, is not sufficient, unless it has been proved to the complete satisfaction of the Court that it was so made because the defendant could not be found. 11 A L J 875=21 I C 614 = 35 All 556.

—The enquiry should not be confined to the son or relations of the defendant. Attempt should be made to find out the defendant by an enquiry from his neighbours or other persons. It is essential that the requirements of O. V, r. 15 should be strictly carried out. A I R 1921 Cal 638 = 35 C L J 203 = 26 C W N 359 = 68 I C 991; see also 16 O C 83 = 16 I C 600.

—But even where no attempt is made at personal service, notice on head member of joint family is proper service. A I R 1923 Cal. 682 = 37 C L J 478 = 75 I C 105.

—Service on son—Father will not be bound unless son is adult and father cannot be found. 26 C W N 359 = 35 C L J 203 = 68 I C 991.

**C. P. C. (1908) Or. 5, r. 15 (Concl'd)**  
**Service to other Members—(Concl'd)**

—As to service on brother see 9 I C 763 = 1911 M W N 186 = 9 M L T 358.

—A notice served under O. 5, R. 15, on the members of the family of a person in marine service, who was both before and after such service, in communication with the family, is good service, sufficient to authorise the court to pass an *ex parte* decree against him. An officer or mechanic in the Indian Marine Service is subject to the same rules with regard to service of summons as any ordinary person under Rules 27 and 28 of O. 5 of the C P Code. 42 Cal 67=25 I C 380

—A munim is not a member of the family of his employer within the meaning of O. 5, R. 15 of the C P Code. 105 P W R 1918=45 I C 932.

—Nor is the service on servant sufficient. A I R 1927 Lah 202=8 Lah 54=102 I C 523.

**C. P. C. (1908) Or. 5, r. 16**

—The serving officer must carry out one of the modes prescribed by the rule unless impossible : 8 A L J 715=11 I C 39=33 A 649.

—Merely shewing a summons is apparently not sufficient signature of the party served is necessary. 5 Bom. H. C., Cr. Cas., 20. See also 16 Bom 117; and 8 Bom L R 584; and 7 Bom L R 159; similarly as the Punjab view see 99 P R 1918 = 48 I C 28.

—But the Madras—39 M 561 and Patna—3 Pat 236 High Courts have held contra and so also the Nagpur J C Court : 46 I C 277 Nag.

—Where the deft did not retain the copy of summons and refused to sign it was held by the Patna High Court that the service was not sufficient unless the case fell under O. 5, r. 17. 91 I C 184=A I R 1925 Pat 441=4 Pat 135; and see 12 P L T 911=135 I C 110=A I R 1932 Pat 150; and 1 I C 163.

**C. P. C. (1908) Or. 5, r. 17**

**Local Amendments.**

—**Bengal** :—Cancel Rule 17 and substitute therefor the following :—17. Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person upon whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous

C. P. C. (1908) Or. 5 r. 17 (Contd)  
Loca; Amendants—(Concl'd)

part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of person (if any) by whom the house was identified and in whose presence the copy was affixed."

#### Synopsis.

- (1) Legislative Changes.
- (1-a) Scope of the rule.
- (2) "After using all due and reasonable diligence."
- (3) Cannot find the defendant.
- (4) Copy of the Summons must be affixed
- (5) Ordinarily resides or carries on business or personally works for gain.
- (6) Refuses to sign the acknowledgment.
- (7) Report of process-server.
- (8) Sufficiency of Service.

#### (1) Legislative Changes.

—(1) The words "after using all due and reasonable diligence" have been newly added for the effect of which see under heading (2) infra.

—(2) The words "or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or works for gain" have been newly added see under heading (5) infra

—(3) The words "and the name and address of the person (if any), by whom the house was identified and in whose presence the copy was affixed" are new. The words "if any" suggest that an identifier is not always necessary.

#### (1-a) Scope of the rule.

—O. 5, r. 17 is mandatory 46 I C 277 Nag. and a party should not be lightly excused from effecting personal service under s. 45. A I R 1925 Bom 231 = 27 Bom L R 251 = 49 Bom 368 = 91 I C 20.

—Rule 17 relating to mode of Service applies to notices served under s. 49 of the Bengal Tenancy Act, and they will be vitiated if the rule is not complied with. A I R 1925 Pat 441 = 4 Pat 135 = (1925) Pat 106 = 7 P L T 175 = 91 I C 184.

—Where a person is evading service of summons, the mode under r. 17 can be resorted to. 1932 P C L 59 (62-63) (Civ) = A I R 1932 L 248 = 136 I C 258 = 33 P L R 5 = I R 1932 L 210 = A I R 1932 L 59 (Civ.)

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C. P. C. (1908) Or. 5, r. 17 (Contd)

#### (2) "After using all due and reasonable diligence."

—The words "after using all due and reasonable diligence" are new, but there were decisions under the old Code to the effect that service officer is bound to exercise due and reasonable diligence and substituted service can be effected only after proper efforts have been made to serve personally without success see 19 C 201; 26 C 101; 21 M 324; 24 A 302; and 21 B 223, and 30 B 623; and 21 M 419; and 5 C L J 12 and see 32 I C 744; and 50 I C 566.

—But it should be noted that the words "after using all due and reasonable diligence" are specially restricted to the case where there is no agent empowered to accept service on behalf of the defendant nor any other person on whom service can be made. Where there is such a person, service-officer need not make such diligent efforts to effect personal service, even if the agent or adult member of the defendant's family refused to accept service. It is still necessary to prove that defendant "cannot be found". A I R 1922 Nag 105 = 5 N L J 41 = 65 I C 44

—It is only when there are reasonable grounds to believe that the defendant is going out of the way to avoid service or that for other reasons it cannot be served in the ordinary way that substituted service should be ordered. A I R 1931 Nag 119 = 27 N L R 53 = Ind Rul (1931) Nag 151 = 134 I C 279 following 29 M 324; 21 M 419 and 2 N L R 62.

—All available steps to effect personal service must be made before resort is had to substituted summons. It is not enough to attend at the ordinary place of residence or of business or the place where the defendant personally works for gain, and to conclude that substituted service may be effected merely because at the time when the serving peon attends at such place the defendant does not happen to be there. It is necessary that the serving peon, having discovered or believing that the defendant cannot be served at the time when he is attending, should institute proper enquiries to endeavour to ascertain where the defendant's whereabouts are. The serving peon before he can take advantage of the provisions of r 17 must attend at the right place, and he must attend at a time when he may reasonably expect that the defendant will be present, and if he fails to find the defendant he must take reasonable steps to discover where the defendant may happen to be. A I R 1925 Cal 627-52 Cal 179 = 88 I C 508 see also 91 I C 965 = A I R 1926 C 327.

—If the debt is residing at two places inquiries must be made for him at both of these places. A I R 1925 Cal 801 = 52 Cal 453 = 88 I C 929.

C. P. C. (1908) Or. 5, r. 17 (Contd).

(2) "After using all due and reasonable diligence—(Concl'd)

—Where a process-server affixes the duplicate copy of the notice to the outer door of defendant's house, on being told by a woman at the house and another man that the defendant had gone to a place 4 miles off, and that the date of his return was not known, the service so effected was sufficient. 1 L W 351=23 I C 219.

—And where a peon, on being told by defendant's wife that her husband had gone to B, a place in Madras Presidency, affixed the summons to the outerdoo of the defendant's house, the service so effected was proper. 17 C W N 999=13 I C 127.

—So also if defendant is away in foreign territory, substituted service may be effected. 21 M L J 978 = 10 M L T 566 = (1911) 2 M W N 357 = 12 I C 420.

—Where a process-server visited the village of the defendant five times to serve summons on the defendant, it may be held that every effort was made to effect personal service. Affixture of summons to his house under such circumstances is good under O V, r. 17. A I R 1931 Nag 122=27 N L R 50=Ind Rul (1931) Nag 140=134 I C 268

—But where a serving officer finding that the respondent was away from his house but was expected back in two or three days, affixed the summons, the service so effected was not sufficient. 39 I C 544.

—That is, service of summons by affixture is not proper if the person to be served is temporarily away and is traceable. 37 I C 826; see to the same effect. 29 I C 584; and A I R 1924 Lah 233.

—Where petitioner being absent the summons is affixed on the door of his house, the Court is not justified in holding that there was proper service, notwithstanding previous refusal of the petitioner to accept the service. A I R 1930 Lah 192 = Ind Rul (1930) Lah 545=124 I C 673.

—Where peon affixes notice at entrance of party's house on being told that the party was absent at his *bari* 2 or 3 miles off, the service is not valid for personal service is not to be dispensed with unless it is unavoidable. A I R 1924 Cal 1004=40 C L J 154=82 I C 703.

(3) Cannot find the defendant.

—Where service of summons is to be effected on a *pardanashin* lady to whom no access can be obtained, nor a copy of summons can be delivered or tendered, service by affixture can be resorted to: 19 C W N 1231 = 21 C L J 653 = 30 I C 64.

—So also a *Pardanashin* lady not having other member of family or agent to receive

C. P. C. (1908) Or. 5, r. 17 (Contd)

(3) Cannot find the defendant—(Concl'd)

summons—Service by affixture is valid. A I R 1923 Pat 433=4 P L T 89=72 I C 910.

—Where service tendered to adult male related to lady refused service, service by affixture was held sufficient. A I R 1922 Oudh 268=9 O L J 439=69 I C 667.

—Process server knowing where defendant was and still affixing, the service is not proper: 43 I C 632.

—So also mere temporary absence from house when process-server calls does not entitle one to say he cannot be found. A I R 1924 Oudh 237 = 10 O L J 337 = 74 I C 792; see to the same effect. 16 I C 600; and A I R 1931 N 119; and A I R 1924 I 233.

—But otherwise in case of absence for indefinite period: 50 I C 1042=A I R 1926 M 31; see also 23 I C 14.

—Or where the process-server seriously tries to find out the debt but fails: A I R 1931 Nag 122 = 27 Nag L R 50 = 134 I C 263; see also 6 I C 282.

(4) Copy of the summons must be affixed.

—A copy of every summons not acknowledged by the party, or not actually served on him, under circumstances mentioned above must be affixed on the outer door of the house in which he ordinarily resides. The duplicate summons must be affixed to the outer door or to some other conspicuous part of the house in which defendant resides. Merely leaving the duplicate summons on the teapoy of the defendant's residence is not sufficient. A I R 1929 Bom 257 = 31 Bom L R 424 = Ind Rul (1929) Bom 488 = 118 I C 792

—Where defendant by his conduct renders it impossible to have the copies affixed on the house, he cannot be permitted to plead that the omission to affix rendered service invalid. A I R 1924 Pat 446 = 3 Pat 236 = 2 Pat L R 58=5 Pat L T 576=78 I C 889.

—Affixture on door of the place of business is sufficient; 26 I C 866. but not at the place where debt was found, it not being his ordinary place of residence 9 C W N 108 Note; see also. 1 I C 118.

—Summons should be returned unserved and not affixed on the door where the debt never resides in the village. 1 I C 118.

—Service by affixture, when good, see 26 M L J 368.

—Service of summons—Affixed to door—Court when can make a declaration of service, see. 22 I C 498.



## C. P. C. (1908) Or. 5 r. 17 (Contd)

## (5) Ordinarily resides or carries on business or personally works for gain.

—Summons must be served in the house in which the defendant ordinarily resides. 41 I. C. 181.

## (6) Refuses to sign the acknowledgment.

—On refusal by defendant to sign the acknowledgment a copy of summons may be affixed on his house. 13 N. L. R. 46 = 38 I. C. 545.

—Refusal to accept the service of Summons by the defendant justifies service by affixture and the service so effected is sufficient. 41 P. L. R. 1918 = 31 P. W. R. 1918 = 43 I. C. 718.

—As to the effect of deft's undivided brother refusing to accept notice see A. I. R. 1931 Cal 546 = 35 Cal. W. N. 332 = 134 I. C. 80.

## (7) Report of process-server.

—Report of a process-server not containing the name of any witness while there must have been persons present at the time of service cannot be deemed to have been framed in accordance with law and does not furnish *prima facie* proof of due service A. I. R. 1928 Nag. 80 = 23 N. L. R. 166 = 107 I. C. 666.

## (8) Sufficiency of Service.

—Where defendant used to go to his family house from time to time though he practised as a Pleader elsewhere and notice was affixed on the door of his family house on the refusal of his brother to accept it: *Held*, service was valid. A. I. R. 1931 Cal 546 = 35 C. W. N. 332 = Ind. Rul. (1931) Cal 784 = 134 I. C. 80.

—Service by affixture during temporary absence on the outer door of house where party's wife was living is sufficient service. A. I. R. 1922 Mad 93 = 42 M. L. J. 422 = (1922) M. W. N. 173 = 45 M. 875 = 70 I. C. 611.

—Though service by post or affixture is *Prima facie* sufficient where person cannot be personally served, under r. 22 added by Allahabad Rule Committee to O. VII, Court is bound to direct additional service by registered post. 43 A. 11-19 A. L. J. 145 = 61 I. C. 135.

—Where on refusal to accept service by defendant, summons was affixed on outer door of premises in which he is found but which was not his residence held the service was not enough. A. I. R. 1925 Cal 801 = 52 Cal. 453 = 88 I. C. 929.

—Where a partner of a firm against which a suit has been brought, refuses to accept summons served upon him as a partner of that firm, the summons can be affixed to the

## C. P. C. (1908) Or. 5 r. 17 (Concl'd)

## (8) Sufficiency of Service—(Concl'd)

place where either he is residing, or carrying on business or personally working for gain although in a different name from that of the firm sued against. A. L. R. 1933 S. 393.

## C. P. C. (1908) Or. 5, r. 18

## Local Amendments.

—Madras :—Insert the following as Rule 18-A :—

—“18-A. A District Judge, within the meaning of the Madras Civil Courts Act, 1873 may delegate to the Chief Ministerial Officer, District Courts may be empowered to order issue of fresh summons. Court the power to order the issue of fresh summons to a defendant when the return on the previous summons is to the effect that the defendant was not served and the plaintiff does not object to the issue of fresh summons within seven days after the return has been notified on the notice board.”

## Endorsement of time and manner of service.

—As to the form of return see Appendix B to Sch. I, form 11; and as to the scope of the present rule see. 20 I. C. 318 (All).

—Under the rule there need not always be an identifier. A. I. R. 1923 Pat 114 = 3 P. L. T. 498 = 65 I. C. 49.

—In order to prove the service it is necessary that the person who served the summons should be examined : A. I. R. 1926 Cal 539 = 91 I. C. 711.

—But in case of summons sent under O. 5, rr. 24, 26, 27, 28 the return is evidence; and the entry of service in order sheet of Court will be ordinarily presumed to be accurate though such entries are not evidence against third parties. 37 I. C. 66.

—And it is for the person attacking decree on the ground of non-service of summons to prove that the statements made in the report, which will ordinarily be presumed to be correct, are untrue. A. I. R. 1923 Pat 327 = 4 P. L. T. 102 = (1923) Pat 137 = 1 Pat. L. R. 252 = 71 I. C. 843.

—Revision on question of service lies only in case of patent and extreme hardship under Govt. of India Act 107, but not otherwise. 23 I. C. 14 (Mad).

## C. P. C. (1908) Or. 5, r. 19

## Local Amendments.

--Bengal:--Cancel Rule 19 and substitute therefor the following :--

--"19. Where a summons is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the declaration of the serving officer, and may, if it has been so verified, examine the serving officer, on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit."

--Insert the following after Rule 19 :--"19. A. A declaration made and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of the summons."

## Synopsis

- (1) Scope of the Rule.
- (2) Examination of serving officer.
- (3) Declare that summons had been duly served.
- (4) Miscellaneous.

## (1) Scope of the Rule.

--Court under r. 19, should examine the service officer on oath, and declare the summons to be duly served or order such service as it thinks fit and may make such further inquiry as it thinks fit. L B R 1872-1892, 639.

--But where the Court thinks that debt was unaware of the suit despite the service it can order service in another even though the provisions of O. 5, r. 17 had been complied with. 30 I C 64

## (2) Examination of serving officer.

--Before an ex parte decree can be passed, the process-server should be examined on oath. 31 I C 479.

--For omission to examine the process-server on oath is a material irregularity: A I R 1923 Mad. 27 = 16 M L W 444.

--But it has been recently held by the Oudh J. C. Court that examination of serving officer on oath is discretionary with Court, failure to do it is immaterial, if no injustice has resulted therefrom to any of the parties. 9 O W N 896 (899) = A I R 1932 O 326 = A L R 1932 O 636

## (3) Declare that summons had been duly served.

--On return of the summons, the Court must proceed under the rule and decide whether

## C. P. C. (1908) Or. 5, r. 19 (Concl'd)

## (3) Declare that summons had been duly served--(Concl'd)

ther the summons has been duly served or not; and, if not, whether a new summons shall issue or substituted service be directed. 6 W R 13; see also 10 Bom 202; 16 Bom 117; 26 Calc. 101=2 Calc. W N 574. and 1914 M W N 79.

--As to the meaning of "duly served" see 42 I C 611.

--Where a return has been made that the affixing required has been made, service is insufficient until confirmed under this rule. 10 Bom. 203. see also 74 I C 792 = A I R 1924 Oudh 237; and 22 I C 498; and 29 I C 26 and 23 I C 14; and 33 P L R 5 = 136 I C 258 = A I R 1932 L 248.

--Summons served by affixture will not be deemed as duly served until declaration of the same is made by the Court. 43 I C 263.

--In Bombay--21 B 223; and Oudh 16 I C 600 service on female members is not proper, and so an affixture to the knowledge of the wife of the debt is not good; but the Madras and Calcutta High Courts have held contra see 13 I C 127; and 70 I C 611=A I R 1922 M 93 = 45 M 875.

--Court's omission to make order declaring proper service is not a mere irregularity. A I R 1927 Mad 813 = 39 M L T 34 = 26 L W 481 = 103 I C 825.

--It is the duty of the Court to pass subsequent order in case summons is returned unserved: 15 I C 188.

--Where summons is sent by one Court to another Court for Service, the serving Court is the proper one to declare as to the propriety of the service 11 I C 39 = 33 A 649.

--Declaration that summons has been duly served required by the rule need not be express but may be implicit in the circumstances attending the service of the summons or its return to the Court which had issued it. 9 O W N 896 (898-9) = A I R 1932 O 326 = A L R 1932 O 636, see also 22 I C 302 but see contra 43 I C 632 (All); and 103 I C 813 = A I R 1927 M 813; and 18 M L J 96; but if there be any order of declaration it must be clear and not vague. 12 I C 188.

--Declaration of service--No express order --Presumption see 1914 M W N 63. Ex parte decree passed by Small Cause Court without declaring that summons was properly served, was set aside. A I R 1922 Mad 417 (1)=15 L W 17. see also 43 I C 632

## C. P. C (1908) Or. 5, r. 20

## Synopsis.

- (1) Local Amendments
- (1-a) Scope of the rule:
- (a) General

C. P. C. (1908) Or. 5, r. 20 (Contd.)

- (b) Substituted service, when effectual?
- (2) Could not be served in the ordinary way
  - (3) Court's duty to order
  - (4) Fix time for appearance
  - (5) For any other reason
  - (6) Interference by Appellate Court
  - (7) Keeping out of way for the purpose of avoiding service
  - (8) Or in such other manner as the Court thinks fit
  - (9) Sufficiency of service.
  - (10) Where the Court is satisfied
  - (11) Whether substituted service is due service?

## (1) Local Amendments:

—**Oudh:**—Between Rules 20 and 21, insert the following:—"20-A (1) where the defendant resides in British India outside the province of Oudh or within the limits of head-quarters town of a District in the province, a summons may be served on him by registered post, and in this case, where an acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service has been received the process shall, unless the contrary is proved, be deemed to have been served."

—(2) Where the registered address of the defendant or opposite party, as defined in Order 8, Rule 11, is within the limits of a head quarters town or of a municipality in India including Burma, or Ceylon, a notice, summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served."

—**Rangoon:**—After Rule 20, the following shall be inserted as Rule 20-A, Namely:—

—"20-A. (1) Every plaintiff, appellant or applicant on presenting or on entering an appearance to prosecute a plaint, memorandum of appeal, or originating petition or application shall at the same time file in Court a proceeding stating his address for service."

—(2) Every defendant or respondent who intends to appear and defend any suit, appeal, or originating petition or application shall on or before the date fixed for his appearance in the summons or notice served on him file in Court a proceeding stating his address for service."

—(3) Such address for service shall be within the local limits of the jurisdiction of the Court in which the suit, appeal or petition or application is filed, or of the District Court within whose jurisdiction the party ordinarily resides."

C. P. C. (1908) Or. 5, r. 20 (Contd.)

## (1) Local Amendments—(Contd.)

—(4) Where any party fails to file an address for service as required by sub-Rule (1) or sub-Rule (2) he shall, if a plaintiff, appellant, or applicant, be liable to have his suit, appeal, petition or application dismissed for want of prosecution and, if a defendant or respondent, be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. Any party may apply for such an order against an opposite party and the Court may on such application make such order as it thinks just."

—(5) Where a party is not found at the address given by him for service, and no agent or adult member of his family on whom a notice or process can be served is found at the address, a copy of the notice or process shall be affixed on the outer door or some other conspicuous part of the house or place which has been given as the address for service; and such service shall be deemed to be as effectual as if the notice or process had been personally served on the party."

—(6) Where a party is represented by an advocate or pleader, notices or processes for service on him shall be served in the manner prescribed by order 3, Rule 5, unless the Court directs the service at the address for service given by the party."

—(7) A party who desires to change the address for service given by him under sub-Rule (1) or sub-Rule (2) shall present a verified petition to the effect, and the Court may direct the amendment of the record accordingly, notice of every such petition shall be given to all other parties to the proceedings."

—(8) Nothing in this rule shall prevent the Court from directing the service of a notice or process in any other manner if it thinks fit to do so."

## (1-a) Scope of the rule.

## (a) General.

—Substituted service is not to be used in a way which is unbusinesslike and ridiculous. A I R 1929 Cal 553 = 33 C W N 1199 = Ind Rul (1930) Cal 300 = 57 C 538 = 123 I C 268.

—Nor is it correct to order substituted service on a person to show cause why he should not be appointed guardian. It is necessary to issue proper notice by ordinary service on a person who is capable of becoming guardian and who agrees expressly or by indication to become a guardian. A I R 1930 All 609 = (1930) A L J 1020 = Ind Rul (1930) All 495 = 124 I C 191.

C. P. C. ( 1908 ) Or. 5, r. 20 (Contd)

( 1-a ) Scope of the rule—(Concl'd)

( a ) General—(Concl'd.)

—Mere absence from village is not sufficient ground for substituted service.  
L R 2 A 244 ( Rev. )

—Substituted service should be ordered after due and reasonable effort has been made by party to serve personally. 29 I C 26.

—But not where plaintiff has failed to make enquiries. A I R 1924 Lah 191 = 69 I C 467.

—Substituted service valid according to materials available at the time of the order can not be invalidated by showing that the belief of the Court was erroneous 138 I C 146 = 1932 M W N 133 = I R 1932 M 525 = A I R 1932 M 472.

—Court ordering substituted service—another Court whether competent to examine the validity of the order—application whether must be accompanied with an affidavit see. A L R 1933 L 407.

( b ) Substituted service when effectual.

—Substituted service of summons is invalid if there is no order of Court on record to that effect 62 P L R 1904 = 42 P R 1904; see to the same effect. 55 I C 824 (Lah);

( 2 ) Could not be served in the ordinary way.

—Substituted service should not be ordered unless defendant could not be served in the ordinary way or has refused to accept service. Ind Rul (1930) Lah. 98 = 120 I C 594.

( 3 ) Court's duty to order.

—Where summons is not served, though taken out several times, Court should order substituted service. Suit cannot be dismissed. A I R 1931 Pat. 420 = 12 P L T 644.

( 4 ) Fix time for appearance.

—In the cases of substituted service time should be given for the notice to come to the knowledge of the party concerned A I R 1928 Rang 185 = 6 R. 218 = 111 I C 371.

—Where substituted service is ordered to be effected by means of newspaper reasonable time to allow newspaper to reach in addition to the time of the notice is sufficient. L R 2 A 242 Rev. Hence, proceeding *ex parte* against party after substituted service on same day is bad. 2 U P L R (B R) 90 (2). Or allowing only one day between date of substituted service and the hearing : A I R 1932 Lah 248 = 33 Pun L R 5. A L R 1932 L 59.

C. P. C. ( 1908 ) Or. 5, r. 20 (Contd)

( 5 ) For any other reason.

—Court's power to order substituted service is not confined to deft evading personal service. 96 I C 17 = A I R 1926 Notes 162.

—Substituted service can be ordered if for any reason other than that of keeping out of way for purposes of avoiding service, the summons cannot be served in the ordinary way. 46 P L R 1902.

( 6 ) Interference by Appellate Court.

—The advisability of effecting service by substituted service is a matter mainly for the trial Court. An Appellate Court has no power to go into the question whether the substituted service ought to have been ordered unless the trial Court has made some error of law. All that it can see is whether the summons is issued according to law. 102 I C 243, relied on. A I R 1931 Lah 118 = 31 P L R 1006 = 131 I C 344, relying on 102 I C 243.

( 7 ) Keeping out of way for the purpose of avoiding service.

—Order for substituted service passed on failure of two attempts to serve and on filing of affidavit by plaintiff that the defendant was keeping out of way, was held to be valid. 138 I C 146 = 1932 M W N 133 = I R 1932 M 525 = A I R 1932 M 472; see also 107 I C 563 = A I R 1928 A 118.

( 8 ) Or in such other manner as the Court thinks fit.

—Service by registered post is a poor substitute for personal service. If defendant represents to the Court that he had not been offered the postal packet, he is entitled to re-trial where an *ex parte* decree has been passed. A I R 1922 Bom. 377 = 46 B 130 = 23 Bom L R. 908 = 64 I C 386.

( 9 ) Sufficiency of service.

—Finding by Court that deft. evaded service and refused postal notice is inconsistent with the finding that there was no due service: 1930 M W N 1227.

—Tree to which summons was attached being reasonably near it is probably sufficient service. A I R 1923 Nag 13 = 69 I C 549.

—But affixing of summons without being accompanied by copy of plaint is not a sufficient compliance with the law. A I R 1927 Lah 376 = 28 P L R 300 = 101 I C 615.

—Proclamation in newspaper on failure to effect personal service is good service where party was cognizant of proceeding against him. A I R 1930 Lah 397 = Ind. Rul. (1931) Lah 209 = 129 I C 689.

C. P. C. (1908) Or. 5, r. 20 (Concl'd).

(9) Sufficiency of service—(Concl'd)

—Notice published in newspaper at a place distant from party's residence without giving sufficient time is valid substituted service. A I R 1929 Lah 235 = Ind. Rul. (1929) Lah 556 = 116 I C 620.

(10) Where the Court is satisfied.

—Substituted service should be ordered only when the Court is satisfied that there is reason to believe that the defendant is evading service or that summons cannot be served in the ordinary way. 69 I C 467 see also. 107 I C 282.

—And it cannot be ordered unless the Court is satisfied that defendant is purposely evading summons. 104 P R 1888. But see 1932 Mad 472 = 1932 M W N 133.

—Though defendant avoiding service is not the only ground for ordering substituted service. It can be ordered wherever Court is satisfied that service is not possible in usual way. 94 I C 395 (Nag).

(11) Whether substituted Service is due Service ?

—Substituted service is as effectual as if it is made on the defendant personally and is due service within the meaning of Art. 164, Limitation Act. A I R 1928 Mad 815 = 51 M 860 = 55 M L J 565 = (1928) M W N 49 = 28 L W 513 = 110 I C 490 see to the same effect 8 O W N 845 = 132 I C 778 = A I R 1931 O 369; and 9 N L R 35 = 19 I C 425; but see A I R 1928 Mad 655 = 54 M L J 448 = 108 I C 889.

—In the case of substituted service the summons is "duly served" on the defendant even though it does not in fact come to the defendant's knowledge A I R 1927 Mad 487 = 38 M L T 359 = 52 M L J 512 = 101 I C 651.

—And ignorance in such case is not sufficient cause for not appearing. 108 I C 753 (Mad).

—Substituted service amounts to personal service—notice served by affixture to the judgment-debtor's last known place of residence when his wife was living there was held to be good service on the judgment-debtor. A I R 1928 Mad 1052 = Ind Rul (1929) Mad 555 = 116 I C 363.

—But substituted service is not necessarily due service, and a defendant against whom an *ex parte* decree has been made can show, if he can that he has not been duly served in the sense that knowledge of his opponent's claim has been brought home to him, even though the formalities of substituted service have been carried through A I R 1931 Mad 813 = 34 L W 496 = (1931) M W N 1069 = 134 I C 1202.

C. P. C. (1908) Or. 5, r. 20 (Concl'd)

(11) Whether substituted Service is due Service—(Concl'd)

—And it cannot be laid down broadly that substituted service is necessarily due service or that substituted service is necessarily not due service. The question depends upon the facts of each case and the aggrieved party must be given an opportunity of proving that substituted service had not been properly effected, or in other words that there had not been proper service. A I R 1931 Mad 812 = (1931) M W N 1079 = 34 L W 633.

—Service by affixture made at the very first time raises no presumption that defendant had notice of case. A I R 1924 Oudh 237 = 10 O L J 337 = 74 I C 792.

C. P. C. (1908) Or. 5, r. 21

Local Amendments.

—Bombay :—Order 5 Rule 21—The following shall be inserted as Rule 21-A in Order 5 :—

—"21-A. Where the plaintiff so desires the Court may, notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not, cause the summons to be addressed to the defendant at the place where he is residing, and sent to him by registered post prepaid for acknowledgment provided that such place is at a town or village in British India which is the head-quarters of a district or recognised sub-division of a District, such as a taluka, tahsil or mahal or in which a municipality has been established, or to which the provisions of this rule may from time to time be extended by a notification by the High Court published in the Bombay Government Gazette. An acknowledgment purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be prima facie proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary."

—Rangoon :—In order 5, the following shall be inserted as Rule 21-A :—

—"21-A. When any summons is sent for service by a Court to any Court situated beyond the limits of Burma it shall, unless it is written in English, be accompanied by a translation in English or in a language of a locality in which it is to be served."

—Sind :—Insert the following as Rule 21-A in Order 5 :—



**C. P. C. (1908) Or. 5, r. 21 (Concl'd)**  
**Local Amendments—(Concl'd)**

—“21-A. Service of summons by prepaid post wherever the defendant may be residing, if the plaintiff so desires—Where the plaintiff so desires, the Court may notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not cause the summons to be addressed to the defendant at the place where he is residing, and sent to him by registered post prepaid for acknowledgment, provided that such place is at a town or village in British India which is the head quarters of a District or a recognised sub-division of a District such as a Taluka, or to which the provisions of this rule may, from time to time, be extended by a notification by the Court of Judicial Commissioner of Sind, published in the Sind official gazette. An acknowledgment purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be prima facie proof of service. In all other Cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary.”

**Scope of the Rule.**

—Service through registered post under Bom. H. C. Rules. see 16 Bom. L. R. 204.

—Service on defendant residing in another district by a peon from the court of the Collector of the District in which the suit is brought, instead of through the Collector of the District in which the defendant resides is not such an irregularity as vitiates the whole proceedings. A I R 1925 R 325 = 3 R 239 = 89 I C 870.

**C. P. C. (1908) Or. 5, r. 22**

—Summons sent by registered post and returned refused—Decree passed—Party appearing and denying that postal packet was never delivered to him—Re-trial should be ordered. A I R 1922 Bom 377 = 23 Bom L R 908 = 46 Bom 130 = 64 I C 386.

**Local Amendments.**

—Bombay:—The following proviso shall be added to Order 5 Rule 22:—

—“Provided that where any such summons is to be served within the limits of the town of Bombay, it may be addressed to the defendant at the place within such limits where he is residing and may be sent to him by the Court by post registered for acknowledgment. An acknowledgment by a postal servant that the defendant refused service shall be deemed by the court issuing the summons to be prima facie proof of service. In all other cases the

**C. P. C. (1908) Or. 5, r. 22 (Concl'd)**  
**Local Amendments—(Concl'd)**

Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary.”

—Rangoon:—The following proviso shall be added namely:—

—“Provided that where such summons is to be served within the limits of the town of Rangoon, the Court may in addition to or in substitution of any other mode of service send the summons by registered post to the defendant at the place within such limits where he is residing on carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be prima facie proof of service thereof.”

**C. P. C. (1908) Or. 5 r. 23**

—When a summons is sent for service to be effected to a court having jurisdiction in the place where the defendant resides, by another court it is for the court to which such summons is sent for service to determine whether the service is sufficient or not. 33 A 649 = 8 A I J 715 = 11 I C 39. dissenting from 22 C 889.

—Certificate as to whether service was sufficient or not, signed by the *munsurim* and not by the presiding officer of the Court, is neither legal nor of value. A I R 1924 Omdh 337 = 10 O L J 337 = 74 I C 792.

**Local Amendments.**

—Rangoon:—The following shall be Order 5, Rule 23-A:—

—“23-A-- (1) Before retransmitting a summons received from another Court for service, the Court shall either takedown the deposition of the peon serving the summons as to the time when, and the manner in which the summons was served; or cause the peon to make an affidavit before the bailiff if the bailiff has been empowered to administer oaths; and shall transmit the same, together with the summons, to the court whence the summons originally is issued. In the case of processes received from other provinces the deposition or affidavit of the peon serving the summons, if not recorded in English shall be translated into English, before the summons is returned to the issuing Court.

—(2) In the case of processes received from India, if the person on whom the summons is to be served is not personally known to the process-server an affidavit or deposition by the person who pointed out to the

C. P. C. (1908) Or. 5, r. 23 (Concl'd)  
Local Amendments—(Concl'd)

process-server the said person or his ordinary residence or place of business shall also be attached to the summons.

—(3) When a process is forwarded for service by one Court in Burma to another Court in Burma and when the person on whom the process is to be served is not personally known to the process-server the case, in connection with which the process was issued, shall not be heard ex-parte without an affidavit or deposition of some person who pointed out to the process-server the person to be served or his ordinary residence. The onus shall be upon the person at whose instance the summons is issued, either himself or by an agent, to point out to the process-server the person on whom the process is to be served or his ordinary residence or place of business.

—(4) When the summons has been returned by the process-server under Rule 17, a declaration of due service or of failure to serve shall be recorded in Form (Civil) 47, and sent with the summons to the Court by which it was issued.

C. P. C. (1908) Or. 5, r. 25

Local Amendments.

—Allahabad :—

—Rule 25.—For the word "Shall" in the third line read the word "may."

—Rule 25-A.—Add the following as Rule 25-A :—

—25-A.—When the defendant resides in British India but outside the limits of the United Provinces of Agra and Oudh the Court may, in addition to or in substitution for any other mode of service, send the summons by post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant refused service, may be deemed by the Court issuing the summons to be prima facie proof of service."

—Madras :—Substitute the following for Rule 25 :—

—Where the defendant resides out of British India and has no Agent in British India empowered to accept service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate :

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C. P. C. (1908) Or. 5, r. 25 (Concl'd).  
Local Amendments—(Concl'd),

nication between such place and the place where the Court is situate :

—Provided that if, by any arrangement between Local Government of the Province in which the Court issuing the summons is situate and the Government of foreign territory in which the defendant resides, the summons can be served by an officer of the Government of such territory, the summons may be sent to such officer in such manner as by the said arrangement may have been agreed upon."

—Nagpur :—Rule 25.—substitute "may" for "shall." Add the following rules 25-A :—

—25-A. (new)—Where the defendant resides in British India but outside the limits of the Central Provinces, the Court may, in addition to any other mode of service, send the summons by registered post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by him, or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be prima facie proof of service."

—Oudh :—Substitute the word "may" in place of the word "shall."

—Rangoon :—Rule 25-In Rule 25, the words "may be addressed" shall be substituted for the words "shall be addressed."

—Rule 25-A.—After Rule 25, the following shall be inserted as Rule 25-A; namely:

—25-A.—Where the defendant resides in British India, but outside the limits of the province of Burma, the Court may in addition to or in substitution of any other mode of service, send the summons by registered post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service, may be deemed by the Court issuing the summons to be prima facie proof of service thereof."

Scope of the Rule.

—This rule provides for service of summons to a British defendant residing outside British India, though it does not cover the case of a defendant who is merely temporarily absent in foreign territory : 21 M L J 978 = 10 M L T 566 = 12 I C 420:

—In practice, the summons is forwarded under a registered cover, and if the party does not appear, a verified statement should be put in to show that he is or has recently been residing in the place to which the summons

**C. P. C. (1908) Or. 5, r. 25 (Contd)****Scope of the Rule—(Contd)**

was sent. 15 W R 31; see also 32 I C 820 (Mad); and 3 Pat L T 29 = 1922 P H C C 76 = 62 I C 927 = A I R 1922 Pat 376 = 1 Pat 48: registered cover is preferable to a registered post card : A I R 1929 Cal. 553 = 33 Cal W N 1199.

—Refusal to receive letter containing summons amounts to due service A I R 1930 Lah 439 = 31 P L R 26 = Ind Rul (1930) Lah 222 = 121 I C 382.

—A summons was sent to the defendant who resided out of British India, by registered post under the provisions of O. 5, R. 25 it was returned unserved its envelope bearing the postman's endorsement "Refused to take." A question then arose whether it was proper service—*Held* that as it appeared that the envelope was properly addressed to the defendant, and has been duly-stamped, registered, and posted, the court was entitled to draw the inference indicated in S. 27 of the General Clauses Act, 1897 and to hold that there was sufficient service. 35 B 213 = 13 Bom. L R 323 = 11 I C 351.

**C. P. C. (1908) Or. 5 r. 26**

—As compared with the corresponding S. 90 of the Code of 1882 the present rule has been considerably altered, being almost entirely new.

**Local Amendments.****—Allahabad :—**

—After the words "the summons may" insert the words "in addition to, or in substitution for the method permitted by Rule 25."

—**Madras :—**Substitute the following for Rule 26 :—

**—"Where—"**

—(a) in the exercise of any foreign jurisdiction vested in His Majesty or in the territory, through political agent or Court Council, a Political Agent has been appointed, or a Court has been established or continued with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

—(b) the Governor-General in Council has, by notification in the Gazette of India, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service, or

**C. P. C. (1908) Or. 5, r. 26 (Contd)****Local Amendments—(Contd)**

—(c) by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides the summons can be served by an officer of the Government of such territory;

—The summons may be sent to such Political Agent or Court, or in such manner as may have been agreed upon to the proper officer of the Government of the foreign territory by post or otherwise, for the purpose of being served upon the defendant; and if the summons is returned with an endorsement signed by such Political Agent or by the Judge or other officer of the Court or by the officer of the Government of the foreign territory that the summons has been served on the defendant in manner herein before directed, such endorsement shall be deemed to be evidence of service."

—**Nagpur :—**In rule 26, insert the words "in addition to or in substitution for the method permitted by Rule 25," between the words "may" and "be sent."

—**Oudh :—**In Rule 26 (b), after the words "The summons may" insert the words, "in addition to, or in substitution for, the method permitted by Rule 25."

**C. P. C. (1908) Or. 5, r. 27****Local Amendments.**

—**Allahabad :—**Add the following note to order 5, Rule 27, after Rule 27 :—

—"Note to order 5, Rule 27—(1) A list of heads of officers to whom summons shall be sent for service on the servants of Railway Companies working in whole or in part in these provinces is given in Appendix II of the General Rule (Civil).

—(2) In every case where a Court sees fit to issue a summons direct to any public servant other than a soldier under Order 16, simultaneously with the issue of summons notice shall be sent to the head of the officer in which the person concerned is employed, in order that arrangements may be made for the performance of the duties of such persons.

**Illustrations.**

—If the Court sees fit to issue a summons to a Kanungo or Patwari it shall inform the Collector of the district, and if to a sub-Registrar it shall inform the District Registrar to whom the sub-Registrar is sub-ordinate."

—**Madras :—**In the Rule 27, Order 5, after the words "send it" insert the words "by registered post prepaid for acknowledgment."

**C. P. C. ( 1908 ) Or. 5, r. 27 (Contd)****Scope of the Rule.**

—**Public Officer** :—The words "Public Officer" are now confined to civilians; in the former Code they were left quite general. Service of summons on public servant through head office is discretionary with the Court and the discretion is not affected by rule 138 of Oudh Civil Rules read with rules 140 and 142. 9 O W N 896 (898) = A I R 1932 O 326 = A I R 1932 O 636.

—**Non-compliance with O. 5 r. 27 C P Code** is not a ground for a suit, though enough to sustain application to set aside. 1 Pat. L W 246 = 38 I C 207.

—**Officer or mechanic in marine service**—Mode of service on. See C P Code, O. 5, Rr. 15, 16, and 25 I C 380.

**C. P. C. (1908) Or. 5, r. 28****Local Amendments.**

—**Allahabad** :—The present Rule 28 shall be numbered 28 (1)

—**Add the following as Rule 28 (2) :—**

—“(2) Where the address of such Commanding Officer is not known, the Court may apply to the Officer Commanding the station in which the defendant was serving when the cause of action arose to supply the address, in the manner prescribed in sub-Rule (4) of this rule.”

—**Add the following sub-Rules (3), (4) and (5) :—**

—“(3) Where the defendant is an officer of His Majesty's Military Forces, wherever it is practicable, service shall be made on the defendant in person.

—“(4) Where such defendant resides outside the jurisdiction of the Court in which the suit is instituted, or outside British India, the Court may apply over the seal and Signature of the Court to the Officer Commanding in station in which the defendant was residing when the cause of action arose, for the address of such defendant, and the Officer Commanding to whom such application is made shall supply the address of the defendant or all such information that it is in his power to give, as may be bad to the discovery of his address.

—“(5) Where personal service is not practicable, the Court shall issue the summons to the defendant at the address so supplied by registered post.”

—**Madras** :—In O. 5, R 28 after the words "shall send" insert the words "by registered post prepaid for acknowledgment."

—**Oudh** :—Add the following as 28 (a) and re-number the present rule as (b) :—

**C. P. C. ( 1908 ) Or. 5, r. 28 (Contd)****Local Amendments—(Contd)**

—“(28 (a) Where the defendant is an officer in His Majesty's military, Naval or Air Forces, the Court shall send the summons direct to him for service together with a copy to be retained by him.”

**C. P. C. (1908) Or 5 r. 29****Local Amendments.**

—**Allahabad** :—In Rule 29, sub Rule (1) line 3, for the word and figures "Rule 28" read "Rule 28 (1)"

—**Madras** :—Insert the Rule 29 A.

—“(29 A. (new) Notwithstanding anything contained in the foregoing rules, where a defendant is public officer (not belonging to His Majesty's military or naval Forces or His Majesty's Indian Marine-Service) sued in his official capacity, service of summons shall be made by sending a copy of the summons to the defendant by registered post prepaid for acknowledgment together with the original summons, which the defendant shall sign and return to the Court which issued the summons.”

**C. P. C. (1908) Or. 5, r. 30****Local Amendments.**

—**Allahabad** :—Insert the following as Rule 31 of Order 5 :—

—“(31—An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose, no other forms shall be received by the Court.”

—**Insert the following as Rule 32 of Order 5 :—**

—“(32—Ordinarily every process, except those that are to be served on Europeans, shall be written in the Court Vernacular. But where a process is sent for execution to the Court of a district where a different language is in ordinary use, it shall be written in English and shall be accompanied by a letter in English requesting its execution.

—“(In cases where the return of service is in a language different from that of the district from which it is issued it shall be accompanied by an English translation.”

—**Sind** :—Add the following as Rule 31 of Order 5 :—

—“(31—If a summons issued to a defendant residing in British India is returned unserved, the Court may while issuing a fresh summons for personal service or ordering substituted service of summons also order that a copy of the summons addressed to the defendant at the place where he is residing and be sent

**C. P. C. (1908) Or. 5, r. 30 (Contd)****Local Amendments—(Contd)**

to him by registered post, if there is postal communication between such place and the place where the Court is situate."

**ORDER VI.****Pleadings generally.***Synopsis.*

- (1) Construction of pleadings.
- (2-3) Function of pleadings.
- (4) Nature of suit.

**(1) Construction of pleadings**

—Pleadings in Indian Courts should not be construed with the same strictness as those in English Courts. 6 A 406 = A W N 1884, 140 see to the same effect 1914 M W N 883 = 26 I C 337.

—In India the substance of the pleading and not the form should be considered. Principles of English pleadings to be applied with due regard to circumstances A I R 1928 Mad 445=54 M L J 587=27 M L W 769 = 109 I C 199.

—It is for the Court to find and examine all pleas of law applicable to the facts of a particular case. A I R 1928 Nag. 246=107 I C 513.

**(2-3) Functions of pleadings.**

—The object of pleadings is to narrow the parties to definite issues by making them fully aware of the questions that are to be argued. 5 S L R 192 = 15 I C 757.

—Pleadings, far from being mere formalities, are statements required by law to be true and wilful falsification of pleadings is punishable by the Criminal Law. 7 L B R 257 = 25 I C 805.

—A plaintiff or complainant has an absolute right to know exactly the allegations upon which the opposite side relies and they must be put to him clearly, specifically and with the utmost plainness, so that he may have an opportunity of meeting them. A I R 1928 All 222=30 Cr L J 530=10 A I Cr. R 101 = 9 L R A Cr 90 = 26 A L J 196 = 115 I C 872

**(4) Nature of Suit**

—Nature of suit is determined by allegations in the plaint and not by question of finding. A I R 1929 Lah 386 = 120 I C 421; nor from the pleas of the deft: 129 I C 124=A I R 1930 L 613.

**C. P. C. (1908) Or. 6, r. 2***Synopsis.*

- (1) Scope of the rule.
- (1-a) Alternative and inconsistent allegations
- (2) Every pleading must state facts and not law
- (3) Every pleading must state material facts and material facts only.
- (4) Every pleading must state facts and not evidence by which they are to be proved
- (5) Variance between proof and pleadings see O. 6, r. 7
- (6) Practice

**(1) Scope of the Rule.**

—This rule and practically the whole Order VI has been imported bodily from the English order (see O. 19, r. 4 of the Rules of supreme Court) and it is no doubt intended to introduce so far as is possible the present system of English pleading. This system involves the following principles:—(1) Pleadings must state material facts only; (2) They must state those facts in a concise form; (3) They must not state the evidence by which those facts are to be proved; (4) They must not state propositions of law

**(1-a) Alternative and Inconsistent Claims**

—A party can advance alternative claims but he cannot be allowed to make out a new case not set up in his pleading 15 P. L. R. 1920 = 2 Lah. L. J. 56 = 54 I. C. 43 = 4 P. W. R. 1920 = 2 U. P. L. R. (1) 17.

—And the alternative pleas should not be destructive of each other. A I R 1931 Nag 57 = 26 N L R 367 = Ind. Rul (1931) Nag 44 = 130 I C 108.

—Right to discharge rain water can be claimed on the ground of existence of an easement and alternatively on that of natural right 10 Bur. L. T. 38 = 35 I. C. 394.

—A claim of ownership and right of easement can only be advanced in the alternative. A. I. R. 1924 Cal. 369=69 I. C. 183.

—It is open to base claim on promissory notes and alternatively, on the original debt. A. I. R. 1930 Bom. 424 = 128 I. C. 43.

—Allegation of existing rental at a certain rate may be made with an alternative prayer for fair and equitable rent if not existing rental is found. A. I. R. 1930 Pat. 485=123 I. C. 615.

—plaintiff always entitled to claim an alternative relief, unless it offends against some express provisions of the law. Claim for a declaration of possession as owner of the land and, in the alternative, if the Court found no possession, a decree for possession of the lands, is legal and proper. A. I. R. 1929 Lah. 820 = 116 I C. 890.



C. P. C. (1908) Or. 6, r. 2 ( *Conclud* )

( 1 a ) Alternative and inconsistent

Claims—( *Contd* )

—A plff. may rest his right to pre-emption either on custom or on the Mahomedan Law. 36 All. 456 = 12 A. I. J. 681 = 24 I. C. 425.

—Pre-emptor may claim partial alleging vendor's want of title to the rest, and in the alternative offer to pre-empt the whole property, if Court holds that the vendor had title to the whole. A. I. R. 1929 All 338=1929 A. I. J. 589=116 I. C. 16.

—Question was, if possession of Crown was averred in claim either expressly or by implication—Possession, held not alleged in the statement of claim—Allegation that land was sold in London as enemy property—Not a sufficient allegation of possession. A. I. R. 1931 P. C. 51=58 M. L. J. 375=31 M. L. W. 566

—Suit for rent and for alternative claim for money-decree against plaintiff's co-sharers is maintainable. 40 I. C. 173

—Either party to a litigation may include in his pleading two or more inconsistent sets of material fact and claim relief thereunder in the alternative. 24 C. W. N. 145 = 30 C. L. J. 428 = 54 I. C. 700.

—Assertion of non-performance of marriage ceremony also includes denial of the validity of marriage. 64 I. C. 150.

—Prayer for alternative relief does not imply waiver of original reliefs. 216 P. L. R. 1914 = 111 P. W. R. 1914 = 25 I. C. 856 = 4 P. R. 1915.

—Inconsistent pleas of denial of execution of and want of consideration for promissory note may be allowed to be raised. 5 L. B. R. 251 = 9 Ind. Cas. 467.

—Where right of way is based on ownership in the alternative user and defendants claim ownership but evidence not proving it, it was held that relief on the ground of user can be given. A I R 1922 Bom 199 = 46 B 200 = 23 Bom L R 1009 = 64 I C 517.

—Alternative claims on the ground of ownership and prescriptive right are entertainable. 20 O. C. 192 = 41 I C 903 = 40 L J 499.

—A party litigant cannot be allowed to take inconsistent positions to the detriment of his opponent. A I R 1922 Cal 114 = 35 C L J 58 = 64 I C 903.

—Appellate Court must see that inconsistent defences are not trumped up during the suit, but it can decide a question not raised in the pleadings, but not inconsistent with questions specifically raised in the pleadings. U B R 1912, 2nd Or. 141.

—Where plaintiff based his suit on the averment that A was the last male holder but it was found that B was the last holder, suit cannot be dismissed on the ground of false

C. P. C. (1908) Or. 6, r. 2 ( *Conclud* )

( 1 a ) Alternative and inconsistent

claims—( *Contd* )

avement. A I R 1927 N. 104 = 22 N L R 175 = 10 N L J 5 = 100 I C 446.

—Inconsistent plea can be set up in a subsequent litigation. A I R 1925 Mad. 645 = 21 M L W 551 = 90 I C 124.

—Plea of non-existence of a policy and contract of insurance, is not inconsistent with a coupled plea of non-liability due to certain conditions, even if policy was in existence. A I R 1924 Rang. 317=2 Rang. 144=83 I C 593.

—Claim for mesne profits not a specific issue and is not denied—Plaintiff not disentitled to claim. A I R 1923 Mad 168 = 16 Mad L W 752 = 69 I C 389.

—A prayer for general relief must be consistent with a specific claim and the pleading. 63 I C 2.

—In a suit on mortgage inconsistent pleas of denial of execution and of execution under undue influence cannot be allowed. 47 I C 11.

—Inconsistent positions in Court cannot be taken by the parties to the detriment of their opponents. 27 C L J 535 = 44 I C 159.

—A deft. may raise, by his written statement, as many distinct and separate, and therefore, inconsistent defences as he may think proper. 15 C L J 439 = 13 I C 128.

—A party can allege two or more inconsistent sets of material facts and claim thereunder in the alternative. 21 O C 1 = 44 I C 368 = 40 L J 648.

—Inconsistent pleas not destructive of each other are permitted by O. VI, r. 2. A I R 1925 Oudh 120 = 27 O C 175 = 11 C L J 619 = 82 I C 333.

—Defendant is not prohibited by any rule of law, from raising inconsistent pleas M W N 1912, 413 = 15 Ind. Cas. 382.

( 2 ) Every pleading must state facts and not law.

—Counsel should not plead their opinion in the plaint in originating summons A I R 1923 Bom 177 = 24 Bom L R 111 = 47 Bom. 349 = 77 I C 83.

—Pleas and facts constituting them should be expressly stated. A I R 1925 P. 168=1924 P H C C 297 = 6 P L T 465 = 84 I C 386.

—Under O. VI, r. 2 and O. VIII, r. 2 it is necessary to plead facts only and not the points of law. A I R 1930 Bom 511 = 32 Bom L R 1178 = Ind. Rul. ( 1931 ) Bom 65 = 128 I C 609.

## C. P. C. (1908) Or. 6, r. 2 (Contd.).

## (3) Every pleading must state material facts and material facts only.

—Plaint should state only material facts upon which plaintiff relies for his claim. 137 I C 33 = I R 1932 N 53 = A I R 1932 N 23 (26) = 27 N L R 327 = A L R 1932 N 70.

—Plaint should state substantially the facts which make up the plaintiff's case and should so be framed as to enable the other party to know what case he has to meet. 22 C L J 254 = 20 C W N 310 = 31 I C 181.

—The decision of a case should be based on pleading. In collision case, plaint should be so framed as to enable the adversary to know the case he has to meet, and to state the particular acts of negligence result of which was collision. 25 C W N 519 = 34 C L J 178 = 66 I C 745.

—Suit should not fail by reason of accidental error where particulars of claim are given with reasonable precision. A I R 1928 Mad 940 = (1928) M W N 466 = 56 M L J 70 = 28 L W 565 = 111 I C 887.

—Under O VI, r. 2 facts and only material facts are to be stated in a concise form in the plaint and not the evidence by which they are to be proved. A I R 1925 Pat 410 = 3 Pat L R 36 Civ. = 86 I C 629.

—Under O. VI, r. 2 besides pleas which should be definitely taken, facts constituting them should also be stated. A I R 1925 Pat 168 = (1924) Pat 297 = 6 P L T 465 = 84 I C 386.

—In an action based on fraud it is necessary to prove that the representatives were either known to be false to the party making them or that they were made recklessly and were made for the purpose of being believed and acted upon, and actual damage was caused for which the relief is claimed : 21 A L J 571 = 74 I C 466 = A I R 1924 A 17; see also 7 O W N 1045 = 129 I C 168 = A I R 1931 05; and 24 S L R 232 = 128 I C 682 = A I R 1930 S 298; and 125 I C 145 = A I R 1930 Pat 357; and A I R 1930 A 427 = 1930 A L J 469; and A I R 1930 C 22 = 56 C 868; and 108 I C 383 (Lah); and 92 I C 322 = A I R 1926 L 96 = 6 Lah 512.

—Party must make all necessary assertions to carry the reliefs and prove them in an alternative case. A I R 1931 Cal 25 = 57 Cal 796 = 129 I C 355.

—Mere abuse should not be allowed to find a place in any pleadings. A I R 1930 A 647 = 126 I C 830.

—Argument addressed on a point not alleged in the pleadings and on which no issue is framed will not remedy the defect in pleadings. A I R 1929 All 657 = 1929 A L J 1132.

## C. P. C. (1908) Or. 6, r. 2 (Contd.)

## (4) Every pleading must state facts and not evidence by which they are to be proved.

—Evidence of party is not part of pleading. A I R 1925 All 759 = 47 All 867 = 23 A L J 795 = 6 L R A Civ. 405 = 89 I C 639.

## (5) Variance between Proof and pleadings.

—See cases under O. 6, r. 7.

## (6) Practice.

—Determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. A I R 1927 Sind 219 = 20 S L R 220.

—And defective pleadings may be supplemented by evidence, oral and documentary. 29 M L J 786 = 31 I C 704.

—Though admission by one debt is not binding on others. 22 I C 916.

—Where a plea is not specifically raised but the courts deal with it as if it were raised, the suit is not to be dismissed for failing to raise it. A I R 1928 Mad 703 = 28 M L W 213 = 55 M L J 369 = 111 I C 266.

—The Court is to apply the law whatever the case of the parties may be. A I R 1928 Bom 291 = 52 Bom 393 = 30 Bom L R 591 = 110 I C 633.

—The rule of *secundum allegata et probata* should not be applied regardless of circumstances. A I R 1927 Sind 248 = 104 I C 412.

—Claim of easement for self and others—Claim in respect of others not proved—Entitled to succeed on proof of proper user. A I R 1926 Cal 647 = 91 I C 348.

—When there is a possible case on the allegations, the Court should not dismiss the suit but must take evidence and decide the suit so far as it is sustainable : 16 A L J 611 = 46 I C 925 = 40 A 637;

—Property to be attached in execution—Party alleges allotment of that property to him on partition but fails to prove it—Attaching creditor also fails to prove his allegation of allotment to judgment-debtor—Court may grant party such relief as flows from the findings and this cannot be impeached in appeal. A I R 1926 Nag 203 = 90 I C 263.

—Absence in the pleadings of any specific reference to a contract of sale, does not compel the Courts to treat it as if it were non-existent. 3 Bur. L J 78 (F B) = 2 Rang. 285 = A I R 1924 Rang. 214 = 81 I C 857.

—The objection to a document for want of registration is one of substance of the transaction. A I R 1930 Pat 530 = 122 I C 158.

C. P. C. (1908) Or. 6, r. 2 (Conclud)

(6) Practice—(Contd)

—A plea that suit is premature means that it should be dismissed. A I R 1929 N 137 = 116 I C 646.

—No finding can be based upon statements, however true, made in an affidavit by a person about 18 or 19 years of age, where the statement is made at the instigation of interested persons. A I R 1930 Cal. 69 = 33 C W N 930 = 51 C L J 320 = 57 Cal 434 = 124 I C 167.

—Statute may be alleged to be *ultra vires* without assigning any further reasons. A I R 1921 P C 163.

—In a suit on lost bond, the greatest care in deciding the loss of original must be taken. A I R 1926 All 741 = 49 All 78 = 24 A L J 964 = 97 I C 82.

—General rule is a plea once abandoned may not be raised; fundamental issues as limitation and *res judicata* are exceptions. A I R 1927 Mad 273 = 25 M L W 11 = 100 I C 40.

—False allegations to establish plaintiff's right as the presumptive reversioner, does not disqualify him from maintaining the suit, if facts disclose a status in which he can sue for the declaration he seeks. A I R 1930 All 734 = 128 I C 782.

—Party to mortgage having full opportunity to take a plea that it is not binding on him not taking it must be deemed to have waived it. It is waiver also in respect of the personal covenants in the mortgage. A I R 1931 Mad 140 = 60 M L J 56 = 33 M L W 95 = 54 M 163.

—A point relevant to liability in a suit, which is abandoned, cannot be re-opened but this principle does not apply to points which are irrelevant before decree. 3 U P L R (All) 11 = 62 I C 273.

—Suit for ejectment—Third party added as defendant supports plaintiff. Defendant supports plaintiff. Defendant should file a written statement to that effect. A I R 1931 C 76 = 52 C L J 357.

—A suit must always be regarded as relating only to the legal obligations previous to its institution. A I R 1928 Mad 245 = 1927 M W N 527 = 108 I C 319.

—A party is not absolved from taking up all available grounds for resisting a contention of the other side, merely because he has authority of the High Court which, if followed, would relieve him of resisting that contention on any but one ground. A I R 1927 All 668 = 25 A L J 842 = 103 I C 277.

—Moffusil pleadings not to be strictly construed. Much latitude to be given to them—Intention should be seen. A I R 1928

C. P. C. (1908) Or. 6, r. 2 (Contd)

(6) Practice—(Contd)

Mad 489 = 1928 M W N 98 = 110 I C 21. Also 12 N L R 90 = 34 I C 704.

—Where the plaintiff has not expressly asked for a relief he should not be non-suited merely because of the inartistic method in which his pleas were made in the mofussil Court. A I R 1923 Nag. 11 = 68 I C 559.

—Mortgage-deed inadmissible but defendant added amount due—Court can pass a personal decree. A I R 1922 Bom 440 = 24 Bom. L R 502 = 68 I C 1005.

—A written application is not a substitute; for the oral examination under O 10. R. 1 A I R 1922 Oudh 78 = 8 O L J 439 = 66 I C 222

—Decree for one share may be granted in a suit for the possession of whole estate. 1915 M W N 968 = 2 M L W 1214 = 19 M L T 296 = 30 M L J 451 = 31 I C 833.

—Where the undoubted evidence is consistent both with the allegation of the plaintiff as with the denial of debt, the plaintiff must fail. A I R 1923 Pat. 165 = 67 I C 451.

—Pleader not using his confidential position to his advantage in arranging a sale on behalf of his client. *Held*, the case does not come within the ruling in *Carver v. Palmer*. 8 C. L. & F 657. A I R 1931 Cal 144 = 52 C L J 492.

—Rules of pleadings are not strictly enforced in Courts. Absence of specific denial not tantamount to clear admission. A I R 1923 Lah 409 = 71 I C 779.

—A custom alleged in defence but not proved and not framed as a distinct issue, does not prejudice the defence. A I R 1924 All 831 = 78 I C 480.

—Pleadings, judgments and decrees in this country must always be liberally construed. A I R 1924 Lah. 342 = 72 I C 477.

—In a suit to recover the price of goods sold and delivered to the debt, the plff. set up an adjustment of account in his plaint. The Lower Courts found the claim to be true but dismissed the suit on the ground that plff. had failed to prove the adjustment of account on which suit was based: *Held* that the dismissal was wrong, as in spite of the adjustment set up in the plaint, what the plff. sued for was the price of the goods that were supplied to the debts. 41 I C 421.

—Court may find that the case of a party lies somewhere between the cases of both parties. A I R 1926 Nag. 48 = 89 I C 991.

—Adverse inference not to be drawn from mere omission in pleadings. A I R 1930 P 455 = 11 P L T 403 = 127 I C 817.

C. P. C. (1908) Or. 6, r. 2 (Contd.)

(6) Practice—(Contd.)

—Custom set up by parties must be taken as a whole and not piece-meal. A I R 1929 Oudh. 204 = 114 I C 113.

—Pleadings must be taken as a whole. A I R 1926 Nag. 60 = 89 I C 1016.

—Reliance by plaintiff upon a voidable transaction, justifies defendant to challenge it by defence and not by a separate suit. A I R 1925 C 26 = 28 C W N 805 = 82 I C 369.

—A case cannot be defeated merely on the ground of some technical defect in the pleadings. 46 Bom 200 = 22 Bom L R 1009 = A I R 1922 Bom. 199 = 64 I C 517.

—The practice of dismissing a suit on the pleadings alone is highly to be deprecated, and ought not to be restored to except in absolutely clear cases. 29 M L J 786 = 31 I C 704.

—Suits must be decided with reference to the pleadings of the parties, and unless the Court is specially asked to determine a particular question, as between the parties, it is not only not bound to do so, but it would not be justified in so doing. 24 C 433.

—The strict rule that averments not traversed must be taken to be admitted, is not applicable to, in Indian Courts. 11 C W N 225 = 5 C L J 181 = 34 C 57. (9 M I A 287 F)

—The plea of "Demurrer" has not been recognised in India. A I R 1923 B. 24 = 24 Bom L R 328 = 47 B. 182 = 67 I C 326. *Held*, that pleadings in the mofussil ought not as a general rule, to be strictly construed. 2 S L R 59.

—The character of a suit is primarily to be ascertained by a reference to the pleadings and is not dependent upon the plff's success at the trial. 14 Bom L R 1135 = 17 I C 779.

—If an appellate Court is of opinion that the plaintiff has been prejudiced by the defective pleadings and that there has been a finding upon insufficient evidence and upon evidence which the plaintiff had no reasonable opportunity of meeting, the proper course is to remit an issue on the point. 15 Ind. Cas 3.

—Fraud is not established in case of equally strong and consistent proofs on either side. A I R 1923 Pat 327 = 4 P L T 102 = 1923 P H C C 137 = 1 P L R 252 = 71 I C 843.

—Where evidence is led on right issues and no party is prejudiced, the proper relief should be granted even though it is not clearly set forth. A I R 1926 L 417 = 8 L L J 166 = 27 P L R 344 = 93 I C 928.

C. P. C. (1908) Or. 6, r. 2 (Contd.)

(6) Practice—(Contd.)

—Where in a suit for possession it is found that parties are joint owners of the land, a decree for joint possession alone should be passed. A I R 1926 L 567 = 96 I C 253.

—Plaintiff's evidence is to be taken before dismissal of suit. A I R 1926 All 672 = 96 I C 89.

—Defences are also included in rules relating to procedure, unless they negative them. A I R 1930 C 53 = 56 C 704 = 121 I C 403.

—A plaintiff purposely vague is to be tied down to definite pleadings. A I R 1930 All 321 = 127 I C 524.

—Appellate Court should inquire whether a compromise set up by one of the parties is binding on the parties and if the compromise was not binding whether the plaintiff had proved his case on the merits. 15 I C 478 = 63 P L R 1912 = 142 P W R 1912.

—A Hindu mother sued for maintenance against the two widows of her son. One of the widows set up a posthumous son whose paternity was denied by the other and he was thereupon added as a party. *Held*, that it was unnecessary to decide this question of paternity and that the proper decree to pass was one directing the amount allowed as maintenance to be payable by any one or more of the defendants who was in possession of the estate, out of and in proportion to, the part thereof in his or her possession. 18 A L J 828 = 60 I C 99.

—Admission to be taken in whole and not be dissected in part. 28 M L J 589 (P C) = 29 I C 223.

—Where in a suit on a mortgage a deft. pleaded that the deed was never executed by him, that if it was signed by him, he was a minor and subject to undue influence. *Held*, that on the pleadings it must be taken that the deft. did positively deny the execution of the deed. 10 L J 366 = 25 I C 648.

C. P. C. (1908) Or. 6 r 4

#### Synopsis

- (1) Scope of the rule.
- (2-3) Breach of trust.
- (4) Collusion.
- (5) Confession and avoidance.
- (6) Contract.
- (7-8) Custom.



**C. P. C. (1908) Or. 6, r. 4 (Contd)**

- (9) Estoppel
- (10) Fraud and Coercion.
- (11) Gift.
- (12) Misconduct.
- (13) Misrepresentation.
- (14) Negligence.
- (15) Undue influence.

**(1) Scope of the rule.**

—Where burden of proof as regards an allegation rests upon plaintiff, defendant cannot be compelled to disprove it. A I R 1921 Sind 106 = 17 S L R 9 = 80 I C 958.

—Where the relief claimed is to have a decree of a Court set aside on certain grounds alleged, it is absolutely necessary that the grounds relied on should be set out clearly and definitely. A I R 1928 Mad 945 = 108 I C 639.

**(2-3) Breach of trust.**

—In actions based on general allegations of fraud or breach of trust, specific particulars constituting the fraud or breach of trust must be given. Mere general allegation is insufficient. A I R 1930 Mad 78-57 M L J 609-30 L W 914=Ind Rul (1930) Mad 431=123 I C 15.

**(4) Collusion.**

—In collusion cases, the plaint should set out the circumstances of the collusion with clearness and accuracy, to enable his adversary to know the case and state the particular acts of negligence that caused the collusion. 25 C W N 519 = 34 C L J 178 = 66 I C 745.

—Burden of proof as regards allegations of fraud and collusion lies on those who assert them, which must be proved from established facts or from inference legitimately drawn from them as a whole. A I R 1923 P C 73 = 45 M L J 363 = 33 M L T 325 = 28 C W N 327=39 C L J 165 (P C) = 73 I C 391.

**(5) Confession and avoidance.**

—Defendant pleading confession and avoidance must completely admit the basis of plaintiff's claim and avoid the effect of that admission by pleading performance, fraud, release, limitation or otherwise. 54 I C 131.

**(6) Contract.**

—In a suit for money advanced, if defendant pleads illegality of contract, he must so clearly plead and give particulars and prove illegality. A I R 1925 Rang 275 = 3 R 275 = 92 I C 270.

—That he was ready to perform his part of the contract, is not necessary for the

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**C. P. C. (1908) Or. 6, r. 4 (Concl'd)****(6) Contract—(Contd)**

plaintiff to allege, in a suit for damages by purchaser for breach of contract unless defendants put him to its proof. A I R 1930 Lah 553 = 31 P L R 110 = Ind Rul (-1930) Lah 259=121 I C 723.

**(7-8) Customs**

—In an action based on custom, custom should be specifically pleaded and all the essential requisites to its validity must be proved. 34 C L J 319 (F B) = 66 I C 640.

—Custom, an issue and allegation in plaint—Should contain particulars—Distinctness and certainty of custom in pleadings, not necessarily final. 1915 M W N 968 = 2 L W 1214 = 19 M L T 296 = 30 M L J 451 = 31 I C 833.

—A custom different from one set up by party should not ordinarily be allowed to be proved. In a case it is not permissible to split up the custom set up by a party. It must be taken as a whole and not piece-meal. A I R 1929 Oudh 204 = Ind Rul (1929) Oudh 113 = 114 I C 113.

**(9) Estoppel.**

—Where there are allegations in the written statement which are such that the plea of estoppel might have been raised, it is always proper though not absolutely essential that the plea should be definitely raised and issue framed thereon. A I R 1926 Mad 1052 = 96 I C 915.

**(10) Fraud and Coercion.**

—In pleadings, plea of fraud should be clearly put. A I R 1921 Mad 759 = 54 M L J 644 = 28 L W 367 = 110 I C 763 see also A I R 1921 Pat 48.

—General allegation of fraud without particulars does not amount even to averment of fraud. A I R 1928 Pat 112 = 9 P L T 476=104 I C 821.

—Plaintiff seeking the benefit of s. 18, Limitation Act, must clearly allege the particular fraud and in detail by which he was kept in dark about his right to sue. A I R 1927 All 437 = 101 I C 322.

—Where a decree is sought to be set aside on ground of fraud, such plea must be clear, definite and specific. A I R 1923 All 566 = 21 A L J 488 = L R 4 A 481 Civ = 74 I C 964.

—When fraud is alleged particulars must be given in plaint, mere general allegation is not sufficient. A I R 1921 Pat 193 = 2 P L T 528=6 P L J 373 = (1921) Pat 209 = 62 I C 962, see also 2 C P L R (Pat.) 242 = 58 I C 317,



C. P. C. (1908) Or. 6, r. 4 (Contd.)

## (10) Fraud and Coercion--(Contd.)

—Party relying on fraud must state in his pleading particulars thereof of general allegations however strong are insufficient. 58 I C 317.

—Allegations of fraud have to be particularised in the plaint and unless this is done the question of fraud will not be inquired into. 23 C W N 1045 = 31 C L J 3 = 54 I C 197.

—General allegations of fraud undue influence, misrepresentation are not enough, particulars must be given. 39 Bom 441 (P C).

—Where fraud is alleged, particulars must be stated. 20 C W N 638 = 35 I C 284.

—Where fraud is alleged clear statement thereof is necessary. 35 I C 252.

—A plea of fraud will not be heard unless it is specifically averred in the pleadings. 30 I C 20 = 8 Bur. L T 269 = 8 L R 185.

—Where fraud and coercion are alleged, detailed particulars must be given in the pleadings and the parties should be strictly confined to the particulars so given. 39 Bom 149 = 17 Bom L R 157 = 28 I C 921.

—A plea of fraud should always be made in the clearest and most definite way. 41 Cal 148 = 20 I C 679.

—Fraud—Acts constituting fraud to be specifically alleged in pleadings. 8 S L R 3.

—Where a suit is brought to set aside a decree on the ground that it was obtained by fraud, the plaintiff must clearly and specifically set out the fraud. Fraud or forgery should be specifically proved. A I R 1926 P C 109 = 1926 M W N 812 = 25 A L J 20 = 38 M L T 3 = 31 C W N 538 = 3 O W N 731 = 97 I C 543 (P C).

—A party who relies upon fraud must both plead and prove it. He is bound to give particulars of the alleged fraud and can succeed upon proof of the fraud as alleged and not of any other kind of fraud. 4 Bur L T 118 = 10 I C 922.

—In a defence by defendants, points as to fraud or forgery should be specifically pleaded in written statement. If not defences should not easily be accepted. A I R 1926 P C 109 = (1926) M W N 812 = 31 C W N 538 = 25 A L J 20 = 38 M L T 3 (P C) = 97 I C 543.

—Allegation of forgery may be inferred from the allegation that the document was not executed but that it was executed by fraud cannot be inferred therefrom. A I R 1929 Cal 77 = 111 I C 746.

—If one kind of fraud is not proved, another kind of fraud cannot be set up as a basis of the case. A I R 1929 Bom 1 = 53 B 75 = 30 Bom L R 1539 = 113 I C 229.

C. P. C. (1908) Or. 6, r. 4 (Contd.)

## (10) Fraud and Coercion--(Contd.)

—General allegations of fraud however strong are insufficient, particulars must be given, party alleging one kind of fraud cannot set up another kind of fraud in the course of the trial. 20 C W N 819 = 35 I C 339.

—In the case of an action based on fraud or undue influence particulars as regards the fraud or undue influence must be given. If one kind of fraud is not proved, another cannot be set up. A I R 1928 Oudh 330 = 5 O W N 435 = 110 I C 91.

—When fraud of one kind is alleged, relief on another ground cannot be allowed. Undue influence is a fraud of gravest nature and where such fraud is alleged and proved to be a part of a scheme, conceived early whether proved or not, it is immaterial for the purposes of establishing fraud and obtaining a relief thereon. A I R 1922 Cal 202 = 34 C L J 529 = 26 C W N 177 = 68 I C 577.

—A charge of fraud must be substantially proved as laid, so that when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it. 30 C L J 475 = 55 I C 689 = 24 C W N 662.

—Court is not entitled to go into the question of fraud if no such issue is raised. A I R 1927 Mad 538 = 50 M 357 = 38 M L T 197 = 101 I C 399. But see 46 I C 676 Nag.

—In a general allegation of fraud a party cannot afterwards be allowed to say that he was taken by surprise, if he fails to ask for particulars of fraud at the proper trial. A I R 1930 Cal 621 = 34 C W N 805 = Ind. Rul. (1931) Cal 177 = 129 I C 401.

—Plea of fraud omitted to be set up in pleadings may be raised by the party when he becomes aware of it. 36 I C 746 = 3 O L J 501 = 19 O C 334.

—Where the cause of action is one *ex contractu*, the plaintiff cannot by alleging fraud, base it on fraud. A I R 1929 B 119 = 53 Bom 271 = 31 Bom L R 21 = 117 I C 417.

—Where fraud is pleaded very vaguely by the defendant it is for the Pleader of plaintiff to get delivered particulars of it, if he fails it is for the Court to get the deficiency supplied. Court's duty is to see that the case is so framed as to let each side know fully the nature of the one against it. When particulars are ordered to be delivered defaulting party should be ordered to pay costs, occasioned by the application. If the plaintiff is the defaulter, he should have his action staged. In case of defendant, his defence should be struck out. Judge should allow evidence only on particulars. A I R 1924 All 17 = 21 A L J 571 = L R 4 A 464 = 45 A 624 = 74 I C 466.

## C. P. C. (1908) Or. 6, r. 4 (Contd.)

## (11) Gift.

—A party relying upon an oral gift, to prove with utmost precision the words on which he relies with other circumstances of time and place. A I R 1929 Oudh 134 = 6 O W N 51 = 117 I C 456.

## (12) Misconduct.

—Although it is perfectly true in one sense that a legal adviser must accept statements of fact from his client, yet in application for transfer, statements imputing prejudice or unfairness or corruption to Magistrates should not be made unless an application for transfer drafted by *mukhtar* contained a statement which would have been considered as a statement that there was such a relationship between the Magistrate and the person who was mentioned as having visited him, as to make it undesirable that the Magistrate should sit and try a case in which the interests of that person were adversely affected. The statement was found to be totally unfounded and untrue: *Held*, that the *mukhtar* was guilty of professional misconduct. A I R 1929 Pat 151 = 8 Pat 575 = 10 P L T 711 = Ind Rul (1929) Pat 330 (F. R.) = 116 I C 762.

## (13) Misrepresentation.

—Pleas of misrepresentation and fraud must be examined with the utmost rigour. A I R 1923 Sind 25 = 82 I C 81.

—Particulars of misrepresentation and fraud must be given at the instance of the auction-purchaser in an action to resist auction-purchaser's title under s. 65. A I R 1926 Bom 33 = 27 Bom L R 1318 = 91 I C 426.

## (14) Negligence.

—In an auction based on negligence, all particulars which constitute negligence must be specifically stated in pleading. A I R 1922 Pat 17 = 3 P L T 222 = 67 I C 664.

—General allegations of fraud and negligence are insufficient, particulars must be given. 29 I C 482.

## (15) Undue influence.

—Where fraud or undue influence is alleged, detailed particulars must be given in the pleadings, and parties must be strictly confined to that state of facts. Where one kind of fraud or undue influence is charged, another kind of fraud or undue influence cannot, upon failure of proof, be substituted for it. A I R 1928 Oudh 330 = 5 O W N 435 = 110 I C 91. Also 24 Cr. L J 35 = 37 I C 707, Also 14 A L J 25 = 38 A 126 = 33 I C 913.

## C. P. C. (1908) Or. 6, r. 4 (Concl'd).

## (15) Undue influence—(Concl'd)

—Plea of undue influence cannot be entertained unless particulars thereof are given. 47 I C 11.

—The rule only requires that the particulars which would amount to misrepresentation or undue influence should be stated. Where there are facts to justify an inference of undue influence, the omission to make an allegation of undue influence specifically is not fatal to the plaintiff's case. A I R 1931 Nag. 63 = 27 N L R 19 = Ind Rul (1931) Nag 100 = 132 I C 452.

## C. P. C. (1908) Or. 6, r. 5

## (1) Scope of the rule.

—This rule corresponds with English O. 19, r. 7 of R. S. C. When an order is really one under O. 6, R. 5, but purporting to be made under O. 11, r. 21, it should be treated as one made under O. 6, R. 5. 137 I C 842 = 1932 M W N 301 = I R 1932 M 460 = A I R 1932 M 316 (318) = A L R 1932 M 414.

—When both a plaint and written statement are defective, the proper course is to either return the plaint for amendment and require a fresh written statement in reply to the amended plaint, or to examine the parties in Court with a view to frame proper issues. 4 Bur. L T 118 = 10 I C 922.

## (2) Failure of supply particulars ordered.

—Where the particulars ordered are not supplied by defendant in time Court can strike out his defence even where the penalty is not specified in Court's order. So where the original Court strikes out defence on failure of defendant to supply in time particulars ordered and on submitting inaccurate and incomplete particulars after long time, the discretion is not improper and should not be interfered with in appeal. A I R 1930 Mad 473 = 31 L W 387 = 59 M L J 22 = 53 M 645 = Ind Rul (1930) Mad 901 = 126 I C 629.

—Suit under Bengal Tenancy Act (1885)—Plaint not giving particulars in s. 148, Bengal Tenancy Act—Defendant should ask for them, but if cause of action given suit should not be dismissed—Amendment of plaint should be allowed. A I R 1931 Pat 135 = 11 P L T 617 = Ind Rul (1931) Pat. 49 = 128 I C 785.

## (3) When application should be made.

—Where averments in a plaint are not precise, defendant should apply for particulars, failure to do so disentitles him to refer to the matter in second appeal. (1919) Pat 451 = 52 I C 964 = 1 Pat L T 34.

**C. P. C. ( 1908 ) Or. 6, r. 5 ( Concl'd )****( 3 ) When application should be made—( Concl'd )**

—Flaw in title appearing from pleadings of person bound to prove it—Objection may be raised on such disclosure. A I R 1929 P C 303.

**C. P. C. (1908) Or. 6, r. 6**

—This rule corresponds with the English O. 19, r. 14 of R. S. C. Condition precedent and its non-performance must be specified by defendant in pleading otherwise performance will be presumed. Plaintiff need not plead it. Pleadings if silent imply allegation of performance. A I R 1924 Pat 205 = 72 I C 1.

—In a suit for damages for breach of contract averment of the willingness of the plaintiffs to perform their part of the contract, must be implied and the defendants if they contest that fact must raise the matter expressly in their pleadings. A I R 1926 Lah 318 = 7 Lah 442 = 94 I C 304.

—So also the plff. relying on a rule of prohibition of adoption should raise it in plaint. A I R 1927 P 145 = 6 Pat 506 = 8 P L T 34 = 106 I C 620.

—Where in a suit for injunction, the plff. set up his title as owner of a piece of land, but failed to establish ownership, and it appeared that he was only a non proprietor in the village and was in possession of a portion of the land as tenant of the defts. on payment of the customary rate. *Held*, that having failed to establish title set up by him, his suit must be dismissed. 75 P L R 1916 = 36 I C 55.

**C. P. C. ( 1908 ) Or. 6, r. 7.**

—This rule corresponds with the English O. 19, r. 16 of R S C. See also Ss. 33-100 and O. 3, rr. 8 and 9 and O. 41, r. 2 C P C.

**Synopsis.****( 1 ) Scope of the rule :**

- ( a ) General.
- ( b ) Inconsistent or alternative pleadings.
- ( c ) Pleadings in contravention of the rule.
- ( d ) Variance between pleading and proof.
- ( 2 ) Consideration.
- ( 3 ) Custom.
- ( 4 ) Suit against agent as such.
- ( 5 ) Suit against persons in individual capacity.
- ( 6 ) Suit based on a contract.
- ( 7 ) Suit based on a deed of gift.
- ( 8 ) Suit based on fraud, undue influence, and collusion.

**C. P. C. (1908) Or. 6, r. 7 ( Cont'd )**

- ( 9 ) Suit for a share in partnership.
- ( 10 ) Suit for damages.
- ( 11 ) Suit for declaration of title.
- ( 12 ) Suit for enforcement of a lien.
- ( 13 ) Suit for enhancement of rent.
- ( 14 ) Suit for establishing adoption.
- ( 15 ) Suit for maintenance of possession.
- ( 16 ) Suit for partition.
- ( 17 ) Suit for pre-emption.
- ( 18 ) Suit for recovery of a bride.
- ( 19 ) Suit for recovery of money.
- ( 20 ) Suit for redemption.
- ( 21 ) Suit for rent.
- ( 22 ) Suit in ejectment.
- ( 23 ) Suit on a bond.
- ( 24 ) Suit on a basis of easement.
- ( 25 ) Suit on basis of surety-ship.
- ( 26 ) Suit on guarantee.
- ( 27 ) Suit on mortgage.
- ( 28 ) Suit on pro-note.
- ( 29 ) Suit on settlement of account.
- ( 30 ) Suit on title.
- ( 31 ) Suit to set aside alienation.
- ( 32 ) Suit to set aside decree.
- ( 33 ) Suit to recover possession of property.

**( 1 ) Scope of the rule.**

—(a) *General*—A plea raised for the first time in the Appellate Court cannot be considered by it. 8 M L T 247 = 8 Ind Cas 354. see also 25 W R 11; and 11 W R 485; and 224 P L R 1913 = 133 P W R 1913 = 19 I C 770.

—Plea of special period of limitation, not raised in written statement, nor considered by first Court cannot be allowed in appeal. 28 C L J 216.

—Objection involving question of fact and not raised in Lower Court cannot be urged in appeal. A I R 1924 Cal 372 = 69 I C 1003.

—Party cannot raise a new plea in appeal, where it depends on evidence. 28 B L R 513 = 95 I C 73. see also 20 A L J 92 = 64 I C 952 = A I R 1922 A 346.

—Point not raised in the pleading nor in the appeal not to be considered in second appeal. 41 B R 371.

—Plea of equitable acquiescence cannot be taken for the first time in second appeal. A W N 1905, 90 = 27 A 556.

—New plea as to the validity of notice cannot, as of right, be raised. A I R 1924 Mad 904 = 20 M L W 433 = 1924 M W N 830 = 82 I C 956.

—Claim of title by adverse possession must be raised in Court of first instance. 47 I C 892.

—But it may be raised for the first time in appeal if such a case arises on the facts stated in the plaint and the defendant is not taken by surprise. 20 C W N 778 = 36 I C 890.

C. P. C. (1908) Or. 6, r. 7 (Contd)

(1) Scope of the rule—(Contd)

—The High Court in order to do substantial justice, may permit a plea to be advanced in second appeal, though it was not raised in plaint. A I R 1929 Pat 237 = 119 I C 556.

—Thus parties may be allowed to state their pleas whenever possible, provided no further delay is caused: 39 M L T 273 = 53 M L J 504 = 105 I C 288 = A I R 1927 M 1007.

—And an objection, which is fundamental to the validity of a deed creating transfer, can be taken even after the period for its cancellation had run out: 128 I C 433 = A I R 1930 A 605.

—So also question as to admissibility for want of registration or irrelevancy of document can be raised at any stage. A I R 1925 C 370 = 82 I C 949

—But new case in appeal should not be allowed especially if it necessitates remand. 35 Bom 231 = 9 I C 941. See also 40 I C 407 and 44 I C 624.

—So no amendment altering the nature of the suit can be allowed for first time in appeal. 10 P W R 1918 = 44 I C 228.

—New case cannot be set up especially without amending plaint. A I R 1928 Sind 103 = 23 S L R 370 = 107 I C 440.

—Nor at a late stage of the hearing 52 I C 47.

—Appellate Court cannot reverse the decision of the first Court on a point not set up in the plaint before the primary Court or in first appeal. 43 I C 29.

—The Court is not entitled to set up a case for plaintiff which not only he did not set up but which he through his Counsel definitely repudiated. 56 I C 638 = 2 Lah L J 609.

—A party having claimed on one basis, cannot claim on another basis when he finds that the first basis is prejudicial to him. A I R 1929 P C 77 = 1929 A L J 406 = 49 C L J 335 = 33 C W N 493 = 31 B L R 710 = 1929 M W N 422 = 57 M L J 581 = 30 M L W 835 = 114 I C 565.

—Where parties allow a suit to be conducted in the lower Court as if a certain fact was admitted, they cannot afterwards, on special appeal, question it, and resile from the tacit admission. 15 B L R 142 = 23 W R 174.

—Where the court finds a new case, the opposite party is entitled to notice of it. A I R 1926 N 385 = 95 I C 294.

—In the absence of any pleading and issue on a point, a Court is not justified in setting up a case, not attempted to be asserted in pleading. A I R 1930 Lah 803 = 31 P L R 578 = 130 I C 334.

C. P. C. (1908) Or. 6, r. 7 (Contd)

(1) Scope of the rule—(Contd)

—But a party to a suit is quite competent to raise a fresh plea during the progress of the suit, if that plea arises out of facts which come to light during the course of the suit, which were not in the knowledge of either party. 5 O L J 179 = 46 I C 52.

—Relief not asked for in plaint may be allowed if facts necessitate it. Appellate Court will not reject a case as being a new case, if it is not specifically raised in the pleadings, but raised in cross examination of witness without objection by the defendant. 46 I C 184.

—The determination in a cause should be founded upon a case either to be found in the pleadings or involved in, or consistent with the case thereby made, and a decision not so founded ought to be set aside. 5 L B R 76 = 3 Ind Cas 719. See also 57 I C 873.

—A claim should be decided *secundum et allegata et probata* and proof must accord with pleas. 95 I C 18 (N).

—The court of first instance although it declared the plaintiff's title nevertheless passed an order for maintaining the defendant's possession as manager. *Held* this was a wrong order inasmuch as the defendant did not profess to be in possession as manager but was setting up an adverse title. A I R 1922 All. 114 = 20 A L J 231 = 66 I C 148.

—The allegations in the pleadings, the evidence and the findings should correspond in legal intent. A I R 1923 C 570 = 37 C L J 552 = 27 C W N 496 = 75 I C 557.

—Where plaintiff fails to prove his claim and defendant totally denies the claim the suit should be dismissed. 50 I C 366.

—Both parties give evidence—Plaintiff fails to prove his case—One of the defendants does not expressly deny one of the facts in issue—Plaintiff cannot ask for decree against that defendant. A I R 1924 All 150 = 45 All 571 = 77 I C 609.

—But a right not founded on the pleadings may be granted, if put in issue and decided. A I R 1926 Cal 1003 = 43 C L J 501 = 95 I C 1011.

—A suit cannot be dismissed merely on account of a false statement. A plaintiff who claims exclusive possession of land can be awarded its joint possession. A I R 1924 Nag. 189 = 76 I C 200. see also 12 N L R 57 = 33 I C 497.

—Where plaintiff alleges a certain fact and defendant denies but admits certain sum due, decree may be granted for the amount admitted to be due. M W N 1913, 432 = 24 M L J 561.

Plaintiff—pleading express authority, can plead implied authority if that appears from the evidence. A I R 1928 C 863 = 110 I C 817.



**C. P. C. (1908) Or. 6, r. 7 Contd.)****(1) Scope of the rule—(Contd.)**

—In a case from a District Court in Burma pleadings and the whole conduct of the case can scarcely be scrutinized with the strictness of English principles. A I R 1926 P C 29 = 4 Rang 513=1926 M W N 489=3 O W N 735=94 I C 916.

—Plaintiff, a creditor of the defendant not included in trust deed executed by defendant, after institution of the suit in favour of his creditors—Plaintiff wanted to implead the trustee as second defendant as trustee of a trustee—Claim against second defendant disallowed as property not identifiable—Impleading the second defendant is not abandoning claim against first defendant. A I R 1929 Mad 720 = 23 M L W 564=51 M L J 373 = 96 I C 164.

—(b) *Inconsistent or alternative pleadings:*—Pleadings—Inconsistent or alternative claims, after all the evidence is closed, not to be allowed to be set up—except by way of amendment. 29 M L J 53.

—A plea inconsistent with statement made on being questioned by Court before issues are framed cannot be raised at later stage except by amendment of pleading. A I R 1929 Lah 165 = Ind. Rul. (1929) Lah 701 = 117 I C 813.

—Where a plea of out and out division has been raised and negatived, a plea of severance cannot be urged in appeal. A I R 1924 Mad. 845 = 1924 M W N 485 = 79 I C 902.

—Neither party to a litigation can be allowed to set up at the hearing an entirely new and consistent case. In allowing an objection that the case has been decided on a ground not raised in the pleadings, the test to be applied is, whether the party aggrieved has really been taken by surprise. A I R 1922 Cal. 254 = 35 C L J 103 = 26 C W N 294 = 64 I C 565.

—Where plaintiff bases his claim on specific allegation Court cannot base the decree on different allegation contrary to the former. 54 I C 797.

—Party impleaded without objection or on his motion cannot in appeal plead that he was improperly joined. 47 I C 536.

—Plaintiff stating in the plaint that the pro-notes were made over to her by defendant's ancestor in consideration of her refraining from putting forward certain objections to the grant of succession certificate to the latter cannot subsequently plead that the transfer was in consideration of natural love and affection. 80 C 116.

—Where, on objection by deft, a suit was treated as an execution application under S. 244 of the old Code; held that the deft. could not plead there after that the plff, could

**C. P. C. (1908) Or. 6, r. 7 (Contd.)****(1) Scope of the rule—(Contd.)**

have no remedy under S. 244. 26 M L J 460 (462) = 24 I C 696.

—Minor plaintiffs are bound by admission made by their duly appointed pleader. 86 P L R 1916 = 164 P W R 1916 = 35 I C 870.

—But it is not possible to say, that a plea of no legal necessity for a loan does not entitle a defendant to say that the rate of interest is excessive. A I R 1923 P C 37 = 2 P 285 = 44 M L J 615=25 Bom. L R 568=1923 M W N 382=38 C L J 25 = 4 P L T 29 = 32 M L T 129 = 50 I A 14 = 28 C W N 416 = 18 M L W 767 = 1 Pat L R 445 = 4 I R P C 75 = 71 I C 933.

—Plea that gift was not given effect to, includes plea of non acceptance by the donee. A I R 1924 Oudh 164 = 74 I C 818.

—Prayer for "confirmation of possession" include a prayer for recovery of possession, if the plaintiff is out of possession. A I R 1923 Pat. 137 = 2 Pat 198 = 1922 P H C C 337 = 4 P L T 71 = 1 P L R 25 = 73 I C 43=68 I C 316.

—(c) *Pleadings in contravention of the rule:*—Court is entitled to ignore pleadings in contravention of the rule. 7 O. 6 57 I C 684.

—Consent of parties cannot sustain that which statute declares should not be valid. Lateness of pleading is similarly unavailing. A I R 1925 P C 83 = 27 Bom. L R 770 = 29 C W N 893 = 49 M L J 136 = 23 A L J 195 = 52 I A 126=1925 M W N 257 = 6 L R P C 66 = 52 Cal 408 = 86 I C 545.

—(d) *Variance between pleading and proof:*—The rule that the pleading and proof must correspond, is intended to serve to apprise the defendant specifically of the case that he might not be surprised to preserve an accurate record of the cause of action. The principle of variance between pleading and proof should not be applied in an abstract way. A I R 1923 Cal. 142=36 C L J 356 = 50 Cal 292 = 74 I C 793 Also 24 C W N 662=30 C L J 475 = 55 I C 689; Also 23 C L J 429= 34 I C 444.

—So the test is, whether the defendant will be taken by surprise, and there can be no surprise, if relief not specifically claimed is consistent with that specifically claimed as well as with the pleadings. 43 C 743 = 20 C W N 446 = 22 C L J 419 = 32 I C 437.

—Where the plaintiff alleged tarward ownership of the money but it did not say distinctly whether a certain deed was taken in the defendant's name benami or the money was a gift, evidence required to prove either being the same, the defendant cannot be said to be taken by surprise or hampered. A I R 1924 Mad. 174 = 1923 M W N 657 = 74 I C 1012.



C. P. C. (1908) Or. 6, r. 7 (Contd.)

(1) Scope of the rule—(Contd.)

—And a court ought not to set up a new case for party, but if neither party discloses the truth, it should ascertain facts from the evidence and then proceed to judgment. A I R 1925 Oudh 617 = 2 O W N 361 = 12 O L J 342 = 28 O C 397 = 87 I C 822.

—A party, who in the trial Court fails to establish the case which he set up, is not entitled to advance a new case in appeal, nor is he entitled to a remand to enable him to establish his claim on the new case set up. 54 C 645.

—Every variance between the pleading and proof is not material and does not justify a dismissal of the claim. A I R 1930 Pat 476 = 11 Pat L T 447 = 126 I C 858. Also A I R 1922 Cal 203 = 34 C L J 529 = 68 I C 577.

—The court must carefully consider whether the objection is one of form or substance. 30 C L J 475 = 24 C W N 662 = 55 I C 689, see also 5 W R Act X rule 62.

—Every variance between pleadings and proof is not fatal. This rule has no application where a finding though at variance with the plea of the plaintiff has been arrived at by the admission of the defendant and on the evidence adduced by him. A I R 1925 Nag 434 = 89 I C 486.

—A variance between what is alleged and what is proved is immaterial when it does not relate to an integral part of the cause of action, or where the deft. has not been really hampered by the pleading. 15 C W N 882 = 11 I C 540.

—Where the subsequent variance of a certain agreement on which suit is based is not mentioned in plaint but is put in issue and contested and proved the suit must be decided as it is fought by parties deliberately upon issues framed. A I R 1930 P C 205 = 32 Bom L R 1166 = 52 C L J 1 = 59 M L J 328 = 32 L W 467 = Ind Ral (1930) P C 263 = 124 I C 887.

—There is no variation disentitling party to a decree, where the plaint states that certain lands were acquired for a family by A, but it appears in the course of proceedings later, that B acquired the lands. A I R 1925 C 257 = 80 I C 432.

—The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or is consistent with the case made thereby. But every variance between pleading and proof is not material and does not justify dismissal of the claim : 18 C W N 473 = 16 I C 741;

—Variance not affecting cardinal point in issue is not fatal : 20 C W N 297 = 30 M L J 444 = 3 L W 208 = (1916) 1 M W N 137 = 34 C 268 (P C); see also 23 C L J 429 = 34 I C 444.

C. P. C. (1908) Or. 6, r. 7 (Contd.)

(1) Scope of the Rule—(Contd.)

—Where the Lower Appellate Court found the cases set up by both the parties to be false, it was held on second appeal, that the High Court should proceed not on the pleadings but on the facts found : 22 C W N 149 = 45 I C 795.

—As to plea of absolute title by adverse possession and decree declaring acquisition of limited interest see. 38 I C 459.

(2) Consideration.

—Plea that consideration for a mortgage was a time-barred debt may be taken in appeal : 6 P L J 256 = 2 P L T 318 = 61 I C 20 = A I R 1921 P 99.

—but a plea that consideration was illegal must be definitely stated in pleadings. It cannot be raised in argument for the first time. A I R 1925 Lah 345 = 7 Lah L J 86 = 26 P L R 76 = 86 I C 683.

(3) Custom.

—Plea of, one particular custom not to be altered into another during progress of suit. 3 O L J 327 = 36 I C 66.

(4) Suit against agent as such

—In a suit against agent as such no personal decree can be passed on appeal. 32 M L J 146.

(5) Suit against persons in individual capacity.

—In a suit against persons in individual capacity—Decree against firm, not to be passed. 76 P R 1915 = 31 I C 209.

(6) Suit based on a contract

—Party alleging complete contract, to show that the contract was complete on the particular date; it cannot be allowed to prove a contract of different date, when it definitely alleges the contract of a particular date. A I R 1930 Lah 325.

—Plaintiff claiming maintenance on the ground of express contract, can procure decree on the ground of implied contract. 15 C W N 205 = 12 C L J 173 = 7 I C 118.

—Defence not set up in the first Court cannot be set up in appeal and as such a defendant pleading in first Court that he has nothing to do with the contract or its breach, cannot in appeal plead that he is not liable for damages even if made and broke it. 81 P W R 1912 = 146 P L R 1912 = 14 Ind Cas 1008.

—Plaintiffs cannot found their cause of action on a question of fact not alleged in

**C P C. (1908) Or. 6, r. 7 (Concl'd)****(6) Suit based on a contract—(Concl'd)**

the plaint by amending it. Where company alleges in the plaint, that director had interest in the contract but does not aver its non-disclosure it will not be allowed after issues are framed and evidence closed, to make the allegation A I R 1929 M 353 = 1928 M W N 481 = 115 I C 486.

**(7) Suits based on a deed of gift**

—Defendant's witness values gifted property at over Rs 100 and plaintiff's at Rs. 200—Plaintiff cannot contend that it was too valuable for a gift and at the same time, claim that being worth only Rs. 200, it was in fact sold. A I R 1923 A 135 = 4 L R A Civ. 85 = 73 I C 295.

**(8) Suit based on fraud undue influence and collusion.**

—New case cannot be set up in appeal by parties or by court. Where one kind of fraud or undue influence is charged another kind of it cannot upon failure of proof be substituted for it. A I R 1928 Oudh 330 = 5 O. W. N. 435 = 110 I C 91.

**(9) Suit for a share in partnership.**

—A plaintiff in a suit can only succeed on the cause of action set forth in the plaint or on a cause of action consistent with his pleadings. Suit for a share in partnership—Plaintiff bases claim on his being a partner—But proved that he is the assignee of a partner—Not entitled to a decree. A I R 1927 Rang. 118 = 5 Bur. L J 233 = 101 I C 367.

**(10-11) Suit for declaration of title**

—In a suit for declaration of title and possession, title can be based on adverse possession. A I R 1930 All. 576 = 124 I C 710.

—Suit for damages for loss of goods against Railway Company under Risk Note B.—Plaintiff alleged payment of full rate wherefore Risk Note B not justifiable—Issue not in this form in trial court—Also two witnesses speak to reduced rates—Plaintiff cannot have another opportunity to disprove these statements and prove as a fact, payment at reduced rate. A I R 1925 Oudh 631 = 87 I C 215.

—Perpetual leases in waste lands granted by some cosharers—Suit by some of the rest. A declaration that lease "are improper, null and void and are not fit to be enforced" and an alternative prayer for a decree for joint possession in favour of the plaintiffs, and all the co-sharer defendants, "if, for any reason the passing of a declaratory decree be not thought proper by the Court" Court granted the declaration sought for. In appeal plaintiffs

**C. P. C. (1908) Or. 6, r. 7 (Cont'd)****(10-11) Suit for declaration of title—(Concl'd)**

cannot pray for joint possession by actual ejection of the lessees defendants, in addition to the declaration already granted and not by way of alternative A I R 1924 All 271 = 74 I C 331.

—Where in a suit by reversioners for declaration that the gift by widow should not affect their rights, the donee unsuccessfully pleads he is appointed heir of deceased male-holder, the Court cannot decide that the widow was entitled to make the gift. 34 P R 1916 = 54 P W R 1916 = 31 I C 386.

**(12) Suit for enforcement of a lien**

—Suit for enforcement of a lien for non-payment of purchase money directed to be paid to a third person, cannot be treated as a suit for an account on the basis of agency or a suit for damages for non-performance of a contract 21 M L J 359 = 10 I C 98 = 10 M L T 71.

**(16) Suit for partition**

—Where in a suit for partition of a house, plaintiff alleges that the defendant is only a benami-purchaser, while latter pleads that he is the real purchaser, the Court cannot dismiss the suit by holding that the house had been gifted to the defendant. 136 P W R 1918 = 46 I C 646.

**(17) Suit for pre-emption**

—When a claim for pre-emption is based on the allegation that the area on which land in dispute is situate is a town, he cannot be allowed to contend afterwards that the area is not a town but a village. 15 P L R 1911 = 2 P W R 1911 = 9 Ind. Cas. 36.

—Suit for pre-emption based on title cannot be decreed on the ground that plaintiff is agriculturist. 50 I C 160.

**(18-19) Suit for recovery of money.**

—In a suit for recovery of money paid under contract of sale, damages will not be allowed if they are not prayed for. 21 M L J 359.

—Where in a suit for money an issue is framed as to maintainability of the suit, mere consent of defendant while giving evidence to plaintiff's recovering the amount, does not validate the suit. 10 Ind Cas 351 = 2 M W N 1911, 393.

—Absence of express relief against the property, does not in a suit for money charged on property, indicate that only personal relief is claimed. 95 I C 1004.

—Where in a suit for money, it was found that debt. received the money, but it became

C. P. C. (1908) Or. 6, r. 7 (Contd)

(19) Suit for recovery of a bride—(Concl'd)

payable immediately after suit, the Court should pass decree without driving the plaintiff to a fresh suit. (1918) M W N 199 = 7 L W 403 = 44 I C 863.

—Plaintiff succeeds or fails on his own allegations, and as such a plaintiff claiming money on one ground, cannot be allowed to change the case in appeal. 40 P L R 1910 = 8 I C 230

(20) Suit for redemption.

—Where in a suit for redemption, mortgage is not proved, possession on a case of invalid sale is not to be allowed. 33 I C 163.

—Where in a suit for redemption, defendant, pleads sham transaction, a finding that the transaction was intended to take effect as a sale cannot be sustained as it sets up a new case. 58 I C 115.

(21) Suit for rent,

—Plaintiff suing for rent under an agreement cannot, on failure to prove the agreement be allowed to change his case into one for occupancy rent. 2 O L J 383 = 30 I C 499.

—Suit for rent by plaintiff as owner of a jagheer on the allegation that defendant cultivated the jagheer, was dismissed because plaintiff failed to establish his case. 24 W R 284, but if in a rent suit, the lease is inadmissible, decree may be passed on the basis of use and occupation : 74 I C 582 = A I R 1924 0 97.

(22) Suit in ejectment

—Suit in ejectment based on title alone, should not be decreed on possessory title. (1916) I M W N 77.

—Suit in ejectment praying for possession only, cannot be treated as one for sale. 25 I C 1.

—Where in a suit in ejectment, appellate Court sets up a new case for defendant, there is no ground for interference in second appeal if plaintiff is not taken by surprise by the case so set up. 50 I C 290.

—Suit in ejectment based on title can be decreed on the strength of prescriptive acquisition only if the defendant was not taken by surprise and had an opportunity of meeting the case set up. 53 I C 639.

(23-24) Suit on basis of easement.

—Plaintiff claiming a right based on easement, cannot succeed upon his natural right unless he has specifically pleaded such right. 56 I C 970.

C. P. C. (1908) Or. 6, r. 7 (Contd)

(23-24) Suit on basis of easement—(Concl'd):

—When a plff. sets up a prescriptive right he cannot be allowed to succeed on a customary right : 34 C L J 319 = 66 I C 440.

—Relief on basis of an easement of necessity cannot be granted on failure to establish right on an easement : 8 L L J 546 = 27 P L R 771 = 99 I C 922 = A I R 1927 L 36.

—In a suit based on easement, no decree on natural right can be granted. 57 I C 504.

(25) Suit on basis of suretyship.

—A person relying on a suretyship cannot get a decree on the basis of a partnership. 10 Bur. L T 119 = 36 I C 464.

(26) Suit on guarantee.

—Where in a suit on guarantee, no plea of misrepresentation was taken by defendant, and no issue was framed thereon, the Court cannot find on misrepresentation proved by the defendant. 25 M L T 257 = (1919) M W N 23 = 9 L W 198 = 49 I C 274.

(27) Suit on mortgage.

—Where in a suit on mortgage executed by father, mortgage is not proved, no personal decree against the son can be passed. 31 I C 206.

—Where in a mortgage suit, defendant bases his case on an oral agreement and the agreement is inadmissible in evidence, defendant cannot be allowed to set up a new and inconsistent case. 34 I C 609 = 25 C L J 24 = 44 Cal 162 = 21 C W N 740.

—Where in a suit on mortgage, an enhanced rate of interest was not claimed in the pleadings, but orally when time-barred, the relief cannot be claimed as it was personal and time-barred 114 I C 309 = A I R 1929 Oudh 301.

—Suit on specific mortgage cannot be decreed on the basis of prior mortgages 37 I C 974.

—Mortgage-deed invalid—Personal decree, though not claimed, may be allowed, after giving scope to establish it : 48 I A 127 = 63 I C 770 = 48 C 509.

(28, 29, 30) Suit on pro-note.

—Where in a suit on a pro-note, defendant pleads non-execution and want of consideration in the first Court he cannot be allowed to plead coercion in appeal. 14 Bur L R 43.

—Where in a suit on bundi executed by one of the defendants other defendants are sought to be made liable on the basis of

**C. P. C. (1908) Or. 6, r. 7. (Contd.)****(28, 29, 30) Suit on pro-note—((Contd))**

partnership among them, but the matter is not referred to in pleadings or issue, evidence ought not to be allowed on such matter and no decree can be based on it. 94 P L R 1914 = 22 I C 716 = 63 P W R 1914.

—Suit on pro-note executed by guardian, not to be converted into one on the debt against the minor, in the absence of allegation in plaint. 30 I C 481.

—Plaintiff suing on proprietary title cannot be allowed to alter his case into one on basis of right to management of wakf. 18 I C 807 = 114 P W R 1913 = 225 P L R 1913.

—Plaintiff suing for land as its sole owner cannot be permitted in appeal to base his claim on the ground of its being *shamilat*. 4 P W R 1913 = 138 P L R 1913.

—A suit based on title cannot succeed on the ground of possessory title in case of failure to prove real title. 72 I C 924 = A I R 1923 A 117.

—Suit based on title should not be decreed on the basis of title by prescription if it is not alleged in the plaint. 20 L J 584 = 32 I C 365.

—But a suit on title can be decreed on the basis of prescriptive title, if the plea of adverse possession was included in the statement of facts on which plaintiff based his claim and the issue on the same was fought in the first Court. 48 I C 448.

**(31) Suit to set aside alienation.**

—Where in a suit to set aside a deed of gift on the ground of fraud and misrepresentation, but which failed, no claim for accounts of a share from agent can be decreed. 17 C W N 427 P C.

**(32) Suit to set aside decree**

—Suit to set aside decree for fraud not to be converted into one for rectification of mistake. 35 I C 91.

**(33) Suit to recover possession of property.**

—Suit for possession of property belonging to charity cannot be decreed on the basis of private property. 1 L W 505 = 23 I C 802.

—Plaintiff making definite case of possession by himself in the plaint, cannot be allowed to make an appeal on entirely new case of possession through co-sharers. 34 I C 466.

—Suit for possession by a purchaser at Court auction on the allegation that an order

**C. P. C. (1908) Or. 6, r. 7. (Contd.)****(33) Suit to recover possession of property—(Contd.)**

under S. 335 of C P Code of 1882 deprived him of possession is not liable to be dismissed on the finding that the order had not that effect as the time and mode of ouster, is not material. 18 C W N 473 = 161 I C 741.

—Where, in a suit for possession as a vendee, it is found that the plaintiff is entitled to possession not as a vendee but as a mortgagee, the defendant can repudiate the mortgage by paying the mortgage money and a separate suit for redemption is not necessary. 23 O C 238 = 57 I C 541.

**C. P. C. (1908) Or. 6, r. 8**

—See R. S. O. r. 20. This rule is in effect, an example of the principle laid down in O. 6, r. 2. If a party desires to avoid an agreement he must clearly state upon what ground he means to contest it, whether he denies that he ever entered into it at all or whether he was induced to do so by fraud, mistake or misrepresentation etc. See also O. 8 r. 2. So also limitation must be expressly pleaded in a suit on unconditional acknowledgment: A I R 1932 All 199 = 1932 A L J 77 = 137 I C 243 = 53 All 963.

—But where the deft. admitted execution never questioned the validity of the mortgage for want of due attestation, the plff. was held entitled to the relief though he did not prove attestation. A I R 1923 Bom, 90 = 47 B 137 = 24 Bom L R 1296 = 76 I C 73.

**C. P. C. (1908) Or. 6, r. 9**

—See R. S. O. 19, r. 21. The plff. is bound to state in the plaint the nature of the deeds on which he relies in deducing his title from the person under whom he claims and to show the devolution of the estate to himself.

—It is absolutely essential that the pleading not to be embarrassing to the defts, should state those facts which will put the deft. on his guard and tell him what he will have to meet when the case comes on for trial; but the plff. need not set out the evidence whereby he proposes to prove the facts which gave him the title. 4 Q. B. D. 127, 139. foll. The parties should be held strictly to their pleadings and should not be allowed to prove at the trial any fact which is not stated in the pleadings. A plff. may in certain circumstances rely upon several different rights alternatively though they may be inconsistent. But he cannot be permitted to allege two absolutely inconsistent statements of facts, each of which is destructive of the other 15 C 684 ref. 22 C L J 254 = 31 I C 181 = 20 C W N 310.



**C. P. C. (1908) Or. 6, r. 9 (Conclud)**

—But when a party sets up a will and gives the facts on which he relies the Court is entitled to infer execution of an oral will. A I R 1926 Oudh 342=13 O L J 152=94 I C 796.

**C. P. C. (1908) Or. 6, r. 10**

—See R. S. O. 19, r. 22. Mere want of diligence is no fraud. Facts constituting fraud must be given in detail. Judgment-debtor applying to set aside sale for fraud must state how he was kept out of knowledge of proceedings and how fraud was practised and how he knew of the sale. A I R 1921 Pat 181 = 3 U P L R (Pat) 33 = 2 P L T 401 = 61 I C 823.

—Similarly, mistaken *bona fide* belief and good faith cannot be presumed but must be distinctly alleged in the pleadings and proved where there are grounds for application of equitable rule of subrogation. 51 I C 67 and A I R 1921 Mad 51, explained. A I R 1931 Mad. 110 = 33 L W 78 = (1930) M W N 1190 = 130 I C 506.

**C. P. C. (1908) Or. 6, r. 11**

—See R. S. O. 19, r. 23. The rule relates to procedure and mistake therein may be corrected at any time after institution of suit. Signature to plaint is meant to prevent dispute as to authority and knowledge of plaintiff for institution, which may be established by other means. A I R 1925 Sind 275 = 87 I C 1002.

—Vendor cannot exercise power of resale without giving notice. Plaintiff must therefore plead and prove notice. A I R 1924 Nag 162 = 78 I C 1026.

**C. P. C. (1908) Or. 6, r. 12**

—See R. S. O. 19, r. 24. In a suit for breach of contract the plff. must allege and prove both the contract and its breach: A I R 1924 All 449 = 46 All 35 = 78 I C 519.

—Where it is for a person to prove his title and not for the opponent to disprove it, the objection to sale-deed by the prior person in favour of another need not have been raised by the opponent, who has no knowledge of the sale until that fact was disclosed by the prior person. A I R 1929 P C 303 = Ind Rul (1930) P C 239 = 124 I C 575 P C.

**C. P. C. (1908) Or. 6, r. 13**

—See R. S. O. 19, 25. Omission to specify the provision of law in an application is not a serious objection, to deprive the plaintiff of his rights. A I R 1926 Mad 305 = 92 I C 314.

**C. P. C. (1908) Or. 6, r. 14 & 15****Local Amendments.**

—Bengal.—Insert the following after Rule 14 as Rule 14 A:—

—“14-A-Every pleading when filed shall be accompanied by a statement in a prescribed form, signed as provided in Rule 14 of this Order, of the party's address for service. Such address may from time to time be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by a verified petition. The address so given shall be called the registered address of the party and shall, until duly changed as aforesaid be deemed to be the address of the party for the purposes of service of all processes in the suit or in any appeal from any decree or order therein made and for all purposes of execution and shall hold good subject as aforesaid for a period of two years, after the final determination of the cause or matter service of any process may be effected upon a party at his registered address in like manner in all respects as though such party resided thereat.”

**Synopsis.**

- (1) Scope of the rules.
- (2) Admissions in pleadings.
- (3) Affidavit.
- (4) Mistake or omission as to signing and verification of pleadings.
- (5) Persons competent to sign and verify pleadings.

**(1) Scope of the rules.**

—General:—The procedure for signing is the same for Vakalats, affidavits and pleadings. A I R 1928 Mad 175 = 54 M L J 65 = (1927) M W N 885 = 27 L W 237 = 51 M 242 = 107 I C 804.

—Provision relating to signing and verification far from being a mere formality must strictly be complied with. 26 I C 240.

—Application for Letters of Administration—Grounds of objection must be in form of pleading and duly verified—Reply to objection must also be properly verified—Proceeding should then take form of suit. A I R 1924 Rang. 273 = 3 Bur L J 68 = 82 I C 973.

—“Party to suit”:—“Party to suit” in the rule would include even a corporation. 26 S L R 158 = A I R 1931 S 178 = 134 I C 1170 = A L R 1932 S 196.

**(2) Admissions in pleadings.**

—Where a party relies on admissions by an ignorant pardanashin lady in the pleadings purporting to be signed and verified by her in manner required by O. 6 r. 14 and 15, which are subsequently disproved by evidence



## C. P. C. ( 1908 ) Or. 6, r. 14 &amp; 15 (Contd)

## ( 3 ) Admissions in pleadings—(Conclud.)

of her conduct during trial, strict proof must be given of her having signed the document and of the same having been read out and explained to her. In the absence of such evidence the pleadings will not be accepted as satisfactory proof that the purport and effect of such admissions were brought to her knowledge. Courts should strictly comply with the provisions of O. 13, R. 4. 14 A L J 1248 = 19 O C 192 = 38 All. 627 = 31 ML J 607 = 18 Bom. L R 1037 = 21 C W N 130 = 36 I C 104 ( P C )

## ( 3 ) Affidavit.

—Pleading filed on behalf of corporation—Affidavit that person signing is duly authorised in that behalf is necessary. A I R 1927 Cal 780 = 31 C W N 1030 = 105 I C 568.

—Plaint signed by agent mentioning name of another person as being able to depose to facts and verified by him—Affidavit that he is authorised to verify is necessary. A I R 1927 Cal 773 = 105 I C 564.

## ( 4 ) Mistake or omission as to signing and verification of pleadings.

—Where a plff fails to sign a plaint, but signs only the verification, the plaint ought to be returned for amendment or it should be amended in open court; the plaint ought not to be rejected. 165 P W R 1911 = 11 I C 842 see also 9 C W N 608.

—Defect in signing or verification is a mere irregularity not affecting jurisdiction: A I R 1931 All 507 = 1931 A L J 777 = 134 I C 26 S B. and may be waived 59 I C 282 = 1 Pat. L T 447. see also A I R 1929 M 790 = 30 L W 499; and 22 C 268.

—It is an irregularity curable under s. 99 and not justifying interference in appeal 7 N L R 33.

—Manager of Bank giving power-of-attorney to pleader Director to sue Plaintiff filed as signed by him and verified by accountant—Defect is technical and can be amended there being nothing irregular. 69 I C 422

—Plaintiff filing plaint through agent and not signing it—No power-of attorney given to agent on record and no explanation for failure to sign obtained nor objection taken—S: 99 applies. A I R 1923 Rang 206 = 1 R 42 = 74 I C 100.

—A plaint with defective verification or with no verification at all can always be amended and the defect remedied; as the defect is one of form. Even where the defect is never remedied and the application never verified, the character of the application is in no way affected. An application made under s. 73, Registration Act, may be said to be bad

## C. P. C. ( 1908 ) Or. 6, r. 14 &amp; 15 (Contd)

## ( 4 ) Mistake or omission as to signing and verification of pleadings—(Contd)

and refused because it was not properly verified, but the application would still be an application under s. 73. A I R 1924 Lah. 28 = 5 Lah. L J 217 = 74 I C 688 see also 133 I C 626 = A I R 1932 L 28. See also 22 A 55 F B (dissenting from 55 A W N 1899); and 20 A 445 N; and 1895 A W N 75; and 18 A 396; and Civ Cir No 5 dated 22 nd Feb. 1870; and 15 A L J 309 = 39 I C 462 = 39 A 343; and 1912 M W N 1207 = 25 M L J 174 = 17 I C 580; and 48 M L J 721 = A I R 1925 M 660; and A I R 1927 All 514 = 101 I C 698; and 19 S L R 286 = A I R 1925 S 159; and A I R 1925 All 79 = 46 A 637 = 22 A L J 690 = 87 I C 938; and 11 C W N 871.

—Amendment may be made even after the period of limitation: 69 I C 422; see also A I R 1926 Lah 82 = 89 I C 363 or at any stage of the suit. 31 I C 664 = 19 Cal W N 1159; see also 2 C L J 11.

—Non-confirmation with provisions of O. VI, r. 15 is mere irregularity curable by amendment—Verification amended—Plaint must be taken to be presented on date of first presentation and not of amendment. A I R 1927 Cal 376 = 54 C 380 = 31 C W N 397 = 101 I C 573.

—Signing plaint is matter of procedure and defect therein can be cured at any stage of litigation even in Appellate Court as it is not a defect affecting merits of case. A plaint was signed by an agent not authorized to sign plaints on objection by defendants, the plaintiff who was exempted from attendance in Court gave his agent power to sign the plaint and ratified the signature already made. Held that the agent's signature ratified by the plaintiff is sufficient verification. A I R 1928 Pat 51 = 8 P L T 820 = 104 I C 747 see also 19 C W N 1159; and 138 I C 797 = 34 Bom L R 628 = A L R 1932 B 457 = A I R 1932 B 367.

—But O. 33, r. 5 leaves the Court no option where an application for leave to sue as a pauper is defective. Where the verification of the statements in it is not in accordance with the rule for verification of pleadings as stated in O. 6, R. 15, the court is bound to reject the application. 16 I C 83 = 5 Bur. L T 123 = 6 L B R 117.

—Verification as to points of law is not necessary: 138 I C 335 = A I R 1932 L 328.

—The object of signing and verification is to testify the knowledge of the plaintiff: A I R 1925 Sind 275 = 87 I C 1002; and to fix responsibility on the party verifying 34 I C 235 = 20 Cal. W N 1192 = 43 Cal 1001; see also A I R 1931 Mad 679 = 34 Mad L W 69 = 1931 Mad W N 1016 = 133 I C 769; and see also as to importance of verification 41 Cal. 113 = 14 Cr. L J 305 = 19 I C 993.

C. P. C. (1908) Or. 6, r. 14 & 15 (Contd)

(5) Mistake or omission as to signing and verification of pleadings—(Conclud)

—But the verification of a pleading is not evidence of the facts contained in the pleading, and cannot form the basis for a decree in any undefended suit : 20 C W N 1192=34 I C 235 = 43 C 1001.

—In case of Purdamashin lady it should be strictly proved that the pleadings were read out and explained to her : 36 I C 104 = 43 I A 212 = 31 Mad L J 607=14 A L J 1248 = 19 Oudh Cas 192 = 18 Bom L R 1037 = 21 Mad L T 40 = 38 All 627 = 1 Pat. L W 157=4 Oudh L J 22 = 25 Cal. L J 363 = 6 Mad L W 378 = 10 Bur. L T 140 P C.

—So signing and verification are not mere formalities. 26 I C 249 = 7 Bur L T 310.

(6) Persons competent to Sign and verify pleadings.

—A plaint signed by a person who is proved to the satisfaction of the Court to be acquainted with the facts of the case :

1 Pat L T 647 = 59 I C 282.

—As also by any other authorised agent is sufficient. 31 I C 559.

—Person having instructions of real and ostensible plaintiff to sign is a duly authorised person. A I R 1925 Lah 144 = 75 I C 880.

—But plaint signed by an agent holding a special power of attorney in respect of a different matter is irregular. A I R 1930 Bom 511 = 32 Bom L R 1178 = Ind Rul (1931) Bom 65 = 128 I C 609.

—So also signature of a servant who signed and presented the plaint is not sufficient where servant is not proved to be recognised agent. A I R 1922 Bom 113 = 46 B 150 = 23 Bom L R 911 = 68 I C 217.

—Where an agent acting under a power of attorney which did not authorise him to file a suit for dissolution of the partnership, instituted such a suit, held, that the defect in the plaint and in the signature thereof contravened the provisions of O. 6, R. 14, but the defect being a formal one, the court should allow the plaint to be amended and signed by the principal. 7 Bur L T 202 = 25 I C 140.

—Jail regulations and Manuals have the force of law but they cannot override or alter the general law. A plaint signed or a suit authorised by a man in jail is just as good as any other plaint or suit, however many jail regulations are broken. The breach of Jail regulations by the prisoner, his pleader or friends cannot destroy a cause of action or invalidate a plaint and the Court should not enter into the question whether permission of jail authorities had been given or not. A person in jail who is unable to sign a plaint

C. P. C. (1908) Or. 6, r. 14 & 15 (Contd)

(6) Persons competent to sign and verify pleadings—(Conclud)

may authorise some other persons under O. 6, R. 14, to sign it for him and the plaint so signed will be a valid plaint. 40 All 147 = 16 A L J 64 = 44 I C 28 = 19 Cr. L J 865.

—O. VI, r. 14, C P C applies to the case of Companies as well as to the case of private persons and a plaint on behalf of a company may be signed by any person authorized by the company to sign the same. 32 P L R 655, following. 55 B 151 and 8 P R 1912.

—For provisions of O. XXIX, r. 1, are permissive and do not exclude the operation of O. VI, r. 14, in a proper case to a company. A I R 1931 Sind 178.

—O. XXIX, r. 1, applies also to a company if party to an action and it can, therefore authorise some person to sign on its behalf. O. XXIX, r. 1 being permissive and not mandatory an agent can sign for the company without express authority. A I R 1930 Bom 566 = 32 Bom L R 1305 = Ind Rul (1931) Bom 61 = 55 B 151 = 128 I C 557.

—In 100 I C 450 = A I R 1927 S 263 it was held that S. 151 of old Civil P. C. corresponding to O. VI, r. 14 new Civil P. C., does not apply to a suit on behalf of a limited company in which case the plaint must be signed and verified either by the Secretary or by a Director or other principal officer of the Company. But in this case reliance was placed on the Privy Council ruling in 20 I A 139=21 C 60. That ruling, however, when subsequently considered in A I R 1930 B 566=55 B 151. Was held to have been decided on the peculiar facts of that case. And Beaumont C J came to the conclusion in 55 B 151 that O. 6, r. 14 does in a proper case apply to a company.

—Under S. 263 of the Indian Contract Act the rights and obligations of a dissolved firm continue in all things necessary for the purpose of winding up the business of the partnership. If therefore, one of the partners of such firm signs and verifies a plaint on behalf of the firm it would be valid under the proviso to S. 51 of the Civil Procedure Code. 1882; 9 I C 450 = 4 Bur L T 10. see also 12 A L J 1020 = 25 I C 131.

—Person named as co-plaintiff is a plaintiff though he does not sign or verify plaint. A I R 1924 Pat 104 = 3 Pat 67=(1923) Pat 273 = 2 Pat L R 169=5 P L T 591=79 I C 5. see also 17 C 580.

—But where the authority and knowledge of the plff not signing the plaint are not established, such plff must sign and verify. 23 I C 431 = 26 Mad L J 494 = 15 Mad L T 342.

## C. P. C. (1908) Or. 6, r. 16

## Synopsis.

- (1) Appeal.
- (2) Amendment of pleading.
- (3) Complain against amendment.
- (4) "Scandalous".
- (5) "Tend to prejudice, embarrass or delay the fair trial of the suit".
- (6) "Unnecessary".

## (1) Appeal

—Order of the High Court refusing to direct certain allegations in defendant's written statement to be struck out as being unnecessary and scandalous is not a judgment. A I R 1926 Mad 64 = 49 M L J 632 = (1925-) M W N 75 = 52 L W 868 = 91 I C 566.

## (2) Amendment of pleading.

—Where a plaintiff sued in his private capacity to recover a certain amount from the deft. and subsequently put in an application for an amendment that a decree in the alternative may be passed in his favour as managing director of a certain Company. Held the amendment can be allowed and S. 22 of the Limitation Act has no application to the case. By the amendment the Company was not in fact added as party, but the capacity in which the plaintiff sued was sought to be altered. 16 M L T 251 = (1914) M W N 797 = 25 I C 59.

—The plaintiff in action for rescission of contract can be allowed an amendment claiming specific performance as an alternative relief, arising out of the same facts. A I R 1924 Pat 280 = 2 Pat L R 82 = 5 P L T 49 = (1923) Pat 357 = 75 I C 433.

—*Cornish J.*—Where defendant fails to supply particulars of his defence after being ordered by the Court to do so he runs the risk of having his defence struck out. A I R 1930 Mad 473 = 59 M L J 22 = 53 M 645 = 31 L W 387 = Ind Rul (1930) Mad 901 = 126 I C 629.

—Plaint—Returned for amendment—Failure to amend within time—Rejection of plaint—Duty of Court. see 40 Mad 365.

## (3) Complain against amendment.

—Proper person to complain against the amendment by order of court is the plaintiff and not the opponent and so if the former waives that right, the latter cannot do otherwise. A L R 1934 Mad 289.

## (4) "Scandalous."

—The power of the High Court to expunge remarks appearing in the judgment of a Lower Court will only be exercised in extraordinary circumstances, such as, where the observa-

## C. P. C. (1908) Or. 6, r. 16 (Contd.)

## (4) "Scandalous."—(Contd.)

tions are pointedly seditious, blasphemous, or irrelevantly scandalous, or indecent. 3 L W 283 = 33 I C 608.

## (5) "Tend to prejudice, embarrass, or delay the fair trial of the suit."

—Parties should stick up to the pleadings as regards the facts to be proved at the trial; inconsistent rights claimed alternatively should be permitted except when they are destructive of each other. 22 C L J 254 = 20 C W N 310 = 31 I C 181.

—The rule that the Court is not to dictate to the parties how they should frame their case is one that ought always to be preserved sacred subject only to this limitation that the parties must not against the rules of pleadings which have been laid down by law, introduce what is unnecessary or tends to prejudice, embarrass and delay the trial of the suit. In a suit for possession the plff. denied the genuineness of the deed of wakf set up in defence and pleaded in the alternative that the deed had been obtained from her by the defts by fraud and undue influence. Held that there was nothing in the above allegation that could be regarded as likely to embarrass, delay or prejudice the trial, so as to justify the Court in taking action under O. 6, R. 16 C. P. Code. 4 O L J 230 = 40 I C 488.

—It is a question of a fact in each case whether the alternative relief claimed prejudices, embarrasses, or delays the fair trial of the case and it is no general principle that an alternative claim necessarily prejudices, embarrasses or delays the fair trial of the case. It is open to a plaintiff to claim rescission of an agreement for purchase of a property and in the alternative for specific performance of the agreement. Object of the procedural law is to prevent multiplicity of proceedings. A I R 1924 Pat 280 = 5 P L T 49 = (1923) Pat 357 = 2 Pat L R 82 = 75 I C 433.

—Contradictory pleas cannot be refused. A party should not be prevented from taking a new plea of fact though inconsistent with facts already pleaded. He does it at his own risk. A I R 1926 Nag 265 = 92 I C 926.

—Defendant can raise in written statement inconsistent defence.—Party aggrieved may move Court under r. 16 for striking out some of the inconsistent defences.—If Court is not moved under that rule at trial that party cannot contest in second appeal that trial was vitiated. A I R 1930 Mad 814 = 22 L W 61 = Ind Rul (1930) Mad 980 = 127 I C 292.

## C. P. C. ( 1908 ) Or. 6, r. 16 (Concl'd)

## ( 6 ) " Unnecessary. "

—Where a plaint is verbose, extremely long and involved, and impossible to understand and does not allege clearly any fact which would show that the Judge had jurisdiction to hear the case at all the whole document ought to be struck out, an order made for its amendment, so that on intelligible case can be presented to the Court. ( 1929 ) A L J 496 = Ind Rul ( 1929 ) All 330 = 114 I C 906 see also 8 M L T 202=7 I C 800.

—Court should not decide as to relevancy of matters on application to strike out.—The jurisdiction under O. VI, r. 16 should be exercised with care and caution—A written statement should not be struck out unless it is beyond doubt that allegations therein cannot be a defence to the action. A I R 1925 Cal 860 = 29 C W N 670 = 88 I C 435.

## C. P. C. ( 1908 ) Or. 6, r. 17

*Synopsis.*

- ( 1 ) Scope of the rule.
- ( 2 ) Appeal or revision.
- ( 4 ) At any stage of the proceedings.
- ( 5 ) Costs.
- ( 6 ) Effect of amendment.
- ( 7 ) Leave to amend when given :—
  - ( a ) General.
  - ( b ) Additions or omissions in pleadings through bonafide mistake.
  - ( c ) Falsity of claim not extending to whole of title set up, but confined to one particular link in entire claim.
  - ( d ) Mistake or omission as to signing and verification of pleadings.
  - ( e ) Suit for possession.
  - ( f ) Suit for pre-emption.
  - ( ff ) Suit for rendition of partnership accounts.
  - ( g ) Suit for rent.
  - ( h ) Suit on mortgage.
  - ( i ) Suit on pro-note.
  - ( j ) Where it does not alter the nature of the suit or deprive the defendant of plea of limitation.
  - ( k ) Where it is necessary for determining the real questions in controversy between the parties.
  - ( l ) Where it will cause no injury to the opposite party except such as can be sufficiently compensated for by costs or otherwise.
- ( 3 ) Leave to amend when refused.
  - ( a ) General.
  - ( b ) Substitution of legal representative of defendant deceased.
  - ( c ) Suit for confirmation of possession.
  - ( d ) Suit for declaration.

## C. P. C. ( 1908 ) Or. 6, r. 17 (Cont'd)

- ( e ) Suit for partnership accounts.
- ( f ) Suit to set aside decree.
- ( g ) Where amendment would introduce a toally different, new and inconsistent case and the application is made at a late stage of the proceedings.
- ( h ) When the application for amendment is not made in good faith.
- ( i ) Where the effect of the amendment would be to take away from the defendant legal right which has accrued to him by lapse of time.

## ( 1 ) Scope of the rule.

—It is in the discretion of a Court to allow or not to allow amendment of the plaint. 19 C L J 518=25 I C 567.

—A Court is not justified in dismissing a suit for partition on the ground that it contains only a prayer for declaration of title to the properties sought to be partitioned and none for possession. The defect may be allowed to be remedied by an amendment of the plaint. 35 I C 792.

—A suit for balance of partnership amount being of a small cause nature it is the Court's duty to return plaint for presentation to proper Court on disallowing amendment. A L R 1933 N 157=29 N L R 115.

## ( 2 ) Appeal or revision.

—If as a result of the Court's allowing amendment of plaint, a relief barred by limitation is added it is a case of material irregularity which should be put right by revision. A I R 1931 Mad 542=33 L W 648=61 M L J 316=Ind Rul ( 1931 ) Mad 737 = 133 I C 497; see also 32 M 334.

—Amendment by High Court in Sm. Cause revision, see. 20 C W N 1020.

—Amendment—Suit for partition—change into a claim under a will—No revision. 10 M L T 188=12 I C 104.

—The exercise of the power of a Court to allow pleadings and issues to be amended, under O. VI, r. 17 and O. XIV, r. 5, is discretionary; and this discretion cannot be interfered with in revision until it is shown to have been absurd or perversely exercised. 9 Ind Cas 267=51 P L R 1911.

—Order holding portion of claim not sustainable and directing amendment—Appeal—Revision—See. 216 P L R 1911.

## ( 3-4 ) " At any stage of the proceedings. "

—A Court has power to allow amendment at any stage upon such terms as it thinks



C. P. C. (1908) Or. 6, r 17 (*Conto*)

(3-4) "At any stage of the proceedings."—(*Concl'd*)

just. But ordinarily an application must be made for the amendment, an explanation must be offered, reasons must be given by the Court for allowing it, and, where necessary, terms must be imposed; also, the other side must be given a chance of meeting the plea. 28 N L R 320 (322).

#### (5) Costs.

—Where amendment of plaint is allowed and it is purely of a formal nature and does not in any way prejudice or increase deft's costs, he is entitled to no costs. 2 O L J 40= 30 I C 323.

#### (6) Effect of amendment.

—If a plff. is allowed to abandon a claim, the Court cannot, in allowing such abandonment, be said to be entertaining that claim. The effect of an application to amend a plaint by striking out certain claims is in substance as if the suit had never been commenced in respect of such claims. 12 Bur L T 155 = 9 L B R 275 = 51 I C 376.

—Where a suit was instituted against certain persons as members of a joint Hindu family and after the expiry of the period of limitation the plaint was amended by pleading in the alternative that the defendants were in any event liable as partners of a firm and the other members of the family were also added as parties: *Held.* (i) that so far as the original defendants were concerned there was no bar of limitation, (ii) that as regards the newly added defendants under s. 22 (1), Limitation Act, the suit must be deemed to have been instituted when leave under cl. 12 of the Letters Patent was freshly granted and they were again brought on the record, and the suit was time-barred. 33 Bom L R 1385.

—Date of suit for purposes of limitation in cases where amendment allowed is the date of filing of suit and not date when amendment is allowed. 34 B L R 628 (631) = 138 I C 797 = I R 1932 B 428 = A I R 1932 B 367 = A L R 1932 B 457

—Pleadings—Description of property amended to bring suit within jurisdiction—Effect on suit and on parties and stranger. see. 18 C W N 817. (P C).

#### (7) Leave to amend when given.

—(a) *General*:—On reasonable grounds, even the Appellate Court can allow the amendment of the cause title. "The Court should look to the substance rather than to the form of the title." A I R 1931 Sind 63=

C. P. C. (1908) Or. 6, r. 17 (*Contd*)

(7) Leave to amend when given—(*Contd*)

24 S L R 478=Ind Rul (1931) Sind 78=131 I C 718 see also 47 B 785; 6 L 252; and 5 Pat 128.

—A sole proprietor of a firm, carrying on business in a name of the firm filed a suit in the name of the firm. When it transferred he was sole proprietor and the frame of the suit was objected to be prayed for amendment of plaint, *Held* that amendment should be allowed upon the terms that the plaintiffs would pay all costs up to date of amendment. 35 C W N 432, relying on 33 Bom L R 117.

—Review of decree dismissing suit—Order rejecting—Appeal from—Leave to amend plaint granted in, in the special circumstances of the case, on terms as to costs. 36 C W N 112.

—Where the deft is at default, the Court can allow the plff any equitable relief he may be entitled to, even in appeal and may treat his pleadings as amended for that purpose: 82 I C 964=A I R 1925 C 434.

—Where the amendment is asked for within the period of limitation, the fact that on the date of the order it is barred, will not prevent the court from allowing the same. All these rules have no application where the amendment is ordered at the instance of, and in the interests of, the defendant. 10 N L R 32=23 I C 165.

—(b) *Additions or omissions in pleadings through bonafide mistake*:—Improper addition of claims—Suit for the rent coupled with claim for declaration of title, to oust jurisdiction of Revenue Court—Amendment of plaint allowed on Letters Patent Appeal—*bona fide* mistake. see 34 I C 354.

—Absence of or error in plaint as to—Amendment of plaint so as to furnish particulars—(Giving of opportunity for, proper—Dismissal of suit on that ground not proper. 11 P 624 = 140 I C 570 = A I R 1932 P 355.

—A claim framed through pure oversight and not fraudulent or intended to overreach can be allowed to be amended: 11 I C 827.

—Though the plff's neglect should be remedied with sufficient compensation to deft: 11 I C 856.

—Amendment would generally be allowed in case of pure mistake, but not where the omission is deliberate: 21 W R 208; see to the same effect. 17 C W N 311 = 17 I C 646.

—But it should be noted that when allowing amendment, opportunity must be given to the deft. to amend the written statement and to adduce new evidence: 16 I C 785.

—(c) *Falsity of claim not extending to whole of title set up but confined to one particular link in entire claim*:—Leave to amend plaint will be granted in case of especially



C. P. C. ( 1908 ) Or. 6. r. 17 (Contd)

( 7 ) Leave to amend when given—(Contd)

where defendant also set up a false case. 36

C W N 112 ( 116 )

—(d) *Mistake or omission as to signing and verification of pleadings*:—Amendment to rectify mistake or omission as to signing of plaint is allowed at any time irrespective of bar of limitation. 34 B L R 628 ( 633 ) = 138 I C 797 = I R 1932 B 428 = A I R 1932 B 367 = A I R 1932 B 457.

—Omission as to verification of creditor's petition under Pro. Ins Act 1920 s. 9 can be rectified by amendment and Court ought to allow amendment : A I R 1932 L 28 ( 29 ).

—And the Nagpur J C Court has held that where a suit is in fact filed with the knowledge and by the authority of the plff, a defect in the signature is a mere irregularity not justifying interference in appeal, and that a plaint with defective signature could not be rejected under O. 7 r. 11 but should be amended under O 6 r 17 : 7 N L R 33 = 10 I C 731.

—(e) *Suit for possession*:—A suit brought as one for possession may, in the discretion of the Court, where the circumstances of the case permit it, be converted into one for redemption on the assumption that the mortgage was valid and binding; but a plaintiff must ordinarily succeed on the case he has made in the plaint. A I R 1923 Cal 296 = 67 I C 394.

—(f) *Suit for pre-emption*:—Pre-emption suit—Objection to non-inclusion of portion of property taken at late stage—Objection allowed Plaintiff, also should be allowed to be amended. 230 P L R 1914.

—(ff) *Suit for rendition of partnership accounts*:—Leave to amend plaint in second appeal so as to include prayer for dissolution was granted on payment of costs because all the facts necessary for the decision of the case on the proposed amendment were before the Court. 139 I C 441 = 33 P L R 694 = I R 1932 L 580.

—(g) *Suit for rent*:—A suit for rent may be amended into one for damages for use and occupation. 30 I C 753 = 8 Bur L T 234 = 8 L B R 270.

—(h) *Suit on mortgage*:—A mortgage-deed being found not in accordance with law, the Appellate Court can amend the plaint so that personal remedy against the mortgagor can be granted. 14 A L J 361 = 35 I C 192.

—Though the decision in 30 M 388 does not expressly state that the plff. can always be allowed to redeem a mortgage other than that which he sought to redeem ( but which the deft. admitted as the one under which he was holding ) yet, whenever such a remedy is allowed the plff. ought to amend his plaint. (1916) 1 M W N 171 = 32 I C 624.

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C. P. C. ( 1908 ) Or. 6. r. 17 (Contd)

( 7 ) Leave to amend when given—(Contd)

—*Plaint—Simple mortgage—Suit for sale*:—Mortgage found invalid owing to want of proper attestation—Decree as on simple bond, can be granted, though amendment asked for at late stage of the case. T P Act S. 59 see 3 O L J 397 = 34 I C 397.

—(i) *Suit on promissory note*:—Plaint—Promissory note payable to bearer, suit on—Not opposed to S. 26 Paper Currency Act—Suit on the original cause of action—Maintainability, see 6 L W 630.

—(j) *Where it does not alter the nature of the suit or deprive defendant of plea of limitation*:—Madras Hindu Religious Endowments Board—Suit against—Amendment of plaint sought in—Jurisdiction of Board—Case involving question of—Position of Board in, not quite that of ordinary private litigant—Board ought not to oppose amendment unless effect of amendment is to alter nature of suit or to deprive Board of plea of limitation. 1932 M W N 290 = A I R 1932 M 603 ( 604 ) = A L R 1932 M 237.

—If a cause of action is sought to be added by way of amendment and if a fresh suit on that cause of action would be barred if instituted when the amendment is asked for, then ordinarily—even then the rule is not absolute—the Courts would not allow the amendment so as to give the plff. the benefit of the time between the date of the institution of the suit and the time of amendment and prejudice the deft. by, as it were, ante-dating the institution of the suit. That has nothing to do with a case where an amendment is sought to be made for the purpose of showing that the original cause of action as laid was not barred. 31 M L J 688 = 4 L W 455 = ( 1916 ) 2 M W N 362 = 38 I C 720.

—As the two distinct causes of action, viz. the cause of action on the promissory note and the cause of action on the loan giving rise to the promissory note, could be set up in the same suit by the original plaintiff, an amendment of this nature could be allowed even in appeal. A L R 1933 B 433.

—Where in a suit by the endorsee of a promissory note, the cause of action introduced by the amendment was not barred by limitation but was extraneous to that on which the suit was brought, the plaintiff should pay Court-fees afresh. A I R 1931 Mad. 533 = Ind Rul ( 1931 ) Mad 465 = ( 1931 ) M W N 390 = 131 I C 1. dissenting from. 1918 M W N 89.

—It is competent for the Court to allow amendment of plaint so as to seek different relief provided thereby the fundamental character of suit is not changed. A L R 1933 R 243.

C. P. C. (1908) Or. 6, r. 17 (Contd)

(7) Leave to amend when given—(Contd)

—(k) Where it is necessary for determining the real questions in controversy between the parties A transferee of property who was under the contract bound to cause other property to be transferred to the transferor in consideration of the transfer in his favour, sued for declaration of his right to the property transferred to him without praying for possession and without averring his willingness to perform his part of the contract. An amendment of the plaint was allowed so as to enable plaintiff to pray for declaration and to aver his willingness to perform his part of the contract. 34 B L R 125 (128)=I R 1932 B 530 = A I R 1932 B 175 = A I R 1932 B 283.

—Order VI, r. 17 provides that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. A I R 1931 Oudh 54=7 O W N 1195=Ind Rul. (1931) Oudh 155 = 130 I C 347

—(l) Where it will cause no injury to the opposite party except such as can be compensated for by costs or otherwise.—Applicant for leave not acting *mala fide* and not causing by his blunder injury to his opponent which could not be compensated for by costs or otherwise.—Leave should always be granted in case of. 139 I C 441 = 33 P L R 694=I R 1932 L 580  
See also 2 C 1; and 32 C 582

—Where a party bound to bring a suit contemplated by O. 21, r. 103 of the Code brought a suit under S. 9 of the Specific Relief Act and the High Court in revision held, reversing the Court below, that the suit was not maintainable and it appeared that a fresh suit for declaration by the plaintiff would be barred by time, the plaint was allowed to be amended so as to convert the suit into a regular suit for possession either based on title or on right to possession. 1932 A L J 812 = 139 I C 366 = I R 1932 A 560 = A I R 1932 A 703 = A L R 1932 A 1093.

(8) Leave to amend when refused.

—(a) General—Not allowed, amendment not having been asked for previously at any stage. A L R 1932 L 414 (Civ.) = 1932 P C L 414 (Civ.)

—Appellate court's refusal to entertain application for amendment of written statement which was drafted by skilled lawyer and the case below was hotly contested, amounts to proper exercise of its discretion and so High Court need not interfere. A L R 1934 L 196.

—Date of cause of action amended in plaint—Amended date not proved—Reversion to unamended plaint not allowed A I R 1926 P C 85 = 48 A 457 = 53 I A 187=24 A L J 736

C. P. C. (1908) Or. 6, r. 17 (Contd)

(8) Leave to amend when refused—(Contd)

= 1926 M W N 520 = 24 M L W 241 = 31 C W N 324 = 99 I C 650.

—(b) Substitution of legal representative of defendant deceased:—A mere petition stating that legal representative of deceased defendant in possession of the movable properties of the deceased is not amendment of plaint or substitution of legal representative. 56 C L J 228 = A L R 1933 C 153.

—(c) Suit for confirmation of possession:—A suit for confirmation of possession cannot be changed into a suit for recovery of possession but on a case being *bona fide* Court may assist the plaintiff who has proved in substance but not in form. 4 C 46.

—The Court can allow amendment of a suit for confirmation of possession into recovery of possession if the plaintiff has good cause of action. 35 C W N 620.

—Suit for possession into one for declaration of charge. See 7 Bur L T 69=24 I C 482.

—But a suit for possession cannot be amended into one for redemption. 1 P L R 1912 = 12 I C 576.

—(d) Suit for declaration:—Suit for declaration cannot be amended into one for ejectment on appeal. 48 I C 318.

—Amendment of suit for declaration of right, to easement, into suit on titles is not allowed. 34 I C 541.

—But suit for declaration of title and confirmation of possession can be converted into one for ejectment. 44 I C 996.

—A suit for declaration of title to a specific area on the basis of partition cannot be allowed to be amended by substituting a claim by way of inheritance. 9 I C 774.

—A suit for declaration of title cannot be amended into one for specific performance so as to make a different case A I R 1931 Lah 595 = 32 P L R 278 = Ind Rul. (1931) Lah 822 = 133 I C 646 relying on; 48 C 832 P C.

—A suit for declaration can be amended by adding a prayer for possession, if defendant takes possession after suit. 16 Ind Cas 734. See also 5 Bom L R 429.

—(e) Suit for partnership accounts:—Amendment of a plaint in partnership suit valued at Rs. 5,000 but found on accounts being taken to have a value more than Rs. 11,000 and order to present the same in proper court are *Ultra Vires*. 11 N L R 13. (B).

—(f) Suit to set aside decree:—Suit to set aside decree for fraud cannot be converted into one for rectification of mistake in second appeal. 35 I C 91.

—(g) Where amendment would introduce a totally different, new and inconsistent case and the application is made at a late stage of the proceedings:—A suit for possession cannot

C. P. C. (1908) Or. 6, r. 17 (Contd.)

## ADDITIONAL CASES ON ORDER VI RULE XVII.

## (1) Scope of the rule

—Under O. 6 r. 17 amendment can be allowed at any stage of the proceedings provided it is necessary for determination of real question at issue and there is no question of prejudice, the object being to administer justice and not to punish for mistake: 26 N L R 359 = 130 I C 105 = A I R 1931 N 20 See also 7 O W N 1195 = A I R 1931 O 54.

—Court can rightly dismiss an appeal going on in the name of dead person for long time where no application being made to correct the mistake. A I R 1929 Nag 261 = Ind Rul (1929) Nag 209 = 117 I C 257.

—Court cannot compel the parties to amend their pleadings. 111 I C 787 (Lah).

—The provision of O. VI, r. 17, C P Code, has application of cases before the Sikh Gurdwaras Tribunal. A I R 1928 Lah 325 = 9 Lah 649 = 29 P L R 733 = 110 I C 164.

—Whether one can apply for amendment in a suit by two persons is a question to which no definite answer can be given. A I R 1927 Cal 733 = 46 C L J 51 = 104 I C 151

—Where the amendment introducing a time barred was suggested at the instance of the defendant himself and was allowed, defendant must be deemed to have waived the plea of limitation. A I R 1927 Nag 310 = 23 N L R 81 = 103 I C 455.

—Objective law cannot be allowed to prevail over substantive rights that have accrued to the party and hence validity of amendment or otherwise may be allowed to be argued at the hearing. A I R 1926 Sind 264 = 21 S L R 336 = 96 I C 79.

—If necessary plaintiff must be ordered to be amended but in no case plaintiff can be returned for amendment. A I R 1921 Sind 166 = 17 S L R 223 = 85 I C 893.

—Where a party has been duly summoned but fails to appear cannot be allowed to object to *ex parte* order of amendment. A I R 1925 Nag 108 = 80 I C 375.

—Partible property other than that included in the plaintiff can also be made a subject of partition without necessary amendment. A I R 1924 Mad 354 = 18 L W 656 = (1923) M W N 841 = 76 I C 798.

—The main and perhaps the only object of permitting amendment of plaintiff is to

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C. P. C. (1908) Or. 6, r. 17 (Contd.)

## (1) Scope of the rule—(Contd.)

avoid unnecessary litigation. A I R 1921 Nag 161 = 64 I C 99.

—Order for an amendment by appellate Court can be carried out in the Appellate Court. 63 I C 701.

—The object of r. 17 is to allow all reasonable amendments necessary for the final decision. A I R 1921 Lah 220 = 3 Lah L J 227 = 60 I C 502.

—Order of amendment by High Court under general powers—Time prescribed by O. 6, R. 18—Expiry of, not fatal to amendment. 19 C W N 200 = 22 I C 778

—A Court cannot compel a party to amend a plaintiff. An order returning the plaintiff for amendment when the party refuses to amend is an order without jurisdiction. If a party refuses to amend the proper course is to reject the plaintiff or dismiss the suit. 24 M L J 455 = 1913 M W N 399 = 19 I C 672.

—Applicability of O 6 r. 17 to pauper applications, see 26 M L J 343.

## (2) Appeal or revision.

—Where defendants amended written statements questioning the jurisdiction of the Court after the close of the case, plaintiff was allowed to amend his plaintiff so as to bring the suit within jurisdiction. Question of jurisdiction ought to have been raised earlier and hence order though irregular is not subject to revision. A I R 1928 Mad 559 = 111 I C 737.

—Where discretion in allowing an amendment was exercised upon a wrong principle, it can be interfered with in second appeal. A I R 1927 Oudh 549 = 101 I C 569.

—Amendment allowed after the case was closed, can be set aside in appeal. 27 P L R 29 = 99 I C 979.

—Interference by the High Court with the discretion of the lower Court in allowing an amendment will not be proper unless it was exercised in entirely wrong principles. A I R 1926 Cal 1112 = 30 C W N 928 = 98 I C 751.

—Order refusing to allow an amendment, vital to the suit is subject to revision. A I R 1926 Mad 1124 = (1927) M W N 256 = 24 L W 400 = 97 I C 936.

—Powers given by O. VI r. 17 are very wide and should always be exercised for the determination of real question in issue. Revision lies against improper refusal. A I R (1925) Mad 585 = (1925) M W N 469 = 48 M L J 349 = 21 L W 639 = 87 I C 90.

C. P. C. (1908) Or. 6, r. 17 (Contd.)

(2) Appeal or revision—(Concl'd)

—Revision does not lie against an order permitting the plaintiff suing for a bare declaratory decree to amend his plaint so as to include prayer for consequential relief. A I R 1925 Rang 199 = 4 Bur L J 12 = 86 I C 509.

—Order refusing to allow an amendment is subject to revision. A I R 1925 Nag 195 = 78 I C 510

—Description of plff—Amendment allowed in appeal—No appeal from order allowing amendment. see 42 I C 455.

—Under the Code a Court's power to allow amendment is very comprehensive: so, where a Lower Court allowed a claim for partition to be amended into a claim partly for partition and partly for recovery of certain property, or in the alternative for a partition the High Court refused to interfere in revision. 10 M L T 188 = 12 I C 104 see also 12 I C 119.

—The exercise of the powers of a court to allow pleadings and issues to be amended under O 6 R 17 and O 14 R 5 is discretionary and this discretion cannot be interfered with in revision until it is shown to have been abused or perversely exercised. 51 P L R 1911 = 193 P W R 1911 = 9 I C 267.

—Discretion and power to amend pleadings and issues—Interference in revision—See 9 Ind Cas 267 = 51 P L R 1911

—Where on the objection of the original sole Deft. in a case other Defts. were added at the request of the Plffs, but the plaint was not amended in consonance with the addition so as to set forth a cause of action against the newly added Defts; where though the objection was taken in the written statement of one of the newly added Defts. no issue was taken and the point was neither argued in both the lower Courts nor even clearly taken in the memorandum of second appeal; and where one of the newly added Defts. actually adduced evidence in respect of title which he claimed in himself. Held, that the irregularity was not incurable and was insufficient to warrant an interference by the High Court in second appeal 1 L W 775 = 25 I C 607.

—Amendment of pleadings—Refusal by Pres, Sm. C. Court—Revision see. 22 I C 241.

(3) Amendment of pleading without notice.

—Effect should be given to the amendment which though allowed without notice to the defendants is in no way prejudicial to them. 64 I C 305 (Cal)

C. P. C. (1908) Or. 6, r. 17 (Contd.)

(4) At any Stage of the proceedings.

—Amendment sought to be introduced in second appeal cannot be allowed. A I R 1930 Cal 737=34 C W N 671 = Ind Rul (1931) Cal 28=128 I C 108.

—Where in a suit for ejectment the transaction was held to be mortgage by conditional sale and not sale, the plaint was allowed to be amended accordingly even in Appellate stage. A I R 1930 Sind 98 = Ind Rul (1930) Sind 220=125 I C 828.

—Amendment at a late stage entailing a re-trial cannot be allowed. A I R 1928 Lah 599=9 Lah 599=9 Lah 289=29 P L R 477 = 112 I C 425.

—Amendment of plaint if not sought in earlier stages, cannot be allowed in second appeal. A I R 1928 Lah 32 = 9 Lah L J 334 = 109 I C 320.

—Court has got power to allow amendment at any stage. A I R 1927 Lah 103 = 8 Lah 257 = 9 Lah L J 25 = 28 P L R 15=99 I C 770.

—In proper cases amendment can even be permitted for the first time in second appeal. A I R 1926 Mad 1117=51 M L J 418 = 98 I C 39.

—Amendment in second appeal should be allowed only in special circumstances. A I R 1926 Mad 989=49 M 978=51 M L J 328 =24 L W 304 = (1926) M W N 730 = 7 O L J 1123=97 I C 643.

—Court may allow amendment of objection-petition even after the expiry of the time allowed for the same. A I R 1926 Mad 396=24 L W 213=92 I C 100.

—Amendment can be allowed at any stage even in appeal. Amendment allowed with the consent of the Pleader of the opposite party in appeal cannot be objected to in second appeal. A I R 1926 Oudh 98=1 Luck 33=13 O L J 115=3 O W N 45 = 91 I C 927.

—Alternative claim sought to be set up in the last stage, was disallowed by the Privy Council though it had power to do so. A I R 1925 P C 169=L R 6 P C 126 = 49 M L J 238=1925) M W N 532=22 L W 306 = 47 A 459=41 C L J 459 = 27 Bom L R 853 (P. C.) = 87 I C 292.

—An amendment under O. XVII, r. 6 may be allowed at any stage including of appellate stage. A I R 1925 Pat 168=1924 Pat 297=6 P L T 465=84 I C 386.

—Amendment cannot be refused only on the ground of delay. A I R 1925 Oudh 291=27 O C 231=11 O L J 613=79 I C 1033.



C. P. C. (1908) Or. 6, r. 17 (Contd.)

(4) At any Stage of the proceedings—(Contd.)

—Grounds of appeal can be allowed to be amended at any stage if they are not sufficiently clear. A I R 1923 Lah 115=3 Lah 382=77 I C 207 (C).

—Amendment of pleadings at such a late stage as second appeal cannot be allowed. A I R 1923 Lah 657=75 I C 740.

—But an amendment at a late stage which would cause prejudice to the defendant should not be allowed. A I R 1929 Cal 223=26 C W N 459=69 I C 963.

—Provided no injustice is done to the other party, amendment of plaint should be permitted at any stage of the proceeding. A I R 1921 Lah 367=85 P L R 1922=67 I C 335.

—Plaintiff's alleging but failing to prove title to part of joint estate—Defendant's asserting but found to have no exclusive title—Decree for joint possession can be given—Highest Court of appeal may allow amendment of plaint 6 Lah L J 25=2 L 73=68 P L R 1921=61 I C 415

—Amendment can be permitted at any stage provided no injustice, other than which can be compensated for by costs, is due to the other side. 3 U P L R (Lah) 44=61 I C 328

—Claim for relief against party exonerated in court below—Amendment not to be allowed in second appeal. See 58 I C 581.

—An application for amendment of the pleadings will not be granted at a late stage of the case on second appeal. 145 P L R 1918=47 I C 906.

—The Chief Court will not interfere in second appeal and allow an amendment of the plaint which had been disallowed by the court below. 119 P W R 1918=46 I C 471.

—Where in a suit for damages for injuries sustained by plff. by reason of deft's negligence, the trial judge allowed an amendment of the plaint by increasing the amount of damages claimed on an application made at the beginning of the trial when the learned judge reserved his decision until he had heard more of the evidence and granted the amendment at a later stage, *held*, that the order allowing the amendment was not illegal and would not be interfered with in appeal. 23 M L T 312=7 L W 415=45 I C 556.

—Amendment at any stage of the proceedings. see 7 N L R 33=10 I C 731

—“At any stage, Old—Code—Difference see 18 I C 576=167 P W R 1911.

C. P. C. (1908) Or. 6, r. 17 (Contd.)

(5) Costs.

—Order to pay costs of amendment in cash against pauper plaintiff is not proper. A I R 1922 Bom 385=24 Bom L R 924=47 B 104=69 I C 207.

(6) Effect of amendment.

—Amendment dates back the suit when no new party is added. A I R 1926 Mad 487=50 M L J 442=(1926) M W N 174=93 I C 625.

—Amendment has retrospective effect at least from the date of the application. A I R 1927 Nag 95=98 I C 658.

—Where a plff. originally suing for possession of certain plots of land seeks to amend the plaint by including certain other plots the question is not one of amendment of plaint but of an addition of entirely new lands and as regards such new lands, the suit must be taken to have been filed on the date when the claim in respect thereof was made by the plff. 41 I C 728.

(7) Leave to amend when given.

—(a) General :—New plaintiff may be added for really deciding plaintiff's claim. Defendant's costs should be on plaintiff who had no just claim. A I R 1931 Cal 765=2 C L J 357=Ind Rul (1931) Cal 300=58 C 561=129 I C 860.

—Non-joinder of parties is no ground for dismissal of a suit—Opportunity should be given to the parties to amend the plaint accordingly. The Appellate Court should not consider the plea of non-joinder which was not raised in the trial-Court. If it is raised and the suit is dismissed, it would be contrary to O. I, r. 9. A I R 1930 Rang 295=Ind Rul (1931) Rang 76=129 I C 508.

—Discretion under O. VI, r. 17, given to the Court is a judicial discretion to be exercised in legal principles and not arbitrarily by amendment to be allowed must be sought in good faith, an application for the same must be made before the claim is time-barred and the character of the suit should not thereby be changed A I R 1930 Nag 295=Ind Rul (1931) Nag 7=128 I C 407.

—One of the main objects of allowing an amendment of plaint is to avoid multiplicity of suits. Hence the amendment of a suit for a mere declaration into one for possession is allowed. Amendment ought not to be allowed where there is a change in the jurisdiction, or if it admits of time barred



C. P. C. (1908) Or. 6, r. 17 (Contd)

(7) Leave to amend when given—(Contd)

claim or entails fresh enquiry. "The rule (permitting amendment) is confined solely to those cases in which the cause of action for the new relief was already existing but is on account of ignorance or *bona fide* mistake, omitted to ask for the proper relief in the first instance. 124 I C 244 See also. A I R 1928 Mad 828=(1927) M W N 784=110 I C 775.

—Amendment can be allowed where the change is only in the nature of the liability to pay the debts. Amendment should be allowed even if the original cause of action is modified to some extent or another is added. A I R 1931 M 369 = Ind Rul (1930) Mad 302 = 122 I C 174.

—In a suit for specific performance, amendment as to relief of possession may be allowed. A I R 1926 Mad 155 = 22 L W 579 = (1925) M W N 802 = 92 I C 599.

—Under O. VI, r. 17 amendment can always be allowed unless suit is changed or greater inconvenience is caused to the defendant. A I R 1930 Lah 221 = 30 P L R 645 = Ind Rul (1929) Lah 874 = 119 I C 330.

—Amendment should always be allowed unless it be *mala fide* even if defendant is grossly careless. A I R 1929 Rang 33 = Ind Rul (1929) Rang 195 = 117 I C 563. See also A I R 1928 Nag 203 = 109 I C 293.

—Object of the rules of procedure is to administer justice properly and hence amendment whenever necessary can be made even without formal application unless prejudice to defendant is thereby caused. Ind Rul (1929) Lah 596 = 116 I C 884.

—Where in suit for dissolution of partnership plaintiff comes to know of business carried on in some place of which he was not so long aware he is certainly entitled to include a prayer for dissolution of that business and the plaint can be allowed to be amended to that effect. A I R 1928 Mad 402 = 107 I C 637.

—In a suit by owner of house for perpetual injunction, amendment seeking to add prayer for possession of house should be permitted without driving him to a separate suit. A I R 1928 Lah 112 = 9 Lah L J 577 = 29 P L R 280 = 106 I C 615.

—Where defendant had died before suit was filed of which plaintiff was not aware but had also joined his heirs by way of additional precaution it was held that amendment for striking out the name of dead defendant should be allowed A I R 1928 Cal 152 = 105 I C 284.

—Only if a slight amendment of a plaint is necessary, it should be allowed. A I R 1926 Lah 472 = 27 P L R 317 = 97 I C 800.

C. P. C. (1908) Or. 6, r. 17 (Contd)

(7) Leave to amend when given—(Contd)

—If plaintiff's right had been jeopardized by a decision subsequent to the filing of the suit, amendment although strengthens plaintiff's claim not derived by the defendant, should be allowed. A I R 1926 Mad 754 = 23 L W 618 = 95 I C 267.

—Non-payment of Court-fees should not be a ground for the rejection of amendment. It should be allowed and the applicant be asked to pay the necessary Court-fee within a fixed time. A I R 1926 Oudh 508 = 94 I C 875.

—Amendment for the purpose of administration of justice, of saving of time and money, should be freely allowed. A I R 1925 Sind 260 = 92 I C 1019.

—Wherever possible the tribunal should be guided by the provisions of the C P C and the amendment of original charge according to evidence should be allowed. A I R 1926 Mad 1043 = 91 I C 450.

—Amendment so as to avoid multiplicity of suit can be allowed at any stage of the proceeding. A I R 1925 Rang 282 = 4 Bur L J 141 = 3 Rang 183 = 89 I C 425.

—Plaintiff is not entitled to damages on the basis of re-sale made after undue delay in a suit where defendant fails to take delivery on due date. But amendment as to claim of damages on the basis of market price should be allowed. A I R 1925 Sind 222 = 88 I C 571.

—Powers of amendment should be liberally exercised and amendment should always be allowed where nature of the suit is not thereby changed. A I R 1925 Mad 790 = 22 L W 318 = 48 M L J 489 = 88 I C 65.

—Order allowing the withdrawal of suit with liberty to bring a fresh suit and refusing amendment on the ground that it would entail a re-trial is illegal and must be set aside and the amendment allowed to avoid multiplicity of suits. A I R 1925 Oudh 718 = 87 I C 1055.

—Very wide discretion is given to a Court by O. VI, r. 17. A I R 1925 Oudh 692 = 87 I C 950.

—Where claim of title is based on custom, amendment that the title was valid even if the Sind custom were not proved should be allowed. A I R 1925 Oudh 523 = 12 O L J 253 = 87 I C 356.

—Amendment for avoiding multiplicity of suits may be allowed. A I R 1925 Cal 944 = 86 I C 615.

C. P. C. (1908) Or. 6, r. 17 (Contd.)

(7) Leave to amend when given—(Contd.)

—Where if the plea had been raised earlier, defendant could not have objected to it, amendment should be allowed so as to include that plea. A I R 1925 Sind 241 = 19 S L R 12 = 86 I C 357.

—Amendment seeking to add alternative prayer on the same ground should be allowed. A I R 1925 Oudh 555 = 85 I C 344.

—O. VI, r. 17 gives very wide power to the Court to allow an amendment at any stage of proceeding. A I R 1925 Nag 62 = 79 I C 911.

—Court can allow even the amendment seeking to introduce time-barred relief. A I R 1924 Cal 517 = 50 C 878 = 27 C W N 1007 = 79 I C 287.

—Amendment which has the effect of shortening litigation should be allowed. A I R 1925 Nag 195 = 78 I C 570.

—Claim for share in ancestral property can be changed into one of maintenance in second appeal. A I R 1923 Nag 151 = 6 N L J 69 = 71 I C 566.

—Discretion given to the Courts under O. VI, r. 17 is very wide. If a limit to amendments may be laid down, it is this that they must not be allowed to prejudice the substantial rights of the opposite party, but observing due caution in that regard, the time and extent of each amendment are in the judicial discretion of the Court. A I R 1923 Nag 182 = 19 N L R 36 = 6 N L J 100 = 71 I C 436.

—In a suit for damages on breach of contract, amendment for rectification of errors in the contract may be allowed. A I R 1921 Mad 664 = 14 L W 341 = 70 I C 284.

—Plaintiff sued for pre-emption and possession of certain land transferred under an *adhilapi* tenure. The first Court found in favour of the plaintiff on all the issues, but dismissed the suit on the ground that plaintiff had not stated in the plaint that he was prepared to perform all the conditions attaching to the *adhilapi* tenure. An application for amendment of the plaint was rejected as having been made too late. Held, that the Appellate Court had ample power to allow an amendment which did not offend against any provision of the law and that the amendment allowed in the present case by the Dt. Judge on appeal did not alter the nature of the suit and that it was a fit case in which the amendment ought to have been allowed. 53 I C 965.

—A suit was instituted as a suit for partition but the Court held that the Court-

C. P. C. (1908) Or. 6, r. 17 (Contd.)

(7) Leave to amend when given—(Contd.)

fee of Rs. 10 paid was insufficient as the plffs. were out of possession at the date of the suit. *Adcalorem* Court-fees were thereupon paid but no amendment was made of the plaint and an application for the purpose filed at the hearing was rejected as the application did not contain all the elements necessary to convert the suit into a suit for recovery of possession. Held, that O. 6, r. 17 C P C gives ample power to the Court to give leave to the parties to amend the pleadings but such leave should not be given where the amendment would prejudice the opposite party. 24 C W N 749 = 58 I C 665.

—The law relating to the amendment of pleadings, as contained in O. 6, R. 17 confers a plenary authority upon the Court to allow a party to alter or amend his pleadings in such manner and upon such terms as may be just and the amendment may be allowed at any stage of the proceedings. An amendment should always be allowed if thereby the real and substantial question can be raised between the parties and multiplicity of legal proceedings avoided. 56 I C 115.

—Amendment—Plaint appellate Court, T P Act Ss. 54-55 sec 53 I C 283.

—In a suit for specific performance or in the alternative for damages, amendment can be allowed as to giving up of a claim for specific performance, rule under O. VI, r. 17 being sufficiently wide. A I R 1922 Sind 36. See also 52 Bom 597 = 53 I A 360 = 30 Bom L R 292 = 28 L W 257 = 55 M L J 523 = 41 I C 413 = 26 A L J 1220 = 48 C L J 451 = (1928) M L W 893 = 32 C W N 953 = A I R 1928 P C 208 O. 6, R. 17 of the C P Code confers a very wide discretion upon the Court with respect to the amendment of pleadings, and an order allowing amendment of a plaint will not be set aside when the amendment has not caused any prejudice to deft 21 P W R 1919 = 49 I C 441.

—It is competent to the court to allow an amendment of the plaint, where after taking the evidence it finds that the plff's pleader had in the beginning of the trial and as a result of his information made a wrong statement. 113 P W R 1918 = 48 I C 114.

—The provisions of O 7 R 6 of the C P Code. should be construed in a liberal and reasonable spirit and save under very exceptional circumstances the Court of first instance should allow the plff to amend his plaint so as to state the ground of exemption from the law of limitation as required by that rule. 31 I C 195 dist. 102 P R

C. P. C. (1908) Or. 6, r. 17 (Contd.)

(7) Leave to amend when given—(Contd.)

1918 = 116 P W R 1198 = 120 P L R 1918 =  
46 I C 495.

—Amendments of pleadings should be allowed when asked for by a party provided the opposite party is not taken by surprise or precluded from adducing evidence or raising the necessary issues. Where, however, a party is agitating only a technical claim and the character of the suit is likely to be altered or where there is inordinate delay in asking for amendment the Court would be justified in refusing to grant an amendment. The main considerations to be borne in mind are that multiplicity of suits should be avoided and the interests of substantial justice should be advanced. 34 M L J 177 = 23 M L T 280 = 45 I C 949.

—Plff. applied for leave to amend his plaint before settlement of issues so as to increase the number of shares claimed from 1/17th to 2/16ths or 1/8th. This application was rejected and so was an application for review of the order of refusal. Plff. then applied to Chief Court for revision of the order. *Held*, that the Chief Court has power to interfere with interlocutory orders will exercise that power only in very exceptional cases 36 Mad 378, 7 I C 436 ref *Held* also that the Lower Court should under the circumstances of the case have allowed the application for leave to amend the plaint under O 6 R 17 of the C P Code as otherwise irreparable loss would be caused to the petitioner 26 P R 1917 = 40 I C 65.

—Delay in asking for leave to amend and the effect of the amendment in depriving the other side of the plea of limitation should not be disregarded, when the court is called on to exercise its discretion in the matter. Each case must be dealt with on its merits, 21 M L J 475; 378. ref. 37 I C 914

—R 17 of O 6 of the Code is in more general terms than the corresponding S. 53 of the Code of 1882. It leaves questions of amendment of pleadings to the discretion of the Court but the discretion must be exercised in accordance with settled judicial principles. The general rule is that any amendment allowed must be such as is either raised in the pleadings or is consistent with the case as originally laid; and the state of facts and the equities and grounds of relief originally alleged and pleaded by the plff. should not be departed from. A suit to enforce a mortgagor's right of redemption cannot be amended so as to convert it into a suit to enforce a right as owner 9 Bur L T 150 = 8 L B R 418 = 36 I C 5.

C. P. C. (1908) Or. 6, r. 17 (Contd.)

(7) Leave to amend when given—(Contd.)

—Amendments to determine the real questions raised in the action and to avoid multiplicity of suits—Partition suit see 20 C W N 1276 = 1 Pat L J 393 = 35 I C 370.

—Amendment of Plaint in appeal—Remand—Appellate Court power of. see 32 I C 906.

—Under O. 6, R. 17 and S. 153 of the C P Code, the Court has very wide powers of granting amendment and can in the exercise of its discretion grant an amendment so as to enable a plff who has failed on the original cause of action to continue his suit on a cause of action accruing. *pendente lite*. 9 S L R 61 = 31 I C 7.

—Specific performance, suit for—Contract proved different from that set out. 31 I C 1.

—Plaint—Amendment in appellate Court—Prejudice to defendant. 30 I C 379.

—Where the plff. is a minor and where the plaint discloses no cause of action, the High Court may, if the case is otherwise a fit one, allow the plaintiff to be amended in second appeal. 109 P L R 1915 = 62 P W R 1915 = 29 I C 769.

—Amendment should be allowed if necessary where there has been part performance of the alleged contract and when time is not the essence of it. 31 I C 1.

—The Court has got full power to allow an amendment so as to make the defendant, in the case a plff. 28 M L J 147 = (1915) M W N 143 = 28 I C 45.

—It is in the discretion of a court to allow amendment of plaint. 19 C L J 518 = 25 I C 567.

—Amendment asked for first in appellate Court—Suit as partner if may be amended on basis that he was a servant remunerated by share of profits. see 22 C W N 104.

—Amendment of pleading—Power of Original and Appellate Courts. see 20 C W N 1076.

—No hard and fast rules can be laid for granting amendments. It depends upon the circumstances of each case and with due regard to the interest of the other party and upon the fact that unnecessary litigation should be avoided. 9 S L R 61 = 31 I C 7.

—Amendment of plaint—Appellate Court, power of, to amend plaint and remand

C. P. C. (1908) Or. 6, r. 17 (Contd)

(7) Leave to amend when given—(Contd)

case for fresh statement and disposal, see  
20 C W N 547.

—The mere fact that the plaint in a suit has not been signed by a proper person is no ground for refusing leave to amend on objection taken. 22 A 55 foll; and where a Court refused leave, it is a matter for interference under S. 25 Prov. Small Cause Courts Act. 9 A L J 294=14 A 348=14 I C 507.

—A declaration of what is not in accordance with facts cannot be given. The provisions of the Civil Procedure Code O. 6, R. 17, regarding power to amend plaints, are very comprehensive. 12 I C 119.

—Amendment relating to subsequent events can be allowed by the Court, the proper discretion under O. VI, r. 17 being sufficiently wide. 9 S L R 61 = 31 I C 7.

—Where, by fraud, a wrong description of the property really intended to be mortgaged was inserted in the mortgage deed and a decree was obtained on the mortgage, and where, in execution of the decree, the fraud was discovered, and the present suit was instituted for a declaration that the property mortgaged was not the one described in the deed but something else. Held, that the plaintiffs were not entitled to the relief prayed for by them, because the Court cannot declare what would not be in accordance with the facts. Held, also, that the plaintiffs ought to have asked for the rectification of the deed. 10 M L T 116.

—(b) Additions or omissions in pleadings through bona fide mistake:—In a case merely of a misnomer name of a party in appeal should be allowed to be changed in the interest of justice. A I R 1931 Sind 63=24 S L R 478=Ind Rul (1931) Sind 78 = 131 I C 718.

—Where a mistake was discovered after written statements were filed whereupon plaintiff applied to amend the plaint as to give cause of action and the facts of this clearly show that it was necessary for the determination of the suit, amendment was allowed. A I R 1930 All 474 Ind Rul (1930) All 765=126 I C 13.

—In a passing off action if the omission to refer to fraud be through an oversight, necessary amendment ought to be allowed. A I R 1928 Mad 759 =28 L W 367=54 M L J 644=110 I C 763.

—Mere error in the initials of the name of the defendant was allowed to be amended even after two years after *ex parte* decree was passed. A I R 1928 Mad 367 = 110 I C 433.

C. P. C. (1908) Or. 6 r. 17 (Contd)

(7) Leave to amend when given—(Contd)

—Amendment of pleadings should be allowed in order to overcome the effects of *bona fide* mistakes whether of law or fact. A I R 1928 Nag 203 = 109 I C 293.

—Plaintiff suing in name of firm carrying business outside British India—Court deciding that suit by plaintiff in firm's name was not maintainable—Plaintiff seeking amendment of plaint by striking his name and inserting names of partners—Amendment must be treated as an application for substitution and not as an amendment following on misdescription. A I R 1928 Bom 191=30 Bom L R 117 = 109 I C 99.

—Where major is described as minor through a *bona fide* mistake, amendment by way of correcting the mistake should be allowed. A I R 1927 Cal 477=100 I C 462.

—Amendment as to plea omitted by mistake should be allowed. A I R 1926 Nag 385 = 95 I C 294.

—Plaint can be amended if the property in the suit is wrongly described. A I R 1926 Nag 313 = 93 I C 103.

—Where the plaint is only one of misdescription of party amendment should be allowed. A I R 1925 Lah 441 = 6 Lah 252 = 7 Lah L J 410 = 26 P L R 437 = 89 I C 279.

—Where the plaint is only one of misdescription of party due to *bona fide* mistake, amendment substituting the name of the right plaintiff should be allowed provided defendant is not deprived of the plea of limitation. A I R 1925 Cal 922 = 41 C L J 511 = 88 I C 1029.

—The subsequent verification is not amendment of plaint and omission to verify can be cured at late stage, it being a mere irregularity. A I R 1925 All 79 = 46 A 637 = 22 A L J 690 = 87 I C 938.

—Amendment should always be allowed to correct a *bona fide* mistake whether deliberate or not. A I R 1924 Rang, 249 = 2 R 66 = 81 I C 465.

—*Bona fide* mistake can be allowed to be corrected by way of amendment of plaint. A I R 1925 Nag 9 = 78 I C 234.

—Amendment seeking to correct misdescription of the defendant should be allowed, the mistake being only a little more than clerical error. A I R 1923 Bom 452 = 47 B 785 = 25 Bom L R 513=73 I C 1027.

—Amendment seeking to correct *bona fide* mistake made however negligently or carelessly can be allowed provided injustice is not thereby done to the other side. 67 I C 335.



C. P. C. (1908) Or. 6, r 17 (Contd)

(7) Leave to amend when given—(Contd)

—Amendment which seeks to correct wrong description of the property should be allowed even in appellate stage. A I R 1922 All 81 = 20 A L J 159 = 66 I C 208

—Overstatement of claim is no ground for dismissal of a suit. A I R 1918 P C 287.

—The plff. in a suit for pre-emption included in his plaint some land not actually sold but taken by the vendee in exchange for an equal area of the land sold. On finding his mistake he applied to amend his plaint so as to include the actual lands sold: *Held* that the plff may well have been misled as to the identity of the land which he could claim and there was no sufficient reason why he should not be allowed to correct his mistake. 56 P W R 1919 = 51 I C 757.

—An error in the number of the plot from which ejectment is sought is a clerical error liable to amendment under O 6 R 17 C P Code. 32 I C 512.

—Accidental omission of some items of property—Amendment after expiry of Limitation—see 255 P L R 1914.

—Amendment—principles, regulating grant of—Mortgage suit, non inclusion of previous mortgage though bona fide mistake—Order for amendment—Postponement of application to be disposed of at trial, if proper see 45 Cal 305 = 22 C W N 611 = 47 I C 129.

—Where a plff was described in the plaint as a minor, but had really attained majority some four days before the plaint was filed by his next friend under a *bona fide* belief that he was still a minor when the suit was instituted: *Held*, that the proper procedure to be adopted in the case was to return the plaint for presentation after making the necessary amendments by striking off the description of the plff. as a minor suing through his next friend and making other consequential amendments. 40 Mad 743 = 41 I C 510.

—The only limitation to the duty of allowing amendments, imposed on the Court by O 6 R 3 C P C, is that laid down by S. 151 viz. that the legal rights of no party must be violated and that the process of the Court must not be abused. An order for inquiry as to the constitution of the estate to be divided should be included in a properly drafted preliminary decree. An amendment of the plaint by correcting the Survey number of the properties to be divided should be allowed, even after the passing of preliminary decree in a partition suit. 8 S L R 28=25 I C 863.

C. P. C. (1908) Or. 6, r. 17 (Contd)

(7) Leave to amend when given—(Contd)

—The plaintiff in a pre-emption suit accidentally omitted to include some properties in the suit. At the instance of the plaintiff a prayer for amendment was allowed; both the application and the order for amendment were made after the expiry of the period of limitation. *Held* that the omissions were accidental and not intentional and the amendment was proper. *Held*, further that the date of the institution of the suit must under the circumstances be deemed the original presentation and not the presentation after the amendment. 255 P L R 1914 = 62 P R 1914 = 161 P W R 1914 = 25 I C 439.

—A plaintiff intending to sue N by mistake mentioned his name as V and subsequently tried to rectify the error by applying for amendment. It also appeared that V was dead at the time. *Held*, that the amendment prayed for was rightly allowed and that S. 2 of the Limitation Act was no bar to the suit. 1 L W 336 = 32 I C 764.

(c) Suit for possession:—Amendment in Appellate Court cannot be allowed where plaintiff in a suit for possession had full knowledge that it was misconceived and declined to withdraw it and file a fresh suit for redemption. A I R 1930 Pat 321 = 11 P L T 231 = Ind Rul (1930) Pat 544 = 125 I C 576.

—As a suit for recovery of possession would not be barred even though one for mere declaration could be under Art 118 and as the reform the only effect of refusing the amendment would be to force the parties to a separate suit, it was in the interest of justice to allow the amendment. A I R 1930 Mad 47 = 30 L W 507=Ind Rul (1930) Mad 640 = 124 I C 208.

—In order to let the appellants go on with the suit, amendment of plaint so as to pray for joint possession instead of *khas* possession should be allowed. A I R 1929 Cal 519 = 33 C W N 359 = 56 C 622 = Ind Rul (1929) Cal 814 = 119 I C 814.

—In a suit for possession of certain plots, and injunction in respect of other plots amendment seeking to add the prayer as to the possession of latter plots also should be allowed. A I R 1927 Oudh 513 = 4 O W N 975 = 105 I C 784.

—In a suit for exclusive possession of specific plots, amendment praying for relief of joint possession can be allowed.

A I R 1927 Lah 723 = 104 I C 325.

—Amendment as to claim possession of particular portion of the property in partition suit should be allowed if defendant objects on the ground that the alleged undivided property had ceased to be so before the date of the suit. A I R 1926 Lah 460 = 27 P L R 164 = 97 I C 796.



C. P. C. (1908) Or. 6 r. 17 (Contd)

(7) Leave to amend when given—(Contd)

—In a suit for possession of property against wife on the ground of adultery, amendment adding prayer for divorce should be allowed even in second appeal. A I R 1923 Rang 160 = 2 Bur L J 65 = 75 I C 6.

—A suit for possession into one to enforce a mortgage cannot be allowed to be changed into second appeal. 59 I C 63 (Cal).

—The plaintiff, who held a decree, was in seeking to recover possession of the property in execution of the decree obstructed by the defendant who claimed to be mortgagee in possession. There upon the plaintiff filed a suit under O 21 R 103 of the C P C to establish his right to the present possession of the property, alleging that the defendant's mortgage was a sham. At the trial of the suit however, it was found that the mortgage in favour of the defendant was valid and subsisting, whereupon the plaintiff applied to convert his suit into one for redemption: Held that the plaintiff could not be allowed to amend his plaint in the manner desired by him: 22 Bom L R 735 = 44 Bom 515 = 57 I C 426.

—Amendment of, pleadings by appellate court—Suit for recovery of possession of land contracted to be sold—Relief of specific performance—Amendment of plaint so as to include relief. 53 I C 23.

—A suit for possession of immovable property on the ground of the defendant being a trespasser cannot be transformed into one for redemption, especially at the last stage of the trial. Held, also, that a new Civ. Pro. Code cannot apply to a case disposed of before it has come into force. 167 P W R 1911.

—Plff. brought a suit for the possession of a site and the case was closed and posted for judgment. The plff then applied to the Court praying that a right of way six cubits broad should be given to him. The Court held that the plff. was not the owner of the site but it directed the deft. to alter his hut so as to allow a right of way as claimed by the plff. Held, that the plff should not have been allowed to amend the plaint after the case had closed for judgment. 45 I C 894.

—(g) Suit for rent:—In a suit for rent and possession, amendment to add declaration title is necessary for determination of the suit and as such should be allowed. A I R 1929 Mad 273 = 113 I C 296.

—Claim for arrears of rent can be amended to one under Oudh Rent Act, s 127 where there is no allegation that defen-

C. P. C. (1908) Or. 6, r. 17 (Contd)

(7) Leave to amend when given—(Contd)

dants were liable to pay rent under an agreement between the parties. A I R 1927 Oudh 505 = 4 O W N 945 = 105 I C 87.

—But suit for rent based on lease cannot be allowed to be changed into a suit for damages for use and occupation. A I R 1927 Mad 182 = 52 M L J 399 = 99 I C 977.

—In order that a plaintiff may get a decree for use and occupation on his failure to get a decree for rent, the claim must be specifically laid for rent and in the alternative for use and occupation. Where the claim is for rent only no damages will be decreed for use and occupation. 4 Bur L T 197 = 11 I C 863.

—(h) Suit on mortgage:—In a suit to enforce mortgage, amendment seeking to introduce the issue as to ownership of these properties should be as it is necessary for the decision of the suit. A I R 1928 Mad 2 = 53 M L J 647 = 30 M L T 459 = 106 I C 838.

—In a suit on registered mortgage afterwards found to be not registered, amendment seeking personal decree should be allowed. A I R 1927 Rang 154 = 5 R. 115 = 6 Bur L J 49 = 101 I C 628.

—Suit on mortgage bond can be allowed to be changed into a suit on running account. A I R 1926 Mad 424 = (1927) M W N 256 = 24 L W 490 = 97 I C 936.

—Where in a suit for redemption of mortgage, defendant denies mortgage and sets up for prior mortgages in defence, it was held that amendment of plaint to redeem two prior mortgages can be allowed. A I R 1929 Oudh 483 = Ind Rul (1930) Oudh 49 = 6 O W N 880 = 5 Luck 424 = 121 I C 273.

—Suit for redemption cannot be changed into suit for avoidance of sale—Alteration of the nature of suit. 14 I C 743.

—Where in a suit by the junior members of a tarwad to declare a mortgage created by the manager invalid and not binding on the junior members, a portion of the consideration for the mortgage is found to be binding on the family, the plaintiffs should be allowed to amend the plaint by adding a relief for redemption by paying the valid portion of the mortgage debt. 26 I C 443.

—Amendment of plaint Law—Marriage. 50 I C 270.

—A suit to recover money due on a mortgage bond by sale of the mortgaged properties, some of which were situated in the Sonthal Parganas, was instituted in the Court of the Subordinate Judge at Birbhum. At the hearing objection was taken under S. 5 of the Sonthal Parganas Settlement Regul-

C. P. C. (1908) Or. 6, r. 17 (Contd)

(7) Leave to amend when given—(Contd)

tion III of 1872 that the Court had no jurisdiction to entertain the suit. The pliffs then made an application for the amendment of the plaint by withdrawing their claim against the property in the Southal Parganas which was granted. *Held*, that by permitting the amendment to be made the Court did not exercise its jurisdiction improperly. 29 C L J 206 = 50 I C 49.

—Plaintiff mortgaged his property to 1st defendant, who sub-mortgaged it. After discharge of mortgage, plaintiff was sued by the sub mortgagee for his amount and a decree was obtained against plaintiff—Plaintiff filed an appeal against that decree and while it was pending, instituted the present action against 1st defendant for indemnity, praying for the amount of the decree or, in the alternative for the deposit of the amount in Court. After the institution of the suit and during the pendency of this second appeal plaintiff satisfied the sub-mortgagee's decree and prayed for the amendment of his plaint by a mention of that fact—*Held*, that the amendment should be allowed. (1912) M W N 37 = 13 I C 203.

—(i) *Suit on pro-note* :—Suit on a pro-note can be allowed to be amended into suit as original consideration, the powers of the Court under O. VI, r. 17, being sufficiently wide. A I R 1931 Oudh 54 = Ind Rul (1931) Oudh 155 = 7 O W N 1195 = 130 I C 347.

—Where a suit is brought against the members of the joint Hindu family on the promissory note, executed by one member only, and the plaintiff alleges that the debt was a joint family debt, amendment should be allowed even though it would be introducing cause of action entirely different. A I R 1930 Bom 424 = 32 Bom L R 1035 = Ind Rul (1930) Bom 27 = 128 I C 43.

—Where in a suit for *hundi* under O. XXXVII, amendment of plaint is prayed for striking out words referring to O. XXXVII and falling back upon the original cause of action, it was held that O. VI, r. 17 applies and amendment can be allowed and that question of jurisdiction is not involved and that the case was not a case decided within the meaning of s. 44 of the Punjab Courts Act. A I R 1930 Lah 559 = Ind Rul (1930) Lah 601 = 125 I C 379. (But see 1932 Bom 394 = 138 I C 783 = 34 Bom L R 643)

—Where in a suit on promissory note signed by one partner in his own name, creditors contend to hold all partners liable, no such indication being given in the plaint, it was held that opportunity should be given for making proper amendment in the plaint A I R 1930 Mad 168 = Ind Rul (1930) Mad 502 = 123 I C 358

C. P. C. (1908) Or. 6, r. 17 (Contd)

(7) Leave to amend when given—(Contd)

—But a suit on a promissory note cannot be allowed to be changed into one in original consideration if not time-barred. A I R 1927 Mad 378 = 99 I C 625.

—Suit upon a pro-note can be changed into a suit on transaction referred to in the document, it being a mere technical error, 71 I C 968.

—In a suit on unstamped *hundi* amendment as a suit on original consideration should be allowed. A I R 1922 Lah 394 = 10 P W R 1922.

—When it has been found that the promissory note sued upon is a forgery, the claim must necessarily fail. A I R 1923 Lah 628.

—(j) *Where it does not alter the nature of the suit or deprive the defendant of plea of limitation* :—Amendment which does not change the nature of the suit should be allowed 26 N L R 359 = A I R 1931 Nag 20 = Ind Rul (1931) Nag 41 = 130 I C 105.

—Amendment can be allowed where there is no change in the cause of action. A I R 1927 Mad 501 = (1927) M W N 175 = 38 M L T 221.

—Claim based on exclusive ownership can be allowed to be changed into one based on co-ownership. A I R 1926 Mad 909 = 23 L W 468 = 92 I C 396.

—Amendment which does not seek for change in the cause of action but in the date of the cause of action should be allowed. A I R 1926 Mad 128 = 1925 M W N 781 = 24 L W 136 = 92 I C 330.

—Where nature of the suit remains the same but there is change only in section under which it was originally brought, amendment ought to be allowed A I R 1925 All. 538 = 85 I C 700.

—Question of limitation does not arise where only misdescription of party is sought to be corrected. A I R 1923 Nag 96 = 71 I C 39.

—The three chief conditions on which an amendment should ordinarily be allowed are, (1) that application should be *bona fide*, (2) that no injustice is done to the other side thereby, (3) and that the nature of the case is not changed A I R 1922 Cal 255 = 35 C L J 25 = 26 C W N 73 = 65 I C 39.

—In a suit by a minor, an application for amendment of the plaint was made at the first appearance in Court of the deft. and it was refused. *Held*, that the amendment could not be disallowed. 84 P R 1919 = 6 P L R 1919 = 57 I C 464.

C. P. C. (1908) Or. 6, r. 17 (Contd)

(7) Leave to amend when given—(Contd)

—Where in a suit framed as for a specific legacy, the plaint contained all the necessary allegations to give the relief to which plff. is entitled, the Court allowed him to amend the plaint in second appeal, into one for administration. 33 M L J 195 = 6 L W 85 = 41 I C 605.

—An application to amend a plaint on the ground that it was framed under an erroneous view of the law and that the correct view was subsequently laid down by the High Court, should be allowed though the suit would be barred at the date of the application for amendment. 26 I C 383.

—Where the plaintiff asks for an amendment of the plaint by the addition of a further relief without seeking to add anything to the allegations in the plaint, the court should allow the amendment; and the mere fact that the further relief asked for might have become barred does not necessarily render the amendment improper. 36 Mad 378 = 22 M L J 139 = 13 I C 268 = 10 M L T 557.

—Amendment of plaint—Order refusing that it would alter nature of suit—Registrar

—High Court—Discretion—Wrongly presented. see 22 M L J 136 = 10 M L T 549 = 12 I C 173 = (1911) 2 M W N 257.

—An amendment of a *bona fide* error in the description of the property in the plaint, would not have the effect of barring the suit by limitation. 33 All 616 = 8 A L J 636 = 10 I C 476.

—Further facts giving cause of action—Amendment of plaint—Perpetual injunction. 11 A L J 423 = 19 I C 250.

—Where the vast bulk of the claim remained unaltered and the part that was altered related to the same contract and was similar in amount to the part now given up; that the claim as originally framed was due purely to an oversight and was not fraudulent or intended to overreach, and consequently the amendment should be allowed. 11 I C 827 = 4 Bur L T 177.

—(k) Where it is necessary for determining the real questions in controversy between the parties:—Under O VI r. 17 amendment can be allowed at any stage of proceedings provided it is necessary for determination of real question in issue and there is no question of prejudice, the object being to administer justice and not to punish for mistakes. Order VI r. 17 gives very wide powers of amendment for the purpose of determining real question in controversy and this can be done at any stage of the proceedings. A I R 1931 Nag 20 = Ind Rul (1931) Nag 41 = 26 N L R 359 = 130 I C 105.

C. P. C. (1908) Or. 6, r. 17 (Contd)

(7) Leave to amend when given—(Contd)

—Amendment necessary to determine real questions in controversy should be allowed. A I R 1931 Oudh 54 = Ind Rul (1931) Oudh 155 = 7 O. W. N 1195.

—Amendments should be allowed for the determination of real question in issue but not so as to introduce a new case with inconsistent pleas. A I R 1930 Lah 278 = 11 Lah L J 550 = 31 P L R 340 = Ind Rul (1930) Lah 76 = 120 I C 492.

—Amendment to clear defects in the pleadings should always be allowed but not one which is much too vague. Discretion allowing the amendment ought not ordinarily be interfered. A I R 1926 All 672 = 96 I C 89.

—In a suit by co-parcener to recover his share sold by the defendant co-parcener on the ground of its being sold after partition and for no want of legal necessity it was found that there was no legal necessity and therefore the amendment for the possession of the entire estate was allowed as being necessary for the purpose of determining real question in issue. A I R 1926 Pat 427 = 5 Pat 746 = 7 P L T 719 = (1926) Pat 274 = 95 I C 991.

—Amendment necessary for the determination of real question in issue should be allowed if no injustice is caused to the other side. A I R 1926 Oudh 508 = 94 I C 875. See also A I R 1925 Sind 72 = 78 I C 817.

—Where in a suit for redemption prayer for redeeming only one of the mortgages was included and in appeal it was found that the mortgagor could not redeem without at the same time redeeming for other mortgages, amendment to redeem other mortgages also was allowed. A I R 1926 All 506 = 48 A 292 = 24 A L J 260 = 92 I C 772.

—However the necessity to amend, may have arisen, amendment should be allowed at any stage in order to determine real question at issue unless the party applying for leave has acted in bad faith or the amendment will cause some injury to the opposite party for which he cannot be fully compensated by costs or otherwise. The questions in controversy between the parties which have to be brought out clearly and decided are save in exceptional cases, the questions in controversy when the parties join issue that is, when the defendant puts in his written statement. A defendant, who has deliberately and under no mistake or misapprehension admitted a material fact in his written statement cannot be allowed at a later stage to go back upon them and make a new case. A I R 1925 Mad 950 = 22 L W 26 = 85 I C 900.

C. P. C. (1908) Or. 6, r. 17 (Contd)

(7) Leave to amend when given—(Conclud).

—In a suit under O. 1 r. 8 brought in the name of one person amendment to add other necessary persons as parties can be allowed. A I R 1923 Bom 305 = 25 Bom L R 689 = 47 B 809 = 83 I C 856.

—Amendment by way of signature necessary to the suit can be allowed under O. 13 A I R 1924 All 801 = L R 5 A 565 Civ - 82 C 65.

—All amendments necessary to decide points in controversy should be allowed A I R 1925 Sind 26 = 78 I C 817.

—Powers of Court under O VI, r. 17 are very wide, but inconsistent pleas should not be allowed. Amendment whenever necessary for determination of real question in issue and avoiding further litigation. 73 I C 748. See also 71 I C 452 = 48 A 220 = A I R 1923 All 112.

—Amendment necessary for the determination of question at issue owing to change in position of parties should be allowed. A I R 1921 Lah 220 = 3 Lah L J 227.

—Under O 6 R 17 C P Code it is imperative on the courts to allow all amendments which are necessary to bring out all the disputes between the parties for the adjudication of the court. The High Court will not interfere under S. 115 with an order refusing to allow an amendment when the party has another effective remedy under S. 105 (1) C P C. (1914) M W N 98 = 14 M L T 588 = 22 I C 39.

—Where an amendment is necessary for the purposes of settling all matters in controversy and works no injustice, nor takes by surprise the opposite party, Judges should make such amendments. A I R 1923 All 112 = 45 A 220 = 71 I C 452.

—An amendment in the pleadings should be made if thereby the real substantial question can be raised between the parties and multiplicity of legal proceedings avoided. A I R 1922 Oudh 266 = 2 O L J 259 = 68 I C 986.

—(1) Where it will cause no injury to the opposite party except such as can be sufficiently compensated for by costs or otherwise:—There is no injustice and amendment is proper if defendants are not taken by surprise and opportunity is given to them to contest the fresh allegations. 113 I C 757 (Cal.)

—Amendment can be allowed where no prejudice is caused to the defendant. A I R 1925 Nag 155 = 82 I C 177.

—Whether an amendment should or should not be allowed depends upon the facts that whether if allowed it would cause

C. P. C. (1908) Or. 6, r. 17 (Contd)

(7) Leave to amend when given—(Conclud)

such injury to the defendant as cannot be compensated for by costs. A I R 1923 Lah 305 = 77 I C 471.

—S. 53 C P C (1882) expressly provided that a plaint should not be amended so as to convert a suit of one character into a suit of another and inconsistent character, that limitation on the court's power has been omitted from O 6 R 17 of the new Code. The cases with regard to amendment must be regarded as falling under two heads: first those in which the amendment is sought to be made at the hearing of the suit and secondly, those in which it is sought to be made before such hearing or in which if the suit were called on for hearing, it were intended to grant an adjournment to enable the defendants to meet the new case set up. 11 I C 856 = 4 Bur L T 188.

(8) Leave to amend when refused.

—(a) General:—Amendment in written statement will be disallowed after plaintiff has called all his evidence on issues of fact and has closed his case. But where a new defence of law arises from the plaintiff, it may be allowed even after the plaintiff has closed his case. A I R 1930 Rang 140 = 7 R 800 = Ind Rul (1930) Rang 131 = 121 I C 803.

—When plaintiff deliberately adopted a particular course and when plaintiff cannot be allowed to amend the plaint after the case has been closed. 10 Lah L J 169 = 113 I C 87.

—Amendment of plaint cannot be allowed by Court having no jurisdiction, to try suit so as to bring it within Jurisdiction A I R 1928 Mad 384 = 54 M L J 409 = 27 L W 291 = 109 I C 542.

—Plaint cannot be allowed to be so amended as to oust Court's own jurisdiction. A suit originally filed in the Civil Court, Madras, was transferred to the High Court in the exercise of its extraordinary original civil jurisdiction. Application to amend plaint was later made the effect being to oust jurisdiction of the City Civil Court. Held that amendment could not be allowed as the powers of the High Court under cl. 13 are those of the City Civil Court itself. A I R 1928 Mad 400 = 54 M L J 145 = 27 L W 609 = 108 I C 413.

—Amendment should not ordinarily be granted in a suit in which defendant objects to its continuation but plaintiff insists upon the same but fails. A I R 1926 Mad 988 = 24 L W 324 = 97 I C 727.



C. P. C. (1908) Or. 6, r. 17 (Contd)

(8) Leave to amend when refused—(Contd)

—Plaintiff having no right to sue, amendment so as to enable the proper party to sue is to be disallowed. A I R 1926 Mad 577=23 L W 377 = (1926) M W N 288 = 93 I C 305.

—Amendment to strike out in appeal the name of the plaintiff not found to be entitled to pre-emption which was the cause of the dismissal of the pre-emption suit, cannot be allowed. A I R 1925 All 355=47 A 450=23 A L J 198=87 I C 55.

—Amendment seeking to bring new plaintiff on record at a time when the suit would be time barred, cannot be allowed. A I R 1925 Mad 917=85 I C 961.

—Pre-emption suit—Stranger as co-plaintiff along with a co-sharer—Amendment cannot be allowed by striking off name of stranger. A I R 1923 All 187=79 I C 220.

—Amendment cannot be allowed by the lower Court after a decree has been passed. The proper course is to apply for review. But it is different with an Appellate Court. A I R 1924 Bom 166 = 25 Bom L R 888 = 77 I C 171.

—Where opportunity was already given but not taken advantage of and subsequently amendment was sought to be introduced at a late stage, it was disallowed as prejudice would have been caused to the defendant. A I R 1923 Sind 17=75 I C 549.

—Shortening of litigation is a good ground for refusing amendment. 53 P L R 1919.

—After the judgment is given, the order directing amendment of the plaint is inconsistent in the judgment and unnecessary and should be set aside. A I R 1923 Mad 245=31 M L T 449=70 I C 335.

—Where party was given opportunity to amend, but was not taken advantage of, the result is that amendment cannot afterwards be allowed. Failure of plaintiff to amend the plaint as directed is no ground for dismissal of a suit. 60 I C 376 (Lah).

—A suit filed against a dead person is no suit and no amendment will be allowed in it. 42 I C 539.

—Pre-emption suit—plaint alleging one ground of claim—Decree based on different ground—no amendment after notice to defend—Effect—Validity of decree. 83 P R 1917 = 142 P W R 1917=42 I C 263.

—Where the Plff. has refused to amend the plaint at the time of the trial in the Lower Appellate Court, the High Court will not in second appeal allow him to do so. 29 I C 132.

C. P. C. (1908) Or. 6, r. 17 (Contd)

(8) Leave to amend when refused—(Contd)

—Under O. 6, R. 17 leave to amend pleadings should be refused where the amendment is merely technical or is immaterial. As the objection refused on S.244 of the old C P C (1882) was of a highly technical character, no amendment should be made or allowed for that purpose. 14 C L J 83=10 I C 532.

—Amendment of written statement cannot be allowed after the close of plff's case unless plff is allowed to call further evidence: 74 I C 822.

—(c) *Suit for confirmation of possession*:—Where a plff. in a suit for declaration of title and confirmation of possession alleges facts which show that he was out of possession his suit, even though framed for confirmation of possession, may be treated as one for recovery of possession if his title to recover possession has not been barred by limitation but where the plff. in such a suit makes a case that he is in possession, but fails to prove his possession, the Court will not give him possession, even though he proves his title and the suit has been instituted within the limitation prescribed for suits for recovery of possession. 44 I C 996.

—(d) *Suit for declaration*:—Where objection was taken on the ground that no consequential relief was asked for and plaintiff opposed it, and did not amend the plaint, subsequent amendment for the same should not be allowed. A I R 1928 Rang 134 = Ind Rul (1929) Rang 143=115 I C 911.

—Co-parcener executing fraudulent sale-deed to defeat equity of purchaser recognized by partition decree—Subsequent purchaser obtaining property by partition decree—Former purchaser can sue for declaration that decree was collusive—No consequential relief claimed—Suit is maintainable and amendment adding consequential relief for setting aside decree can be allowed even at stage of appeal. A I R 1931 Bom 218 =33 B L R 141=Ind Rul (1931) Bom 310.

—Person suing for declaration that gift effected by Hindu widow is not binding on him and if widow dies during the pendency of suit and hence applies for amendment of plaint by adding prayer for possession, such an amendment should be allowed. A I R 1931 Nag 10=26 N L R 348=Ind Rul (1930) Nag 260=124 I C 244.

—Where a suit for declaration and possession is bad for want of prayer for specific relief and a separate suit for specific Relief is barred by limitation amendment to include specific relief should be allowed. 1929 A L J 487=Ind Rul (1929) All 663 = 116 I C 871.



C. P. C. (1908) Or 6, r 17 (Contd)

(8) Leave to amend when refused—(Contd)

—The suit that a certain decree being based on fraud shall not affect the plaintiff's rights and for any other relief granted therein is a declaratory suit, and is not competent unless accompanied by prayer for consequential relief the necessary amendment even at a late stage ought to be allowed and opportunity given for the same and the mere prayer for general relief is not necessarily a prayer for consequential relief so as to make the suit out of the class of suit for a declaration only. 65 P W R 1921.

—In a declaratory suit, amendment by way of consequential relief should, if necessary, be allowed but not so as to allow a time-barred claim. A I R 1927 Cal 733 = 46 C L J 51 = 104 I C 151.

—In a declaratory suit falling under s. 7, Court Fees Act, amendment should not be for consequential relief if a separate suit can lie for it. A I R 1927 Lah 499 = 8 Lah 531 = 9 Lah L J 400 = 102 I C 46.

—In a declaratory suit, amendment seeking to add consequential relief may be allowed in second appeal if plaintiff was under a *bona fide* belief that consequential relief is not open to him. A I R 1924 Pat 310 = 2 Pat 919 = 5 P L T 314 = 76 I C 347.

—Where a plff during the pendency of a suit for declaration of title alleged he has lost possession he must be allowed to amend his plaint and ask for possession. 56 I C 458

—Suit for declaration—Consequential relief, Prayer for essential—Opportunity to amend to be given to plff. 54 I C 833.

—(f) *Suit to set aside decree*:—A suit to set aside a mortgage decree, obtained against a Hindu father and son on the ground that the infant son was not properly represented was converted into a suit for redemption by the son. 17 C W N 219 = 15 C L J 446 = 15 I C 845

—(g) *Where amendment would introduce a totally different, new and inconsistent case and the application is made at a late stage the proceedings*:—Amendment setting up a new and an inconsistent case is to be disallowed. A I R 1930 Mad 325 = 30 L W 557 = Ind Rul (1930) Mad 87 = 120 I C 887.

—Suits by principals against agents should not be originally changed into suits by one partner against another and hence no decree should be passed on the basis of partnership at last without prior amendment of plaint. A

C. P. C. (1908) Or. 6, r. 17 (Contd)

(8) Leave to amend when refused—(Contd)

I R 1931 Mad 300 = 60 M L J 315 = 33 L W 307 = (1931) M W N 497 = Ind Rul (1931) Mad 462 = 130 I C 766.

—Where amendment if allowed would necessitate trial of a suit *de novo* or taking further evidence, such an amendment cannot be allowed at a late stage of the proceeding and order rightly refusing such a prayer cannot be set aside. A I R 1931 Lah 260.

—Where amendment sought to be introduced at a late stage entirely sets up a new case entailing great examination and probably amendment of statements which would prejudice chances of defendants regarding judgment, order was passed in the alternative either allowing amendment on payment of costs or giving judgment without prejudicing the chances of plaintiff to bring a fresh suit. A I R 1930 Cal 534 = 57 C 338 = Ind Rul (1930) Cal 900 = 127 I C 772.

—Amendment should be disallowed if it altogether changes the nature of the relief claimed. A I R 1929 Lah 449 = 11 Lah L J 306 = Ind Rul (1939) Lah 39 = 120 I C 279.

—Where amendment entails a new trial, it should be disallowed. Ind Rul (1929) Lah 3 = 120 I C 163.

—Order allowing the amendment at a very late stage and changing the character of the suit altogether is highly unjudicial. A I R 1929 Lah 710 = Ind Rul (1929) Lah 893 = 119 I C 429.

—Amendment which substitutes one cause of action for another cannot be allowed. A I R 1929 Rang 179 = 7 R 140 = Ind Rul (1929) Rang 200 = 117 I C 577. See also (1927) M W N 781 = 110 I C 775 = A I R 1928 Mad 828.

—Amendment introducing new cause of action necessitating a new trial should be disallowed. A I R 1928 Bom 516 = 52 B 640 = 30 Bom L R 1300 = Ind Rul (1929) Bom 304 = 115 I C 400.

C. P. C. (1908) Or. 6, r. 17 (Contd)

(8) Leave to amend when refused—(Contd)

—Where plaintiffs had every opportunity to amend their pleadings before but failed to do so, amendment resulting in totally different case, specially at a late stage, cannot be allowed. A I R 1928 Lah 933 = 10 Lah L J 534 = Ind Rul (1929) Lah 281 = 114 I C 441.

—Amendment at very late stage should be disallowed. A I R 1921 Lah 156 (1) = 3 Lah L J 437.

—Amendment entailing re-trial of a suit cannot be allowed in an appellate stage. A I R 1928 Lah 375 = 9 Lah 588 = 30 P L R 41 = 110 I C 384.

—Amendment seeking to introduce a matter of much more contentious nature cannot be allowed omission is properly explained. A I R 1928 Oudh 135 = 4 O W N 1219 = 106 I C 823.

—Original plea of inability to perform contract, cannot be allowed to be changed into a plea of denial of contract. A I R 1927 Mad 973 = (1927) M W N 668 = 39 M L T 613 = 105 I C 563.

—Where Sheriff of Bombay was deliberately sued as a corporation sole, amendment to make him personally liable might not be allowed in an appellate stage. A I R 1927 Bom 521 = 51 B 749 = 29 Bom L R 1071 = 104 I C 685.

—The powers of amendment under O. VI, r. 17 are very wide but amendment which seeks to alter cause of action should not be allowed. A I R 1927 Mad 839 = 103 I C 670.

—When the case has been remanded to the original Court for trial upon certain issues, it would be improper for the original Court to allow the plaint to be amended further. A I R 1928 Mad 828 = (1927) M W N 784 = 110 I C 775.

—Where no cause of action existed, amendment cannot be allowed so as to cure the defect. A I R 1927 All 451 = 49 A 599 = 25 A L J 385 = 101 I C 643.

—Amendment introducing altogether a new cause of action should not be allowed. A I R 1927 Lah 771 = 101 I C 280.

—Amendment seeking to change the nature of the whole suit cannot at least be allowed in Privy Council. A I R 1927 P C 18 = 6 Pat 323 = 54 I A 55 = 25 A L J 74 = (1927) M W N 69 = 8 P L T 98 = 38 M L T

C. P. C. (1908) Or. 6, r. 17 (Contd)

(8) Leave to amend when refused—(Contd)

(P C) 74 = 31 C W N 469 = 52 M L J 402 = 45 C L J 313 = 25 L W 635 = 29 Bom L R 796 (P C) = 100 I C 56.

—But merely because an amendment sets up an alternative case, is no ground for its refusal. A I R 1927 Mad 212 = 38 M L T 33 = 98 I C 458.

—If in a redemption suit alleged mortgage is not proved, amendment seeking to prove different mortgage cannot be allowed. 96 I C 304.

—Amendment seeking to change the nature of the suit cannot be allowed. Defendant accepting costs of adjournment granted to plaintiff can object to amendment of the above nature. A I R 1926 Lah 453 = 27 P L R 163 = 93 I C 871.

—But amendment raising title acquired after the date of the plaint cannot be disallowed if otherwise admissible. A I R 1925 Mad 1021 = 22 L W 120 = 91 I C 503.

—And an amendment otherwise admissible can be allowed so as to include cause of action arising after the filing of the suit. A I R 1926 Mad 6 = 49 M L J 479 = 22 L W 287 = (1925) M W N 622 = 90 I C 881.

—New cause of action should not be allowed to be introduced if defendant is deprived thereby of his plea of limitation. A I R 1925 Rang 264 = 4 Bur L J 110 = 90 I C 639.

—Where suit on allegation of tenancy fails, plaintiff cannot be allowed to amend the plaint so as to succeed on title. A I R 1925 All 705 = L R 6 A 348 Civ. = 89 I C 103.

—Suit as principal contracting party cannot be changed into one as agent of defendants. Substitution of new plaint can not be allowed. A I R 1925 Bom 248 = 27 Bom L R 277 = 87 I C 481.

—Amendment so as to convert an ordinary suit into a representative one cannot be allowed in second appeal. A I R 1925 Mad 441 = 21 L W 224 = 86 I C 747.

—Plaintiff suing as a *kittima* son but makes no alternative claim as an *appathitta* cannot be allowed to make the alternative claim for a first time in appeal. A I R 1926 Rang 49 = 3 R 483 = 92 I C 253.

—But where defence raised *kritrima* adoption but *appathitta* adoption was proved, written statement can be allowed so as to make the defence on alternative one of *appathitta* adoption. A I R 1925 Rang 178 = 2 R 661 = 85 I C 286.

## (8) Leave to amend when refused—(Contd.)

—In revision no amendment can be allowed which changes the nature of the suit nor can a question of estoppel for the first time be raised. A I R 1921 Sind 159 (F B) = 16 S L R 207 = 83 I C 360.

—Where a legal right has accrued to the defendant, amendment seeking to take away the same cannot be allowed but exception to this rule may be made in special cases. A I R 1925 Cal 67 = 41 C L J 149 = 28 C W N 1009 = 83 I C 110. See also 78 I C 905 = 19 S L R 26 = A I R 1924 Sind 144. See also 78 I C 846 = A I R 1925 Sind 173.

—But amendment seeking change in the date corresponding to the vernacular which remains the same is not one which seeks to introduce new cause of action and hence can be allowed. A I R 1924 Oudh 385 = 11 O L J 297 = 81 I C 484.

—Amendment seeking to introduce plea of fraud cannot be allowed unless the Court is satisfied as to the cause of the delay and truth of the plea. A I R 1924 Mad 883 = 47 M L J 540 = (1924) M W N 522 = 82 I C 492.

—But amendment seeking to modify but not to change the original cause of action can be allowed. A I R 1925 Mad 188 = 80 I C 278.

—Suit for redemption on registered mortgage cannot in an appeal be allowed to be converted into one for possession. A I R 1924 Mad 292 = 47 M 203 = 45 M L J 667 = (1923) M W N 825 = 19 L W 37 = 33 M L T 146 = 79 I C 510.

—To try to disclose further details of facts which go to support the same cause of action and hence there is no question of prejudice to defendant on point of limitation. A I R 1925 Nag 9 = 78 I C 234.

—Amendment in second appeal seeking to introduce a new case altogether should not be allowed. A I R 1923 Lah 530 = 77 I C 518.

—Necessity of formal amendment may sometimes be done away with. A I R 1925 Mad 63 = 75 I C 112.

—But where plaintiff's title changes during suit but nature of relief claimed remains the same, relief can be given even without getting the plaint amended. A I R 1923 All 560 = L R 5 A 28 Rev. = 74 I C 971.

—Amendment involving claim for additional relief, addition of new parties, and change in the nature of case, cannot in second appeal be allowed. A I R 1923 Pat 590 = 2 Pat 925 = (1923) Pat 263 = 1 Pat L R 373 = 5 P L T 193 = 74 I C 758.

## (8) Leave to amend when refused—(Contd.)

—But Court may in its discretion allow an amendment seeking to change the nature of the suit. A I R 1923 Nag 241 = 8 N L J 76 = 74 I C 317.

—Claim originally based on gift cannot be allowed to be changed into claim based on inheritance. A I R 1923 Pat 481 = 4 P L T 37 = 71 I C 897.

—Amendment setting up altogether a different case cannot be allowed. A I R 1923 P C 21 = 44 M L J 476 = 2 Pat 230 = 4 P L T 217 = 50 I A 58 = 37 C L J 369 = 25 Bom L R 560 = (1923) M W N 377 = 32 M L J 121 = 27 C W N 901 = 18 L W 597 (P C) = 71 I C 769.

—Amendment which substantially changes the cause of action and deprives the defendant of the plea of limitation ought not be allowed (1921) M W N 639 = 41 M L J 525 = 71 I C 270.

—But where minority of the plaintiff was discovered after an objection by the defendant, plaint should be allowed to be amended. A I R 1924 Lah 157 = 69 I C 401.

—Amendment sought by the legal representative of the deceased plaintiff to be introduced, amounting to assertion of title hostile to that of the deceased cannot be allowed. A I R 1922 Mad 49 = (1922) M W N 42 = 42 M L J 43 = 15 L W 72 = 30 M L T (H C) 204 = 68 I C 703.

—Amendment which would cause trial *de novo* should not be allowed. A I R 1921 Cal 125 = 33 C L J 380 = 25 C W N 552 = 68 I C 514.

—Amendment altering the claim to one for a refund of losses paid upon wagering contract cannot be allowed. A I R 1922 Lah 408 = 5 P W R 1023 = 67 I C 959.

—But in certain circumstances decree can be given upon a cause of action arising after the filing of the suit. Appellate Court can take notice of facts that happened after the filing of suit for modifying the relief unless based on new title acquired after the filing of the suit. 67 I C 894 (Lah).

—Suit for pre-emption based on custom should not be decreed on the basis of contract not set up and amendment for the same should not be allowed in second appeal. A I R 1922 All 5 = 20 A L J 15 = 65 I C 242.

—Amendment allowing the plaintiff to sue on a cause of action arising subsequent to the suit should not be allowed in second appeal. 65 I C 214 (Cal).

C. P. C. (1908) Or. 6, r. 17 (Contd.)

(8) Leave to amend when refused—(Contd.)

—Amendment to introduce new cause of action after limitation ought not to be allowed. 13 Bur L T 201 = 64 I C 29.

—Amendment seeking to change the nature of the suit altogether cannot be allowed at the judgment stage. A I R 1921 Lah 53 = 3 Lah L J 181 = 67 I C 132.

—Conversion of suit for specific performance of contract into one for damages in respect of prior contract amounts to introducing a new case and hence cannot be allowed. A I R 1922 P C 249 = 24 Bom L R 682 = 30 M L T 23 = 48 I A 214 = 48 C 832 = 4 U B R 30 = (1921) M W N 336 = 63 I C 914.

—A plff. ought not to be allowed to amend his plaint so as to substitute a fresh cause of action or separate cause of action for the one disclosed in the plaint as originally framed. (1919) 3 U B R 171 = 52 I C 961.

—Where parties elect to go to trial on a particular cause of action and the issues and the evidence in consequence are limited to those which are relevant to that cause of action the Court in second appeal will not permit an amendment of the pleadings from a view to a remand for re-trial. 6 O L J 322 = 52 I C 849.

—An amendment which would involve the alteration of the entire nature of the suit ought not to be allowed. 51 I C 435.

—Though under R. 17 of O 6 of the C P Code, very wide powers of amendment are vested in the court, an application for amendment in the second appellate Court was disallowed on the ground that the plff would start afresh on allegations wholly inconsistent with those made in the original plaint and to support the new allegation he would have to bring forward evidence directly contradictory to the evidence already placed by him on the record. 46 Cal 16 = 27 C L J 392 = 45 I C 241.

—An amendment which would have the effect of altering the nature of the suit cannot be allowed upon a verbal suggestion made in a final reply. 11 S L R 103 = 45 I C 173.

—Amendment—Change of case not to be allowed in appeal—*Khattima apatitha*, distinct forms of adoption. 41 I C 749.

—Suit on behalf of caste—Defective authorisation of plff to represent—Amendment not to be allowed—Change of case. 40 Bom 158.

—A plff. who maintained in the courts below that his suit was properly framed and presented ought not in second appeal be allowed to amend the plaint on an admission that the suit was brought in a wrong form. 39 I C 861.

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C. P. C. (1908) Or. 6, r. 17 (Contd.)

(8) Leave to amend when refused—(Contd.)

—An amendment of the plaint could not be allowed, if it would change the cause of action and help the plffs. who had not acted in good faith. 10 S L R 58 = 35 I C 653.

—Amendment setting out an inconsistent case at the final stage cannot be allowed. 22 C L J 309 = 31 I C 391.

—Plff. sued for a declaration that he had acquired a prescriptive right to take water by building a dam across a river. It was proved that the dam was erected by permission of the deft. Plff. then prayed for permission to amend the plaint and convert the suit into one for a declaration of his title to the river bed. *Held*, that the amendment prayed for was inconsistent with the plaint and should not be allowed. 34 I C 541 (F B).

—No court should allow an amendment including a claim barred by limitation or introducing a new cause of action. Amendment under O 6 R 17 can be allowed only if no injustice is done to any party and no legal right is violated. 8 S L R 69 = 27 I C 344.

—Suit against agent as such—Amendment of claim into one against agent personally not to be allowed in appeal. 32 M L J 146.

—Amendment of pleading introducing new cause of action after period of limitation—Limitation how computed for amended cause of action—C P Code, S. 105—Objection to amendment on appeal—Plea of exemption from limitation to be set up in the plaint. 8 S L R 69 = 27 I C 344.

—An application for amendment of the plaint at a very late stage after the parties had definitely agreed not to put in any evidence was rightly refused. 12 A L J 833 = 26 I C 42 See also 27 M L J 25.

—Where the parties sleep over their right for so long a period as 12 years they are not entitled to any indulgence and a suit in ejectment cannot be allowed to be amended in second appeal so as to convert it into one for redemption. 24 I C 723.

—Amendment of pleadings—Adoption—Hindu Law—Presumption—Wide powers of court—Practice of calling parties or witnesses interested on the opposite side commented on—He who relies on adoption must establish it—Suit on the basis of an adoption not allowed to be converted into one for partition—1913 M W N 828 = 21 I C 737.

—Prayer to get twelve years' annuity—Change of frame of suit and pleading—Not allowed in second appeal. 11 A L J 580 = 19 I C 661.

—Amendment—Pleadings—Suit for redemption—Conversion into suit for recovery of possession on the strength of agreement to reconvey. 9 Bur L T 177.



C. P. C. (1908) Or. 6, r. 17 (Contd)

(8) Leave to amend when refused—(Contd)

—An amendment of the plaint, a year or more after the institution of the suit and inconsistent with the original claim, is improper and should not be allowed 3 C L J 306=10 C W N 738 = 33 C 511.

—A suit for recovery of rent only is based solely on the contract of tenancy and in the absence of proof of such tenancy, the plaintiff cannot get relief by way of damages for use and occupation based on his title. Where however, the suit is in ejectment and for rent and the title of the plaintiff is disputed by the defendant the question of title is put directly in issue and even in the absence of proof of tenancy the court can order ejectment and grant damages for use and occupation. 7 S L R 23=20 I C 570.

—Where in a suit contesting an adoption, plaintiff applied after a considerable body of evidence had been taken to amend the plaint for the purpose of alleging that the ancestors of the adoptor were originally non-Hindus, who in course of time adopted certain customs in vogue amongst the Hindus, but that they did not recognise the custom of adoption *Held*, that the plaintiff could not be allowed to amend the plaint at that stage; evidence however was admissible to show the origin of the community to which the plaintiff's ancestors belonged as there was nothing in the plaint as originally filed, which was irreconcilable with such evidence and the evidence was relevant to an issue which had been framed to determine whether the estate was governed by a custom which barred inheritance by adopted sons. 5 Pat L J 164.

—(h) *When the application for amendment is not made in good faith* :—Ordinarily, the amendment of a plaint ought not to be allowed where the application for the amendment is not made in good faith. An application made at a late stage of the suit, merely to get an advantage over the other side in the course of argument on a preliminary issue and raising a plea which clearly is an afterthought is not an application made in good faith. Where a court has refused an application to amend a plaint, it ought not allow the plff. to withdraw the suit with liberty to institute a fresh suit, as in such a case if permission is granted, it would practically be the same as if the Court had allowed the application for amendment of the plaint already refused. 13 S L R 1 = 51 I C 570.

—(i) *Where the effect of amendment would be to take away from the defendant legal right which has accrued to him by lapse of time* :—Amendment sought to be introduced after the claim becomes time-

C. P. C. (1908) Or. 6, r. 17 (Contd)

(8) Leave to amend when refused—(Contd)

barred cannot be allowed as it deprives the defendant of the valuable plea of limitation. A I R 1931 Nag 74 = Ind Rul (1931) Nag 81 = 131 I C 417.

—If the defendant would not be allowed to raise the plea of limitation, amendment of plaint in second appeal should not be allowed. A I R 1931 All 160=(1931) A L J 56=Ind Rul (1931) All 318 = 130 I C 702.

—But amendment not legally barred could be allowed although the claim was barred by limitation. A I R 1929 Bom 51 = 30 Bom L R 1588=Ind Rul (1929) Bom 214=114 I C 262.

—Amendment which would cause to opposite party injury which cannot be compensated by costs, cannot be allowed. A I R 1928 Oudh 305 = 5 O W N 459 = 12 R D 130 = 111 I C 360.

—Though amendment for allowing a time barred claim should not generally be permitted, exception may be made to this rule in special circumstances. A I R 1927 Lah 819=30 P L R 149 = 104 I C 700.

—Amendment sought in second appeal by which defendant is likely to lose his plea of limitation should not be allowed. A I R 1927 Mad 650 = 25 L W 506 = 38 M L T 345 = 101 I C 390.

—Not only should the amendment substituting new cause of action be disallowed but also if it deprives the other party of the plea of limitation. A I R 1926 Mad 827=23 L W 771=(1926) M W N 392=51 M L J 414=96 I C 700.

—Where time-barred cause of action is introduced; amendment cannot be allowed. A I R 1926 Cal 189=87 I C 218. See also A I R 1928 Mad 828=(1927) M W N 784=110 I C 775.

—Amendment seeking to introduce, time-barred claim cannot be allowed. A I R 1925 Rang 49=2 R 414=84 I C 295

—Amendment taking away defendant's legal right, to plead bar of limitation should not be allowed unless there are special considerations. A I R 1924 Sind 144 = 19 S L R 262=78 I C 905.

—Amendment causing prejudice such as one which seeks to deprive defendant of right acquired by virtue of limitation cannot be allowed A I R 1921 Pat 485=2 P L T 679 = 64 I C 125.

—A power of amendment should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, but there are cases where such considerations are outweighed by the special circumstances of the case. 39 M L J 195=28 M L T 149=18 A L J 1095=22 Bom. L R 1370 = 57 I C 606 = 47 I A 255 (P C).

—Suit by bank in liquidation, bank proper plaintiff in 17 A 292=A W N 1895, 81.



C. P. C. (1908) Or 6, r. 17 (Contd).

(8) Leave to amend when refused—(Contd)

be amended into one for sale, the limitation period of which had already expired on the date of the plaint. A I R 1931 Mad 542=33 L W 648=61 M L J 316 = Ind Rul (1931) Mad 737=133 I C 497.

—Amendment of plaint altering the frame of suit cannot be allowed in second appeal. A L R 1934 L 175.

—Amendment involving alteration of nature of case cannot be allowed; 225 P L R 1913=18 I C 807.

—Amendment of plaint changing character of suit is not to be allowed in second appeal. 4 Bur L T 447=9 I C 774.

—A suit against a minor on the foot of his having an interest in the joint family business cannot be amended into one, on the foot of that member being liable to the extent of his share in the assets of the business under s. 247 of the Contract Act on being admitted to its benefits solely, otherwise the effect would be a new cause of action to the prejudice of the minor. 34 B L R 35 (42) = I R 1932 B 340 = 137 I C 710 = A I R 1932 B 117 = A L R 1932 B 355.

—Amendment of a suit for unpaid balance of the mortgage money into a suit on the cheque given by the mortgagee for a portion of the mortgage consideration, should not be allowed at such a late stage as in second appeal. 1932 P C L 414 (Civ.)

—Suit for recovery of debt cannot be converted into one for partnership accounts. 163 P L R 1911.

—Where a suit for possession was filed against defendants alleged as permissive occupants but was dismissed on defendants denying such occupancy and pleading possession as owners, and on appeal the appellate court passed an order granting plaintiff's application for amendment and ordering new trial on the ground that plaint contained no averment of title, held, that the order was erroneous. A L R 1933 S 411.

—Suit brought on the basis of negligence cannot be amended so as to make it rest on nuisance. 38 C 797.

—Amendment of plaint cannot be allowed at a very late stage i. e. in appeal. A L R 1931 Lah 260.

—Amendment during appeal—altering nature and frame of suit is not to be allowed. A L R 1933 L 284.

—Prayer for amendment of plaint at the time of argument before High Court disallowed. A L R 1933 L 46 = 34 P L R 5.

—Plaintiff claiming to be presumptive reversioners cannot be allowed at the time of arguments, to claim amendment so as to make the suit into one by remote reversioners

C. P. C. (1908) Or. 6, r. 17 (Contd)

(8) Leave to amend when refused—(Contd)

authorized to sue under certain circumstances. (1913) M W N 383 = 18 I C 212.

—(h) Where the application for amendment is not made in good faith:—Amendment cannot be allowed in the absence of good faith and bona fides. 36 C W N 112 (116).

—Amendment must not be allowed when the parties intentionally misled the Court. 1932 P C L 456 (459) (Civ.) = 33 P L R 263 = 136 I C 710 = I R 1932 L 246 = A I R 1932 L 322 = A L R 1932 L 456 (Civ.).

—(i) Where the effect of the amendment would be to take away from the defendant legal right which has accrued to him by lapse of time Amendment of pleadings is not allowed except in very special cases, when the result of it is to take away a legal right from the defendant, which has accrued to him by lapse of time. 34 B L R 628 = 138 I C 797 = I R 1932 B 428 = A I R 1932 B 367 (368) = A L R 1932 B 457.

—Only in special cases, the Court can allow an amendment which takes away a legal right from the defendant such as a right to plead limitation. 34 B L R 35 (37-38, 8, 41-2) = 137 I C 710 = I R 1932 B 340 = A I R 1932 B 117 = A L R 1932 B 355.

—Amendment depriving defendant of his legal right is not allowed. 10 R 74 = 137 I C 39 = I R 1932 R 89 = A I R 1932 R 26 = A L R 1932 R 48.

—Amendment which took away defendant's legal right to plead limitation, was not allowed by the High Court. 43 Cal 95 = 20 C W N 475 = 36 I C 179.

—Amendment of plaint by adding a new cause of action that has become barred by limitation can never be allowed by court. 36 A II 370 = 12 A L J 635 = 24 I C 255.

—Amendment that deprives the defendant of his legal right should not be allowed. A I R 1931 Mad 1 = 33 L W 210 = 60 M L J 713 = Ind Rul (1931) Mad 663 = 132 I C 311.

—Amendment of plaint after the claim was barred would deprive the defendant of plea of limitation and therefore should not be allowed. A I R 1931 Nag. 74 = Ind Rul (1931) Nag 81 = 27 N L R 291 = 131 I C 417.

—If the effect of amendment is to deprive the opposing party of an acquired right, leave to amend plaint should be refused. A L R 1933 Bom. 441.

—The High Court will not give leave to amend a plaint when the amendment, if permitted, would deprive the deft. of their plea of limitation. 43 Cal 95 = 20 C W N 475 = 38 I C 179.

—Court's power to allow amendment is very wide. 139 I C 441 = 33 P L R 694 = I R 1932 L 580.

C. P. C. (1908) Or. 6, r. 17 ( *Concl'd* )

( 8 ) Leave to amend when refused—( *Concl'd* )

—Amendment should not be allowed if it results in depriving the defendant of his legal right., 1932 M W N 290 = A I R 1932 M 603 = A L R 1932 M 237.

—Whether Court can order amendment of plaint after return of plaint for presentation to the proper Court see 1932 P Q L 436 ( 437 ) ( Civ. ) = A L R (1932) L 436 (Civ.).

—And whether amendment of pauper application is permissible see. 138 I C 355 = I R 1932 L 460 = A I R 1932 L 328 ( 330 ).

—As to amendment in second appeal see. 241 C 723.

—Plaint amended by High Court under S 25 Prov S. C. Courts Act by striking out claim for Sp. performance so as to bring the suit under the cognisance of Small Cause Court. see 20 C W N 1020.

—Suit that plff. was a partner if may be amended on basis that he was a servant remunerated by a share of profits. see 22 C W N 10.

—Suit to establish adoption into one for partition see. 21 I C 737.

—Suit for possession into suit for declaration of charge. see 7 Bur L T 69.

—Amendment will not be allowed after limitation. 36 All. 370.

—Nor to set up a totally different title and cause of action 30 I C 391 see also 21 I C 935.

—Plaint-Fraud not proved—Undue influence found—Whether remandable for see. 18 Bom. L R 27.

—Order allowing amendment—Application made at beginning of trial—Order made later after hearing evidence see 7 L W 415.

C. P. C. (1908) Or. 6, r. 18

—Where the High Court ordered amendment on consent of parties, not under O. 6 C P C. but under power to enable parties to settle their differences it was held that the time limit prescribed by O. 6 R. 18, was inapplicable. 22 I C 778.

## ORDER VII.

### *Plaint*

### *Synopsis.*

- (1-2) Construction of plaint
- (3) Description of defendant
- (4) and (5) "Facts constituting the cause of action" and "Facts showing that the Court has jurisdiction"
- (6) Insanity or minority of party

C. P. C. (1908) Or. 7, r. 1 ( *Cont'd* ).

- (7) Practice
- (8) Presentation of plaint
- (9) Relief which plaintiff claims
- (10) Verification of plaint.
- (11) Plaintiffs.
- (12) Defendants.
- (13) Cause of action.
- (14) Where and when it arose.
- (15) Effect of statement in plaint.
- (16) Objection as to description.
- (17) Clause. (h)
- (18) Valuation.

### (1-2) Construction of plaint.

—In the case of pleadings in the *muffassil* Court specially the Court should look to the substance of the plaint rather than to its wording. A I R 1931 Pat 179=Ind Rul (1931) Pat 239 = 12 P L T 636 = 131 I C 529.

### (3) Description of defendant.

—If the plaintiffs rely upon the defendant's residence or place of business as giving jurisdiction the facts showing this should be stated in the body of the plaint. It is not enough if this is stated in the cause title. The plaint should also contain the particulars of the loan etc. when suit is for such. If they are not available the suit should be framed as one for accounts. A I R 1931 Cal 458 = 58 Cal 418 = Ind Rul (1931) Cal 842=134 I C 538.

—As to the test to see whether the description of debt is only a misdescription see 34 B L R 1410 (1413-4)

—Order under O. 7, r. 1 returning pleadings verified by representatives of a firm, for inserting the description of persons verifying in the pleadings is not warranted. A L R 1933 S 52=26 S L R 429=A I R 1933 S 102.

### (4) and (5) "Facts constituting the cause of action" and "Facts showing that the Court has jurisdiction."

—Specific statement in plaint as to date on which the Cause of action arose is necessary unless it is otherwise alleged specifically 59 C 448 = 35 C W N 990 = 137 I C 353 = I R 1932 C 319 = A I R 1932 C 259.

—Date of cause of action must be specifically stated in the plaint. A paragraph stating such date is not therefore, superfluous where the date has not been alleged in the statement of facts, 35 C W N 990 dissenting from. 58 C 419.

—Order VII, r. 1 (a) and (f) requires not that a statement should be made that the plaintiff has a good cause of action or that it arose on such and such a date or that it arose wholly or partly within the jurisdiction

C. P. C. (1908) Or. 7, r. 1 (Concl'd)

(4) & (5) "Facts constituting the cause of action" and "Facts showing that the Court has jurisdiction."—(Concl'd)

but that particulars should be given of the facts constituting the cause of action and when it arose and the facts showing that it arose partly or wholly within the jurisdiction. A I R 1931 Cal 458=58 Cal 418=Ind Rul (1931) Cal 842=134 I C 538.

—In a suit for redemption there should be *prima facie* proof in support of the plaintiff's claim. When the particulars and proof of the plff's claim in respect of the mortgage are absent from the records of the suit the claim for redemption must fail. A I R 1931 Oudh 378=8 O W N 732=Ind Rul (1931) Oudh 345=132 I C 793.

—In a suit for partition, plaintiff must state in his plaint the nature of the deeds and transactions from which he deduced his title. 20 C W N 310=22 C L J 254=31 I C 181.

C. P. C. (1908) Or. 7, r. 2

#### Local Amendments.

—Lahore :—In the second paragraph of Rule 2 of Order 7, after the word "defendant" insert or for moveables in the possession of the defendant, or for debts of which the value he cannot after the exercise of reasonable diligence, estimate" and after the word "amount" where it last occurs insert "or value."

#### Synopsis.

- (1) Documents with plaint
- (2) Effect of non-compliance
- (3) Suit for mesne profits or amount found due on taking unsettled accounts

#### (1) Documents with plaint.

—Order VII. does not allow documents which are part of evidence in suit to be annexed to the suit Particulars which are too voluminous to be included in the plaint may be annexed thereto and may be delivered separately, and these facts should be given in the plaint. A I R 1931 Cal 458=58 Cal 418=Ind Rul (1931) Cal 842=134 I C 538.

#### (2) Effect of non compliance

—Per Lord-Williams, J.—Every practitioner when pleading should have particular regard to the provisions of O. VII, r. 2. Either the pleadings lack in conciseness or they state immaterial facts and a mistake which is frequently made is to include in the pleading either directly or indirectly by reference to some document annexed the evidence

C. P. C. (1908) Or. 7, r. 2 (Concl'd)

(2) Effect of non-compliance—(Concl'd)

nee by which material facts are to be proved. A I R 1931 Cal 458=58 Cal 418=Ind Rul (1931) Cal 842=134 I C 538.

(3) Suit for mesne profits or amount found due on taking unsettled accounts.

—O. 7, R. 2 does not prevent plaintiff from entering in plaint approximate amount of damages claimed and offering to pay more Court fees if the damages should prove heavier than anticipated. 17 M L J 625.

—Where plaintiff claims mesne profits both for period antecedent to suit and period subsequent thereto, the valuation refers to both periods. If he sues for mesne profits in respect of only one of these two periods, the valuation refers to that period only. Per *Jwala Prasad, J.*—Neither O. VII, r. 2 of the Code of Civil Procedure nor s. 7, cl. (iv) (f) of the Court Fees Act would apply to unascertained future mesne profits A I R 1926 Pat 218 (F B)=5 Pat 361=7 P L T 313=(1926) Pat 49=93 I C 939.

—When mesne profits are claimed only from the date of institution of the suit, it is not possible to state even approximately the amount of mesne profits. A I R 1923 Rang. 110=4 U B R 140=1 Bur L J 267=77 I C 53.

—In a suit to recover past mesne profits the Plff. is bound to state approximately the amount sued for. 24 I C 232.

—In a suit for winding up a partnership and for accounts it is open to the plaintiff to value the amount at which the relief sought is estimated for the purpose of court fees. 15 Bom L R 1123=22 I C 71.

C. P. C. (1908) Or. 7, r. 3.

#### Local Amendments.

Bengal :—

—After R. 3, O. 7, add the words "and where the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same area in terms of the local measures."

#### Synopsis.

- (1) Scope of the rule.
- (2) Description of property
- (3) Omission or misdescription of property

#### (1) Scope of the rule.

—Provision in r. 3 as to description of property, is inapplicable to a suit which is for administration and not for possession of immoveable property. 138 I C 335=A I R 1932 L 328 (330)=1 R 1932 L 460.

## C. P. C. (1908) Or. 7, r. 3 (Concl'd)

## (2) Description of property.

—Where boundaries of property as given in plaint are not correct the property within those boundaries cannot pass. A I R 1929 Pat 49 = 108 I C 814.

## (3) Omission or misdescription of property.

—Misdescription of plot as to number is not absolutely fatal even though the plaint was not amended by stating the correct plot. 17 C L J 118 = 18 I C 745.

## C. P. C. (1908) Or. 7, r. 4

—Character in which the plaintiff sued or defendant is sued need not necessarily appear in the cause title. It is sufficient if it appears in the body of the plaint. A I R 1928 Nag. 319 = 109 I C 785.

—R. 4 of O. 7 of the Code does not require that the plff suing in a representative capacity should state so in the cause title of the plaint. 19 C W N 1193 = 28 I C 818.

—The plaint must contain a statement that the suit is brought in a representative character whenever it is so. A I R 1925 Nag 183 = 82 I C 201.

—Character in which the plaintiff sued or defendant is sued need not necessarily appear in the cause of title. A suit by or against a shebait, the idol is not a necessary party. 46 Clc. 877 = 50 I C 525.

—Suit by stray individuals without properly representing community—No jurisdiction to adjudicate on public right. 42 I C 543.

—In a suit by the manager of an undivided family on a promissory note passed in his name by the defendant the other members are not necessary parties and the suit is not bad for non-joinder. A I R 1922 Bom 281 = 46 B 358 = 23 Bom. L R 1135 = 64 I C 966.

—So long as the compliance with s.187 of the Succession Act is prior to decree, the fact that it is after the institution of the suit makes no difference and the Court is fully competent to deal with the suit. A I R 1923 Cal 1 = 50 C 49 = 36 C L J 35 = 74 I C 630.

## C. P. C. (1908) Or. 7, r. 5

—Verification does not amount to evidence of facts contained in pleading so as to justify decree thereon without taking evidence. 20 C W N 1192.

—Where goods consigned to a station in one Ry. were entrusted to another Ry. and there was a shortage of goods, and a suit was

## C. P. C. (1908) Or. 7, r. 5. (Concl'd)

brought by the consignor against one of the Railways for compensation on the plea that, that Ry. Co after delivering the goods accepted liability in a correspondence with him *Held*, that there was sufficient interest in the Ry. Co to sustain a suit against it and there was a good cause of action also. 12 A L J 339 = 25 I C 77.

—A plaint which does not show the cause of action is a defective plaint. The Court is in such a case bound to call upon the plaintiff to disclose his cause of action correctly against each defendant. A I R 1924 Nag 191 = 79 I C 614.

## C. P. C. (1908) Or. 7 r. 6

*Synopsis.*

- (1) Scope of the rule.
- (2) Grounds of exemption from limitation law.

## (1) Scope of the rule

—Where a suit on the face of the plaint is time barred. O. 7 R 6 C P has no application. 25 I C 463 = 70 P R 1914 = 260 P L R 1914 = 195 P W R 1914

—But O 7 R 6 of the C P Code applies to cases in which the suit as laid in the plaint is *prima facie* barred by limitation. 1 Lah 21 = 51 I C 956.

—Provisions of this rule should be liberally construed 102 P R 1918 = 46 I C 495.

## (2) Grounds of exemption from limitation law.

—(a) *General* :—A plaintiff cannot take advantage of any ground of exemption from limitation which he has not pleaded in his plaint. 31 C 195 = 8 C W N 168.

—Ground of exemption from limitation not stated in plaint cannot be allowed. 83 P R 1914 = 232 P L R 1915 = 26 I C 441.

—In case of a claim affected by limitation the plaint must take a ground for limitation. 24 I C 232.

—Objections based on plaintiff's failure to set out the ground of exemption from limitation in the plaint must be taken in the trial Court. Otherwise the High Court will not permit them to be raised before it in revision. 4 L W 148 = 36 I C 593. (1)

—Special plea of limitation ought to be taken in the written statement though a plea of limitation can be raised at any stage of suit even in appeal. A I R 1924 Cal 463 = 69 I C 194.

—A suit returned to be presented to the proper Court. When so presented it was beyond time. On the plaint no statement, as re-

C. P. C. (1908) Or. 7, r. 6, (Contd)

(2) Grounds of exemption from limitation law—(Contd)

quired under r. 6, was made. The omission was not fatal to the suit, because circumstances entitling plaintiff to claim benefit of s. 14 of Limitation Act appeared on face of record, being endorsed therein by the Court. A I R 1923 Lah 591 = 82 I C 866.

—Omission to show ground of exemption in a suit filed on the day the Court reopened after the summer vacation would not entail the dismissal of the suit even if the period of limitation for the suit had expired during the vacation. 56 I C 926.

—(b) *Minority*:—Where suit would be barred but for the alleged minority of plaintiffs onus is on plaintiffs to prove that suit is within time. I R 1928 Lah 763; 10 Lah L J 309 30 P L R 105 = 109 I C 331.

—(c) *Acknowledgment*:—An acknowledgment of liability sufficient under s. 19 of the Limitation Act to give a fresh start to limitation from the date thereof should be pleaded specifically. A I R 1924 Pat 806 = 5 P L T 551 = 78 I C 919.

—Acknowledgment saving suit from bar of limitation—Proof of its having been made within limitation period—Onus of. See 1932 A L J 279.

—Where in a suit *prima facie* barred by limitation, plaintiff fails in his plaint to set up a plea of exemption, he cannot be allowed in course of trial to use any document as being an acknowledgment saving limitation. 25 M L T 295 = (1919) M W N 429 = 9 L W 82 = 52 I C 243.

—Plaintiff failing in his plaint to set up acknowledgment as saving limitation. He cannot be allowed to raise it an acknowledgment. A I R 1922 Lah 39 = 4 Lah L J 190 = 3 Lah 233 = 69 I C 419.

—Though an acknowledgment is not pleaded in plaint—Yet it can be set up in reply to defence of the defendant. A I R 1922 Oudh 135 = 25 O C 82 = 17 O L J 7 = 68 I C 196.

—Plaintiff can show in reply to the defence set up that his claim was within time by reason of the acknowledgments of the defendants. A I R 1922 Oudh 135 = 25 O C 89 = 68 I C 196.

—(d) *New or inconsistent ground of exemption*:—Where in a suit on pro-note after the expiry of period of limitation, ground of exemption is stated in the plaint, plaintiff is not entitled to set up a different or another ground of exemption during trial except by way of amendment of the plaint. A L R 1933 M 230.

—The plaintiff, having mentioned one ground of exemption in the plaint is not debarred from taking another and inconsistent ground to get over the bar of limitation. But

C. P. C. (1908) Or. 7, r. 6 (Contd)

(2) Grounds of exemption from limitation law—(Contd)

where no ground of exemption from the Law of Limitation is stated in the plaint, acknowledgment as a ground of exemption cannot be allowed to be set up in appeal. A I R 1922 Lah 39 = 3 Lah 233 = 4 Lah L J 190 = 69 I C 419.

—Where plaint shows how plaintiff's claim is within limitation, plaintiff ought not to be debarred from taking another and even an inconsistent ground to get over the bar of limitation. A I R 1921 Nag 1 = 17 N L R 209 = 65 I C 279.

—Rule 6 should be construed liberally and reasonably. Where exemption from limitation is not stated in the plaint the Court should allow the inclusion of that ground. Where the point is expressed in the plaint r. 6 is satisfied but in such a case plaintiff may try to get over the bar of limitation by putting forth another ground if he believes the latter to be true. 3 Lah L J 22 = 60 I C 772.

—Where the plaintiff mentions one ground of exemption in the plaint there is no bar to take another and an inconsistent ground to avoid limitation and the acknowledgment made in the written statement in a previous case can be relied on. A I R 1922 Lah 230 = 2 Lah 13 = 3 Lah L J 22 = 63 P L R 1921 = 60 I C 772.

—Where the plaint is rejected by trial Court for want of Court-fee and the Appellate Court reverses the order, it may yet reject the plaint on another ground. A I R 1923 Nag 30 = 69 I C 521.

C. P. C. (1908) Or. 7, r. 7

*Synopsis.*

- (1) Alternative relief.
- (2) General or other relief.
- (3) Relief not founded on pleadings.

(1) Alternative relief

—The discretion under O. VII, r. 7 and O XLI, r 33, covers the granting of a declaratory decree in a suit for possession where alternate relief is claimed therein. A I R 1923 Lah 422 = 85 I C 95.

—Suit for sp. performance dismissed—Decree for refund of earnest money competent to give. See 17 C W N 100 = 15 I C 268.

(2) General or other relief.

—The meaning is clear. If the facts stated in the plaint entitle the plaintiff to a particular relief he is entitled to be given it even



**C. P. C. (1908) Or. 7, r. 7 (Contd)****(2) General or other relief—(Contd)**

though he may not have asked for it specifically provided the Court thinks it just to do so, (Bose A J C) (1932). A I R 1932 N 23 (26) = 27 N L R 327 = 137 I C 33 = I R 1932 N 53 = A L R 1932 N 70.

—A Court can grant general or other relief to the same extent as if it had been asked for. A I R 1930 Pat 71 = 10 P L T 630 = Ind Rul (1930) Pat 4 = 120 I C 292.

—General of specific relief not prayed for —Court may grant such relief if facts in plaint cover it. A I R 1923 Pat 386 = 1923 P H C C 153 = 5 P L T 330 = 76 I C 940.

—A prayer for general relief is unnecessary. All that is necessary is that the necessary foundation of facts must be laid in the plaint. A I R 1923 Pat 386 = (1923) Pat 153 = 5 P L T 330 = 76 I C 940.

—Where the plaint sets out facts in issue that are material, the plaintiff is entitled to relief which those facts will sustain under the general prayer but he cannot desert specific relief prayed and under the general prayer ask specific relief of another description unless the facts and circumstances mentioned in the plaint will consistently with the rules of the Court, maintain that relief. A I R 1924 Lah 324 = 69 I C 501. See also 43 C 743 = 22 C L J 419 = 20 C W N 446 = 32 I C 437.

—The general or 'other relief' which can always be given by the Court should not be inconsistent with the relief claimed in the plaint. The granting of interest not specifically asked for in a suit for money, cannot be regarded as an inconsistent relief and therefore a Court has discretion to award interest subsequent to the institution of the suit. A I R 1921 Lah 125 = 2 Lah 256 = 107 P L R 1921 = 64 I C 896.

—Court has power to grant reliefs not prayed for in the plaint provided there are material allegations in the plaint on which such reliefs can be based. A I R 1921 Pat 14 = 6 Pat L J 190 = 2 P L T 325 = (1921) Pat 235 = 60 I C 980.

—Declaration of right can be given though not specifically asked for. 22 C L J 419 = 43 Cal. 743 = 20 C W N 446 = 32 I C 437.

—Prayer for possession, whether includes prayer for sale in a suit by a simple mortgagee. 25 I C 1.

—Prayer for general covers only relief out of the same cause of action and not out of a different cause of action. See 13 I C 650.

—On a prayer by plaintiff for such general relief as the Court might grant if prayer for possession is refused, the Court can grant the plaintiff a declaration of his title though he fails to obtain the specific relief prayed for. 4 Lah L J 393.

**C. P. C. (1908) Or. 7, r. 7 (Contd)****(3) Relief not founded on pleadings**

—Where in a suit for possession the plaintiff omits to state his claim for mesne profits, the Court's order appointing receiver to safeguard the mesne profits is not justified. A L R 1933 S. 378.

—Where in suit by non-proprietor for declaring him owner of site, ownership was not proved the Court could not grant a decree in the absence of a prayer that he was the proprietor and that he could build a house on it and could not be ousted from it. A I R 1929 Lah 126 = 10 Lah L J 513 = 112 I C 485.

—Relief not claimed in plaint cannot be granted. 2 Pat L J 6:8 = 43 I C 463.

—Relief in excess of pleading should not be granted. 2 Pat L J 698.

—The rule that the Court will grant only such relief as the plff. is entitled to upon the case made by his pleadings is strictly enforced when the plff. relies on fraud. 20 C W N 638 = 35 I C 284.

—Specific performance—denial of decree for alternative relief of return of deposit:— 17 C W N 111.

—But where facts pleaded and found proved show that the plaintiff is entitled to a particular relief the Court can grant him such relief though it has not been specifically pleaded. A I R 1930 Nag 92 = 26 N L R 94 = Ind Rul (1930) Nag 17 = 120 I C 321.

—In a suit for possession of certain property the lower Court found that the property was held by a Hindu widow and transferred by her to the defendants without legal necessity. The Court could under O. VII, r. 7, grant a declaration that the transfer was void beyond the life time of the widow, though declaratory relief was not specifically asked for. A I R 1929 All 555 = Ind Rul (1929) All 861 = 118 I C 381.

—Court can give the plaintiff a decree for less than he had demanded if the Court finds him entitled to less relief. A I R 1923 Sind 5 = (F. B.) 16 S L R 112 = 71 I C 161.

—Claim for possession by partition, but property found impartible. A decree for joint possession should be given and the suit must not be dismissed although plaintiff may not have expressly asked for a declaratory decree. A I R 1921 All 106 = 43 A 318 = 19 A L J 61 = 60 I C 878.

—Plff. suing for partition of certain property and asking to be put in possession thereof can be given a decree for ejectment, if the plff. in effect asks for that relief and the deft. had not been taken by surprise. 13 S L R 159 = 53 I C 722.

—Claim for larger relief—Plff. entitled to decree for smaller relief to which he was

C. P. C. (1908) Or. 7, r. 7 (Concl'd)

(3) Relief not founded on pleadings—(Concl'd)

found- entitled—Decree for joint possession in suit for ejectment can be passed. 44 I C 557.

C. P. C. (1908) Or. 7, r. 8.

—Plaintiff claiming property by ownership as successor to a person in the *mahantship* of a temple and in his reply to the defendant's written statement pleading that he is entitled, even if not the owner, to the management of the property. The first claim cannot include the second and plaintiff has two distinct claims, founded on separate and distinct grounds and the case falls under O. VII, r. 8. A I R 1929 Nag 347=Ind Rul (1930) Nag 36= 120 I C 404. See also 24 C W N 145 = 30 C L J 428=54 I C 700.

C. P. C. (1908) Or. 7, r. 9.

#### Scope of the Rule.

—There is a distinction between documents sued upon and documents relied upon by plff. Under O. 11, R. 15, C P C a deft. is not entitled as of right to have inspection of the documents relied upon by plff. before filing his written statement. 24 C W N 302 = 56 I C 457.

—A suit is instituted when the plaint is filed and not when it is ordered to be registered. 34 C L J 465 = 66 I C 923.

C. P. C. (1908) Or. 7 r. 10

#### Synopsis.

- (1) Scope of the rule.
- (2) Appeal, revision or reviv.
- (3) "At any stage of the suit."
- (4) Court-fee.
- (5-6) Effect of return of plaint.
- (7) Erroneous Valuation of suit.
- (8-9) Limitation.
- (10) Technical defects.
- (11) Want of jurisdiction.
- (12) Wrong presentation and representation of plaint.

#### (1) Scope of the rule.

—O. VII r.10 had not been overridden in the Punjab. A I R 1928 Lah 484=110 I C 293.

—By virtue of s. 107, O VII, r. 10 applies to appeals. A I R 1923 Nag 310 = 8 N L J 63= 74 I C 93.

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C. P. C. (1908) Or. 7, r. 10 (Cont'd)

(1) Scope of the rule—(Cont'd)

—O. VII r. 10 does not apply to order returning plaint under S. 27 of the Pro. Sm. C. C. Act. 18 C W N 380.

—Provisions of O. 7 r. 10 are mandatory—the Court must return the plaint even though plaintiff may not have asked for the same. 10 L W 525=53 I C 308=1920 M W N 163.

—O. 7, R. 10 C. P. Code empowers a Court to return a plaint for presentation as an application in the Court having jurisdiction to accept it as an application. 6 O L J 640 = 54 I C 364.

—O. 7 r. 10 being applicable only to suit which as originally framed was wrongly instituted, does not apply when it is found on evidence or admissions of parties that the relief to which plaintiff is really entitled is different from the one claimed in the suit. In the latter case the Court cannot decline jurisdiction but must proceed with the case to its finish after amendment of pleadings or otherwise. A L R 1933 S 274.

—The rule applies only when it is found that the suit as originally framed was wrongly instituted. 135 I C 257 = I R 1932 S 17 = A I R 1932 S 67 (68-9) = A L R 1932 S 293.

—O. VII R. 10 applies where suit as ordinarily framed is wrongly instituted in that Court but does not apply when it is found at the trial whether as the result of admissions made by the parties or evidence led by them, that the relief which the plaintiff is really entitled to is different from that claimed in the suit and that that relief is not cognizable by that Court. In the latter case the Court cannot decline jurisdiction but should proceed with the trial or pass such decree as the circumstances permit. It may in certain fit cases grant permission for the withdrawal of the suit with liberty to file a fresh suit. A I R 1930 Sind 252 = 25 S L R 63 = 130 I C 554.

—Where a Court originally had jurisdiction to try the suit but discovers at the time of passing a decree that it is incompetent to pass the decree because of the pecuniary valuation O. VII, r. 10 does not apply. A I R 1928 Lah 484 = 110 I C 293.

—The rule applies when the suit as originally framed was wrongly instituted. The abandonment of a claim *pendente lite* cannot be given retrospective effect so as to vitiate the institution of the suit. 54 I C 655.

—Where some causes of action are within and some outside the jurisdiction of a Court the Court should retain the plaint, strike out that part which is beyond its jurisdiction and try the case. For the struck out part, the plaintiff may file another suit in proper Court. The Court cannot proceed on a certified copy

C. P. C. (1908) Or. 7, r. 10 (Contd.)

(1) Scope of the rule—(Concl'd)

of the plaint for trial of causes of action within jurisdiction. A I R 1926 Bom 283=28 Bom L R 521 = 94 I C 783.

—Where some reliefs are within and some outside the jurisdiction of a court the Court should not return the plaint for presentation to proper Court but the Court should proceed with that part of the case which is in its jurisdiction. 40 L J 374 = 41 I C 125.

—Return of plaint ordered, plaintiff willing to drop part of his claim to bring his case within the Court's pecuniary jurisdiction

—Court can admit the plaint as amended. A I R 1926 Mad 133 = 22 L W 582 = (1925) M W N 804 = 92 I C 800

—Suit under s. 92, included claim for possession—Court should not return plaint altogether. The Court may allow plaintiffs to amend the plaint by striking off the claim for possession or may dismiss the claim with regard to that particular relief in its judgment. A I R 1925 All 683 = 47 A 770 = 23 A L J 661 = L R 6 A 352 Civ = 89 I C 40

—Out of two claims, one which is out of jurisdiction shall be regarded as a separate claim. A I R 1921 All 193 = 19 A L J 822 = 64 I C 688.

—The jurisdiction in a particular case is determined by the nature of the claim as brought. A I R Nag 221 = 107 I C 671 (2)

—The subject matter of the suit or application must be determined by looking into the application itself or the plaint of the suit itself. A I R 1927 Cal 711 = 46 C L J 46 = 104 I C 349.

—When the plaint is not *mala fide* it will determine jurisdiction although it may be mistaken. A I R 1926 All 747 = 96 I C 787.

—Court for determining jurisdiction cannot decide material issue in the case. Where the defendant puts in an objection that the plaintiffs claim is purposely over valued by including in it an item without any title to it the Court cannot decide the issue to determine its jurisdiction A I R 1926 Mad 339 = 91 I C 737.

—In case of transfer of parties raising valuation of object matter of suit beyond the Court's jurisdiction the Court should add parties and return the plaint for presentation to proper Court A I R 1926 Pat 28=90 I C 82.

—There is nothing in the C P Code to prevent a Court, from awarding a decree in excess of its pecuniary jurisdiction. 40 Mad 1=32 M L J 221 = 5 L W 580 = (1917) M W N 367 = 39 I C 439.

—Suit instituted in Court without jurisdiction A second suit in a Court of proper jurisdiction. The second suit cannot be regarded as a continuation of the first, even

C. P. C. (1908) Or 7, r. 10 (Contd.)

(1) Scope of the rule—(Concl'd)

though the subject-matter and the parties to the suits are identical. A I R 1929 P C 103 = Ind Rul (1929) P C 129 = 56 C 1048 = 56 I A 128 = (1929) A L J 254 = 33 C W N 485 = 291 M L W 682 = 56 M L J 614 = 6 O W N 473 = 49 C L J 462 = 31 Bom L R 741 = (1929) M W N 546 P C = 115 I C 713.

—Where a Judge can try a case under the ordinary procedure the mere fact that he tries it under a special procedure is no ground for dismissing that suit The proper procedure is a remand. A I R 1927 Lah 174=8 Lah 156=9 Lah L J 57=28 P L R 539 = 99 I C 648.

—Plaint cannot be returned for amendment. After retaining it on the Court file the plaintiff must if necessary be ordered to amend it within a certain time. A I R 1921 Sind 166=17 S L R 223 = 85 I C 893.

—*Vakalatnama* must in all cases be returned along with plaint. A I R 1923 Nag 182 = 19 N L R 36=6 N L J 100 = 71 I C 436.

—Where Judge holds a case set out in the plaint to be untrue in fact. He ought to dismiss the suit on the merits and not return the plaint under O. VII, r. 10. If he returns the plaint, he fails to exercise jurisdiction vested in him by law and the order is open to revision. A I R 1926 All 58 = 48 A 168=24 A L J 83 = 90 I C 353.

(2) Appeal, revision or review.

—An appeal against an order wrongly returning the plaint to be presented to the proper Court is tenable even though the plaintiff has submitted to the jurisdiction of the other Court. A plaintiff with a good case should not by an erroneous decision of a Court be made to face alternatives acceptance of either of which may preclude him from obtaining investigation of his claim A I R 1930 Nag 207 = 13 N L J 4 = Ind Rul (1933) Nag. 124=121 I C 668.

—An appeal is provided under O. XLIII, r. 1. Cl. (a) on an order returning plaint under O. VII, r. 10. The order by the Appellate Court becomes final under s. 104, cl (2) and s. 105 does not preclude the aggrieved party from disputing the correctness of the remand order in second appeal if he is otherwise entitled to do so. A I R 1926 Mad 900 = 51 M L J 119 = 24 L W 630 = (1926) M W N 613 = 97 I C 790.

—But where a plaint is returned by a Civil Court after it had been returned by a Small Causes Court the order of the Civil Court does not come under O. VII r. 10 and no appeal lies on it. A I R 1926 Cal 83 = 85 I C 1002.

—Where an Appellate Court dismisses an appeal when it is the only course open to it, it cannot be said that it has failed to exercise

C. P. C. (1908) Or 7, r. 10 (Contd.).

(2) Appeal revision or review—(Contd.)

its jurisdiction A I R 1930 Oudh 2 = 4 Luck 667 = 7 O W N 573 = Ind Rul (1929) Oudh 471 = 118 I C 807.

—An appeal presented to the High Court wrongly without any excuse, should be dismissed, as the High Court will in such cases refuse to return the memorandum of appeal. A I R 1925 Cal 335 = 80 I C 858.

—Though an order returning a plaint for presentation to the proper Court is appealable a second appeal is not competent from such a case A I R 1931 Lah 294 = 32 P L R 362 = Ind Rul (1931) Lah 907 = 134 I C 203.

—Where on appeal from an order returning a plaint to be presented to the proper Court, an order is passed remanding the case to the trial Court no further appeal therefrom lies. Nor is it liable to revision Ind Rul (1930) All 725 = 125 I C 581.

—A second appeal does not lie from an order returning a plaint A I R 1926 Lah 141 = 89 I C 384 see to the same effect 21 M 234; and 3 A 855.

—A second appeal does not lie from an order passed under O VII r. 10 ordering return of plaint for presentation to the proper Court under O. XLIII, r. 1 (a) A I R 1925 Bom 431 (1) = 27 Bom L R 635 = 88 I C 753.

—High Court can revise the order directing the plaint to be returned for presentation to proper Court A I R 1930 All 158; (1929) A L J 1157 = Ind Rul (1930) All 526 = 124 I C 478. see also. A I R 1925 Lah 479 = 7 Lah L J 285 = 26 P L R 584 = 90 I C 603.

—Order returning plaint—High Court refusing revision—Lower Appellate Court in appeal setting aside trial Court's order returning plaint—Plaintiff could not be restored to his prior position as further interference was not desirable—The trial Court's order should be confirmed A I R 1923 Oudh 38 (2) = 79 I C 237.

—It is within the power of the High Court to decide question of jurisdiction necessary for the just trial of the suit A I R 1922 Pat 368 = 2 P L T 739 = 64 I C 496.

—An application for leave to sue in forma pauperis is not a plaint and as such an order returning such application for presentation to proper court is without jurisdiction and can be interfered within revision. 52 I C 688.

—Court ordering a return of plaint for presentation to proper Court on payment of additional Court-fee cannot review its order and extend time previously fixed for payment of Court-fee. A I R 1926 Mad 133 (2) = 22 L W 582 = (1925) M W N 804 = 92 I C 800.

C. P. C. (1908) Or 7, r. 10 (Contd.)

(3) "At any stage of the suit".

—Court can raise objection to territorial jurisdiction *suo motu* and return plaint for presentation to proper court at any stage of the suit. 53 I C 331.

—But where parties went to trial on the merits and after evidence had been recorded and the case argued the issue as to want of jurisdiction was raised by the Sub-Judge *suo motu. Held*, in revision the order of the Court returning the plaint was not justified and that the same should be set aside. Ind Rul (1931) Lah 431 = 32 P L R 737 = 131 I C 303 (2)

—Where a plaint is returned after trial to be presented to proper court, the latter Court should not remand the case for retrial but should decide it on merits. A W N 1882, 45.

But see (1916) 32 I C 759 = 1915 M W N 784.

(4) Court-fee.

—Where a plaint is returned for presentation to the proper Court the plaintiff can pay the deficient Court-fees in the Court having Jurisdiction to hear the case by taking advantage of previously paid Court-fees A I R 1927 Bom 257 = 51 B 236 = 29 Bom L R 280 = 101 I C 343.

—A Court should on plaintiff's refusal to pay Court-fee though for a claim exceeding its jurisdiction reject the plaint. If plaintiff pays the requisite Court-fees the plaint should be returned for presentation to proper Court. A I R 1924 Mad 646 = 46 M L J 345 = 34 M L T 92 = (1924) W N 338 = 77 I C 781.

—On return of plaint credit should be given to the old stamp. 35 Mad 567 = 21 M L J 533 = 10 I C 201 = 10 M L T 29 (F B.)

(5-6) Effect of return of plaint

—Return of plaint terminates proceeding. 35 I C 595.

—Plaint returned for presentation to proper Court The suit is said to be instituted on date of such presentation and the suit thus presented cannot be said to be in continuation of the suit filed in a Court without jurisdiction. A I R 1928 Bom 421 = 30 Bom L R 970 = 52 B 548 = 113 I C 511.

—Plaint returned and presented in proper Court. Suit must be taken to be instituted on date of such representation Court fee on such plaint should be leviable under the law which was in force at the time when the plaint was re-presented. If the Act is amended in the meantime increasing the amount of fee payable there under the plaintiff should be credited with the originally Court fee paid. A I R 1926 Cal 355 = 30 C W N 90 = 91 I C 862.



**C. P. C. (1908) Or. 7, r. 10 (Contd)****(6) Effect of return of plaint—(Concl'd)**

—Where plaint is returned for presentation to proper Court, the suit is to be considered as instituted on the date of such presentation and the plaintiff should amend the plaint so as to include all intermediate transactions between the date of first presentation and the date of presentation to competent Court. 15 C L J 241=13 I C 377.

—Where the Court erroneously returns a plaint on the ground that the plaintiff has not furnished a list of the documents he proposes to rely upon and the plaint is accordingly represented, the suit should be deemed to have been constituted on the date of first presentation. A I R 1930 Lah 480 = Ind Rul (1930) Lah 360=122 I C 488

—A plaint returned for presentation to the proper Court if again returned on account of wrongful valuation by the latter Court to the Court which first returned it cannot be said to have been filed on the later date of presentation, to the Court first returning it. A I R 1929 Lah 409=30 P L R 306=11 Lah L J 251=Ind Rul (1929) Lah 493=116 I C 317.

—The presentation of a plaint in another Court, after its return by the Court to which it is first presented by mistake is a continuation of the original suit and therefore a fresh *vakalatnama* in another Court is not necessary. A I R 1923 Nag 182=19 N L R 36=6 N L J 100=71 I C 436.

—Where a plaint is returned for presentation to proper Court, it can after amendment be represented to the same Court. A I R 1931 Mad 8=32 M L W 694=59 M L J 953=Ind Rul (1931) Mad 254=129 I C 254.

—Presentation to competent Court—Effect—New suit whether continuation of old suit. See 24 I C 232.

—Plaint presented on objection by defendant plaintiff amending valuation of plaint and plaint was then returned to plaintiff for presentation to proper Court. The plaintiff was not acting as agent of the Court for purposes of s. 34 of the Punjab Courts Act. A I R 1928 Lah 484=110 I C 293

**(7) Erroneous Valuation of suit**

—Suit for partition. In preliminary decree at the time of final decree it is found that the suit is under-valued, Court cannot if the value of the property exceeds the pecuniary limits of the Court, declare preliminary decree a nullity and return the plaint for presentation to competent Court. A I R 1930 Cal 147 (1)= Ind Rul (1930) Cal 488 = 125 I C 104.

**C. P. C (1908) Or. 7, r. 10 (Contd)****(8-9) Limitation.**

—Where a plaint is returned the time to be excluded under s. 14, Limitation Act, is the period from the date of presentation to the date of return of the plaint. A I R 1926 Mad 178 = 22 L W 816 = 92 I C 373 But see (1893) 3 M L J 190.

—Plaint returned for presentation to proper Court plaintiff appealing—He can still present the plaint to the proper Court subject to limitation. A I R 1925 Bom 418 = 27 Bom L R 652=89 I C 68.

—Presentation of, to wrong Court—Suit barred on day of presentation—Return for presentation to the right Court—Limitation—See 10 M L T 254= 21 M L J 1000=2 M W N 1911, 221.

**(10) Technical defects.**

—Court cannot return a plaint on the ground that the plaintiff has not mentioned therein the list of the documents on which he relies. The only effect of a person not furnishing the list of documents on which he relies is that, unless the Court permits him to do so he is not entitled to produce them at a later stage. A I R 1930 Lah 480=Ind Rul(1930) Lah 360 = 122 I C 488.

—Failure to adopt proper procedure, such as could have given the Court the jurisdiction entails the dismissal of the suit. A I R 1922 Bom 152 = 46 B 229 = 23 Bom L R 1086 = 64 I C 919.

**(11) Want of jurisdiction.**

—Where there is want of jurisdiction the proper procedure is to return the plaint A I R 1931 All 664 = Ind Rul (1931) All 651 = 133 I C 411.

—When the Court finds that on correct valuation, the plaint is not cognizable by it, the proper thing is to return the plaint so that it may be presented to the Court having jurisdiction. 51 Bom 236; 8 M 62; 8 B 313; 7 M 171 relied on 7 B 487 not followed A I R 1931 Mad 67 = Ind Rul (1931) Mad 346 = 61 M L J 43 = 129 I C 826.

—Where a court finds that it has no jurisdiction to try a suit, it should at once return it for presentation to the proper court. It has no power to call on plaintiff to pay deficient court-fee and to reject it on default of payment. A L R 1931 N 359.

—Court finds that on correct valuation of plaint, suit is beyond its jurisdiction—Plaint should be returned for presentation to proper Court—Latter Court can consider whether proper Court-fees have been paid and proceed as per law—Former Court has no such power. A I R 1931 Mad 67 = Ind Rul (1931) Mad 346 = 129 I C 826.



C. P. C. (1908) Or. 7, r. 10 (Contd.)  
(11) Want of jurisdiction—(Contd.)

—Plaint should at once be returned where Court discovers that the valuation is beyond its jurisdiction. A I R 1931 Mad 69 = 59 M L J 899 = (1930) M W N 656 = 33 L W 68 = Ind Rul (1931) Mad 289 = 129 I C 625.

—When a suit is instituted in a Court which has no jurisdiction to try it, then the Court must return the plaint to the plaintiff for presentation to the Court having jurisdiction. The date of institution of the suit is the date on which the plaint is presented to a Court having jurisdiction to try the same. A I R 1930 Lah 394 = Ind Rul (1930) Lah 868 = 127 I C 708.

—Where on re-valuation, Court finds that the suit is beyond its jurisdiction it can only order the plaint to be presented to the proper Court. It cannot reject the plaint for failure to pay additional Court-fee. A I R 1930 Mad 699 = 31 M L W 831 = 58 M L J 651 = Ind Rul (1930) Mad 831 = 126 I C 111.

—A Court not having jurisdiction to try a suit can neither transfer its jurisdiction temporarily to an arbitrator nor send the suit to the District Judge for transfer to the proper Court. The only course for the Court is to return the plaint for presentation to the proper Court. The only exception to the rule is where a preliminary decree for accounts has been passed by a Court not having jurisdiction to pass a final decree on the examination of accounts. Where, on reference by Court, an award was passed, it could not be said to be a preliminary decree. A I R 1930 Lah 195 = Ind Rul (1930) Lah 606 = 155 I C 334.

—Suit of a small cause nature. Small Cause Judge finding that there was partnership and dismissing the suit. The suit is rightly dismissed and the Judge need not have returned plaint for presentation to proper Court. A I R 1929 All 907 = Ind Rul (1929) All 907 = 118 I C 667.

—Suit for rendition of accounts—Preliminary decree by High Court in second appeal. Suit remanded to trial Court for further proceedings. On receipt of Commissioner's Report the trial Court thinking it possible that the pecuniary value of the case may be outside its jurisdiction and returning plaint to plaintiff for being presented to proper Court. The trial Court could not act under O. VII, r. 10, as it had come to no definite finding that it had no jurisdiction to deal with the suit. There was also no question of any withdrawal of the first suit or fresh institution thereof. The plaintiff having obtained a preliminary decree, it cannot be believed that he contemplated foregoing the fruits of that decree and instituting the suit afresh. A I R 1929 Lah 248 = Ind Rul (1929) Lah 641 = 117 I C 369.

C. P. C. (1908) Or. 7, r. 10 (Contd.)  
(11) Want of jurisdiction—(Contd.)

—Where a suit is filed in a Court without jurisdiction, that Court should return the plaint and not dismiss the suit. A I R 1927 Pat 254 = 6 Pat 358 = 103 I C 435.

—Court in which the suit is instituted cannot return the plaint for presentation to the proper Court on the ground that it would be more advantageous to the defendant to have the suit tried in that Court. The plaint can be returned only on the ground of want of jurisdiction. A I R 1927 Cal 87 = 97 I C 979.

—Suit presented—Court having no jurisdiction should not dismiss it but return it for proper presentation. A I R 1926 Mad 140 = 22 L W 522 = (1925) M W N 771 = 91 I C 280.

—Civil Court holding that it cannot entertain appeal and that the appeal lies in a Revenue Court. The Civil Court should not dismiss the appeal, but return the memorandum of appeal for presentation to the proper Court. A I R 1925 Oudh 499 = 12 O L J 362 = 2 O W N 499 = 89 I C 511.

—Where a Court finds that it has no jurisdiction to try a suit it cannot try it on merits. If a decree be passed it can be set aside in revision. A I R 1925 Oudh 735 = 88 I C 991.

—Court without jurisdiction must return plaint and not dismiss the suit; want of jurisdiction does not entail dismissal. A I R 1922 All 424 = 44 A 686 = 70 I C 98.

—Suit not cognizable by Court must be returned for presentation to proper Court and must not be tried on merits. 41 I C 203 = 27 C L J 590.

(12) Wrong presentation and re-presentation of plaint.

—Appeal presented to a wrong Court should be returned for presentation to proper Court. 5 L W 264 = 38 I C 772.

—A plaint may be returned for proper presentation even at the instance of the plaintiff filing it in wrong Court. A I R 1929 Pat 722 = Ind Rul (1929) Pat 491 = 118 I C 139.

—A declaratory suit to prove that the award is not binding on plaintiff may be brought in Sub-Judge's Court also. A I R 1922 Lah 26 = 4 Lah L J 12 = 68 I C 187.

C. P. C. (1908) Or. 7, r. 11

Synopsis.

- (1) Scope of the rule.  
(a) General.  
(b-c) Practice.

## C. P. C. (1908) Or. 7, r. 11 (Contd.)

- (2) Appeal, revision or review.
- (3) Effect of order rejecting the plaint.
- (4) Enlargement of time.
- (5-6) Irregularity in form of plaint.
- (7) Rejection of plaint at any stage.
- (8) Rejection of plaint in part.
- (9) Return of plaint for amendment.
- (10) Suit against minor.
- (11) Suit barred by law.
- (12) "Where plaint does not disclose cause of action."
- (13) "Where the relief claimed is undervalued."
- (14) "Where plaint is written upon paper insufficiently stamped."

## (1) Scope of the rule.

## (a) General.

—General:—The question of rejection of plaint depends not upon what is stated in the written statement but upon the plaint. The defect for rejecting the plaint should be apparent on the face of it. A L R 1933 S 202.

—Dismissal for default cannot be set aside on the ground that plaint ought to have been rejected. A I R 1924 Pat 271 = 2 P 784 = 74 I C 847.

—Mere fact that Secretary is described in plaint as "an *officio* Secretary of King's Yunani Hospital Committee" would not enable plaintiff to execute against Committee any decree which he might get. A I R 1924 Oudh 128 = 26 O C 333 = 80 I C 495.

—O VII r. 11 applies to first proceedings only. A I R 1930 Nag 224 = 26 N L R 183 = Ind Rul (1930) Nag 257 = 124 I C 241.

—The dismissal of the plaint for non-appearance of the plaintiff on the fixed day and the subsequent non-payment if the deficiency causes the dismissal of the plaint under O. VII, r. 11 and not under O. IX, r. 8. A I R 1929 Mad 344 = Ind Rul (1929) Mad 725 = 117 I C 789.

Per, *Fawcett, J*—R 11—Extends to or is applicable to cases where the Court has jurisdiction to try suit even if the relief claimed is undervalued. A I R 1927 Bom 257 = 51 B 236 = 29 Bom L R 280 = 101 I C 343.

—Provisions of O. VII, r. 1 are not exhaustive, plaint may be rejected under s. 151. A I R 1924 Oudh 413 = 11 O L J 260 = 83 I C 778.

—O VII, r 11 is only a rule or procedure and is only meant to secure proper Court fees and stamps. A I R 1930 Cal 686 = 58 C 281 = Ind Rul (1931) Cal 475 = 131 I C 587.

## C. P. C. (1908) Or. 7, r. 11 (Contd.)

## (1) Scope of the rule—(Contd.)

## (a) General—(Contd.)

—Non compliance with S. 80 entails dismissal of the whole suit. A I R 1931 Mad 175 = 32 L W 810 = 59 M L J 923 = 54 M 416 = Ind Rul (1931) Mad 264 = 129 I C 456.

## (b-c) Practice

—Suit not otherwise bad and which has reached the stage of arguments must be dismissed and not rejected. A I R 1928 Oudh 495 = 12 R D 332 = 5 O W N 927 = Ind Rul (1929) Oudh 158 = 114 I C 510.

—Where memorandum is not stamped Court should fix time within which the requisite stamp must be supplied. 40 Mad 687 = 38 I C 617 = 31 M L J 269.

—No order for additional Court-fee can be issued after the suit is dismissed. A I R 1925 Lah 326 (1) = 7 Lah L J 18 = 86 I C 266.

—It is not absolutely necessary to draw up a decree in order rejecting a plaint. A I R 1929 Lah 83 = 108 I C 597.

## (2) Appeal revision or review.

—An order rejecting a plaint for non-payment of extra Court-fee is a decree under s. 2 and appealable as such, and no revision lies against such an order. 265 P L R 1914 = 80 P R 1914 = 167 P W R 1914 = 25 I C 565.

—Power of appellate Court is co-extensive with trial Court. A I R 1924 Nag 80 = 69 I C 554.

—Where the Court refused to strike off plaint on the ground that plaintiff has not set the particulars of fraud, the order is not appealable. A I R 1931 Lah 77 = 31 P L R 946 = 131 I C 129.

—An order passed in appeal on rejection of a plaint that no appeal lies is also a decree and is, therefore, subject to second appeal and not revision. A I R 1929 Cal 226 = 49 C L J 81 = Ind Rul (1929) Cal 368 = 115 I C 368.

—High Court cannot call for revision of a plaint which is rejected for there is no scope for appeal on rejection. A I R 1930 Pat 277 = 11 P L T 172 = Ind Rul (1930) Pat 184 = 122 I C 152.

—There is revision from an order wrongly dismissing a suit as time-barred. A I R 1928 Lah 274 = Ind Rul (1929) Lah 421 = 115 I C 757.

—According to practice in Madras High Court, order holding that certain Court-fee is payable is revisable. A I R 1925 Mad 722 = 48 M L J 514 = (1925) M W N 104 = 87 I C 25.

—An order rejecting an appeal from an order disallowing the plaintiff to sue as a pauper and requiring the Court-fees to be

C. P. C. (1908) Or. 7, r. 11 (Contd)

(2) Appeal revision or review—(Contd)

paid on a fixed date is subject to revisional proceedings only. A I R 1929 Lah 125 = 112 I C 490.

—An order refusing permission to sue in *forma pauperis* does not come under O. VII, r. 11 and, therefore, it being neither a decree, nor a decision, nor a judgment is subject only to revisional proceedings. A I R 1928 Nag 24 = 10 N L J 177 = 105 I C 30.

—Order rejecting plaint for non-payment of fee cannot be restored if signed by Court, but is subject to review. A I R 1923 Pat 354 = 2 Pat 504 = 4 Pat L T 261 = 72 I C 629.

(3) Effect of order rejecting the plaint.

—Where an order is not really an order of dismissal for default but one rejecting the plaint for non payment of deficient Court-fee, a second suit is not barred under O. IX, r. 3. Ind Rul (1931) Pat 369 = 133 I C 449 (1).

—Order rejecting a plaint is res-judicata and bars a second suit. (1920) M W N 616 = 12 L W 457.

(4) Enlargement of time.

—Court has power to extend period fixed for payment of deficit Court fee under O. 7, R. 11 (e). 51 I C 154.

—Insufficient stamp on—Power to extend time *ex post facto*—6 Ind Cas 424 = 14 C W N 882 = 12 C L J 62.

—Court can extend time for payment of deficient Court fees. A I R 1926 Nag 312 = 93 I C 64.

—Rule requiring the Court to fix a time for payment of the deficient Court-fees is mandatory but the Court may not further extend the time; deficient Court-fees paid after the fixed date entails the rejection of a plaint. A I R 1926 Mad 676 = (1926) M W N 341 = 51 M L J 90 = 95 I C 439.

(5-6) Irregularity in form of suit.

—In case of defect in verification the suit should not be tried on merits, but the plaintiff should be given an opportunity of curing the defect if any. 17 C W N 989 = 15 I C 583.

—Where a plaint is not signed by plaintiff, it should be returned for amendment, but cannot be rejected. 165 P W R 1911.

—Non-joinder—Mis-joinder—Whether justifies rejection of. 132 P L R 1911.

(7) Rejection of plaint at any stage.

—Rejection of plaint for discovery of defect after admission thereof is improper. 29 I C 410.

C. P. C. (1908) Or. 7, r. 11 (Contd)

(8) Rejection of plaint in part.

—Plaint must be rejected as a whole but with due discretion. A I R 1921 S'nd 106 = 17 S L R 9 = 80 I C 958.

(9) Return of plaint for amendment.

—Failure to file rejected plaint after amending it as ordered, comes under O. VII, r. 11 and not under O. XVII, r. 3. A I R 1925 Mad 1045 = 86 I C 491.

—Court should reject a plaint not amended within the time fixed. 40 Mad 365 (F B)

—A plaint should not be rejected for defect therein, but should be returned for amendment. 1 Pat L T 188 = 55 I C 445.

(10) Suit against minor.

—Court can dismiss the suit filed by next friend of minor, if not in minor's interest. A I R 1924 Oudh 413 = 11 O L J 260 = 83 I C 778 See also 1 L W 875 = 25 I C 738.

(11) Suit barred by law.

—If a suit appears from the statement of the plaint to be barred by any law, the proper course is to reject the plaint under O. 7, R. 11 (d) and not dismiss the suit. 21 C W N 209 = 29 C L J 17 = 35 I C 76.

—O. 7, R. 11 (d) does not apply where there is no statement in the plaint which suggests that the suit is barred. 18 C W N 1340 = 27 I C 232.

—Where the plaint discloses suit in time and the question of limitation has not been raised in written statement and further no issue framed about it, the Court cannot dismiss the suit by reason of bar of time appearing in cross-examination of plaintiff's witness. The question of amending the pleadings is in discretion of the Court. A L R 1934 All 137.

—It may be doubted whether the Legislature has intended that, where a plaint has been rejected on the ground that the claim is barred by limitation, the plaintiff would be at liberty to file a fresh plaint either without any new allegations or with new allegations showing an exemption from the law of limitation. 54 A 525 (530) = 1932 A L J 489 = I R 1932 A 397 = A I R 1932 A 543 = 138 I C 396 = A L R 1932 A 689.

—The Limitation Act is absolute in its terms only; the form of the suit and the relief claimed are the only criterion for the applicability of a particular article. In applying the provisions of the Indian Limitation Act to the suit the plaintiff's version is the only one to be considered. A I R 1927 Nag 10 = 9 N L J 198 = 229 N L R 147 = 98 I C 27.

## C. P. C. ( 1908 ) Or. 7, r. 11 (Contd)

## ( 12 ) "Where plaint does not disclose Cause of action."

—Plaint stating no cause of action must be rejected. There is no need to look into jurisdiction then. A I R 1923 Lah 290 = 75 I C 165.

—Plaint showing no cause of action must be rejected. Trustee or mortgagor is bound to account to beneficiary if surplus after payment of mortgage is left. A I R 1922 Bom 152=46 B 229=23 Bom L R 1023=64 I C 919.

—Plaint for declaration of title not containing an allegation that plaintiff was in possession, should be rejected. 37 I C 15.

—If in a suit to set aside mortgage-decree execution of mortgage is alleged to be fraudulent, fraud in conduct of the mortgage-suit need not be alleged A I R 1925 Mad 792=48 M L J 351=(1925) M W N 162 = 91 I C 717.

—In a Suit to recover bonus credited and partly paid to plaintiff—Cause of action exists in completed gift or contract. A I R 1925 Mad 192 = 47 M L J 791 = 20 L W 910 = ( 1925 ) M W N 279 = 87 I C 760

—Suit for damages against Railway—Omission to give details is not fatal. A I R 1929 All 697 = (1929) A L J 859 = 51 A 895 = Ind Rul (1929) All 943 = 119 I C 59.

—In money claim decree may be given even though cause of action arises during the conduct of suit. A I R 1923 Lah 590 = 6 Lah L J 31 = 75 I C 562.

—Cause of action—Limitation—Claim not being barred by—Cause of action if includes. See 54 A 525.

## (13) "Where the relief claimed is undervalued."

—The power to reject a plaint arises only upon it being seen that the plaint is undervalued. The correct valuation of the property in dispute is not necessary for admission of a plaint or memo of appeal before the plaint or memorandum of appeal is registered; it is not that the plaintiff should be called upon to give evidence on the question of valuation merely in order to get his document on file. A I R 1930 Cal 65 = 50 C L J 164 = 33 C W N 952 = 57 C 587 = Ind Rul (1930) Cal 262 = 122 I C 630.

—Plaint alone can be considered to value suits circumstances subsequently influencing Court's judgment are not to be taken into consideration. A I R 1924 Cal 969 = 40 C L J 150 = 79 I C 982.

## ( 14 ) "Where plaint is written upon paper insufficiently stamped."

—O. VII. r. 11 is mandatory—Time must be given to pay deficient Court-fee. A I R 1922 Cal 506=49 C 880=27 C W N 566=38 C L J 74=70 I C 101.

## C. P. C. (1908) Or. 7 r. 11 ( Contd )

## ( 14 ) "Where plaint is written upon paper insufficiently stamped."—(Contd)

—Reasonable time must be given for making up deficiency. A I R 1930 Oudh 104 = 6 O W N 1105=5 Luck 474=Ind Rul (1930) Oudh 228=124 I C 420.

—Insufficiency of stamps does not entail the rejection of the plaint time to provide sufficient stamps, or for the correct valuation of the suit must be given. A I R 1927 Mad 1002=54 M L J 67=105 I C 881

—Court-fee insufficient—Time for payment of deficit must be allowed. A I R 1926 Cal 504=91 I C 1488.

—A Court is not justified in rejecting a plaint under O. 7, R. 11, C. P. Code, unless and until it has given the plff. an opportunity to supply the deficient court-fee within a time fixed for the purpose, and the latter has failed to comply with the order. 27 P L R 1917=25 P W R 1917=39 I C 766.

—Appellate Court memorandum insufficiently stamped—must fix a time. 2 A 875. But see 1923 A 349=74 I C 757=21 A L J 333 = 4 L R A 188.

—A plaint without any stamp must be rejected. A I R 1930 Nag 224 = 26 N L R 183 = Ind Rul (1929) Nag 257=124 I C 241.

—Proceedings taken on a plaint insufficiently stamped are not bad in law. A I R 1928 Lah 221=106 I C 817.

—The plaint is deemed to have been presented within the period of limitation if time is given by the Court to supply the deficient stamps on the day fixed after limitation. A I R 1928 P 579=Ind Rul (1929) Pat 221=115 I C 557.

—Deficient Court-fee paid within time allowed but after limitation—Suit is tenable. A I R 1926 156Nag=89 I C 419.

—Payment of deficient Court-fees after limitation but within time allowed does not cause dismissal of suit. A I R 1923 All 538 = 45 A 518=21 A L J 387=L R 4 A 251 Civ.=74 I C 358.

—Payment of deficient Court-fee after limitation period but within time given by Court does not bar suit. A I R 1922 Pat 56=3 Pat L T 142=70 I C 378.

—Where plaintiff fails to pay additional Court-fee as directed within specified time, but applies within that date for permission to continue suit as pauper, the plaint should not be rejected. A L R 1933 M 499.

—Where plaintiff fails to make up deficiency in Court-fee on plaint within time fixed by Court, the suit should be dismissed and the appellate Court has no power to give

C. P. C. (1908) Or. 7, r. 11 (*Conclld*)

(14) "Where plaint is written upon paper insufficiently stamped."—(*Conclld*)

option to plaintiff to limit his claim to the extent of Court-fee paid 16 Bom L R 763=26 I C 746.

—Plaint—Deficit court-fee on—Omission to pay within time allowed—Rejection of plaint—Duty of Court—Appeal—Jurisdiction to allow amendment. 44 Cal 352 = 21 C W N 834 = 40 I C 96 (2) See also 44 Cal 352.

—Deficient court-fee not paid in time—Procedure. see 237 P L R 1914=25 I C 435.

—Order rejecting plaint for not paying extra Court fee. see 265 P L R 1914.

—Deficient court fee—Failure to pay—Dismissal of suit on merits—Legality. see 85 P R 1914.

—Deficient court fee on plaint—Appeal by respondent—Power of appellate court to order respondent to pay court-fee—Omission—Effect of—Dismissal of suit—Rejection of plaint. 4 Pat L J 703.

—Where a plaint is returned for payment of additional Court-fee, plaintiff can abandon the excess claim and represent the plaint. A I R 1931 Mad 716 = Ind Rul (1931) Mad 864 = (1931) M W N 677 = 34 L W 252 = 134 I C 816.

—Order rejecting a plaint for non-payment of proper Court-fee does not amount to dismissal of the suit and a fresh suit is not barred. A L R 1932 P 451 = A I R 1932 P 11 = 133 I C 449.

—The words "properly valued" cover the case of proper valuation being ascertained by Court after investigation in the course of the suit itself. 36 C W N 567 = 139 I C 520 = I R 1932 C 634 = A I R 1932 C 685.

—R. 11, does not apply to a case of memorandum of appeal properly valued but deliberately stamped insufficiently. 59 C 388 = 138 I C 643 = I R 1932 C 483 = A I R 1932 C 482 (483-4).

—A memorandum of appeal improperly stamped should be returned for making good deficiency in Court-fee. 1932 M W N 104.

—Appeal on rejection of plaint for undervaluation cannot be rejected for deficiency of stamps without ascertaining value of the suit, even though valuation is not changed in appeal. A I R 1926 Cal 427 = 87 I C 651.

—Payment of additional court-fee limitation see. 27 A 197 = A W N 1904, 224 = 98 I C 814.

C. P. C. (1908) Or. 7, r. 14

*Documents relied on in plaint.*

—Other Documents :—Object of the rule is to prevent dishonest fabrication of documents: 60 I C 372

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C. P. C. (1908) Or. 7, r. 14 (*Conclld*)

*Documents relied on in plaint—(Conclld)*

—So it was held by the Privy Council that the High Court should not have treated a Razi petition as creating rights : 19 Bom L R 394 = 32 M L J 137 = 21 C W N 553 = 39 I C 243.

—A party suing upon a document must produce it at the time of filing the plaint : 22 Bom L R 819=57 I C 598=44 B 625; see also 32 B 152; similarly as to accounts : 57 I C 185=19 P L R 1920=1 L 6.

—A document not listed may not be admitted in evidence at a subsequent stage : 8 L L J 346=A I R 1926 L 527 = 95 I C 258.

—But a plff. is not bound to list a document of which he has no knowledge. 63 I C 968.

—Secondary evidence can be given where document is lost after production : 49 M L J 132 = 27 Bom L R 777 = 29 C W N 965 = 23 A L J 109 = 86 I C 552 = A I R 1925 P C 80.

C. P. C. (1908) Or. 7, r. 15, 16

—Plff basing his claim on lost negotiable instrument must furnish security against possible claims : 273 P W R 1912 = 166 P L R 1912 = 16 I C 769; see also 12 L W 147=59 I C 363.

C. P. C. (1908) Or. 7, r. 17, 18

—If there is no doubt as to the existence of the document on the date of the suit, the Court should not refuse to accept it merely because it was not produced with the plaint : 8 B 377; and 13 C W N 797; and 44 I C 21.

—Unless it is unacquitable e. g. where it was produced ten years after the filing of the suit and only one day before judgment : 22 Bom. L R 819 = 57 I C 598 = 44 B 625.

—A document may be handed to a witness merely to refresh his memory : 23 C W N 577 = 21 O C 228 = 41 A 63 P C.

## ORDER VIII.

*Written Statement and Set-off.*

*Synopsis.*

- (1) Scope of the Rule.
- (2-3) Filing or admission of written Statement.
- (4) Notice.

(1) Scope of the Rule.

—General :—Exaggeration of their claims by the parties does not render them to crimi-



## C. P. C. (1908) Or. 8, r. 1 (Concl'd)

## (1) Scope of the Rule—(Concl'd)

nal prosecutions 32 Cr. L J 238 = (1930) Cr. Cas. 975 = Ind Rule (1931) Cal 127 = 129 I C 111.

## (2-3) Filing or admission of written Statement

—Filing of written statement by a person other than the defendant himself or his duly authorised agent is not regular, and is not sanctioned by the Code. A I R 1931 All 333 (2) = (1931) A L J 181 = Ind Rul (1931) All 388 = 131 I C 548.

—Per *Ayling, J* (*Seshagiri Aiyar, J. dissenting*.) An order declaring a defendant *ex parte* to whom time has been given to file his written statement and who fails to tender it in time but who still appears in person is not *ultra vires*.

—Per *Seshagiri Aiyar, J.*—Difference between declaring a defendant *ex parte* and placing the case on the undefended board, pointed out. (1917) M W N 241 = 40 I C 223.

## (4) Notice.

—In Small Cause Court suits, written statement is not necessary in the absence of specific notice in the summons. But, should such a statement be found necessary, time should be granted without burdening the defendant with the adjournment costs. A I R 1930 Oudh 171 = 4 Luck 529 = 7 O W N 197 = Ind Rul (1930) Oudh 78 = 121 I C 894.

## C. P. C. (1908) Or. 8, r. 2

—O. VIII, r. 5 should be considered along with r. 3, A I R 1925 Mad 950 = 22 L W 26 = 85 I C 900.

—In written statement it is necessary to plead facts only and not point of law A I R 1930 Bom 511 = 32 Bom L R 1178 = Ind Rul (1931) Bom 65 = 128 I C 609.

—As to the effect of allegation in plaint not traversed in written statement see. 35 M L J 248.

—Limitation should be specifically pleaded particularly when the alleged bar is under some special law—Points of the limitation should not be decided unless parties have been given sufficient opportunities to make their case. Issue if necessary ought to be framed. 34 C L J 205 = 66 I C 287.

—In a suit in ejectment on the ground that plffs. were permanent tenants, the defts pleaded in their written statements that neither the plffs, nor their predecessors-in-interest ever had any sort of rights of possession over the land in suit within twelve years

## C. P. C. (1908) Or. 8, r. 2 (Cont'd)

and that their claim was barred by limitation. No issue was settled as to whether the special rule of limitation in Art. 3 of Sch III to the B, T Act applied to the case. The first court decreed the suit but on appeal the suit was dismissed on the ground that it was barred by limitation under Art. 3 of the B T Act. *Held*, that the special case of limitation under the provisions of Art. 3 Sch III to the B T Act not having been specially pleaded and the facts in support of such a case not being apparent on the face of the record the judge of the Appellate Court had no jurisdiction to go into the matter and to enquire whether on certain facts that he had found the suit was barred by limitation. 28 C L J 216 = 46 I C 787.

—When a suit is barred on the face of the plaint, general plea of limitation in written statement can be taken, but such a plea cannot otherwise be taken unless necessary facts are also stated. A I R 1924 Pat 664 = 3 Pat 546 = 5 Pat L T 303 = (1924) Pat 189 = 80 I C 956.

—Plea of limitation under the provisions of Sch III, Art. 2 of Bengal Tenancy Act cannot be allowed to be raised in appeal. O. VIII, r. 2 requires the defendant to raise a question of special limitation in the pleading itself. 69 I C 194.

—Under O. VIII, r. (2) a point as to limitation cannot be raised in appeal for the first time. It should be so done by the defendant in his written statement. 32 C L J 236 = 60 I C 280.

—Under O. VIII, rr. 2 and 4 in the defence all points of law or facts should be particularised. The Court will not otherwise allow them to be agreed to in second appeal. A I R 1923 Cal 578 = 76 I C 603.

—Plea as regards want of legal necessity in a mortgage suit by the manager of a joint Hindu family cannot in an appeal be raised for the first time. A I R 1922 Pat 356 = 3 P L T 367 = 1 Pat 612 = 67 I C 790.

—Where a point is not specifically taken in the written statement but was decided in Lower Courts on evidence without objection, *Held* that the parties cannot object to it in Second Appeal, as if taken in the first court, necessary amendments might have been made under O 6 R 17, (1914) M W N 883 = 26 I C 337.

—Pleas of estoppel of whatever nature are not barred if not set up in the written statement by reason of O. 8, R. 2. A plea of *res judicata* which was not put forward in the written statement, nor in the lower Court in the grounds of appeal, can be raised with the leave of the Court under O 41, R. 2, 19 C W N 942 = 26 I C 673.

## C. P. C. (1908) Or. 8, r. 2 (Concl'd)

—If a deft puts the plff, to a proof of mortgage-deed set up by him, the defendant must be taken to put the plaintiff to proof of its execution, which includes its signing and attestation. 6 O L J 600 = 54 I C 107.

## C. P. C. (1908) Or. 8, r. 4

—Denial by defendant of plaintiff's allegation as to the date of certain event is no evasive denial, nor is it admission notwithstanding the failure of the defendant to give therein his own date. A I R 1924 Mad 838 = 47 M L J 520 = 20 L W 399 = (1924) M W N 788 = 82 I C 584.

—Pleadings should be specific. A I R 1929 All 721 = (1929) A L J 1153 = Ind Rul (1930) All 246 = 122 I C 598.

## C. P. C. (1908) Or. 8, r. 5

*Synopsis.*

- (1) Admissions in written statement.
- (2) Denial of allegations in plaint.
- (3) Failure to deny allegations in plaint.
- (4) Omission to file written statement.

## (1) Admissions in written statement.

—O. VIII, r. 5 should be read with r. 3. A I R 1925 Mad 950 = 22 M L W 26 = 85 I C 900

—When the defendant's written statement is in agreement with the plaintiff's claim, no further proof of the claim is necessary because that part of the claim must be taken to have been admitted. A I R 1931 Lah 203 = 12 Lah L J 293 = Ind Rul (1931) Lah 446 = 131 I C 206.

—But where a mortgage was admitted to be duly executed it was held that the Court may require proof of valid execution and attestation. 25 M L T 19.

## (2) Denial of allegations in plaint.

—A recital in the written statement that a certain allegation in the plaint was not admitted amounts to a denial. A L R 1933 All 567.

—But a pleading of 'not known' is not tantamount to 'not admitted' does not put the other party to the proof. A I R 1931 All 423 = Ind Rul (1931) All 654 = 133 I C 414.

—Ordinarily in an *ex parte* case no issues arise and there is nothing for the plaintiff to prove but the Court may require some of the selected facts to be proved which must be stated as issues. A I R 1923 Nag 83 = 69 I C 619.

—So also provisions expressly made applicable to allegations in plaint, and to defen-

## C. P. C. (1908) Or. 8, r. 5 (Cont'd)

## (2) Denial of allegations in plaint—(Cont'd.)

dant's failure to deny them should not be applied to an oral pleading of the defendant so as to infer from the absence of a reply by plaintiff, that the latter accepted it as true.

A I R 1925 Nag 380 = 85 I C 768.

—A fact admitted by the defendant's mukhtiar is not conclusive before the framing of the issues and may be required to be proved otherwise: 6 L L J 358 = 82 I C 617 = A I R 1924 L 744.

—Mere general denial in the written statement of fact explicitly relied upon in the plaint is not enough unless equities are in favour of the defendant under O. VIII, r. 6; minor defendant, however, is an exception. A I R 1923 Mad 114 = 43 M L J 579 = 16 L W 911 = 31 M L T 258 = (1923) M W N 42 = 69 I C 724.

—Though wording of O. VIII, r. 5 is defective, it clearly means that evasive denials of facts alleged in the plaint, should be taken as an admission of alleged facts. A I R 1927 All 225 = 96 I C 778.

—Evasive denial of facts alleged in the pleading cannot in fact amount to admission but that seems to be the effect of O. VIII r. 5. A I R 1924 All 180 = 46 A 55 = 21 A L J 830 = L R 4 A 570 Civ. = 79 I C 562.

—In a partnership suit if the defendant saying shares of partners are different, such a denial is evasive unless actual shares are specified. Such an evasive denial may be taken as admission that the terms stated in the plaint, are correct. A I R 1929 Sind 7 = 113 I C 370.

—Discretion under O. VIII, r. 5 is to be used when admissions are suspected to be made collusively to avoid rule of public policy. Evasive denial of facts alleged in the plaint amounts to admission and it would be wrong for the Appellate Court to require proof of them 39 M L J 463 = (1920) M W N 512 = 23 M L T 213 = 60 I C 554.

—But the Lahore High Court has held that evasive denial of facts alleged in the plaint does not necessarily amount to an admission of them. Rules of pleading are not strictly enforced. A I R 1923 Lah 409 = 71 I C 779.

—Defendant's statement that they do not admit plaintiff's allegation as to the date of a certain event is not evasive denial or admission notwithstanding that defendants do not give their own date for the event. A I R 1924 Mad 838 = 47 M L J 520 = 20 L W 399 = (1924) M W N 788 = 82 I C 584.

## (3) Failure to deny allegations in plaint.

—Where allegation in plaint is not denied either specifically or by implication proof is

## C. P. C. (1908) Or. 8, r. 5 (Contd)

## (3) Failure to deny allegations in plaint—(Contd)

not necessary therefor. A I R 1923 Nag 7 = 68 I C 664 see also 49 I C 733.

—But the Court may require proof of a fact notwithstanding admission by deft. in pleadings. (1918) M W N 853.

—In the old Code of Civil Procedure there was nothing corresponding to O. 8 R 5 of the new Code. Even under the new Code, a failure by the defendant to deny the allegations in the plaint is not conclusive in favour of the plff for under the proviso the Court may still call upon the plaintiff to prove his allegations. It is within the discretion of the court to allow an amendment 19 C L J 518 = 25 I C 567.

—And non-traversal of allegations in plaint amounts to admission only when deft. files written statement and not when deft. is made *ex parte*. 43 Cal 1001 = 34 I C 235 = 20 C W N 1192.

—So also an execution petition is not a pleading and allegations in such petition not denied do not amount to admission of their truth. 2 Pat L J 24.

—In a suit on a mortgage against certain minor defts. their guardian did not deny in his written statement the allegations in the plaint as to the proper execution of the mortgage and their pleader neither asked for an issue nor let in evidence on the question but the whole trial proceeded only on the issues as to limitation and *res judicata*. The Court decreed the suit in favour of the plffs. *Held*, that the omission of the defts to raise an issue as to the execution of the mortgage implied an abandonment of that question at the trial and that it was not incumbent on the court to require proof of execution of the mortgage from the plffs. under such circumstances 35 M L J 372 = 47 I C 589.

—The plff in a suit to recover money relied in their plaint on a letter written by the defts. in saving limitation—the defts denied that the letter saved limitation. On a question whether on the pleadings the letter can be deemed to have been admitted. *Held*, in the absence of specific denial the letter must be accepted as admitted between the parties and therefore unnecessary to be proved 41 Bom 89 = 18 Bom L R 946 = 38 I C 14.

—The deft. in a suit for possession did not specifically deny the allegation made by the plff. that the property sued for formed a portion of a certain taluk. The Munsif, *held* that there was a constructive admission by deft. of the plff's title as alleged in the plaint and decreed the suit without considering the evidence adduced on both sides on the question of the title. On appeal the judge rever-

## C. P. C. (1908) Or. 8, r. 5 (Concl'd)

## (3) Failure to deny allegations in plaint—(Concl'd)

sed the decision of the Munsif on the ground that there was no such admission on the part of the deft. as would warrant a decision in favour of the plff's title especially as the trial Court had required proof of the plff's title in spite of the so-called admission by the deft. *Held*, that the decision of the appellate court was correct. 45 I C 878.

—Where the deft. did not plead as to notice he was deemed to have admitted notice. 9 I C 470.

## (4) Omission to file written Statement.

—Where defendant has not put in any written statement, O. VIII, r. 5 has no application. Verification of plaint is not evidence on which claim can be allowed whether the absent party is or is not present. A I R 1928 Lah 769 = 10 Lah L J 339 = Ind Rul (1929) Lah 377 = 29 P L R 715 = 115 I C 425.

—O. VIII, r. 5 implies that defendant making written defence shall make it specific. But this is not applicable in case of defendants not putting in written statements and such defendant is allowed even to give evidence which transveres the allegations in the plaint. A I R 1930 Pat 293 = Ind Rul (1930) Pat 609 = 126 I C 369.

## C. P. C. (1908) Or. 8, r. 6

## Synopsis.

## (1) Scope of the rule :—

- (a) General
- (b) Counter-claims
- (c) Denial of plaintiff's claim and plea of Set-off.
- (d) Extent to which set-off may be allowed.

## (2-3) Appeal

## (4) Court fee

## (5) Effect of set-off

## (6) Resjudicata

## (7) Set-off in insolvency

## (8) Set-off in winding up proceedings

## (9) Solicitor's lien for costs

- (10) The amount claimed to be set-off must be an ascertained Sum of money and not unliquidated damages.

## (a) General.

## (b) Equitable set-off.

- (11) The amount claimed to be set-off must be "legally recoverable".

## (a) General.

- (b) A separate debt cannot be set-off against a joint and several debt.

- (12) The amount claimed to be set-off must not exceed the pecuniary limits of the jurisdiction of the Court in which the suit is brought.

- (13) The suit must be one for the recovery of money.

C. P. C. (1908) Or. 8, r. 6. (Contd.)

(1) Scope of the rule.

(a) General.

—The Court is bound to try a claim to set off which falls under the provisions of O. 8, R. 6 of the C. P. Code. 12 L W 85=57 I C 656.

—In a suit to recover an amount of money due on an account, the defendant claimed to set-off the amount of pay due to him by the plff. The Lower Court disallowed the set-off on the ground that the parties did not fill the same character in regard to the attempted set-off as they filled in the suit. *Held*, that the set-off should have been allowed, for in regard to both the claims the capacity, that is the personal capacity of the parties was not varied. 41 Bom 163=19 Bom L R 67=39 I C 17.

—Plea of written statement necessary—No plea of set off can be raised without plea of statement. 16 M L T 122.

—No plea of set off can be raised without filing a written statement. 16 M L T 122=25 I C 361.

—The same character :—Claim to set off is not allowed when the parties claiming are in different capacities. A I R 1927 Lah 228=8 Lah 105=28 P L R 427=101 I C 762.

(b) Counter-claim.

—No provision is made by C P Code, O. VIII for counter claims in money suits though it provides for set off. A I R 1922 Cal 1=80 I C 192.

—As to distinction between set-off and counter-claim see. A L R 1933 B 259=34 B L R 1401.

—Counter-claim must be within time at the date the defendant files his pleadings. A I R 1925 Nag 445=89 I C 371.

—Counter-claim if properly stamped may be tried as a cross suit. A I R 1924 Rang 346=2 R 276=82 I C 721.

—Party to a suit alone can make counter-claim. 38 M L J 353 (P C)=18 A L J 335=1920 M W N 319=2 U P L R 58=22 Bom L R 531=32 C L J 214=27 M L T 190=55 I C 793. (P C).

—Counter-claim is not admissible in a suit under s. 73 (2) Punjab Contract Act. A I R 1923 P C 114=40 C L J 1=28 C W N 689=50 I A 162=4 Lah 284=25 Bom L R 1248=45 M L J 497=75 I C 7.

—Claim to share of profits realised by manager of the tenancy land cannot be a set off in a suit for contribution of rent between the plaintiff and the defendant but can be allowed as a counter-claim. A I R 1926 Nag 155=8 N L J 205=92 I C 74.

C. P. C. (1908) Or. 8, r. 6 (Contd.)

(1) Scope of the rule—(Contd.)

(b) Counter-claim—(Contd.)

—Failure to plead part of cross-claim as a set-off is merely technical defect and can be cured by amendment of pleading. Distinction between set off and counter claim is that set-off is for an ascertained sum or it must arise out of the same transaction, as the plaintiff's claims. Counter-claim need not arise out of the same transaction. Set off is ground of defence and it should be pleaded in the written statement. Counter claim is not any defence to the plaintiff's claim, it is a good ground of independent action against the plaintiff. If the Statute of limitations is pleaded in defence of set off, the plaintiff in order to establish his plea, must prove that the set off was barred when the plaintiff commenced his action. In the case, however, of counter-claim it is enough for the plaintiff to prove that the counter-claim was barred when it was pleaded. A I R 1923 Bom 113=24 Bom L R 998=77 I C 943. *See also* 66 I C 209=48 C 817=25 C W N 800=A I R (1921) Cal 67. *See also* 67 I C 326=24 Bom L R 328=47 B 182=A I R 1923 Bom 24.

—Vague counter-claim in partnership suit for accounts allowed by practice in India. 8 S L R 124=27 I C 320.

(c) Denial of plaintiff's claim and plea of set-off.

—Plaint to state ground of exemption from limitation. Effect of not stating see 83 P R 1514=26 I C 441.

(d) Extent to which set-off may be allowed.

—Where a principal is also a banker under another name, in a suit by principal against the agent for sale proceeds in agent's hands, agent can set-off the amount deposited in the bank. A I R 1921 P C 108=15 M L W 201=24 C W N 1004=76 I C 944.

—Defendant cannot claim accounts but he may claim a set-off. A I R 1924 All 872=22 A L J 844=L R 5 A 734 Civ=46 A 922=82 I C 340.

—In a suit by the assignee from the Karnawan or stakeholder of a Malabar Kuri or chit fund, which has collapsed against the assignee of the liabilities of a benefited ticket-holder the defendant is entitled to set-off the amount due by the stakeholder to a non-benefited ticket-holder, whose rights the defendant has purchased. The set-off, however, cannot be enforced on the ground that the debt claimed by the plaintiff arose out of the same transaction as the debt claimed by the defendant as a kuri is not a partnership composed of the stakeholder and the



C. P. C. ( 1908 ) Or 8, r. 6 (Contd)

( 1 ) Scope of the rule—(Concld)

( d ) Extent to which set-off may be allowed—(Concld)

members but the transaction between the stake holder and each individual member is distinct from and independent of the transaction between him and each of the other members. Such set-off is permissible under S. 132 of the Transfer of Property Act, the debtor being at liberty to set-off against the assignee of his creditor independent claims which he had against his creditor's assignor. Such set-off is enforceable even though the plaintiff was the purchaser of the actionable claim in Court auction ( 1912 ) M W N 1235 = 16 I C 686

#### (2-3 & 4) Court-fee.

—A written statement pleading a set off must bear an *advalorem* court fee stamp on the amount of the set off claimed. Where a written statement pleading a set-off does not bear an *advalorem* Court-fee on the amount of set off, the Court is debarred from going into the question : An Appellate Court cannot make an order for payment of additional court fee when no fee at all has been paid and where the original Court has not decided the question of valuation. 10 Bur L T 242 = 36 I C 957.

—The rulings in 8 C W N 174; 2 L B R 186; 17 M L J 481 do not now represent the law. Amount of set-off must be stamped separately. 26 I C 270.

—Under O. 20, r. 19 equitable set-off can be allowed on payment of Court-fees in a suit for accounts. Such set-off is not governed by O. 8, r. 6 : 35 C W N 17 = 132 I C 195 = A I R 1931 C 359.

—The Allahbad High Court has held that claim of equitable set-off can be allowed independently of the provisions of C P C and no Court-fees need be charged : 128 I C 763 = A I R 1930 A 875.

—A plea of satisfaction cannot be a set off and Court fee in such a case is unnecessary. A I R 1927 Nag. 120=9 N L J 227=99 I C 510.

—A plea of set off is quite distinct from the plea of payment and should not be entertained until court-fee with respect to it has been paid by the defendant in the court of first instance, nor should it be entertained if the claim is not within the jurisdiction of the Court. 15 I C 526.

—Court-fee is payable for the excess over plaintiff's claim in case of a claim to set off exceeding plaintiff's claim and if the decree for the excess is prayed for. A I R 1927 Nag 74 = 97 I C 916.

C. P. C. ( 1908 ) Or. 8, r. 6 (Contd)

( 5 ) Effect of set-off

—*Quære*:—Whether Rule 136 of the Bombay High Court Original Side Rules will apply if the amount in excess in respect of a claim on which a separate action cannot for want of jurisdiction be brought in the Bombay High Court. 34 Bom L R 1401 ( 1404 ) = A I R 1932 B 617.

( 6 ) Res judicata.

—Omission to claim an equitable set off or a counter claim, does not bar a fresh suit. A I R 1926 Mad. 1020 = 24 M L W 282 = 971 C 407 See also 90 I C 465 = 49 M L J 14 = 1925 M W N 282 = A I R 1925 M 830 and 28 M L J 513 = 29 I C 34 and 74 P R 1919.

—But a set-off which is not claimed as such in the suit cannot be so claimed in execution. A I R 1924 Oudh 434 = 11 O L J 517 = 27 O C 248 = 81 I C 651.

—And an omission to plead set off does not bar a fresh suit but if it was so pleaded, and was within the competence of the Court, but was not allowed by the Court, bars a fresh suit in respect of whole or part of it as the case may be. 12 L W 173 = 60 I C 226.

—Statement by defendant that separate counterclaim would be made by him is no bar to his pleading a set off in the same suit. A I R 1925 Mad 228=20 M L W 531=83 I C 769.

( 8 ) Set-off in winding up proceedings.

—Company-Liquidation Creditors—Right of set off against demands of the liquidator. see 53 I C 653.

( 9 ) Solicitor's lien for costs.

—Whether an attorney's lien should or should not be allowed to intercept a set-off between the parties to a suit is in India a matter of discretion. Attorney's lien will not be allowed to prevail over rights of parties. 34 B L R 1429=A I R 1932 B 619=A L R 1932 B 1195.

—No set off can be allowed at least to the extent of Attorney's lien when a creditor's petition against the debtor is dismissed with costs to be paid to the debtor. A I R 1930 Bom 516=32 Bom L R 1076 = Ind Rul ( 1931 ) Bom 8 = 128 I C 24.

—As to effect on set off solicitor's lien on the decree obtained. See 43 Cal 932.

—Pleader realising money by sale of shares entrusted to him in private capacity —Right to set-off his fees See 5 S L R 222 = 15 I C 785.



C P C. (1908) Or. 8, r. 6 ( *Contd* )

( 10 ) The amount claimed to be set-off must be an ascertained sum of money and not unliquidated damages.

( a ) *General*.

—Under O. 8, R. 6, C P C a debt, is entitled to claim a set-off when it is an ascertained amount and does not apply when his proportionate share out of a joint claim has to be ascertained by calculation and after he has given proof that it was legally recoverable at the date of the institution of the suit. An equitable set off must be shown to arise out of the same transaction. 1 Pat L W 615 = 2 Pat L J 451 = (1917) Pat 279 = 40 I C 350

—Whether the claim is for an ascertained sum of money or only for unliquidated damages is one test to distinguish legal from equitable set off. If the claim is found to be of damages it is one for unliquidated sum and hence comes under equitable set-off. A L R 1933 M 850.

—That the suit is based on negotiable instrument is no bar to a claim for set off by the defendant. A I R 1931 Nag 12 = Ind. Rul. (1931) Nag 23 = 130 I C 87.

—Ascertained sum does not mean sum admitted by the plaintiff. The term is simply contradictory of unliquidated damages, that is the sum of money of which the amount is known. It excludes both unliquidated damages as well as mesne profits A I R 1931 Nag 12 = Ind. Rul ( 1931 ) Nag 231 = 130 I C 87. See also 82 I C 340; and 22 A L J 844; and 46 A 922; and A I R 1924 A 822.

—Thus set-off claimed under the basis of damages to be ascertained after the protracted inquiry cannot be allowed as such. A I R 1929 All 52 = 111 I C 790.

—Sums specified are not necessarily ascertained, so that they may be legally recoverable within the meaning of O. VIII, r. 6. A I R 1926 Sind 225 = 21 S L R 385 = 93 I C 358.

—The plff, who left his employment without notice on the 4th April 1916 sued for his salary for March, 4 days of April and for May. The debt. company claimed to set off the pay for April "by way of damages in lieu of notice." *Held*, that the employer in the same suit could not counter claim to set-off a month's pay in lieu of notice as damages. 39 All 362 = 15 A L J 262 = 38 I C 703.

—The expression 'ascertained' in O. 8 R. 6 (1) C. P. Code means beyond challenge and beyond dispute, concluded and conclusive. A set off can be claimed on the basis of a contractual relation between the parties. The right to equitable set-off is founded on the condition that the set-off arises out of the same transaction out of which the claim

C. P. C (1908) Or. 8, r. 6 ( *Contd* ).

( 10 ) The amount claimed to be set-off must be an ascertained sum of money and not unliquidated damages—( *Contd* )

( a ) *General*—( *Contd* )

in the suit springs. If it is found that the set-off is foreign to the original claim the set off will not be allowed. In a claim for rent due by a tenant under a lease it is not open to the latter to plead a set-off of amounts due to him by the plff. on accounts in respect of payments made on the plff's behalf in respect of totally different properties which are not the subject matter of the suit. The debt. can, however, claim a set-off in respect of payments made on plff's behalf *qua* the property which he holds under him. 1 Pat L W 760 = (1917) Pat 225 = 41 I C 631.

—Preliminary decree for sale directing accounts to be taken of what is due under the mortgage, cannot be a set off under O VIII, r. 6. A I R 1931 Cal 23 = 57 C 855 = Ind Rul (1931) Cal 196 = 129 I C 420.

—Right of share holder to set off paid up subscriptions towards mortgage debt due by him to fund—Distinction between limited and unlimited Companies. See 21 M L T 233.

—Calls on shares in a company—Debts due in future by the company. See. 201 P L R 1914 = 25 I C 672.

( b ) *Equitable Set-off*.

—O. VIII, r. 6 being not exhaustive, equitable set off if it arises out of the same transaction can be allowed but in a suit by vendee, set off of mesne profits against vendor, for refund of sale consideration owing to dispossession by vendor's relatives, cannot be allowed. A I R 1926 Oudh 301 = 92 I C 787.

—O. 8, R. 6, C P Code, applies only to a legal set-off and not to any other set-off that a party may be equitably entitled to claim. O. 20, R. 19, C P Code, lays down the form in which a decree in a suit in which a set-off is allowed should be drawn up. The intention of the legislature was that only one decree should be drawn up in a suit in which a set-off is claimed and that the decree could only be drawn up when the entire matter in controversy between the parties had been disposed of. 62 P R 1917 = 65 P W R 1917 = 39 I C 508.

—Though the rule only allows claims for an ascertained amount, the practice in India in such suits is to permit equitable counter-claims of amounts, not ascertained, as a Court of Equity and not under the common law. 8 S L R 122 = 27 I C 316.

—*Per Phillips J.*—The right to set off strictly speaking is confined to a defendant and if plaintiff makes a claim by way of equitable set off it is not very clear how the

C. P. C. (1908) Or. 8, r. 6 (Contd.)

(10) The amount claimed to be set-off must be an ascertained sum of money and not unliquidated damages—(Contd.)

(b) Equitable Set-off—(Contd.)

plaintiff who has interest the aid of the court against right entitled to any equity as against them. 34 M L J 32-44 I C 428.

—Under O. XX, r. 19 equitable set off can be allowed on payment of Court-fees in a suit for accounts. Such set off is not governed by O. VIII, r. 6. A I R 1931 Cal 358-35 C W N 17 = 132 I C 195.

—The Allahbad High Court has held that a claim of equitable set off can be allowed independently of the provisions of Civil P C and no Court-fees need be charged. A I R 1930 All 875 = Ind Rul (1931) All 91 = 128 I C 763.

—A right to set-off exists not only in cases of mutual debits and credits, but also where cross demands arise out of the same transaction, or are so connected in their nature and circumstance as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit. 11 C 557, followed.

—Therefore, in a suit for account by a principal against his agent's surety the surety will be allowed credit for arrears of salary due to the agent in taking the accounts. 19 I C 901-17 C W N 1060-19 C L J 156.

—The principle underlying the equitable set off is that even if it is not of an ascertained sum, it must arise out of the same transaction so as to make it inequitable that the plaintiff should recover and the defendant be driven to a separate suit where a step-son claims his share of sale-proceeds of her deceased husband's property in a partnership suit by the step-mother against the step-son, share is no equitable set off and as such cannot be allowed. A I R 1930 Lah 808 = Ind Rul (1930) Lah 732 = 126 I C 444. See also 90 I C 465-49 M L J 14 = (1925) M W N 228 = A I R 1925 Mad 830.

—Allowing a plea of equitable set-off at final hearing after a remand is not improper, even though on a previous hearing the plea has been disallowed. 27 M L J 128-18 C W N 425-17 O C 330-22 I C 315-1 O L J 159 (P. C.)

—Where the defendant claims to set-off against pronotes and each accounts the value of building work done by him, the matter stands to be adjudicated according to equity on a common sense apart from the provisions of the Contract Act contained in Ss. 59 and 61. 25 I C 560-82 P R 1914 = 277 P L R 1914.

—Where some of several claimants take proceedings for recovery of property for their own benefit the fact that the result is also to the benefit of the other claimants

C. P. C. (1908) Or. 8, r. 6 (Contd.)

(10) The amount claimed to be set off must be an ascertained sum of money and not unliquidated damages—(Contd.)

(b) Equitable Set-off—(Contd.)

does not create an implied contract or give the former an equity to be paid a share of the costs of the litigation by the latter. In an equitable set-off the sum claimed need not be an ascertained sum. The right of set off exists not only in case of mutual debits and credits but also where cross demands arise out of the same transaction or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the debt be driven to a cross suit. If the enquiry into the cross demand made by the debts would involve great delay, the Court may order the inquiry to be made in the suit on certain terms imposed on the debts. 19 C W N 1183 = 21 I C 716.

—Time barred debt may be claimed as equitable set-off A I R 1926 Pat 77 = 7 P L 158 = (1925) P H C C 317 = 90 I C 785.

—A time-barred debt may be claimed by way of equitable set-off. 21 I C 716 = 19 C W N 1183 following 32 C 576.

—But the Madras High Court has held that apart from special cases like those of mortgagor and mortgagees; trustee and cestui que trust a claim which is barred cannot be the subject of an equitable set-off. Held accordingly that in a suit for rent by lessor it was not open to the lessee to plead by way of equitable set-off an unliquidated claim for damages for obstruction to quiet enjoyment in previous years which had become barred by limitation. 39 Mad 939 = 30 M L J 59 = 3 L W 24 = 32 I C 80.

—Mortgagee failing to discharge prior incumbrances with money left in his hands—Effect of—Set-off—Court fee. See 15 I C 526.

—Suit on mortgage by assignee—Decree-debt against assignor subsequent to assignment, not to be set-off. 40 Mad 683 = (1916) 1 M W N 351 = 34 I C 859 = 30 M L J 615.

—Where S sued to recover a sum of money due from M as balance of a commission agent account, and M claimed to set-off an amount due to him by S as damages in respect of two contracts of sale of grain to S. Held, that M's claim of set-off, though of an unascertained amount, could be allowed, by way of equitable set off. 6 S L R 138 = 19 Ind Cas 390.

—Equitable in its debits—Limits of doctrine—Mutual credits and operation—Debtor of insolvent when can claim. See. 95 P L R 1914 = 23 I C 927.

—Assignment of mortgage—Subsequently decree for debt—Suit by assignee—Whether set off allowed—Meaning of equitable set-off. See 30 M L J 615.

C. P. C. (1908) Or. 8, r. 6 (Contd)

- (11) The amount claimed to be Set-off must be "legally recoverable"

(a) General.

—A defendant can claim to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff. When a defendant claimed a set-off of a ruqqa on which he could have brought a suit in the Punjab; *held* that the sum was legally recoverable and the set-off could be allowed in the Province. 11 A L J 141 = 35 A 238 = 18 I C 763.

—A claim which has become barred by limitation at the time of filing of the written statement in a suit is not a debt legally recoverable by the deft. from plff. and cannot therefore, be allowed to be set-off 47 I C 938.

—Expiry of the period of limitation only bars the remedy and does not extinguish the right. Limitation affects only the plaintiff and not the defendant. A I R 1926 Lah 633 = 96 I C 844.

—In a partition suit of joint Hindu family property, time barred debt due by the joint family cannot be pleaded as a set-off. A I R 1921 Mad 688 = 41 M L J 370 = 14 M L W 534 = 30 M L T (H C) 15 = 42 I C 852.

—Set off if a sum due on foot of the first contract in defence to a claim on foot of the second contract when the first contract was admitted as time barred at the time of the suit, can neither be allowed in law nor in equity 31 P L R 107 = Ind Rul (1930) Lah 262 = 122 I C 490.

—Where it is claimed to set-off a certain sum of money which *inter alia*, consists of interest upon certain of the items composing that sum calculated at a rate fixed by the defendant, but not admitted by the plaintiff, the sum of money so claimed is not an ascertained sum of money legally recoverable within the meaning of O. 8 R. 6 32 P W R 1912 = 80 P L R 1912 = 141 I C 463.

—In a suit by an agent against his principal for the recovery of the balance found to be due to him by the deft on taking accounts, the latter filed a written statement stating that, if the accounts between the parties were looked into, a balance would be found to be due to him and praying for a decree for the same. Deft's claim against plff. was barred on the date on which he filed his written statement. *Held*, that though deft's claim might be allowed to the extent of plff's claim and the latter's suit might be dismissed, he (deft) was not entitled to a decree against plff. for any additional amount claimed by him. Deft's claim was not a set off under O. 8, R. 6 of

C. P. C. (1908) Or. 8, r. 6 (Contd)

- (11) The amount claimed to be set-off must be "legally recoverable"—(Contd)

(a) General—(Contd)

the C P Code, and he was not therefore entitled to a decree under O. 20, R. 19 of the C P Code. An equitable set-off which is barred by limitation cannot be allowed. 42 Mad 873 = 37 M L J 193 = 10 L W 183 = (1919) M W N 628 = 26 M L T 276 = 53 I C 234.

—Debt barred by limitation. See 21 I C 716. see also 19 I W N 275.

- (b) A separate debt cannot be set-off against a joint and several debt.

—The plaintiffs and the defendants were joint owners of a *zamindari*, who brought *zamindari* to sale for arrears of *patni* rent. It was purchased by third party. The *patnidars* sued to set aside sale and recovered their costs from some of the *zamindars* who in turn claimed contribution from the other joint-owner. The latter had paid the costs of the auction-purchaser at the *patni* sale and claimed to set it off. *Held* that he was only entitled to set off in respect of the actual liability of the plaintiffs for the purchaser's costs. A I R 1926 Cal. 454 = 87 I C 788.

- (12) The amount claimed to be set off must not exceed the pecuniary limits of the jurisdiction of the Court in which the Suit is brought.

—The words in O VIII r. 6 "not exceeding the pecuniary jurisdiction of the Court" mean that the proper test for the purposes of the jurisdiction of the Court must be whether the whole of the sum claimed as set off is within the jurisdiction. A I R 1925 Rang 65 = 2 R 462 = 84 I C 971.

—The amount of the set-off must be within the pecuniary limits of the jurisdiction of the Court in which the plaintiff's suit is brought. The nature of the set off must also be within the cognizance of the Court. A Court cannot entertain a set off if its nature is such that if it is made the subject-matter of a separate suit, it will not come within its jurisdiction. But a Court can entertain a set off as a defence to an action, even if it would have no territorial jurisdiction in respect of the subject-matter of the set-off if a suit were filed in respect of such subject matter. In this respect there is a distinction between a set-off and a counter-claim. In one sense both are cross actions, but a set-off is also a ground of defence. If established, it affords an answer to the plaintiff's claim either wholly or *pro tanto*, for a set-off is really a debt claimed by a defendant against the plaintiff balancing a debt claimed by the plaintiff against the defendant. A counter-claim on the other

## C. P. C. (1908) Or. 8, r 6 (Contd)

(12) The amount claimed to be set-off must not exceed the pecuniary limits of the jurisdiction of the Court in which the Suit is brought—(Contd)

hand is really a weapon of offence, and enables a defendant to enforce a claim against the plaintiff as effectually as in an independent action. It is allowed to be pleaded by the defendant at his option, subject to certain rules, in order to avoid multiplicity of proceedings between the parties. 34 B L R 1491.

(13) The suit must be one for the recovery of money.

—Suit for sums from *khateelar* by *inamdar*—claim to set-off stipend due as *pujari* of temple, not allowed 39 Bom 131 = 16 Bom L R 746 = 27 I C 350.

—In a suit for rent by a landlord against his *jeth raiyats* or head tenants the latter are entitled in law and equity to set-off the ascertained commission due to them from the landlord on amount of rents collected by them from the tenants of the village on behalf of the former. 38 I C 71.

—Suit in ejectment—Landlord put in possession—Tenant successful in second appeal—Set off for rent due if claimable by landlord. See 19 M L T 336 = 3 L W 465 = 34 I C 2.

—Suit "for recovery of money"—suit on promissory note accompanied by deposit of title-deeds—prayer for sale—sum "ascertained" see : A L R 1933 R 74 = A I R 1933 R 13.

—The mere fact that the plaintiff's suit is based on a negotiable instrument is not bar to the defendant's claim for a set-off, A I R 1931 Nag 12 = Ind Rul (1931) Nag 23 = 130 I C 87.

## C. P. C. (1908) Or. 8, r. 7

—Where set off is not claimed in a suit for rent and compensation Court cannot go into accounts and make reduction. A I R 1927 Lah 431 = 28 P L R 297 = 102 I C 688.

## C. P. C. (1908) Or. 8, r. 8

—Defendant can plead in his written statement an adjustment of the claim made after the suit : 22 Bom. L R 1048 = A I R 1921 B 310 = 59 I C 53 = 45 B 245.

—In other words, Court can take notice of subsequent events : 30 Bom L R 1149 = 113 I C 27 = A I R 1928 B 427 = 52 B 883; (but see 15 C W N 703 = 10 I C 49).

## C. P. C. (1908) Or. 8, r. 9

—Pleadings subsequent to written statement require Order of Court. A I R 1925 Bom 390 = 27 Bom L R 890 = 91 I C 272.

—Inconsistent case cannot be allowed to be set up at a late stage—(1918) Pat 323 = 48 I C 746.

—Oral examination under O X r. 1 cannot be substituted by written application. A I R 1922 Oudh 178 = 8 O L J 439 = 66 I C 222.

## C. P. C. 1908, Or. 8 r. 10

## Scope of the Rule.

—Order VIII, r. 10 applies only on failure to file written statement required by O. VIII r. 9 and not in other cases. A I R 1925 Oudh 567 = 12 O L J 325 = 2 C W N 331 = 88 I C 540.

—It enables Court to pronounce judgment only when party fails to file written statement required by O. VIII, r. 9 on fixed day. A I R 1928 Rang 261 = 6 R 466 = 112 I C 438.

—Dismissal is not, therefore, proper except in cases of written statement and set off. A I R 1929 Bom 413 = Ind Rul (1930) Bom 151 = 31 Bom. L R 1118 = 122 I C 423.

—Order requiring written statement must be unconditional. Otherwise decree would be interfered within revision. A I R 1927 Mad 1907 = 53 M L J 504 = 39 M L T 273 = 105 I C 288.

—Pleader refusing to file written statement and not consenting to engage other Pleader held sufficient cause to excuse delay in filing written statement 14 L W 154 = 41 M L J 213 = (1921) M W N 562 = 44 M 978 = 69 I C 695.

—Written statement—not filed—Defendants whether can defend the suit—Bom. High Court Rule—see 15 Bom L R 126 = 19 I C 95.

—Refusal to strike out plaint as plaintiff did not set particulars of fraud—Order is not appealable. A I R 1931 Lah 77 = 31 P L R 946 = 131 I C 129.

—Power to pronounce judgment—When written Statement not filed—Revision—Material irregularity see. 15 O C 78 = 15 I C 212.

## Order VIII, r XI of Lahore High Court.

—Provisions of O VIII r 11 apply to corporations as well as to other litigants. A I R 1929 Lah 459 = Ind Rul (1929) Lah 367 = 115 I C 31.

—Court has discretion to strike out defence of defaulting party A I R 1929 Lah 459 = Ind Rul (1929) Lah 367 = 115 I C 31.

